

**Joint Center for Housing Studies
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**A Survey of Issues Facing Federal Coordination for the Housing and the
Redevelopment of the Gulf Coast, U.S.**

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About the Author

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I. Introduction: Federalism, Disasters and Housing

It is often said along the Gulf Coast that one might never be able to return to the same place after a storm. In physical terms, this may not be an absolute, but in terms of the psychology of space, there is no doubt that the devastation of the physical environment transforms not only the participatory experience but also the very essence of the relationship between space and community—or, place.

The goal of this paper is to identify a wide variety of systematic “barriers” that in the aggregate impact a displaced person’s chances of ever returning to a place called home. This paper seeks to identify not only short- and long-term barriers, but also to find federal solutions to the underlying problems thwarting the redevelopment of the Gulf Coast. Regulatory, judicial and legislative barriers exist by and between every local, state and federal regulatory regime. The degree to which conflicts arise is an inverse measure of administrative efficiency. An inefficient administrative system usually just adds costs to the development model, but when speaking in terms of disaster redevelopment, there is a disproportionately greater cost to the model because the federal government is looked on as the ultimate source of leadership and capital. With the parameters of these impacts in mind, this paper intends to find a normative framework from which regulatory agencies, legislative bodies, courts and communities can be better prepared to recover from disasters in the future.

While the Bush administration played a marginal role in advancing a federal prerogative over redevelopment, the Obama administration shows early signs of seeking to expand the federal role over what is popularly regarded as ineffective state and local governments and judiciaries. The current administration has been quick to recognize not only the vital role the federal government must play in the redevelopment of the Gulf Coast, but also that any meaningful results will only come to fruition after the execution of a comprehensive multi-agency plan. The administration has already tasked multiple federal agencies to address the problem in a unified way.

On a joint visit to New Orleans with the Department of Housing and Urban Development (HUD) Secretary Shaun Donovan in March of 2009, Homeland Security Secretary Jane Napolitano openly questioned “why” there was so much red tape hampering the redevelopment process.¹ Secretary Napolitano was echoing the broader public perception that the redevelopment

¹ Christina Bellantoni, *HUD Secretary ‘Disturbed’ by Katrina Rebuilding*, WASHINGTON TIMES, March 5, 2009.

is hampered by administrative and political ineptitude. While the administration's current policy of forcing states and local governments to spend it or lose it is an effective measure to bypassing regulatory barriers at the local and state level, the federal government is equally to blame for hindering the process by failing to assert its federal prerogative. In response to the imposition of a federal prerogative over redevelopment, state and local governments will argue that Congress does not fund the promises they make. In this current period of stimulus spending, however, it is likely the region will eventually receive a significant infusion of redevelopment capital and resources.

In evaluating the housing specific responses to disasters, this paper looks at the issue from both a short-term and long-term perspective. While this is a convenient topical division for academics and administrators, the current situation in the Gulf Coast calls for redevelopment objectives that also accommodate a mid-term housing need for a period of time between one (1) and five (5) years. The redevelopment community asserts that keeping people close to their homes (preferably on-site) in semi-permanent housing accelerates the process of resettlement by preventing the severance of community and economic ties. In order to keep people close to their homes, relief efforts must provide provisional housing that can last the duration of the redevelopment term, while at the same time offering some minimal quality of life. The current response system operates under the division of short- and long-term housing needs and will be examined further in this paper.²

II. Regulatory and Legislative Barriers to Short-Term Housing

A. Emergency and Temporary Housing

For the typical disaster stricken household, the next morning is always a dose of harsh reality. In the hours and days following a disaster, the government has three major priorities: (i) provide safe emergency housing; (ii) inventory the damage; and, (iii) start the clean up process. Problematically, each of these objectives is often interdependent on the others, and the responsibility for each of these objectives varies by and between jurisdictions. Likewise, it is difficult to manage the supply of emergency housing if the supply and demand at any given location and time is undetermined. Response agencies also run into a barrier caused by the

²Federal Response to Hurricane Katrina, *before the U.S. Senate Committee on Homeland Security and Governmental Affairs*, 109th Cong. (October 6, 2005)(Testimony of Robert David Paulison, Acting Director, Federal Emergency Management Agency, acknowledging the underlying need for a mid-term housing solution).

inability of government actors to timely and lawfully share data. There is, therefore, no unified automated system for tracking displaced persons in real time relative to their geographical origin and present location in the United States.

The Federal Emergency Management Agency (FEMA) has historically utilized databases consisting primarily of data collected from private credit agencies, the Internal Revenue Service (IRS) and the Bureau of Census for the purpose of tracking evacuees. The shortcomings to relying on these fragmented systems are numerous. For instance, people can file for emergency retroactive tax relief with the IRS, but the administrative lag in processing the data and the type of data collected does very little to facilitate managing displaced households and their respective housing needs. This is especially relevant to those evacuees who receive some sort of subsidized housing assistance. A barrier often arises when the beneficiaries attempt to utilize their assistance across jurisdictional lines. In the case of Hurricane Katrina, protocol was eventually promulgated, which cleared this barrier. Local public housing authorities' (PHA), however, were not able to initially accommodate the demand, and many beneficiaries were turned away.³

Even for those homeowners who are not the beneficiaries of public assistance, there is a great demand for a central processing system for tracking displaced persons. Such a system could be used to facilitate insurance payouts, reduce fraud, and match evacuees with housing services. FEMA's current software platform is limited to HAZUS-MH.⁴ HAZUS is designed for purely prospective applications in risk assessment and not for the real time inventorying of people and shelter. In 2007, as a partial response to this underlying need, Congress authorized the development of the National Family Registry and Locator System (NEFRLS) by FEMA.⁵ The NEFRLS is designed primarily for unification of children and is centered upon a national call center for the collection of field data. Unfortunately, the NEFRLS was already outdated by the time of its release relative to existing commercial platforms that are much more user accessible.

Aside from the federal government's inability to inventory evacuees and housing, the inventorying of the broader spatial and physical landscape has benefitted from technological advances under the HAZUS system. The widespread application of HAZUS has been accelerated due to HAZUS's interface with commercially available software, such as ArcGIS. Unfortunately,

³ See *Appendix*, Table 1.

⁴ See generally, Philip J. Schneider and Barbara A. Schauer, *HAZUS—Its Development and Its Future*, NATURAL HAZARDS REVIEW, Vol. 7, Issue 2., 40-44 (May 2006).

⁵ FEMA, DISASTER ASSISTANCE DIRECTIVE, FEMA FACT SHEET (January 31, 2008).

interfacing technology and the law is a slow and uncertain process. Flood mapping is an especially pertinent example of this dynamic between law and technology. Flood mapping initiatives are crucial to redevelopment because the resulting data allows for risk-adjusted redevelopment determinations. Congress and FEMA, however, have largely dropped the ball on their own Flood Map Modernization Initiative (FMMI).⁶ The FMMI mandate incorporates a spatial component to disaster assessment and management, in addition to more detailed digital mapping activities. A conglomerate of private suppliers formulated a variety of systems, but no priority was given to funding due to various IP management and government acquisition complications.

While private insurance firms use their own proprietary systems, there is no system to collect and integrate the parameters of data needed for the inventorying and management of people and property in relative real time. One of the prime impediments to real time management of data is the lack of a uniform system for reporting and verifying information inputted from various public and private sources. A web-based community similar in design to a Twitter or Facebook platform with a verification function to minimize fraud could be the answer to the difficult problem of tracking housing demand and other spatial-demographic variables. Existing web-based federal identity verification systems are currently being used by the IRS and the Departments of Education and Energy.

As an example, local communities on the Gulf Coast who organized similar community web-based public forums using a spatial-GIS function achieved a great deal of success.⁷ One advantage to such a program is that displaced households can remotely track damage assessment and relief efforts based on on-the-ground reports complete with digital photography and video. Providing very basic information, such as utility service coverage maps, to displaced families goes a long way in each household's decision to either find alternative short-term housing or to return home. An additional resource could be an application to map available rental housing so that lower income families who are not likely to afford the means of moving to another region can efficiently find rental housing.

To further this effort, arrangements could be made with landlords and hoteliers nationwide to create an emergency housing trust supply, which could be used in cases of national emergencies. After Hurricane Katrina, the non-profit groups sorting and matching the available

⁶ Wayne A. Morrissey, *FEMA's Flood Hazard Map Modernization Initiative*, Congressional Research Service, Order Code RL33264, at CRS-31 (February 3, 2006).

⁷ See, Greater New Orleans Community Data Center, available at www.gnocdc.org.

emergency housing supply encountered problems matching available units with determinants such as the size of the household and the regional relocation preference because they were unable to source protected federal data.⁸ A well-integrated system could make great progress toward efficiently matching the supply and demand of emergency and short-term housing.

B. FEMA and HUD Interagency Workload

For those evacuees who are able to return, there are many housing challenges that await them. While homeowners ultimately looked to the state homeowner assistance programs for help, FEMA is the primary agency tasked with managing the collective emergency response. Historically, FEMA has done little more than provide tents and trailers, but Hurricane Katrina changed the scale and rules of engagement.⁹ In the first few weeks after Katrina, the Red Cross undertook most of the emergency housing management.¹⁰ FEMA was slow off the start because it grossly underestimated the need for emergency housing. There simply was no emergency housing trust. The Red Cross was able to use a nationwide database of existing contractual partners, but FEMA did not have an analog program for managing very short-term emergency rental housing beyond that of expensive hotels.¹¹

To understand why it took FEMA so long to provide emergency housing, one must understand the legal and judicial predicate. Generally speaking, regulatory barriers are identified in the context of a supply side barrier, such as duplicated and contradicting building codes. In the case of emergency housing, the barriers that arise are often on the demand side of the equation in that not all those who demand emergency housing assistance will receive it. This section will identify the legal framework for the existing system and the barriers that thwart the demand, and ultimately the supply, for emergency housing assistance.

⁸ Spencer S. Hsu and Jacqueline L. Salmon, *A Big Cut in Katrina's Hotel Bill*, WASHINGTON POST, October 19, 2005, at Page A08.

⁹ SHELIA CROWLEY, *Where Is Home? Housing for Low-Income People After the 2005 Hurricanes*, in THERE IS NO SUCH THING AS A NATURAL DISASTER, 132 (Chester Hartman & Gregory D. Squires eds., 2006).

¹⁰ Kevin McGill, *Red Cross Turns over Program for Katrina Evacuees to FEMA*, THE ADVOCATE (Baton Rouge, La.), Oct. 25, 2005, at B3.

¹¹ For example, the Department of Defense utilizes the same type of contingency contract for carriage on commercial airlines; see also, H.R. 5441, 109th Congress (2006): Department of Homeland Security Appropriations Act, 2007, available at http://www.govtrack.us/congress/bill_xpd?bill=h109-5441 (requiring FEMA to upgrade the application of technology for managing housing supply pursuant to a National Disaster Housing Strategy).

The principal statutory authority for addressing emergency housing following national disasters is the Stafford Disaster Relief and Emergency Assistance Act.¹² Depending on the scale of the disaster, the President is charged with determining the types of housing assistance to be provided, based upon factors such as “cost effectiveness, convenience to the individuals and households, and such other factors as the President may consider appropriate.”¹³ The Stafford Act allows the President to provide for assistance to both state and local governments (Section 403)¹⁴ and individuals and households (Section 408).¹⁵ As previously mentioned, the Red Cross, as part of the Federal Response Plan,¹⁶ took over in the immediate aftermath of Katrina. After a month, the Red Cross no longer considered the long-term housing of some 85,000 evacuees in hotel rooms as part of its mission.¹⁷ This is a relatively small number considering the best estimate for the total number of people who either lived in a neighborhood that was flooded or in a home that suffered severe structural damage was 711,698.¹⁸ Within a few months, FEMA took over administration of the hotel program and supported it using funding from Section 403.

FEMA’s goal from the start was to get people out of hotels, while at the same time pushing them to apply for one or more assistance programs. For example, in the case of a standard type of FEMA assistance, a person had to have applied and been rejected for a loan from the Small Business Administration (SBA) before being eligible for assistance.¹⁹ According to congressional investigators, this program turned out to be an exercise in futility because the SBA approved less than 30% of applications for home repair loan products.²⁰

Just the sheer number and variety of assistance packages is a daunting hurdle in administrative terms. The model that requires specific types of assistance to be processed and segregated from other types of financial assistance ignores the reality of preferences in consumer consumption. Consumers have a relatively static demand for necessities and will prioritize within their budgets to maintain those consumption levels. Simply put—people will pay for shelter and

¹² 42 U.S.C. § 5121, *et seq.*

¹³ 42 U.S.C. § 5174(b)(2)(A) (2000 & Supp. 2002).

¹⁴ This provision was enacted as Public Law 93-288, Title IV, § 403 (1988).

¹⁵ This provision was enacted as Public Law 93-288, Title IV, § 408 (1988).

¹⁶ DEPT OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN, *available at* <http://www.dhs.gov/xlibrary/assets/NRPbaseplan.pdf>.

¹⁷ FEMA Concludes Short-Term Lodging Program; Longer Term Housing Efforts Continue. Press Release Number GQ-06-020., February 1, 2006, *available at* <http://www.fema.gov/news/news-release.fema?id=23158>.

¹⁸ Thomas Gabe *et al.*, *Hurricane Katrina: Socio-Demographic Characteristics of Impacted Areas*, Congressional Research Service, CRS Report RL33141 (2006).

¹⁹ 44 C.F.R. § 206.119(a)(1) (2006).

²⁰ Ron Nixon *et al.*, *For Hurricane Victims, A Flawed System*. N.Y. TIMES, April 21, 2006.

food before anything else. With housing costs hovering around 50 percent of a person's budget following displacement, there is no logic in straining a household further by piece-mealing out the assistance and requiring upfront assistance to be spent on specific non-housing expenditures. A good example of how this can backfire was when assistance checks and the directions for those checks were mailed out separately by the U.S. Treasury and FEMA. The result was that people used money that was supposed to be spent only on housing for non-housing items then found themselves theoretically in debt to the U.S. Treasury.²¹ It took public outcry and a lawsuit to put a stop to that.²² Piecemealing aid is difficult enough when talking about one agency, but the problem is compounded when there are housing assistance programs available through FEMA, HUD, the Rural Housing Service (USDA), SBA, and various state and local agencies. The problem is not that there are so many separately administered programs *per se*, but that there is little public coordination in communicating the priority which should be allocated for each program by the applicant.

FEMA's plan for moving people along in the system revolved around the Katrina Disaster Housing Assistance Program (KDHAP), which was administered by HUD but funded through Section 408 assistance. The underlying idea behind KDHAP is that evacuees apply and register through FEMA, but direct payments are made by PHA's to local landlords. At the time, the Bush administration rejected the application of a voucher model because of a longstanding political aversion to the expanded use of vouchers in the private market. This was in contravention to the historical conservative embrace of vouchers starting with the Nixon administration. The Bush administration took this action despite the fact that emergency housing vouchers were considered successful after their application following the Northridge Earthquake. The result was that evacuees who were also beneficiaries of HUD housing assistance programs (HUD-HAP), including voucher programs, were not initially eligible for KDHAP for the first six (6) months after the disaster, but these HUD-HAP beneficiaries did eventually become eligible for the Disaster Voucher Program (DVP).²³ The layers of confusion between the KDHAP

²¹ Eric Lipton, *Hurricane Evacuees Face Eviction Threats at Both Their Old Homes and New*, N.Y. TIMES, November 4, 2005.

²² *McWaters v. FEMA*, Case 2:05-CV-05488-SRD-DEK, Document 28.2005 (E.D.La. December 12, 2005).

²³ Barbra Sard and Douglas Rice, *Changes Needed in Katrina Transitional Housing Plan to Meet Families' Needs*, Center on Budget and Policy Priorities (Washington, D.C., 2005).

program and the HUD-HAP (DVP) resulted in homeless evacuees who were not in a HUD homeless program and thus not eligible for any assistance under KDHAP or HUD-HAP (DVP).²⁴

An additional barrier for those evacuees venturing to obtain emergency housing came at the transition point from the Red Cross Hotel Plan (Section 403) to the KDHAP (408) or HUD-HAP (DVP). To compound the problem, the Bush administration and Congress could not agree on whom was going to pay for what, which led to unnecessary delays and confusion. Again, the issue of efficiently and accurately assessing housing damage came into play. KDHAP rejected many Section 403 beneficiaries because according to FEMA the beneficiaries' neighborhoods and homes were habitable, but in fact, they were not.²⁵ Even if a public housing evacuee managed to get accepted into the program, there was no guarantee that the PHA having jurisdiction over the evacuee's temporary location would participate in the program.²⁶

The next barrier facing the applicant is that he or she must share all of the assistance funds with everyone else in his or her household, regardless of where the individuals are located at the time of the application for and payment of the aid. This disproportionately affected lower income households who often have "extended family" living with them.²⁷ A final financial strain on the evacuees participating in the program was that Fair Market Rents (FMR) were adjusted slowly upwards towards Real Market Rent (RMR). The inflationary rents were not capped, and the gap in aid (i.e., FMR-RMR) prevented many tenants from returning to their currently rented units. In many cases, those who did return found that their homes were already rented to another household who could pay the inflated RMR in cash.

There are strong arguments in favor of HUD taking over administration of all of the housing assistance programs following disasters. Likewise, this type of uncertainty in the outcome is precisely what drives the argument for a rights based system which is inclusive of procedural due process. Many legal commentators and plaintiffs have argued in vain that due process applies to both Section 403 and 408 or to any other government disaster assistance. Without clear legislative intent, these arguments have invariably failed. One of the primary advantages to

²⁴ National Alliance to End Homelessness, *HUD Program May Strand Many Previously Homeless Katrina Victims* (2005), available at www.endhomelessness.org/do/uncoveredhomelesskdhap.pdf.

²⁵ Mike Snyder, *FEMA Deemed These Homes Habitable*, HOUSTON CHRONICLE, April 13, 2006.

²⁶ HUD, Office of Public and Indian Housing, *KDHAP Participating Public Housing Authorities* (December 1, 2005); HUD, Office of Public and Indian Housing, *Notice PIH 2006-12, Subject: Disaster Voucher Program (DVP) Operating Requirements* (February 3, 2006).

²⁷ Crowley, *supra* note 2, at 135 (FEMA eventually reversed a component of this rule under public pressure in a Public Directive issued on September 19, 2005).

centralizing control of all disaster housing assistance programs (KDHAP and DVP) at HUD is that HUD has the administrative legal capacity to undertake due process considerations for the application and delivery of housing assistance. HUD, through the Office of Hearings and Appeals, already has a system in place to ensure due process for beneficiaries of housing assistance, whereas FEMA does not have any kind of analog structure. At every step of the process, there were complaints that FEMA's measures to comport with actual and legal notice were grossly insufficient. Again, this goes back to the notion of managing the demand for housing assistance. Unfortunately, the law of service of notice has not caught up with the technological innovations to register and track large numbers of people through a remote web-based system.

When it comes to managing housing, an argument can be made that HUD should be the lead agency. Aside from the ability to comport with due process requirements from quasi-entitlement programs, HUD was very proactive in the weeks following Katrina. Unlike FEMA, HUD has been quick to memorialize internal lessons learned from prior disaster response efforts. The key to HUD's success was immediately implementing a series of administrative waivers paving the way for local response teams to implement some measure of flexibility in the process, while at the same time maximizing the available housing supply.²⁸ The waivers in Appendix Table 1 delineate how HUD was prepared to internally maximize the supply of publicly administered housing by prospectively preparing for regulatory barriers that might arise. It should also be noted that Appendix Table 1 is by no means complete, but the variety of waivers demonstrates HUD's systematic approach to looking at potential regulatory barriers. For instance, it took the action of the IRS in Notice 2005-69 at the behest of HUD to suspend income and non-transient requirements for Low Income Housing Tax Credit (LIHTC) properties because HUD was prepared to acknowledge the need for interagency cooperation in waiving certain regulations.

The waivers are an attempt to accomplish one of two results: (i) to simplify the process of certification and authorization, or (ii) to internally reprogram expenditures. Reoccurring regulatory targets of the waivers are those regulations relating to the public participatory process. There are those critics who might cite this pattern as inherently anti-democratic. When looking specifically at the public participation regulations, however, it is difficult to justify their limited

²⁸ HUD, Office of Community Planning and Development, *Waivers Issued to Facilitate the Hurricane Katrina Recovery Effort*, available at <http://www.hud.gov/offices/cpd/library/katrina/CPDWaivers.pdf>; Curtis W. Copeland, *Regulatory Waivers and Extensions Pursuant to Hurricane Katrina*, Congressional Research Service, Order Code RS22253 (September 19, 2005).

utility relative to the grave need for emergency shelter. Even before Hurricane Katrina landed on the Gulf Coast, Secretary Alphonso Jackson was preparing a cross-departmental work group for evaluating potential regulatory barriers before they arose.²⁹ The relatively successful outcome in minimizing regulatory barriers was in part due to leadership and in part due to the wide discretion HUD has in administering housing laws in general. As we will discuss, the EPA, for instance, does not have near the amount of legal discretion for waiving certain regulations.

The evidence suggests that HUD was much better prepared to manage emergency supply and demand than was FEMA. From September 2005 to December 2007, FEMA and HUD operated on a variety of Interagency Agreements (IAA) and Memorandums of Understanding (MOU). The interagency cooperation started with HUD transferring real estate owned (REO) properties over to FEMA for their use.³⁰ The agencies also created the Joint Housing Solutions Group (JHSG), which relegated itself to promulgating alternative solutions to trailers. The JHSG lacked the legislative mandate and the political power to review the cross-jurisdictional regulatory and legislative barriers. That being said, the JHSG's work with the Alternative Housing Pilot Program has been vital to the urgent need to replace trailers as the primary shelter of last resort. This is especially true given that during the summer of 2008, all of the remaining displaced persons were removed from the trailers. Slowly but surely, FEMA has given up turf as various assistance programs have morphed into the KDHAP and DVP analog programs. This gradual transfer of responsibility has itself served as a barrier to timely administration of the programs.

In addition to HUD's gradually increased work-load from FEMA, the department also had a variety of responsibilities stemming from damaged properties encumbered by FHA insured mortgages and, to a lesser extent, those obligations arising under Ginnie Mae.³¹ The storm season of 2005 left about 52,000 FHA insured loans delinquent.³² HUD's response to the mortgage delinquencies came in three phases over a period of two years, as delineated in Appendix Table 2.³³ Phase I was geared to provide liquidity in the mortgage market for

²⁹ Statement of Brian Montgomery, Assistant Secretary for Office of Housing/Federal Housing Commissioner, United States Department of Housing and Urban Development, *before the House of Representatives Committee on Financial Services, Subcommittee on Housing and Community Opportunity*, 109th Cong. (December 14, 2005).

³⁰ *Id.*

³¹ Government National Mortgage Association, created by the Housing and Urban Development Act of 1968, 825 Stat. 491 (1968).

³² Leslie Eaton, *Mortgage Aid Set for 20,000 Storm-Hit Homes*, N.Y. TIMES, Dec. 6, 2005.

³³ HUD Mortgage Letter 2005-33 (August 31, 2005); HUD Mortgage Letter 2005-45 (November 22, 2005); Government National Mortgage Association 2005 Annual Report, pg. 16-17; *HUD Announces Mortgage Assistance*

evacuees. This was ultimately a duplicate effort because most of the funding allocations and public attention were focused on the state managed homeowner assistance programs. Mortgaging a home (or vacant land) with a 100% LTV loan is not necessarily going to generate enough funds to rebuild the structure. The only reasonable scenario by which a household could utilize this program would be if they owned the land free and clear prior to the disaster.

The Section 203(k) program was eventually expanded into the Streamline(k) program, as shown in Appendix Table 2. The problem with the Steamline(k) program is that it was not geared for rehabilitation of structures that are subject to environmental contamination. After many months of delay, lead paint remediation was finally added as an allowable rehab expenditure. However, mold remediation was not an acceptable rehab item. This is pretty remarkable considering the nature and extent of the flood damage. In addition, delays for required third party inspections translated into inconsistent timing of escrow releases and subsequent contractor payments. Phase II represents a shift towards focusing on stimulating private investment in the region. While Ginnie Mae acknowledges that 2005 represented a roughly 30% year-to-year increase in lending activity through the Targeted Lending Initiative, there is no data suggesting that any of the increased liquidity translated into access to credit for evacuees.

Phase III can be characterized as an attempt to find greater utility in existing programs and resources through the promotion of repair and restoration. HUD tried to fix-up to habitable standards its inventory of REO properties for use by FEMA. As noted in the Congressional testimony of various witnesses, many of the HUD properties were in deplorable condition and were not fit to be lived in. For a cost of \$29 million dollars: (i) 6,500 REO homes were taken off the market; (ii) 2,600 REO homes were cleaned up; (iii) 68 sales contracts to evacuees were approved; and, (iv) 9 REO properties were sold to evacuees.³⁴ This \$29 million dollar price tag does not account for the cost of repairing those properties that were leased to evacuees and subsequently subject to waste. Low participation could be explained by the evacuees' desire to stay closer to home, as the REO properties were spread throughout the U.S., or by evacuees not having the financial ability to undertake a home purchase. While the REO sales concept makes sense, there were sufficient regulatory barriers to create a barrier to entry into the REO market

for Disaster Victims: \$200 Million Initiative Designed to Rebuild Lives and Communities, HUD No. 05-164; HUD Mortgagee Letter 2006-12 (June 30, 2006); HUD Mortgagee Letter 2006-18 (August 31, 2006).

³⁴ President's Council on Integrity and Efficiency, Executive Council on Integrity and Efficiency, *Oversight of Gulf Coast Hurricane Recovery: A Semiannual Report to Congress*, at 117 (September 30, 2006).

for evacuees. Ultimately, the poor conditions of the properties prevented the units from moving on the market or from being legally habitable. It was not until late in Phase III that HUD incorporated an escrow credit for repairs, which could have been applied to either an REO purchase or for their own homes. As the volume of inventory for REO properties increases with the current housing recession, these problems raise broader issues relating to asset management of REO properties.

FEMA's only alternative to REO properties was the utilization of the mobile trailer. Long-term reliance on trailers works against long-term redevelopment and is a barrier itself to community redevelopment. First, trailers and the broader idea of trailer "communities" are not socially or economically beneficial to the community. Trailers are generally sited in large lots of land that are on the urban fringe and are not easily accessible or do not have access to mass transit. In the case of flooding disasters, trailer parks can not be located in a federal flood zone, so very often the idea of keeping evacuees close to home is legally negated. An increased transportation budget expenditure stemming from a lack of mass transit imposes an additional financial burden on the evacuee. The design and layout of trailer parks is usually oriented around the most efficient delivery of utility connections and gives little regard to community space planning. In sociological and public health terms, it has been well documented that this type of housing environment is deleterious to the health and well being of displaced persons.³⁵ In more acute environmental health terms, the trailers have sparked national outrage over the unhealthy and toxic levels of phormaldahide exposure. Likewise, local politicians have consistently worked to exclude trailers based on the argument that diminished property values are a result of land use behavior which is consistent with blight. There is no doubt that trailers do not achieve the highest and best use of government resources.

The transition from motels to trailers to homes is a long process, but a process nonetheless. Our fragmented assistance system has yet to consolidate interagency housing policy objectives, and the lack of a safety net leaves many people, mostly renters, in the dark—literally. The primary policy objective after securing people's lives from immediate harm should be consistency and equal application of resources. The existing emergency housing system produces inconsistent results which prevent evacuees from being able to plan and act accordingly. As

³⁵ International Medical Corp., *Report: Suicide, Violence, and Depression Widespread in FEMA Travel Trailer Parks* (March 26, 2007).

discussed in the next section, the existing environmental regulatory scheme is equally as disruptive to the redevelopment process.

C. Environmental Remediation and Deregulation

There are two major components to environmental policy which must be considered as part of the discussion for rebuilding housing after disasters. First, one must consider the environmental implications of cleaning up the debris. The second consideration revolves around the concept of whether people should or can resettle certain environmentally sensitive geographies. Aside from the technical nature of environmental remediation, there are a number of regulatory barriers that arise at the state and federal level during the course of cleaning up housing materials, cars and other toxic and non-toxic debris.

State and local governments are primarily in-charge of the cleanup process.³⁶ FEMA's role is largely one of funding and resource support. To complicate matters, the Environmental Protection Agency (EPA), Department of Energy (DOE), General Services Administration (GSA) and other numerous federal agencies have some jurisdiction over the land, the waste and debris itself, or the method of transportation and disposal of the debris. To achieve speedy removal, most federal agencies issue emergency waivers ranging from extended hours for truck drivers to waivers of point source pollutant regulations.³⁷ The most controversial waivers are those statutorily granted by congress for National Environmental Policy Act (NEPA) and Comprehensive Environmental Remediation and Liability Act (CERLA).³⁸ The problem is that these waivers are so limited that agencies find it difficult to assess their risk exposure. These waivers only apply to emergency response actions taken pursuant to the Stafford Act; they do not apply to long-term redevelopment projects nor do they extend to any other environmental regulations.³⁹

CERCLA asserts that “any person who owned or operated, arranged for disposal or treatment, or transported hazardous substances to a disposal site shall be liable for costs of

³⁶ Ryan M. Seidemann et. al, *How Do We Deal With All Of This Mess? A Primer for State and Local Governments On Navigating The Legal Complexities Of Debris Issues Following Mass Disasters*, 61 U. MIAMI L. REV. 1135, 1158 (2007).

³⁷ Copeland, *supra* note 28, at CRS-2-5.

³⁸ Linder Luther, *NEPA and Hurricane Response, Recovery, and Rebuilding Efforts*, Congressional Research Service, CRS-6 (Library of Congress September 28, 2005); National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq.; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); 42 U.S.C. § 9601 et seq.

³⁹ Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended by Pub. L. 106-390 (Oct. 20, 2000) at Section 301.

removal or remedial incurred by the government at such a site.”⁴⁰ Generally, the federal government is a “potentially responsible party” when it comes to CERCLA liability.⁴¹ Pursuant to 42 U.S.C § 9607(d), emergency response activities may be shielded from liability, but governmental actors are still liable for negligence. Unfortunately, the courts have inconsistently applied the various statutory waivers and defenses of and to liability under CERCLA following natural disasters. An act of God defense, as codified in 42 U.S.C. § 107(b)(1), has been held inapplicable to some natural disasters, as they are “foreseeable based on climatic conditions.”⁴² The implication here is that defendants who are seeking an act of God defense must show that the natural disaster was unforeseeable.

Courts have also parceled out liability based on the type of work being undertaken at any given disaster site. For example, storing material may give rise to liability whereas actions taken to remediate the site will secure a limited waiver of liability.⁴³ This intrinsically leads to problems when overlapping layers of regulation at the federal and state levels are inconsistently waived. Many government actors incorrectly assume that principals of sovereign immunity shield them from liability, while others are cautiously aware of the precarious nature of the liability that they are potentially subject to. While the Disaster Relief and Emergency Act (DRA) does provide some blanket immunity for certain types of tortious events, environmental liability is still an unsettled question in terms of specific response protocols. For example, a private contractor working for a county government could remove and remediate toxic materials from a storage tank and be liable under state Leaking Underground Storage Tank Act (LUSTA) laws but be immune from the provisions of CERCLA.⁴⁴ Likewise, if the private contractor made the contamination problem worse and the federal government came to the rescue several years later, then the federal government itself may be liable because the applicable CERCLA waivers do not apply to activities not taken as part of the National Contingency Plan (NCP).⁴⁵ The scenarios by which a governmental actor could be liable are significant enough to limit or delay the remediation process.

At all levels of government, there was a great uncertainty as to the environmental liability of the actors undertaking environmental remediation and that resulted in further modification of

⁴⁰ 42 U.S.C. § 9607(a).

⁴¹ 42 U.S.C. § 9601(21).

⁴² *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987).

⁴³ *United States v. New Orleans*, No. 02-3618, 2003 WL 22208578 (E.D. La. Sept. 29, 2003)(citing *Easton v. Gilbert Southern Corp.*, No 9400505-CIV, 1995 U.S. Dist. LEXIS 114525 (S.D. Fla. 1995)).

⁴⁴ Leaking Underground Storage Tank Act(s) (LUSTA)

⁴⁵ 42 U.S.C § 9607(d)(1).

protocol in order to minimize risk.⁴⁶ This administrative tool is known as, “alternative regulatory compliance arrangements” in the parlance of the Council of Environmental Quality (CEQ).⁴⁷ A good example of how a narrowly interpreted law can undermine agency risk assessment is the law of emergency toxics remediation. Pursuant to the codification of the National Contingency Plan (NCP), “no federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA....”⁴⁸ The problem is that it is difficult to define “on-site” and a great deal of work presumably has to be done off-site. For instance, toxin and debris sorting activities can’t always be undertaken in the backyards of destroyed neighborhoods if you have any underlying notion of promoting a repopulation of the area. While the EPA recommends that local governments locate suitable remediation, storage, recycling and transfer sites ahead of time,⁴⁹ many local governments do not want to risk being on the hook both in financial and environmental terms for these sites, as was the case in New Orleans.⁵⁰ As previously noted, not all activities will be taken pursuant to the NCP.

For those public institutions that are both aware of their limited environmental liability and mobilized, there is often a delay due to the fact that funding for the cleanup is inconsistently applied. That can be primarily attributed to the limited amount of discretion that local FEMA administrators have in releasing aid dollars for cleanup projects.⁵¹ From the local government level to the federal level, it was not just a function of poor communication but also inconsistent regulatory response protocols. Luckily before Hurricane Ike hit in September 2008, FEMA worked hard to resolve these issues and made contractual arrangements to be financially responsible for the cleanup.

⁴⁶ Darnell Weeden, *Hurricane Katrina and the Toxic Torts Implications of Environmental Justice in New Orleans*, 40 J.MARSHAL L. REV. 1 (2008).

⁴⁷ See, U.S. Department of Energy, *Emergency Actions and NEPA*, available at <http://ceq.eh.doe.gov/nepa/nepanet.html>.

⁴⁸ 40 CFR § 300.400(e)(1).

⁴⁹ EPA, *Planning for Disaster Debris*, EPA-530-K-010 (December 2005) available at <http://www.epa.gov/garbage/disaster/dstr-pdf.pdf>.

⁵⁰ California Integrated Waste Management Board, *Integrated Waste Management Disaster Plan: Chapter 4, Temporary Storage(Pre-staging) Sites* (October 2007) available at <http://www.ciwmb.ca.gov/Disaster/DisasterPlan/chp4.htm> (citing that local governments should, “take into account the cost for leasing public or private land. In some cases, particularly in areas with high real estate costs, establishing a site may be prohibitive when weighed against the cost to collect and recycle the materials.”).

⁵¹ Samantha Turino, Comment, *Cleaning Up Disaster or Making More? A Look At Avenues of Relief For Those Devastated By The Clean-Up Efforts of Hurricane Katrina*, 18 VILL. ENVTL. L.J. 84, 87 (2007).

In the months after Katrina, there were several failed bills in Congress which proposed either long-term environmental waivers⁵² or a one-stop shop environmental permitting process for redevelopment. In theory, the legislation could have overcome the problem of inconsistent waivers for both public and private actors.⁵³ The underlying political support in Congress, however, dwindled when various revised bills were put forward to speed up the reconstruction of petroleum refineries.⁵⁴ To the credit of Congress's petrol lobby, a great deal of energy infrastructure was damaged and the entire country faced an emerging energy crisis after Katrina.⁵⁵ That being said, members of Congress were still not eager to subject themselves to the argument that congress "sold-out" the Gulf Coast to big oil at an opportunistic moment. The concept of a one-stop environmental permitting system never came back up in Congress. While there are compelling efficiency arguments for one-stop environmental permitting, it almost invariably cuts short the comprehensive nature of local, state, and federal regulations. This supports the notion that the real reform agenda for Congress should be identifying and overcoming inconsistencies within the existing regulatory frameworks, as opposed to just restructuring the front end permit process. The tension between streamlined permitting and comprehensive planning is a tension that plays out in a variety of redevelopment scenarios.

While environmental regulatory waivers are well intentioned, the result is that government actors often inconsistently interpret these waivers or they are ignorant of them altogether. This could just be a function of poor communication, but is more likely a result of inherent inconsistencies in response protocols between the National Response Plan and state and local analog plans.⁵⁶ Even within the federal government, the EPA and U.S. Army Corps of Engineers (USACE) found themselves undertaking duplicative environmental response efforts.⁵⁷

For an example of how this impacted the Gulf Coast, consider the notion of the environmental impact of debris. Following Hurricane Katrina there was roughly one hundred million (100,000,000) cubic yards of debris that was sent to landfills all over the country. A great deal of housing construction material could have been recycled and reused, with environmentally sensitive materials being sorted out. The EPA did undertake a tremendous effort to sort debris

⁵² S. 1711, 109th Cong. (2005).

⁵³ S. 1765, 109th Cong. (2005).

⁵⁴ H.R. 3836, 109th Cong. (2005).

⁵⁵ Jad Mouawad, *Katrina's Shock the System*, N.Y. TIMES, September 4, 2005, at A1.

⁵⁶ EPA, *Lessons Learned: EPA's Response to Hurricane Katrina*, Report No. 2006-P-00033, 3 (September 14, 2006) available at <http://www.epa.gov/oig/reports/2006/20060914-2006-P-00033.pdf>.

⁵⁷ *Id.* at 9.

materials, but to say that resources were devoted to sorting is not to say that equal resources were applied for recycling activities.⁵⁸ For example, after Katrina the hardest hit Parishes in Louisiana recycled only 30% of all of their debris.⁵⁹ Of that 30% of recycled material, most of it was organic material that was either burned or mulched.⁶⁰

Current estimates show that only 20-30% of housing materials are recycled using conventional demolition (not deconstruction) techniques.⁶¹ With material costs being the inflationary line item in redevelopment budgets, the reuse and reapplication of materials could certainly help stabilize the market for at least those items which lend themselves to being recycled. The premier model of this type of systematic recycling and deconstruction is The Green Project (TGP) out of New Orleans. TGP is a non-profit entity devoted to creating working algorithms for the deconstruction of buildings and the reuse of their materials.⁶² The business model is premised on discount retail sales of the recycled materials to the community. In addition to the environmental implications, the reuse of various materials also promotes the preservation of a very unique architectural history in New Orleans. TGP, however, does not have the capital to develop the manufacturing infrastructure necessary for large scale production. TGP's community-based distribution system could also benefit from the commercial acceptance of recycled materials. The problem that faces all recycled materials suppliers revolves around narrowly adopted building codes, which are infrequently updated to account for the use of recycled materials. The American National Standards Institute and other industry and trade associations simply do not have the ability to test and publish reference standards relative to the pace of emerging recycled materials technology.⁶³ The promotion of the TGP model as a model for private enterprise not only serves disaster stricken economies but also promotes efficiencies in the supply-side end of the redevelopment equation.

⁵⁸ EPA, *EPA Provided Quality and Timely Information on Hurricane Katrina Hazardous Material Releases and Debris Management*, Report No. 2006-P-00023 (May 2, 2006) available at <http://www.epa.gov/oig/reports/2006/20060502-2006-P-00023.pdf>.

⁵⁹ Louisiana Department of Environmental Quality, *Recycling Fact Sheet: Information Based on Army Corp's of Engineers Situation Reports* (2006) available at <http://lra.louisiana.gov/assets/enviro/TwentyOneParishRecycleReuseInformation.pdf>.

⁶⁰ *Id.*

⁶¹ Remarks by Deputy Director Maria Vickers, EPA Office of Solid Waste, at the 2005 Beneficial Use Summit (November 29, 2005) available at <http://www.epa.gov/epaoswer/osw/consolve/speeches/bene-05.htm>.

⁶² The Green Project, available at www.thegreenproject.org; see also, Martha McNeil Hamilton, *New Orleans Deconstruction Zone*, WASHINGTON POST, December 17, 2005, at F01.

⁶³ See generally, New York City Department of Sanitation, Bureau of Waste Prevention, Reuse and Recycling, *Inter-Agency Task Force Action Plan: Recycled-Content Building Materials* (2000).

Urban environments built in flood zones are particularly prone to widespread dispersion of toxic and biological contaminants. In the case of Katrina, much of the point-source contamination came from layers upon layers of residual sedimentary waste from the region's petrochemical industries. Even those homes that perceptively "dried out" posed significant risks to public health. FEMA and local governments did not implement uniform or timely criteria for the entry onto properties. The result is that emergency personnel and evacuees were undoubtedly exposed to toxic contamination, and that exposure was preventable.⁶⁴ Several weeks after Katrina, the EPA and the Centers for Disease Control (CDC) were finally making recommendations for the development of such entry criteria.⁶⁵ The EPA did eventually publish various materials several months after the fact, but it is not known how effective their public ad campaign was relative to what it should have been given the level of risk associated with the existing environmental contamination.⁶⁶

The implications of this lack of regulatory coordination and inter-agency communication are that: (i) sites are delayed in getting cleaned up and (ii) environmental contamination can spread. A great deal of these problems arise because of a collective *de facto* response to disasters. Pre-planning by way of an outside assessment of previous performance is the only way to improve and strengthen a comprehensive response plan. Without such a review, agencies are not able to adapt and utilize innovative problem solving tools developed outside their own agency.

III. Regulatory and Legislative Barriers to Long-Term Housing

A. Barriers to Property and Flood Insurance

If everyone got property and flood insurance for their home, then there really would not be much to discuss. The reality is that the insurance system does not by virtue of state and federal regulation have the capacity to cover all risks for all insured households. Even in cases where insurance is relatively affordable, not all homeowners are going to get insurance even if they are legally or contractually obligated to. Neither the federal government nor private industry wants to assume all the risk that is politically and economically untenable in light of the

⁶⁴ Felicity Barringer, *E.P.A. Struggles to Determine Extent of Hazards in Sludge*, N.Y. TIMES, September 15, 2005.

⁶⁵ Joint Taskforce Centers' for Disease Control and Prevention and U.S. Environmental Protection Agency, *Environmental Health Needs and Habitability Assessment: Initial Assessment* (September 17, 2005) available at http://www.epa.gov/katrina/reports/envneeds_hab_assessment.pdf.

⁶⁶ See generally, EPA, EPA Public Outreach Materials: Katrina (2008) available at <http://www.epa.gov/katrina/outreach/index.html>.

exceedingly large private and social costs attributable to natural disasters. At the same time, there is a compelling non-monetized social cost to uninsured losses as it relates to long-term manifestations of communities following disasters, which should not be overlooked.

These two competing public-private perspectives result in a patchwork insurance system that is susceptible to market failure following disasters. A market failure is defined as a point in time when the market is not able to either pay claims or provide insurance going forward for future redevelopment. For homeowners, the first step in moving forward with long-term resettlement is collecting on the insurance claims followed by the need to insure their new homes. The division of risk into various insurance products does little to promote the efficiencies of the insurance system mode of premium retention, premium investment and claim payouts.

Consumers do not always accurately gauge their risk, and even insured households are invariably underinsured. Following disasters, the process of filing, litigating and appealing claims is generally state specific as to rule of law but is undertaken in a Federal District Court venue. The result is inconsistencies in rulings among federal and state courts as to just about any possible question of law or interpretation of regulation. What is the standard of proof for demonstrating that the building was destroyed by the wind and not the flood? Will wind insurance cover flood damage—and vice versa?⁶⁷ The result is that the system is undermined by the cost to consumers collecting on claims, which should have otherwise been payable upon the stated occurrences. In this sense, the civil court system becomes a true economic barrier as a function of limiting a person's aggregate claim amount.

Following Katrina, the proposed solution to the vexing litigation problem came by way of the American Arbitration Association (AAA). The AAA worked with the State of Louisiana Department of Insurance to develop an alternative system of adjudication for the timely resolution of homeowners' claims.⁶⁸ This action was taken as a result of a judicial system which had exceeded its emergency capacity for timely procedural due process. The resulting alternative dispute program which discouraged lawyers and promoted a fiduciary role for public adjusters was regarded as a success by the state authorities, as well as by the public.⁶⁹ The only limitation to the program was that it was designed for all or nothing determinations as to the value of a

⁶⁷ Samuel W. Bearman, *Responding to an Unwelcome Visitor: Hurricane Claims Under the "Old Law" and the "New Law,"* American Association for Justice, AAJ Winter Convention Reference Materials (February 2007).

⁶⁸ Michael A. Patterson, *Evaluating the Louisiana Department of Insurance's Hurricane Katrina Homeowners Mediation Program*, 62 DISP. RESOL. J. 34, 36.

⁶⁹ *Id.* at 40.

house and was not able to handle more factually complex partial damage cases which make up a large percentage of the cases.⁷⁰

From the perspective of homeowners, claims resolution is the key barrier to redeveloping their homes because they cannot begin to rebuild without timely remittance of insurance proceeds. From the insurance company's perspective, regulation is the primary barrier to total coverage rates (i.e., every household is insured for their appropriate level of risk). The industry has long argued that the state regulators have not allowed them to pass on their reinsurance costs on a household by household basis, and as a consequence, insurance has been relatively unaffordable and sporadic in its coverage.⁷¹ An additional argument made by the industry that has attracted significant academic commentary is the concept that the Internal Revenue Code (IRC) prevents insurance companies from establishing large cash reserves that could be utilized in the event of a disaster.⁷² Several pieces of legislation have been put forward to allow insurance companies to create tax-free cash reserves, but legislation alone may not encourage the establishment of these reserves.⁷³ Many companies are reluctant to pay dividends, and this reflects a decreased internal rate of return to investors for marginally non-performing capital that has been set aside in order to maintain the same historic and projected levels of return on capital.⁷⁴

Contrary to a displaced homeowner's intuition, the insurance industry lobby did push for some fairly innovative post-Katrina legislation. The industry pushed for legislation that allowed for private reserves at each level of the insurance market from consumers to reinsurers. For instance, one failed bill would have allowed for private disaster reserves by way of a tax-free personal savings account for disaster-related expenditures.⁷⁵ At the reinsurance level, the industry and some lawmakers with bi-partisan support argued that property insurers could not

⁷⁰ See generally, James A. Knox, Jr., "Causation, the Flood Exclusion and Katrina," *Symposium Issues on Hurricane Losses and Liability*, 41 TORT & INS. L.J. 901 (SPRING 2006).

⁷¹ *Is America's Housing Market Prepared for the Next Natural Catastrophe*, Before the House Financial Services Committee, Subcommittee on Housing and Community Opportunity, 109th Cong., 3-5 (June 28, 2006)(statement of Ernest Csiszar on behalf of The Property Casualty Insurers Association of America).

⁷² Christine L. Agnew, *Come Hell and High Water: Can the Tax Code Solve the Post-Katrina Insurance Crisis?*, 11 LEWIS & CLARK L. REV. 701, 720 (2007).

⁷³ Policyholder Disaster Protection Act of 2007, H.R. 164, 110th Cong. (2007); Policyholder Disaster Protection Act of 2006, S. 3116, 109th Cong. (2006).

⁷⁴ Agnew, *supra* note 73, at 714.

⁷⁵ Catastrophe Savings Account Act of 2006, H.R. 4836, 109th Cong. (2006); S. 3115, 109th Cong. (2006).

issue new policies because their limited cash reserves were held up paying claims and could not be used to pay inflationary reinsurance premiums.⁷⁶

The industry and a significant bi-partisan Congressional delegation argued that State Catastrophe Funds, such as those in California and Florida, should further mitigate their risk not through new and greater premium retention and bond issuances but through a national catastrophe fund.⁷⁷ The goal of the proposed legislation was to shift some of the risk away from the cash-strapped secondary insurance market, which in theory would result in risk-adjusted premiums going down in the primary market. Even though participation in the proposed national fund program was entirely elective between states, the bill and others like it eventually stalled. Unfortunately for homeowners, there was not even enough support to create a commission to study the problem.⁷⁸ This lack of Congressional attentiveness sets a dangerous precedent. What worries risk managers and insurance regulators are not just disasters but the mega disasters threatening to deliver losses that far exceed reserve capacity for state insurers of last resort.⁷⁹

One private sector post-Katrina insurance matter that did gain political traction was the desire to reform the National Flood Insurance Program (NFIP).⁸⁰ As previously mentioned, the NFIP has set in motion the platform for reform with the Flood Map Modernization Initiative (FMMI). Unfortunately, Congress has consistently failed to fully fund the program for almost 10 years. During this time, restructuring of the program administration under FEMA and the Department of Homeland Security have further delayed the initiative. In an about face, the 110th Congress passed the Flood Insurance Reform and Modernization Act of 2007, which provides for discounted rates for participating communities who undertake either: (i) unfunded digital map modernization or (ii) efforts which increase flood insurance participation levels and enforcement.⁸¹ Off-budget premium incentives could be the driving force for state and local communities to expedite the modernization process, which to this point has been delayed for a lack of funding.

⁷⁶ *Issues Related to Catastrophe Insurance Availability and the Housing Markets, Before the House Financial Services Committee, Subcommittee on Housing and Community Opportunity*, 109th Cong., 4 (2006)(Testimony of Guy Williams on behalf of the American Bankers Association).

⁷⁷ The Homeowners' Insurance Protection Act of 2007, H.R. 91, 110th Cong. (2007).

⁷⁸ Commission on Natural Catastrophe Risk Management and Insurance Act of 2007, S.2286 and H.R. 3644, 110th Cong. (2007).

⁷⁹ See, Rawle O. King, *Hurricane Katrina, Insurance Losses and National Capacity for Financing Disaster Risk*, Congressional Research Service, Order Code RL33086 (September 15, 2005).

⁸⁰ Knox, *supra* note 71, at 6.

⁸¹ Flood Insurance Reform and Modernization Act of 2007, H.R. 3121, 110th Congress (May13, 2008).

While Congress has yet to appropriate funding sufficient to support the flood map modernization for the entire country, Congress has allocated priority in funding to the Gulf Coast. One of Congress's motivations in speeding up flood map modernization in the Gulf Coast is that the NFIP needs to be used to prevent people from rebuilding in areas that pose inordinate risk. While this initiative is essentially a federal prerogative, Congress has delegated much of the process to state and local governments, which have been subject to political and administrative delays. The process of determining if and when someone can return to the *situs* of their former home is one that raises many questions of equity and fairness and is very often plagued by delays and litigation.

B. Fair Housing and the Right to Return

It is inevitable that large numbers of people will not be able to return to or rebuild their homes by virtue of either updated flood maps (i.e., market forces) or government sanctioned redevelopment plans. No matter where people end up, they risk being the victims of housing discrimination. This is especially true in light of the fact that many evacuees will rent in unfamiliar and tight housing markets after a disaster. As a consequence of the post-Katrina mass migration, advocates for underrepresented demographics have called for greater attention not only to the process of making relocation determinations but also to the underlying risk that evacuees might be subject to unlawful discrimination.⁸² The housing advocate's primary course of action has been to redress the impacts of housing discrimination with the application of the Fair Housing Act (FHA).⁸³ While the FHA is principally enforced by HUD, housing advocates with the support of state agencies can also prosecute a private cause of action. Unfortunately, private causes of action are generally too expensive to prosecute for those who are discriminated against. The former public housing residents in New Orleans, however, did manage to prosecute a high-profile FHA claim against the PHA and HUD, but such actions under the FHA ultimately failed.⁸⁴

⁸² Rob Wilcox, *Housing in Post-Katrina New Orleans: Legal Rights and Recourses for Displaced African-American Residents*, 2 NW J. L. & SOC. POL'Y 105 (SUMMER 2007); Janet Murguria, National Council of La Raza, *Fair Housing Issues in the Gulf Coast in the Aftermath of Hurricane Katrina and Rita*, submitted to U.S. House of Representatives, Sub-committee on Housing and Community Development (February 28, 2006).

⁸³ Fair Housing Act, Title VIII, Civil Rights Act of 1968, codified as § 42 U.S.C. 3601 et seq..

⁸⁴ See, *New Orleans Public Housing Residents File Class Action Lawsuit Against HUD*, National Low Income Housing Coalition, Memo to Members, Vol. 11, Issues 26 (June 30, 2006)(this series of cases, which came to be known as the HANO Lawsuits, are still pending in their respective jurisdictions in some form or another).

HUD's administrative law capacity for adjudicating FHA violations is efficient enough in its processes, as a function of administering due process, but the administrative law system is ultimately not the most efficient or effective venue for relief. Traditional equitable powers retained by courts of primary jurisdiction are ultimately the only meaningful tools for redress. The federal government has been largely ineffective in resolving FHA claims to the extent that the Justice Department under the Bush administration has rarely elected to prosecute these cases.⁸⁵ The Housing and Civil Enforcement Section of the Civil Rights Division at the Justice Department prosecuted 255 cases during the entire term of the Bush administration.⁸⁶ In 2007, only 4 cases were brought by HUD pursuant to random "tests" of potential discrimination practices. It is important to remember that HUD advertises these "tests" as being leading and effective deterrents.⁸⁷ In the same year, not a single case of housing discrimination appears to have been prosecuted along the Gulf Coast.⁸⁸ Just in the year 2007, more than 10,000 FHA complaints were formally filed nationwide with HUD.⁸⁹

The core barriers to enforcement of the FHA are two fold. First, discriminatory actors are both private and public entities. This expanse of jurisdiction makes prosecution outside the administrative arena much more difficult. In any given year, housing-related civil rights actions brought by both public and private actors make up less than .25 percent of the total number of federal civil rights cases prosecuted.⁹⁰ This statistic does not cover the expanse of private civil actions relating to contract, landlord-tenant relations and real estate ventures, which often are litigated in state courts pursuant to state law. It does demonstrate marginalization in terms of prosecuting violations outside of HUD's administrative system by the Justice Department. The second principal problem is that there are a series of seemingly inconsistent judicial precedents relating to a showing of discriminatory "intent" in various Federal District and Appellate Courts

⁸⁵ See generally, Charles Lamb, American Federalism and Civil Rights Enforcement: the Fair Housing Act from 1973 to 2004, Paper Presented to the Midwest Political Science Association (May 8, 2008)(using a thirty-one year dataset obtained from HUD, this unpublished paper examines the effectiveness and efficiency of federal versus state and local enforcement of the Fair Housing Act between the Carter and Bush II administrations).

⁸⁶ U.S. Justice Department, Recent Accomplishments of Housing and Civil Enforcement Section, Civil Rights Division (May 2, 2008) available at <http://www.usdoj.gov/crt/housing/fairhousing/whatnew.htm>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Steven D. Barnes, *Last Year, 10,000 People Filed Complaints Claiming Housing Discrimination*, ORLANDO SENTINEL, May 5, 2008, at C4.

⁹⁰ U.S. Dep't of Justice, Bureau of Justice Statistics, *Civil Rights Complaints*, Civil Justice Data Brief (July 2002).

that make FHA claims very difficult to prosecute.⁹¹ In light of the relatively onerous legal and economic hurdles that private parties have to overcome to protect their housing-related rights and interests, the federal government should allocate some prosecutorial resources to the Gulf Coast to further deter a well-documented pattern of housing discrimination.

IV. Looking Forward with Smart Growth and Alternative Housing Types

June 2008 marked the final month that evacuees were able to reside in trailers. The public uproar over unsafe levels of phermaldehyde in trailers was the final straw for the FEMA trailer program. These trailers were the only home for thousands of evacuees for years, and the process of depopulating trailer parks will be challenging.⁹² Fortunately, FEMA and HUD's Alternative Housing Pilot Program (AHPP) with the help of the Mississippi State Government has been able to step up to the table with a plethora of constructive ideas and models to fill the void of the retired trailers. The AHPP has also attracted a strong interest from those searching for more economical and sustainable methods of construction and design. With the support of increased funding from Congress, the pilot program is poised to change the landscape for how we house displaced persons.

How we house people in light of the current economic disaster on the Gulf Coast is another issue. Despite the political attentiveness to innovation and the ideals of sustainable smart growth, many local communities are reluctant to embrace the hallmark product of the AHPP—the Katrina Cottage. The cottages cost roughly \$45 to \$55 per square foot to build and generally range from 400 to 800 square feet. That translates to a production cost of \$27,000 to \$46,000. In terms of square footage, these units are generally about 1/2 to 1/3 larger than the previously habitable trailers and cost about 1/3 less to produce. It is important to remember that these cottages are almost exclusively on the sites of the former homeowner's lots and are generally not grouped in communities, as was the model for trailers. Prior to Katrina, much of the revered housing in the region was of the Acadian-Creole and Victorian vernaculars, and the Katrina Cottage emulates these designs.⁹³ The aesthetic architectural variations of the cottages work to compliment the previously situated housing stock, but ultimately, these units are not designed to

⁹¹ Wilcox, *supra* note 101, at 111-113.

⁹² *Police Kill Man in Standoff Over FEMA Trailer*, Associated Press republished by CNN (June 4, 2008) available at http://www.cnn.com/2008/CRIME/06/04/fema_standoff_ap/index.html.

⁹³ Mississippi Renewal Forum, *A Pattern Book for Gulf Coast Neighborhoods* (2005) available at http://www.mississippirenewal.com/documents/Rep_PatternBook.pdf.

be permanent structures. Much to the dismay of local governments, the design of the Katrina Cottage actually made the structure feel more permanent than was intended. The primary goal of the AHPP is to develop prototype houses for mass production that are both economical and sustainable. The resulting series of designs, including the Katrina Cottage, were the result of participation from designers and planners from all over the country. Despite the numerous advantages, local communities have been very reluctant to allow the siting of Katrina Cottages.⁹⁴

While the government provides the improvements, the actual real estate is generally owned or leased by the beneficiaries. As noted, local governments fear that the cottages will become a long-term solution to a mid-term problem. Their principal concern is that lower property values from properties with Katrina Cottages will directly result in an absolute decline in revenue collections. The local government's answer to this problem has been to put up regulatory roadblocks at every turn. Almost four years later and despite the fact that cottages cost between 30-40 percent less than trailers, fewer than 1000 people have moved into cottages.

Unfortunately, more legislation does little to remedy existing regulatory barriers, unless those barriers are specifically identified and targeted as a component of a comprehensive plan. The federal government cannot expect state governments to undertake apolitical moves to limit local home rule, which is to blame for much of the delays on the ground. One possible solution for overcoming barriers is for the federal government to work in concert with the states to land bank property for scaled development. This common trust model could be managed by one regulatory body that has jurisdiction over the entirety of the devastated land and would be able to internally regulate systematic barriers. Although this type of scaled development concept is what was behind the well thought-out but failed Baker Bill, this very well could be politically viable in the future as more and more land becomes available through taxes, sales and foreclosures.⁹⁵

Like much of the regulation identified in this paper, this problem could be overcome if Congress and the federal government took a more active role in policing the problem with more expansive legislation and less expansive administration. In the case of local governments refusing to site cottages, there is clearly a federal prerogative which trumps local home rule interests. While the federal government is generally required to follow local land use regulations,

⁹⁴ Jenny Jarvie, *Post-Katrina Cottages Get a Lukewarm Welcome*, L.A. TIMES, December 16, 2007.

⁹⁵ The Baker Bill, H.R. 4100, 109th Cong. (2005)(The Baker Bill was introduced by Rep. Richard Baker (R-LA) and had the strong support of the Gulf Coast congressional delegation; however, the bill was overwhelmingly rejected by Republican house).

it does so as a courtesy to the states. For instance, the federal government has the power to pass a piece of legislation tailored to prevent discrimination of cottage beneficiaries. The Religious Land Use and Institutionalized Persons Act of 2000 provides a perfect example to demonstrate a federal prerogative over land use matters traditionally retained by the states and delegated to local governments.⁹⁶

These issues inevitably boil down to who has the power to make decisions about the future of the built environment. As a country, our collective intuition after Katrina was to let the residents decide. This charrette model for public participation worked well for networking design professions, but it did little to voice guidance that was democratic, realistic and constructive. The process was inherently undermined by the random and unpredictable nature of participation, the resulting political response, and the lack of working capital available for private investment in redevelopment activities. Today, the Gulf Coast needs political leadership backed by strong federal legislation that allows for uniform systems of regulatory compliance and claims adjudication. Likewise, priorities should be given to fair housing enforcement and developing the flood map initiative. While government resources have historically focused on emergency housing, the government must continue to develop strategies for meeting short-, mid- and long-term housing needs. Disaster beneficiaries need a simple and equitable process for receiving assistance. Developers need a simple and straight forward process to take on the risk of redeveloping. While efforts are underway for the future redevelopment of the Gulf Coast region, the present unsustainable housing conditions for hundreds of thousands of people must not be forgotten.

⁹⁶ 42 U.S.C. §§ 2000cc, et seq.

APPENDIX TABLE 1: HUD'S EMERGENCY REGULATORY WAIVERS

Office of Community Planning and Development—Grant Programs

PROGRAM	CITATION	EXPLANATION	JUSTIFICATION
HOME Investment Partnerships (HOME) Act, as amended (42 U.S.C. 12721 et seq.)(Act)	Citizen Participation for Consolidated Plan Amendment , 24 CFR 91.105(c)(2) and (k) (Local Governments), 24 CFR 91.115(c)(2) and (i) (States), and 24 CFR 91.401 (Consortia).	When proposing a substantial amendment to its Consolidated Plan, a participating jurisdiction (PJ) must provide a period of not less than 30 days to allow citizens and public interest groups to comment on the proposed amendment(s). This waiver will permit PJs amending their plans as a result of Hurricane Katrina to reduce the comment period to 3 days.	This waiver is required to permit PJs that sustained damage and displacement of population as a result of Hurricane Katrina to immediately reprogram HOME funds in their FY 2005 or prior years' HOME agreements, and deliver emergency housing assistance to affected residents.
HOME	Tenant-Based Rental Assistance (TBRA) Section 212(a)(3)(A)(i) (Act), and 24 CFR 91.225(d)(1) (Local Governments), §91.325(d)(1) (States), and §91.425(a)(2)(i).	This section of the rule requires PJs intending to use HOME funds for TBRA to certify that the provision of such assistance is an essential part of its Consolidated Plan.	Required to relieve the PJ of the administrative burden of determining and certifying needs that are obvious.
HOME	Source Documentation for Income Determinations 24 CFR 92.203(a)(1) and (2), and 24 CFR 92.610(c) .	This section of the rule requires that initial income determinations be made using source documentation. This waiver will permit the PJ to use self-certification of income, as provided in §92.203(a)(1)(ii), in lieu of source documentation to determine eligibility of beneficiaries for HOME and ADDI assistance who are unable to provide such documentation because their homes were severely damaged or they were displaced by Hurricane Katrina. The PJ must retain the income self-certification.	Many families whose homes were destroyed or damaged by Hurricane Katrina will not have any documentation of income and will not be able to qualify for HOME assistance if the requirement remains effective. This waiver is limited to a period of one year.
HOME	Limitation on Use of HOME funds for Administrative Costs Section 212(c) (Act), and 24 CFR 92.207.	This section of the rule limits the amount of HOME funds that a PJ may use for administrative and planning costs to 10 percent of allocation plus program income received. This provision is suspended to enable the PJ to expend up to 20 percent of its FY 2004, FY 2005, and FY 2006 allocations and program income received for administrative and planning costs.	Required to provide the PJ adequate funds to pay for the increased cost of administering HOME-related disaster relief activities and to relieve the PJ of the burden of identifying PJ funds to pay these costs.
HOME	Tenant-based rental assistance (TBRA); Eligible costs and requirements Section 212(a)(3)(Act), and 92.209(b), (c), (h), (i), (j) and (k).	This section of the rule governs the operation of a HOME TBRA program. The provisions of: (b) General requirement (certification); (c) Tenant selection; (h) Maximum subsidy are being suspended; (i) Housing quality standards; (j) Definition of Security deposit; and (k) Program operation. (HUD cannot suspend requirements with respect to low-income status of beneficiaries.)	Suspending these provisions will provide the PJ with greater flexibility to use tenant-based rental assistance as an emergency housing resource.
HOME	Rent Standards for Tenant-Based Rental Assistance 24 CFR 92.209(h)(3).	This section of the HOME final rule provides two options for PJs in establishing rent standards for their TBRA programs. The TBRA payment may not exceed the difference between the rent standard and 30% of the family's adjusted income. In many housing markets there is a limited stock of vacant units that charge rents within the rent standards and evacuees receiving TBRA would be required to pay more than 30% of their income toward rent. This waives the HOME rent standard requirement and permits PJs to establish rent standards, by unit size, that are reasonable based upon rents being charged for comparable unassisted units in the area, taking into account the location, size, type, quality, amenities, facilities, management and maintenance of each unit. This rent standard is to be used in calculating the TBRA subsidy for persons displaced by Hurricane Katrina. PJs are required to determine rent reasonableness in accordance with §92.209(f). This waiver is limited to a period of one year.	This waiver is required to expedite efforts to identify suitable housing units for rent to families that have been displaced by Hurricane Katrina and provide a more generous subsidy to families that must rent units with rent charges that exceed the PJ's normal TBRA rent standard.
HOME	Reduction of matching contribution requirement 24 CFR 92.222(b).	HUD is hereby reducing the matching requirements for the PJ by 100 percent with respect to any HOME funds expended during FY 2006 and FY 2007. The requirement that the PJ must submit a copy of the disaster declaration is waived.	The approval of a match reduction will relieve the PJ from the need to identify or provide matching contributions to HOME projects, in light of the urgency of its housing needs and the substantial financial impact Hurricane Katrina will have on the PJ.
HOME	Project Requirements: Maximum per-unit subsidy Section 212(e) (Act), and 24 CFR 92.250(a) and §92.612(a).	This section of the rule specifies the maximum subsidy amount of HOME and ADDI funds that the PJ may invest per unit.	Required to allow the PJ needed flexibility to assist affected low-income households by removing the per-unit cap on assistance.
HOME	Project Requirements: Property Standards 24 CFR 92.251 and 24 CFR 92.612(b).	This section of the rule requires that housing assisted with HOME or American Dream Downpayment Initiative (ADDI) funds meet property standards based on the activity undertaken, i.e., HUD housing quality standards (HQS) in Section 982.109 for tenant-based rental assistance and homebuyer assistance, and state and local standards and codes or model codes for rehabilitation and new construction. Property standard requirements are waived for repair of properties damaged by Hurricane Katrina and for units occupied by tenant-based rental assistance recipients that were displaced by Katrina. Units must meet State and local health and safety codes. The lead housing safety regulations established in 24 CFR Part 35 are not waived.	Required to enable the PJ to meet the critical housing needs of families whose housing was damaged and families who were displaced by Hurricane Katrina.

HOME	Property Standards for Tenant-Based Rental Assistance 24 CFR 92.209(i) and 24 CFR 92.251(d).	This section of the HOME final rule provides that units occupied by recipients of HOME TBRA meet the Housing Quality Standards (HQS) established at 24 CFR 982.401. This property standard requirement is waived for units occupied by TBRA recipients who were displaced by Katrina and are registered with the FEMA. PJs must ensure that these units, at a minimum, meet state and local health and safety codes within 30 days of occupancy. The lead hazard safety regulations at 24 CFR Part 35, Subpart M, which require the PJ to perform a visual assessment for deteriorated paint surfaces when a child under age 6 will occupy a unit using a TBRA subsidy, remain in effect.	This waiver is required to enable PJs to expeditiously meet the critical housing needs of the many thousands of families that have been displaced by Hurricane Katrina. This waiver is effective for one year.
HOME	Tenant and participation protections Section 225(d) (Act), and 24 CFR 92.253(d).	This section of the rule requires an owner of rental housing assisted with HOME funds to adopt written tenant selection policies and procedures.	The requirement that there be written tenant selection criteria constitutes an impediment to the expeditious use of HOME funds. Waiver limited to period of one year.
HOME	Homeownership Housing Maximum Value/Sales Price Limitation Section 215(b)(1) (Act), and 24 CFR 92.254(a)(2).	This section of the rule requires that the sales price or maximum after-rehabilitation value of HOME-assisted housing not exceed 95% of area median sales price.	The waiver is necessary to provide the PJ with flexibility to assist affected low-income homeowners to repair hurricane and flood damage to their homes and low-income homebuyers to purchase available, standard housing in local market areas.
HOME	Community Housing Development Organizations (CHDOs): Set-aside for Community Housing Development Organizations Section 231 (Act), and 24 CFR 92.300(a)(1).	This section of the rule establishes a set-aside for Community Housing Development Organizations (CHDOs). The requirement that the PJ use 15% of its allocation for housing owned, developed, or sponsored by CHDOs is suspended for the PJ's FY 2005 and FY 2006 allocations.	Required to relieve the PJ of requirements that impede the obligation and use of funds to expeditiously provide housing to displaced persons and repair damaged properties.
HOME	American Dream Downpayment Initiative (ADDI) Requirements: First-time Homebuyer Requirement: Section. 271(c)(1) (Act), and 24 CFR 92.602(a)(1).	This section of the rule provides that households assisted with ADDI qualify as first-time homebuyers.	Required to enable the PJ to assist families that previously owned homes that were damaged or destroyed in Hurricane Katrina to purchase homes with ADDI funds. Waiver limited to households affected by the disaster.
HOME	Per Unit Limit on ADDI Assistance Section. 271(c)(2)(A)(i) (Act), and 24 CFR 92.603(e).	This section of the rule limits the amount of ADDI assistance that may be provided to an assisted homebuyer to the greater of: 1) 6 percent of the sales price; or, 2) \$10,000.	Required to relieve the PJ of the burden of finding other sources of financing to assist families affected by Hurricane Katrina to purchase homes. Suspension is limited to households affected by the disaster.
MISC.	Optional Relocation Assistance 24 CFR 92.353(d).	This section requires a publicly available, written policy for providing relocation payments and other relocation assistance to persons displaced by activities not covered by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (42 U.S.C. 4201-4655)(URA) or assistance to persons covered by the URA or section 104(d) at higher levels than required by such provisions. Equal levels of assistance must be provided for each class of displaced persons.	Because of the large numbers of displaced person, requiring the PJ to provide equal levels of assistance to each class of displaced persons may reduce assistance to such low levels that it would have little meaningful benefit.
MISC.	Section 104(d), One-for-One Replacement Section. 105(a)(16) of the NAHA, Section. 104(d)(2)(A)(i) and (ii) and Section. 104(d)(3) of the HCD Act, 24 CFR 92.353(e) and 24 CFR 42.375.	These provisions require a PJ to replace occupied and vacant occupiable lower-income dwelling units that are demolished or converted to a use other than as lower-income dwelling units in connection with a development project assisted with HOME.	Required to relieve the PJ of requirements that would impede disaster recovery, discourage PJs from acquiring, demolishing or rehabilitating disaster-damaged housing and thereby inhibiting recovery efforts designed to address health and safety problems.
MISC.	Replacement Housing Assistance Section. 105(a)(16) of the NAHA, Section. 104(d)(2)(A)(iii) and (iv) and Section. 104(d)(2)(B) and (C) of the HCD Act, 24 CFR 92.353(e) and 24 CFR 42.350(e)(1).	These provisions require a PJ to provide rental assistance payments calculated based on 60 months.	This requirement to calculate replacement housing payments based on 60 months, rather than 42 months as required by the URA creates a disparity between the available benefits. The waiver assures uniform and equitable treatment for all such tenants.
MISC.	Decent, Safe and Sanitary Standard 24 CFR 92.353(b)(2)(iii).	The rehabilitation of a substandard dwelling occupied by a non-displaced person in a disaster-damaged building triggers a requirement that the unit be decent, safe and sanitary upon completion of the rehabilitation	Failure to waive this provision would impede disaster recovery, discouraging grantees from undertaking rehabilitation of disaster-damaged housing and thereby inhibiting recovery efforts designed to address health and safety problems.

<p>Housing and Community Development Act of 1974, as amended (42 USC 5305(a)(8))(Act).</p> <p>Community Development Block Grant (CDBG)</p>	<p>Reduction in Public Comment Period 24 CFR 91.105(c)(2).</p>	<p>Grantees are required to prepare consolidated plans and action plans identifying activities to be carried out with CPD formula funds. Amendments to plans are generally subject to a 30 day comment period in order to give the public an opportunity to review and comment on proposed changes. Waiver reduces comment period from 30 to 3 days.</p>	<p>Several Community Development Block Grant (CDBG) entitlement grantees proposed the use of CDBG funds to pay costs associated with the expense of housing and providing other services to Hurricane Katrina evacuees. Given the unexpected nature of this situation, the grantees' consolidated plans do not include activities designed to address these needs and expenses. To quickly address these costs, the entitlement grantees sought approval to waive the 30-day public comment period standard in order to amend approved consolidated plans. HUD cannot totally waive this statutory requirement but the waiver reduces the comment period to the bare minimum.</p>
<p>CDBG</p>	<p>Suspension of 15 Percent Public Service Cap Section 105(a)(8) of Housing and Community Development Act of 1974, as amended (42 USC 5305(a)(8)).</p>	<p>Section 105(a)(8) of the HCD Act imposes upon CDBG grantees a 15 percent cap on public service expenditures. CDBG grantees in disaster areas contacted HUD seeking relief from the CDBG public services cap in order to utilize CDBG funds to cover expenses related to servicing this population. As noted above, many of these needs are public service expenses and activities eligible under the CDBG program. This waiver suspends the 15 percent cap on public service expenditures imposed by section 105(a)(8) of the Act. The relief granted by this suspension shall enable CDBG grantees to obligate and expend amounts in excess of their individual 15 percent public services caps for activities and purposes related to Hurricane Katrina assistance efforts.</p>	<p>The damage attributable to Hurricane Katrina has been so great and widespread that it has caused an exodus from the declared disaster areas. In this instance, addressing the damage caused by the federally declared disaster involves addressing the needs of population displaced by the disaster. As noted above, many of these needs are public service expenses and activities eligible under the CDBG program.</p>
<p>Emergency Shelter Grant (ESG) Program Regulations Codified at 24 CFR Part 576</p>	<p>Citizen Participation for Consolidated Plan Amendment 24 CFR 91.105(c)(2) and (k) (Local Governments), 24 CFR 91.115(c) and (i) (States).</p>	<p>When proposing a substantial amendment to its Consolidated Plan, a grantee must provide a period of not less than 30 days to allow citizens and public interest groups to comment on the proposed amendment(s). This waiver will permit grantees amending their plans as a result of Hurricane Katrina to reduce the comment period to 3 days. A waiver is not needed for non-substantial changes in plans.</p>	<p>This waiver is required to permit ESG grantees, especially "receiving communities," to reprogram ESG funds to provide emergency shelters and other essential services to evacuees.</p>
<p>ESG</p>	<p>Definition of "emergency shelter" 24 CFR 576.3</p>	<p>The Secretary may waive the definition of "emergency shelter" so that it is not limited to "facilities."</p>	<p>The current definition prevents the use of conventional housing owned by private sector landlords from being used as short-term emergency and transitional shelter resources. Because of the scope of this disaster, HUD should provide maximum flexibility to grantees to meet their emergency housing needs.</p>
<p>ESG</p>	<p>Deadlines for using grant amounts 24 CFR 576.35</p>	<p>This waives obligation and expenditure requirements as listed in (a) and (b) for a period of up to one year (subject to any applicable statutory limitations). States must currently make the funds available for use within 65 days, obligate them within 180 days and spend them within 24 months. Entitlement communities must spend funds within 24 months.</p>	<p>This waiver will enable grantees to retain their funds while homeless providers and their communities seek to rebuild service delivery systems in the wake of the Katrina disaster.</p>
<p>AIDS Housing Opportunities Act, as amended (42 U.S.C. 12901 et seq.) (Act) and in the Housing Opportunities for Persons with AIDS (HOPWA) Program Regulations Codified at 24 CFR Part 574</p>	<p>Program Requirements: Citizen Participation for Consolidated Plan Amendment: 24 CFR 91.105(c)(2) and (k) (Local Governments), 24 CFR 91.115(c)(2) and (i) (States).</p>	<p>When proposing a substantial amendment to its Consolidated Plan, a participating HOPWA grantee must provide a period of not less than 30 days to allow citizens and public interest groups to comment on the proposed amendment(s). This waiver will permit the grantee to amend their plans as a result of Hurricane Katrina to reduce the comment period to 3 days</p>	<p>This waiver is required to permit grantees that sustained damage and displacement of population as a result of Hurricane Katrina to immediately reprogram HOPWA funds in their FY 2005 or prior years' grant agreements, and deliver emergency housing assistance to affected residents.</p>
<p>HOPWA</p>	<p>Source Documentation for Income and HIV Status Determinations 24 CFR 574.3, Eligible Person</p>	<p>This section of the regulation establishes the definition of eligible person as a low-income person who is living with HIV/AIDS and their families. The grantee or a project sponsor must document eligibility determinations in client files. This waiver will permit these organizations to use self-certification of income and credible information on their HIV status in lieu of source documentation to determine eligibility for HOPWA assistance of persons displaced by Hurricane Katrina. HIV status would be documented within 60 days.</p>	<p>Many families whose homes were destroyed or damaged by Hurricane Katrina will not have any documentation of income or other HIV related records and will not be able to quickly qualify for HOPWA assistance if the requirement remains effective. This waiver is limited to a period of one year.</p>

HOPWA	Rent Standards for Tenant-Based Rental Assistance 24 CFR 574.310(d), Resident Rent Payment and 574.320(a)(1), Maximum Subsidy	This section of the HOPWA regulations provides two options for grantees in establishing rent standards for their TBRA programs. The TBRA payment may not exceed the difference between the rent standard and 30% of the families' adjusted income. In many housing markets there is a limited stock of vacant units that charge rents within the rent standards and, if units that rent above these standards are available, the evacuees receiving TBRA would be required to pay more than 30% of their income toward rent. This waives the HOPWA rent standard requirement and permits grantees to establish rent standards, by unit size, that are reasonable based upon rents being charged for comparable unassisted units in the area, taking into account the location, size, type, quality, amenities, facilities, management and maintenance of each unit. This rent standard is to be used in calculating the TBRA subsidy for persons displaced by Hurricane Katrina. This waiver is limited to a period of one year. In cases where an eligible person or household moves into a unit owned by another member of their family, this waives the requirement that the entire family income be used in determining eligibility and in establishing the amount of housing assistance.	This waiver is required to expedite efforts to identify suitable housing units for rent to families that have been displaced by Hurricane Katrina and provide a more generous subsidy to families that must rent units with rent charges that exceed the grantee's normal TBRA rent standard and allow for the use of family-owned units.
HOPWA	Property Standards for Tenant-Based Rental Assistance 24 CFR 574.310(b)	This section of the HOPWA regulations provides that units occupied by recipients of HOPWA TBRA meet the Housing Quality Standards (HQS) established in this section. This property standard requirement is waived for units occupied by TBRA recipients who were displaced by Hurricane Katrina. Grantees and their project sponsors must ensure that these units, at a minimum, meet state and local health and safety codes within 30 days of occupancy.	This waiver is required to enable grantees to expeditiously meet the critical housing needs of the many individuals and families that have been displaced by Hurricane Katrina. This waiver is effective for one year.

**APPENDIX TABLE 2: HUD'S MORTGAGE INSURANCE PROGRAM
EMERGENCYRESPONSE: REGULATORY WAIVERS**

PHASE I – PRIMARY MARKET LIQUIDTY	PHASE II – SECONDARY MARKET LIQUIDITY	PHASE III – REPAIR
<ul style="list-style-type: none"> ➤ Ninety (90) Day Moratorium on Foreclosures (FHA/GNMA). ➤ Encouraged lenders to forebear, modify, and refinance. ➤ Destroyed or Severely Damaged Houses, as determined by FEMA, are eligible for 100% Financing under Section 203(h) of the National Housing Act. ➤ Waived age of structure requirements to facilitate Section 203(k) Financing. ➤ Extended underwriting criteria to allow for 45% of gross income for total monthly debt service. ➤ Required lenders to get permission from borrowers prior to using insurance proceeds as payment for arrearages. 	<ul style="list-style-type: none"> ➤ Mortgage Assistance Initiative (MAI): HUD pays up to twelve (12) months of payments on FHA Insured Notes. ➤ MAI applies to not only those who were physically displaced, but also for those who are unemployed as a result of the Disaster. ➤ MAI only applies to Primary Residence. ➤ MAI payments carry a 0% interest rate and are aggregated to a principal amount which must be paid off when the existing FHA insured notes are paid off. ➤ GNMA extends Targeted Lending Initiative (TLI) to Disaster Areas. ➤ GNMA does not count delinquencies in disaster areas for delinquency statistics for risk monitoring (risk pricing) in TLI MBS. ➤ Up to three (3) basis points off a six (6) basis point Guaranty Fee that GNMA charges MBS packagers for TLI MBS offerings. 	<ul style="list-style-type: none"> ➤ Steamline(k) Limited Repair Program (Steamline(k)): expanded Section 203(k) to \$35K loan for rehab work. While this program was not Katrina specific, various construction work oversight regulations were adapted to facilitate speedy release of escrow funds. ➤ Steamline(k) expanded to cover Lead Paint Remediation and Cash-out Options Available for 203(h)-(k). ➤ Limited Extension of Foreclosure Moratorium: extended moratorium to bring in-line with La and Ms. State program eligibility. ➤ HUD transferred REO properties to FEMA to be sold or leased with escrow funds for repair to be combined with MAI.