

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

_____)	
RALPH MORRIS,)	
)	
Plaintiff,)	
)	
vs.)	Civil Action No. 06-3814
)	Hon. Ivan L. R. Lemelle
FEDERAL EMERGENCY)	
MANAGEMENT AGENCY, and)	
R. DAVID PAULISON, Director of)	
Federal Emergency Management Agency,)	
)	
Defendants.)	
_____)	

**DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Plaintiff Ralph Morris, whose house was damaged by Hurricane Katrina in New Orleans, Louisiana, brings this action against the Federal Emergency Management Agency alleging that the agency exceeded its statutory authority by denying his applications for federal disaster assistance. Following the Hurricane Katrina, plaintiff applied for several forms of FEMA disaster assistance and thereafter was provided expedited assistance, rental assistance, and a trailer. Plaintiff was found to be ineligible for home repair and personal property assistance, however, because he did not have flood insurance on his property as required by the Stafford Act and FEMA regulations.

Plaintiff alleges that he was not aware of the requirement to carry flood insurance on his house because he purchased it from a bank at a foreclosure sale and was not told by the bank of his obligation to purchase flood insurance. Plaintiff maintains that the

flood insurance requirement does not apply to him, but to the previous owner who had received FEMA flood assistance in the past. He claims that FEMA's denial violates the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"), the Due Process Clause of the Fifth Amendment, and the Administrative Procedure Act. As explained more fully below, plaintiff's Complaint should be dismissed in its entirety on several grounds.

First, the Court lacks jurisdiction to entertain this suit because the United States has not waived sovereign immunity under the Stafford Act. The United States cannot be sued without its consent, and a waiver of sovereign immunity cannot be implied, but must be explicit and unequivocal in the statutory language. In his complaint, plaintiff fails to cite a waiver of the United States' sovereign immunity. Because neither the Stafford Act nor the U.S. Constitution waives the United States' sovereign immunity, plaintiff' claims against the United States should be dismissed for lack of subject matter jurisdiction.

Second, nor are plaintiff's claims encompassed by the APA's waiver of sovereign immunity. FEMA's denials of plaintiff's applications for home repair and personal property assistance are discretionary actions that involve an element of judgment and are based on considerations of important public policy to distribute limited funds to victims of major disasters. Those challenged agency actions are the type of actions that Congress intended to shield from judicial scrutiny under the Stafford Act's discretionary function exception. See 42 U.S.C. §5148. That, in turn, places plaintiff's claims outside the APA's waiver of sovereign immunity. See 5 U.S.C. § 701(a)(2).

Finally, the Complaint fails to state a claim against the federal defendants upon which relief can be granted. The allegations in the Complaint establish that plaintiff did

not comply with the legal prerequisite for flood insurance assistance. Plaintiff's due process claim is without merit because his applications were considered by the agency and he was given an opportunity to appeal any adverse determination.

BACKGROUND

a. Relevant Statutory and Regulatory Provisions

The Stafford Act authorizes the President to administer and coordinate the Federal response to presidentially-declared major disasters. 42 U.S.C. § 5121, *et seq.* The President has delegated this authority to FEMA. Executive Order 12148 (1979). FEMA's mission is to provide federal disaster assistance to state and local governments, and to individuals who have sustained losses in major disasters. 44 C.F.R. § 206.3 (a). Under the Stafford Act, FEMA may provide several types of assistance to victims of major disasters, including (1) financial assistance to rent alternate housing; (2) direct housing assistance in the form of temporary housing units (e.g., mobile homes and travel trailers) where rental accommodations are not available; (3) financial assistance (up to \$5,000 per household) for repair of the owner-occupied private residences; (4) financial assistance (up to \$10,000 per household) for the replacement of owner-occupied private residences; and (5) other assistance for personal property, transportation, and other necessary expenses or serious needs resulting from major disasters. 42 U.S.C. § 5174; 44 C.F.R. §§ 206.119, 206.108. The Act does not establish the eligibility requirements for those benefits, but left that responsibility to FEMA to promulgate regulation to "carry out this section, including criteria, standards, and procedures for determining eligibility for assistance." 42 U.S.C. § 5174(i).

As a condition of eligibility, the Stafford Act further requires applicants for repair a replacement of flood-damaged property to “comply with regulations prescribed by the President to assure that, with respect to any property to be replaced, restored, repaired, or constructed with such assistance, such types and extent of insurance will be obtained and maintained as may be reasonably available . . . to protect against future loss to such property.” 42 U.S.C. § 5154. The Stafford Act requires sellers of such properties to notify buyers in writing of their responsibility to obtain and maintain flood insurance in accordance with applicable Federal law with respect to such property. *Id.* at § 5154a (b)(1). If a seller fails to notify the buyer who later fails to carry flood insurance and the property is damaged by a flood disaster and FEMA provides assistance to repair or replace that property, the seller is required to reimburse the federal government for any disaster relief provided. 42 U.S.C. § 5154a(b)(2).

Providing federal disaster assistance under the Stafford Act is wholly discretionary, and the authority to determine eligibility for, and designate types of, available federal disaster assistance in presidentially-declared major disasters is reserved solely to FEMA. 42 U.S.C. § 5171, 44 C.F.R. § 206.110. Recognizing that FEMA has limited resources to respond to major national disasters, Congress included a nonliability provision to protect FEMA from suits. The Stafford Act expressly states that “[t]he Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or any employee of the Federal Government in carrying out the provisions of this Act.” 42 U.S.C. § 5148 (emphasis added).

Acting under its statutory authority, 42 U.S.C. §§ 5164, 5174 (i), FEMA enacted implementing regulations to determine when an applicant is eligible for federal disaster assistance. For example, under the Stafford Act, properties that were previously flood-damaged and received FEMA flood assistance are required to have insurance as a condition to receiving future FEMA disaster assistance. 42 U.S.C. § 5154. Furthermore, as stated earlier, section 5174 lists the different types of assistance available, but is silent as to the eligibility requirements. To implement those statutory provisions, FEMA promulgated the following regulation, which states in pertinent part that:

(i) As a condition of the assistance and in order to receive any Federal assistance for future flood damage to any insurable property, individuals and households named by FEMA as eligible recipients under section 408 [42 U.S.C. § 5174] of the Stafford Act who receive a grant, due to flood damages, for acquisition or construction purposes under this subpart must buy and maintain flood insurance, as required in 42 U.S.C. 4012a, for at least the grant amount, in order to get any Federal assistance for future flood damage to any insurable property. This applies only to real and personal property that is in or will be in a designated Special Flood Hazard Area and that can be insured under the National Flood Insurance Program.

(A) If the grantee is a homeowner, flood insurance coverage must be maintained on the structure at the flood-damaged property address for as long as the address exists. The flood insurance requirement is reassigned to any subsequent owner of the flood-damaged structure.

(ii) FEMA may not provide financial assistance for acquisition or construction purposes to individuals or households who fail to buy and maintain flood insurance requirement under paragraph (k)(3)(i) of this section.

44 C.F.R. § 206.110 (k)(3).

FEMA's regulations also establish an appeal process, under which an applicant for financial assistance may appeal an adverse eligibility determination within 60 days to the appropriate FEMA Regional Director. 44 C.F.R. § 206.106. The Regional Director

will then review the appeal along with the documentation and issue a final decision within 90 days. Id.

b. Plaintiff's Complaint

Plaintiff is a New Orleans resident, whose house was damaged by Hurricane Katrina on August 29, 2005. Plaintiff now sues FEMA and R. David Paulison, the Director of FEMA in his official capacity, alleging that FEMA unlawfully denied his applications for home repair and personal property assistance under the Stafford Act. Compl. ¶ 4. Plaintiff asserts that Hurricane Katrina flooded his house causing \$100,000 in damage, and destroyed his motor vehicles. Id. at ¶ 13.

After the Hurricane Katrina, plaintiff applied for FEMA assistance and received \$2,000 in expedited assistance and over \$5,000 in rental assistance,¹ and is currently living in a FEMA-provided trailer. Compl. ¶ 14. Plaintiff's applications for home repair and personal property assistance, however, were denied for non-compliance with the regulatory flood insurance requirement and other reasons. Compl. ¶¶ 17, 19. Plaintiff alleges that FEMA exceeded its statutory authority by denying his claims. Id. at ¶ 24. Plaintiff maintains that he is eligible for the assistance because he purchased the property from a bank which had acquired it through a foreclosure and that neither the bank, the previous owners, nor FEMA informed him of his obligation to purchase and maintain flood insurance on this property as a precondition to receiving future flood assistance. Id. at ¶¶ 9-11.

¹ Plaintiff received \$1,206 in rental assistance on May 5, 2006 and \$3,900 on July 28, 2006.

Plaintiff further claims that, because of FEMA's denials, he could be denied an additional \$50,000 in Road Home Funds, a Louisiana state program. Id. at ¶ 22. Plaintiff also asserts that FEMA's regulation regarding the appeal process "does not provide for fair and impartial consideration of appeals." Compl at ¶ 23. Plaintiff further alleges that FEMA violates the anti-discrimination provision of the Stafford Act by failing to conduct the disaster program "in an equitable and impartial manner without discrimination on the grounds of economic status." Id. at ¶ 25. The complaint raises claims under the Stafford Act, the Due Process Clause of Fifth Amendment to the United States Constitution, and the Administrative Procedure Act. Compl.¶¶ 24-28. Plaintiff seeks declaratory and injunctive relief. Id.

ARGUMENT

I. THE STAFFORD ACT DOES NOT WAIVE THE UNITED STATES' SOVEREIGN IMMUNITY

It is well-settled that "the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983) (citations omitted). A suit against an executive department of the United States, or against departmental employees in their official capacities, is a suit against the United States, and is therefore subject to the defense of sovereign immunity. State of Hawaii v. Gordon, 373 U.S. 57, 58 (1963), FDIC v. Meyer, 510 U.S. 471, 475 (1994) (citations omitted). The bar of sovereign immunity applies even when purely equitable relief is sought. Beale v. Blount, 461 F.2d 1133, 1137 (5th Cir.1972); Jaffee v. United States, 592 F.2d 712, 717 n.10 (3d Cir. 1979) (citing Malone v. Bowdoin, 369 U.S. 643, 648 (1962)).

“The principle of sovereign immunity protects the federal government from suit except as that immunity is waived.” Pena v. United States, 157 F.3d 984, 986 (5th Cir. 1998). Such waiver may not be implied, but “must be unequivocally expressed in statutory text.” Lane v. Pena, 518 U.S. 187, 192 (1996). Furthermore, any such waiver “will be strictly construed . . . in favor of the sovereign.” Id.; accord Rothe Dev. Corp.v. U.S. Dept. Of Defense, 194 F.3d 622, 624 (5th Cir. 1999). In the absence of a waiver of sovereign immunity, a district court lacks jurisdiction over claims against the United States. Mitchell, 463 U.S. at 212; United States v. Testan, 424 U.S. 392, 399 (1976); Koehler v. United States, 153 F.3d 263, 267 (5th Cir. 1998) (“sovereign immunity deprives the courts of jurisdiction irrespective of the merits of the underlying claim.”).

In this case, plaintiff sues FEMA, as well as R. David Paulison, the Director of FEMA in his official capacity, alleging that FEMA violates several provisions of the Stafford Act by denying his applications for disaster assistance. For the Court to entertain this suit against the federal defendants, plaintiff must point to some explicit language in the Stafford Act that expressly and unequivocally waives the United States’ sovereign immunity, a burden that plaintiff cannot meet, because the Stafford Act contains no such provision. See Gurgos-Montes v. Municipality of Yauco, 294 F. Supp.2d 141, 142 (D. Puerto Rico, 2003) (finding that the Stafford Act does not waive FEMA’s sovereign immunity). Thus, because the Stafford Act does not contain any express waiver of the United States’ sovereign immunity, plaintiff’s claims under this Act against the federal defendants should be dismissed for lack of jurisdiction.²

²Plaintiff fails to comply with Fed. R. Civ. P. 8 (a), which requires that a complaint contains “a short and plain statement of the grounds upon which the court’s jurisdiction depends [.]” Plaintiff instead relies on 28 U.S.C. §§ 1331, 1337(a), 1361 to invoke the Court’s jurisdiction. However, none of those statutes waives sovereign immunity. Broad

II. THE U.S. CONSTITUTION DOES NOT WAIVE THE UNITED STATES' SOVEREIGN IMMUNITY.

Like plaintiff's claims under the Stafford Act, his Due Process' claim fails for the same reasons, because the Constitution does not waive the federal government's sovereign immunity. See Lynch, 292 U.S. at 582 ("sovereign immunity . . . applies to cause of action . . . arising . . . [from] the Constitution"); Testan, 424 U.S. at 399-402; Jaffee, 592 F.2d at 717-18; Calhoun v. United States, 32 Fed. Cl. 400, 405 (1994); Forbes v. Reno, 893 F. Supp. 476, 482 (W.D. Pa. 1995), aff'd, 91 F.3d 123 (3d Cir. 1996) ("Because there is no basis for a waiver of sovereign immunity, [plaintiff's] attempts to assert a cause of action directly against the United States for alleged violation of the Fifth . . . Amendment[] . . . fail[s] for lack of jurisdiction."); United States v. Timmons, 672 F.2d 1373, 1380 (11th Cir. 1982) ("claims based directly on Fifth Amendment violations are likewise barred by the doctrine of sovereign immunity"); Kelly v. United States, 512 F.Supp. 356, 362 (E.D.Pa. 1981) ("Even where there exists a direct cause of action under the Constitution, the United States is not liable for the deprivation of constitutional rights unless it has waived immunity from suit. . . "). Thus, because the federal government has not consented to be sued under any constitutional provision invoked by plaintiff, the Court lacks jurisdiction to entertain plaintiff's Due Process claim.

III. THE APA PRECLUDES JUDICIAL REVIEW OF PLAINTIFF'S CLAIMS AGAINST THE FEDERAL DEFENDANTS

jurisdictional statutes, such as 28 U.S.C. § 1331, do not waive sovereign immunity. See, e.g., Beale v. Blount, 461 F.2d 1133, 1138 (5th Cir. 1972) ("Sections 1331 and 1343, Title 28, United States Code, may not be construed to constitute waivers of the federal government's defense of sovereign immunity"); Circuit City Stores, Inc. v. Equal Employ. Opportunity Comm'n, 75 F. Supp. 2d 491, 504 (E.D. Va. 1999) ("It is well settled that 28 U.S.C. §1331 . . . do[es] not, in [itself], operate as a general waiver by the United States of its sovereign immunity") (citation omitted).

Although the APA allows judicial review of final agency actions, such review is barred when the “(1) statute[] preclude[s] judicial review; or (2) [the] agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a). Here, the Stafford Act expressly precludes judicial review of FEMA’s discretionary actions. 42 U.S.C. § 5148. The Act explicitly states that the federal government “shall not be liable” for any claim based on a federal agency’s or employees “exercise or performance of or the failure to exercise or perform a discretionary function or duty.” *Id.* This statutory provision embodies Congress’ clear intent “to prevent the second-guessing of administrative decisions,” *Berkovitz v. U.S.*, 486 U.S. 531, 536 (1988), by ensuring that if “mistake[s]” were made in the administration of federal disaster relief, “there shall be no liability on the part of the [federal] Government.” *See* 96 Cong. Rec. 11895, 11912 (1950) (statement by Chairman of House Public Works Committee). As further explained by the United States Claims Court:

This provision, on its face, clearly precludes federal governmental liability for its action or inaction in providing disaster relief. . . . Congress clearly manifested its intent to raise a statutory barrier to judicial review Additionally, the emergency assistance given under the Act constitute[s] a gratuity. Liability should not be imposed on the federal government for discretionary acts or omissions of its agencies or employees in distributing benefits under such gratuitous programs.

Ornellas v. United States, 2 Cl. Ct. 378, 379-80 (1983).

In determining whether FEMA’s eligibility determinations, under 44 C.F.R. §§ 206.101(k)(3), 206.113(b)(8), and 206.119, are discretionary functions shielded from judicial review by the Stafford Act, courts apply a two-part test. First, courts examine “whether the act involves an element of judgment or choice.” *Dureiko v. United States*, 209 F.3d 1345, 1351 (Fed. Cir. 2000) (citations omitted). An agency action “does not

involve an element of judgment or choice if it is mandatory, i.e., if a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow.” Id. at 1351 (citations and internal punctuation omitted). If, however, the agency’s actions involved an element of judgment or choice, the court moves to the second prong of the test, which considers “whether that judgment is of the kind that the discretionary function exception was designed to shield.” Id. (citations omitted). Under this test, the court examines whether the governmental actions and decisions at issue were “based on considerations of public policy.” Id. (citations omitted).

Here, plaintiff is challenging FEMA’s determinations of his eligibility for different types of federal disaster assistance. Specifically, plaintiff was found ineligible for home repair and personal property assistance for failing to comply with the flood insurance requirement, and other reasons. See 44 C.F.R. § 206.110(k)(3). Plaintiff does not dispute that he did not satisfy the regulatory requirements, but he instead claims ignorance of the law by alleging that no one informed him of his legal obligation. See Compl. ¶¶ 8-12. FEMA, the agency that Congress entrusted with the responsibility to administer the federal disaster assistance program, reviewed plaintiff’s application, documentation and applicable regulations, determined that plaintiff was not eligible for some assistance that he requested. These FEMA decisions and actions clearly fall within its “discretionary functions” and are “based on considerations of public policy,” namely allocating the government’s limited resources among victims of major disasters. These challenged agency actions were not mandatory because they involve a degree of “judgment or choice” and are the type of agency judgment that the Stafford Act was designed to insulate from judicial review. See 42 U.S.C. § 5148.

FEMA's mission is to distribute limited funds to victims of major disasters, and that distribution is "inherently a discretionary responsibility" and "eligibility determinations . . . regarding the funding of eligible projects are steps in this discretionary process." City of San Bruno v. FEMA, 181 F.Supp.2d 1010, 1014 (N.D.CA, 2001); see Graham v. FEMA, 149 F.3d 997, 1006 (9th Cir. 1998) (holding that under the Stafford Act, "decisions involving the allocation and deployment of limited government resources are the type of administrative judgment that the discretionary function exception was designed to immunize from suit.").

Courts that have considered federal agencies' eligibility determinations under the Stafford Act have routinely dismissed those suits for lack of jurisdiction. In Rosas v. Brock, 826 F.2d 1004 (11th Cir. 1987), for instance, a plaintiff challenged the Labor Department's decision to deny him post-disaster Stafford Act unemployment assistance on the basis of a regulation promulgated and administered by Labor. The court held that this decision was not reviewable:

By enacting 42 U.S.C.A. sec. 5148, Congress indicated its intent to preclude judicial review of all disaster relief claims based upon the discretionary actions of federal employees. . . . This claim [that the challenged rule represented an improper interpretation of the relevant federal regulations] is beyond the jurisdiction of the federal courts. The Disaster Relief Act does not contain any guidelines for determining which workers are eligible for [unemployment] benefits and which are not. In the absence of such guidelines, and in light of the potential for disruption of the administrative process, we must conclude that promulgation of the challenged rule is exactly the sort of exercise of discretion that Congress intended to insulate from judicial review.

Id. at 1008-09; see also Lawson v. FEMA, No. 03 Civ. 0881, 2003 WL 2006600, at *3 (April 30, 2003) (no jurisdiction under Stafford Act or APA for claim that FEMA illegally denied plaintiff rental assistance); United Power Ass'n v. FEMA, No. A2-99-

180, 2000 WL 33339635, at *3-4 (D.N.D. Sept. 13, 2000) (FEMA's determination that utility company was ineligible for disaster relief fell within the discretionary function exception); City of San Bruno, 181 F.Supp.2d at 1014-15 (FEMA's determination that the city was not eligible for federal disaster following collapse of a hillside caused by rain was discretionary and unreviewable).

Furthermore, FEMA is not obligated to provide any specific type of assistance under the Stafford Act or its implementing regulations. For example, section 206.117(b)(2) states that FEMA "may" provide financial assistance for repairs, and section § 206.119 states that FEMA and the State "may" provide financial assistance for other needs, including personal property and transportation assistance. None of those sections requires FEMA to provide this assistance, and the decision regarding applicants' eligibility is wholly reserved to FEMA's discretion.

Because plaintiff's challenges are expressly made discretionary by the Stafford Act, they fall within the APA's discretionary function exception. 5 U.S.C. § 701(a)(2). That, in turn, deprives this Court of jurisdiction over plaintiff's claims.

IV. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The complaint alleges that FEMA exceeded its statutory authority by denying plaintiff's applications for disaster assistance. Compl. ¶ 24. Plaintiff speculates that FEMA denied the applications under 42 U.S.C. § 5154a of the Stafford Act without even acknowledging the possibility that FEMA's decision could have been based on 42 U.S.C. § 5174 and 44 C.F.R.

§ 206.110(k)(3)(i). Defendant does not dispute plaintiff's conclusion that section 42 U.S.C.

§ 5154a³ is inapplicable to his factual situation, because plaintiff never received FEMA flood disaster assistance in the past.

However, this statutory provision is not the legal basis upon which FEMA acted. FEMA's eligibility determinations over plaintiff's applications were based on 42 U.S.C. § 5174 and its implementing regulations. See 44 C.F.R. § 206.110(k)(3). Section 5174 and its implementing regulations specifically require homeowners to carry flood insurance on a property that previously received FEMA flood assistance and that is located in a flood-prone area. See 44 C.F.R. §§ 206.110(k)(3), 206.113(b)(8). As demonstrated below, section 5174 controls the resolution of plaintiff's claims and the regulations FEMA promulgated to implement section 5174 are consistent with the statute and bar plaintiff's claims as a matter of law.

a. FEMA's Regulations Are Within The Scope of Its Statutory Authority

Since the Stafford Act does not provide a waiver of the United States' sovereign immunity, plaintiff's challenge to FEMA's implementation of the Stafford Act and its implementing regulations is, if at all, reviewed under the APA. See 5 U.S.C. §§ 702, 706. Under the APA, a reviewing court may strike an agency's regulation only if the court finds that regulation to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of its statutory authority," or

³ Section 5154a states that "[n]otwithstanding any other provision of law, no Federal disaster relief assistance made available in a flood disaster area may be used to make a payment . . . to a person for repair, [and] replacement . . . if that person at any time has received flood disaster assistance that was conditional on the person first having obtained flood insurance under applicable Federal law and subsequently having failed to obtain and maintain flood insurance as required under applicable Federal law on such property."

"without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C)-(D). This standard of review is "highly deferential" and "presumes an agency's action to be valid." Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976), cert. denied, 426 U.S. 941 (1976). When reviewing an APA challenge, the court begins with the presumption that the agency acted properly and in accordance with the law. FCC v. Schreiber, 381 U.S. 279, 296 (1965). The reviewing court "must affirm agency's decision if rational basis for that decision exists, even if the court disagrees" with that decision. Conference of State Bank Supervisors v. Office of Thrift Supervision, 792 F. Supp. 837, 842 (D.D.C. 1992) (citing Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C.Cir. 1981)). Here, FEMA's challenged regulations easily meet this standard.

When an agency interprets a statute it administers, as in this case, courts review that interpretation under a two-step process. Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984). Under the first step, this Court should refer specifically to the text of the statute and "determine whether Congress has directly spoken to the precise question at issue." Id. at 842. If Congress has directly addressed the specific controversy in this case, the court "must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. However, if the statute is "silent or ambiguous with respect to the specific issue," the Court proceeds to Chevron's second step. Id. at 843. At this step, the court must determine whether the agency's regulation is a reasonable and permissible interpretation of the statute. Id.; Barnhart v. Walton, 535 U.S. 212, 218 (2002). In other words, the court must uphold FEMA's regulation unless it is "irrational and not reasonably related to the purposes of the [Stafford Act]." Clark v. Unified Servs., Inc., 659 F.2d 49, 53 (5th Cir. 1981).

Here, section 5174 is silent or ambiguous with regards to the specific question at issue: whether a homeowner of a previously flood-damaged property in a flood-proned area is required to maintain flood insurance on that property as a precondition of receiving future FEMA flood assistance. Section 5174 states that FEMA “may provide financial assistance . . . to individuals and households” who have suffered losses in a major disaster and who are “unable to meet such expenses or needs through other means.” 42 U.S.C. § 5174. It then lists several types of assistance that FEMA may provide to the victims, including housing and direct financial assistance. However, section 5174 does not define the eligibility criteria for each benefit. *Id.* Instead, Congress specifically left it to FEMA to promulgate regulations to establish eligibility requirements and procedures, by requiring FEMA to “prescribe rules and regulations to carry out this section, including criteria, standards, and procedures for determining eligibility for assistance.” 42 U.S.C. § 5174(i). In other words, Congress entrusted FEMA with the statutory responsibility to fill in the gap in the statutory text, and that is precisely what FEMA has done by enacting 44 C.F.R. § 206.110(k)(3)(i).

Relying on its expertise and discretion to implement section 5174, FEMA promulgated 44 C.F.R. § 206.110(k)(3)(i), which requires homeowners of damaged-property to carry flood insurance as a prerequisite to obtaining future FEMA home repair and personal property assistance. Section 206.110(k)(3)(i) states that:

As a condition of the assistance and in order to receive any Federal assistance for future flood damage to any insurable property, individuals . . . who receive assistance, due to flood damages, for acquisition or construction purposes . . . must buy and maintain flood insurance, as required in 42 U.S.C. 4012a, for at least the assistance amount. This applies only to real and personal property that is in or will be in a designated Special Flood Hazard Area and that can be insured under the National Flood Insurance Program.

Id. The regulation goes on to provide that “[i]f the applicant is a homeowner, *flood insurance coverage must be maintained at the address of the flood-damaged property for as long as the address exists. The flood insurance requirement is reassigned to any subsequent owner of the flood-damaged address.*” Id. at 206.110(k)(3)(i)(A) (emphasis added).

Because Congress has not addressed the specific question in this case, the Court now must determine whether FEMA’s regulation is based on a permissible interpretation of the Stafford Act. In upholding the regulation, the Court need not conclude that FEMA’s interpretation of section 5174 is the only permissible interpretation, or even the one that the court would have reached if the question initially had arisen in a judicial proceeding. Chevron, 467 U.S. at 843 n.11 (citing FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981)). The reviewing court “may not substitute its own construction of a statutory provision for a reasonable interpretation made by ... an agency.” Chevron, 467 U.S. at 844 (citing INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981)). Instead, the court should give deference to an “[agency’s] construction of a statutory scheme it is entrusted to administer.” Id. at 844 (citing Aluminum Co. of America v. Cent. Lincoln Peoples’ Utl. Dist., 467 U.S. 380, 389 (1984)); Nat’l Railroad Passengers Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992) (“[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law”).

FEMA’s interpretation of section 5174 is clearly a reasonable one, because it furthers the purpose of the Stafford Act. The property in question is located in a flood hazard area and had received FEMA flood assistance in the past. Compl. ¶ 11. By

requiring that this property have flood insurance coverage to protect against future flood damage, FEMA's regulation furthers one of the critical objectives of the Stafford Act, i.e., "encouraging individuals . . . to protect themselves by obtaining insurance coverage to supplement or replace government assistance." 42 U.S.C. § 5121(b)(5); see also 42 U.S.C. § 5154 (requiring homeowner of flood-damaged property to comply with FEMA regulations to ensure that a flood-damaged property has the type of insurance as reasonably available to protect against future loss) . In effect, both the statute and FEMA's implementing regulations impose a certain level of personal responsibility on the homeowner as a means of reducing dependency on governmental resources. Thus, FEMA reasonably interpreted the Stafford Act to require subsequent owners of a flood-damaged property to carry flood insurance as a prerequisite to obtaining future FEMA assistance. Such interpretation effectuates the purpose of the Act.⁴

b. FEMA's Procedures In Determining Eligibility For Disaster Assistance Under The Stafford Act Satisfy Due Process

Plaintiff also fails to state a claim under the Due Process Clause of the United States Constitution. Plaintiff claims that FEMA denied him due process by not approving his requests for home repair and other needs assistance. Compl. ¶ 26. To determine whether an individual's procedural due process rights have been violated, a court must make a two-step inquiry. See Harrison v. United States Postal Service, 840 F.2d 1149,

⁴ Plaintiff also alleges that he was discriminated against based on his economic status. Compl. ¶ 25. The complaint, however, fails to state how FEMA's decisions are discriminatory. Regardless of an individual's economic status, a homeowner of a previously flood-damaged property in a flood hazard zone is required to carry flood insurance on that property. If he fails to do so, the regulations are clear that he is not eligible for FEMA assistance. Plaintiff's claim that he was discriminated against based on his economic status is without merit, and he thus fails to state a claim for which relief can be granted.

1152-54 (4th Cir. 1998). First, a court must determine whether the plaintiff had a liberty or property interest in the right he claims. Id. at 1152 (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)). Second, a court must determine what process is due by analyzing: (a) the private interest that will be affected by an official action; (b) the risk of an erroneous deprivation of such interest through the procedures used; and (c) the government's interest in the procedures utilized. Id. at 1154 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

Plaintiff cannot meet the first prong of the Eldridge test, because he cannot demonstrate a liberty or property interest in FEMA's disaster assistance. It is well-established that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Roth, 408 U.S. at 577. Here, plaintiff cannot show a "legitimate entitlement" to home repair and personal property assistance. As explained in the preceding section, plaintiff was required to obtain and maintain flood insurance as a condition of his entitlement to the assistance he seeks. Because plaintiff failed to do so, he has no property in the assistance he is after.

Even assuming that plaintiff could meet the first prong of the Eldridge test, he cannot satisfy the second prong because FEMA's procedures are designed to avoid erroneous denials of flood assistance payments. Contrary to plaintiff's allegation, FEMA's regulations provide for fair and impartial considerations of appeals. Section 206.115 establishes the appeal process, under which an applicant can submit a written appeal of an insurance coverage denial to the appropriate FEMA Regional Director, who

then review the documents and issue a final decision within a limited period of time. See 44 C.F.R. § 206.115. Plaintiff does not even allege how this appeal process erroneously deprived him of his interest.

Furthermore, FEMA has a significant interest in maintaining the procedures plaintiff was provided. In the wake of a disaster of Katrina's magnitude, requiring FEMA to employ a more expansive and time-consuming procedure for resolving claims for damage assistance would endanger the government's interest in providing as much assistance as generally possible to as many disaster victims as possible.

CONCLUSION

Because the United States has not expressly and unequivocally waived its sovereign immunity from suit under the applicable statute and because plaintiff failed to state a claim, this Honorable Court should dismiss plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(1) or (6).

Respectfully submitted,

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