

**FIVE YEARS AFTER KATRINA:
WHERE WE ARE AND WHAT WE HAVE
LEARNED FOR FUTURE DISASTERS**

(111-137)

HEARING

BEFORE THE

SUBCOMMITTEE ON
ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND
EMERGENCY MANAGEMENT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

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U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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September 21, 2010

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Economic Development, Public Buildings, and Emergency Management

FROM: Subcommittee on Economic Development, Public Buildings, and Emergency Management Staff

SUBJECT: Hearing on “Five Years after Katrina: Where We Are and What We Have Learned for Future Disasters”

PURPOSE OF THE HEARING

The Subcommittee on Economic Development, Public Buildings, and Emergency Management will meet on Wednesday, September 22, 2010, at 2:00 p.m., in room 2167 of the Rayburn House Office Building to receive testimony on the status of recovery efforts from Hurricanes Katrina and Rita. The hearing will focus on the status of an arbitration program created for Public Assistance projects for Hurricanes Katrina and Rita as well as other programs created by legislation and administratively to facilitate the Public Assistance program for Hurricanes Katrina and Rita.

BACKGROUND

Hurricane Katrina made landfall on August 29, 2005, and proved to be the costliest natural disaster in American history. The storm had a massive physical impact, affecting 90,000 square miles, an area the size of Great Britain. Under authority granted to the President by the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)¹, a Major Disaster was declared in the States of Louisiana, Mississippi, and Alabama on the date the storm made landfall on the Gulf Coast. The President declared a Major Disaster in Florida on August 28, 2005.

¹ 42 U.S.C. §§ 5121-5207.

Hurricane Rita made landfall on the Gulf Coast on September 24, 2005. Prior to making landfall, Hurricane Rita broke the record previously set by Hurricane Katrina as the most intense hurricane in the Gulf of Mexico in recorded history. Hurricane Rita also set the record for the most rapid intensification of any recorded tropical cyclone, strengthening from a Category 2 to a Category 5 hurricane in less than a day. The storm prompted three million residents to evacuate their homes, one of the greatest evacuations in United States history. The President declared a Major Disaster in the States of Louisiana and Mississippi on the date the storm made landfall.

I. FEMA's Recovery Programs

Federal Emergency Management Administration's (FEMA) Public Assistance program is authorized primarily by sections 403, 406, and 407 of the Stafford Act.² This program reimburses State and local emergency response costs and provides grants to State and local governments as well as certain private non-profits to rebuild facilities. The Public Assistance program is typically the largest component of FEMA's disaster recovery efforts.³

Because of the many lessons learned from Hurricane Katrina, Congress enacted significant changes to the Stafford Act in the Post Katrina Emergency Management Reform Act (Title VI of P.L. 109-295). However, these changes were not retroactive to Hurricane Katrina and, as a result, do not provide for additional assistance for the recovery from Hurricane Katrina in Louisiana or Mississippi.

To address the outstanding recovery needs, in the 110th Congress, the Committee on Transportation and Infrastructure reported H.R. 3247, the "Hurricanes Katrina and Rita Recovery Facilitation Act of 2007", H. Rept. 110-387 on October 18, 2007. The bill passed the House on October 29, 2007 by voice vote. H.R. 3247 addressed concerns raised in testimony from Members of the Mississippi and Louisiana delegations at the Subcommittee on Economic Development, Public Buildings, and Emergency Management hearing on May 11, 2007, "Legislative Fixes for Lingering Problems that Hinder Katrina Recovery." H.R. 3247 provided additional Federal relief targeted to those States and, if enacted, would have been applicable to the relief efforts in both Louisiana and Mississippi.

Specifically, H.R. 3247 would have increased the Federal in-lieu contribution for alternate projects from the current level of 75 percent to 90 percent; allowed the FEMA Administrator to include Gulf Coast recovery efforts under a public assistance pilot project authorized by the Post-Katrina Emergency Management Reform Act; permitted the use of third parties to review and expedite public assistance appeals through the use of alternative dispute resolution procedures; allowed the use of temporary housing for volunteers assisting in the recovery and reconstruction efforts in the Gulf Coast; allowed FEMA to use a simplified procedure, under which small projects are permitted to proceed based on estimates, for projects up to \$100,000, an increase from the current level of \$55,000; authorized re-interment of remains in private cemeteries; and waived the requirement that certain certifications in the hazard mitigation grant program occur prior to commencing projects.

² 42 U.S.C. §§ 5170b, 5172, and 5173.

³ See Written Statement of Francis X. McCarthy, Congressional Research Service, at 2 and U.S. Government Accountability Office, "DISASTER ASSISTANCE Information on FEMA's Post 9/11 Public Assistance to the New York City Area," GAO-03-926 (August 2003).

The Senate failed to pass this legislation in the 110th Congress. Even though Hurricanes Katrina and Rita struck more over five years ago, recovery is still delayed in many areas of Mississippi and Louisiana. It is believed that some of the provisions of this legislation, if enacted, would still help speed the recovery from these storms.⁴

In previous hearings, the Subcommittee heard concerns from State and local officials in the Gulf Coast about the difficulties with FEMA's Public Assistance program as it was implemented in the recovery from Hurricanes Katrina and Rita. In particular, concerns were raised about FEMA's appeal process. To address these concerns, H.R. 3247, as reported by the Committee and passed by the House, specifically "authorized and encouraged" FEMA to use alternate dispute resolution.⁵ Notwithstanding this language, FEMA was already authorized to use alternate dispute resolution under the Stafford Act⁶ and the Administrative Dispute Resolution Act of 1996⁷ and was encouraged to utilize it by the Committee.⁸ Despite this authority and concerns raised about the pace of recovery in the Gulf Coast, the previous Administration refused to implement any meaningful alternate dispute resolution procedures, including not employing FEMA's Office of Alternate Dispute Resolution fully.⁹ FEMA was even reluctant to admit that there any problems with the appeals process for the Public Assistance Program¹⁰.

A. Improvements in the Public Assistance Program for the Gulf Coast

Both Federal and State officials have indicated at previous Subcommittee hearings that the implementation of the Public Assistance Program is improving in the Gulf Coast since January 2009. One small, but important, indication of the change from the previous Administration is an acknowledgment by the current Administrator of FEMA and other FEMA officials that there are problems that still need to be addressed.¹¹

B. Arbitration Provision

FEMA's reluctance to initiate alternate dispute resolution on its own forced Congress to require FEMA to implement an arbitration program in the American Recovery and Reinvestment Act of 2009 (P.L. 111-5) (Recovery Act). Section 601 of the Recovery Act states:

⁴ See e.g. Statement of Paul Rainwater, Executive Director Louisiana Recovery Authority, Subcommittee hearing: "Final Breakthrough on the Billion Dollar Katrina Infrastructure Logjam: How is it Working?" (September 29, 2009), Committee Print 111-63, at p. 49.

⁵ Section 3(c) of H.R. 3247 (110th Congress).

⁶ Section 423 of the Stafford Act, 42 U.S.C. § 5189a.

⁷ 5 U.S.C. § 572.

⁸ See House Report 11-387 to Accompany H.R. 3247 the "Hurricanes Katrina and Rita Recovery Facilitation Act of 2007" at p. 5.

⁹ See Written Statement of Francis X. McCarthy, Congressional Research Service, at p 7.

¹⁰ Testimony of David Garrat, Acting Deputy Administrator Federal Emergency Management Agency, Subcommittee hearing on "Post-Katrina Disaster Response and Recovery: Evaluating FEMA's Continuing Efforts in the Gulf Coast and Response to Recent Disasters" (February 25, 2009).

¹¹ Testimony of Craig Fugate, Administrator Federal Emergency Management Agency, Subcommittee hearing: "Post Katrina: What it Takes to Cut the Bureaucracy" (July 27, 2009), Committee Print 111 – 53, at 27 and Written Statement of Tony Russell, at p. 2.

Notwithstanding any other provision of law, the President shall establish an arbitration panel under the Federal Emergency Management Agency public assistance program to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region. The arbitration panel shall have sufficient authority regarding the award or denial of disputed public assistance applications for covered hurricane damage under section 403, 406, or 407 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170b, 5172, or 5173) for a project the total amount of which is more than \$500,000.

To implement this provision, FEMA promulgated a rule on August 31, 2009.¹² The regulations limited arbitration appeals to those projects that have not received a final written decision of a second appeal by the date of enactment (February 17, 2009).¹³ Further applicants must not have failed to file a timely appeal¹⁴ and must elect arbitration in lieu of filing an appeal under FEMA's regular appeals process.¹⁵

The arbitration panels are comprised of three current or senior administrative law judges and other similar officials. The program is administered by the United States Civilian Board of Contract Appeals (CBCA), an independent entity housed within the General Services Administration. The first appeals were filed in October of 2009. To date, 26 cases have been filed. Fourteen cases have been filed from Louisiana, 10 from Mississippi, one from Texas, and one from Alabama. In their first decision the CBCA ruled that appeals shall receive *de novo* review, rather than deferring to the prior factual determinations of FEMA.¹⁶ The most notable case was Charity Hospital in New Orleans. The State of Louisiana sought arbitration on FEMA's determination that that the State was eligible for repairs to the hospital of \$127 million. The CBCA ruled that the State of Louisiana was eligible for \$475 million in disaster assistance to provide for the replacement of the hospital.¹⁷ A summary of this case and all of the cases to date provided by the Board of Contract Appeals is attached.

While section 601 of the Recovery Act requires FEMA to offer arbitrations for disputes above \$500,000, there is nothing in the Recovery Act that prohibits FEMA from implementing a similar program for smaller disputes. FEMA is already authorized under other statutes to execute an alternative dispute resolution program. FEMA should utilize its statutory authority to expand the availability of arbitration panels to disputes under \$500,000.

¹² 44 C.F.R. § 206.209, 74 Fed. Reg. 44761.

¹³ 44 C.F.R. § 206.209(d)(2).

¹⁴ *Id.*

¹⁵ 44 C.F.R. § 206.209(d)(1).

¹⁶ In the Matter of Bay St. Louis-Waveland School District CBCA 1739-FEMA (December 8, 2009), available at http://www.cbca.gsa.gov/2009FEMA/BORWICK_12-08-09_1739-FEMA_BAY_ST_LOUIS-WAVELAND_SCHOOL_DISTRICT.htm.

¹⁷ In the Matter of State Of Louisiana, Facility Planning And Control CBCA 1741-FEMA (December 9, 2009), available at http://www.cbca.gsa.gov/2009FEMA/DANIELS_12-09-09_1741-FEMA_STATE_OF_LOUISIANA_FACILITY_PLANNING_AND_CONTROL.htm.

C. Other Efforts to Resolve Disputes in the Public Assistance Program

The Recovery Act does not preclude FEMA from implementing other programs to resolve disputes or difficulties with Public Assistance projects. Since January 2009, FEMA has been using new procedures to review these projects, including the appointment of the “Joint Expediting Team” and the “Unified Public Assistance Project Team”. According to FEMA, these two teams have resolved 173 previously disputed cases. Witnesses are expected to provide testimony with updated status reports in the public assistance program in the Gulf Coast since January 2009, including the use of these “decision teams”.

D. Recovery Schools and Special Procedures

The Consolidated Appropriations Act of 2008 (P.L. 110-161) authorized FEMA to take a systemic approach to rebuilding school facilities rather than evaluating projects on a facility by facility basis. FEMA has existing authority under section 406(c) of the Stafford Act to do so,¹⁸ however; for projects from Hurricane Katrina and Rita, the statute provides a “penalty” of 25 percent if State or local governments.¹⁹ This provision eliminates the “penalty” for alternate projects for school facilities.

This approach is very similar to a provision recently reported by the Committee. Section 311 of H.R. 3377, the “Disaster Response, Recovery and Mitigation Enhancement Act of 2009”, applies to future disasters and authorizes the President to establish “special procedures” for areas that have experienced widespread damage and destruction. The Committee has noted that with the exception of eliminating the “penalty” for alternate projects, the Stafford Act already provides the President the flexibility and discretion to implement this program.²⁰

E. Staff Turnover

A frequent concern that has been raised after numerous disasters, including Hurricane Katrina, has been the turnover of FEMA officials in the field. This has resulted in inconsistent interpretations and, in many cases, new officials changing the interpretation or decisions of their predecessors. To resolve this problem, FEMA recently issued a new standard operating procedure.²¹ This should provide more rapid and consistent decision making in the field.

In some cases, the changes implemented merely simplified procedures and policies. For example, after Hurricane Katrina, FEMA left many of their key staff in New Orleans, while the State of Louisiana’s staff was in Baton Rouge. Recently, FEMA has moved more key staff to Baton Rouge to facilitate better communication and coordination.

¹⁸ 42 U.S.C. § 5172(c).

¹⁹ Amendments made by the Post Katrina Emergency Management Reform Act, Title VI of P.L. 109-295, changed this to 90 percent for State and local governments in future disasters.

²⁰ See House Report 111-562, to accompany H.R. 3377 “Disaster Response, Recovery and Mitigation Enhancement Act of 2009” at 26.

²¹ *Project Specialist Transition at Joint Field Offices – Standard Operating Procedure 9570.15 – June 2010*, available at http://www.fema.gov/pdf/government/grant/pa/9570_15.pdf.

F. Use of Single Expert

Recently, FEMA has expressed a willingness to change a key component of the Public Assistance program. Historically, when expert advice was needed from a specialized engineer, architect, or other technical experts or consults, both FEMA and the State or local government, each hired their own expert, both paid with disaster relief funds. In many cases this resulted in “dueling experts” each reaching their own opinions. Recently, FEMA Administrator W. Craig Fugate has stated that FEMA will accept the opinion of licensed experts rather than having each side employ their own. This should result in savings of both time and cost.²²

G. Estimated Costs

A potentially significant improvement to the Public Assistance program was authorized nearly ten years ago in the Disaster Mitigation Act of 2000 (P.L. 106-390), but has not yet been implemented by FEMA. Section 205(d) of that act amended section 406(e) of the Stafford Act²³ to allow FEMA to pay for large Public Assistance projects on the basis of estimates rather than waiting for reimbursement of actual costs. However, this provision does not take effect until FEMA promulgates a rule to implement this provision.²⁴ To date, FEMA has not offered an official explanation as to why this authority has not been implemented.²⁵ The Committee has expressed concern about FEMA’s failure to implement this provision and recently reported legislation to require FEMA to promulgate the necessary implementing rule within 180 days of enactment.²⁶ The Committee noted in the report that had FEMA implemented the cost estimating procedures authorized in the Disaster Mitigation Act of 2000, many of the delays in the recovery from Hurricane Katrina would have been avoided.²⁷

II. Status of Recovery

A. Louisiana

The Gulf Coast is still recovering from Hurricanes Katrina and Rita. According to FEMA, as of September 2010, the agency had obligated approximately \$9.9 billion in public assistance funding. Louisiana has distributed about \$5.5 billion of that amount. The remainder (\$4.4 billion) is still available to be drawn down by the eligible applicants.

Since January 2009, FEMA has obligated over \$2.55 billion in total Public Assistance funding in the following sectors:

- Education: \$1.62 billion;
- Public Works: \$235 million;

²² Testimony of Craig Fugate, Administrator of the Federal Emergency Management Agency, Subcommittee Hearing: “Priorities for Disasters and Economic Disruption: The Proposed Fiscal Year 2011 Budgets for the Federal Emergency Management Agency and the Economic Development Administration” (May 5, 2010).

²³ 42 U.S.C. § 5172(e).

²⁴ See P.L. 106-390 section 205(d)(2).

²⁵ See Written Statement of Francis X. McCarthy at 5.

²⁶ See section 310(b) of H.R. 3377 “Disaster Response, Recovery, and Mitigation Enhancement Act Of 2009”.

²⁷ See House Report 111-562, to accompany H.R. 3377 the “Disaster Response, Recovery, And Mitigation Enhancement Act Of 2009” at 25.

- Public Safety and Protection: \$177 million;
- Health Care: \$7.9 million;²⁸
- Public Infrastructure: \$428 million; and
- Debris Removal/Emergency Protective Measures: \$83 million.

B. Mississippi

By September 2010, FEMA had obligated approximately \$3 billion in public assistance funding. Mississippi has distributed about \$2.1 billion of that amount. The remainder (\$1.7 billion) is still available to be drawn down by the eligible applicants.

Since January 2009, FEMA has obligated over \$240.5 million in total Public Assistance funding in the following sectors:

- Roads and Bridges: \$19.7 million;
- Public Buildings: \$63.6 million;
- Public Utilities: \$45 million;
- Parks/Recreation Facilities: \$41.6 million; and
- Debris Removal/Emergency Protective Measures: \$35.7 million.

PRIOR LEGISLATIVE AND OVERSIGHT ACTIVITY

The Committee and Subcommittee have held numerous hearings dealing with Hurricane Katrina recovery issues:

- “Priorities for Disasters and Economic Disruption: The Proposed Fiscal Year 2011 Budgets for the Federal Emergency Management Agency and the Economic Development Administration” (May 2010)
- “U.S. Mayors Speak Out: Addressing Disasters in Cities” (March, 2010)
- “Final Breakthrough on the Billion Dollar Katrina Infrastructure Logjam: How is it Working?” (September, 2009)
- “Post Katrina: What it Takes to Cut the Bureaucracy and Assure a More Rapid Response After a Catastrophic Disaster” (July 2009)
- “Still Post-Katrina: How FEMA Decides When Housing Responsibilities End” (May 2009) (Housing)
- “Post-Katrina Disaster Response and Recovery: Evaluating FEMA’s Continuing Efforts in the Gulf Coast and Response to Recent Disasters” (February 2009)
- “FEMA’s Response to the 2008 Hurricane Season and the National Housing Strategy” (September 2008)
- “Moving Mississippi Forward: Ongoing Progress and Remaining Problems” (June 2008)
- “Legislative Fixes for Lingering Problems that Hinder Katrina Recovery” (May 2007)
- “FEMA’s Preparedness and Response to ALL Hazards” (April 2007)
- “FEMA’s Emergency Food Supply System” (April 2007)

²⁸ Health Care Assistance decreased from \$70 million to \$7.9 million due to de-obligations occurring after January 20, 2009.

- “Post-Katrina Temporary Housing: Dilemmas and Solutions” (March 2007)
- “Disasters and the Department of Homeland Security: Where Do We Go From Here?” (February 2006)
- “Legislative Proposals in Response to Hurricane Katrina” (November 2005)
- “A Vision and Strategy for Rebuilding New Orleans” (October 2005)
- “Recovering after Katrina: Ensuring that FEMA is up to the Task” (October 2005)

On July 22, 2010, the Committee reported H.R. 3377, the “Disaster Response, Recovery, and Mitigation Enhancement Act of 2009”, which amends the Robert T. Stafford Disaster Relief and Emergency Assistance Act to improve the assistance that the Federal Government provides to States, local governments, and communities before, during, and after major disasters and emergencies.

In the 110th Congress, the Committee reported H.R. 1144, the “Hurricanes Katrina and Rita Federal Match Relief Act of 2007”, to provide significant relief for communities devastated by Hurricanes Katrina, Rita, and Wilma. In addition, the bill focused on unaddressed concerns since the occurrence of these disasters. An amended form of the legislation was included in the Emergency Supplemental Appropriations bill that was signed by the President on May 25, 2007 (P.L. 110-28). The Committee reported H.R. 3247, the “Katrina and Rita Recovery Facilitation Act of 2007”, which passed the House on October 29, 2007; the Senate took no action on the bill. The Subcommittee also collaborated with the Committee on Financial Services on H.R. 1227, the “Gulf Coast Hurricane Housing Recovery Act of 2007”, to ensure Louisiana’s ability to use its Hazard Mitigation Grant Program funds for its Road Home program. This bill passed the House on March 21, 2007.

WITNESSES

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Civilian Board of Contract Appeals

Mr. Tony Russell
Region VI Administrator
Federal Emergency Management Agency

Mr. Matt Jadacki
Assistant Inspector General for Emergency Management Oversight
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United States Civilian Board of Contract Appeals
Summary of FEMA Arbitration Cases

Background

Under section 601 of the American Recovery and Reinvestment Act of 2009 (P.L. No. 111-5, 123 Stat. 115, 164 (2009)), the Secretary of Homeland Security designated the United States Civilian Board of Contract Appeals (CBCA) to act as an impartial arbitrator in disputes between the Federal Emergency Management Agency (FEMA) and State and local jurisdictions in the Gulf Coast region concerning public assistance grants resulting from damage caused by Hurricanes Katrina and Rita.

Overall Summary

Cases Filed: 26

States: Louisiana - 14, Mississippi - 10, Alabama - 1, Texas - 1

Link to full text of decisions: <http://www.cbca.gsa.gov/2009FEMA/2009FEMA.htm>

Individual Case Summaries

BAY ST. LOUIS-WAVELAND SCHOOL DISTRICT (Mississippi)
CBCA 1739-FEMA

Facts: School District claimed damages of \$7.2 million for replacement of roofs, siding, and windows in schools (later adjusted to \$7.0 million by agreement of the parties). FEMA was willing to pay \$176,000 of the claim.

Decision: School District is entitled to disaster grant assistance of \$7.0 million for complete replacement of: (1) metal roofs at the high school and middle school; (2) damaged windows at the middle and the elementary school; and (3) damaged siding at the high school.

Prior to issuing its decision on the merits of this case, the CBCA in a separate decision determined that it does not sit as a court reviewing agency action, but instead acts as an arbitrator with authority to resolve disputes over public assistance grants under the Stafford Act. The CBCA review is *de novo* and applies customary broad arbitration standards and authorities, including independent findings of fact and law.

FACILITY PLANNING AND CONTROL (Louisiana)
CBCA 1741-FEMA

Facts: The State of Louisiana's Facility Planning and Control (FP&C) claimed \$491 million for replacement of the Charity Hospital in New Orleans. FEMA was willing to pay \$126 million of the claim for repairs to the existing hospital, rather than complete replacement.

Decision: The cost of repairs to Charity Hospital would exceed 50 percent of the cost of replacement, so under applicable regulations, replacement is required. FP&C is entitled to disaster grant assistance of \$475 million for replacement of the hospital. This amount equals FEMA's estimated replacement cost, which the CBCA finds to be the best approximation of the cost of replacing the facility.

MISSISSIPPI STATE PORT AUTHORITY (Mississippi)
CBCA 1757-FEMA

Facts: The Mississippi State Port Authority (MSPA) claimed \$63 million for replacement of two cold storage buildings located in Gulfport, MS. FEMA asserted that the building refrigeration system costs should be estimated separately from the construction costs in determining repair versus replacement. On this basis, FEMA concluded that repairs to the building would equal less than 50 percent of the replacement cost, so the building was not eligible for complete replacement.

Decision: The refrigeration systems in the buildings are integral to the structures and cannot be separated for cost estimation purposes. The repair costs exceed 50 percent of replacement costs, so replacement is required. MSPA is entitled to \$57 million for replacement of the building.

SEWERAGE AND WATER BOARD OF NEW ORLEANS (Louisiana)
CBCA 1758-FEMA

Facts: The Sewerage and Water Board of New Orleans requested \$14 million to increase the height of the berm protecting the East Bank Waste Water Treatment Plant. FEMA denied the request because it considered the berm not to be an eligible facility for a public assistance grant.

Decision: The case is pending with the CBCA. The parties have informed the CBCA of their intent to file a joint settlement agreement.

SEWERAGE AND WATER BOARD OF NEW ORLEANS (Louisiana)
CBCA 1759-FEMA

Facts: The Sewerage and Water Board of New Orleans (Board) requested \$6.2 million to install a backup generator at the East Bank Waste Water Treatment Plant in New Orleans. FEMA denied the Board's request because the backup generator is a new component to be added to the plant, not an existing component damaged by the hurricane and in need of repair or replacement.

Decision: The CBCA agreed with FEMA, finding the new generator to be ineligible for public assistance, and therefore denied the Board's request.

SEWERAGE & WATER BOARD OF NEW ORLEANS (Louisiana)
CBCA 1760-FEMA

Facts: The Sewerage & Water Board of New Orleans claimed costs for replacement of anti-theft devices on fire hydrants in New Orleans damaged by Hurricane Katrina.

Decision: The CBCA granted FEMA's motion to dismiss the case due to the failure of the applicant to file timely its appeal of the agency's determination.

SEWERAGE AND WATER BOARD OF NEW ORLEANS (Louisiana)
CBCA 1761-FEMA

Facts: The Sewerage and Water Board of New Orleans (Board) requested \$2.3 million for refurbishment of certain components of the New Orleans sewage treatment system. FEMA denied the request, saying that the damage to the components in question was not caused by Hurricane Katrina but was pre-existing.

Decision: The CBCA found that only a part of the damage to the sewage treatment components was attributable to hurricane damage and ordered FEMA to provide the Board with any costs the Board proves were associated with repairing or replacing the applicable steel components.

FACILITY PLANNING AND CONTROL (Louisiana)
CBCA 1768-FEMA

Facts: The State of Louisiana's Facility Planning and Control (FP&C) requested \$2.2 million for repair of damage to the New Orleans City Park. FEMA refused to make payment, maintaining that the damage was not disaster-related. After the case was filed, FEMA and the FP&C agreed to a grant of \$1.9 million for a portion of the project. FP&C sought additional funding for the portions of the project not included in the parties' agreement. FEMA asserted that the CBCA lacks jurisdiction to decide the additional request by the FP&C.

Decision: The CBCA denied FEMA's request to dismiss the case for lack of jurisdiction with respect to the additional sites. Thereafter, the parties settled that portion of the case.

FORREST COUNTY BOARD OF SUPERVISORS (Mississippi)
CBCA 1772-FEMA

Facts: The Forrest County Board of Supervisors (BOS) claimed \$202,000 for mold remediation for the Forrest County Courthouse in Hattiesburg, Mississippi. FEMA requested dismissal of the case because the amount of the claim was less than \$500,000.

Decision: The BOS is entitled to \$76,000 for mold remediation. The CBCA determined that 40 percent of the mold damage in the courthouse was due to Hurricane Katrina, and therefore 40 percent of the costs of remediation should be paid by FEMA, after subtracting \$25,000 paid to the BOS under its mold insurance policy. The CBCA rejected FEMA's motion for dismissal based upon the amount of the claim because the total amount reflected on the FEMA project worksheet was \$506,000, which exceeded the statutory threshold of \$500,000 for a project.

WEST CAMERON PORT COMMISSION (Louisiana)
CBCA 1775-FEMA

Facts: The West Cameron Port Commission claimed between \$12 and \$15million to dredge sediment from the Cameron Loop and East Fork channels in or near Cameron, Louisiana. FEMA denied the request on the ground that the alleged damage was not disaster-related.

Decision: Case was dismissed at the request of the parties.

ST. BERNARD PARISH SHERIFF'S OFFICE (Louisiana)
CBCA 1776-FEMA

Facts: The St. Bernard Parish Sheriff requested public assistance for expenses incurred in response to Hurricane Katrina.

Decision: Case was dismissed at the request of the parties.

ST. TAMMANY PARISH (Louisiana)
CBCA 1778-FEMA

Facts: St. Tammany Parish requested public assistance for removal of debris from canals located in the Parish. Following Hurricane Katrina, FEMA removed some debris as an immediate threat to public health and safety under its authority to perform emergency work. FEMA denied the Parish's request for further debris removal on the basis that the Parish is not an eligible entity to receive such funding and that the canals in question are not eligible facilities.

Decision: The CBCA found that the Parish is an eligible entity to receive public assistance funds, but that the canals in question are not eligible facilities for receipt of such funds. On this basis, the CBCA denied the Parish's request for funds to dredge the canals. However, the CBCA did direct FEMA to allow funds of approximately \$132,000 for the study upon which FEMA relied in making its decision.

JEFFERSON PARISH (Louisiana)
CBCA 1780-FEMA

Facts: Jefferson Parish requested \$271 million in public assistance for repair of roadways damaged as a result of flooding from Hurricane Katrina.

Decision: Case was dismissed at the request of the parties.

UNIVERSITY OF SOUTHERN MISSISSIPPI (Mississippi)
CBCA 1781-FEMA

Facts: The University of Southern Mississippi (USM) requested \$2.5 million to replace its Administration Building, which had been damaged by the hurricanes.

Decision: Case was dismissed at the request of the parties after FEMA agreed that the building was eligible for replacement and said that it would make a grant in the amount of \$2.5 million.

CITY OF WESTWEGO (Louisiana)
CBCA 1783-FEMA

Facts: The City of Westwego (City) claimed \$1 million for replacement of the City Hall and police station building. FEMA asserted that repairs to the building would equal less than 50 percent of the replacement cost, so the building was not eligible for complete replacement. FEMA determined that \$337,000 was needed to carry out repairs.

Decision: City is entitled to \$1 million for replacement of the building.

SABINE PASS PORT AUTHORITY (Texas)
CBCA 1787-FEMA

Facts: The Sabine Pass Port Authority asked that its request for a public assistance grant be considered timely and processed by FEMA. FEMA denied the request because it was filed more than two years after the applicable deadline.

Decision: The CBCA denied the Port Authority's request, finding that the request for public assistance was not timely filed with FEMA and no extenuating circumstances excused the late filing.

MOSS POINT SCHOOL DISTRICT (Mississippi)
CBCA 1800-FEMA

Facts: The Moss Point School District applied for replacement costs for its Magnolia Junior High School. FEMA asserted that replacement was not warranted and that construction of a flood wall around the school would constitute repair and bring the facility within the requirements of the National Flood Insurance Program (NFIP) and the local building codes based upon the NFIP. FEMA also asserted that the CBCA did not have jurisdiction to hear the case because a final agency action had been taken before the effective date of the statute under which CBCA arbitrations are conducted.

Decision: The CBCA found that FEMA's proposed flood wall around the school is not feasible and that repair of the school would cost more than 50 percent of the replacement cost. Accordingly, the CBCA ordered FEMA to fund the replacement cost of the school. The CBCA also denied FEMA's motion to dismiss the case based upon lack of jurisdiction, finding that the appeal was filed timely from a matter not addressed by the appeal decisions cited by FEMA.

MISSISSIPPI GULF COAST COMMUNITY COLLEGE (Mississippi)
CBCA 1850-FEMA

Facts: The Mississippi Gulf Coast Community College seeks \$839,000 in public assistance grants for repairs to hurricane damage to the College's campus. FEMA denied the request, stating it has already paid \$877,000 in costs and no further work is eligible.

Decision: The case is pending with the CBCA.

PEARL RIVER COMMUNITY COLLEGE (Mississippi)
CBCA 1898-FEMA

Facts: Pearl River Community College requested the replacement cost of rebuilding the college's coliseum, which it believed to be \$13.6 million. FEMA contended that the college was entitled to the cost of repairing the building, which it estimated as \$1.5 million.

Decision: Case was dismissed at the request of the parties.

HANCOCK COUNTY SCHOOL DISTRICT (Mississippi)
CBCA 1951-FEMA

Facts: The Hancock County School District applied for replacement costs for fourteen school buses destroyed by Hurricane Katrina. FEMA denied the full cost of replacement, asserting that the School District was entitled only to the cost of used buses of similar make and model to those destroyed. FEMA also requested dismissal of the arbitration claim on the basis that the School District had failed to file the required first level appeal with FEMA and make a timely application to the CBCA for arbitration.

Decision: The CBCA denied FEMA's motion to dismiss the case, finding that the document FEMA asserted was an appealable final decision was not one and that appeal was timely filed from FEMA's later final decision. The merits of the case have yet to be addressed; the case is pending.

TOWN OF GRAMERCY (Louisiana)
CBCA 1976-FEMA

Facts: The Town of Gramercy requested \$473,000 to install protective fins, called "dolphins" on the town's wastewater treatment plant. FEMA denied the claim initially, then reversed itself and said it will grant the full amount.

Decision: Case is pending with the CBCA awaiting a motion for dismissal from the parties.

BALDWIN COUNTY BOARD OF SUPERVISORS (Alabama)
CBCA 2018-FEMA

Facts: The Baldwin County Board of Supervisors requested arbitration of whether FEMA can recover previously reimbursed landfill fees, so-called "tipping fees," for deposit of debris. The fees sought to be recovered totaled \$440,000 plus \$83,000 in interest. FEMA maintained that the fees were excessive. FEMA also asserted that this case should be dismissed because the Board of Supervisors previously elected to appeal the case administratively rather than seek arbitration.

Decision: FEMA is not entitled to recover the fees in question or the interest on those fees, since the fees were reasonable and FEMA had previously agreed to their payment in lieu of demanding cost documentation from the County. The CBCA denied FEMA's motion to dismiss the case, concluding that an applicant may elect arbitration after receiving a decision on a first-level administrative appeal.

NEW ORLEANS CITY PARK IMPROVEMENT ASSOCIATION (Louisiana)
CBCA 2032-FEMA

Facts: FEMA seeks reimbursement of \$226,000 in public assistance grants paid to the New Orleans City Park Improvement Association for repairs to hurricane damage in city parks. FEMA determined in a later audit that the Association was overpaid for the repair work.

Decision: The case is pending with the CBCA.

FACILITY PLANNING AND CONTROL (Louisiana)
CBCA 2040-FEMA

Facts: The State of Louisiana's Facility Planning and Control (FP&C) claims \$3 million for repairs to Charity Hospital in New Orleans. The repairs took place in the immediate aftermath of Hurricane Katrina at a time when the FP&C was unsure whether the facility would be repaired or replaced and so acted to protect the property from further deterioration. FEMA denied the claim, stating that the costs in question are included in the hospital's replacement costs already awarded to FP&C under CBCA 1741-FEMA.

Decision: The case is pending with the CBCA.

BAY ST. LOUIS-WAVELAND SCHOOL DISTRICT (Mississippi)
CBCA 2042-FEMA

Facts: School District claims \$732,000 for repairs to an access road to an elementary school which was destroyed by Hurricane Katrina. The elementary school was later rebuilt by a public assistance grant from FEMA, but damage to the road accessing the school has rendered the School District unable to obtain a certificate of occupancy for the school. FEMA denied the claim, stating that the road construction is discretionary and therefore not eligible for public assistance funding.

Decision: The case is pending with the CBCA.

DIAMONDHEAD WATER AND SEWER DISTRICT (Mississippi)
CBCA 2135-FEMA

Facts: The Diamondhead Water and Sewer District seeks \$36 million for replacement of its wastewater treatment plant and repairs to the current plant during the interim period until the new plant is complete. This amount includes \$7 million for relocation of the plant. The Sewer District also seeks \$759,000 for construction management costs for the project. FEMA contends the relocation costs are already included in the project worksheet total. It denied the claims for the additional funds for relocation as well as the request for construction management costs.

Decision: The case is pending with the CBCA.

**HEARING ON FIVE YEARS AFTER KATRINA:
WHERE WE ARE AND WHAT WE HAVE
LEARNED FOR FUTURE DISASTERS**

Wednesday, September 22, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC
BUILDINGS AND EMERGENCY MANAGEMENT,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:11 p.m. in room 2167, Rayburn House Office Building, the Honorable Eleanor Holmes Norton [Chairman of the Subcommittee] presiding.

Ms. NORTON. Good afternoon.

We are pleased to welcome our witnesses to another of our important series of Subcommittee hearings to make certain that there is real progress in the recovery from Hurricanes Katrina and Rita on the Gulf Coast.

Today we will evaluate the efforts of the Federal Emergency Management Agency, as well as the affected State and local governments, in their efforts to proceed more rapidly with their work on the long five-year recovery from these storms.

This hearing is part of the vigorous oversight agenda that this Subcommittee has pursued on a bipartisan basis since the storms struck our Nation in 2005.

Today we will hear about the arbitration program mandated in the American Recovery and Reinvestment Act, as well as about other steps that the leadership at FEMA is taking to improve the pace and the quality of recovery efforts on the Gulf Coast. Nearly a year ago, before our arbitration mandate was instituted to break the logjam on billions of dollars of projects, the Subcommittee received testimony about how the arbitration program would be structured. Today we are not merely looking at what has been done and what currently is being done, we also are looking forward to seeing what lessons we can learn from these experiences for future disasters. We do not intend to allow logjams to develop when there is Federal money on the table again.

We will hear from those who are engaged in these efforts to improve the recovery from Hurricanes Katrina and Rita and also from experts in the Federal Government and academia who will provide analysis on these efforts.

Prior to last year, FEMA resisted efforts from the Subcommittee and other stakeholders to try to break the logjam on public assistance projects that were seriously impeding the recovery from the

storms. Yet at that time, in testimony before the Subcommittee, FEMA officials denied that there was even a problem with the Public Assistance Program.

Some of the key recommendations of the Subcommittee to improve the recovery from these storms were reflected in H.R. 3247, the Hurricanes Katrina and Rita Recovery Facilitation Act of 2007. This is 2010. This Subcommittee reported H.R. 3247 and the House passed it in October of 2007. As a matter of fact, we passed this bill not once, but twice, as a similar bill was passed in October, 2008.

Unfortunately, the Senate never passed this legislation. Many of the recommendations in today's testimony were included in that legislation three years ago. These include such common sense steps as encouraging the use of third parties to review and expedite public assistance appeals, simplified procedures under which small projects would be permitted to proceed on estimates for projects up to \$100,000, and raising the Federal contribution for certain projects from 75 percent to 90 percent.

We are encouraged that recent hearings and the written statement submitted for today's hearing indicate progress. Like an individual who is in personal recovery, the first step to improvement is acknowledgment that there is a problem. FEMA Administrator Craig Fugate did acknowledge that there were problems with recovery from these storms at our Subcommittee hearing earlier this year.

FEMA is taking steps short of arbitration to resolve disputes, including appointing special joint expediting teams of FEMA and State officials to resolve lingering disputes.

In some cases, common sense solutions also are being applied in other areas. For example, moving FEMA officials so that they are in the same city as their state counterparts. Another costly and exasperating example is eliminating dual consultants, where both sides would hire licensed professionals to provide expert opinions. And this elimination of dual consultants was a strong recommendation of this Subcommittee.

Astonishingly, both State and Federal consultants were paid with Federal disaster funds to essentially set up an adversarial process to determine costs. This was a prodigious waste of money.

At a Subcommittee hearing earlier this year, Administrator Fugate announced that FEMA would move to a system, when appropriate, allowing both parties to rely on the advice of a single licensed professional.

It is important to emphasize that many of the items that are recommended to improve the Public Assistance Program in testimony today are already authorized and within FEMA's discretion to carry out. For example, FEMA currently has authority to engage in alternative dispute resolution as a result of the Administrative Dispute Resolution Act of 1996, and has been encouraged to do so by this Subcommittee.

A number of witnesses today note that one significant improvement in FEMA's Public Assistance Program would be to move to a system that pays State and local governments for repair and construction projects on the basis of the cost estimates as is done in the insurance industry. FEMA is not only encouraged to do so, but

has been mandated to do so by the Disaster Litigation Act of 2000, a bill that was passed by this Committee, enacted by Congress and signed by President Clinton nearly 10 years ago.

That Act mandated that FEMA move to a cost-estimating system once FEMA implemented a rule to do so. So it is unconscionable that nearly 10 years later, the required rulemaking has not occurred.

As this Subcommittee previously noted, had FEMA implemented this provision as it was authorized to do in 2000, many of the delays in the recovery from Hurricanes Katrina and Rita would have been avoided.

In order to remedy this delay, legislation recently passed by the Committee would require FEMA to implement this provision within 180 days of enactment. I hope that this new statutory mandate will prove unnecessary, however, because legislation should not be necessary and FEMA is fully empowered to make this step on its own.

We are looking forward to hearing from today's witnesses and we very much appreciate their being here on how arbitrations are proceeding, how FEMA and the States are moving forward on the recovery from the devastating storms, and the lessons that their experiences teach us for further actions.

Let me welcome again the witnesses and once again offer the gratitude of the Subcommittee for their willingness to come forward.

It is my great pleasure to introduce the Ranking Member, Mr. Diaz-Balart, who is from a State which has extensive experiences of just the kind we are discussing today.

Mr. DIAZ-BALART. Thank you, Madam Chairwoman.

Let me just first thank you for this very important hearing, for calling this very important hearing. Five years after Katrina, it is hard to believe. Right?

But those of us in Florida understand that you have to learn from these disasters in order to mitigate for future disasters. Andrew was our wake-up call in Florida, Hurricane Andrew, and a lot of good lessons were implemented after that. And obviously Katrina was the wake-up call for the rest of the Country and it was a big wake-up call.

So it has now been five years since it hit Louisiana, Mississippi, Texas, and Alabama, and also Florida. Florida was actually hit relatively hard by Hurricane Katrina. We had a lot of interesting issues in those days trying to remind people that Florida had also been hit by Katrina. It made landfall in the District that I am privileged to represent, and also just part of the Gulf Coast.

So obviously we all know that Katrina left a tremendous amount of devastation in its wake. But since Hurricanes Katrina and Rita, Congress has taken a number of I think really important steps, frankly, to strengthen FEMA and our emergency management capabilities, including passing the Post-Katrina Reform Act.

Now, while that legislation took I think some very important steps to improve preparedness and response, there is a lot more that obviously needs to be done. For example, all too often recovery following a major disaster has been painfully slowed by bureaucratic red tape and just inflexible policies. And the impact of this

red tape is especially greatly magnified following a large scale disaster when that assistance is really critical, really critical to the rebuilding of those local communities that have been devastated.

So finding ways to cut through that red tape and to expedite funding really ultimately I think also saves money in the long term. And it helps those communities recover more quickly. In hearing after hearing, and the Chairwoman has mentioned that, we have received testimony about the frankly very slow process which communities have to navigate. And this process, it really taxes Federal, State and local resources.

So I need to mention Congressman Cao from this Subcommittee who has worked tirelessly, and frankly very effectively, to cut through the bureaucracy, the red tape, to free up funding for the recovery of Louisiana. And he is, as always, here today. But last year, Ranking Member Mica hosted two roundtables at Congressman Cao's request to bring together FEMA, the State and the local representatives, to work through that funding backlog to try to break through those barriers and figure out if we could work through that. And since then, FEMA put into place decision teams to tackle the growing funding backlog.

Last year, a new arbitration process was established to expedite recovery funding which has freed out more funds for the rebuilding of Louisiana, and I think that is a really positive step. And I am pleased that today we will hear more on how well that process is moving along.

So while it will be important to determine whether or how even an arbitration process should be used in the future, frankly it shouldn't take Congressional action and an arbitration panel to cut through the bureaucratic red tape. It is something that should just happen naturally.

So responsible changes to the Stafford Act and to FEMA policies can go a long way to really speed up the recovery of communities after they have been hit by one of these disasters. And we know that others will be coming, unfortunately.

For example, reviewing and streamlining FEMA policies and procedures or implementing the cost estimate provisions that the Chairwoman just mentioned, and as usual the Chairwoman and I really see eye to eye and there is very little light between us on most of these issues. Doing that could go a long way in speeding up the recovery process and again helping to rebuild the communities.

This Congress, I am glad to have worked with my Chairwoman, Chairwoman Norton, along with Chairman Oberstar and Ranking Member Mica, on H.R. 3377, the Stafford Act bill. The bill, if passed, would improve preparedness and mitigation, including incentives for building codes, improving the Nation's public alert and warning system. Those are two things that I have been working on now for a number of years, along with the Chairwoman. And providing for the transfer of excess goods and housing units to local communities, which we keep hearing about. Unfortunately, this Congress has decided to not move that bill forward, maybe because they felt that naming post offices was more important.

I hope that today we will be able to examine the progress made in the recovery efforts of the Gulf Coast and what lessons can we

learn, have we learned, to better prepare for the future disasters that we know unfortunately will hit us.

So I once again want to also thank the witnesses for joining us today. We really look forward to your testimony.

And thank you, Madam Chairwoman, for calling this very important hearing.

Ms. NORTON. Thank you very much, Mr. Diaz-Balart.

I ask unanimous consent that Representative Gene Taylor of Mississippi, a Member of the Committee on Transportation and Infrastructure, be permitted to participate in today's Subcommittee hearing.

Without objection, so ordered.

Mr. Taylor, have you any opening statement?

Mr. TAYLOR. Madam Chairman, just only to thank you and the Ranking Member for letting me participate. I have a fairly lengthy statement for the record that I would like to submit.

Ms. NORTON. So ordered. Thank you, Mr. Taylor and welcome.

Mr. Cao, have you an opening statement?

Mr. CAO. Yes, I do, Madam Chair.

And first of all, I just want to thank you and the Ranking Member for your leadership in this important Subcommittee and for working with me on some of my District's greatest challenges in our ongoing recovery. Both of you have been steady and compassionate partners, and together we have held government accountable for their responsibilities in the recovery of Orleans and Jefferson Parishes.

We have made a good team both in oversight initiatives and on the legislation we have successfully passed during this Congress. So on behalf of my constituents, I would like to offer to both of you our thanks.

August 29 of this year marked five years since Hurricane Katrina landfall along the Gulf Coast. The tragic loss of life alone made this one of the greatest disasters this Nation has ever seen. And more than 1.2 million people were under some type of evacuation order; 3 million were left without electricity for weeks; and hundreds of thousands were left jobless.

So make no mistake, Hurricane Katrina destroyed Orleans and Jefferson Parishes and these effects are still felt today. Many of the critical institutions like Charity Hospital, and basically the entire health care infrastructure in the hardest-hit New Orleans east have never reopened. Many basic services like hospitals, police, fire and rescue, libraries and schools were wiped away by the floodwaters and today remain empty and padlocked. In the immediate area around New Orleans, 80 percent of the buildings and 40 percent of the housing stock were damaged in some way.

But hurricane recovery continues even in the face of the new environmental, economic and health challenges caused by the massive BP oil spill. We have had tremendous successes in the past two years, and this is because of the hard work of the people I see before me today, including Tony Russell and Mark Riley. So I thank both of you for everything, for your compassion, as well as for your partnership in this recovery process.

For the past two years, I have been focused on both institutional change and the release of recovery money already approved by the

Congress to the devastated region. Since January of 2009, through sustained oversight by this Subcommittee, FEMA has obligated \$2.55 billion in recovery dollars to Louisiana. These are critical dollars for the State and include education, \$1.62 billion; public works, \$235 million; public safety and protection, \$177 million; health care, \$7.9 million; public infrastructure, \$428 million; and debris removal emergency protective measures, \$83 million.

From this, I fought for a resolution to the Charity Hospital dispute, which eventually came with the \$475 million settlement to reopen that critical health facility. This is in addition to hundreds of millions for local universities, school districts, and public services which came only after I brought all the parties to the table to resolve their differences.

I also launched an investigation into allegations of mismanagement, inordinate delays and unnecessary additional levels of bureaucracy at the FEMA office in New Orleans, which directly led to the closure of the office and its reorganization. It also led to the streamlining by Mr. Russell and his staff of hundreds of projects that had been stalled.

In addition, we have worked hard on institutional reform within FEMA to ensure that policies are relevant and responsive to actual disasters and catastrophes. In talking with constituents, with State, local and Federal officials, with FEMA Administrator Fugate, and with one of our witnesses today, Mr. McCarthy, I drafted H.R. 3635, the Disaster Relief and Recovery Development Act of 2009. This would streamline operations and increase accountability and transparency at FEMA; return focus on FEMA's role as the recovery and coordinating agency; formally direct FEMA to consider lump sum settlements for projects similar in nature; and ensure critical emergency information is reaching citizens.

I am pleased to report that the majority of these provisions were included in H.R. 3377, which passed out of Committee.

My constituents know Stafford Act as something that was evil and prohibited us from progress and recovery. But because of our working together on this in this Subcommittee, we will make it work for those who have been affected by the disaster.

We still have a long way to go. I look forward to working with my colleagues to continue our important reforms. I look forward to the testimony from our witnesses and discussing the critical areas remaining for reform.

So again, I would like to thank the Chairwoman and the Ranking Member for their hard work on this Subcommittee and I yield back.

Ms. NORTON. Thank you very much, Mr. Cao.

We will proceed to panel one. We will begin with Matt Jadacki, Assistant Inspector General for Emergency Management Oversight at the Department of Homeland Security.

Mr. Jadacki?

TESTIMONY OF MATT JADACKI, ASSISTANT INSPECTOR GENERAL FOR EMERGENCY MANAGEMENT OVERSIGHT, DEPARTMENT OF HOMELAND SECURITY; FRANCIS MCCARTHY, FEDERALISM, FEDERAL ELECTIONS AND EMERGENCY MANAGEMENT SECTION, CONGRESSIONAL RESEARCH SERVICE; LISA BLOMGREN BINGHAM, PROFESSOR, SCHOOL OF PUBLIC AND ENVIRONMENTAL AFFAIRS, INDIANA UNIVERSITY AND VISITING PROFESSOR OF LAW, WILLIAM S. BOYD SCHOOL OF LAW, UNIVERSITY OF NEVADA, LAS VEGAS

Mr. JADACKI. Good afternoon, Madam Chairwoman and Members of the Subcommittee.

Thank you for the opportunity to discuss where we are and what we have learned in the five years since Hurricane Katrina. In brief, we have learned a lot since Katrina, and FEMA is better prepared to handle large disasters.

There is, however, still room for improvement to ensure that preparedness, response, recovery and mitigation efforts are carried out effectively and efficiently, and in a manner that minimizes waste, fraud and abuse.

My office has conducted a significant amount of work in the past five years assessing FEMA's programs and policies, as well as conducting audits of disaster grantees and sub-grantees. Our program let us cover a wide range of areas, including acquisition management, logistics, individual assistance, public assistance, and mitigation.

Today, I will discuss our recent report on public assistance policies and procedures, as well as the arbitration process that has been established for some public assistance projects.

In response to concerns raised by this Committee, my office conducted an in-depth assessment of design and implementation of FEMA's Public Assistance Program policies and procedures. Our review focused on the efficacy of FEMA's policies and procedures with respect to the individuals and organizations that have to navigate them, the grantees and the sub-grantees.

Our assessment revealed multiple challenges that significantly hinder FEMA from consistently administering the PA Program in an effective and efficient manner. These challenges include untimely funding determinations, deficiencies in program management, and poorly designed performance measures. Although we determined many of these obstacles derive from personnel-based issues, there are other noteworthy causes that contribute to the obstacles that FEMA must overcome.

Consequently, we presented FEMA with 16 recommendations to improve not only FEMA's process for reviewing and approving the public assistance projects, but the overall administration and delivery of the program.

FEMA has taken some actions in response to our recommendations. As I said, we found challenges in the areas of program management and performance measures. FEMA needs to improve the timeliness of PA to avoid project delays and improve program efficiency. Such improvements should center on the appeal determination process, the environmental and historic preservation process, and the reconciliation of insurance settlements.

In its response to our report, FEMA acknowledged the untimeliness issue, but insisted the problem is being addressed through the application of additional resources and improvements in the process of appeals. We remain concerned that FEMA does not plan to take action to establish time frames in the appeal process beyond what is currently in regulation.

For example, current regulations do not include a time frame for applicants who have submitted additional information to support their appeal or a time frame for independent technical experts to provide information to FEMA on the appeal.

Another area that could benefit from improvement is FEMA's management of the PA Program. Keys to successful program management include the use of the cost estimating format, as required by the Disaster Mitigation Act of 2000; more accurate cost estimation and scopes of work; procedures to minimize repetitive documentation requests; and identifying eligible PA hazard mitigation work early on in the process.

Contributing to many of the challenges we identified in our report are turnover, inexperience and limited training within FEMA's disaster workforce. FEMA has identified several areas of planned improvement in its personnel system and is taking a number of actions in this area, but full implementation is lacking.

We identified various alternatives that could be employed to streamline the PA process. All those alternatives represent opportunities to improve the program. Each alternative also presents drawbacks. Those alternatives that we explored include negotiated settlements, increasing the large projects threshold, replacing some grants with mission assignments, transferring Federal disaster programs from other agencies to FEMA or vice versa, and providing interval payments based on project estimates.

Despite the challenges here, we have learned that many of FEMA's customers consider the current PA Program design inherently sound. They believe the flaws are primarily in execution. Consequently, we are in agreement that most of the challenges could be significantly diminished by focusing on the fundamentals upon which the PA Program rests.

There are times, however, when FEMA and its grantees and sub-grantees reach an impasse in the application and appeals process. Hurricane Katrina occurred five years ago, yet there are still critical public assistance projects that have not been funded. In an effort to break the impasse that sometimes leaves PA applications in limbo for years, Congress enacted legislation that established an arbitration process for PA projects related to Hurricanes Katrina and Rita. As of September 9, 2010, there were 25 arbitration requests, 20 of which have been undecided. The most well known of these arbitration cases is Charity Hospital, in which the arbitration panel awarded the applicant \$474 million for replacing the hospital.

We suggested in our report on public assistance policies and procedures that FEMA should consider establishing a mediation and arbitration process for appeals that reach an impasse. We are currently monitoring the arbitration cases and plan to conduct work in this area to determine whether the current arbitration frame-

work provides a means for speeding assistance to communities, while protecting the interests of American taxpayers.

Madam Chair, this concludes my prepared remarks. I welcome any questions that you or the Members may have.

Thank you.

Ms. NORTON. Thank you very much, Mr. Jadacki.

Next, Francis McCarthy, Federal Elections and Emergency Management Section of the Congressional Research Service.

Mr. McCarthy?

Mr. MCCARTHY. Thank you, Madam Chair.

Good afternoon. It is an honor to appear before you today to talk a bit about public assistance, or the PA Program, and ways that we might be able to improve it.

The appeals process for PA generates a lot of interest based upon the huge number of dollars involved, but also because the projects are important to a community's recovery from a disaster. Two of the criticisms that stand out on PA appeals are usually the time-consuming nature of the appeal and how long it can drag out, but also a feeling that the appeals process is internal to FEMA without enough outside review.

Many have noted that due to its experience in disaster situations, it is important for FEMA both to provide leadership and to offer flexibility in the administration of disaster programs. In essence, FEMA works on disasters every day, while States and localities become involved due to an extraordinary event that may never recur in their area. So it is difficult for States and local governments to match FEMA's mastery of the details of the appeals process.

That is also why it is important that FEMA explain its process fully to applicants in order to provide a level playing field for the exploration of eligible damage and the costs to address that damage.

There are a couple of options that could be utilized to lessen the need for appeals. As has been mentioned by everyone, the cost-estimating process was approved in DMA2K in 2000. And what that provides for is the ability for FEMA to pay for large projects based upon an agreed upon estimate. Finally implementing that authority would go a long way towards shortening any appeals.

A second option is to use the alternate projects option to turn multiple projects into a single project that captures the recovery vision of a community. I think the recent experience with the New Orleans Recovery School District might suggest a promising approach in this area.

There are two existing options to lessen appeals, and maybe improve the process itself. A project decision team, similar to one used on the Gulf Coast, is a concept that is of interest not due to only its recent success, but also in the fact that conceptually it brings in experts from within the agency that have not previously been associated with the case in dispute and they can provide an objective review.

A second existing option is for increased use of the alternative dispute resolution process. FEMA has an office that can do this, and it could be used more extensively to really improve the relationship between FEMA and applicants.

Regarding the arbitration system, it is not new to Federal disputes, but it is very new to the recovery process. And while the arbitration system may arguably lead to a more equitable result, it may also stretch out the time of the recovery process and thus the time of restoration.

A vital consideration is whether the arbitration process should move toward a common agreement, or whether it approximates litigation, rather than mediation. If so, an adversarial arbitration process could undercut the existing Federal-State relationship and reduce the overall level of cooperation for all disaster response and recovery programs.

In approaching the establishment of permanent arbitration authority, Congress ought to consider a number of criteria; if the authority should be triggered by the projected cost of a project, or by the definition of the project itself. One of the things I thought of in looking at arbitration is that in some ways we could suggest that maybe the threshold for dollars should be higher so that there will be fewer requests.

On the other hand, maybe we should think of arbitration as something to have in the quiver that is going to encourage more settlements, but also that could be used for any problem, no matter how small, whether it involves not just large public assistance projects, but also the kind of disputes that arise within individual assistance where people are disputing the types of housing that is being used or the way that services are being provided.

I think if we are going to use arbitration, it might be something that gives the President the discretion to use it regardless of the size of the project, but as a way to overcome an impasse.

Finally, I want to mention that a block granting approach has a number of different angles to it. I think a number of approaches have come forward. We have heard lump sums referred to, and I would particularly speak to the special procedures for widespread damage that are in H.R. 3377, that really suggest a means of getting to a cost-estimating proposal that could end with a block grant for disaster areas.

There are many approaches that can make a positive contribution to the discussion. Congress may also wish to conduct a study of the current arbitration pilot process to determine the efficacy of the panel findings. Similarly, Congress may also wish to examine the New Orleans Recovery School Project that I mentioned, and the arbitration process that has just completed to see which ones merit replication.

In addition, other suggestions such as the special procedures in H.R. 3377 could at least initially be used as a pilot program to see how it works. The pilot programs in both I.A. and PA I think really did succeed in showing some effective processes that can be used for the benefit of disaster victims and their communities.

I hope my testimony was focused on those themes and proposals that can improve PA and I would be happy to answer any questions you might have.

Ms. NORTON. Thank you, Mr. McCarthy.

Finally, Lisa Bingham, Professor Bingham, School of Public and Environmental Affairs, University of Indiana, also the University of Nevada, Las Vegas.

Professor Bingham?

Ms. BINGHAM. Thank you, Madam Chairwoman and Members of the Committee. It is a tremendous honor and privilege to be here today to discuss the use of dispute resolution in public assistance programs under the Stafford Act.

My areas of expertise include dispute resolution in the Federal Government. I have done research with the United States Postal Service on mediation of discrimination cases; with the Department of Justice on its use of dispute resolution in Federal litigation involving the Assistant U.S. Attorneys; with the Occupational Safety and Health Review Commission on its use of settlement procedures.

In addition, I have served as a consultant with the Departments of the Air Force, Agriculture and the National Institutes of Health. I have, however, never served as a consultant in any capacity with FEMA and this is my first experience doing research on their project.

The arbitration program to date has entailed approximately 26 cases. A number of those involve cases in which the parties have asked for the case to be withdrawn by agreement or dismissed by agreement. It appears that there are settlements. In addition, there are a number of awards. But the arbitration, the total number of cases is too small to do any empirical research on the program.

What we can say about the program is that there do not appear to be any administrative problems. I believe it was anticipated when this program was created that there would be many more cases than have in fact been filed. And the Civilian Board of Contract Appeals, which has substantial expertise in the substantive area of these disputes, has been able to absorb this caseload and establish an orderly system that does not present any concerns about due process or fairness, unlike arbitration programs, for example, for consumers and employees that are mandated by corporations or employers.

This is an entirely voluntary program and therefore it doesn't present issues about unequal bargaining power or fairness of process.

However, the program has resulted in substantial awards against FEMA and there are a number of alternatives that would provide perhaps faster, less expensive and better ways of handling conflicts involving the Public Assistance Program. FEMA has an Office of Dispute Resolution. That Office of Dispute Resolution has authority under the Administrative Dispute Resolution Act to help the agency design systems for handling conflict. To date, it has designed a system for employment disputes.

FEMA does have some experience using mediation and voluntary processes for hurricane-related damage. It did so in 1998 in a dispute involving Hurricane George and the island of Puerto Rico, and mediated very successfully a dispute there.

Mediation is very different from arbitration. Arbitration is an adjudicatory process that is adversarial, involves the imposition of a final and binding award as it is designed in this program. Mediation is assisted negotiation and a voluntary process in which the parties use a third party to help them reach a voluntary settlement.

FEMA could, and I would recommend, that FEMA undertake a comprehensive dispute system design process. It could develop a system that involves negotiation, mediation, potentially non-binding fact finding, that could get at disputes much earlier in the life of the conflict. It could involve stakeholders, including grantees, sub-grantees, nonprofits, local governments, as well as the public in its design process, and its own staff. It should develop interest-based negotiation training for its staff, and a comprehensive design would include an evaluation system that would entail feedback from stakeholders, including grantees.

This system should also address the question of the scope of negotiation under the Stafford Act, which I believe has been the source of some conflict as reflected in the Inspector General's report.

This concludes my prepared remarks. I am happy to answer any questions of the Committee.

Ms. NORTON. Thank you very much, Ms. Bingham.

I want to thank all three of you for really quite informative and interesting testimony.

Let me say a word as a predicate for my questions about the arbitration process. This Subcommittee was faced with more than \$3 billion lying on the table in the middle of the Great Recession. It hadn't moved. A Member from Louisiana in the Senate was so disturbed, I can't blame her, at the misery of seeing nothing happen that she actually put into legislation in an appropriations bill that the President would appoint arbitrators for the Gulf Coast. It just got that bad.

So the first thing you should bear in mind is that the Subcommittee is very aware that arbitration is rarely used except in circumstances where agreement has broken down.

We then worked with the Senate to say that is going to be even more cumbersome to go through the Administration. And the result was the arbitration process that you have. And you do note that we looked to the existing procedures and found that there were people of some independence that could all along have been used and are used in this process.

Now, we would be very interested and do note that we believe the fact that the arbitration process has had an effect on both the agency and on the States. That is what it is supposed to do.

This is my concern, and I think particularly, I don't know if it is you, Professor Bingham, or you, Mr. McCarthy, talked about what we are very aware of and very exasperated was not used, and that is an ADR system within FEMA. One of the reasons we figured out that the process didn't move, whether you were talking about the appeals process, it still doesn't move, or the negotiation process, is quite simply FEMA is a party. FEMA's job is to preserve the taxpayer funds of the people of the United States of America. The job of Mississippi, the job of Louisiana is to extract as much as these States and these localities can.

As Chair of the Equal Employment Opportunities Commission, I set up a system that got rid of the backlog, an early resolution system. So I am not only familiar, but a great proponent of early resolution systems. But the EOC was an independent agency. So when you suggest that FEMA as a party, for example, within FEMA, if

I am Mr. Cao's District or I am Mr. Taylor's District, and FEMA invites me into its processes, and says just come right here. And here you have an agency, a part of FEMA, which will decide this dispute.

I want to know whether you believe that the localities and the States involved are to have full confidence that out of such a process located within FEMA, there could be a just resolution, and particularly whether you believe it would go any faster than the present appeals process or the present arbitration process.

I give that to any of you who care to answer. It is a question of independence. Who gets to decide when one of the parties is holding the money and the other side wants the money? And there is by definition an adversarial relationship unless FEMA isn't doing its job, or Mississippi and Alabama aren't doing their jobs.

Ms. BINGHAM. I understand the question and I would be happy to address it, Madam Chairwoman.

A comprehensive system would be one that started at the point that the parties are developing the project worksheet. The parties are already negotiating and working collaboratively in many instances in developing the estimates of costs. But we don't have a system that provides interest-based negotiation training skills.

Ms. NORTON. Which would mean they would develop the costs collaboratively, the cost sheets collaboratively as well?

Ms. BINGHAM. I confess I am not an expert on FEMA's internal procedures.

Ms. NORTON. No, but go right ahead. Don't assume that those procedures can't be changed. OK?

Ms. BINGHAM. My understanding of the nature of the disputes are that they involve facts, the facts of estimates of costs, the estimates of construction, how those relate to total costs. That is analogous to any kind of an insurance program where we are trying to estimate what the policy should pay. Negotiation in that circumstance is common. It is a daily fact, but it is improved greatly with skills training. And that skills training would encompass how to negotiate constructively using principles and interests, as opposed to adversarial bargaining like haggling over the price of a car.

It would also encompass discussions of the scope of bargaining. I believe that one of the areas of disagreement is the question of FEMA's obligations under the law, as distinguished from the facts of a particular project. And so a comprehensive system would start with negotiation. You could then move to mediation. Mediation could either be provided by inside neutrals, but there are also outside neutrals. There is a shared neutrals program in the Federal Government that would provide employees from other Federal agencies who are substantially neutral. And that could be a next step.

There are other alternative processes that are designed to encompass, including fact finding which can be either non-binding or binding arbitration just on the facts, not the law. And then there is also a process called partnering that the Army Corps of Engineers uses where when there is a big construction project, they set up a team. That sounds to me that it may have some similarity to the expedited teams that FEMA is now using, where all the players

involved in that project have a retreat. They have shared negotiation training. They set up an agreed procedure for handling conflict. And then there are backup processes. Binding arbitration of rights is a last resort under these kinds of designs.

Ms. NORTON. That is very helpful, your suggestions, and that is from within the Federal Government. Your last suggestion comes from within the Federal Government itself.

Mr. McCarthy, you speak about cost estimating procedures, I take it, from the insurance industry, in your testimony?

Mr. MCCARTHY. Actually, insurance and other industry experts. That was FEMA's charge, was to streamline.

Ms. NORTON. Now, those are profit-making enterprises. How come they rely on, how are they able to rely on estimates and still stay in business and the Federal Government hasn't been able to figure it out?

Mr. MCCARTHY. Madam Chair, I have to confess I worked at FEMA and I worked on DMA2K and I didn't expect it was going to be questioned 10 years later on why it hasn't been implemented.

Essentially, FEMA put together the panel it was supposed to immediately after the bill passed. It did bring in industry experts, insurance experts and other experts to set up a system that would work, to develop estimates that would be of assistance to local governments both on the high end and the low end.

Ms. NORTON. But it is the part of my question, I would be particularly interested in. Somebody bumped into my car coming to the Congress. I called the insurance agency. They said go to the insurer and find out what is the estimate, and they paid it. And the people who did the car reported to them, and they didn't come and negotiate with me. They told how much it would be.

I am trying to understand why they are able, and I recognize that they have people there who look at it, who come over. They are not just a pass-through.

I am asking how very profitable industries like the insurance industry can say give me your cost estimate, take it, and my car was fixed in a few days. Now, that is small compared to what my colleagues have gone through on the Gulf Coast, but I do not understand the process and would like to understand it. And maybe I would understand why it took some time for FEMA to implement it.

Mr. MCCARTHY. I can't answer on why that happens. I think in some ways the culture that grew up in the PA Program was we are going to be certain of every cost before a dollar is spent; before the audit comes and gets us; that we are going to be certain so that we are not going to be caught on anything, so we will wait until the end of the process to pay.

Ms. NORTON. I see. You may be right in the government.

Mr. Jadacki, and then I am going to go on to my colleagues before I come back. I am interested in the shortest way to get an answer. That is why the arbitration process ought to be a last resort. It hasn't always been a last resort. After all, the State, I understand we have been using both. And the State can opt for arbitration, I guess it is. But once they do, they are into arbitration, which is the way it ought to be.

But I understand from your report that the appeals process still can go on for as much as eight or nine months, and that the arbitrator gets done in 60 days. Now, I am trying to find out what the reasons for the much longer process, because I don't even think they accept, do they, the findings such as they are of the appeals process? They do their own independent findings.

How in the world could you do that in 60 days with judges? That is who they are. And the appeals process takes many times that.

Mr. JADACKI. In some cases, it takes years to get the appeals done. There are several rounds of appeals and there are timelines. I think there are 90 days, and I think in reviewing your bill, the proposed legislation, you reduce that to 60 days, which I think is a good idea.

The problem is with the arbitration process, my understanding is everything has to be in, the witnesses have to be, everything has to be prepared so they make a decision. In the appeals process, what we found was that documentation submitted, may be deficient. They go back and ask the applicant for additional documentation. The clock stops. It starts again when the additional information comes in. And the process just takes an inordinate amount of time to get done because there is a lot of negotiating back and forth.

Ms. NORTON. Mr. Jadacki, that doesn't sound like an appeals process. That sounds like an ordinary negotiation.

Mr. JADACKI. That is a negotiation. That is exactly what it is. In a lot of cases, some of the ones I have been reviewing, and you used the example before about the accident. I think a lot of the cases it's the extent of damage. How much damage did it cause? I have seen some cases where FEMA comes in and says, well, we are going for repairs because it is less than 50 percent, versus replacement. The same thing with the insurance company with your car. If your car was totaled, you get the entire replacement cost for that and a lot of the disputes result from exactly how much damage was caused.

Now, the use of an independent, I don't know whether it resides in FEMA. I think that would be very difficult to have an arbitrator or mediation in FEMA, but if you can agree on an independent assessor like you do in insurance companies, that both parties agree with, saying yes, it is 150 percent damage; we are going to pay replacement costs. Or no, it is somewhat less than that; we are just going to pay for the repairs.

I think that is the basis for a lot of these problems.

Ms. NORTON. Do you think this notion that I spoke about in my opening statement about dual consultants. You tell me, Mississippi, what the damage is. FEMA will tell you what the damage is. That sounds like a real setup there.

Mr. JADACKI. Yes. It is kind of similar to what the arbitration, you know, there is maybe one arbitrator if you use an independent engineer. But it is the same basis the arbitration is, where you present your evidence and they present their evidence, and somebody decides.

So if it is a damaged building, you have one entity instead of paying for both on the State side and the Federal side, and they decide, yes, this is substantially damaged and you both live by that.

Ms. NORTON. So just getting rid of dual consultants and having one agreement well ahead of time, that might not even get you to the appeals process. Maybe you could decide it so you wouldn't even have to appeal.

Mr. JADACKI. I think if they can agree on somebody that is truly independent and doesn't have any of either side's interest at stake, just like an insurance assessor, an independent insurance assessor, as long as you are not affiliated with the insurance company, same thing. They will go out and do an honest assessment and the parties live by that. There could be some negotiations back and forth still, but right now the process is we want this, we want this, and it just seems a long time to get these things settled.

Ms. NORTON. Thank you very much, Mr. Jadacki.

Mr. Cao, please.

Mr. CAO. Thank you, Madam Chair.

My first question to the panel, or anyone who might have expert knowledge on community disaster loans. I would like for you to compare for me the rules promulgated by FEMA for disasters before Katrina, and the rules promulgated by FEMA in relation communities as to loans for Katrina.

Mr. MCCARTHY. Mr. Cao, the biggest difference would be how the first sets of loan were made for Katrina. I think rules were written differently at that point because there was an idea that there would be no forgiveness of any loans and that they all had to be paid back. And that when the second set of loans were done, that was after Congress had permitted the idea of forgiveness for loans.

So I think it was somewhat different between the two sets of loans for CDLs, but I don't know the exact details of how they changed it.

Mr. CAO. But for disasters prior to FEMA, it was routinely done that CDLs were forgiven. Is that correct?

Mr. MCCARTHY. Yes, absolutely. I think you could count on one hand the number of loans that were actually paid back, and those were very small loans to smaller communities. I think the amount of loans that were forgiven was well over 90 percent. In fact, dollars forgiven was well over 90 or 95 percent.

Mr. JADACKI. Right. I actually worked in the FEMA CFO's office and they had a default rate of 96 percent prior to Katrina, which means 96 percent of the money that was lent wasn't expected to come back. And it was based on three years' average revenues, post-disaster revenues. I don't know all the formulas on that, but there were a couple that paid it back, but for the most part, most of them were canceled.

Mr. MCCARTHY. Those were loans from Hurricane Andrew.

Mr. JADACKI. There were floods.

Mr. MCCARTHY. Yes.

Mr. CAO. Now, based on the data that you have collected, can you provide me with a percentage of CDL loans forgiven by FEMA in connection with Katrina?

Mr. MCCARTHY. I can get that information.

Mr. CAO. I can ask Mr. Tony Russell when he comes up here later. That would be a lot easier.

Mr. MCCARTHY. OK. Yes.

Mr. CAO. I know that one of the biggest issues in regards to the community disaster loans forgiveness for Katrina-related projects, or municipalities, is the issue of income, three years' income. That is one of the requirements for St. Tammany, for instance, for Jefferson Parish, and some other municipalities like the Jefferson Parish Sheriff's Department. Right after Katrina, they received a spike in income because of the tremendous number of people moving over there to temporarily reside while waiting for their homes to be rebuilt in New Orleans.

Based on your understanding of rules promulgated by FEMA for previous disasters, were the income criteria, were they the same? Or are they different from what was drafted for Katrina? Do you know?

Mr. MCCARTHY. I don't know if they are different. I just don't know if there was a similar circumstance with the jurisdiction absorbing that kind of population. I can't think of one in Florida that was similar, but I am sorry, but I could look into that and see if there was at least something similar.

Mr. CAO. OK. In regards to the arbitration process, I guess I am somewhat in a similar circumstance as you, Mr. McCarthy, in the sense that I am somewhat skeptical of the arbitration process because I do feel that if the process is available to them, they might just kick everything to arbitration, and thus slow down the recovery after a disaster.

What we have seen in Louisiana after Katrina was the need to move at a very quick pace. And that was not available there. I guess when we are looking at ways to resolve disputes, what would be some of your recommendations to possibly allow for an expedient resolution to the many disputes that we have?

Mr. MCCARTHY. I guess one of the things I would point to really is some of the things that you have experienced. The idea of a project decision team of people admittedly within FEMA, but still without a stake in the ongoing argument, bringing in those people really does open a new page.

And it also starts dialogue within FEMA where people have to start looking at regulations. And if you are bringing in people from different regions who worked on different disasters at different periods, I think it really does broaden the kind of conversation and maybe make things a bit more flexible and move you toward settlement.

On the other hand, having an arbitration process probably also encourages many settlements that never go to arbitration. It may be the threat of arbitration that helps to move some of it that way. But I do think that the kind of action team that was put together with Mr. Russell previously is good example of what can be used for future disasters as well.

Mr. CAO. That is all the questions I have of this panel. Thank you very much. I yield back.

Ms. NORTON. Thank you very much, Mr. Cao.

Mr. Taylor of Mississippi?

Mr. TAYLOR. Again, I want to thank the panel for being here.

Early on when it came to debris removal, something that stuck out in my mind was the Corps of Engineers came to my home county which lost the county courthouse and city hall. And basically

gave them the option of saying we estimate the debris removal should cost this much per cubic yard; we will let you put it out for bid; you do all the paperwork, and we will reimburse you up to this. Or given the fact that you guys don't even have a pocket calculator to your names, which was accurate, we will do it, and let the Board of Supervisors make that decision.

What I have really noticed in some of these adjustments that have been dragging on for five years is the total lack of initiative on the part of HUD for housing or the Department of Education when it came to schools, to find an expert who could look at a school or a building and say this is our estimate of what it would cost to not only make it look like it did the day before the event, but bring it up to compliance with the laws that have been passed since that building was built, whether it is for asbestos; whether it is for the Americans With Disabilities Act, and say: This is what we have estimated it will cost to fix; this is what we will make available to you, or we will do it, and absolve you of all responsibility. We will do it and we think we can bring it in at that price.

Given the enormous amount of money that has been spent and is still being requested, I am still to this day appalled at what I sense is a total lack of expertise within our Nation as far as estimating what something should cost. And we ought to be the experts, not communities of 4,000 or 5,000 people. They can't afford an expert. We certainly have to afford an expert.

What, if anything, has happened in the past five years to address those things?

Mr. McCARTHY. I can't point to a specific instance where that has happened. I guess that is why I have kind of belabored the point about FEMA using the cost-estimating formula that Congress gave it. And that goes back to when Director Witt was at FEMA when that was granted. Since that hasn't been implemented, everything FEMA worked on as far as developing expertise to be able to do cost estimating right at the start of a disaster to try to reach an agreement, use industry experts to develop all that, has just lain dormant for those 10 years.

I think FEMA can have people that are expert at estimating. They do a lot of disasters every year. They can have some staff that is good at estimating. And I think they have also tried to at least encourage a bit more that the local governments themselves can begin to establish those kind of contracts for debris removal and give them a greater cost share if they have those kind of things in place.

But the overall expertise you are discussing I think, at least as far as FEMA PA projects, wouldn't really develop because I think we are staying with the system we have and not with the authority Congress had given to maybe increase that expertise.

Mr. TAYLOR. Going back to Congressman Cao's observation, which we saw the same thing in many of the Mississippi Gulf Coast communities that rely on sales tax for their revenue. When all the stores are gone, obviously the sales tax revenue is gone. But then when the big box stores come back, you will have a spike since everyone is replacing every refrigerator, every air conditioner, every microwave oven. So for a short period of time, there will be

a huge spike in sales tax, but then it gets back to a desperate situation.

To what extent are the Federal agencies empowered to just on their own turn to their bosses in Washington and say, look, I have looked at this. These guys cannot repay the loans. I am asking you, FEMA, to forgive them.

Why do even, in many instances when it is just blatantly obvious in some of these communities, why do you even have to wait for a town of 1,500 or 2,000 or 3,000 to hire an attorney and a staff to put together that, when in so many instances it is just obvious?

Does anyone wish to address that?

Mr. JADACKI. I have worked on CDLs for a number of years, going back to Hurricane Hugo and Hurricane Marilyn, and I tend to agree with you. There is a big spike. I mean, the whole purpose of the CDL program is there is going to be a drop in the tax base because homes are destroyed; people are moving out. But eventually in some cases after disasters, you have a real big spike on that.

I think the idea of the CDLs is a sound idea, that communities do need the working capital. They do need to pay the police force and the firemen and those types of things because of that base. But they are eventually going to recover, they are going to get back to where they were before, so they are going to be living at this same level, but yet trying to pay a big Federal loan back, too, at the same time.

So I think that needs to be taken into account also, even though they did return to their tax base, now they have the additional liability of paying back this Federal loan. And I think, again I mentioned before, historically there is about a 95 percent, 96 percent default rate because communities have just demonstrated through their financials that they just can't recover. And I think that has to be taken into consideration when the loans are up for cancellation.

Mr. MCCARTHY. And I would mention, too, check on this, but I think another thing historically is that when CDLs first began, very briefly, it was a grant program and not a loan program. And I think when I was at FEMA years back, and I think when we would look at straight up costs of looking at the finances of many communities and sending auditors down and trying to guesstimate things, and the cost involved in hiring accounting firms to go to various counties and look, certainly what we came back to is maybe another approach would be, maybe loans not of that size, but maybe a smaller size that just become grants to smaller communities, rather than trying to put both the Feds and the communities through that kind of process. In some cases, you can end up spending as much on the administration of the loan as on the interest on the loan itself.

So one of the suggestions that was made, at least back in 2000, was to consider making it a partial grant program. But given all the other costs on the Federal Government, it is not the kind of thing that gets a lot of traction.

Mr. TAYLOR. Mr. McCarthy, and again I very much appreciate the Chairwoman. I am not even a Member of this Subcommittee, so she is very kind of let me participate. But what, if anything, if it happened again tomorrow, only this time it was coastal North

Carolina or coastal Georgia or Charleston for the second time in 20 something years, if it happened again tomorrow, what assurances can you give me that it would be done better than it has been done since 2005? And if you can't give me any assurances that it would be done better, what specific recommendations would you or anyone on that panel make for changes in the law so that we don't keep making the same mistakes?

Mr. MCCARTHY. Mr. Taylor, I want to say that I think there have been improvements. And when people ask me about the Act, it wasn't retroactive to what Mississippi and Alabama and Louisiana went through, but I think the pilot programs from that project were useful. FEMA experimented in Iowa and Texas and found out they could do something about helping to restore the rental inventory, rather than just thinking about trailers, of thinking of fixing up apartment buildings in areas so that there is more available housing.

And another thing I always point to is I think when we had all the people dispersed around the Country in 38 States after Katrina, trying to meet up with family members, FEMA at that point didn't have a case management authority where you could actually have them talk to people and make them aware of what services they were entitled to and how they could be linked back with their family.

I think there have been small improvements. And I think that Mr. Fugate at FEMA really has reinvigorated the agency to be looking forward. And I think you put your finger on it, initiative. You can't just have a law that sits there or regulations that sit there. You have to have administrative initiative to make it work because you can't legislate the spirit of an organization. You can only give them the tools.

I think Congress has given the Administration a number of tools to make disaster recovery work better, but it is partly how it is administered that really counts.

Ms. NORTON. Yes, Mr. Taylor, certainly.

Mr. Johnson of Georgia?

Mr. JOHNSON. Thank you, Madam Chair, for holding this hearing, a very important hearing, five years after Hurricanes Katrina and Rita, which struck the Gulf Coast. All of us will never forget that area just literally being drowned, an enormous stretch of land and an enormous number of people who were adversely impacted. And to go back there now and look at the lay of the land, it doesn't really look like a lot has been done.

And as I understand it, I am pretty much interested in this arbitration process that has been put into place to resolve disputes. And I wanted to know who are the arbitrators? And do the decisions come from arbitrators or arbitration panels?

Does anyone really know? I know we don't have anybody from GSA.

Ms. BINGHAM. The arbitrators are experienced administrative law judges with the Civilian Board of Contract Appeals. They sit in panels of three. And each arbitrator has a vote and they decide cases by majority vote, analogous to an appellate court, for example, but they conduct the hearings using de novo review. They take in evidence and argument from witnesses.

Mr. JOHNSON. Are there any rules of procedure, rules of evidence?

Ms. BINGHAM. Arbitration is by design an informal process. Arbitrators generally are not bound by the rules of evidence.

On the other hand, the rule of thumb is they let almost everything in because that is the safer practice. So to my knowledge, there haven't been disputes about arbitrators excluding evidence in this program, and the rules of evidence, when you have an expert decision maker, and these are expert decision makers with substantial background in contracting and construction disputes, for example, the rules of evidence aren't as necessary. They are designed primarily to keep evidence away from lay people on juries.

Mr. JOHNSON. Yes, how are these experts selected for a particular case? Is there a wheel system or somebody pulls their name out of a hat? Or do they volunteer, I want to hear this one, I want to hear that one?

Ms. BINGHAM. I believe Chief Judge Daniels can respond to that question. He is on a subsequent panel. I don't have detailed information about that.

Mr. JOHNSON. Yes, I would be concerned about even with trained witnesses or trained arbitrators without a set rule of law, if you will, you know, on what basis can a decision be made? And then how can one rely upon that decision as precedent for any future decisions to be made? And without rules of evidence, how can you determine whether or not something is material or relevant or whether or not any evidence may be tainted in some way? I wonder about those things.

Is there an ability to appeal from the arbitration panel's decision?

Ms. BINGHAM. The process of arbitration is different.

Mr. JOHNSON. It is a binding arbitration?

Ms. BINGHAM. It is a binding arbitration. And it is different from an administrative adjudication in that it does not set precedent of any kind. It is substantially final under the Federal Arbitration Act. Arbitration awards can only be appealed on certain limited grounds, and these include fraud, evident partiality, collusion, corruption of the arbitrators, the failure to execute an award that is within the scope of the submission, the refusal of arbitrators to admit evidence or to postpone a hearing on good cause shown. These are very limited grounds for appeal.

Mr. JOHNSON. Yes. So now on the front end of the process, do the litigants or contestants, or whatever you want to call them, are they given a choice as to whether or not to proceed in binding arbitration? Are there any alternatives for them at the beginning of the dispute?

Ms. BINGHAM. This is a voluntary program, so the claimants, who are grantees and sub-grantees in the Public Assistance Program, can opt into it by filing a request for arbitration. Their other alternative is the two-stage administrative appeal within FEMA, which results in a final agency decision that is also not appealable, but largely committed to agency discretion.

There is not in place right now a formal, more comprehensive dispute system design for these kinds of cases that start with a negotiation step or providing the mediation alternative. And such a

design, especially if it provides for a prompt and early intervention at the outset of a dispute, might resolve. Evidence shows in other programs that the earlier that there is some sort of a dispute resolution intervention in the life of that case, the more quickly it terminates and the shorter time it spends on the docket.

Mr. JOHNSON. Yes, is mediation an alternative dispute resolution process that is available?

Ms. BINGHAM. Yes. Mediation is voluntary assisted negotiation. FEMA has a mediation program for employment disputes in place. It has an ADR office with substantial expertise in mediation, and there are mediators available across the Federal Government in the Shared Neutrals Program who are in agencies outside FEMA who could also provide assistance. In addition, under the Administrative Dispute Resolution Act, Federal agencies have the authority to hire outside neutral mediators, as well as outside neutral arbitrators.

Mr. JOHNSON. Are these mediators, by the way, paid hourly? Are they hourly workers or salaried workers? Or do they work for private dispute resolution companies, arbitration associations and what not?

Ms. BINGHAM. Under the Shared Neutrals Program, the mediators who participate in that program I believe are given special duty assignments across agency lines in order to mediate. So that there is no additional cost to the agency.

Mr. JOHNSON. And when you say mediators, are you referring to the arbitrators as well? I am really wanting to know about the arbitrators with that question.

Ms. BINGHAM. My understanding of the arbitrators that are currently used, Civilian Board of Contract Appeals, is that these folks are already salaried employees of the Federal Government in the General Services Administration, and therefore there are no additional fees paid to arbitrators as there would be in the case of resort to outside neutrals. There are panels of arbitrators available from nonprofit organizations like the American Arbitration Association or JAMS. And they charge varying fees, depending on the individual practitioner. It is a private business, so it is as variable as what lawyers charge.

Mr. JOHNSON. If I might ask one more question. What determines whether or not to use the salaried arbitrators, as opposed to an outside arbitration group?

Ms. BINGHAM. My understanding is that the previous legislation in the stimulus bill delegated to the President the authority to set up the program. The President, in turn, delegated that to the Secretary of Homeland Security, who designated the Civilian Board of Contract Appeals. It is within the authority of FEMA to establish a different kind of arbitration program provided it complies with guidance from the Department of Justice and publishes a policy and establishes a written agreement to arbitrate in each case. FEMA could, with the voluntary agreement of the grantees and sub-grantees, the other side of the dispute, could voluntarily agree to arbitrate using outside neutrals.

Mr. JOHNSON. Thank you.

Ms. BINGHAM. You are welcome.

Ms. NORTON. Thank you very much, Mr. Johnson.

I am going to quickly ask a few more questions to clarify the record, and then move on to the next panel.

Mr. Jadacki, do you have any concerns about the arbitration procedures now being used? You have looked at what they have been doing. Or about any of the arbitration decisions that have been made?

Mr. JADACKI. There haven't been that many decisions and I haven't been privy to the proceedings. But I did review a lot of the decisions that were made. Without knowing, having intimate knowledge and being there and seeing what was presented by both the oral testimony and some of the documentation that was provided, it is really difficult for me to say that.

I still believe that I think a lot of the cases that are being presented could have been resolved a while ago.

Ms. NORTON. Through what procedures, Mr. Jadacki?

Mr. JADACKI. I am sorry?

Ms. NORTON. You have testified, though, that it takes nine months through the appeals procedure. You mean through procedures at the negotiating stage, the cost setting stage?

Mr. JADACKI. Right. I think some of the ideas that we discussed earlier where we got the independent assessments, some of those folks. I think if you could get buy-in from both parties, you can probably avoid or prevent a lot of these cases going to arbitration. Again, it is just sort of one party says this, one party says this, and they can't agree. But if you get somebody to come in before that and says this is what we are going to do, this is the decision we are going to make, and we both have to agree to do that. Because it is a very expensive process. There is a lot of time that is consumed presenting documentation and evidence and those types of things. It is a very time consuming process.

Ms. NORTON. This is very important because, as I said, people are suffering when we are talking about this program. Legal procedure is exasperating and therefore what you have to say here is going to be the basis for our calling in FEMA after this hearing to see whether or not we can go below the present processes and get to where you can begin to get some kind of agreement. We ourselves, just hearing FEMA talk back and forth, got the dual consultants. That was pretty easy.

But you are suggesting that, and so did Professor Bingham, that way down in the process, you could begin to get early agreement on numbers so that you might even avoid other processes, including the appeals process.

In fact, arbitration does seem has had the effect of increasing settlements. Arbitration does seem to do that, an independent somebody who is not beholden to either side does get the attention. We see that eight have been settled. Several more have been resolved before arbitration. It is as if you look arbitration in the eye, it looks like the State can, once you get into one system, you are into it. But then the State can always look at what has happened before and make a decision as to whether it is going to try arbitration the next time.

Do you think that arbitration should therefore be the bogey man that is always there for disasters of a certain kind or only for certain disasters?

Mr. JADACKI. What the arbitration does, it forces the agency to do something it should be doing anyway. They should be working with the States and the locals. They should be coming up with the amount of the projects. And because they promulgate the regulations based on the law, and that should be it.

When you get to an arbitration point where you have to use an arbitrator, there is something entirely wrong with the system. OK? The system is not working if you have that much of a disagreement on such a large scale.

I think in the case of Katrina, and I think you mentioned it in some of the legislation that you have about the special provisions, you know, using project worksheets for small disasters may work very well. City hall gets damaged. You rebuild city hall where it is. Where you have widespread people being displaced, you don't know what the demographics are going to be, I think that the States and locals need more flexibility. Instead of possibly funding by P.W., why not fund by category? Like, I think the RSD is a good example of that where let them make the decision. If it doesn't make sense to build a school here, build it here, but don't get penalized because there is an alternative project.

So larger scale disasters, I think when there is uncertainty about people moving back, what is going to happen, I think you need to get more flexible. I am not familiar with what the special provisions would be, but I certainly think in a catastrophic type event, that the P.W. process may not work as well as it did in the smaller types of disasters.

Ms. NORTON. Ms. Bingham, I was interested in your suggestions. I became Chair of the EOC as a litigating lawyer, and quickly understood that my job was to help people, not to help lawyers. I am a tenured professor of law, still, at Georgetown, and I am always looking for ways to break through legal processes because America has learned to hate lawyers, I have to say, for good reasons. And we shouldn't let that go on by looking as if there is no other way to get things done and that we can't facilitate agreement.

You mentioned something called non-binding fact finding.

Ms. BINGHAM. Yes.

Ms. NORTON. If it is non-binding fact finding, why should the parties participate in it? What is the credibility to the parties to make them have confidence that the fact finding is something that they should rely upon? How would it work? Who would do it?

Ms. BINGHAM. There are a couple of different models. First, let me comment on non-binding arbitration. Fact finding is a sub-category of arbitration.

Ms. NORTON. Yes, or even of an appeals process, not just arbitration.

Ms. BINGHAM. Right.

Ms. NORTON. Could it be used even in an appeals?

Ms. BINGHAM. Absolutely.

Ms. NORTON. All right.

Ms. BINGHAM. But in non-binding processes in general that result in an award, the parties comply with the award over 90 percent of the time. And the reason for that is that it is a public statement of what the appropriate and fair outcome is, and there is a

certain amount of moral suasion associated with that public statement.

You can use fact finding in two different ways. You can use it as a way to essentially adjudicate fact and determine a set of facts retroactively that then are the basis for further negotiation. Or the term is also used in labor relations as a step toward creating a contract. So in labor relations if there is a dispute between labor and management over what the new contract should be, then a fact finder will come in, hear evidence about the economics and comparable contracts in the industry, and then recommend what that contract should be.

So it is actually a very broad use of fact finding, but it can also be, again, non-binding and the parties then can sit down and negotiate the parameters of their final deal.

So what that does is there is a conflict here. FEMA's obligation is to enforce the law and act within the scope of its delegated authority. And the disputes that are arising are largely disputes of fact. The arbitration panel is not subject to review on grounds of error of law. I think that under the Federal Arbitration Act, an error of law is not a basis for overturning an arbitration award, unlike an administrative adjudication. When these same decision makers sit as administrative law judges, then they are subject to a broader scope of review.

Ms. NORTON. Because both sides have agreed this will be the fact finder, if the arbitrator is the agreed-upon fact finder.

Ms. BINGHAM. The parties could agree.

Ms. NORTON. Often, the arbitrator is. Now, if I understand it, in this case the State can say we want arbitration and FEMA, I think, has to agree.

Ms. BINGHAM. Correct. That is my understanding.

Ms. NORTON. One more question for you. Just let me say for the record, I agree. I think it is you, Mr. Jadacki, who indicated that by the time you get to arbitration, you have a failed process. That is the only way this Committee got to arbitration, with almost \$4 billion on the table, a disgrace.

So I couldn't agree more that nobody would want to think of arbitration as a way to proceed and we see that this was a highly unusual act.

Let me say another, the reason we looked at arbitration at all, given the size of the dispute, is that it was brought to our attention that there were disputes between a number of States, a large number of States, in fact, and the Federal Government some years back. And somebody got smart and figured out to try to take something like Medicaid and disentangle it enough State by State just wasn't going to work. They used arbitration and we figured that that was the failed dispute of the size and scope that we were faced with. Impact means failure and therefore the fact that this process is unable to do in 60 days what the entire process hasn't done in months, and sometimes years, does speak to the efficacy of arbitration, at least in such large disputes.

I am wondering if any of you are aware of, perhaps you, since you are a student of these procedures, of the Federal Arbitration Act, and whether the Federal Arbitration Act informs or could inform what FEMA has done with arbitration until now.

Ms. BINGHAM. The Federal Arbitration Act was adopted to provide safe haven for arbitration from the courts.

Ms. NORTON. What from the courts?

Ms. BINGHAM. To provide a safe haven for arbitration in the early parts of the 20th century. Courts were interfering in arbitration awards and commercial parties at arms length were trying to use arbitration to resolve their conflicts and stay out of court. So what the Federal Arbitration Act does is it creates a space that is protected from judicial review for parties to use a private justice system or private adjudicatory process. And it does not speak to the design details of arbitration.

Ms. NORTON. Thank you.

Just a couple more questions. Mr. Jadacki, I was interested, especially in light of all you know about the issues and problems that FEMA has had with Katrina and Rita public assistance programs that you recommended transferring other disaster programs to FEMA. I wonder what you had in mind and whether you think that would improve those particular programs?

Mr. JADACKI. Yes, and I think it goes both ways. There might be some FEMA programs. And I will use the case of the highways, roads, you know, clearing debris. FEMA is responsible for the local roads and in some cases the State roads, and the Federal Highway Administration is in charge of the Interstates and the Federal highways and those type of things. You have two separate processes going on that essentially do the same thing, remove debris.

So it might make sense for economies and efficiencies to combine those efforts where you would have one entity, whether it is FEMA or the Federal Highway Administration would be responsible for that, versus having two separate things. In some cases it could be the States and locals going through a project worksheet to work debris. In some cases, the Corps of Engineers would come in. So there is a lot of jurisdictional issues there.

So looking at some of the places where there is duplication and jurisdiction issues might be good.

Ms. NORTON. But is there real duplication? The States are supposed to do their part.

Mr. JADACKI. Right.

Ms. NORTON. The roads intersect.

Mr. JADACKI. You are having in some cases Feds contract out to debris removal people at the same time the States or locals are doing the same thing. You could achieve economies by doing it once and then sorting it out later on under the auspices of one organization.

Ms. NORTON. Just like your cost estimating procedures.

Mr. JADACKI. Just like that, yes.

Ms. NORTON. Finally, Mr. McCarthy, I was intrigued and could understand almost instantly when you said that the Recovery School District, consolidating the schools and doing it together, economies of scale, I guess, or even decisions of scale might work. I wonder if it did work. If putting all the schools together, in your judgment, as neat as it sounds, given all of the issues that were raised in the process we have just gone through whether you think it really worked, or if it should work, because you would think theoretically schools would have much in common and that would

do it. So did that work because people acted rationally when they had schools together and said, hey, we are just building schools.

So all schools should cost no more than, and this is the maximum amount, and we are going to make them out of the same material. Did it have that effect? And do you think that there are other examples other than school consolidations where the desired effect, theoretical effect could come about?

Mr. MCCARTHY. I believe so. And I am basing it, I think we are all students of Katrina at this point after five years. And there were a lot of discussions at the beginning on the number of schools affected and what the future would be, and the reason I have expressed some enthusiasm regarding the Recovery School District is that it was locally generated and it was their decision as to how to approach it, about how many campuses they wanted to have eventually.

And I think what Matt and others have pointed out is that if you are going by a project worksheet for each school building and suddenly you say, well, we are not planning on having that campus anymore, and we want to move that money over here. If there are questions about that throughout that process and if you are doing it school by school by school, that is how things stretch out into years.

But in this case, it really appeared to be the local initiative and the local decision making that drove it. And the good part is that Congress, first of all, gave the authority that provided additional money. Because usually if you make that choice to do something different than just repairing or replacing that school, that means you will get 90 percent of the Federal money, not 100 percent.

So in this case, Congress made sure that it was a full Federal payment. They provided for 100 percent. So that is something else that could be looked at in the future is whether those kind of in lieu payments perhaps, I think the idea always was that you don't want FEMA's money to be just repairing overall infrastructure in an area. You just want to go to the areas that were affected by the disaster.

And that was I think part of the reason to only pay 90 percent, to make sure that people are making a decision, a wise decision on that. But I think the Recovery School District maybe presents the argument that perhaps it ought to be treated like every other PA project and that if people make a choice to redesign parts of their public infrastructure that that ought to be their decision, and that there shouldn't be a 10 percent penalty for making that choice.

Ms. NORTON. We think about Charity Hospital, which was one of the projects which drove us to suggest arbitration, one wonders if it would work with clinics and with smaller health services, and where the economies of scale could come about that way. So that you shouldn't really be preferring one jurisdiction over another when it comes to health centers and clinics and that you might, indeed, get some economies that you would not otherwise get, jurisdiction by jurisdiction, after the initial planning had been done and approved from the local jurisdiction.

Could I thank all three of you for coming? We asked you to come first because we don't like the experts from the agencies, who are going to come next, to simply engage in show and tell. They don't.

They are often very analytical, but I have never understood the witnesses who have looked at them come afterwards, and then they come and testify and they leave. So they don't even get to hear the independent critiques.

So we thought, while we have our own questions for the officials from the States and from the Federal Government, we thought it might be good to hear the critics first and that would even inform our own questioning, and it certainly has.

Thanks to all three of you for very informative and invaluable testimony. Thank you very much.

Now, could I ask the second panel to approach now: FEMA from the State of Mississippi, from the State of Louisiana, and of course from the Civilian Board of Appeals. We are going to begin with Stephan Daniels, Chairman Daniels of the Civilian Board of Appeals.

Mr. Daniels?

TESTIMONY OF STEPHEN DANIELS, CHAIRMAN, CIVILIAN BOARD OF CONTRACT APPEALS; TONY RUSSELL, REGION VI ADMINISTRATOR, FEDERAL EMERGENCY MANAGEMENT AGENCY; MIKE WOMACK, EXECUTIVE DIRECTOR, MISSISSIPPI EMERGENCY MANAGEMENT AGENCY, STATE OF MISSISSIPPI; MARK RILEY, CHIEF OF STAFF, GOVERNOR'S OFFICE OF HOMELAND SECURITY AND EMERGENCY PREPAREDNESS, STATE OF LOUISIANA

Mr. DANIELS. Thank you very much, Madam Chairwoman and Members of the Subcommittee.

A year ago when I testified before this Subcommittee, I assured you that the Civilian Board of Contract Appeals would do its utmost to fulfill a mission we have been assigned by the Congress and the Secretary of Homeland Security. As the arbitration panel established under the American Recovery and Reinvestment Act of 2009, we would resolve as quickly and as fairly as possible disputes between the Federal Emergency Management Agency and State and local jurisdictions in the Gulf Coast region concerning public assistance grants resulting from damage caused by Hurricanes Katrina and Rita.

I am pleased to be able to report to you today that the Civilian Board has over the past year been doing exactly that. State and local governments have filed 26 cases with us seeking arbitration of their disputes with FEMA regarding these grants. The cases involve all sorts of facilities: schools, hospitals, arenas, roadways, parks, port areas, canals, water and wastewater treatment plants, solid waste disposal areas, and fire hydrants.

Most of the cases have come from jurisdictions in Louisiana and Mississippi, with 14 from Louisiana and 10 from Mississippi. We have had one case from a jurisdiction in Texas and one from a jurisdiction in Alabama.

Eight of the cases have been settled by the parties. Six cases are still pending. Of the cases that have ended other than by settlement, we resolved each one of them within the time limit prescribed by regulation, which is 60 days after the parties have completed their presentations.

Three of the applications have been granted in full. Six have been granted in part. Two have been denied, meaning that FEMA's position was upheld. And one was dismissed for lack of jurisdiction.

Some of the cases, as was noted by the previous panel, have involved large sums of money. The most publicized of them, Charity Hospital in New Orleans, resulted in a determination that FEMA should pay to the State of Louisiana nearly \$475 million as the replacement value of the damaged facility. Other cases have involved far less funds, and in some the project value has been only slightly greater than the minimum of \$500,000 necessary to place a case before us.

However large the case, our proceedings have taken far less time and required the expenditure of far less resources by the parties than would have been involved in a court or even in a contract case before the Board. Nevertheless, I feel confident that we have understood the essence of every one of the cases, and in each of them, we have reached a result which has been fair and appropriate.

FEMA issued regulations on August 31, 2009, opening the possibility for resolution of these disputes by arbitration. And during the fall of 2009, the Board experienced an initial rush of case filings. Indeed, 15 of our 26 cases were filed in October, 2009. The numbers of filings has slowed since then, and increasingly cases have been settling, rather than going to decision.

My own personal sense is that this trend has occurred because the ability of State and local governments to opt for arbitration has had a positive impact on the process of resolving the disputes. The parties have been addressing issues earlier and more cooperatively in an effort to come to positions which are mutually acceptable.

I thank you again for the opportunity to testify this afternoon, and I am happy to respond to any questions the Subcommittee may have.

Ms. NORTON. Thank you very much, Chairman Daniels.

Tony Russell, Region VI Administrator, FEMA.

Mr. RUSSELL. Yes, good afternoon, Madam Chairwoman, and the distinguished Members of the Subcommittee.

My name is Tony Russell. I am the Region Administrator for FEMA Region VI, which includes States of Texas, Louisiana, New Mexico, Oklahoma, and Arkansas.

Before coming to Region VI, I served as the Acting Director of the Louisiana Transitional Recovery Office. It is my honor to appear before you today to discuss what we have done in the aftermath of Hurricanes Katrina and Rita, and to help facilitate a faster, smarter and better recovery for the Gulf Coast.

Now, when I say what we have done, I mean we in the broadest sense of the word, from individuals in the community, the State, the parents, the local leaders, FEMA field and regional staff, our Congressional partners, Administrator Fugate, Secretary Napolitano, and President Obama. Together, what we have done is to fundamentally adjust our attitude so that we can create solutions to common problems.

We use the trust that we have built in order to speed up the recovery process in the Gulf Coast.

When I began a year and a half ago as the Acting Director for the LATRO, I noticed many obstacles to recovery. One was a cul-

ture of formality where process prevailed over a focus on outcomes. Another was that we lacked a system for regular communication with our partners and the pace and the scale of recovery suffered as a result.

My life experience has shown me that when working with others, you can only go as fast as the speed of trust. So we worked hard to establish a level of trust between the communities, the States and FEMA. We also opened up the lines of communication. Instead of writing letters back and forth, we began sitting down across the table from each other and working together.

As a result, we were able to use the law, the regulation and the policies as tools to serve the communities. But with time and with an established level of communications and trust, we were able to shift the focus from the process to the outcomes and break many of the logjams to recovery.

As an example, we completely changed the way we approached disputed recovery projects. When I arrived in Louisiana, we had hundreds of projects that were simply not moving forward. In order to resolve these projects that were in dispute and speed up the process of making a decision, Secretary Napolitano established two joint public assistance decision teams in March of 2009. To date, these review panels have resolved 173 previously disputed cases, helping those stalled projects move forward.

Our ability to resolve these disputes was a direct result of the relationships we have built in the community and our willingness to sit in the same room together and arrive at common sense solutions.

We try hard to communicate and resolve disputes with the State before adjudication becomes required. However, there will always be disagreements. Last year, you gave us another important tool, an arbitration process to resolve those disagreements. Most importantly, the use of arbitration allows us to continue to remove barriers to communication and work with our partners in an informal setting in order to speed up the recovery process. While the law specifies that the arbitration process be used for certain projects relating to Hurricanes Katrina and Rita, we will evaluate whether the use of arbitration could be useful in other contexts as well.

But there is no doubt that the trust we have built in the community and the close collaboration with our partners has been key to our ability to settle disputes and get stalled projects moving again.

The good news is that our approach is getting real tangible results. In Louisiana, FEMA has obligated \$9 billion in public assistance funds, including \$2.5 billion in just the past year and a half alone. In Mississippi, FEMA has obligated over \$3 billion in public assistance funds, including more than \$240 million in the past year and a half. We are seeing the results of our work, which we measure not in terms of the dollars spent, but in terms of communities rebuilt, parents getting back to work, and children learning and growing in new and improved schools.

As we at FEMA help our States and communities recover from the devastation of Hurricanes Katrina and Rita, we have learned and continue to learn valuable lessons about how to deliver the best possible service to our communities. We view the work of recovering from Hurricanes Katrina and Rita with a simple ap-

proach. First, we are here as partners. Second, we work closely with the affected communities to resolve common sense outcomes. And third, we will be flexible and pragmatic as we work to help the Gulf Coast rebuild.

Thank you again for the opportunity to testify before you and I am happy to take your questions at this time.

Ms. NORTON. Thank you very much, Mr. Russell.

Mike Womack, Executive Director of the Mississippi Emergency Management Agency for the State of Mississippi.

Mr. Womack?

Mr. WOMACK. Thank you, Madam Chairwoman and Members of the Committee.

I have been the State Coordinating Officer for Katrina since the disaster happened on the 29th of August, and I have been on the Mississippi Gulf Coast at least half the time since then. I have been directly involved in the Public Assistance Program, as well as housing programs and the mitigation programs.

Mississippi has approximately \$3.1 billion obligated for public assistance projects. We have dispersed \$2.1 billion of that, meaning the projects are complete and we have paid the applicants their money to pay their contractors.

We feel like the State of Mississippi, in partnership with FEMA, has done a very good job in trying to resolve disputes. Therefore, the fact that we only have 10 disputes that have gone to arbitration, which represents about \$40 million, which is less than 2 percent, really a little bit more than 1 percent of the total amount obligated, is a pretty good showing of how well we have done with this.

It has been a partnership. It was a partnership from the very beginning. We decided that we would try to build a team of FEMA, MEMA and the local governments to make sure that we would minimize the number of appeals and arbitrations, and certainly minimize the amount of money that was ultimately not paid to local governments or to the State.

Now, we did this primarily using the FEMA management cost funds that were provided to the State. Now, I will say that if under current rules and regulations, they are limited to 3.34 percent for all disasters after Katrina, roughly. There is no way that we could have done what we have done in partnership with FEMA with 3.34 percent. It just cannot be done.

Now, I will say that everything I am going to talk about today I have discussed with Administrator Fugate, Associate Administrator Bill Carwile, and Deputy Associate Administrator Beth Zimmerman. They are very cooperative. They are working with not only Mississippi, but all the States in trying to work through these very difficult issues.

But getting back to how we tried to minimize the number of disputes, we had integrated project management where we would work with the State agency that was administrating the CDBG funding, and with our State Department of Archives and History and with the Department of Education and other State agencies and Federal agencies, because we know that the rebuilding was not just public assistance money. It was all sorts of Federal grants. In fact, in total, about \$24 billion worth of Federal money has been provided to the State of Mississippi.

We developed a whole series of management tools to go well beyond what the MEMA's program does as far as being able to track the funding all the way from the date of obligation through disbursement, through the final inspection process. We also worked with FEMA on trying to make sure that the applicant did in fact get the estimated amounts that they deserved before they went and requested the improved and alternate projects.

So of the \$40 million that is in dispute, I would say that the arbitration process has been very favorable for our applicants. Every one of the cases that has been settled, the applicant received at least partial funding. The smallest amount was about one-third of what they requested. All the others were over half or a full amount that they requested.

I would say that while we have made great progress, we have dozens of new facilities across the coast that are already completed; dozens of others that are under completion right now, to include numerous fire stations, police stations, city halls that were built with mitigation money to harden them so that they will be much safer for the next storm that comes to the Mississippi Gulf Coast.

We do have some challenges. The biggest challenge we have is that of FEMA individuals coming, changing decisions throughout the process. Again, Administrator Fugate is going to try his best to try to fix these problems, but just the fact that many of the arbitration cases that we see are the result of the fact that one FEMA employee or contractor would make a decision, and then a year or two or three years later that would change.

Now, the other thing that I want to mention is that the role of the IG is absolutely critical, but the IG sometimes drives those decisions that FEMA makes changes on. So it should be a matter of making sure the IG is there at the very beginning so when the decisions are made they agree with it and there doesn't have to be a change.

As I have run out of time, I will simply say the one program that we need to reinstitute or find out a way to do administratively is the PA pilot program. It is a great program and needs to be re-instituted.

Thank you.

Ms. NORTON. Thank you very much, Mr. Womack.

Mark Riley, Chief of Staff of the Governor's Office of Homeland Security and Emergency Preparedness, the State of Louisiana.

Mr. Riley?

Mr. RILEY. Madam Chairwoman, Committee Members, Louisiana is in the midst of the recovery of several compounding disasters that have occurred since 2005. Although I have not always been able to say this, I believe that FEMA and the State are now on the same path with common objectives in the recovery. We now have a true and transparent partnership with FEMA thanks to the leadership of people like Administrator Fugate and Regional Administrator Russell.

With this change of leadership at FEMA, we are looking at recovery as a holistic approach to restoring a community, not just the repair of an individual piece of damaged infrastructure.

The testimony that I will present today will review the effects of several pieces of legislation which have assisted the recovery, to in-

clude provisions authorizing arbitration. I will also discuss additional actions that we may want to consider, especially in the circumstances of a catastrophic disaster.

In 2007, FEMA had obligated \$5 billion for the recovery from Katrina and Rita. Today, we have a little more than \$9 billion or a \$4 billion difference. At the fifth anniversary of Katrina and Rita, we have 2,789 cases that we designate as unresolved, and we believe that when we have resolved all these projects, final dollar amounts will be between \$13 billion and \$14 billion.

Our short-term goal with FEMA is to complete the funding determinations in the Public Assistance Program and we think this will take another 18 to 24 months at the current pace.

Arbitration has been a very effective tool and has instilled a sense of independent evaluation and fairness in the Stafford Act. We have filed 14 arbitration cases with the Civilian Board of Contract Appeals, for an approximate value of \$952 million. The value of claims settled are determined by the CBCA in favor of applicants total approximately \$613 million. Several new requests for arbitration are currently being prepared and the need for this process will continue until we have completely resolved the remaining 2,789 project worksheets that have funding issues.

Based upon the State's experience with the arbitration process, we recommend that Congress consider making the arbitration option available or some other option that includes independent third parties to all applicants in all future disasters.

We would recommend three changes to the current process. Allow applicants to be reimbursed for the costs that they incur in the arbitration effort if the case is not frivolous. Increase the time to file an arbitration filing from 30 days to 60 days from the FEMA decision. And lower the jurisdictional threshold from \$500,000 to \$100,000.

I would like to take this opportunity to comment on the service and professionalism of the CBCA, its Chairman, Judge Stephen Daniels, and the judges serving on the assigned panels. The Stafford Act Assistance Program is a very complex and nuanced program and the CBCA has given each case detailed attention and responded to the process in a fair and even-handed manner.

There is a completely different toolkit that is needed to respond to a catastrophic event as an ordinary disaster. The Stafford Act needs a catastrophic annex to deal with such a catastrophic event. The average disaster over the last 10 years, measured in terms of public assistance dollars, was approximately \$40 million. Hurricanes Katrina and Rita in Louisiana will top \$12 billion or 300 times the size of the average disaster.

In order to effectively recover from a catastrophic event like Katrina-Rita, communities need the following. They need assistance in developing master recovery plans. They need 100 percent Federal funding of recovery activities even if that includes a loan for the non-Federal cost share. And they need a waiver of the alternate project penalty of 25 percent.

I would like to take a minute to discuss two other issues affecting Louisiana's current recovery process. After Hurricanes Katrina and Rita, 57 local governmental entities took advantage of the Community Disaster Loan Program and borrowed approximately

\$822 million. FEMA is in the process of completing the review of these loans to determine the level of payback.

Initial indications are that 42 local governmental entities will be required to pay back all or part of the loans. We suggest this puts an unfair burden on these communities still attempting to recover and still in need of support, and that FEMA's analysis of the ability of these local governmental entities to repay CDL loans is flawed.

Finally, we ask for support to implement common sense investment of hazard mitigation funds into shelters. Louisiana and the Federal Government spent \$50 million in transporting critical transportation need individuals outside the State of Louisiana during Hurricane Gustaf. We would like to take money that is already appropriated to us and invest it in multi-purpose facilities for sheltering.

Few jurisdictions in our Nation have experienced the levels of disaster brought upon our State in the last five years. Louisiana continues to recover from Hurricanes Katrina and Rita, the largest disasters in U.S. history, which have been compounded by Hurricanes Gustaf and Ike in 2008, another \$1 billion disaster. Most recently, the State has been contending with the environmental and economic impact of the largest oil spill in U.S. history. The 2010 hurricane season is still upon us and we are keeping our fingers crossed.

In closing, the State of Louisiana greatly appreciates the attention and interest that this Committee has demonstrated over the years in helping the State navigate a very cumbersome, bureaucratic, highly regulatory recovery process.

Thank you very much.

Ms. NORTON. Thank you very much, Mr. Riley.

Let me begin with Chairman Daniels. First of all, let me congratulate you, Chairman Daniels, on apparently meeting the 60-day time frame in every single arbitration. We would like to understand why, particularly in light of testimony here and our own investigation that shows that it has taken, what is the charitable way to put this?, close to a year, let's put it, and often longer for the ordinary appeals process.

So I would like to know whether it is you, the personnel, Chairman Daniels, or whether there is something about the process, which everybody fears, doesn't want to go to it. Except when you go to it, it looks like you get an answer in what I suppose the average layman would think would be a very complicated process, in a whole lot less time than you do in the so-called more simplified processes.

Could you explain that to us?

Mr. DANIELS. Certainly by the time a case is presented to us, each party presents the very best evidence and arguments it has.

Ms. NORTON. If I could pause there, Chairman Daniels. But you reach the facts de novo.

Mr. DANIELS. Yes, we do, but it is on the basis of what we learn from the presentations and the hearings. And I think part of it also is that as administrative judges, we are all trained to be dispute resolution experts. We come into the process thinking there needs

to be an answer here, and the parties benefit the faster we can get them the answer.

Ms. NORTON. Do you sometimes find that in the middle of the proceedings, as is the case with a District Court Judge, for example, the parties will reach decision while the arbitration is ongoing?

Mr. DANIELS. That occasionally happens. And obviously, it is the process that drives them to think about what really are the strengths and weaknesses of each position; where can we reach a middle ground? Because my goodness, parties came to believe, we would rather have control over the resolution of this case than leave it up to those "crazy" judges. Who knows what they are going to come up with?

Ms. NORTON. Do the 60 days include the time for presentation of the evidence, as well as your own decision making time?

Mr. DANIELS. The 60 days is the period after the case is finally presented to us.

Ms. NORTON. About how long does it take the case to be presented?

Mr. DANIELS. Once an application is filed with us the State has 15 days to file its comments, then FEMA has 30 days to file its comments.

Ms. NORTON. And you hold them to those time frames?

Mr. DANIELS. Yes, we do. We will then have a hearing within 60 days and usually less of the time that we get FEMA's comments. And we will issue a decision within 60 days after the hearing.

Ms. NORTON. This is notable because apparently not only do you stay with your own time frames, you have been successful in keeping the parties within time frames as well.

Mr. DANIELS. Well, if a party doesn't choose to file any particular comments, then all we have to rely on is what we receive from the applicant. And I think that is quite an inducement to having the other parties file comments.

Ms. NORTON. I would like to hear something about Charity Hospital. We were very chagrined when Charity Hospital took so long. Charity Hospital was settled through this process. Can you describe how that decision was reached? Why had it taken so long before? And how you were able to do it within the 60-day time frame, apparently holding the State and FEMA to the time frames you just discussed?

Mr. DANIELS. I couldn't tell you why it took so long for the case to get to us. I think we might have some other witnesses here who could address that. I could just tell you that once the case did come to us, each party made a very thorough and professional presentation. We then had a hearing which took four days. We heard from all the witnesses that all the parties felt were critical for us to hear from.

The feeling of the panel, the three of us who heard the case, was that the witnesses who were presented by the applicant, which was the State of Louisiana, were far more qualified, far more experienced and knowledgeable, had spent a lot more time in the facility than the FEMA people had, and had given a great deal more thought to how to do their cost estimates.

As a result, we found them a lot more credible than the FEMA people. The issue in the Charity Hospital case involved FEMA's

rule, that if a facility is damaged during a disaster, you are supposed to do estimates of the cost to repair and the cost of replacement. Then you compare the two. If the cost of repair is more than 50 percent of the cost of replacement, then FEMA should reimburse the applicant for the replacement costs. If the cost to repair is less than 50 percent, FEMA reimburses for the repair costs.

In this case, the uniform evidence presented to us by the applicant and believed by us was that the cost of repair would be considerably more than 50 percent of the cost of replacement. We went through the analysis that is required under FEMA's regulations and came to the conclusion that the cost of replacement is what should be reimbursed.

Ms. NORTON. It just sounds like a very rational process. We are only sorry that this was not available to FEMA beforehand. But Mr. Russell, what was available to FEMA beforehand was its statutory mandate to implement cost estimating procedures. Now, that was 10 years ago and you have heard testimony from the prior witnesses. All of them were experts. None of them could tell me, because it is only appropriate to ask you, Mr. Russell, perhaps the other witnesses as well from the States if they have any insight. But why FEMA has not promulgated the implementing regulations which were mandated when President Clinton was President?

Mr. RUSSELL. Well, yes, Madam Chair. I know that we are working through that process now.

Ms. NORTON. You are. Yes, Mr. Russell. We would really be disappointed if you weren't at least working through it. Why has it taken 10 years to do anything on the process is our question. We don't think you have been doing nothing, unless that is what you going to tell me.

Mr. RUSSELL. Yes, ma'am. In fact, at this moment now, I can tell you, ma'am, that we are working through that process now.

Ms. NORTON. Mr. Russell, when will FEMA publish the regulations? When is it your present plan to publish the regulations under a law enacted 10 years ago?

Mr. RUSSELL. Yes, ma'am. I know that we are working through it now, and I don't have an exact date for you, ma'am.

Ms. NORTON. I tell you what, Mr. Russell, I understand. We don't want to shoot the messenger, but we are trying to find somebody to shoot. We really think that there is a problem and that the problem was acted out on the ground. And this is what we would like you to submit, this is FEMA to submit, within 30 days, a timeline for the publishing of the cost estimating procedures required by Federal law 10 years ago.

I am going to act like Chairman Daniels: no extension, charted timeline. And we would hope, and there must be a very good reason why, it could be rebuttable, but I doubt it. We would expect to have implementing procedures on paper by the end of the year. I am giving you 30 days, and by that time, because as you say, you have been working on it for 10 years.

So we are impatient with any more extensions. The question should have been called before Katrina. And frankly, hundreds of thousands of people paid the price. Thirty days, less if possible, timeline, end of the year. That is this year, Mr. Russell. We want to see some implementing regulations.

I am simply reflecting the frustration of the entire Committee. And this is two administrations. So we are bipartisan in our concern here.

Why, Mr. Russell, or let me put it this way. I understand that your own Office of Alternative Dispute Resolution is largely confined to employee disputes. Is that correct? And is that the intended purpose?

Mr. RUSSELL. Yes, Madam Chair. At the moment now, they are used mainly for disputes with the employees. But they are a tool in the tool box.

Ms. NORTON. Say that again?

Mr. RUSSELL. They are a tool in the tool box to be used where they are required to be used. Now, my goal and what I push for in Louisiana is to solve things on the ground, to do whatever we can to put the elements of arbitration into the field. By that I mean by making it transparent between the State, between FEMA, and between the applicant. We all come together and work on the outcome, and the outcome is whatever they want to build in this case. And so put all the minds together towards that.

And I think that is why you have seen a reduction of the cases going before arbitration because we are solving them in the field now and that has been our main focus to do exactly that.

Ms. NORTON. Mr. Russell, yes, we know everyone's working for the same outcome, but that hasn't in and of itself stopped disputes at the very beginning level. I hope you heard the testimony of the witnesses who preceded you, for example, the whole notion of I asked Professor Bingham how non-binding fact finding was useful. And it was very interesting to hear what she said. And I am not sure people learn from these hearings that once it is a matter of public record what somebody that is not primarily involved, it becomes easier to reach conclusions.

We are going to ask you to work on the 10 year old statute first, but we would be very interested in the agency's view of what it could do outside of arbitration that would have the confidence of the public that a fair decision would be reached, and of the States involved.

As you may have heard me say, we regard FEMA as nothing short of a party, so we think that if, or at least I think, that if you set up a procedure within FEMA, you are already suspect unless you can show some degree of independence to give the other side confidence so that otherwise you are going to have the same disputes arise because they don't think you are fair.

And I have never regarded that as your fault or the fault of FEMA, Mr. Russell, because it is true that we are looking at FEMA not to squander taxpayers' funds.

And Mr. Womack and Mr. Riley are there representing taxpayers of Louisiana and Mississippi, and they have had a terrible disaster and they are not out here to save you money.

So it really does take some thinking, hard thinking, and I would recommend to each of you that you look to the kind of experts that preceded you to consider what FEMA should do for the first time, it would appear, since your own internal mechanism is largely for employees, to make alternative resolution live in your work and in

the field. And I am going to go on because I want to ask a question of Mr. Womack and Mr. Riley, and then go to my colleagues.

I want to ask something that I think may have plagued both Mr. Womack and Mr. Riley, and that is something that FEMA apparently is trying to come to grips with, which is the turnover in the field that results in inconsistency of decisions.

So that I take it you get a decision and it could actually be turned around on you. And I want to know whether you have seen any improvement in that, and what do you think should be done with respect to that inconsistency beyond what you may already know about? FEMA has recently issued standard operating procedure. Do you think that will help it? And whether you think that has really been a real issue in the recovery from Rita and Katrina?

Both of you, it seems to me, would help us by answering that question.

Mr. WOMACK. Yes, ma'am, I would say the turnover has been a tremendous factor, and I quite frankly in a catastrophic event am not sure how you would fix this, because you have to have tens of thousands of very competent people. That may be too large a number, but certainly thousands of competent people. And they have to be mobilized and they have to be brought in very quickly, and they have to live in very, very difficult conditions.

So I would like FEMA to consider and the IG and all the rest of the regulatory agencies to consider something. If a FEMA representative, either a full-time FEMA employee or a contractor, comes in and writes a project worksheet based on an estimate, and they do this early on, if in fact there is not fraud or a deliberate mission of trying to get somebody to mislead someone, then say that FEMA has to stand behind it unless the local government wants to change that project worksheet.

Because these are good-intended people that I have worked with over the past five years. They say by regulation, I have to change the project worksheet because the initial one was incorrect. And in my opinion, we should not delay recovery, because that is exactly what it does, by having the local governments have to go back and start over and redesign and fight to try to get what they were originally told, and so forth and so on.

So if we could just simply say that the first FEMA representative that writes the estimate, that FEMA is bound by that. And that no regulatory agency is going to come back and say, nope, it wasn't done right so we have to change it, unless there was fraud or directly trying to mislead the FEMA representative.

Ms. NORTON. It really is an outrage to make a State go all through that again. I don't know if Mr. Riley agrees or whether, for that matter, Mr. Riley or Mr. Womack believe that this new standard operating procedure gets them toward that goal.

Mr. RILEY. We have, in fact, experienced the change of personnel, change of decision event on a number of occasions. I think two mistakes were made at the front end of this. One, FEMA headquarters took direct control of the people on the ground that were making decisions, so you had headquarters personnel involved in this decision making process. What normally happens in a disaster is the people that are on the ground responding to the disaster work for the region, and the region has a close association with the people

at the State level and have a good working relationship. Well, that relationship was abandoned and we could never, until recently, get that good partnership approach with FEMA.

Secondly, because this was catastrophic and when FEMA showed up to the event, they were looking for a hurricane and they didn't find it. They found a catastrophe, a large catastrophe. We have 23,000 projects. So one of the decisions they made is we are going to go out and issue project worksheets as placeholders, just to identify that there is a building or some infrastructure that has been damaged. Now, we are going to put just a very bland estimate on it and we will come back later and then do the detailed analysis of what the damage was.

Well, that group of people rotated out and a new group of people came in. The new group of people took the position that those project worksheets were good project worksheets, and so if you, applicant, want to change that, the burden of proof is on you, and you have to come in and change that.

Again, it belied this very collaborative relationship that should have existed to really determine what the recovery was, what the end goal was, as opposed to just what the dollar amount might be.

But having a consistent relationship with the FEMA personnel on the ground is very important.

Ms. NORTON. I think you indicated there have been improvements with that kind of partnership now.

Mr. RILEY. Correct. One of the things FEMA did was transfer the responsibility for the recovery back to the region. Tony Russell said it. One of the things you have to do is establish that trusting relationship between those people. We work closely with Region XI, always have, and the people there know us and we know them. And that trust is there because they know how we operate. We know how they operate.

Ms. NORTON. One more question for you both before I ask my colleagues if they have questions.

It goes to Mr. Daniels' process. I have indicated I certainly don't think the arbitration process is the way to resolve most disputes; that we were driven to it by the problems we were reaching while FEMA was getting a new act, shall I say, together. But I think it is in Mr. Riley's testimony that there was some concern about the impartiality or the possible perception of impartiality in the first and second appeals in FEMA's traditional appeals process.

Could you explain, since I take it that doesn't have the same kinds of safeguards that Mr. Daniels' process has, what your concerns are in these appeals processes which are where we are still having problems? And do you still see problems there?

Mr. RILEY. The problem we were having is as we were trying to develop a project worksheet, we would sit down with a FEMA counterpart on the other side of the table and we would work through the project worksheet. We would come to some impasse.

So we would go away and we would file the appeal. Well, the appeal would then be worked by the same guy that was sitting on the other side of the table from us to begin with and he would provide the Regional Director his input as to the answer to the appeal.

So we don't get someone else looking at this thing afresh. We get the same people involved.

Ms. NORTON. And that is an appeal? I appeal to my adversary?

Mr. RILEY. That is exactly what our complaint was about independent process. Even within FEMA, if they had had an independent team come in and look at it, but their practice was, and I don't have enough experience to know whether it was unique to Louisiana TRO or whether this was throughout the system, but the practice was when we filed that appeal, it would go back to the same individual that made the decision in the first place.

Ms. NORTON. Mr. Womack, was that your experience as well?

Mr. WOMACK. It is a little bit more complicated than that. You had the people, in our case in Biloxi, that wrote the project worksheets. If it was a difficult decision, they might in fact call the region, or before the region had control of the recovery office, they would call headquarters. And they would ask their opinion on these things.

Then once a decision was made, the applicant didn't like the decision, they appealed it. Before it went to the Regional Administrator, the same office that made the decision had a chance to write their comments. Then it went to the Regional Administrator and his staff, the public assistance staff that in fact may have consulted with the local field office for FEMA, they wrote their recommendation back to the Regional Administrator.

Now, the Regional Administrator in some cases would go against his program staff, but that is very difficult to do in many cases because you hire these people to be the experts. But if they were already consulted on the front end as to what they thought the project should be, then it doesn't seem that there is a lot of value in having those same people provide input into the appeal.

Ms. NORTON. Mr. Russell, I understand if you are sitting outside of the system that we are, and trying to get inside a moment. When sitting outside, this sounds kafkaesque. If you are inside, you are inside a Federal bureaucracy and you are trying to operate according to regular procedure.

You can understand, though, I am sure, if you extract yourself for a moment from your own processes, how circular this process necessarily is.

What if, for example, I heard neither of these State representatives say go hire yourself somebody like Professor Bingham. But they seem to imply that there have got to be fresh eyes. What about a different regional office, for example, looking at the matter? So that you don't have the frustration of no confidence, even when the appeal goes upstairs, because those who had input, who are closer to the decision maker, have already influenced the decision maker as to the outcome. What about a different regional office?

I mean, this is off the top of our head. You might be able to think of a better person inside of FEMA. I might even ask you to go to Mr. Daniels. I am trying to find something within your own processes that would eliminate the appearance of unfairness that our two State officials have spoken of

Mr. RUSSELL. Yes, ma'am. I think that, at least for me, my first objective has always been to solve this in the field. And that is with a culture shift to where the default answer is yes. OK? That is my default answer. So when my employees come to meet with the applicant in the State, the default is yes.

Ms. NORTON. Mr. Russell, you are not answering my question. The default answer is the no. When the default answer is no, and as you said yourself in your own testimony, there will be some things that have to be appealed.

Mr. RUSSELL. Yes.

Ms. NORTON. I am now trying to find, out of this hearing, some procedures which FEMA would consider. The default answer is no. You tried your best. Now, Mr. Womack and Mr. Riley are appealing. They are now spending months upon months in the same process, essentially. Would it assist the process in having, for example, a different Regional Administrator who has not been part of the process look at it? Or do you have a suggestion as to how to restore the perception of fairness of the State officials who are on the ground?

Mr. RUSSELL. Ma'am, you know, we are looking at a bottom-up review as we review our whole PA process, and I will definitely take that back as an option for us to take a look at.

Ms. NORTON. Thank you very much. In 30 days, Mr. Russell, we would like an answer to the following question. Will FEMA consider, in order to—let me, the predicate of this question is, we have seen huge improvement once we reach impasse and go to the arbitrators. They have stayed within their timelines and they have been successful in getting the parties to stay within their timelines. We are very, very satisfied with how that process, should that process be used, go.

According to those who testified before you, the process that we now have the most trouble with doesn't have anything to do with this atom bomb process which has done its work apparently in keeping wars from breaking out, and of course, once things get to arbitration. Our process now is in the ordinary appeals process.

In 30 days, will FEMA consider the use of a different regional office at the first level of appeal so that the appeals process will be not only close to a year, but will get closer to what the arbitration process is? And if you find that unsatisfactory, within 30 days, let the Subcommittee know what alternatives are under consideration.

I will turn now to Mr. Cao, who is acting as Ranking Member.

Mr. CAO. Thank you, Madam Chair.

I thought that my hari-kari statement was tough. You just want to line up people and—anyway.

[Laughter.]

Ms. NORTON. So you are right with me.

Mr. CAO. Well, maybe. Anyway, thank you very much.

Tony, it seems to me that, based on my conversation with counsel, that the Hazard Mitigation Act of 2000 enables us to prevent many of the backlogs that we saw after Katrina. And if the Chairwoman is right that it has taken FEMA 10 years, over 10 years to come up with the rules and regulations, I see that as inexcusable.

And I hope that you can bring the words back to Administrator Fugate that this Subcommittee is thoroughly disappointed and I hope that a greater urgency would be put on FEMA to come up with these rules because based on what I have heard so far, the Act itself would provide incentives for the State to actually save money, and in essence save FEMA money.

At the same time, it would create a structure upon which FEMA can settle many of the projects through a lump sum settlement type of procedure that we have been pushing for.

So again, once you have come up with a time line to submit to the Chairwoman, I would like to get a copy of that time line, if you don't mind. But beyond that, I would have to say that you have done a wonderful job as the TRO Director and now as the Regional Director of Region VI.

And I have mentioned it many, many times before. I appreciate your cooperation and your hard work and your staff's hard work in the past two years.

But now we have a new problem and this new problem that we have is the Community Disaster Loan Forgiveness Program. It seems to me, based on the testimony of the prior panel members, that for previous disasters, community disaster loan forgiveness has been routinely given, up to 96 percent of the loans.

The question that I have here is why is FEMA changing its perception or its position on the forgiveness of these loans? I am not sure what the rationale is based on the fact that Katrina was and still is the most devastating disaster to befall upon our Country. It seems to me a no-brainer to forgive these loans so that communities can recover and then to obviously continue with what they have to do in order to rebuild and to assist their citizens.

I know that I have confronted Administrator Fugate many, many times in the last two years, pushing for very friendly regulations so that loans can be forgiven. And it seems to me that our plea has fallen on deaf ears because we are encountering frustration upon frustration, before with P.W.s, now with community disaster loan forgiveness.

And it seems to me that, again, rather than to work in cooperation with municipalities to rebuild and then to carry on with their lives, obstructions are now being put forward and barriers are being built. And again, I would like for you to approach the Administrator and ask him to revisit this problem.

With that being said, based on what I have heard so far with respect to the appeals process and with respect to the arbitration panel that we now have, would it be more efficient for us just to simply get rid of the appeals process, to go from first termination and allow the members to ask for arbitration?

Mr. RUSSELL. Well, sir, you know I will go back to my first statement that we tried to do it all in the field, but if we can't do it in the field, then I think that what is going to happen is we are going to look at this from the bottom up. And to look at arbitration and to look at appeals and to see how those timelines match up. And is it more efficient? And in my mind, what is the less amount of burden on the applicant? Because there is a burdensome process to get your case together, to file your case. There is an expense there when it comes to arbitration.

And so I would like to be able to analyze both of those and figure out what is the best way to proceed for the applicant. And we are in that process now.

Mr. CAO. But based on the testimony of the previous panel, the average time wait for the appeal process to go through was about a year. And if children were waiting for schools to reopen, if ill peo-

ple were waiting for hospitals to reopen, it seems to me that the one-year period is a time that people cannot afford to waste. And if you can look at really, really streamline this process and to bring as much efficiency, as much as possible, I am pretty sure that future victims of any natural disaster would appreciate that.

Mr. Riley, first of all, I just want to thank you so much for everything that you have done for Louisiana. I know that you and your staff have worked very hard to push forward the recovery. As we go forward to look at how we would deal with future disaster, what would be the most important area based on your experience that we need to focus on right now?

Mr. RILEY. I think this was mentioned by the earlier panel. You get these small communities that have been hit by a disaster and if it is an ordinary disaster, in my terms, they might have a building or two that needs to be repaired or replaced, and that is pretty simple to do.

When it is a catastrophic event, they are overwhelmed and they don't have the capabilities necessary to really develop the kind of planning that it takes to bring an entire community back, as opposed to just build a building back.

Now, the experience that we had early on with FEMA was that they would come in and they would concentrate on building the building back, not reestablishing the community. And it is that sort of urban planning master planning expertise that FEMA could bring with them to help the community do a good planning process.

We want to build communities back more resilient, safer, stronger than they were before the storm so that the next storm doesn't hurt them the same way.

So bring in the right expertise to help them do that sort of planning to become more resilient, safer, stronger and to do the sorts of things that you need to do to bring the community back. What are the priorities of processes or infrastructure that you need to be back? How do you bring it back? Do you bring it back exactly like it was? Or do you do something like the Recovery School District and develop a master plan and bring schools back online in a different sequence of events that matches the community coming back to town.

So that sort of expertise at the front end of a disaster, to help these communities I think would be really helpful.

Mr. CAO. So, Tony, based on what Mr. Riley has said, what is FEMA's position, FEMA's perspective going forward?

Mr. RUSSELL. Yes, sir. I think that we have an emergency support function 14, which is long-term recovery. And during a disaster, we can mobilize them. They can get with the State and begin those long-term planning of that matter. So that is something that can be done.

Mr. CAO. Thank you, and I yield back.

Ms. NORTON. Thank you, Mr. Cao.

Mr. Taylor of Mississippi?

Mr. TAYLOR. Thank you, Madam Chairman.

I want to thank our panelists for being with us this late in the day.

Mr. Russell, let me start by saying that the people of South Mississippi are incredibly grateful for the help this Congress and your

agency has provided. Mr. Womack says \$24 billion. My number is \$21.8 billion. That is a lot of money to the State of Mississippi and we are grateful for every penny of it.

There have, however—and I want to contextualize everything in that we are grateful for the help we have received. But there are still some communities where the majority of neighborhoods are drive-ways that lead to a vacant lot; where the houses have not come back.

As you know, most local communities are a combination of property taxes, and so if the house isn't there, the property tax revenue is way down. And sales taxes, again if people aren't there, they aren't buying things, and in many instances the stores haven't come back because the people haven't come back, et cetera.

Some of the communities that I represent, the loans have been forgiven for rebuilding schools. There are other communities that in my mind's eye were actually more devastated, where the loans haven't. One of the things that has happened that I think has skewed this is that our Nation, and again I say this with gratitude, came up with re-start money knowing that the houses were gone, that the stores were gone, therefore there was no property tax or sales tax to pay for this. Our Nation stepped forward to get these schools going again within about 60 days of the storm with re-start money, and we are grateful for it.

The problem comes in in that that was one-time money from our Nation to get these schools going, but it was counted as if it was an ongoing source of funds for these communities trying to get their loans forgiven, when it was not an ongoing source of funds. It was a one-time source of funds.

I was wondering if this has been brought to your attention by Mr. Womack or others? And if it has not, I would certainly ask that you take a look at this because I do think some of these communities—no, I know some of these communities have a very legitimate request for help.

Mr. RUSSELL. Yes, sir. At this time, we are still in the process of gaining additional information about the loan process. And if the recipient has information to bring forward, we are receptive to receiving that because nothing is final yet. We are still in the process and it is still being under review even as I speak. And it is on a case-by-case basis also.

So as more information comes through that is advantageous toward the recipient, then they can be taken into account.

Mr. TAYLOR. OK. Secondly, and I am going to shift gears, Madam Chairman, if you don't mind. But again, hopefully we have learned some lessons from the last storm.

In my mind's eye, one of the visions that I both said, gee, I am grateful to my Nation, and boy, there has got to be a better way to do this, is passing about a week after the events of the storm, passing by the Stennis Airport and seeing an L-1011, an absolutely enormous cargo plane, the nose of which is now picked up and looking in the cargo plane it is full of ice.

So on one hand, I am going, gee, we sure need that ice. I am sure grateful for this. On the other hand, being a self-professed logistician, I am going, that is the most expensive way on earth to get

that ice here. We need the stuff. We are grateful for it, but, boy, there had to be a cheaper way to get this stuff here.

Mr. Brown never got it on the importance of ice. You've got people who weren't working outside suddenly working outside. It prevents them from getting a heat stroke.

Mr. Womack and I recall the very sad situation where we actually commandeered an ice truck to put corpses in because there was no electricity and they were rotting in the sun.

For those people who could find their refrigerators, it gives them a few days to take their frozen goods and slowly thaw them out so they can feed themselves for a period of weeks until the stores get open again. It is a necessity. I can tell you from experience, it is a necessity to help people be as self-reliant as possible under these terrible circumstances.

Having said that, Brown and I think his predecessor said in the future that there would not be ice. And again, going back to that L-1011 full of ice, I am grateful for it, but boy, there has got to be a better way to do this.

One of the advances that I have seen since then, and understanding that the cost of moving that commodity is extremely expensive. Something that has come along since Katrina are these portable ice-making machines. It is actually a vending machine, that are fairly common throughout South Mississippi now.

Almost every city in my District has their own water wells. Almost all of them have backup generators to get water to those wells.

I would ask that FEMA strongly consider as a short-term relief buying machines, or at least having the ability to lease machines like that so that they could be placed at the water wells in a community that has lost its electricity and needs some ice, and cut down on those huge logistics costs of taking ice from the Midwest and dragging it down to coastal Mississippi or the Midwest that in a future storm and taking it to coastal North Carolina.

Again, I have a responsibility to the taxpayers who aren't affected, but also to those people who are affected. We want to help those people affected and we have to do it in the most cost-effective manner. I think this is just a common sense thing that ought to be looking at.

Secondly, hurricanes can hit a coastal community. There is a really good chance the bridges will be out, just like they were last time. I never really could get it through the previous Administration of the need to have a response from the sea, a rescue from the sea. And there are businesses that transport fuel by barge. And I would hope that you would seriously consider pre-negotiated contracts with those barge firms to deliver fuel.

And that does a couple of things. Number one, it gets the fuel to the point of greatest impact, which is going to be closest to the water. But the second phenomena that we went through is that everyone who went through the hurricane thought they had it the worst, when the truth of the matter is the people the farthest from the refinery actually had it the worst because they were right there on the coast. But every community between that inland refinery and the coast tried to grab that fuel truck.

And in many instances, that fuel truck ended up where it really didn't need to be, and never got to where it needed to be.

Secondly, you can carry a heck of a lot more fuel on a barge than a truck. And it becomes the filling station if properly designed.

And so again, lessons learned, response from the sea, and keeping in mind that over half of all Americans live in coastal America, so something bad happens and it is not the hand of God, but a terrorist, is probably going to happen in a coastal community; and a response from the sea for a floating hospitals using large-deck amphibious assault ships that the Marines have; fuel; food.

Again, I would hope that you would be working with the Military Sealift Command and others in the military to come up with this response ahead of time, rather than doing it on the fly after one of these events.

Mr. RUSSELL. Yes, sir. In fact we are doing exactly that. We are looking at every avenue for health and safety, and I will take this back with me to make sure this is one the agenda also.

Mr. TAYLOR. OK. Again, Madam Chairman, thank you for your courtesy of letting me participate in your hearing.

Ms. NORTON. Of course, Mr. Taylor.

I don't have many more questions, but I would like to ask a couple more questions before we dismiss this panel, because these are questions I like; when everybody who is engaged in a process are before us, so that you can react candidly to one another.

Now, I note that in the arbitrations, and remember that is a new process, so we had a very special obligation to look at it. We note that three had resulted in full implementation for the State; six in partial implementation for the State; and two were denied.

So I would like to ask Mr. Russell, Mr. Womack and Mr. Riley, are you all satisfied with Mr. Daniels sitting right here? He would be glad to hear it, I know. Are you all satisfied with the arbitration process? What has been its effects on other parts of the process? And why have more arbitrations not been requested?

Mr. Russell, why don't you start?

Mr. RUSSELL. Yes. Madam Chairwoman, my goal is to put Mr. Daniels out of business, and that is by solving things at the lowest level possible.

Ms. NORTON. Has this process, arbitration, had the effect, if not of putting him out of business, he is very much still in business, but had an effect on the speed or ease of the process you are necessarily involved in? And if so, how? Be specific, Mr. Russell.

Mr. RUSSELL. Well, I think that the trust that we have built has had a factor in the field of getting things done. And that we continue to try to solve that, and we know that arbitration is there. It is a choice that we can take, but we will try as much as possible not to go there if at all possible.

Ms. NORTON. Mr. Womack?

Mr. WOMACK. I personally participated on behalf of the State in four of the hearings that were held. First of all, I think that the panel, the judges, do a tremendous job with it. I was at the very first one and we were allocated two days for the oral testimony. And now they have shortened it for most cases down to one day. And it is a very good process as far as I am concerned.

I will be quite frank with you. I have very good friends at the local level in Mississippi, the Regional Administrator, Deputy Administrator, much of his staff and here at FEMA headquarters. It was almost like my support for the arbitration process I was being disloyal to my friends in some way because they felt like they had been doing the right things.

And what I tried to emphasize, and I have continued to emphasize to them is look at what the arbitration panel said and say: Do we need to change our policies and process? Is there something that we missed in all of this?

And as I looked at it, what I thought was that the judges looked at things like what was an applicant told early on; did decision, were they changed throughout the process?

And the other thing is one of the cases where you had one part of FEMA, Public Assistance, who said one thing and the National Flood Insurance Program, who had a different set of regulations. And so the school district got a new school based on the fact of the National Flood Insurance Program regulations versus the Public Assistance, or at least that was part of the decision making process.

Has it assisted us in decision making? I think so. I think that, yes, we are moving forward quicker on some cases. As to why there haven't been more cases filed, you have to remember if you had already gone through your second appeal process, you could not go back and enter into arbitration. So well over \$1 billion had already been dispersed, maybe \$1.5 billion, that was not subject to arbitration.

Mississippi is further along in the recovery, I believe, than Louisiana, but basically because \$12 billion versus \$3 billion in PA cost. So logically speaking, I think we are at the end of many of our processes.

Ms. NORTON. The reason Mississippi is further along is?

Mr. WOMACK. Well, they had \$12 billion worth of PA projects. We had \$3 billion. So their disaster is about four times the size of ours, if that makes sense. And I also like to say that the water came up and went down in 12 hours in Mississippi. It had to be pumped out of New Orleans and it took months.

So it is two different disasters, and in many of their projects they are still in that negotiation phase of trying to sort through what they are actually entitled to, where we are really under construction on most of ours. So that is why we don't have as many arbitration cases.

Ms. NORTON. Mr. Riley?

Mr. RILEY. First of all, I think that the arbitration services that the CBCA provides have been excellent. Whether we win or lose, we walk away with a feeling that we have fair and impartial and very professional services. What that tool has done for us is it has allowed us to bring FEMA to the table in a manner with a larger propensity to work the issue out.

When I first met Tony Russell, he said just give me something to hang my hat on and the answer is going to be yes. He didn't wear a hat, so I gave him a hat and then I gave him a nail. And it has worked.

And so we have been able to in a very professional manner with the personalities involved currently to sit down and come to reasonable solutions. But I do think one of the reasons that you haven't seen as many arbitrations, when we came here last year, we said that there were over 4,000 cases in dispute. And now we are saying there are a little over 2,600 and almost 2,000 have been resolved.

One of the reasons more have not ended up in arbitration, however, is because I think the dollar limit for arbitration is too high, and when FEMA adopted its regulations it said that the applicant will pay for the costs of arbitration. And in order to do this, in the cases that have been successful before the CBCA, hired lawyers and experts. In order to do that, you need money. And if you are a small applicant, you don't have the money to hire lawyers and experts.

Ms. NORTON. What do you think the ceiling should be? Or should they vary based on the size of the community?

Mr. RILEY. In our disaster, the way I have looked at it, if we were at \$100,000 or more, that would be a good arbitration case. And so that is just a casual observation from us.

Ms. NORTON. Do you think the State or local government should use the administrative or management funds to help defray the costs, if allowed?

Mr. RILEY. Yes, I do. Many of them are stretched as it is to provide the necessary administrative management just to oversee the projects. So it would be helpful if there was a consideration of additional funding. And you can use your arbitrator to kind of balance that out. You could give him authority to set fees maybe for attorneys, and also to deny costs if the case is simply a frivolous case.

So you could manage it so that it is not excessive. But Charity Hospital, for example, is a good example. We had a highly professional team of lawyers. We had three experts in architectural construction engineering, cost-estimating world. And that cost money to do that.

Ms. NORTON. Final question. What all of you have had to say has been very encouraging.

And let me say, Mr. Russell and Mr. Womack, Mr. Riley, it has been the first time I have heard States speak so favorably, Mr. Russell, of FEMA. And so it says a great deal about improvements at FEMA that you hear two guys on the ground, if I may call them that, who in their respective positions and with their predecessors have flooded us with complaints about FEMA, now speak about a new partnership. It is very encouraging to the Subcommittee.

It is very encouraging from all of you to hear both the effects of arbitration, shall we say, direct and indirect. And we use these hearings to resolve issues. We don't do "gotcha" hearings. We then follow up based on your answers and our questions just as we have given Mr. Russell a time frame. We give the agency a time frame for responding based on what we have learned here.

Now, because we have with us Mr. Russell and Mr. Womack and Mr. Riley who have an effective partnership, and because we would like to see the appeals process, for example, and the negotiating process at the ground level do the job so that, as Mr. Russell says, Mr. Daniels just fades away like an old soldier. Because we would

really like to see that. And he looks like he is ready to go, if need be.

I would most appreciate your using this opportunity, Mr. Womack and Mr. Riley, to indicate for the public record what other steps FEMA should take. You may discuss what steps they have taken, if you like, to hasten, cut red tape, speed recovery for public assistance projects on the ground where you are. What more would you like Mr. Russell to do?

We can start at the very beginning and especially going through appeals.

Mr. WOMACK. Well, first of all, I think we need to keep the appeals in place. I think we need to have a form of arbitration. Whether what we have now is the right one, I don't know, but some sort of independent way of looking at things.

But what I would like as part of the bottom-up review that Tony has talked about, that FEMA is looking at Public Assistance. I really think over the last 20 or 30 years that FEMA and the other regulatory agencies have kind of lost sight a little bit of what the Stafford Act is all about. And it may mean that we need to go back and rewrite regulations that say, OK, let's always give the applicant the benefit of the doubt; rather than let's try to figure out to make sure that they are not getting something they are not entitled to.

And certainly, local governments and sometimes their contractors will push to try to get more than they are truly entitled to, and I fully understand that. But I think now we have a whole set of regulations, policies and procedures, and I don't want to over-emphasize this, but I think a lot of them were driven by external sources to FEMA. So that now it is such a cumbersome process that I think a lot of the regulations need to be rewritten.

One example is this. Under the PA pilot program, you could get straight time for debris removal for your employees, for the local employees. OK? It is now in regulation that they cannot do that.

Ms. NORTON. The statute allows it? The regulations say you cannot do it?

Mr. WOMACK. As I understand it, the statute doesn't address straight time for emergency work and debris removal. The regulation does.

Ms. NORTON. And it disallows it?

Mr. WOMACK. It does. Which means that your incentive is to go out and hire a contractor, rather than let your employees do the work. You can get overtime and you can get equipment cost, but you cannot get their straight time.

Ms. NORTON. Mr. Russell, excuse me, while we have that on the table, could you explain that one to us?

Mr. RUSSELL. Yes, ma'am. Again, as Mr. Womack said, that is part of our bottom-up review to make sure that we are not overly taxing our State partners.

Ms. NORTON. You are not taxing your State partners. They are making a rational decision to get as much money from FEMA as possible because of a regulation you put in place.

Mr. RUSSELL. Yes, and then that was, my understanding of it, it was to ensure that we didn't double-pay somebody for doing the

exact same work. But again, it is going to be under review, ma'am, and we are going to take a look at it again.

Ms. NORTON. You have 30 days to tell us whether you intend to change that particular regulation and whether it is under consideration for change and the options you are considering.

Mr. RUSSELL. Will do.

Ms. NORTON. The taxpayers, it seems to me, are on the bad end of that one, U.S. taxpayers, because the encouragement is to do exactly what Mr. Womack says: maximize your costs, and he is not doing it to jack up the government. He is trying to get as much as is possible for reimbursement for work done.

Mr. Womack, you can continue.

Mr. WOMACK. I would just finish that by saying that I think there are a lot of other regulations and policies that need to be looked at. And I do know that the senior leadership at FEMA are doing this. They are looking at this.

It is going to take some time. If it took us 20 years or 30 years to get here, an overly cumbersome Public Assistance Program, it is going to take some time to move back the other direction. I think they are moving in the right direction.

Ms. NORTON. Mr. Riley, do you have any thing you would like to say to Mr. Russell about how the process leading up and going through appeals could be streamlined, shortened and the rest?

Mr. RILEY. The Stafford Act, the Act itself is full of the ability to make subjective decisions. And I think it was intentionally done that way because every disaster is different. So when you get on the ground, you have to make different decisions.

The regulations have removed a lot of that subjective decision making. And so, again, you have to default to the ordinary hurricane by regulation. That is what you can do. OK? But it may not fit the circumstance you have.

So I would encourage the regulation to give the Regional Administrator a lot more flexibility on how he responds to a disaster. The goal of a disaster is recovery, not the expenditure of funds. And if both the State and FEMA have that same goal of recovery, not to reduce the amount of funds that are necessary for recovery, but to do an adequate job at recovery.

I think what we do in our program is we design the program so that one person that is trying to get over on us won't get over on us. And if we design it so that we have adequate safeguards in place, but focus on the necessity to recover and to give the applicant the necessary means to recover. From an applicant's point of view, it is all about the cash flow. I can't start my project until I have identified all the money that I think I am going to need. OK? So we have to get there quickly.

From the State's perspective, for example, when we bring an architect or an engineer to the table to give a professional opinion, he is a licensed architect or engineer. Our experience with FEMA is that that is not always the case. He may have an architectural or engineering background, or he may be an engineer who has experience on roads and we are talking about a building.

So we don't have the same experts talking to each other, and sometimes they talk a different language. So having the ability to get with FEMA and to agree on a single expert for a project I think

is a very important thing, someone that both the applicant and FEMA can trust to make a professional opinion that he signed off on and his license is at risk and every other thing that is at risk when you hire an architect or an engineer in the private sector.

So I do think that we need to work on the culture that Mr. Russell has built about the trust between the State and FEMA, and that is a lot of what happened to us in the first part of this disaster was that lack of trust, and it was hard to work through.

So a culture of trust, some more subjective decision making for the Regional Administrator who knows what is going on on the ground, and putting the right experts in place to make decisions that people have confidence in.

Ms. NORTON. Thank you very much.

I want to thank all of you. Because this is a hearing on Katrina and Rita and because I have learned of some assistance from the private sector this Committee or at least this Chair did not know of, but you may know of, for the record I would like to get your comments.

Though I am a Member of the Aviation Subcommittee, of the Homeland Security Committee as well, I was unaware of the role that general aviation played during Katrina and Rita. And I wonder if you had any comments on what I am told was the case that general aviation planes played an important role in the early days of the disaster. What has been cited to me is delivering of supplies.

I raise general aviation because of the difficulty of planes at all getting in. And of course, even in New Orleans, for example, it was difficult for plane travel to occur. So if that was the case, imagine these smaller areas in Mississippi and New Orleans. And what we are told is that there were missions to deliver supplies to devastated areas in the Gulf Coast. This is general aviation, smaller planes which can sometimes maneuver into disaster areas to transport evacuees, to coordinate relief flights, to connect available aircraft to people who needed airlifting to Gulf Coast area hospitals, or from those hospitals to other hospitals. That general aviation was instrumental in a rescue operation and an example was cited to us of patients who were airlifted. This happened with helicopters as well.

I wondered if any of you in your experience for the record have anything to say about the role of general aviation in this disaster, these smaller planes that can get where larger planes didn't and couldn't.

Mr. WOMACK. Congressman Taylor may know more about this than I do. I do know that there were a lot of general aviation aircraft that had volunteered their services; that did come in and provide services. It was similar to what we saw with people driving up with their pickup loads full of water and food and diapers and that sort of thing. It was volunteers, spontaneous volunteers. It was extremely helpful, but the flip side of it was it was very difficult to control all that aviation into the area.

Ms. NORTON. How do you control it? I mean, you have to go through some kind of—

Mr. WOMACK. Exactly, and there were so many aircraft flying. If you think of all the military aircraft that were flying and then you

bring in all the civilian aircraft, all trying to get to the same areas and do the same things.

But yes, absolutely. They did some life-saving missions early on in Katrina.

Ms. NORTON. Mr. Riley?

Mr. RILEY. We had the same experience. The volunteerism is a very important part of any disaster response. And I think what we are trying to do is put together a process where we organize it a little better up front so that it is not so haphazard and we have a single source to go through for aviation requests and that sort of thing.

Ms. NORTON. Yes, and we do understand these are volunteer efforts. I don't know if Mr. Taylor knows anything about this. Do you know anything about the general aviation? Because you certainly had smaller areas.

Mr. TAYLOR. Madam Chairman, I am certain it happened. I would be fibbing if I said I was an eyewitness to it. We saw the Mississippi National Guard. We saw C-130's with Navy SEALs. We saw a 13 year old kid hop on a street sweeper to clear a 10,000-foot runway the day of the storm, which I mistook as an act of God that there wasn't a twig on this runway, and it was a 13 year old kid jumped on his dad's street sweeper. I know of a 13 year old kid who was refueling Blackhawk helicopters, which I am sure violated every OSHA rule on earth.

[Laughter.]

Mr. TAYLOR. But that crew got the fuel they needed and no one got hurt. So there were a lot of remarkable things involving aviation, and I am sure something like that happened. I am just not a witness to it.

Ms. NORTON. Thank you very much. I just thought that in this hearing on Katrina after five years, we ought to take note of all the unsung heroes. We certainly have before us some of the more visible heroes and we thank each of you for being here and for your very valuable testimony.

The hearing is adjourned.

[Whereupon, at 5:22 p.m., the Subcommittee was adjourned.]

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STATEMENT FOR THE RECORD

**Hearing On "Five Years After Katrina: Where Are We And What Have We Learned For
Future Disasters"**

**Subcommittee on Economic Development, Public Buildings, and Emergency Management
Committee on Transportation and Infrastructure**

September 22, 2010

Thank you, Chairwoman Norton, for holding another hearing on Hurricane Katrina. I appreciate your help in the past to get FEMA to address some of our concerns in Mississippi. It is unfortunate that your bill that the House passed in 2007 did not become law because I believe that it would have sped up the recovery of cities and school districts on the Gulf Coast.

Five years after Hurricane Katrina, we still have several obstacles to the recovery on the Mississippi Gulf Coast. The focus of this hearing is on FEMA's Public Assistance program, but before getting into that, I would like to briefly go over a few other items.

Shortly after Katrina, Congress funded Special Community Disaster Loans (SCDL) to help the devastated local governments cover their payroll and operating expenses. At the time, the Republican House Leadership insisted on language that the SCDL loans could not be cancelled, even though the statute normally provides that they can be cancelled if a local entity has not recovered three years later.

When the Democrats gained the majority in 2007, Majority Whip Jim Clyburn introduced a bill that I cosponsored that would reinstate the three-year cancellation rule and also waive the local matching funds for FEMA Public Assistance projects. The Bush Administration has reduced the local match from 25 percent to 10 percent, but the communities in Mississippi and Louisiana that had been wiped out were not going to be able to pay 10 percent of every project and probably were not going to be able to repay the Community Disaster Loans.

The House included both of these provisions in our version of the 2007 Supplemental Appropriations Act and Rep. Clyburn convinced the Bush Administration to accept them in the final bill. The elimination of the matching funds on Public Assistance projects has saved local governments hundreds of millions of dollars.



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It took FEMA until January 2010 to publish the final rule for the cancellation of the Special Community Disaster Loans. In August FEMA made its initial determinations. FEMA has bungled yet another simple assignment.

The intent of the statute is very clear. If after three years, a local entity has not recovered to the point that its revenues are sufficient to cover its normal operating costs, then it is eligible for full or partial cancellation of the loans. Somehow FEMA has interpreted this simple statute in a way that denied cancellation to several school districts, cities, and counties that are still dependent on FEMA and other federal assistance to pay some of their operating costs. I would think that by definition, if a local entity needs the federal government to pay some of its costs, then it has not recovered.

In the case of school districts, it appears that FEMA made the ridiculous decision to count the Restart grants from the Department of Education as revenues. The Immediate Aid to Restart School Operations was one-time supplemental assistance to help with the costs of reopening the schools that had been forced to close. Those funds are not part of the regular revenue base of the local schools and should not be counted for the purpose of determining whether the school district has recovered and can repay the SCDL. Someone with a little common sense needs to fix this. It should not take an act of Congress.

In the case of cities, it appears that some cities have been punished because their box stores were able to open before the stores in other cities, so they had a one-time surge in sales taxes from reconstruction activity. I urge FEMA to examine these cases and apply the intent of the statute to determine whether the local entity is truly self-sufficient.

Cities and school districts on the Mississippi Gulf Coast have not fully recovered because we have thousands of vacant lots that should have single-family homes on them. Those single-family homes and many locally-owned small businesses will not return until Congress enacts insurance reform. There is no competitive market for insurance on the Mississippi Gulf Coast. The cost of windstorm coverage on the coast is several times higher than what is needed to pay the claims, yet the insurance companies are not writing new policies. In some cases, the monthly insurance premiums are as high as the mortgage payment. These high insurance costs are the largest remaining obstacle to Mississippi's recovery from Katrina.

I have addressed this issue at length in hearing testimony, letters, statements, and in debate on the House floor. My legislation, the Multiple Peril Insurance Act, would create an option for property owners to buy both wind and flood insurance from the National Flood Insurance Program. The wind coverage would be priced at actuarial rates so that the program pays for itself. This program would allow homeowners to buy insurance and know that hurricane damage would be covered without delays and disputes over what was caused by wind and what was caused by flooding.

The federal hurricane coverage also would be more efficient than state-by-state wind pools because it would spread the risk geographically. The Mississippi wind pool concentrates the risk in three counties where every policy could be affected by a single storm. That is the

worst possible way to cover hurricanes. Insurance only works economically if the risk is spread and diversified.

My legislation passed the House in 2007 but failed in the Senate. The Obama Administration came out against it before showing any interest or understanding of the coastal insurance market or of the Katrina claims practices that allowed insurance companies to bill some of their wind losses to the federal flood program. I am still waiting for the opponents of my bill to propose a reasonable alternative that would address the wind-water dispute and would provide reasonably-priced wind insurance. We are not asking for any subsidy. Coastal homeowners need insurance competition and protection from the anticompetitive practices of the insurance and reinsurance industries.

I want to make one last point before I address the problems with FEMA's Public Assistance program. Most of my colleagues in Congress and most of the country probably are not aware of the mitigation actions that Mississippians have taken to reduce future hurricane and flood damage. We have implemented new flood insurance maps that raised the elevation requirements for new construction by as much as 8 to 10 feet. Our elevation requirements now are higher than any other coastal state.

Thousands of homes and businesses have been elevated or constructed to the new elevations using NFIP Increased Cost of Compliance coverage, FEMA mitigation grants, or the property owners' own funds. Hundreds of flood-prone properties have been bought out using FEMA mitigation grants or Corps of Engineers coastal restoration funds.

Many more low-lying properties could have been bought out if the FEMA Hazard Mitigation Grant Program was better designed. FEMA is not allowed to go in unilaterally and buy a flood-prone property, even from a willing seller. The current rules require that the projects be initiated by the local government, negotiated by the local government, and have cost-share requirement for the state and local government. After a major disaster, local governments do not have the money to pay matching funds and do not have the resources to devote to the property negotiations, cost-benefit analysis, and other requirements to implement a buy-out. FEMA needs to have limited authority to go in after a major disaster and use 100% federal funds to buy out repetitive loss properties.

Four years ago, Rep. Charlie Melancon and I announced the recommendations of the Katrina Task Force of the Democratic Caucus. We had been appointed by Minority Leader Nancy Pelosi and Caucus Chairman Jim Clyburn to confer with our colleagues and our constituents and then propose policies to improve the recovery in our states.

At the time, our first point was that Hurricane Katrina was too big for FEMA and the Stafford Act. The rules in place might work in places that had reparable damage and needed temporary assistance, but in the cities and counties and parishes that were devastated, we needed much more flexibility, more resources, more technical assistance, and more expertise than FEMA was willing or able to offer.

FEMA insisted on making every public building, every street, every water line, and every sewer line a separate project to be haggled over for years. The result has been thousands of examples of “penny-wise, but pound-foolish” actions where FEMA delayed the reconstruction of essential facilities and infrastructure for years, disputing a few hundred thousand dollars on individual projects. The result of FEMA’s inaction cost taxpayers billions of dollars in disaster assistance by delaying the overall recovery. The water and sewer systems, the schools, and other public facilities needed to be the first things rebuilt because those services would allow local residents and business owners to return and rebuild.

Our Katrina Task Force Report also urged Congress and the Bush Administration to fully engage other federal agencies in the recovery. We have a federal Department of Housing and Urban Development yet they did not join the housing recovery or the urban development recovery until Senator Thad Cochran inserted an earmark that forced HUD to allocate billions of dollars of Community Development Block Grants. Even then, HUD never offered the technical assistance and planning guidance that could have accelerated the housing recovery and could have freed local communities from the quagmire of FEMA’s slow-motion building-by-building procedures.

Similarly, we needed the Department of Education to help develop and approve plans for recovery of the schools and we needed the Department of Health and Human Services to take more interest in restoring health care services. Those agencies did allocate grants that were earmarked into Supplemental Appropriations bills by Congress, but they never showed up to offer the expertise that was badly needed.

As a result, the public schools and other public facilities were forced to slog through thousands of FEMA project worksheets, in many cases wasting two or three years arguing over a whether a damaged building could be repaired or should be rebuilt. If FEMA finally agreed that the building should be rebuilt, then there would be a lengthy dispute over whether it should be built exactly as it was or if instead the new building could be built to current needs and standards. In many cases, there was a side argument about whether to rebuild on the old site or relocate to a new site.

FEMA’s default position is that it will only reimburse to replace exactly what was there before, but after Katrina it would have been stupid to spend billions of dollars restoring inadequate and obsolete facilities, and constructing replicas of buildings that did not comply with current codes, accessibility standards, energy efficiency practices, or security requirements. FEMA’s position made it almost impossible to consolidate two or more old buildings into a new and better building.

I made these same points when I testified at the hearing held by this subcommittee in May of 2007. Later that year, the House later passed a bill that included some of my recommendations. The House bill would have forced FEMA to accept alternate projects so that schools could have been built to the highest standards. Unfortunately, the Senate was not able to pass a comparable bill, so our legislation did not become law.

If any researcher is looking for a case study of how FEMA's compliance-zealot culture works at cross purposes with its primary mission to facilitate recovery, I recommend a review of FEMA's interactions with the Bay St. Louis-Waveland School District over the past five years.

The cities of Bay St. Louis and Waveland were devastated by Katrina. Every school in the Bay-Waveland district was either destroyed or substantially damaged, and the property tax base was wiped out. Bay-Waveland School District is a prime example of why we need the federal government to help rebuild public facilities and restore public services after a catastrophe. Restoring devastated school districts should be one of FEMA's most important missions. Yet, over and over and over again, the school district has had to fight with FEMA over debris removal rules, damage estimates, reconstruction costs, building standards, code requirements, and every other action or proposal.

The Bay-Waveland School District has had a severe shortfall in local revenues for the past five years. The central office is still located in trailers. The district has had to cut staff, delay technology purchases, and raise student fees. The district's utility and insurance costs have increased by 60 percent since Katrina. Yet, FEMA ruled that the district did not qualify for cancellation of its \$7 million Special Community Disaster Loan because it received supplemental Restart funds from the Department of Education.

With that history, it should not be surprising that one of the first big arbitration cases involved the Bay-Waveland School District. Congress and the Obama Administration established a FEMA arbitration process to resolve remaining Katrina and Rita public assistance disputes in the American Recovery and Reinvestment Act of 2009. The Bay-Waveland School District had requested replacement costs of \$7 million for damages at three schools. FEMA claimed that the damages could be repaired for only \$176,000. The U.S. Civilian Board of Contract Appeals awarded the full \$7 million to the school district. This case reinforces my opinion and the opinion of our local officials that FEMA was not being reasonable all these years.

I wish that I could say that FEMA has learned the lessons of Katrina and is much better prepared for future disasters, but I do not see the evidence of that. FEMA still needs substantial management and oversight reforms. FEMA personnel need to be evaluated on the speed and efficiency of their recovery missions instead of the current system that appears to reward those who delay and deny recovery projects.

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TESTIMONY OF

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BEFORE THE SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC

BUILDINGS, AND EMERGENCY MANAGEMENT

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

U.S. HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 2010

Madam Chair and Members of the Subcommittee, good afternoon. It is an honor and great privilege to appear before you today to present testimony regarding the status of the arbitration program created for Public Assistance projects for Hurricanes Katrina and Rita. My area of expertise encompasses designing systems to resolve disputes in the federal government using various forms of alternative or appropriate dispute resolution (ADR), including interest-based negotiation, mediation, arbitration, and other processes. A fellow of the National Academy of Public Administration, I have conducted empirical research on mediation in employment at the United States Postal Service, ADR use by the Assistant US Attorneys and Department of Justice, and processes for settlement at the Occupational Safety and Health Review Commission. I have also served as a consultant on ADR for the Department of the Air Force, Department of Agriculture, and National Institutes of Health. I have not served as a consultant or in any capacity with the Federal Emergency Management Agency (FEMA) prior to my invitation to present testimony today.

As requested, I intend to address lessons learned from FEMA's Public Assistance arbitration and other programs and from federal agency experience with other forms of ADR that might aid in resolving disputes arising under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

I. FEMA's Existing Dispute Systems Design for the Public Assistance Program

Pursuant to 42 U.S.C. §5189a, FEMA adopted an appeals process for the Public Assistance program (42 U.S.C. §5170, et seq.), codified in 44 C.F.R. §206.206 that permits an eligible applicant, subgrantee, or grantee to appeal FEMA's Public Assistance program determinations in writing through the grantee. Most generally, there are two levels of appeal within FEMA, a first appeal to the Regional Administrator and second level to the Assistant Administrator for the Disaster Assistance Directorate. Appellants must appeal within sixty (60) days after receiving notice of FEMA's action. FEMA must respond within ninety (90) days of receiving the appeal either by disposition of the appeal or requesting more information. Ultimately, FEMA's disposition of the second appeal is the final agency decision on matters committed to agency discretion and not subject to judicial review except on limited grounds, such as constitutional procedural due process of law claims.

In response to concerns regarding delays on disputed claims for Public Assistance related to Hurricanes Katrina and Rita, Congress enacted a limited arbitration alternative as part of section 601 of the American Recovery and Reinvestment Act of 2009, Public Law 111-5. The President delegated to the Secretary of the Department of Homeland Security authority to establish the arbitration program, who in turn designated the Civilian Board of Contract Appeals (CBCA)¹ in the General Services Administration (GSA). Under 44 C.F.R. §206.209, the arbitration program generally provides that an

¹ See generally, <http://www.cbca.gsa.gov/>, which identifies the CBCA's commitment to ADR.

applicant may submit a written request for arbitration within thirty (30) days of notice of the FEMA's disputed action. The CBCA arbitration administrator appoints a three-member panel from among its administrative law judges. FEMA must respond within thirty (30) days of receipt. Within ten (10) days after FEMA's response, this panel conducts a preliminary telephone conference with all parties, establishes a hearing schedule, and supervises exchange of information and documents. Upon a party's request and generally within sixty (60) days of the telephone conference, the panel conducts a hearing at which all participants can hear each other simultaneously either in person, by telephone, or by other means. Within sixty (60) days after the hearing closes, the panel issues a written reasoned decision that discusses its factual and legal basis. The arbitration award is binding and substantially final, subject to limited judicial review under the Federal Arbitration Act, 9 U.S.C. §10.

To date, there have been approximately twenty-six (26) arbitration cases, fewer than might have been anticipated given the backlog of disputed cases at the time the program was created. The Civilian Board of Contract Appeals has a panel of administrative law judges with substantive expertise related to disputes over public infrastructure contracts and procurement. The program provides sufficient due process to participants consistent with arbitration's goals of providing a final and prompt decision to the parties. Unlike mandatory arbitration in employment and consumer disputes, this program is voluntary for the applicants, which are institutions with access to specialized counsel and more bargaining power than an employee or consumer acting alone. Thus, it raises no concerns about fairness similar to the controversial use of adhesive arbitration plans for employees and consumers. The CBCA has been able to absorb this caseload and there appear to be no administrative issues.

However, the program has resulted in substantial awards against FEMA, raising budgetary issues for the agency. There are too few case awards to date to constitute a sufficient sample for meaningful statistical analysis.

II. FEMA and ADR

Federal agencies have broad statutory authority to develop ADR programs under the Administrative Dispute Resolution Act of 1996 (ADRA).² Under the ADRA, 5 U.S.C. §571(3), agencies may use any form of dispute resolution, "including but not limited to "conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof." This amendment to the Administrative Procedure Act³ commits to agency discretion whether and how to use ADR, but requires that every federal agency must appoint a dispute resolution specialist and develop a policy on ADR.⁴

² See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (codified as amended in scattered sections of 5 U.S.C.).

³ 5 U.S.C. §500, *et seq.*

⁴ For a more detailed discussion of ADR in the federal government, see Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Citizen and Stakeholder Voice*, 2009 J. DISP. RESOL. 269 (2009); and Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal*

Every federal agency has adopted ADR for employment disputes,⁵ and many agencies have also adopted ADR programs for procurement issues, environmental disputes, and civil enforcement.⁶ The ADRA has contributed to a great expansion of ADR use within the federal government.

FEMA has adopted a mediation program for employment disputes.⁷ Its ADR Office lists contact information for staff members who in theory are available to provide services for other categories of disputes. However, it does not appear that FEMA has exercised its broad existing statutory authority to develop permanent ADR programs beyond employment. At present, FEMA has no formal program providing for negotiation or mediation as ADR alternatives for Public Assistance program disputes.

However, FEMA does have experience using mediation for disputes related to disasters, and particularly, to hurricanes, as reflected in this excerpt from the *Interagency ADR Working Group Report to the President* (May 2000) and the *Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government* (April 2007).⁸

Federal Emergency Management Agency

After Hurricane Georges wreaked havoc on the Island of Puerto Rico in September 1998, a local community had disputes regarding a debris removal contract, including disagreements as to which company actually performed the work, the total amount of debris, and the amounts of money owed to the companies. This difficult situation was further complicated by an FBI criminal investigation, the incarceration of the community mayor, litigation filed against the community by a subcontractor, allegations of fraud and conspiracy by all parties, death threats, and bankruptcy petitions. Without a consensual resolution, expensive and time-consuming litigation involving all parties to the seven relevant contracts was virtually inevitable.

FEMA suggested mediation. The Governor, the local community, and the three contractors agreed. The mediation was very difficult, but the mediators were able to craft an acceptable agreement. The principal contractor later wrote a letter to FEMA saying the following: "I write this letter to praise certain individuals who have gone above and beyond the call of duty in representing FEMA and the people of the United States.... Through [FEMA's] initiative and good judgment,

Infrastructure for Collaborative Governance, 10 WISC. L. REV. 297 (2010).

⁵ See generally, Lisa B. Bingham & Charles Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate Its Success?*, 6 J. PUB. ADMIN. RES. & THEORY 383 (1996) (reviewing the state of implementation of dispute resolution in the federal government and finding widespread adoption of mediation programs in employment, some in procurement, and a few in regulatory disputes).

⁶ See generally, Federal Interagency ADR Working Group, www.adr.gov.

⁷ See generally, FEMA's Alternative Dispute Resolution (ADR) Policy, <http://www.fema.gov/help/adr/about.shtm>, and <http://www.fema.gov/help/adr/faq.shtm>.

⁸ Available at http://www.adr.gov/president_reports.html.

mediation was arranged.... Had [FEMA] not pursued the matter with uncommon vigor, it would probably be wrapped up in court for many years."

In other words, there is both legal authority and past practice supporting a broader use of mediation within FEMA.

The DHS Office of the Inspector General (OIG)'s *Assessment of FEMA's Public Assistance Program Policies and Procedures* adopts the following recommendation:

Recommendation #3: Establish a FEMA-wide mediation or arbitration process for appeals that have reached an impasse. Refer claims that have reached an impasse within FEMA's appeals system to the mediation or arbitration board.⁹

However, FEMA responded: "FEMA does not concur with the recommendation, which we believe is based on a fundamentally and logically flawed supposition, as it appears to state that impasses can occur once the appeal process has been triggered by an applicant. The appeals process does not present any opportunities for an impasse to occur. Once an issue is referred for appeal, the process will produce a determination."¹⁰

The OIG has responded that FEMA misunderstands its use of the term impasse, which it used "to denote a significant delay in the appeals process."¹¹ OIG discusses negotiations with subgrantees on eligibility (p. 9), and suggested that when there are significant delays in parties coming to agreement on work eligibility, and where FEMA has not finalized project worksheets or obligated funding, this might be a good situation in which to apply mediation or arbitration. Others have recommended expanding the current arbitration program beyond disasters related to Hurricanes Katrina and Rita.

III. Recommendations for Dispute Systems Design and FEMA

FEMA has existing legal authority under the ADRA to develop a comprehensive system for addressing disputes in the Public Assistance program and other programs. A number of the recommendations before the Subcommittee involve legislatively imposing a program on FEMA without giving it the opportunity to develop a comprehensive system on its own. There is a third way; Congress could provide FEMA with the resources and direction to develop a comprehensive dispute system design for its various streams of conflict within a certain time period and then review its progress.

As discussed in more detail below, I have four recommendations:

- 1) FEMA should develop a comprehensive dispute systems design (DSD).
- 2) FEMA should involve stakeholders in the design of its comprehensive system.
- 3) FEMA should develop interest-based negotiation skills training for its employees in the Public Assistance and other programs.
- 4) FEMA should develop an evaluation system to measure and assess its performance.

⁹ OIG 10-26, 8 (December 2009).

¹⁰ *Id.* at 32, Appendix B.

¹¹ *Id.* at 37, OIG Analysis of Management Comments to the Draft Report.

1) With resources from Congress, FEMA should develop a comprehensive dispute systems design.

Best practices in DSD recommend designing a system that focuses primarily on interest-based processes such as negotiation and mediation, but also includes loop-backs or interventions that bring the parties back to negotiation with additional information (such as FEMA's use of technical experts). In the event of impasse, a comprehensive DSD would include low cost rights-based processes such as fact-finding and arbitration.¹²

In DSD, it is not a question of a choice between mediation or arbitration; it may be possible or desirable to use both. Mediation and arbitration are entirely different processes. Mediation is a voluntary process in which an impartial third party assists disputants in negotiating a mutually agreed solution to the dispute. Arbitration is an adjudicatory process, and as it has been used to date in Public Assistance cases, involves imposing a binding outcome on the parties. Both have their uses in a comprehensive system.

A comprehensive system may entail a sequence, including negotiation, mediation, and potentially arbitration, perhaps overseen by an ombuds or broadened ADR Office within FEMA. The system may provide different processes or steps for different kinds of disputes. For example, the Public Assistance program DSD might provide for negotiation, followed by mediation upon request. In lieu of binding arbitration, FEMA might consider a final fact finding step for Public Assistance program disputes. In fact finding, a neutral third party hears evidence on facts that are disputed and makes findings of fact in a decision that may be either advisory or binding, depending upon the design of the program. For example, many of the disputes in the Public Assistance program concern facts such as the amount and cost of damage to public infrastructure. A fact finder's decision can provide a loopback to negotiation over how to apply the law to these facts. This would differ from the current arbitration program in that the fact finder would not have jurisdiction to render a binding award of funds under the program; that decision would remain with FEMA.

These are just a few of the many possibilities for DSD for one program. A comprehensive DSD would provide options for multiple programs.

2) FEMA should involve stakeholders in designing a comprehensive system.

Experience in other agencies suggests that ADR programs function best when they are designed in a participatory way, with extensive stakeholder engagement and input to identify the sources of conflict, culture of the agency, opportunities for training,

¹² William Ury, Jeanne Brett, and Stephen Goldberg, *GETTING DISPUTES RESOLVED* (1989); Cathy Costantino and Christina Sickles Merchant, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING HEALTHY AND PRODUCTIVE ORGANIZATIONS* (1996); Stephanie Smith and Janet K. Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009); and Lisa Blomgren Bingham, Janet K. Martinez, and Stephanie Smith, *DISPUTE SYSTEMS DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT* (2011 forthcoming, Stanford University Press).

organizational structure, and opportunities for a variety of interventions using different processes. This process would address the following five key elements: What are the goals that motivate the system? What is the system's structure, including its process options and incentives for use? Who are the stakeholders of the system, and does the system reflect their interests? How is the system supported by financial and personnel resources? How successful, accountable and transparent is the system?¹³

A design process would begin by identifying the various stakeholders and their interests. The Public Assistance program is analogous to an insurance program. Stakeholders include applicants, subgrantees, grantees, FEMA employees and program officers. Stakeholders also include members of the public. FEMA could use its Open Government Plan to consult with the public through appropriate engagement processes.

FEMA's Management Responses suggest that the agency has concerns, or interests, about administering this program within the scope of its statutory authority. This is related to agency autonomy and recognition of its statutory authority. It cannot approve expenses that fall outside the scope of reimbursable costs under the Stafford Act; to do so would expose administrators to criticism by the OIG's office for *ultra vires* activity, and potentially accusations of collusion or corruption.

For example, the classic administrative law case *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947) shows an agency with the same problem. An agency representative advises a farmer that crops will be covered, but as it turns out, the regulations do not cover this planting. The agency representative cannot simply agree to depart from the regulations; this opens the door to ad hoc and inconsistent decisions outside the scope of agency authority from Congress.

Nevertheless, the OIG analysis identifies a number of opportunities for negotiation within the Public Assistance program. These involve disputed issues of fact, not the scope of coverage under the law. Disputed issues of fact include estimates of costs for repair and/or replacement. Applicants, grantees, and subgrantees have substantial interests in the expedited repair or replacement of critically important public infrastructure. One pending proposal suggested in other testimony would address this interest through the use of block grants, with negotiated totals and no recourse for supplemental funds after the fact. A systematic analysis of stakeholders' respective interests can contribute to developing a DSD suited both to the agency's mission and culture, and adapted to the needs of agency stakeholders and partners.

3) A comprehensive design should include interest-based negotiation skills training.

The OIG report also notes at least one problem with negotiation, in which FEMA project officers "inappropriately asked for concessions on some items of work in exchange for approvals of other items" (p. 10). OIG notes that, "FEMA is required to determine eligibility based on established federal criteria, not through negotiation or deal-making."

This suggests that a DSD would include negotiation training for FEMA employees involved in the Public Assistance program. Negotiation training would include the appropriate scope of negotiation permissible under the Stafford Act,

¹³ Stephanie Smith and Janet K. Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009).

specifically, negotiation and mediation over facts and the application of eligibility criteria to those facts, not the terms of the statute and regulations or law itself.

It would also include interest-based or principled negotiation skills that are consistent with the collaborative relationships established between FEMA and state and local government and qualified nonprofits under these programs.¹⁴ Previous federal studies, including the National Performance Review, which became the National Partnership on Reinventing Government, recommended interest-based negotiation skills training. Most people associate adversarial or positional bargaining with haggling over price and splitting the difference. In interest-based negotiation, parties identify and discuss interests based on needs such as security, economic well being, belonging, recognition and autonomy.¹⁵ In the public sector, interest-based negotiation is more consistent with public officials' ethic obligations of good faith and fair dealing with the public.

4) A comprehensive system should include an evaluation component to measure its performance.

FEMA could learn from other agencies' experience with developing and measuring the impact of broader systems for managing conflict. Evaluations typically collect data on stakeholder and customer perceptions of the system or experiences in mediation or arbitration. In addition, evaluations examine how the program affects dispute processing, for example the time frame within which disputes are resolved or the number or proportion of disputes appealed to the rights-based processes.

Studies have suggested that early intervention upstream with interest-based processes can reduce the number of adjudications downstream. For example, some believe that ADR has contributed to a 20-year decline in the trial rate from 12 to 2 percent of all cases filed in state and federal courts.¹⁶ A study of ADR use by Assistant US Attorneys found that the earlier ADR was used in the life of a case, the sooner the case terminated or reached final disposition.¹⁷ Similarly, in the United States Postal Service, implementation of a mediation program correlated with a 30 percent drop in formal adjudicated complaints of discrimination.¹⁸ Performance data can help improve the system.

Conclusion: It is a privilege and honor to testify before the Subcommittee. I am happy to answer questions and provide additional information.

¹⁴ See generally, Lisa Blomgren Bingham and Rosemary O'Leary (eds.), *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* (2008).

¹⁵ Roger Fisher, William Ury, and Bruce Patton, *GETTING TO YES* (1991).

¹⁶ Lisa Blomgren Bingham, Tina Nabatchi, Jeffrey Senger, and M. Scott Jackman.

Dispute Resolution and The Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes, 24 OHIO ST. J. ON DISP. RESOL. 225 (2009).

¹⁷ *Id.*

¹⁸ Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker, and Won Tae Chung, *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*. 14 HARV. NEGOT. L. REV. 1-50 (2009).

STATEMENT OF STEPHEN M. DANIELS,
CHAIRMAN, CIVILIAN BOARD OF CONTRACT APPEALS
TO THE SUBCOMMITTEE ON ECONOMIC DEVELOPMENT,
PUBLIC BUILDINGS AND EMERGENCY MANAGEMENT
OF THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
UNITED STATES HOUSE OF REPRESENTATIVES
SEPTEMBER 22, 2010

Madam Chairwoman and Members of the Subcommittee:

A year ago, when I testified before this Subcommittee, I assured you that the Civilian Board of Contract Appeals would do its utmost to fulfill a mission we had been assigned by the Congress and the Secretary of Homeland Security. As the arbitration panel established under the American Recovery and Reinvestment Act of 2009, we would resolve as quickly and as fairly as possible disputes between the Federal Emergency Management Agency and state and local jurisdictions in the Gulf Coast region concerning public assistance grants resulting from damage caused by Hurricanes Katrina and Rita.

I'm pleased to be able to report to you today that the Civilian Board has over the past year been doing exactly that. State and local governments have filed twenty-six cases with

us seeking arbitration of their disputes with FEMA regarding these grants. The cases have involved all sorts of facilities -- schools, hospitals, arenas, roadways, parks, port areas, canals, water and wastewater treatment plants, solid waste disposal areas, and fire hydrants. Most of the cases have come from jurisdictions in Louisiana and Mississippi, with fourteen from Louisiana and ten from Mississippi. We have had one case from a jurisdiction in Texas and one from a jurisdiction in Alabama.

Eight of the cases have been settled by the parties -- some of them with mediation assistance by Board judges and many of them without any need for our involvement. Six cases are still pending. Of the cases that have ended other than by settlement, we have resolved each of them within the time limit prescribed by regulation -- sixty days after the parties have completed their presentations. Three of these applications have been granted in full, six have been granted in part, two have been denied -- meaning that FEMA's position was upheld -- and one was dismissed for lack of jurisdiction.

Some of the cases have involved large sums of money. The most publicized of them, Charity Hospital in New Orleans, resulted in a determination that FEMA should pay to the State of Louisiana nearly \$475 million as the replacement value of the damaged facility. Others of the cases have involved far less funds; in some, the project value has been only slightly greater than the minimum of \$500,000 necessary to place a case before us.

However large the case, our proceedings have taken far less time, and required the expenditure of far less resources by the parties, than would have been involved in a court, or even in a contract case before the Board. Nevertheless, I feel confident that we have understood the essence of every one of the cases and have reached a result which has been fair and appropriate.

FEMA issued regulations on August 31, 2009, opening the possibility for resolution of these disputes by arbitration, and during the fall of 2009, the Board experienced an initial rush of case filings. Indeed, fifteen of our twenty-six cases were filed in October 2009. The numbers of filings have slowed since then, and increasingly, cases have been settling rather than going to decision. I sense that this trend has occurred because the ability of state and local governments to opt for arbitration has had a positive impact on the process of resolving the disputes. The parties have been addressing issues earlier and more cooperatively in an effort to come to positions which are mutually acceptable.

Thank you for the opportunity to testify this afternoon. I will be happy to respond to any questions the Subcommittee may have.

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STATEMENT OF MATT JADACKI

**ASSISTANT INSPECTOR GENERAL FOR
EMERGENCY MANAGEMENT OVERSIGHT**

OFFICE OF INSPECTOR GENERAL

U.S. DEPARTMENT OF HOMELAND SECURITY

BEFORE THE

**SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS,
AND EMERGENCY MANAGEMENT**

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

U.S. HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 2010



Good afternoon, Madam Chairwoman and Members of the Subcommittee. My name is Matt Jadacki and I am the Assistant Inspector General for the Department of Homeland Security (DHS), Office of Inspector General (OIG), Office of Emergency Management Oversight (EMO). Thank you for the opportunity to discuss where we are and what we have learned in the five years since Hurricane Katrina.

In brief, we have learned a lot from Hurricane Katrina, and FEMA is better prepared to handle large disasters. There is, however, still room for improvement, to ensure that preparedness, response, recovery, and mitigation efforts are carried out efficiently and effectively, and in a manner that minimizes the risk of waste, fraud, and abuse.

My office has conducted a significant amount of work in the past five years, assessing FEMA's programs and policies, as well as conducting audits of disaster grantees and subgrantees. Our program audits cover a wide range of areas, including: acquisition management, logistics, individual assistance, public assistance, and mitigation. We have made important findings and recommendations in all of these areas, but today I would like to focus my testimony on the area of public assistance. I will discuss our recent report on public assistance policies and procedures, as well as the arbitration process that has been established for some public assistance projects. I will also briefly mention a report that we plan to issue this fall on the public assistance appeals process.

Assessment of FEMA's Public Assistance Program

In response to concerns raised by this committee, my office conducted an in-depth assessment of the design and implementation of FEMA's Public Assistance (PA) Program policies and procedures. This program provides critical assistance—in the form of direct assistance and grants—to state, tribal, and local governments, as well as certain private nonprofit organizations, to enable communities to quickly respond to and recover from presidentially declared emergencies and disasters. The PA Program is administered through a coordinated effort among FEMA, grantees, and subgrantees. FEMA manages the overall program, approves grants, and provides technical assistance to applicants. Our review primarily focused on the efficacy of FEMA's policies and procedures with respect to the individuals and organizations that have to navigate them: the grantees and subgrantees. We interviewed more than 200 officials from FEMA Headquarters, FEMA regional offices, and FEMA recovery offices, and five state government offices responsible for developing and administering the PA Program. Our interviews also included officials of 14 local government entities that are PA Program grant recipients. This fieldwork was conducted in the states of Louisiana, California, Florida, Mississippi, and Washington, as well as the District of Columbia. We also analyzed data on FEMA's timeliness, accuracy, achievement of performance measurements, and other key areas of the PA Program.

Our assessment revealed multiple challenges that significantly hinder FEMA from consistently administering the PA Program in an efficient and effective manner. These challenges include: (1) untimely funding determinations; (2) deficiencies in program management; and (3) poorly designed performance measures. Although we determined

that many of these obstacles derive from personnel-based issues, there are other noteworthy causes that likewise contribute to the obstacles FEMA must overcome. Consequently, we presented FEMA with 16 recommendations to improve not only FEMA's process for reviewing and approving Public Assistance projects, but the overall administration and delivery of the program. Further, we identified various alternatives to streamline the PA process and noted the benefits and concerns associated with each. We also developed 4 specific matters for consideration by Congress.

When we issue a report, we ask the subject agency to respond to our recommendations and provide a Corrective Action Plan (CAP) within 90 days. FEMA's 90-Day Letter/CAP for our report on PA policies and procedures was due in March, but we only received it last week. We are still in the process of evaluating FEMA's response; however, I can report that FEMA has taken some actions in response to our recommendations, and I will note some of these in my testimony.

Timeliness of Funding

FEMA needs to improve the timeliness of PA funding to avoid project delays and to improve program efficiency. Such improvements should center on: (1) the appeal determination process; (2) the Environmental and Historic Preservation (EHP) process; and (3) the reconciliation of insurance settlements.

Appeal Determinations

FEMA takes excessive time to process appeals because it does not adhere to—or has not established—timeliness standards for the entirety of the appeals process, nor does it have a standardized system to track appeals. FEMA frequently rendered its appeal decisions long after the appeal was submitted; in some of the cases we reviewed, the process spanned several years. This problem is compounded because FEMA has no agency-wide system to track appeals from submission date to final determination. As a result, FEMA has no standardized means to identify delays for each appeal. This may serve to explain why some FEMA officials we spoke with were not aware of the untimeliness of the appeals process. Nearly all the subgrantees with whom we spoke expressed dissatisfaction with the process and its seemingly inherent lack of timeliness.

To address this issue, we recommended that FEMA:

- Establish a complete set of standards for achieving timeliness in the appeals process and adhere consistently to those standards previously established; and
- Develop and implement a tracking system that records the status and timeliness of each appeal.

In its CAP, FEMA acknowledges the untimeliness issue but insists that the problem is being addressed through the application of additional staff resources and improvements in the processing of appeals. We are pleased that FEMA has established a system for tracking appeals, as we recommended. We are concerned, however, that FEMA does not

plan to take action to establish timeframes in the appeals process beyond what is currently in regulation.

FEMA should also establish a mediation or arbitration process for appeals that have reached an impasse, and refer claims that have reached an impasse with FEMA's appeals system to a mediation or arbitration board. I will talk more about the current arbitration process later in my remarks.

My office is currently conducting a more in-depth audit of the PA appeals process. While it would be premature to discuss specific findings of the audit, I can say that the current team of auditors is identifying many of the same challenges identified in the previous report. We expect to issue this report by the end of the year.

Environmental and Historic Preservation Process

The Environmental and Historic Preservation (EHP) process has fostered significant delays in the PA Program and continues to have a negative impact on timeliness. FEMA is required to determine subgrantee compliance with applicable environmental and historic preservation laws, regulations, and executive orders before PA funds are provided and work can begin. And although this process can be inherently time-consuming, unnecessary delays occur because FEMA does not:

- Perform EHP reviews consistently, early in the disaster recovery process;
- Triage EHP workload based on importance;
- Require formal time limits for the EHP process;
- Coordinate sufficiently, and establish or simplify pre-disaster agreements, with the federal agencies involved in the EHP process; and
- Coordinate state EHP workload to mitigate duplicative efforts.

To address these challenges, FEMA should:

- Initiate and triage the EHP workload, immediately after a disaster, based on importance and not necessarily the order in which received;
- Establish and enforce formal time limits for the EHP process; and
- Coordinate the EHP process through programmatic or similar agreements with other federal agencies and state entities.

FEMA has told us that they are currently revising the basic EHP course for disaster employees and will ensure the training includes discussion on triaging and using the EHP Management Plan to manage workloads and construction time windows.

FEMA will also make its EHP programmatic agreements more transparent by placing them on the Internet and by referring to them in its Disaster Greenbooks. We appreciate these steps, but believe more needs to be done if timeliness of the EHP process is going to be improved.

Insurance Settlements

Subgrantees encounter delays in completing work on insured structures as a result of monetary shortfalls while awaiting final settlement from their insurer, which can take years. Although subgrantees can receive advances from FEMA, many are generally not in favor of addressing cash flow problems through this option because of financial management and accountability concerns. One solution is for FEMA to provide funding for projects that will later be covered by insurance proceeds, when the subgrantee and the insurer agree to subrogate all applicable funds to FEMA upon settlement.

FEMA indicated in its CAP that they will study the viability of this option and make a decision on implementing it by September 30, 2010.

Program Management

Another area that could benefit from improvement is FEMA's management of the PA Program. Impediments to successful program management include:

- Delays and excessive administrative efforts resulting from FEMA's inconsistent determinations on project eligibility;
- Inaccurate cost estimation or scopes of work in the initial documentation that can create the need for a significant number of time-consuming and labor-intensive revisions;
- Deferral of decisions that can preclude timely site inspections and reviews that would determine cost eligibility more reliably, thereby subjecting subgrantees to risk that cost and scope changes will ultimately be determined ineligible;
- Insufficient detail on scopes of work that can cause delays when grantees require that the project scope of work exactly match the cost documentation;
- Negotiations with subgrantees on eligibility, whereby subgrantees are subjected to deal-making instead of decisions based on formal criteria;
- Repetitive documentation requests that can impose a significant administrative burden on all parties, as well as generate project delays;
- Inconsistently applied local building codes and standards that can result in appeals and delays;
- Unidentified or misinterpreted PA Hazard Mitigation work eligibility that can result in untimely or inaccurate funding determinations after work has been completed, thereby effectively preventing the subgrantee from performing eligible mitigation work; and
- Undefined methodology for cost estimates involving "reasonableness."

I will not take the time to discuss these challenges in detail but would be happy to come back to them during the time for questions. I do, however, want to talk about some underlying causes.

Employee Turnover, Inexperience, and Limited Training

The issues I just listed are caused principally by turnover, inexperience, and limited training within FEMA's disaster workforce. Because FEMA's workforce is drawn nationwide from permanent employees, intermittent employees, and contractors, these staff—generally assigned to areas away from their homes—may lack the commitment for long-term assignments, as well as knowledge of critical local issues, such as contractor availability and pricing. Further, FEMA sometimes transfers these employees to other disaster sites before the recovery process is completed at the site to which they were initially assigned. This results in a “revolving door” effect and has been exacerbated because FEMA has not established permanent offices in those states most vulnerable to recurring, large-scale disasters. It has also been affected by tax implications and federal annuitant offsets for extended temporary duty, essentially disincentivizing employees from continuing their employment in a stable, long-term capacity.

Another area of concern is the lack of sufficient experience and training throughout FEMA's workforce. Following a disaster declaration, FEMA employs many local, intermittent, and contract personnel who may have little experience in, or knowledge of, FEMA's PA Program policies and procedures. These employees do not receive formal training until after a disaster has occurred, and even that training provides only basic classroom instruction—sometimes delivered by temporary personnel, as well.

FEMA has identified several areas of planned improvement in its personnel system, including development of a credentialing system—designed to assure that employees deployed to a disaster are qualified to perform their duties—as well as a single resource that includes all of FEMA's PA publications and policies. FEMA testified before the U.S. Congress in 2007 that such improvements are forthcoming. Although that position was reiterated to us during the course of our fieldwork, we have yet to see any of these ideas finalized and fully implemented. I will note that the CAP we received last week does outline a number of actions FEMA is taking but again, full implementation is lacking.

Specific recommendations we made to address FEMA's workforce challenges include:

- Restructuring the workforce into sufficiently staffed regional cadres, and deploying personnel only to the geographic area in which they reside (unless a nationwide deployment in response to a catastrophic disaster is necessary);
- Developing a recruitment plan to target local candidates when long-term disaster recovery efforts will be needed;
- Requiring that project officers document project activity and ensure that all information is conveyed to their successors during the recovery process—consistent with their responsibilities outlined in federal regulation;
- Expediting the implementation of a standardized credentialing system; and
- Expediting the completion and dissemination of consolidated PA guidance.

Further, we suggest that the U.S. Congress consider providing: (1) authority for an extension or waiver of annuitant and residency stipulations as they affect FEMA disaster personnel assisting the response and recovery efforts for large-scale disasters; and (2)

funding for FEMA to establish a permanent, full-time cadre of professional trainers who will comprehensively educate all FEMA disaster personnel prior to, and independent of, a disaster.

Performance Measurement

FEMA's performance objectives and performance measurement methodology—centered on timeliness and customer satisfaction—need to be clarified and improved to produce more meaningful and useful results.

FEMA's current methodology for measuring how timely FEMA obligates funding after a disaster declaration does not assure meaningful results because it gives equal weight to all disasters, regardless of magnitude. Thus, an inability to fund larger, more complex, disasters in a timely manner could be obscured by timely performance in funding the far more numerous, but less complex, smaller disasters. For example, if FEMA obligates funding in a timely manner for nine small disasters, but does not achieve timeliness for a large-scale disaster, its current performance assessment methodology would indicate that FEMA was 90% successful.

Another performance objective revolves around FEMA's ability to close disasters in a timely manner. However, FEMA's National Emergency Management Information System (NEMIS) does not include a function that can perform this measurement. FEMA officials told us that the next-generation system (the Emergency Management Mission Integrated Environment, or EMMIE) will include this functionality for all current disasters entered into its system. Nevertheless, a similar problem exists with this objective, as in the prior one, in that it does not differentiate between disaster magnitudes. As such, FEMA's ability to close small disasters in a timely manner may obscure the untimely closeout of large-scale disasters.

FEMA's last performance objective centers on customer satisfaction. However, FEMA has not measured its performance in this respect due to the suspension of data collection pending the request for, and the Office of Management and Budget (OMB) approval of, FEMA's customer satisfaction survey. Although OMB has recently provided approval for the survey, as currently planned, the measurement of this objective will make no distinction between the views of those subgrantees with varying degrees of damage. Thus, higher customer satisfaction with FEMA's performance on many smaller disasters could obscure customer dissatisfaction on large-scale disasters.

More meaningful performance measurement could be achieved if FEMA introduced weighted measures to differentiate between disasters of different magnitudes when assessing timeliness of funding and close-out, as well as customer satisfaction.

To ensure that the results of FEMA's measurements of performance objectives are meaningful, Congress may want to consider providing criteria for FEMA to use in categorizing disasters by magnitude (such as small, large, and catastrophic, etc.).

Alternatives to Streamline the PA Process

We identified various alternatives that could be employed to streamline the PA process. Although these alternatives represent opportunities to improve the program, each alternative presents drawbacks. Those alternatives that we explored include:

- Negotiated settlements for: (1) all projects; (2) permanent categories of work; and/or (3) small projects only. This alternative would change the present reimbursement (and document-intensive) process to a fixed, lump-sum negotiated settlement between FEMA and the grantee and subgrantee, based on FEMA's estimates of damage and cost, in conjunction with pertinent information provided by the subgrantee. These estimates would be binding and would not be subject to change for any reason. Moreover, the settlement(s) would be completed no later than 6 months after the disaster declaration. The advantages of negotiated settlements are that: (1) the subgrantees' cash flow would significantly improve early in the recovery process, resulting in reduced project delays; (2) administrative efforts at all levels would be greatly decreased, resulting in significant time and money savings for all; and (3) there would be a reduction in state and local administrative requirements, and thus a reduction in administrative fees paid to the grantee and subgrantee. Drawbacks would exist, nonetheless: (1) FEMA's estimates for the negotiated settlements will likely differ from actual costs, resulting in possible shortfalls or windfalls to the subgrantee with no recourse for either party; and (2) subgrantees may decide to not complete some of the disaster projects, and could instead use that funding for other purposes.
- Increase the *large project* threshold while maintaining the current reimbursement process. This would result in a significant increase in the number of projects classified as *small* projects. The PA Program differentiates between *small* and *large* projects based on costs. That threshold is increased annually, based on the Consumer Price Index. Funding for projects classified as *small* is generally final, and full payment is available upon approval of the original estimates (although projects are subject to final audit and inspection). The advantages for increasing the *large project* threshold are that: (1) administrative efforts and costs for all parties would be reduced based on the streamlined process for small projects; and (2) subgrantees' cash flow would improve because they would not need to incur costs prior to receiving payment, unlike for projects classified as *large*. The drawbacks are that under the *small project* criteria, subgrantees retain any excess funding for all combined *small projects* due to overestimates of costs, whereas excess *large project* funding must be returned to the federal government.
- Replace some grants with mission assignments. This alternative would change the system for designated categories of work—such as debris removal—to a prescribed system of tasking and funding other federal agencies (such as the U.S. Army Corps of Engineers) to perform the work. The advantage of this alternative is that: (1) grantees and subgrantees would avoid the oftentimes cumbersome documentation, reimbursement, and closeout requirements of the current system;

(2) experienced federal agencies would be responsible for the work, thus increasing the likelihood of improved efficiency and quality control; (3) contracting resources may be greater, resulting in faster completion of projects; and (4) administrative costs paid by FEMA to grantees and subgrantees would be decreased. An anticipated drawback would be subgrantees' reluctance to reduce control over work performed within their jurisdictions.

- Transferring other federal disaster programs to FEMA. This alternative would entail Congress permanently authorizing FEMA to assume responsibility for all federal disaster projects that involve significant hazards to life and property. Currently, other federal agencies perform work that—if delayed—could affect public safety and property. Thus, this alternative would: (1) mitigate against risks to life and property by creating the potential for a more immediate response; (2) relieve subgrantees from the burden of learning, and adhering to, various rules and procedures of other federal agencies in the aftermath of a disaster; and (3) reduce subgrantees' costs through economies of scale and increased efficiency by having fewer contracts for similar work. Nevertheless, this alternative may potentially yield less funding for subgrantees because of FEMA's cost-share provisions.
- Interval payments. This alternative would entail the automatic disbursement of funding to subgrantees at specified intervals of the recovery period based on project estimates—as opposed to the present system of requesting cash reimbursements after costs are incurred. At closeout, FEMA would reconcile eligible project costs with the amount disbursed and determine a final settlement with the subgrantee. This alternative would: (1) lessen the administrative requirements for the grantee and subgrantee because those requirements would be reduced as a result of the need to process only a few large payments instead of numerous payments; (2) reduce grantees' responsibility for ensuring that subgrantees' reimbursements are accurate; (3) improve subgrantees' cash flow early in the recovery process; and (4) reduce administrative or management fees based on a reduction of state and local administrative efforts. However, automatic payments based on estimates would require a subgrantee to repay FEMA at project closeout for the amount of interval payments that exceeds actual costs on recovery activities, which could place a burden on the subgrantee if it has inappropriately expended payments.

Despite the challenges presented here, we learned that many of FEMA's customers consider the current PA Program design inherently sound. They believe the flaws are primarily in execution. Consequently, we are in agreement that most of these challenges could be significantly diminished by focusing on the fundamentals upon which the PA Program rests.

There are times, however, when FEMA and its grantees and subgrantees reach an impasse in the application and appeals process. Hurricane Katrina occurred five years ago, yet there are still critical public assistance projects that have not been funded.

Arbitration

In an effort to break the impasse that sometimes leaves PA applications in limbo for years, Congress enacted legislation that established an arbitration process for PA projects related to Hurricanes Katrina and Rita.

On Feb. 13, 2009, Congress passed the American Recovery and Reinvestment Act of 2009 (P.L. 111-5). Section 601 of the law requires the President to establish an arbitration panel to expedite the recovery efforts from hurricanes Katrina and Rita. The law limits the arbitration process to projects totaling more than \$500,000.

FEMA published a final rule in the Federal Register, establishing the arbitration process, on August 31, 2009. The rule sets forth the eligibility criteria for arbitration and makes clear that applicants may choose arbitration in lieu of the appeals process. An applicant cannot do both.

The arbitration services are being provided by the Civilian Board of Contract Appeals (CBCA), which convenes three-judge panels for the purpose. A decision of the majority of the panel is final and binding on all parties.

As of September 9, 2010, there were 25 arbitration requests, 20 of which have been decided. In four cases, the panel found in favor of the applicant. The most well-known of these arbitration cases is Charity Hospital, in which the arbitration panel awarded the applicant \$474 million for replacement of the hospital. Five cases have been decided in favor of FEMA. In eleven cases, the dispute was either settled outside of the arbitration process or the panel provided for a settlement somewhere between what the applicant requested and what FEMA argued the amount should be.

Some in Congress believe the arbitration process should be extended to other disasters. We suggested in our report on public assistance policies and procedures that FEMA should consider establishing a mediation or arbitration process for appeals that have reached an impasse. We are currently monitoring the arbitration cases and plan to conduct work in this area to determine whether the arbitration option provides a means of speeding assistance to communities while protecting the interests of American taxpayers.

Mr. Chairman, this concludes my prepared remarks. I welcome any questions that you or the Members may have. Thank you.

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TESTIMONY OF

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BEFORE THE SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC

BUILDINGS, AND EMERGENCY MANAGEMENT

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

U.S. HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 2010

Good afternoon. It is an honor to appear before you today to present testimony regarding legislative and administrative options for improving the Public Assistance (PA) program within the Robert T. Stafford Disaster Relief and Emergency Assistance Act. My work at the Congressional Research Service (CRS) over the last four years has centered on disaster recovery programs and processes. Prior to my work at CRS I had a 25 year career at the Federal Emergency Management Agency (FEMA) in work that directly touched on the issues being considered in this hearing.

In my testimony I will review the main problems regarding the administration of the PA program at FEMA. Those problems generally include: one, a disagreement between FEMA and applicants over the scope of the damage and the costs to repair that damage and; two, the appeals process regarding that decision. These differences include the time it takes to resolve appeals, the alleged lack of transparency in the process and the insularity that can result in a process tainted by a lack of different FEMA staff involved in various levels of appeal.

I will also review actions taken recently to improve the PA program; processes that were developed through administrative initiative by FEMA, and processes that were legislated by Congress to resolve long-standing issues that were hindering the recovery in the Gulf Coast.

The existence of both types of processes is perhaps the clearest evidence of the challenge facing Congress in this area. Congress may consider both what has succeeded in principle and what changes may only be temporary solutions. To address these challenges observers can point to what appears to be a profound cultural shift at FEMA that resulted in "decision teams" that made rapid progress on seemingly intractable problems. The current Administrator of FEMA has encouraged his staff to investigate and implement mitigation opportunities in the Public Assistance program, and has noted his willingness to accept estimates submitted by accredited state or local engineers without the need for an additional estimate developed by FEMA staff. The creativity and flexibility evidenced by these actions and attitudes are encouraging and may argue for more opportunities for FEMA itself to transform the PA program by increasing trust and accountability in the processes it employs.

The question of current building codes and the law's stipulation that the repairs restore a facility "as it existed immediately prior to the major disaster" also presents areas open to varying interpretations.¹ Often times applicants are anxious to improve upon a project or update it according to the needs of the community coming out of the disaster. Those goals are understandable but can be perceived to be in conflict with the wording in the statute and, for some, represent an intention to update infrastructure using primarily federal funds. The case of the New Orleans School District is a good example of the issues involved and how they may possibly be resolved. FEMA's recent decision to combine many individual building projects into one large award for the New Orleans Recovery School District may point to a new approach by FEMA and Congress that could emphasize the need for some limited statutory changes based on that experience. Such an approach incorporates several concepts regarding local decision-making and cost-estimating that could be a model for future large projects.²

But while those developments can be viewed as substantive steps, Congress generally has made laws based on an equitable and consistent approach to governance that is not dependent on cultural shifts within organizations or the quality of experienced leadership at any given time. In my testimony I will highlight existing options open to FEMA and also potential options that could be exercised to improve or broaden the existing PA and related disaster recovery programs.

¹ P.L. 93-288, Section 406 (e)(1).

² Editorial staff, "Money for New Orleans school construction is a giant step for our recovery", *the New Orleans Times-Picayune*, August 27, 2010, http://www.nola.com/katrina/index/ssf/2010/08/money_for_new_orleans_school_c.html.

FEMA's PA and Appeals Overview

Public Assistance (PA) generally refers to Section 406 of the Stafford Act which provides for the repair, restoration or replacement of public facilities that sustain disaster damage, including roads, bridges, water control facilities, public buildings, public utilities, and parks and other recreation facilities.³ While only one part of FEMA's overall recovery aid package, PA "is typically its largest disaster assistance effort."⁴ Additionally, while Individual Assistance (IA) that provides assistance to families and individuals is limited to about \$30,000 per household, there is no limit on PA funding since all disaster-related damage is eligible. Given the importance and expense of the projects involved, and their importance to a community's recovery, some differences of opinion regarding the scope of damage are not surprising.

FEMA works through a process in which, following a disaster declaration, it offers an "applicant briefing" which provides background on the PA law and its implementing regulations as well as current FEMA policy guidance to state and local officials and their engineers who will be working with FEMA for the life of the recovery projects. A FEMA staff member is usually assigned as the project officer and coordinates with the state and local official involved. In this process FEMA

employs multiple levels of reviews to ensure consistency in determining eligibility of projects. The project officer makes the initial recommendation and a Public Assistance Coordinator reviews the project officer's recommendation.⁵

This effort results in the "Project Worksheet," or PW, that defines the scope of the work and a working estimate of cost. These traditional practices are emblematic of the approach FEMA Administrator Fugate was questioning during an appearance earlier this year. As he noted in Congressional testimony, if professional, licensed engineers working for the state or local government certify a level of disaster damage, "why don't we accept that?"⁶ This approach, with adequate safeguards, could foster a process with more mutual trust and potentially less administrative costs if FEMA accepts that estimate rather than conducting a subsequent engineering estimate on its own.

When all parties have reached agreement on the PW, FEMA provides funds to the main grantee, the state, which then provides the funds, as work is completed, to the sub-grantee, the local government or non-profit organization.

However, if there is disagreement on the scope of work and the costs involved, PA applicants do have the ability to appeal FEMA's decision.⁷

PA Appeals

The appeal process, as administered by FEMA, has two tiers; the initial appeal goes to the FEMA Regional Administrator where the disaster occurred and the second appeal goes to FEMA headquarters for a final decision.⁸

³ 42 U.S.C. 5172.

⁴ U.S. Government Accountability Office, *DISASTER ASSISTANCE -- Information on FEMA's Post 9/11 Public Assistance to the New York City Area*, August, 2003, pg. 8, <http://www.gao.gov/new.items/d03926/pdf>.

⁵ U.S. Department of Homeland Security, Office of Inspector General, *Assessment of FEMA's Public Assistance Program Policies and Procedures*, OIG-10-26. December, 2009, p.28, http://www.dhs.gov/xoig/assets/mgmtprts/OIG_10-26_Dec09.pdf.

⁶ Testimony of FEMA Administrator Craig Fugate, Senate Homeland Security and Governmental Affairs Committee, Ad Hoc Subcommittee on Disaster Recovery hearing, *Stafford Act Reform: Sharper Tools for a Smarter Recovery*, May 12, 2010.

⁷ 42 U.S.C. 5189a.

Under FEMA regulations, those requesting an appeal have 60 days after they have received notice of the final action on the PW. Within 90 days after receiving the appeal the regional director (for the first appeal) or the Associate Director (for the second appeal) will notify the appellant of the decision. FEMA may request additional information regarding the appeal in which the appellant has 90 days to provide such information.⁹

Appeals Critiques and Analysis

Some critics have noted that the appeals process is time-consuming. Some suggest that though timelines exist in the law and regulations, they are not consistently applied. As the Department of Homeland Security's (DHS) Inspector General (IG) reported:

FEMA does not consistently adhere to timeliness standards governing the amount of time its officials have to provide determinations on appeals. We reviewed appeals that showed, on average, FEMA rendered a decision after about 7 months for first appeals, and after about 10 additional months for second appeals. In some cases, the appeal process spanned several years. For example, a subgrantee submitted a first appeal on February 27, 2005, and received an unfavorable response from FEMA on October 20, 2006, an elapsed time of about 20 months. On March 9, 2007, the subgrantee submitted a second appeal and received a response from FEMA 17 months later, on August 7, 2008. In this example, the total elapsed time for the appeal process was about 3 years.¹⁰

FEMA's response to the IG noted the huge volume of PA appeals that were generated by a disaster the size of Katrina.¹¹ Indeed, just during FY2010, looking at the universe that arbitration could include, FEMA reports 500 open projects with costs exceeding \$500,000 per project.¹² Of that total, 172 are from the Gulf Coast hurricanes of 2005.¹³ While many appeals would be expected from such a large universe, the complaints are familiar. One persistent complaint is that all work is internal and that the appeals review could be perceived as tainted by the proprietary interests of FEMA staff. Put simply, FEMA personnel involved in each layer of decision-making can be reviewing their own work. As it was expressed by Senator Mary Landrieu in a letter to DHS Secretary Napolitano, there is "a fundamental belief that FEMA should not have the last word on all Public Assistance projects."¹⁴

FEMA is not a large agency, so some overlap can occur at the field, regional or headquarters level. Also those same staff would be expected to participate, at least to the extent of explaining previous decisions. However, FEMA staff also bring to the decision-making process a great deal of experience in administering the Stafford Act in many disasters across the country and are

⁸ For several years the applicant had three levels of appeal. This was reduced, administratively, to two levels of appeal in 1997 to speed up the overall PA process.

⁹ 44 CFR 206.206 (c).

¹⁰ U.S. Department of Homeland Security, Office of Inspector General, *Assessment of FEMA's Public Assistance Program Policies and Procedures*, OIG-10-26. December, 2009, p. 5, http://www.dhs.gov/xoig/assets/mgmtprts/OIG_10-26_Dec09.pdf.

¹¹ Note – FEMA cites Hurricane Katrina but this particular example employed by the IG preceded Katrina by six months. However, the volume of work was high during that time due to the multiple hurricanes in Florida in 2004. Further, in its response to an IG report, FEMA noted that the agency "annually approves an average of 35,000 projects for 7,100 applicants." U.S. Department of Homeland Security, Office of Inspector General, *Assessment of FEMA's Public Assistance Program Policies and Procedures*, OIG-10-26. December, 2009, p.28, http://www.dhs.gov/xoig/assets/mgmtprts/OIG_10-26_Dec09.pdf

¹² 231 of the Project Worksheets (PWs) are above \$1 million, while 269 are above \$500 thousand but below \$1 million. Data provided by FEMA's Recovery Division, Public Assistance Branch, July 13, 2010.

¹³ Ibid.

¹⁴ Letter from Senator Mary Landrieu to DHS Secretary Janet Napolitano, March 20, 2009.

expert at recognizing disaster damage within the parameters of the statute and the regulations. FEMA has noted that their staff are interpreting regulations that result in determinations based on the information submitted and not simply on a subjective judgment.

The discussion regarding FEMA's appeals process is the result, in part, of the very specialized work FEMA administers through the Stafford Act and the delegation of that authority from the President. Many have noted that, due to its experience and understanding of disaster situations, it is important for FEMA to provide leadership and to offer flexibility in the administration of disaster programs to meet the needs of a particular disaster. In essence, FEMA works on disasters every day, while states and localities become involved due to an extraordinary event that may never recur. Given that framework, it is difficult for states and local governments to match FEMA's mastery of the details of the appeals process. That is also the reason why it is incumbent upon FEMA to explain its processes fully to applicants and provide a "level playing field" for the exploration of eligible damage and the resulting costs to address that damage.

Options to Lessen the Need for Appeals

Cost-Estimating Process

Congress provided FEMA with a new authority, cost-estimating for project costs, in the Disaster Mitigation Act of 2000 (DMA2K, P.L. 106-390). This gave FEMA the ability to pay for large projects based on agreed upon estimates at the start of the process. This provision was intended to accelerate the recovery and reach a common agreement early in the process. The development of the cost-estimating process was to be "consistent with industry practices" and was to be compiled by an expert panel of representatives from "the construction industry and state and local government."¹⁵ FEMA carried out its responsibility and convened a panel which produced a cost-estimating process.

However, while FEMA noted that it has worked to integrate the panel's work into its overall approach to estimating costs of PWs, the promulgation of regulations to implement the actual cost-estimating procedure has never been completed almost ten years after passage of DMA2K.¹⁶ Some have speculated that implementation has been delayed due to concerns that it could lead to increased spending at the start of the disaster cycle or that the process, by dint of its methodology, could result in larger repair or restoration payments. But no official explanation has been offered for the reluctance, in fact the refusal, to implement this authority.

Alternate Projects

The alternate projects option can turn multiple projects into a single project that captures the recovery vision of a community. During recent Congressional testimony Administrator Fugate noted that a Congressional waiver provided FEMA the opportunity to take a different approach to a series of large projects in New Orleans; the New Orleans Recovery School District (RSD). Rather than addressing each school building on an individual basis, an overall approach to the future of education became possible in the agreement between the federal government and RSD that resulted in a \$1.8 billion award.¹⁷ As Mr. Fugate noted in his testimony:

¹⁵ 42 U.S.C. 5172(e)(3)(A) and (B)(i). These provisions have not yet taken effect.

¹⁶ Use of the principals of the cost-estimating formula was noted by FEMA Public Assistance Chief James Walke and Deputy Chief Tod Wells in an interview on January 14, 2010.

¹⁷ Editorial staff, "Money for New Orleans school construction is a giant step for our recovery", *the New Orleans Times-Picayune*, August 27, 2010, http://www.nola.com/katrina/index/ssf/2010/08/money_for_new_orleans_school_c.html.

The Consolidated Appropriations Act of 2008 (P.L. 110-161) provides a statutory waiver of the alternate project penalty. For example, FEMA is now able to provide funding at 100 percent for educational facilities in Louisiana, known as the Recovery School District (RSD). This will allow RSD to reconstruct their school campuses without any reduction in federal financial assistance. RSD will leverage eligible funds pertaining to 127 disaster-damaged campuses to a New Orleans Public School Master Plan that consolidates operations to 87 campuses, over the period of an estimated 8 years.¹⁸

The alternate project penalty referenced is the provision in the Stafford Act that calls for an amount equal to 90 percent (rather than 100 percent) of eligible costs when an applicant chooses an alternative strategy, rather than repairing the same structure that sustained the disaster damage.¹⁹ While the RSD serves as an example of Congressional and administrative initiative, it also should be noted that the agreement with RSD was in August 2010, which was a full 32 months after Congress had provided the waiver. The RSD case underlines both the complexities of such projects and the importance of the organizational culture that would choose to act, or not act, on a Congressional waiver to foster innovation.

Options for the Appeals Process

Technical Advice

Additional options have been and remain available to FEMA to provide alternate resolutions. For example, FEMA's regulations permit the Agency to

submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for this technical review may be in addition to other allotted time periods.²⁰

FEMA has called upon its own Technical Assistance Contractors (TACs) to assist in this process. While they are professional and often not previously involved in the issue, they also are in FEMA's employ and their participation may not assuage the concerns some appellants may have in seeking a more independent review.

Unified Public Assistance Project Decision Team

One of the first decisions made by the Obama Administration's team at DHS was to try to resolve many of the disputes along the Gulf Coast that were generated in the recovery process. The "Decision Team," which was announced in March of 2009, was billed as a joint creation of DHS and the State of Louisiana. The team was led by an experienced regional office staff member, and an equally experienced member of FEMA's Federal Coordinating Officer (FCO) cadre was named to head up the Transitional Office. Together, they oversaw an effort to sort out process from policy. As Administrator Fugate has noted, most of the staff level people involved, and the regulations being applied, had not changed. But what had changed was a more consistent application of the regulations and policies in place. The "decision team" and the PA review panels it spawned "have resolved 173 previously disputed cases."²¹

¹⁸ Testimony of Craig Fugate, Senate Homeland Security and Governmental Affairs Committee, Ad Hoc Subcommittee on Disaster Recovery, *Field Hearing: Five Years Later: Lessons Learned, Progress Made, and Work Remaining from Hurricane Katrina*, August 26, 2010.

¹⁹ 44 U.S.C. 5172, (c).

²⁰ 44 CFR 206.206, (d).

²¹ Testimony of Craig Fugate, Senate Homeland Security and Governmental Affairs Committee, Ad Hoc Subcommittee on Disaster Recovery, *Field Hearing: Five Years Later: Lessons Learned, Progress Made, and Work Remaining from Hurricane Katrina*, August 26, 2010.

The “decision team” concept is of interest not only for its success in resolving cases but also for its conceptual approach. It brought in experts from within the agency, not previously associated with the cases in dispute, and provided the kind of objective review that, while desired, becomes difficult for field staff that have worked long and hard on some of the remaining issues.

Alternative Dispute Resolutions Process

FEMA also has an Alternative Dispute Resolution (ADR) program that has been used sparingly in the disaster context. Though that office has noted its willingness to work in these areas, any decision to use ADR would come from those directing the appeals process. As the ADR site notes:

ADR can be effective in preventing and resolving disputes involving external parties in many contexts, including disaster projects, hazard mitigation projects, insurance claims and flood mapping, personal injury and property damage claims, rulemaking, contracting, policy development, negotiations, and litigation.²²

Legislation introduced during the 110th Congress suggested using ADR as an approach to resolving disputes in the appeals process. H.R. 3247, the Hurricanes Katrina and Rita Recovery Facilitation Act of 2007, contained a provision permitting the use of the ADR process to help resolve PA appeals. In its accompanying report the Committee explained the details of the implementation of ADR for appeals as envisioned in the proposed legislation:

This provision permits the Administrator to use alternative dispute resolution procedures to facilitate the review of appeals in a timely and fair manner. Applicants are permitted to elect alternative dispute resolution for either first or second appeals, but are only allowed to do so once, and only if FEMA concurs. In implementing this pilot program, the Administrator is encouraged to use FEMA's Office of Alternative Dispute Resolution as well as resources outside of FEMA. Under this provision, FEMA is not required to use alternative dispute resolution when requested by applicants, but if the Administrator rejects such a request, he must provide a written notice of the denial including the reasons for the denial. This provision requires FEMA to report to the Committee on denials and to report within one year whether this authority should be granted permanently.²³

Arbitration of Katrina and Rita PA Claims²⁴

In the American Recovery and Reinvestment Act of 2009 (ARRA), Congress directed FEMA to establish arbitration panels as an alternative to the traditional administrative appeals process to facilitate resolution of claims arising from Hurricanes Katrina and Rita. This section describes the scope and procedures of the arbitration panels established by FEMA pursuant to Congress' mandate.

Section 601 of ARRA provided that:

Notwithstanding any other provision of law, the President shall establish an arbitration panel under the Federal Emergency Management Agency public assistance program to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region. The arbitration panel shall have sufficient authority regarding the award or denial of disputed public assistance applications for covered hurricane damage under section

²² U.S. Department of Homeland Security, Federal Emergency Management Agency, *ADR Frequently Asked Questions*, <http://www.fema.gov/help/adr/faq.shtm>.

²³ U.S. Congress, House Committee on Transportation and Infrastructure, *Hurricanes Katrina and Rita Recovery Facilitation Act of 2007*, report to accompany H.R. 3247, 110th Cong., 1st sess., H.Rept. 110-387, (Washington: GPO, 2007), p. 5.

²⁴ Much of the arbitration discussion was contributed by Edward C. Liu, Legislative Attorney, American Law Division.

403, 406, or 407 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170b, 5172, or 5173) for a project the total amount of which is more than \$500,000.²⁵

As one report on the topic has observed,

While limited to appeals of decisions associated with Hurricanes Katrina and Rita, the congressional action indicates some degree of dissatisfaction with the standard appeals process established through regulation under the broad statutory guidance in the Stafford Act. As opined by a former General Counsel for FEMA, the decision by Congress to authorize the arbitration process reflects “congressional belief that the appeal process for FEMA’s public assistance program was broken ...”²⁶

Arbitration Panel Procedure

Although Congress directed FEMA to establish an arbitration program, it left FEMA the discretion to define many of the specifics of that program via the regulatory process. On August 31, 2009, FEMA promulgated regulations implementing the arbitration panel required under § 601 of ARRA.²⁷ Under these regulations, a dispute arising from a PA project or application must not have received a final agency decision before February 17, 2009 in order to be eligible for arbitration. A final agency decision exists if a grantee does not timely note either a first or second administrative appeal, or where FEMA has issued a decision on a second appeal.

Additionally, as required by § 601 of ARRA, only disputes concerning projects in excess of \$500,000 are eligible for arbitration. Importantly, it is the total cost of a project that is to be measured, not just the amount in dispute.²⁸

Under these regulations, arbitration is in lieu of filing or continuing an appeal under the traditional administrative process. As noted by FEMA in its *Federal Register* notice issuing the regulations, Congress directed the creation of the arbitration panel in order to “expedite” recovery efforts. Therefore, FEMA concluded that “[t]he use of both arbitration and the standard appeal process would lengthen, not expedite, the recovery process.”²⁹ However, pursuing a first appeal does not appear to necessarily preclude arbitration at some later date if that appeal is subsequently denied.³⁰

Panel members are selected by the arbitration administrator from “the Federal pool of current and senior administrative law judges and other similar officials serving in adjudicative capacities on boards, commissions and agencies.”³¹ FEMA’s website indicates that the primary pool of arbitrators will be judges that sit on the Civilian Board of Contract Appeals, which oversees disputes between federal agencies and government contractors.³² A simple majority of a three

²⁵ P.L. 111-5, 123 Stat. 164. Note: Section 407 (42 U.S.C. 5173) covers debris removal, which can also be done under Section 403 (42 U.S.C. 5170b) which covers Essential Assistance to meet immediate threats to life and property. All of these areas had large projects due to Katrina but traditionally the most significant projects are accomplished under the authority of Section 406.

²⁶ Ernest Abbott, President, FEMA Law Associates, PLLC, *FLASH Newsletter*, vol. 4, Issue 11, April 2009, p. 1

²⁷ 74 Fed. Reg. 44761 (Aug. 31, 2009) (creating 44 C.F.R. § 206.209).

²⁸ See *In the Matter of Forrest County Board of Supervisors*, CBCA 1772-FEMA, at 2 (Civilian Bd. Contract App. January 20, 2010) (dispute met cost threshold even though amount in dispute was only \$202,443 because total project costs exceeded \$500,000).

²⁹ 74 Fed. Reg. at 44762.

³⁰ See *In the Matter of Baldwin County Board of Supervisors*, CBCA 2018-FEMA, at 2-3 (Civilian Bd. Contract App. July 2, 2010).

³¹ 74 Fed. Reg. at 44763.

³² FEMA, *New Arbitration Panels for FEMA Public Assistance Program Concerning Hurricanes Katrina and Rita*,

member panel is required to make a final decision which will be binding on the parties to the arbitration.

Further judicial review of a final decision by an arbitration panel is limited to four grounds.³³ A federal district court may only vacate an arbitration decision or award:

- (1) where the award [or decision] was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.³⁴

In contrast, a final eligibility determination by FEMA outside of the arbitration process is generally not subject to judicial review by federal courts. The Stafford Act provides that the “Federal Government shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter.” Federal courts interpreting this provision have held that eligibility determinations under the PA program are among the discretionary functions that are immune from suit under the Stafford Act.³⁵

Level of Review by Arbitration Panel

At the outset of the arbitration program, an important question was the appropriate level of review the arbiters would undertake when evaluating disputed determinations by FEMA. In one of the first decisions published by the FEMA arbitration panel, *Bay St. Louis-Waveland School District*,³⁶ FEMA argued that the panel’s review should be limited to examining whether FEMA’s initial determination was either arbitrary or capricious under the APA. Under this standard, the arbiters could not “substitute [their] judgment for that of the agency”³⁷ and would be required to uphold the agency’s determination so long as there was no “clear error of judgment.”³⁸

However, the arbitration panel rejected FEMA’s argument and held that its review would be *de novo* and its determination did not need to defer to FEMA’s initial findings. In support of this assertion, the panel in *Bay St. Louis-Waveland School District* noted that:

FEMA’s own implementing regulations contemplate that a record *be created specifically for the arbitration panel* which will enable the panel to resolve disputes related to a public assistance grant. The record consists of materials submitted by all parties to the

Aug. 9, 2009, available at [<http://www.fema.gov/news/newsrelease.fema?id=49243>].

³³ 44 C.F.R. § 206.209(k)(3).

³⁴ 9 U.S.C. § 10.

³⁵ See, e.g., *St Tammany Parish v. FEMA*, 556 F.3d 307 (5th Cir. La. 2009); and *City of San Bruno v. Fed. Emergency Mgmt. Agency*, 181 F. Supp. 2d 1010, 1016 (N.D. Cal. 2001). Claims alleging violations of the Constitution are not barred by the Stafford Act. See *McWaters v. Fed. Emergency Mgmt. Agency*, 436 F. Supp. 2d 802 (E.D. La. 2006) (plaintiffs’ claim alleging violation of procedural due process in denial of disaster housing assistance is not barred by non-liability provision in the Stafford Act.)

³⁶ In the Matter of *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA (Civilian Bd. Contract App. Dec. 8, 2009).

³⁷ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

³⁸ *Id.*

arbitration as well as any independent material from technical and scientific experts that the panel considers necessary to resolve the dispute.³⁹

The panel reasoned that its authority to create an independent record would be superfluous if it was to defer to FEMA's initial findings. Therefore, de novo review was warranted. Subsequent opinions from arbitration panels have affirmed this conclusion and panels have undertaken de novo evaluations of the credibility of witnesses and determinations of feasibility that had previously been made by FEMA officials. For example, the panel arbitrating the dispute over Charity Hospital in New Orleans was required to determine whether the repair costs of damage caused by Hurricanes Katrina and Rita exceed 50% of the replacement cost.⁴⁰ In addition to reviewing documentation from both parties, the panel conducted a hearing at which experts from both sides testified. After hearing this testimony, the panel found that the experts testifying on behalf of the hospital were more experienced and credible than FEMA's representatives.⁴¹ Based on the conclusions of these experts, the panel found that the damage had met the replacement threshold and awarded \$474,750,898 for the replacement of the hospital.⁴²

Considerations and Potential Solutions

Decisions on the Use of Arbitration

The use of an arbitration system is not new to federal disputes but it is new to the disaster recovery process. While the arbitration system could arguably lead to a more equitable result, it also may stretch out the time of the recovery process and the restoration of disaster-affected communities. The timing factor would be applied to both sides in the dispute, causing state and or local appellants to assemble their arguments for a hearing, and enabling FEMA to emphasize and build a strong case file as part of their administration of the program.

Another consideration is whether the arbitration process should move toward a common agreement or approximate litigation rather than mediation. Much of the Stafford Act is constructed as a partnership between the federal and state governments in administering the recovery process. If FEMA has been working as a full partner with the applicants through each step, an arbitration process could undercut that relationship and reduce the overall level of cooperation for all disaster response and recovery programs.

On the other hand, if FEMA is perceived as a partner that does not share necessary information with its partners or creates a culture of doubt or mistrust, then FEMA will not have the confidence of the state and local partners and arbitration may be the only alternative for settling differences that arise on particular projects.⁴³

In approaching the establishment of a new authority, Congress may wish to consider the criteria for arbitration: if the authority should be triggered by the projected cost of the project, or by the difficulty in resolution, or if the project involves a critical facility where decisions on repairs

³⁹ In the Matter of Bay St. Louis-Waveland School District, CBCA 1739-FEMA, at 7 (Civilian Bd. Contract App. Dec. 8, 2009) (emphasis added).

⁴⁰ In the Matter of State of Louisiana, Facility Planning and Control, CBCA 1741-FEMA, at 2 (Civilian Bd. Contract App. Jan. 27, 2010)

⁴¹ *Id.* at 3.

⁴² *Id.* at 6. See also In the Matter of Moss Point School District, CBCA 1800-FEMA, at 4 (Civilian Bd. Contract App. June 22, 2010) (awarding replacement cost of damaged school because panel determined that construction of flood wall was not feasible).

⁴³ For additional discussion regarding the PA appeals process and arbitration, see CRS Report RL33053, *Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding*, by Keith Bea, March 16, 2010, pp. 26-27.

should be expedited such as for a hospital or a public utility. Further, given the increasing costs of disaster recovery projects, Congress might wish to consider increasing the threshold for any arbitration from a project over \$500 thousand to a project that exceeds \$1 million or more.

It may be that most large projects do not require outside arbitration but some smaller projects may benefit from an independent review. Congress may wish to consider if it wants to provide such discretion to the President or rest the authority on a cost estimate or other considerations. In addition, DHS and FEMA may wish to explore alternatives to the arbitration process that could begin to use agreed upon independent parties to assist in the appeals process, including on-site visits as well as reviews of information. Any steps that reinforce the integrity of the process would be useful for all parties working toward the ultimate goal of assisting states and communities to recover from disaster events.

Impact of Arbitration on PA process

A further consideration is what effect the possibility of arbitration would have on the current administration of Public Assistance grants. It could be argued that, with the shadow of potential arbitration moving across the PW process, an applicant might concentrate on a case for potential arbiters and orient most of its post-disaster work toward the requirement of the potential arbitration rather than the work with FEMA to complete the grant process. Conversely, the alternative of arbitration could arguably help to broaden FEMA's judgment of the appeal and potentially lead to more settlements in which FEMA approves an applicant's appeal. Also, it could create significantly increased administrative expenses for the disaster recovery program.

As noted earlier, these decisions will not be made in a vacuum. The arbitration process set in place by P.L. 111-5, for the most part, reversed earlier FEMA appeals decisions or PW amounts to decisions in favor of the applicant's position. It also appears to have moved a number of projects toward a mutual resolution short of arbitration. The arbitration decisions are not precedents, but they may influence or instruct FEMA's review of future PWs and its work toward resolving PA disputes. But it is also noteworthy that a relatively small number of eligible projects were submitted for the process.⁴⁴ This could indicate that while there are reservations on how some large projects have been handled, the entire process is not broken and in need of replacement.

Other Opportunities for Arbitration

A final consideration is the breadth of arbitration for FEMA decisions. While PA projects tend to be the largest among FEMA's awards, they are not the only FEMA decisions subject to questioning or differing interpretations. All of the programs under Title IV of the Stafford Act are subject to the provisions of Section 423, which delineates the right to an appeal for "any decision regarding eligibility for, from, or amount of assistance under this title," but, as with PA, does not include a right to arbitration of those appeals decisions.⁴⁵

FEMA provides significant assistance under Section 404, the Hazard Mitigation Grant Program (HMGP).⁴⁶ In this area there can be disagreements between the state and FEMA in defining eligible mitigation projects and the costs involved. HMGP is often a close partnership between the state and federal governments but that partnership does not preclude disagreements on choices and priorities. While HMGP is capped by formula (for most disasters about 15% of total disaster

⁴⁴ As noted previously, about 170 projects from the 2005 Gulf Coast hurricanes met the dollar threshold for appeals. However, the total number of appeals submitted, according to FEMA's Public Assistance Office, was 25.

⁴⁵ 43 U.S.C. 5189a.

⁴⁶ 42 U.S.C. 5170b.

costs), there are still disagreements on how those resources should be expended. Congress may wish to consider if arbitration would be useful in resolving differences in the mitigation area.

Another area where differences arise between FEMA and applicants over the type and level of assistance provided is Stafford Act Section 408, the Individuals and Households Program (IHP).⁴⁷ There are fundamental choices FEMA makes on the best approaches to temporary housing, and the services that can support that housing, which are sometimes criticized by disaster victims. Also, FEMA and the state both contribute to the Other Needs Assistance (ONA) program within IHP which provides necessary help such as the purchase of clothing or emergency medical care or assistance with funeral expenses if insurance coverage is lacking.

For these forms of assistance there can be differences between the aid seeking victims' perception of their needs and the types of assistance provided. The program is limited by a spending cap that is adjusted annually, but applicants often want to appeal decisions within the cap.⁴⁸ This is another area where arbitration could contribute to a resolution. Given the volume of individual cases in the area of Individual Assistance (IA) it might be advisable to establish thresholds for arbitration or to again provide it as a discretionary tool to the President to intervene in lingering disputes.

Cost Estimating and Block Granting for Public Assistance

FEMA generally conducts Preliminary Damage Assessments (PDAs) with state and local officials following a disaster event to determine if the damage, and its impact, is severe enough to warrant supplemental federal assistance. In the case of extreme events such as Hurricane Katrina, PDAs are superfluous and a disaster declaration is made by the President. But in both cases, based in part on the Governor's request for assistance, there is a general understanding of the scope of the damage and the types of assistance that will be needed.

If the cost-estimating principles that have been developed by FEMA are implemented in regulations, it may present an opportunity for FEMA to develop a block grant approach that will rapidly make resources available to the affected state and local governments. Such an approach has been suggested in recent legislation introduced by the leadership of this committee. Section 311 of H.R. 3377 provides for "Special Procedures for Widespread Damage."⁴⁹ That section gives the President the discretion to provide financial and technical assistance so that the states and localities can develop an overall plan for recovery and the authority to advance funds (with a federal share of up to 100 percent).

As I noted earlier in my testimony, the recent FEMA work with the state of Louisiana and the New Orleans Recovery School District can serve as a template for what is possible under current law and also, looking forward, how large recover projects can be assembled. A variation on this theme is a suggestion from the DHS IG that FEMA work on negotiating "lump sum" settlement that also concentrates on FEMA making payments based on estimates:

This alternative would change the present reimbursement process, which is document-intensive, to a fixed lump-sum negotiated settlement between FEMA and the grantee and subgrantee based on FEMA's estimates of damage and cost, in conjunction with pertinent information provided by the subgrantee. These estimates would be binding and would not be subject to change.⁵⁰

⁴⁷ 42 U.S.C. 5174.

⁴⁸ 42 U.S.C. 5174(h).

⁴⁹ H.R. 3377, Disaster Response, Recovery, and Mitigation Enhancement Act of 2009.

⁵⁰ Testimony of DHS Deputy IG Matt Jadacki, Senate Homeland Security and Governmental Affairs Committee, Ad Hoc Subcommittee on Disaster Recovery hearing, *Stafford Act Reform: Sharper Tools for a Smarter Recovery*, May

There are many approaches that can make a positive contribution to this discussion. Congress may also wish to conduct a careful study of the arbitration pilot process to determine the efficacy of the panel findings in substantive detail. Similarly, Congress may also wish to examine the New Orleans Recovery School District innovation to determine if either that concept, or the arbitration process, merit replication. Similarly, other suggested approaches to PA reform such as the "special procedures" section of H.R. 3377 could be tested through a pilot program for further application.

I hope my testimony has focused on some of those themes and specific proposals that can improve Public Assistance for future disaster recovery operations. Thank you again for the privilege of appearing before you today. I would be happy to answer any of your questions.

1 CONGRESSIONAL TESTIMONY TO THE U.S. HOUSE OF
2 REPRESENTATIVES COMMITTEE ON TRANSPORTATION AND
3 INFRASTRUCTURE

4 BY

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INTRODUCTION

21

22 Thank you for having me here today. On behalf of the State of Louisiana, I
23 want to express our thanks for this Committee's continued interest in our
24 recovery from what has been deemed the largest disaster in U.S. history. I
25 am Mark Riley, Chief of Staff of the Louisiana Governor's Office of
26 Homeland Security and Emergency Preparedness. I came to the
27 Hurricanes Katrina/Rita recovery process in late 2007 from the Department
28 of Defense. I initially served as the Deputy Director for the agency's
29 Recovery Division and was later designated the Chief of Staff. Coming
30 from DoD, I had experience operating in chaos and chaos is exactly what I
31 observed as I hit the ground in Louisiana two years after the storm. In
32 terms of the actual recovery of the State of Louisiana, FEMA and the State
33 were on two separate paths with what seemed like two separate objectives.
34 Thanks in part to the continued interest and pressure of this Committee, I
35 believe we are now on the same path with common objectives. We now
36 have a true and transparent partnership with FEMA, thanks to the
37 leadership of people like Administrator Craig Fugate and Regional
38 Administrator Tony Russell. With this change of leadership at FEMA, we
39 are looking at "recovery" as a holistic approach to restoring a community,
40 not just the repair of individual pieces of damaged infrastructure.

41 The testimony I present today will review the effects of several pieces of
42 legislation which have assisted the recovery, to include provisions
43 authorizing arbitration to resolve disputes with FEMA. I will also discuss
44 additional actions that may want to be considered especially in the
45 circumstances of a catastrophic disaster such as the combined effects of
46 Hurricanes Katrina and Rita.

47 We have just observed the fifth anniversary of Hurricanes Katrina and Rita
48 and yet the job of recovery is far from complete. In terms of the repair and
49 reconstruction of over 23,000 permanent infrastructure projects (Categories
50 C through G), we are not more than thirty percent (30%) complete. When I
51 first reported to the Disaster Recovery Division in July 2007, FEMA had
52 obligated \$4.9 billion to recovery projects and I was told by FEMA
53 leadership in Louisiana that the disaster recovery cost would not exceed \$6
54 billion. As of August 2010, after a lot of hard and detailed work between
55 FEMA and the State on a project by project basis, FEMA has obligated \$10
56 billion as part of the Public Assistance Program. Analyzing the number of
57 projects that still are not resolved, the State believes that obligated dollars
58 for the repair of permanent infrastructure damaged or destroyed during the
59 storms will be between \$13 billion and \$14 billion. We use a survey metric
60 with applicants to gage the number of projects that still have funding
61 issues. In December 2009 we had 4,605 Project Worksheets with funding
62 issues. Working a continuous "give and take" with FEMA we have resolved
63 1,816 Project Worksheets, leaving 2,789 Project Worksheets "unresolved".
64 We have identified and resolved many policy issues that have impeded the
65 speed of the recovery and continue to work with FMEA on additional issues
66 we believe need to be addressed before we can finish the recovery. Our
67 short term goal with FEMA is to complete the funding determinations in the
68 Public Assistance Program, and we think this will take another 18 to 24
69 months at the current pace.

70

71

72 **ARBITRATION**

73 **ARRA Arbitration Option - Evaluation**

74 Since February 17, 2009, the effective date of the arbitration option for
75 Hurricanes Katrina and Rita established under the American Recovery and
76 Reinvestment Act of 2009 (ARRA), fourteen (14) arbitration cases have
77 been filed with the Civilian Board of Contract Appeals (CBCA) by nine (9)
78 separate applicants. Four (4) cases were settled by FEMA before
79 consideration by the CBCA; one (1) case was withdrawn by an applicant;
80 one (1) case was dismissed by the CBCA; four (4) cases are still pending;
81 and four (4) cases resulted in a CBCA decision awarding additional funding
82 to the applicant. The total value of claims submitted to the CBCA is
83 approximately \$952 million. The value of claims settled or determined by
84 the CBCA in favor of applicants total approximately \$613 million. Several
85 new requests for arbitration are currently being prepared by applicants for
86 submission to the CBCA. The need for this process will continue until we
87 have completely resolved the remaining 2,789 Project Worksheets that
88 have funding issues.

89 From the State's viewpoint, the ARRA arbitration option has been
90 exceptionally successful. Specifically, it has accelerated the dispute
91 resolution process as it was designed to do and has leveled the playing
92 field for all involved parties. FEMA's current administrative appeals
93 process utilizes FEMA management personnel to make the final
94 determinations regarding disputed FEMA decisions at each level of appeal
95 (Region and FEMA Headquarters), with Region in each instance providing
96 an analysis of the dispute. This appeals mechanism allows FEMA local

97 personnel to potentially influence 1st appeal Region determinations; and in
98 each instance, those making 1st appeal Region determinations actively
99 influence 2nd appeal FEMA Headquarters determinations. Whether such
100 influence is actual or merely possible, a system which either permits such
101 or a perception of such is undesirable. The ARRA arbitration option
102 eliminates this perception.

103 Specifically, the ARRA arbitration option substitutes an independent three
104 member CBCA judicial panel into the process. Further, different from a
105 federal district court which might review a FEMA appeals determination and
106 defer to the expertise of the agency unless it concluded there was no
107 reasonable basis for the determination at issue, the CBCA panel is not a
108 court of review and is therefore not required to defer to the agency when
109 analyzing a complained-of agency determination.¹ The Grantee believes
110 this has not only provided a fully fair and impartial hearing mechanism, but
111 has further influenced both applicants and FEMA to resolve disagreements
112 relating to significant projects during project formulation. A tangible and
113 beneficial result of the arbitration process is the number of disputes that
114 have been settled by FEMA as an apparent result of the mere availability of
115 an independent review process.

116 Based upon the State's experience with the ARRA arbitration process, we
117 recommend that Congress consider making the arbitration option available
118 to applicants in all future disasters. Additionally, we recommend amending
119 the current FEMA administrative appeals process to include an
120 Administrative Law Judge (ALJ). Because of the clearly positive outcome

¹ See Bay St. Louis - Waveland School District CBCA 1739-FEMA, CBCA decision determination clarifying the role of the CBCA and whether it must defer to FEMA's decision-making, as would a reviewing court.

121 resulting from the use of the independent CBCA panel under the ARRA
122 arbitration process, we believe the speed of the recovery process would be
123 greatly enhanced and the public would be significantly better-served by the
124 inclusion of independent review within any mechanism for challenging
125 agency decisions.

126 The highest profile dispute to date has been Charity Hospital of New
127 Orleans. The case illustrates the need for quick access to independent
128 review and the damage that can be done by delay in the FEMA process.
129 Shortly after the disaster, FEMA staff analyzed the damage to Charity
130 Hospital and proposed that the hospital could be repaired and returned to
131 use as a certified hospital for \$20 million. The State's position has always
132 been that the damage was so severe that the hospital could not be repaired
133 and must be replaced. The State produced three separate studies that
134 demonstrated the need to replace the hospital. Finally, after five years of
135 dispute, the State was able to utilize the arbitration process and was
136 awarded the full replacement value of the hospital – estimated to be \$474
137 million. The delay of five years has greatly impeded the City of New
138 Orleans' ability to offer the medical services necessary for such a
139 community and is a significant factor in the delay of recovery in that city.

140 **Shortcomings of the ARRA Arbitration Alternative**

141 If the ARRA arbitration alternative has any shortcoming, it is found in that
142 section of the implementing regulations adopted by FEMA which states:
143 "The expenses for each party, including attorney's fees, representative
144 fees, copying costs, costs associated with attending any hearing, or any
145 other fees not listed in this paragraph will be paid by the party incurring

146 such costs.” (44 CFR 206.209(l)) This requirement forecloses many small
147 or budgetarily constrained applicants from pursuing valid arbitration claims.

148 Specifically, we have observed that, unlike the FEMA appeals processes,
149 the ARRA arbitration is a more sophisticated process which requires the
150 use of legal counsel, subject matter experts and/or other consultants.

151 Because of the in-house capabilities of FEMA, the defense of an arbitration
152 case would not normally impose a significant financial burden upon FEMA
153 and in any case FEMA has the wherewithal to sustain the burden.

154 Conversely, applicants whose operating budgets are already pressed to the
155 limit can often not afford to incur the costs associated with arbitration (i.e.,
156 retention of counsel/subject matter experts/consultants, document
157 preparation, travel, etc.). Specifically, even if successful in arbitration, the
158 applicant ends up spending unrecoverable money to obtain a grant which
159 should have been provided free of charge if the proper agency
160 determination had been made at the outset. While an applicant with
161 significant resources can absorb the cost of arbitration, most applicants
162 with budgetary constraints cannot and are therefore effectively foreclosed
163 from accessing an exceptionally useful dispute resolution tool.

164 To make the arbitration process more reasonably available to small
165 applicants, we suggest that consideration be given to modifying 44 CFR
166 206.209(l) to allow reasonable costs, as determined by the CBCA panel, to
167 be awarded to an applicant. To ensure that frivolous claims are not raised,
168 the CBCA can be granted the authority to deny costs if they in fact find that
169 the applicant had no basis for the claim. In this way an applicant which had
170 confidence in its claim could pursue such with an expectation that there

171 would be no shortfall if it prevailed; frivolous claims, on the other hand,
172 would continue to be unrewarded and therefore likely avoided.

173 To address the intent of Congress to quickly resolve program disputes,
174 FEMA regulations require the submission of a request for arbitration within
175 thirty (30) days of a FEMA decision. It is suggested that because of the
176 complicated nature of some of the program issues, the need to hire counsel
177 and expert witnesses, and the need to bring them up to speed with the
178 program and the issues, this thirty (30) day period is insufficient to allow the
179 applicant to properly prepare. A sixty (60) day period to file a request for
180 arbitration would not significantly reduce the speed of resolution and would
181 give an applicant sufficient time to properly prepare its case.

182 Finally, it is suggested that the statutory threshold for arbitration of
183 \$500,000 is too high. Many applicants, especially the smaller
184 governmental entities or private nonprofits, have significant issues with
185 projects of lesser value, but are denied equitable recourse to independent
186 third party review.

187 I would like to take this opportunity to comment on the service and
188 professionalism of the Civilian Board of Contract Appeals, it's Chairman,
189 Judge Stephen Daniels, and the Judges serving on the assigned panels.
190 The Stafford Act Public Assistance program is a very complex and nuanced
191 program and the CBCA has given each case detailed attention and
192 responded to the process in a fair and even-handed manner. We have
193 developed great confidence in the CBCA's through the experiences of
194 arbitration we have had to date.

195

196 **OTHER LEGISLATIVE INITIATIVES**

197 There has been considerable discussion on the need to amend the Stafford
198 Act. The Stafford Act is a tool kit of authority used by FEMA to respond to
199 a disaster and provide assistance for recovery. FEMA brought that tool kit
200 with them in response to Hurricanes Katrina and Rita, but found not an
201 ordinary hurricane event, but a complete disaster. The Stafford Act tool kit
202 was not designed nor is it adequate to address the recovery needs of a
203 community that is completely and utterly destroyed by an event. The
204 Stafford Act is a suitable tool for an "ordinary" disaster when the damage
205 requires the repair or replacement of a few pieces of infrastructure. It does
206 not allow the necessary decision making or the necessary authority to plan
207 and implement the recovery of an entire community. The average disaster
208 over the last ten years measured in terms of Public Assistance Program
209 dollars was approximately \$40 million. Hurricanes Katrina and Rita will
210 likely top \$12 billion or 300 times the size of the average disaster.
211 Whereas a community can plan, manage and share in the funding of the
212 replacement of a couple of buildings in an average disaster, that
213 community is not capable of planning, managing or funding a catastrophic
214 event which damages all of its key infrastructure. We recommend the
215 amendment of the Stafford Act to include a catastrophic annex which
216 provides for the assistance in developing master recovery plans for a
217 community after a catastrophic event; that allows for the return of
218 infrastructure in a stronger more resilient form versus the current standard
219 of return the structure to the pre-disaster status; and provides for 100%
220 federal funding of recovery activities.

221 Section 552 of the Consolidated Appropriations Act of 2008, established an
222 important precedent and developed an important model for recovery,
223 especially recovery of "systems". The Section 552 provisions applied to the
224 Public Assistance funding for the recovery of public schools. It provides for
225 a single payment to the State Department of Education for all eligible cost
226 of schools damaged and provided for the waiver of the 25% Alternate
227 Project penalty. The result of that legislation was a unique
228 programmatically sound master plan for the rebuilding of the New Orleans
229 Recovery School District. The Recovery School District had a system of
230 187 schools damaged or destroyed in the storms. Some of those schools
231 were in areas which might not return. In some areas, it did not make
232 common sense to build back the exact same structure with the exact same
233 function that existed prior to the storms. Prior to adoption of Section 552,
234 FEMA and the State spent three years laboriously arguing over the
235 damage to the schools and the allowable rebuilding process under the
236 Stafford Act. If the State wanted to do something different than simply
237 replace a building, they would potentially face the 25% Alternate Project
238 penalty, thus being deprived of required resources to adequately recover
239 the school system. In 2008 FEMA and the State were at loggerheads and
240 the recovery of the school system was at a standstill. With the passage of
241 Section 552, the State and FEMA agreed on a process to implement the
242 legislative intent of the provision consistent with other provision of the
243 Stafford Act and recently FEMA has obligated a single Project Worksheet
244 for approximately \$1.8 billion which will fund the recovery of the school
245 "system" so that schools are brought back in an intelligent way to meet the
246 need of the recovering community.

247 The take away from this experience is a recommendation to provide for a
248 waiver of the 25% Alternate Project penalty in a catastrophic event and to
249 provide the applicant the ability to take a “systems” approach to recovery,
250 supported by a well designed master planning process which will ensure
251 that the community will recover in a stronger, more resilient fashion.

252 A very important program implemented by FEMA after Hurricanes Katrina
253 and Rita was the Community Disaster Loan (CDL) Program authorized by
254 Section 417 of the Stafford Act. Congress amended this provision following
255 the storm through the Community Disaster Loan Act of 2005, which
256 provided for the forgiveness of loans. These loans were extremely
257 important to the communities who needed support to bring back services
258 and pay operating expenses following the storms. Fifty-seven local
259 governmental entities took advantage of the loan program and borrowed
260 approximately \$822 million. As required by regulation, FEMA is in the
261 process of completing the review of these loans to determine the level of
262 payback. Initial indications from the review are that 42 local governmental
263 entities will be required to payback all or part of the CDL loan. We suggest
264 this puts an unfair burden on those communities still attempting to recover
265 and still in need of support, and that the FEMA analysis of the ability of
266 these local governmental entities to repay the CDL loans is flawed. For
267 example, the repayment analysis included one-time revenue streams and
268 did not discount post-disaster tax revenues based on the economic bubble
269 naturally created by recovery activities immediately after an event. We
270 request that this Committee review the loan forgiveness provisions of the
271 CDL regulations and provide guidance as to the Congressional intent for
272 the forgiveness of these loans.

273 Finally, we ask for support to implement a common sense proposal that will
274 assist Louisiana in becoming disaster independent and reduce the cost to
275 the federal government in future disasters. It involves the use of Stafford
276 Act Hazard Mitigation funding to build multi-purpose facilities that can be
277 used as mass shelters during a disaster. Under the Stafford Act, following
278 a presidentially declared disaster, in addition to support under the Public
279 Assistance Program, the State receives funding under the Hazard
280 Mitigation Program to assist in improving infrastructure to better protect
281 against a similar disaster in the future. Louisiana has asked FEMA to allow
282 a portion of the already allocated Hazard Mitigation funding available to the
283 State following Hurricanes Katrina/Rita/Gustav/Ike to be used to build multi-
284 purpose sheltering facilities. Although the State argues that providing
285 adequate in-state sheltering facilities actually mitigates loss of life and
286 property and enhances recovery, FEMA has been unwilling to allow the use
287 of the available funding in a nontraditional manner. During Hurricane
288 Gustav the State of Louisiana evacuated approximately 2 million people.
289 Currently, the State does not have sufficient shelter capacity, especially for
290 the "critical transportation need" population that cannot evacuate
291 themselves. Thus, during Hurricane Gustav the State transported
292 approximately 30,000 individuals to eight other States, at a cost to FEMA of
293 over \$50 million. The common sense of the request is the fact that the
294 State will spend money already allocated and it will save the federal
295 government millions for each future event.

296 **SUMMARY**

297 In summary, we believe the ARRA arbitration provisions are a very useful
298 and beneficial tool in the recovery process as it provides speed and

299 certainty in the resolution of disputes. We recommend that it be made
300 available in all disasters. Our experience has demonstrated a need to
301 amend the Stafford Act to provide for a different approach in the recovery
302 from a catastrophic event. This should include the ability to waive the
303 State's cost share in a catastrophic event, the elimination of the 25%
304 Alternate Project Penalty, the ability of applicants to look at a "systems"
305 approach to the recovery of a community, and the positioning of FEMA with
306 the ability to help communities with the expertise necessary to develop
307 master recovery plans that ensure the return of a stronger more resilient
308 community.

309 Few jurisdictions in our Nation have experienced the levels of disaster
310 brought upon our State in the last five years. Louisiana continues to
311 recover from Hurricanes Katrina and Rita, the largest disaster in U.S.
312 History. The difficulty of this recovery has been greatly compound by
313 Hurricanes Gustav and Ike in 2008, which directly affected still recovering
314 communities and added another \$1 billion of damaged infrastructure. Then,
315 as we know, most recently the State has been contending with the
316 environmental and economic impact of the largest oil spill in U.S. history.
317 The 2010 Hurricane Season is still upon us and we keep our fingers
318 crossed that we will be spared. As Governor Jindal has said repeatedly
319 throughout his term "We continue to plan for the worst and hope for the
320 best."

321 In closing, the State of Louisiana greatly appreciates the attention and
322 interest this Committee has demonstrated over the years in helping the
323 State navigate a very cumbersome, bureaucratic, highly regulatory,
324 recovery process.

Written Statement of

Tony Russell

**Regional Administrator
FEMA Region VI
Department of Homeland Security**



FEMA

**“Five Years after Katrina:
Where We Are and What We Have
Learned for Future Disasters”**

Before the

**Subcommittee on Economic Development, Public Buildings
and Emergency Management
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC**

I. Introduction

Good morning Chairwoman Norton, Ranking Member Diaz-Balart, and distinguished Members of the Subcommittee. My name is Tony Russell, and I am the Regional Administrator of the Federal Emergency Management Agency (FEMA) Region Six, which includes the states of Texas, Louisiana, New Mexico, Oklahoma and Arkansas. It is an honor to appear before you today on behalf of FEMA.

Before coming to Region Six, I served as Acting Director of the Louisiana Transitional Recovery Office (LATRO), where I worked with State, local and federal officials in order to help Louisiana recover from Hurricanes Katrina and Rita. In the years following these hurricanes, it became apparent that there were many impediments in the decision-making process that negatively impacted our recovery programs. I know from experience that when working with others, you can only move as fast as the speed of trust. Thus my first charge when I got to the LATRO was to foster trust between FEMA representatives and state and local officials. I also worked to support FEMA staff as they identified problems and worked collaboratively to implement solutions. I began by opening up the lines of communication, getting to know the Governor, state and local officials as well as others, and making myself known in the community. It is with that trust in hand that we were able to shift the focus from process to results and break many of the logjams to recovery.

Since then, we have been able to bring all of the parties together to work through outstanding issues and move several hundred projects forward that were left idle due to our collective inability to effectively communicate and trust one another. The LATRO goal is to help the states, local governments and communities speed up the recovery process by improving our ability to make and implement decisions.

Five years ago, Hurricane Katrina struck the Gulf Coast region, devastating 93,000 square miles and claiming more than 1,000 lives. Communities suffered, not just in Louisiana, but also in Texas, Alabama, Mississippi and Florida. While we cannot control the strength of a hurricane or any other natural disaster, we can control how we prepare for, protect against, respond to, recover from and mitigate such disasters. In the aftermath of Hurricanes Katrina and Rita, we witnessed failure in aspects at every level of government. However, over the past year and a half, this Administration, under the leadership of President Obama, Secretary Napolitano and Administrator Fugate, has demonstrated a fierce commitment to helping the Gulf Coast region rebuild.

Recovering from a disaster on the magnitude of Hurricane Katrina requires a team approach, and FEMA is only one part of the team. All members of the federal family, including the Department of Housing and Urban Development (HUD), the Army Corps of Engineers, the Department of Health and Human Services, the Department of Education and others, including state and local governments, the private sector, faith groups and non-profits, and ordinary citizens all have a role to play. Hurricane Katrina survivors and volunteers from around the country have been and continue to be the biggest contributors to the Gulf Coast's recovery.

I am here today to share with you some of the lessons we have learned throughout this process, and how we have applied those lessons to ensure that disaster-affected communities can heal faster and rebuild stronger. Over the past year and a half, we have launched new initiatives to speed up the recovery process, cutting through red tape and making sure that individuals, families and communities in need of assistance are able to get it. Our greatest asset throughout this process has been a commitment to building relationships and work with the communities we serve.

We still have work to do, but we are committed to doing that work, and to doing it right. As Administrator Fugate said last month in New Orleans on the fifth anniversary of Hurricane Katrina, rebuilding the Gulf Coast region is a marathon, not a sprint. Our ability to finish the race depends on the relationships we have built and the partnerships we have made. Going forward, I believe that working with our partners will continue to be our greatest tool in ensuring an effective and efficient recovery for Gulf Coast residents.

II. A New Attitude and a Fresh Approach to Recovery

In the years immediately following Hurricanes Katrina and Rita, many recovery projects were stalled due to disputes and the lack of an efficient means to settle them. A culture of formality and process prevailed over a focus on outcomes. In my opinion, FEMA staff was focused more on executing projects the way things have always been done, instead of exploring the full realm of options available.

We needed a change in both attitude and approach. We needed to communicate and start working together to use the law as a tool to serve communities.

The systems in place did not facilitate good communication with our state and local partners. For example, while FEMA Command Staff operated out of New Orleans, most of the state officials were in Baton Rouge, and we lacked a system for regular communication. Our ability to resolve disputes was hampered, and the pace and scale of recovery suffered as a result. We now have a larger FEMA Command staff presence in Baton Rouge, and we stay connected to state officials through weekly meetings to discuss evolving objectives and priorities.

We are continually working to improve the way we settle disputes. While we have a robust and effective appeals process, we also now employ alternative dispute resolution mechanisms, including negotiation, mediation and collaboration to facilitate decision-making. Our continued focus on the outcome over the process has been vital to our ability to move projects forward.

Review Panels

One of the most important changes we made is the way we approach the recovery process. We re-evaluated our own attitudes, so that we can be more proactive and better at identifying areas to improve our working relationships with State and local partners. An example of this shift is the establishment of two Public Assistance review panels, which help to expedite decisions on pending Public Assistance projects, and give us the opportunity to work closely with applicants

to resolve long-standing disputes. Created by Secretary Napolitano in 2009 in order to expedite final eligibility decisions for disputed projects, these review panels can help stalled projects to move forward. To date, these two panels have resolved 173 previously disputed cases.

Our ability to resolve these disputes is a result of the relationships we have built in the communities.

Arbitration Review Panels

In some cases, the dialogue facilitated by our review panels is not successful and we now have a tool to help us quickly resolve these public assistance disputes. Last year, Congress enacted legislation requiring FEMA to establish a new arbitration process to provide an independent adjudication of disputes arising from public assistance projects through a neutral panel of arbitrators. We have received 25 arbitration cases to date. Of these, the Civilian Board of Contract Appeals has issued five decisions in favor of the applicant, four decisions in favor of FEMA, and three decisions in which the applicant received a portion of its request. In addition, one case has been withdrawn and six have settled or are in the process of settling. Six cases remain open.

Public Assistance

FEMA has demonstrated a fierce commitment to helping Louisiana and the rest of the Gulf Region get back on its feet. One of the most important ways we do this is through our Public Assistance Program. Since January 2009, FEMA has obligated over \$2.55 billion in Public Assistance funding in Louisiana, including: \$1.62 billion in education; \$235 million in public works; \$177 million in public safety and protection; \$7.9 million in health care; \$428 million in public infrastructure; and \$83 million in debris removal and emergency protective measures. Over the past year and a half, Mississippi has received \$240.5 million in Public Assistance funding. This money is essential to rebuilding communities, and FEMA continues to fund projects that get children back to school, parents back to work, and cities back to providing essential public services through hospitals, fire departments, law enforcement, safe roads and clean water.

Recovery School District and Systemic Payments

Other legislative authorities have also helped us to directly assist affected communities. The Consolidated Appropriations Act of 2008 (PL 110-161) provides a statutory waiver of the alternate project penalty. For example, FEMA is now able to provide funding at 100 percent for educational facilities in Louisiana, known as the Recovery School District (RSD). This will allow RSD to restructure their school campuses without any reduction in Federal financial assistance. This past month, Administrator Fugate and Secretary Napolitano announced that a total of more than \$1.8 billion in funding would be obligated to RSD and the Orleans Parish School Board, in order to repair and replace public schools damaged by Hurricane Katrina. RSD will leverage eligible funds pertaining to 127 disaster-damaged campuses to a New Orleans Public School Master Plan that consolidates operations to 87 campuses, over the period of an estimated 8 years.

Our close coordination with the Recovery School District epitomizes the kind of outcome-based approach we have brought to the public assistance recovery process. By working to build a level of trust with the Recovery School District and the Louisiana Governor's Office of Homeland Security and Emergency Preparedness, we could eliminate delays by working with them in the same room, sharing notes and experts, rather than delaying progress by writing letters back and forth to one another and continuing to foster a divisive working relationship. I have placed great emphasis on our continued ability to build and sustain that trust. Moving forward, we will continue to look at our existing policies, in order to determine where we might have some flexibility to look at larger systems instead of reviewing projects on an individual basis.

Individual Assistance

Recovery funding also comes in the form of individual assistance, including helping disaster survivors with housing, crisis counseling, low interest loans, legal services and unemployment assistance. With respect to housing, FEMA has assisted 1,498,722 survivors of Hurricanes Katrina and Rita with some form of financial assistance, totaling nearly \$5.7 billion and making it the largest temporary housing operation in our nation's history. As of September 10, there were 655 Louisiana households and 168 Mississippi households still residing in FEMA-provided temporary housing units as a result of Hurricanes Katrina and Rita. Although over 99 percent of those originally housed by FEMA have now moved into longer-term housing, FEMA continues to work with HUD and our other federal, state and local partners to help the remaining individuals and families transition from FEMA temporary housing to longer-term housing that better meets their needs.

Fresh Approaches to Disaster Preparedness, Response and Recovery

This Administration continues to approach the work of preparedness, response and recovery with a fresh outlook, finding innovative ways to better support state and local officials, individuals, families and communities.

One of the ways we do this is by recognizing that recovering from a disaster on the scale of Hurricanes Katrina and Rita requires sustained and ongoing efforts. To that end President Obama asked Secretaries Donovan and Napolitano to chair the "Long-Term Disaster Recovery Working Group" in order to focus on the long-term effort of communities to rebuild after disasters. Earlier this year, the Working Group released a draft of the *National Disaster Recovery Framework*. The final Framework will be presented to the President later this year, once all of the public comments on the draft have been reviewed.

The Administration also recognizes the importance of all-inclusive planning to make sure that needs are met with respect to emergency planning, response and recovery efforts in the event of a catastrophic disaster. FEMA established both the Children's Working Group and the Disability Working Group in order to ensure that the unique needs of children and individuals with disabilities are included in our planning. In addition, we are proactively bringing diverse racial and ethnic communities to the table, including populations whose members speak limited English.

Internal Policy Review

One of Administrator Fugate's top priorities as FEMA Administrator has been to eliminate barriers to the efficient and effective delivery of assistance under the Public Assistance Program and Individual Assistance Program to disaster-impacted communities. In order to ensure that we are adequately meeting the needs of grant applicants, FEMA recently completed an aggressive review of all disaster assistance policies in the Public Assistance Division. The idea behind such an internal policy review is to allow for an appropriate use of the Stafford Act that maximizes our ability to streamline and enhance implementation of our programs. A similar review is currently being conducted in our Individual Assistance Division. This results-oriented approach will be essential to our work to help communities recover faster.

As a result of our Public Assistance review, FEMA has identified several matters that could improve the delivery of our services under the Public Assistance Program. FEMA is working with the Department and appropriate stakeholders to determine the best way to move forward with those ideas.

Since January 2010, FEMA has reviewed 84 disaster assistance policies, and has made several recommendations for the purpose of revising or rescinding policies, or converting them into fact sheets. By putting clear systems into place, we can help to ensure a results-oriented approach that will lead to better and faster service to affected communities. The next step in our continued effort to remove barriers to efficient and effective delivery of public assistance will be a bottom-up review of the Public Assistance Program. We look forward to sharing those results with this Subcommittee.

As an example, within the past month, FEMA completed a Standard Operating Procedure (SOP) in order to provide guidance on the process that FEMA staff will follow in order to effectively and efficiently transfer the responsibilities of an outgoing Public Assistance Project Specialist to an incoming Project Specialist. While transitions are often necessary, it became apparent that we must do a better job of ensuring operations are able to continue uninterrupted. As a result, the new SOP requires, among other things, a transition briefing, meetings with sub-grantees, and an overlap of at least five days during the transition period in order to ensure the proper transfer of responsibilities at the Joint Field Office (JFO). This new approach of communication and information-sharing will allow incoming Project Specialists to hit the ground running and reassure the State that the trust previously established will be maintained with the incoming staff and the lines of communication will remain open.

III. More Tools in our Toolbox

A fundamental shift in attitude and a focus on communication with our partners have allowed us to cut through red tape and get assistance to those who need it the most. But we have also benefitted greatly from the enactment of specific programs and policies that have helped to change the way we do business, and I would like to highlight a few examples for you.

Post-Katrina Emergency Management Reform Act (PKEMRA) of 2006

A major change made to FEMA in the aftermath of Hurricane Katrina was Congress' enactment of the Post-Katrina Emergency Management Reform Act (PKEMRA) of 2006. This law enabled FEMA to improve our own processes so that we can more quickly and efficiently provide assistance to the communities we serve. The law provided FEMA with more tools in our toolbox, allowing us to enhance operations, enable effective decision-making, and upgrade our response and recovery capabilities. I'd like to discuss just a few of the many PKEMRA provisions, as well as the ways in which FEMA's implementation of these provisions has helped us to better serve our communities.

PKEMRA created several provisions in order to prevent waste, fraud and abuse in the contracting and relief aid processes. To this end, FEMA implemented new software in 2007 that communicates real-time data to caseworkers in order to prevent duplicate housing payments. FEMA also implemented checks in the National Emergency Management Information System that trigger additional review for 'high-risk' recipients before assistance is delivered, in order to prevent potential fraud. These actions allow FEMA to balance the need to quickly provide disaster aid to victims with our responsibility to be good stewards of the Disaster Relief Fund.

FEMA has also greatly benefitted from the establishment of the National Advisory Council, which provides valuable advice on a number of initiatives early in the concept development phase in order to solicit feedback and gain stakeholder buy-in before initiatives are completed.

FEMA has implemented the PKEMRA requirements to establish a National Emergency Family Registry and Locator System and, separately, the National Emergency Child Locator Center, in conjunction with the Attorney General and the National Center for Missing and Exploited Children, to help displaced persons find their loved ones. We've worked with our partners to provide first aid, and education, as well as all-hazards preparedness training to children grades one through seven, caregivers, parents, and responders. The agency also supports team community emergency response training for high school students.

Moreover, PKEMRA has helped us to integrate the private sector into our preparedness, response and recovery efforts. In 2007, FEMA established a Private Sector Division of External Affairs, in response to recommendations in PKEMRA. Our Private Sector Division facilitates full engagement with business and industry, academia, non-profit and other non-governmental organizations as a key player in disaster preparedness, response and recovery.

Finally, PKEMRA enabled FEMA to strengthen its partnerships within the entire emergency management community through the establishment of both a small state and rural advocate and a national disability coordinator, whose office has subsequently been expanded to an Office of Disability Integration and Coordination.

These are just a few examples of the many ways in which the enactment and continued implementation of PKEMRA has strengthened our ability to help individuals, families and communities.

Special Community Disaster Loans

The Stafford Act authorizes FEMA to provide loans to local governments who have suffered a substantial loss of tax and other revenue as a result of a major disaster, and who have demonstrated a need for financial assistance in order to perform their governmental functions, through the Community Disaster Loan (CDL) Program. In response to Hurricanes Katrina and Rita, Congress provided additional funds but specified that these Special CDLs could not be cancelled. The U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007 (PL 110-28) removed the prohibition on cancellation. Therefore, FEMA has the authority to cancel repayment of all or a part of an applicant's Special CDL if the "revenues of the local government during the three full fiscal year period following the major disaster are insufficient to meet the operating budget of the local government, including additional disaster-related expenses of a municipal operation character" (42 U.S.C. 5184(c)(1)).

When drafting the regulations to implement the cancellation process, FEMA gave applicants the flexibility to choose whether this three-year timeframe comprises the 36-month period beginning on September 1, 2005, or the 36 months of the applicant's fiscal year, whichever is most advantageous to the applicant.

We have completed our initial analysis of the financial information submitted by the applicants and met individually with each to personally review the documentation. Some applicants provided additional data that is being evaluated to ensure all relevant information is included in our eligibility analysis. As Administrator Fugate mentioned last month at a Senate field hearing in New Orleans, we are taking a second look at these remaining applications, and are working closely with applicants during this second round of analysis. The final determinations on cancellation eligibility will be made shortly. Upon completion of this process, we will report back to Congress to discuss how this authority was used and implemented.

IV. Conclusion

FEMA has learned valuable lessons from Hurricane Katrina and has taken steps to prepare for the next disaster. We were gratified by the results of a recent DHS Office of Inspector General report, which stated that FEMA is better prepared now than at any previous time in its history to handle a catastrophic disaster.¹ We will continue to build upon the significant progress that we have made to ensure that we are doing everything within our power to help communities prepare for, respond to, recover from and mitigate all major disasters.

We view the work of recovering from Hurricanes Katrina and Rita with a simple approach. First, we are here as partners. Second, we will work closely with disaster-affected communities to reach a common-sense outcome. Third, we will be both flexible and pragmatic as we work to facilitate much-needed recovery.

¹ Department of Homeland Security Office of Inspector General, "FEMA's Logistics Management Process for Responding to Catastrophic Disasters," OIG-10-101 (July 2010).

Thank you again for the opportunity to testify before you today on the lessons we have learned from Hurricanes Katrina and Rita, and how we have changed the way we do business in order to facilitate a faster, smarter and better recovery. We will continue to utilize a results-oriented approach with an emphasis on building strong partnerships and continually communicating with our partners. I am happy to answer any questions the Subcommittee may have.



**THOMAS M. "MIKE" WOMACK
MISSISSIPPI EMERGENCY MANAGEMENT AGENCY DIRECTOR**

**TESTIMONY
BEFORE THE**

**HOUSE TRANSPORTATION AND INFRASTRUCTURE SUBCOMMITTEE ON ECONOMIC
DEVELOPMENT, PUBLIC BUILDINGS, AND EMERGENCY MANAGEMENT**

ON

FIVE YEARS AFTER KATRINA:

**WHERE WE ARE AND WHAT WE HAVE LEARNED FOR FUTURE
DISASTERS**

THE UNITED STATES HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 2010

INTRODUCTION

Thank you Chairwoman Norton, Ranking Member Diaz-Balart, and distinguished members of the Committee for allowing me the opportunity to provide you with a statement for the record on Mississippi's progress in rebuilding communities after Hurricane Katrina five years ago. I am Mike Womack, the Director of the Mississippi Emergency Management Agency. My tenure with MEMA began in 2002 and I served as Director of Response and Recovery and Deputy Director, leading up to my appointment as the Director in December 2006. I bring more than 29 years of experience in active and reserve military service, retiring in June 2001 as a Lieutenant Colonel from the Mississippi Army National Guard with an extensive operations management background.

Five years ago, Hurricane Katrina made landfall on the Mississippi Gulf Coast, tearing apart homes, business, and our communities. Nothing was left untouched, including our schools, police and fire stations, city halls, libraries, hospitals, roads, and utilities. While it seemed nearly impossible at the time, I am proud to be here today to tell you about the extraordinary progress that our communities and citizens have made in rebuilding. Virtually all projects are underway, while some are in the final stages of planning and design, others are now complete. With each ribbon cutting that I attend, I am reminded of where we've been, and how far we have come. Mississippi's tremendous recovery progress would not have been possible without the strong partnership from the federal government.

While I understand that this hearing will primarily focus on the Public Assistance program, first I would first like to provide a brief update on the current status of our housing and mitigation efforts.

HOUSING

We have worked closely with our FEMA partners to transition the remaining travel trailer occupants to more permanent housing solutions. As of September 1, 2010, 171 households remain in FEMA temporary housing units, down from more than 45,000.

MEMA has also used its \$281 million grant from FEMA for the Mississippi Alternative Housing Program, to construct and install Mississippi Cottages as an alternative to those living in FEMA disaster housing. The units were designed to be safer, more durable, more comfortable, and more aesthetically pleasing than FEMA temporary housing. All units offer a front porch and larger bathroom and living areas, and were designed to reflect traditional Gulf Coast architecture. Built to the highest standards of the International Residential Code and HUD Code, these units have a dual certification that allow them to be set anywhere in the country and moved from place to place. At the peak of the program, more than 2,800 units were installed and occupied in Hancock, Harrison, Jackson, and Pearl River counties.

Thanks to the approval of local jurisdictions many of these units will be allowed to stay where they are as permanent residences. As of September 1, 2010 more than 700 households have purchased their cottage. For the cottages returned to MEMA, we have accepted proposals from nonprofits to use the cottages in housing developments for low and moderate-income households. Approximately 430 cottages have been awarded to nonprofits thus far.

The state and FEMA have learned from our Alternative Housing Program for future post-disaster housing initiatives. In April 2010, parts of Central and North Mississippi were struck with a series of deadly tornadoes resulting in a federal declaration. During that disaster, the Mississippi Cottages were used in conjunction with FEMA temporary housing units.

FEMA disaster-housing units were used for families who would be able to repair their homes. For those families who would be unable to make repairs or rebuild their homes, they were allowed to purchase a cottage unit as a permanent housing solution. Due to the working relationship between the state and FEMA, disaster survivors were able to register for assistance through FEMA and go through a vetting process to determine which housing option would be best for each family.

This was made possible because FEMA revised policy to allow Individuals & Household Program grant funds to assist these families in affording a cottage unit, or any ancillary work that needed to be done such as debris removal, access onto property or repair and/or replacement of damaged wells or septic systems. There are now 40 families in Central Mississippi who were able to accept a Mississippi Cottage as their permanent residence due to this policy change.

We do recognize that in a catastrophic event, there is still a need to get short-term, temporary housing such as FEMA's travel trailers on the streets quickly and then use other alternative housing solutions such as cottages to help aid the recovery process for communities. Options like the Mississippi Cottage could be used in conjunction with FEMA units, or as an exception to FEMA providing larger mobile home units.

MITIGATION

Mississippi is using its \$293 million in FEMA Hazard Mitigation Grant Program funding to help communities build back stronger and lessen future disaster damages. We are grateful to Congress for recently including language in the 2010 Supplemental Appropriations Act bill (HR 4877, Public Law 111-212) directing FEMA to consider the match requirement for Hurricane Katrina's HMGP funds to have been met. Mississippi's CDBG-funded homeowner assistance program served as a global match for the HMGP, and the recent legislation helped to eliminate some overly bureaucratic and burdensome documentation requirements. Through the HMGP, Mississippi is implementing a variety of projects and measures to protect our citizens, responders, and property from future losses. Mississippi's HMGP projects include:

- o Retrofitting 36 critical facilities and infrastructure to Category 5 hurricane standards and wind speeds in excess of 200 miles per hour.
- o Hurricane/Tornado safe rooms to provide protection for 33,000 residents and first responders (includes 33 new facilities and upgrades to 23 existing facilities). These include three new schools that can provide shelter for 10,000.
- o Construction of 88 group and 4462 single-family tornado safe rooms.
- o Relocation/Acquisition of more than 300 homes and the elevation of 43 homes in flood prone areas.

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- o Installation of 216 storm warning sirens and 222 Alert FM warning devices throughout the state.
- o Installation of back-up generators at 341 sites and the purchase of 223 trailer mounted generators.

We are appreciative of Congress's recent assistance in helping to bring our global match negotiations with FEMA to a successful conclusion.

PUBLIC ASSISTANCE

FEMA's Public Assistance program is one of the most significant resources available to support Mississippi's recovery and rebuilding efforts. As the grantee, MEMA works very closely with FEMA and all of our sub-grantees to implement the PA program to repair disaster damages to our facilities and infrastructure. I appreciate the continued partnership of the entire FEMA organization, including its local recovery office, Region IV, and FEMA Headquarters as we work collectively to help Mississippi complete its recovery.

As of September, 1, 2010, nearly 70 percent of the Public Assistance funds obligated have been spent. MEMA works closely with the applicants to provide prompt reimbursements and resolve any issues affecting implementation.

Category	Obligated	Drawn Down	Balance	% Paid
A- Debris Removal	\$718,021,216.13	\$715,516,212.12	\$2,584,885.09	99.65
B- Emergency Protective Measures	\$423,260,965.44	\$408,917,007.86	\$14,213,449.18	96.61
C- Roads and Bridges	\$92,268,974.69	\$51,133,320.68	\$40,920,971.61	55.41
D- Water Control Facilities	\$1,137,515.77	\$406,145.38	\$720,077.88	35.7
E- Buildings and Equipment	\$672,182,182.54	\$368,281,325.91	\$301,861,627.39	54.78
F- Utilities	\$904,924,085.99	\$392,274,885.77	\$510,024,635.43	43.34
G- Parks, Recreational, and Other	\$200,511,661.47	\$109,995,690.91	\$90,000,695.66	54.85
Z- State Management Costs	\$140,086,129.12	\$120,836,339.21	\$19,249,789.91	86.25
	\$3,152,392,731.15	\$2,167,360,927.84	\$979,576,132.15	68.75%

State Management of the PA Program

Given the scale of the PA program and extraordinary amount of funding involved, Mississippi has put in place one of the most efficient management systems for PA funds. The system minimizes the potential for fraud and ensures local governments keep track of the completion of and payments for their funded projects. To most effectively manage the PA program, we hired an engineering firm to make sure the scopes of work were properly determined and hired an accounting firm to ensure that finances are properly documented and minimize any potential for de-obligation of funds. The state developed a software system that automatically tracks the funds from the original project estimate, through request from reimbursement, to disbursement of funds. The software is integrated with FEMA's and the state's disbursement systems. The strong financial and programmatic/technical management system that we have established in Mississippi to maintain internal control is a model for other states during disaster recovery.

Based on my experience administering this program, I believe that it is critical that the federal government not limit a state's ability to create effective management systems. Unfortunately, FEMA's current Disaster Assistance Policy caps state management costs at 3.34 percent of the federal share of the projected total PA program costs. Had this policy been implemented during Hurricane Katrina recovery, Mississippi would not have been able to implement its management program. The current policy must be rescinded and states should be funded at a level that allows for effective management of this critical recovery program.

Numerous Initiatives to Support PA Implementation

Mississippi, in collaboration with our local and federal partners, has implemented a variety of initiatives to support the effective execution of the PA program. Many of these efforts have proven to be valuable lessons learned and best practices for us, and I believe have merit for FEMA and other states in future disasters as well. Some of the unique approaches that we have taken under the PA program include:

- *Integrated Project Management*- many local applicants are blending their PA project funds with other federal and state funds, including HMGP, HUD Community Development Block Grants, and State Archives and History grants. We recognized the need to bring all of the project stakeholders together to ensure transparency of funds, align reviews and deadlines, and ensure rapid decision-making. Through monthly meetings with the applicants, together with all relevant state and federal partners we facilitated timely decision-making and developed workable policies for accurate funds tracking and allocation of insurance proceeds. The participation of FEMA Recovery Office leadership and staff and support from the Regional Office was invaluable in this process.
- *Management reports and tools*- Unfortunately, FEMA's NEMIS system does not provide the level of project detail necessary for us to effectively manage PA projects through completion. So that we would have the project status information necessary to support our applicants, identify problems and delays, and track progress, the state and FEMA developed a database to capture this information. This database, in conjunction with NEMIS and our state's financial software, give MEMA the information we need to aggressively manage the program and support the applicants.
- *MEMA/FEMA tech team collaboration*- In order to accelerate reviews and decisions from the MEMA and FEMA PA technical teams, MEMA has established several new management reports, to track and age issues awaiting decision. In addition, MEMA identifies its priorities on a bi-weekly basis to the FEMA tech team so that they can organize their assignments and workloads accordingly. We have seen improved response times since instituting these new reports.
- *2010 and 5th Anniversary goals*- MEMA established programmatic and financial goals for 2010, including interim goals to coincide with the 5th anniversary of Katrina. We briefed the FEMA Recovery Office and Regional Office on our goals so that we could stay aligned and work collaboratively towards achieving them.
- *Application of FEMA's Cost Estimating Format and willingness to adjust obligations to actual estimates*- MEMA worked with FEMA to apply its CEF factors to project estimates, particularly in cases of improved projects where funding would be capped. In several cases, applicants were slow to move forward with projects because they disagreed with FEMA's original funding estimates. With the application of CEF, many projects saw

an increase in estimated costs, some significantly. Resolution of these issues has helped to put stalled projects back on track.

Appeals and Arbitrations

Though we try to broker agreements between FEMA and the applicants, disagreements are inevitable. As of September 1, 2010, we have had 145 PA issues go through the appeals process with FEMA, with 25 of those awaiting resolution.

We appreciate Congress and the Administration's efforts to establish an independent arbitration process for the PA program, and since the arbitration process began last fall, we have had nine issues go to arbitration. I have enclosed a chart detailing the cases and arbitration decisions as an appendix to my testimony. The arbitration process now in place for Katrina Public Assistance has proven effective in resolving disputes in a more expeditious and impartial manner. Going forward, I believe that some form of an independent, third party appeal or arbitration process should be established for the Public Assistance program, which may require legislative changes. Further, because the current arbitration process has resulted in several decisions that were contrary to FEMA's original decisions at the field and regional levels, we need to ensure that the flexibilities that the arbitrators have found in these cases are permanently incorporated into the PA program and its policies.

Remaining PA Challenges and Lessons Learned for Future Disasters

While I am proud of Mississippi's recovery accomplishments and appreciative of FEMA's continued partnership, there are still challenges that remain.

Trapped Funds

As our applicants execute their repair and rebuilding projects, we are at time unable to reimburse them up to the expenses that they have incurred. Because applicants are working on numerous projects simultaneously and the funding issues can sometimes take some time to resolve, their funding gaps can grow significantly. In Mississippi, we use the expression "*trapped funds*" to describe this situation. Applicants may have "trapped funds" when they've expended funds on the work, but we are unable to reimburse them for a variety of reasons. In some cases, PWs include the traditional scope of work, but other information about the project is included elsewhere in the PW, such as in general comments. We are working with FEMA to incorporate scope and eligibility issues from comments into the actual scope of work, to minimize the potential for de-obligations at closeout. In other cases, applicants may have trapped funds because of change orders, which need to be reviewed by the PA technical teams, and, if approved, these activities must be formally documented as PW versions. Additionally, we are seeing many applicants with trapped funds because their actual architectural and engineering costs are higher than what FEMA has approved. FEMA uses a percentage of the overall project to determine A&E estimates. Depending on the complexity of the work, such as infrastructure and hospital projects, the actual A&E costs incurred by the applicant are higher than what FEMA will allow, resulting in a funding gap. We are grateful that the Disaster Relief Fund has been replenished and FEMA is once again able to obligate funds for permanent work projects. Earlier this summer, there was more than \$75 million in project worksheets and versions that FEMA was not able to obligate, further exacerbating the trapped funds issue for some applicants.

Timely reviews and decisions

Timely reviews and decisions by FEMA regarding technical issues, change orders, extension requests, and other issues are essential in keeping our recovery projects on track. The State will continue to be aggressive with the applicants to ensure that they submit the required documentation and information so that FEMA can complete its reviews and make decisions as quickly as possible. We cannot afford to have projects stall because of pending decisions and uncertainties regarding eligibility, time extensions, or scope changes.

Changing Decisions

Looking back on the last five years, some of our most difficult challenges have been because of changing decisions throughout the PA process. Earlier on, as staff turnover was more frequent, FEMA staff were regularly questioning and changing the decisions of their predecessors. These decision changes often resulted in reducing the scope of work and eligible funds. Unfortunately, in many of these cases applicants had already expended funds and moved forward with these projects, only to be faced with costly de-obligations and stalled projects. Recovery efforts were impeded by the varying interpretations of PA projects. While we have worked hard to move beyond these issues at this point in Mississippi's recovery, I am concerned that this issue has not been resolved for the program itself, and will still be a problem in future disasters. I believe that, through law or policy, FEMA should be required to follow through on its decisions and not subsequently take money away from applicants because of internal FEMA decision changing. If FEMA's contractors are found to have made improper decisions, FEMA should hold them liable for the damages, not the applicants who acted at the direction of FEMA at the time.

OIG Oversight

FEMA has been a dedicated, hardworking and outstanding partner to the state and our local governments. Unfortunately, in several cases, they have been hampered by an oversight system that focuses on the recovery of federal funds, not the identification of and proposed solutions to problems in the FEMA recovery process. The DHS Office of Inspector General contributed greatly to ensuring that misuse of federal funds has been minimized; however, I believe that OIG should not recommend de-obligation of funds that were paid to local governments unless there was an attempt to defraud. If local governments made mistakes, either based on guidance from FEMA staff or based on their inability to get any guidance, they should not be penalized.

Special Community Disaster Loan (CDL) cancellations

Mississippi is concerned about the negative financial and operational impacts to its communities and school districts because of FEMA's recent determinations that more than 51 percent of the Special Community Disaster Loans will not be cancelled and will need to be repaid. FEMA recently notified Special CDL recipients of its initial determinations regarding cancellation of the loans. Based on the analyses of FEMA's contractor, of the \$182 million in loans provided to Mississippi applicants, \$78 million qualifies for cancellation, \$93 million must be repaid, \$9 million is still under review, and \$1 million has already been repaid. Repayment of these loans will negatively impact the long-term recovery efforts in these communities. Five years after Katrina, coupled with the current poor economic climate, our communities and school districts are struggling to make ends meet. Several communities are

now or will soon be implementing lay-offs, and yet they are expected to re-pay loans that could have been cancelled. In June 2009, Mississippi submitted comments on the proposed regulation. If those comments had been accepted, it would have provided for a more realistic basis for loan cancellation. I recommend that FEMA and Congress re-examine this issue.

PA Pilot Program

To enhance our recovery toolbox for future disasters, I would like to see FEMA re-establish the provisions of its successful Public Assistance Pilot program as permanent elements of the PA program. In accordance with the 2007 DHS Appropriations Act (Public Law 109-295), FEMA conducted a Public Assistance Pilot Program with the goals of reducing the costs to the Federal Government of providing assistance to State and local governments, increasing flexibility in grant administration, and expediting the provision of assistance to States and local governments. FEMA implemented the PA Pilot program from June 2007- December 2008. The PA Pilot program:

- o Provided grants on the basis of estimates.
- o Increased the Federal cost share to applicants that have a FEMA-approved debris management plan and at least two pre-qualified debris and wreckage removal contractors identified prior to a disaster.
- o Allowed applicants to retain any revenue from recycling disaster debris as an incentive to recycle debris.
- o Reimbursed the straight- or regular-time salaries and benefits of an applicant's permanently employed staff that performs debris-related activities.

Streamline Environmental and Historic Preservation Reviews

In my earlier testimony, I described our efforts to aggressively manage recovery projects that are funded by multiple federal funding sources. One of the most frustrating issues throughout our recovery and rebuilding efforts has been duplicative environmental and historic preservation reviews. The federal government should streamline this process by requiring only one environmental and historic preservation review per project, regardless of whether multiple federal funding sources are contributing to the project. Currently, each federal agency that is contributing funding to a project must conduct its own environmental and historic preservation reviews. This requirement is time-consuming, redundant, and had significantly delayed rebuilding efforts. The federal program with the largest funding contribution for a project should be responsible for addressing the environmental and historic preservation reviews and sharing results with other federal agencies.

CONCLUSION

I appreciate the opportunity to appear before this committee and report to you on the tremendous progress that we have made in the five years since Hurricane Katrina. While some challenges remain, I am confident that by continuing to work together with our partners at FEMA and our local communities, we will find resolution and complete our recovery and rebuilding efforts.

**APPENDIX:
MISSISSIPPI (DR-1604) HURRICANE KATRINA ARBITRATION STATUS UPDATE (AS OF 8/10/10)**

No.	Applicant Name	Summary of Request	Amount in Dispute	Amount awarded (total FEMA and CBCA)
1.	Bay-Waveland School District	Requested replacement eligibility for roofs, windows and siding across three school campuses	\$ 6,988,360.59	\$ 6,988,360.59
2.	Mississippi State Port Authority	Requested eligibility of total costs of replacement for two cold-storage warehouses according to 50% Rule/CEF	\$ 18,969,703.00	\$ 12,865,311.00
3.	Forrest County	Requested eligibility of costs required for mold remediation to public facility	\$ 202,443.34	\$ 72,136.00
4.	University of Southern Miss	Requested replacement costs for College administration building according to 50% Rule	\$ 837,395.45	\$ 837,395.45
5.	Moss Point School District	Requested replacement eligibility of school facility under FEMA regulations on feasibility/50% rule	Replacement of school	\$ 6,148,516.77 * addit. amount granted pre-CEF
6.	Mississippi Gulf Coast Community College	Requested eligibility for actual incurred costs for Category B – Emergency Protective Measures work	\$ 839,203.99	Pending settlement
7.	Pearl River Community College	Requested eligibility of replacement costs for college gymnasium according to 50% Rule	\$ 11,211,949.00	\$ 5,595,488.00
8.	Hancock County School District	Requested eligibility for replacement costs of new school buses when like kind could not be located	\$ 512,785.00	Pending decision
9.	Bay St Louis – Waveland School District	Requested eligibility for costs to construct additional fire access road for school facility as required by city fire code	\$732,327.34	Hearing to be held end of September



**The House Committee on Transportation and Infrastructure
Economic Development, Public Buildings, and Emergency Management Subcommittee**

**Statement for the Record by Amnesty International USA (AIUSA)
Adapted from AIUSA Report: *Un-Natural Disaster: Human Rights in the Gulf Coast*
Submitted by Sarah Burns, Government Relations Director
September 21, 2010**

INTRODUCTION

On August 29, 2005, Hurricane Katrina, one of the strongest hurricanes to ever hit the United States, caused flooding to most of the low-lying areas of the Gulf Coast, including New Orleans, Louisiana, Biloxi, Mississippi, Coden, Alabama and the surrounding communities.¹ It is estimated that more than 1,800 people from these three states died in the storm.² Approximately 200,000 people were evacuated from the Gulf Coast Region to places such as Texas, Florida, Georgia, and Washington, D.C.³ Hurricane Rita struck the region just a few weeks later on September 23rd.⁴

Prior to the catastrophic effects of Hurricanes Katrina and Rita, the populations of the Gulf Coast states suffered from a severe lack of access to adequate health services and housing. During the immediate aftermath of the storms, access to both of these services was even further compromised and the Federal government was slow to rectify the situation. Furthermore, the legal system of Orleans Parish, the parish that makes up most of the City of New Orleans, was seriously affected by the storm surge leading to increased incidences of excessive use of force, abuses of individuals in detention and due process violations.

Now, nearly five years into the recovery process since Katrina, for the residents of New Orleans in particular and the Gulf Coast states more generally, there is a continued lack of access to housing and health care and issues related to the criminal justice system persist. These obstacles have contributed in preventing the overall return of former residents (known under international human rights standards as internally displaced persons (IDPs)) and led to rights violations for those who have returned. While this testimony will speak to similar issues across the three Gulf Coast states, these issues are intrinsically intertwined in the New Orleans region to significantly impact low income residents and communities of color.

One way to help prevent this from happening again is to amend the Stafford Act⁵ to include human rights principles that ensure the rights to health and housing for all disaster survivors. The Stafford Act in its current form does not conform to the United Nations Guiding Principles on Internal Displacement. The Guiding Principles offer protection from forced displacement and protection to displaced persons at all stages of displacement: during displacement (including humanitarian assistance) and in the return, resettlement and reintegration processes. These principles have been systematically undermined in the aftermath of Hurricanes Katrina and Rita.

Amnesty International believes that the best and most effective way to secure and rebuild lives in the wake of Hurricane Katrina is by respecting, protecting and fulfilling the human rights of those affected.

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Amnesty International is calling on Congress to urgently amend the Stafford Act and bring it in line with international law and standards.

HOUSING ISSUES IN THE GULF COAST

Amnesty International is concerned that the slow progress in housing recovery has violated the rights of those residents who have returned and could prevent many Gulf Coast residents from ever being able to return in the future. The right to adequate housing guarantees access to a safe, habitable, and affordable home with protection against forced eviction. Without adequate housing, an individual is vulnerable to human and natural forces, compromising other human rights including the rights to family life, health, education, employment and privacy. Issues that have plagued the recovery process include the demolition of public housing; a lack of a commitment by the states to rebuild lost rental units and provide affordable housing for residents; and authorities' inability to disburse enough money for homeowners to rebuild or to do so in a timely fashion have created a climate where homelessness has increased and former Gulf Coast residents cannot afford to return, leading to permanent displacement.

Nearly 82,000 units of rental housing in Louisiana were lost due to damage from the hurricanes; with most of those units located in the greater New Orleans area.⁶ Recent estimates are that only thirty-eight percent of the lost rental units in New Orleans have been rebuilt.⁷

The money disbursed by the state of Louisiana to rebuild homes has far outpaced the amounts disbursed to rebuild affordable housing.⁸ Along with the demolition of the majority of public housing units without a one for one replacement of lost units, and rents across the city increased as much as forty percent since Hurricane Katrina, there is a lack of adequate affordable housing in New Orleans. Recent estimates of homelessness in New Orleans have ranged from nearly 10,000 individuals and families⁹ to as many as 12,000.¹⁰ According to a survey conducted by Unity for Greater New Orleans, sixty percent of those surveyed said they were homeless because of Katrina.¹¹

The housing recovery program in Louisiana has been plagued by a number of problems and issues which have prevented individual homeowners from rebuilding. For instance, even though \$7.95 billion in grants was paid out through the Road Home program as of June 2009,¹² eighty-one percent of New Orleans homeowners were left with insufficient funds to rebuild.¹³ Furthermore, according to some reports, residents of communities populated largely by people of color were paid lower grant amounts than those living in largely Caucasian communities, where properties had higher values (mainly as an effect of pre-storm housing segregation).¹⁴

Recent estimates of homelessness in New Orleans have ranged from nearly 10,000 individuals and families¹⁵ to as many as 12,000.¹⁶ According to a survey conducted by Unity for Greater New Orleans, sixty percent of those surveyed said they were homeless because of Katrina.¹⁷

The effort to rebuild housing in both Mississippi and Alabama has also been severely impacted during the recovery process. In Mississippi, Amnesty International documented an overall lack of rebuilding of public housing and affordable housing for low income residents.¹⁸ Furthermore; thousands of homeowners were ineligible to receive rebuilding funds because their homes suffered wind damage, which was not covered by the state recovery program.¹⁹ Meanwhile, Mississippi is diverting nearly \$600



million from its housing recovery program to expand the shipping port in Gulfport, Mississippi while nearly two thousand people continue to live in wind-damaged homes.²⁰

In Alabama, the state received an inadequate amount of funds from the federal government for home rebuilding and has been slow to disburse the funds it did receive. Hundreds of mostly low income homeowners will be left out of the rebuilding process when the state will exhaust its funds.²¹

Key Findings: Housing

- Not enough is being done to replace affordable rental housing as well as demolished public housing units in Louisiana and Mississippi, preventing former residents from returning and threatening those who have been receiving hurricane-related rental assistance in the region with the possibility of homelessness.
- Homeowners have been prevented from rebuilding their homes due to problems with the disbursement of funds under the Community Development Block Grants in Louisiana, Mississippi and Alabama.

HEALTH CARE ISSUES IN THE GULF COAST

While the inability to rebuild housing and the unavailability of affordable housing works as an impediment to former residents returning to New Orleans and rebuilding their lives, the unavailability of fundamental services is also a contributing factor. Amnesty International is concerned that the inability to obtain certain services not only acts as a disincentive for displaced residents to return, but also leads to rights violations for those who remained or have returned.

The right to health is the right to the “highest attainable standard of physical and mental health”. It encompasses freedoms (such as the right to control one’s health and body) and entitlements (for example, to equality of access to health care) and consists of two basic components: healthy living conditions and health care.²²

New Orleans residents have been severely impacted in enjoying their right to health by the lack of primary care and mental health hospitals in New Orleans. For instance, neither of the two hospitals that existed in St. Bernard Parish has reopened, while only twelve out of the previous 23 hospitals prior to the storm have reopened in Orleans Parish.²³ The closing of Charity Hospital in particular has the greatest impact on low income residents and communities of color. Charity Hospital was the main hospital serving the uninsured and low income residents in New Orleans.²⁴ Plans for a new hospital will not be completed for as long as eight years and construction will displace hundreds of homeowners who returned and rebuilt their homes. Without a hospital at Charity’s current location, residents of the Ninth Ward and East New Orleans must travel between fifteen and thirty minutes to reach a hospital.

The closure of Charity Hospital also has impacted access to mental health care in New Orleans. Charity Hospital was the largest provider of psychiatric inpatient services in the City and provided a crisis response unit for law enforcement calls dealing with the mentally ill.²⁵ The closure of Charity Hospital and the New Orleans Adolescent Hospital in 2009 has resulted in Orleans Parish Prison being the largest psychiatric facility in New Orleans.²⁶

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Key Findings: Health Care

- Access to primary health care for the uninsured, low income and communities of color in New Orleans is severely impacted by the decision to close Charity Hospital while a facility to replace similar services will not be completed for at least several years.
- The lack of access to mental health care in both New Orleans as well as the coastal areas of Mississippi is negatively impacting hurricane survivors who are suffering from increased rates of mental health issues since the hurricanes, as well as mental health practitioners and law enforcement in these areas.

CRIMINAL JUSTICE ISSUES IN NEW ORLEANS

While Amnesty International recognizes that criminal justice issues have been a long standing problem in the Gulf Coast generally and in New Orleans in particular, this testimony will focus on only a few of the issues which are affecting residents post-Katrina.

The right to equality before the law prohibits discrimination before the law on grounds such as race. Racial profiling, over-policing of particular racial groups, and excessive law enforcement techniques disproportionately affecting particular races violate human rights laws and standards. Furthermore, all detained arrestees are "entitled to trial within a reasonable time or to release" and it "should not be the general rule that persons awaiting trial shall be detained in custody." Amnesty International remains concerned about problems with the criminal justice system in New Orleans and how those problems impact residents who were deeply affected by Hurricane Katrina.

In the days during and immediately after Hurricane Katrina, the criminal justice system failed the people of New Orleans. During the immediate destruction of the storm, the New Orleans Police Department (NOPD) lost a significant amount of its first responders.²⁷ Furthermore; reports of excessive force by police were prevalent, with at least ten shootings and four fatalities in the days following Katrina.²⁸ Recently, six current and former NOPD officers were indicted for their roles in a shooting and cover up that occurred in the days after Hurricane Katrina.

Mississippi residents experienced similar problems with excessive force in the immediate aftermath of Hurricane Katrina. According to the American Civil Liberties Union, there were many complaints of police officers using excessive force, including TASERS, during routine traffic stops. Many of these stops reportedly occurred when people violated city-imposed curfews while attempting to retrieve items from their homes or check on relatives.²⁹

Due to the flooding of the Orleans Parish Prison facility, the NOPD converted the Greyhound bus station into a rudimentary detention center, known as "Camp Greyhound" to house individuals arrested in the weeks after the storm hit.³⁰ Reports of abuse of prisoners and rights violations were numerous,³¹ with many of the people detained for minor violations like curfew violations or accused of looting on questionable grounds.³²

Individuals are being detained in pre-trial detention for unnecessarily long periods of time for even minor violations and those who are indigent are unable to access an attorney in New Orleans. Hurricane

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Katrina flooded the Orleans Parish Criminal District Court.³³ Reports from the year after Hurricane Katrina note that individuals arrested for even minor charges languished in prisons for months with some spending more time in prison than they would have had they been convicted and sentenced.³⁴ An advocate who spoke with Amnesty International reported that the District Attorney's office implemented an expedited screening process in 2009, however individuals were still being held for as many as 45-60 days for non-violent offenses in February 2010.³⁵

Hurricane Katrina also had a devastating effect on the indigent defense system in New Orleans. Advocates who spoke with Amnesty International described how the public defender's office covers eighty-eight percent of all traffic or criminal cases, but receives only about thirty percent as much funding as the District Attorney's office.³⁶ According to recent reports, the public defender's office has recently stopped accepting low level cases due to the office's workload being too high.³⁷ With eighty to ninety percent of the defendants in the criminal justice system being indigent,³⁸ it is imperative to fully fund and staff the public defender's office to not only provide proper representation, but to also assist individuals from being detained for long periods of time in pre-trial detention unnecessarily.

Amnesty International is concerned with the increase in violent interactions between NOPD officers and mentally ill residents in New Orleans, exacerbated by the increased rate of mental health issues since Katrina, the high number of homeless residents with mental health issues, and the lack of mental health care. Mental health officials and law enforcement agencies in the New Orleans area have reported a sharp increase in the number of requests to pick up mentally ill patients, a rise in the number of people who resist violently, or both.³⁹ Meanwhile, media accounts of deadly interactions between police and mentally ill residents continue to be reported.⁴⁰ One advocate who spoke with Amnesty International noted, "You have to get arrested in order to get any mental health help in New Orleans."⁴¹

Key Findings: Criminal Justice

- Local law enforcement in New Orleans was not adequately prepared for the aftermath of Hurricane Katrina which led to many instances of excessive force and abuses in detention.
- Issues around the criminal justice system and lengthy pre-trial detentions for nonviolent and low level offenses negatively impact individuals' ability to maintain employment and housing and contribute to the cyclical nature of crime in New Orleans.

CONCLUSION

Nearly five years after the devastating impact of Hurricane Katrina, decisions made and actions taken on federal, state and local levels have severely impacted Gulf Coast residents' rights to adequate housing, health and equal access to the criminal justice system. Rights violations in these three areas not only are mutually reinforcing, but also combine to have a disproportionate impact and severely affecting low income communities and communities of color while creating the circumstances which prevent their return. As a result, the demographics of the region are being permanently altered, in contravention of the United Nations Guiding Principles on Internal Displacement.⁴²

One way to prevent a recurrence of these human rights violations from being committed during future disasters is to amend the Stafford Act, the principle statute used by the federal government during disaster recovery, to bring it in line with international law and standards including the U.N. Guiding Principles.

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RECOMMENDATIONS

The response to Hurricane Katrina was woefully inadequate and demonstrated the urgent need for the United States to develop a comprehensive plan encompassing both initial disaster response and long term disaster recovery. Amnesty International calls for immediate action to ensure that human rights principles are integrated into disaster relief planning, including through the measures described below.

- The US Congress should amend the Stafford Act to incorporate the U.N. Guiding Principles on Internal Displacement and bring it in line with international law and standards. The Stafford Act should include:
 - a Humanitarian Assistance Program;
 - a Return and Transition Assistance Program;
 - a Long-Term Development Assistance Program;
 - Protections of all rights of displaced persons during displacement and recovery;
 - Durability of Solutions, whereby explicit recognition of displaced status does not end until solutions have proven to be lasting.
- The US Congress should amend the Stafford Act to ensure the right of all impacted individuals and communities to participate in decisions related to the right to return. Communication and coordination with impacted individuals and local non-governmental organizations on the ground is essential in order to address particular local issues for individuals during the recovery process from a disaster.

In addition, federal state and local governments should ensure that:

- Agencies at all levels provide effective case management assistance for individuals affected by disasters in order to aid them in navigating the appropriate agencies and programs to access housing and health care services during both the immediate aftermath of a disaster and the long-term recovery process.
- All persons internally displaced by Hurricane Katrina are guaranteed their right to return to their former homes without discrimination or be compensated for any housing that is impossible to restore as determined by a competent, impartial tribunal.
- All Gulf Coast residents return to adequate housing and an environment which is consistent with the right to the highest attainable standard of health.⁴³

¹ See National Climatic Data Center, Summary of Hurricane Katrina, available at: <http://www.ncdc.noaa.gov/oa/climate/research/2005/katrina.html>, last visited 1 April 2010.

² National Climatic Data Center, US Department of Commerce, *Hurricane Katrina: A Climatological Perspective, Preliminary Report*, October 2005, Updated August 2006, p 3; available at <http://www.ncdc.noaa.gov/oa/reports/tech-report-200501z.pdf>, last visited 1 April 2010.

³ See *Hurricane Katrina Response and Recovery Update*, Federal Emergency Management Agency, News Release HQ-05-198B, 4 September 2005, available at: <http://www.fema.gov/news/newsreleasefema?id=18602>, last visited 1 April 2010.

⁴ Struck, Doug and Dana Milbank, *Rita Spares Cities, Devastates Rural Areas*, The Washington Post, 26 September 2005, available at: <http://www.washingtonpost.com/wpdyn/content/article/2005/09/25/AR2005092500335.html>, last visited 1 April 2010.

⁵ The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act), 42 U.S.C. §5141, provides statutory authority for the federal government to respond to areas hit by natural disasters, most notably through the Federal Emergency Management Agency (FEMA).



- ⁶ Evans, Stephen, *Broken Homes: First Hand Accounts of Living Through Louisiana's Housing Crisis – Part 1: Affordable Housing*, Louisiana Family Recovery Corps, 29 June 2009, p.9, available at: <http://www.recoverycorps.org/media/files/brokenhomes-part1.pdf>, last visited on 1 April 2010.
- ⁷ Reckdahl, Katy, *How Much Affordable Housing does New Orleans Have and How Much Does it Need?*, The Times-Picayune, 10 October 2009, available at: http://www.nola.com/politics/index.ssf/2009/10/how_much_affordable_housing_do.html, last visited on 1 April 2010.
- ⁸ The US Government Accountability Office recently found that, “[a]lthough the proportional damage to rental units was greater, more federal dollars were awarded for homeowner units through the programs ...reviewed. Specifically, federal and state agencies awarded around \$13 billion for homeowner units and around \$1.8 billion for rental units, with the majority of funding awarded through the [Community Development Block Grant (CDBG)] program.” US Government Accountability Office, *Disaster Assistance: Federal Assistance for Permanent Housing Primarily Benefited Homeowners; Opportunities Exist to Better Target Rental Housing Needs*, January 2010, p. 28, available at: <http://www.gao.gov/new.items/d1017.pdf>, last visited 1 April 2010.
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**The House Committee on Transportation and Infrastructure
Economic Development, Public Buildings, and Emergency Management Subcommittee
"Five Years after Katrina: Where We Are and What We Have Learned for Future Disasters"**

**Suggested Hearing Questions by Amnesty International USA (AIUSA)
Submitted by Sarah Burns, Government Relations Director
September 21, 2010**

Implementing a Human Rights Framework in Future Disaster Recovery Plans

Question: In the aftermath of Hurricane Katrina the Federal, State and Local governments all failed to provide basic services to the residents of the Gulf Coast. Many of these human rights abuses happened in the chaotic aftermath of the storm. What steps have been taken to include a human rights framework in future disaster response and recovery plans?

Background:

- The slow and inadequate recovery response by the federal government was almost as catastrophic as the storm itself, placing already marginalized communities in further jeopardy and leading to rampant human rights abuses. Now, five years later, Gulf Coast residents continue to lack basic human rights such as access to affordable housing and adequate health care. Many individuals and families remain displaced across the country, unable to return home.
- Congress has talked about the commitment to reform federal disaster laws such as the Robert T. Stafford Disaster Relief and Emergency Act, but has yet to introduce legislation. Reform of the Stafford Act will ensure both that the Gulf Coast is rebuilt and that the human rights of people displaced by future disasters will be protected.
- International human rights standards protect victims of disasters like Hurricane Katrina. Amnesty International USA calls upon authorities in the local, state and federal government to uphold the rights of all Katrina evacuees to return to their homes. We urge officials to provide long-term, healthy, and affordable housing so that survivors can exercise their right to return, by introducing legislation to reform the Stafford Act today.

Protecting the Rights of Internally Displaced Persons

Question: Approximately 200,000 people were evacuated from the Gulf Coast Region due to Hurricane Katrina and many remain displaced across the country unable to return home. What safeguards have been put in place since Katrina to protect the rights of displaced persons during displacement and recovery?

Background:

- According to Federal government figures, approximately 200,000 people were evacuated from the Gulf Coast Region to places such as Texas, Florida, Georgia, and Washington, D.C. Of the more than 400,000 residents who lived in New Orleans prior to Katrina, approximately 350,000 lived in areas that were damaged by the storm, with seventy-five percent of those individuals

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being African-American and more than twenty-nine percent living below the national poverty line (which was calculated at an income of \$19,350 for a family of four in 2005).

- While the City of New Orleans has regained two-thirds of its pre-Katrina population numbers and US Census estimates for the New Orleans Metropolitan Statistical Area are approximated to be at eighty-five percent of its pre-Katrina population numbers, reports state that it is not necessarily the former residents who have replenished those numbers.
- Prior to the catastrophic effects of Hurricanes Katrina and Rita, the populations of the Gulf Coast states suffered from a severe lack of access to adequate health services and housing. During the immediate aftermath of the storms, access to both of these services was even further compromised and the Federal government was slow to rectify the situation.
- Furthermore, the legal system of Orleans Parish, the parish that makes up most of the City of New Orleans, was seriously affected by the storm surge leading to increased incidences of excessive use of force, abuses of individuals in detention and due process violations.
- Now, nearly five years into the recovery process since Katrina, for the residents of New Orleans in particular and the Gulf Coast states more generally, there is a continued lack of access to housing and health care and issues related to the criminal justice system persist. These obstacles have contributed in preventing the overall return of former residents (known under international human rights standards as internally displaced persons (IDPs)) and lead to rights violations for those who have returned.
- One way to help prevent this from happening again is to amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act) to include human rights principles that ensure the rights to health and housing for all disaster survivors.

Improving the Processes around Distribution of Funds

Question: Homeowners have been prevented from rebuilding their homes due to problems with the disbursement of funds under the Community Development Block Grants in Louisiana, Mississippi and Alabama. What lessons have been applied from the inadequate and slow distribution of funds for home rebuilding?

Background:

- Nearly 82,000 units of rental housing in Louisiana were lost due to damage from the hurricanes; with most of those units located in the greater New Orleans area. Recent estimates are that only thirty-eight percent of the lost rental units in New Orleans have been rebuilt.
- The money disbursed by the state of Louisiana to rebuild homes has far outpaced the amounts disbursed to rebuild affordable housing. Along with the demolition of the majority of public housing units without a one for one replacement of lost units, and rents across the city increased as much as forty percent since Hurricane Katrina, there is a lack of adequate affordable housing in New Orleans.
- Recent estimates of homelessness in New Orleans have ranged from nearly 10,000 individuals and families to as many as 12,000. According to a survey conducted by Unity for Greater New Orleans, sixty percent of those surveyed said they were homeless because of Katrina.
- The housing recovery program in Louisiana has been plagued by a number of problems and issues which have prevented individual homeowners from rebuilding. For instance, even though

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\$7.95 billion in grants was paid out through the Road Home program as of June 2009, eighty-one percent of New Orleans homeowners were left with insufficient funds to rebuild.

- Furthermore, according to some reports, residents of communities populated largely by people of color were paid lower grant amounts than those living in largely Caucasian communities, where properties had higher values (mainly as an effect of pre-storm housing segregation).
- The effort to rebuild housing in both Mississippi and Alabama has also been severely impacted during the recovery process. In Mississippi, Amnesty International documented an overall lack of rebuilding of public housing and affordable housing for low income residents.
- Furthermore; thousands of homeowners were ineligible to receive rebuilding funds because their homes suffered wind damage, which was not covered by the state recovery program. Meanwhile, Mississippi is diverting nearly \$600 million from its housing recovery program to expand the shipping port in Gulfport, Mississippi while nearly two thousand people continue to live in wind-damaged homes.
- In Alabama, the state received an inadequate amount of funds from the federal government for home rebuilding and has been slow to disburse the funds it did receive. Hundreds of mostly low income homeowners will be left out of the rebuilding process when the state will exhaust its funds.