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

LA UNION DEL PUEBLO ENTERO, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL NO. 1:08-CV-487
	§	
FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA),	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

BE IT REMEMBERED that on February 15, 2017, the Court supplemented its Memorandum Order and Opinion of September 30, 2015. *See* Mem. Op. and Order, Dkt. No. 156. The Court hereby **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motion for summary judgment, Dkt. No. 119-1, and **GRANTS IN PART** and **DENIES IN PART** Defendant's motion for summary judgment, Dkt. No. 161-2. For the reasons set forth in the below Memorandum Opinion, the Court **ORDERS** the Federal Emergency Management Agency ("FEMA") to vacate the "deferred maintenance" rule and **ORDERS** FEMA to reconsider the Individuals and Households Program ("IHP") applications of Plaintiffs and La Union Del Pueblo Entero ("LUPE") members without consideration of the "deferred maintenance" rule.

I. Introduction

This case concerns FEMA's administration of IHP (Section 408 of the Stafford Act), codified at 42 U.S.C. § 5174. In the early morning of July 23, 2008, Hurricane Dolly made landfall on the South Texas coast, lashing the region with fierce winds and soaking it in torrential rain. FEMA received thousands of applications for disaster relief under the IHP. A group of South Texas residents whose homes were

allegedly damaged by Hurricane Dolly and LUPE brought this action after FEMA denied all or part of the individual Plaintiffs' applications for housing repair assistance. Dkt. No. 2 at 3–8. According to FEMA letters sent to those Plaintiffs who were denied any assistance, "Based on your FEMA inspection, we have determined that the disaster has not caused your home to be unsafe to live in. This determination was based solely on the damage to your home that is related to this disaster. Although the disaster may have caused some minor damage, it is reasonable to expect you or your landlord to make these repairs. At this time you are not eligible for FEMA housing assistance." *See* Dkt. No. 2, Ex. 18; Dkt. No. 162-7.

Plaintiffs commenced this civil action by filing their complaint and Motion for Preliminary Injunction on November 20, 2008, seeking relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. Dkt. Nos. 1–2. Plaintiffs argued that FEMA failed to comply with its non-discretionary duties pursuant to 42 U.S.C. § 5151(a), § 5174(j) and 44 C.F.R. § 206.117 in issuing regulations establishing eligibility requirements and then applying those requirements fairly and equitably. Dkt. No. 2 at 1–2. Specifically, the complaint alleged that FEMA "fail[ed] to adopt and implement ascertainable standards necessary to insure that housing repair assistance under 42 U.S.C. § 5174(c)(2) is made available to victims of Hurricane Dolly in an equitable and impartial manner." It also alleged that FEMA's use of an unpublished "deferred maintenance policy" violated 42 U.S.C. § 5151(a) by promoting economic discrimination. Plaintiffs asserted that FEMA's failure to publish and apply ascertainable standards was the proximate cause of irreparable injuries to Plaintiffs and their families, who allegedly suffered extensive damage to their homes as a result of Hurricane Dolly.[1] Plaintiffs sought injunctive

[1] Francisca Adame, who did not receive IHP assistance, declared that because of damage to her home's roof, water would leak inside every time it rained. Declaration of Francisca Adame, Dkt. No. 2, Ex. 7. Manuel Benavidez declared that the "torrential rain from the hurricane caused our roof to warp and buckle, and water poured down the kitchen hall, the living room wall, and part of the dining room wall and into the laundry room." Declaration of Manuel Benavidez, Dkt. No. 2, Ex. 8. Maria Gallardo averred that after the hurricane, whenever it would rain, water would stream down the interior walls, and that there was a pungent odor of mold and mildew. Based on an estimate she

relief to enjoin FEMA to (1) publish and apply ascertainable standards to make its housing repair assistance decisions; (2) reconsider all denials of housing repair assistance for Hurricane Dolly using the new standards; (3) provide timely and adequate notice of its actions to applicants for home repair assistance.

On August 6, 2009, this Court granted a preliminary injunction based on 42 U.S.C. § 5174(j) and ordered FEMA to issue rules and regulations that outline definite and ascertainable criteria, standards, and procedures for determining eligibility for relief assistance. Dkt. No. 33. This Court found that 42 U.S.C. § 5174(j) established mandatory, affirmative requirements on FEMA to prescribe rules and regulations to carry out the statutory language, including criteria, standards, and procedures for determining eligibility for assistance, and that FEMA's housing eligibility regulations duplicated, rather than supplemented, the enabling statute.

On September 15, 2009, FEMA filed an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) and moved to stay the injunction. Dkt. No. 41. On August 4, 2010, the Fifth Circuit vacated the preliminary injunction and remanded the case to this Court for further proceedings. *La Union del Pueblo Entero v. FEMA*, 608 F.3d 217 (5th Cir. 2010) (hereinafter "*LUPE*"). The Fifth Circuit held that on the merits of whether FEMA complied with § 5174(j), Plaintiffs had not shown a substantial likelihood of success. *See id. a*t 220–25. The Fifth Circuit found that FEMA promulgated regulations called for by § 5174(j), noting that the regulations "do establish—though sometimes imprecisely—criteria, standards, and procedures for determining eligibility for FEMA aid." *Id.* at 221 (discussing regulations contained in C.F.R. §§ 206.10–206.120). The Fifth Circuit found that the regulations add significant content to the "repairs" subsection of the statute. *Id.* at 222; *see also* 42 U.S.C. § 5174(c)(2)(A).[2]

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obtained, the cost of the necessary repairs totaled $5,910. Declaration of Maria Gallardo, Dkt. No. 2, Ex. 9.

[2] The "repairs" subsection provides as follows:

The President may provide financial assistance for—

The Fifth Circuit also found that, "as Plaintiffs point out, the regulations do not elaborate with specificity the statutory phrase 'damaged by a major disaster.' " *LUPE*, 608 F.3d at 222; *see also* 42 U.S.C. § 5174(c)(2)(A). Rather, at the time of FEMA's inspections, the relevant regulations used the term "disaster-related damages." *LUPE*, 608 F.3d at 222 (quoting 44 C.F.R. § 206.117(b)(2)(i) (2008)).[3] The Fifth Circuit found that the regulations do not "set out a specific procedure by which FEMA investigators will decide the question at the heart of Plaintiffs' complaint, namely, which damages are sufficiently 'related' to the declared major disaster to make an individual or household eligible for relief." *Id.* The Fifth Circuit held that regulations' lack of specificity is a separate issue from the issue that Plaintiffs raised in their initial complaint, which was that FEMA abdicated its responsibility to promulgate regulations or promulgated regulations that directly contravened the statutory language. *Id.* at 223 ("In short, although the C.F.R. materials do not lay out the 'criteria, standards, and procedures for determining eligibility for assistance' with as much specificity as might be desired, we cannot conclude that the regulations contravene Congress's directive to issue eligibility regulations. The additional content provided by §§ 206.110–206.120 significantly narrows the universe of potentially eligible disaster victims.").

The Fifth Circuit then rejected Plaintiffs' argument that FEMA's regulations are so vague that the court should consider them arbitrary or capricious. *Id.* at 223–24; *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The Fifth Circuit found the D.C. Circuit's decision in *American Trucking*

(i) the repair of owner-occupied private residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition; and

(ii) eligible hazard mitigation measures that reduce the likelihood of future damage to such residences, utilities, or infrastructure."

42 U.S.C. § 5174(c)(2)(A).

[3] The regulations also used the term "disaster-related" in the regulations' sub-section on eligible costs. *See* 44 C.F.R. § 206.117(c)(1) (2008). Since the FEMA inspections, FEMA revised 44 C.F.R. § 206.117(b)(2)(i). Effective December 9, 2013, the language changed to state that FEMA may provide financial assistance for the repair of real property components in an owner's primary residence if "[t]he component was damaged, and the damage was caused by the disaster." 44 C.F.R. § 206.117(b)(2)(i) (effective December 9, 2013).

Associations v. Department of Transportation to be applicable because in that case, the D.C. Circuit "noted that '[t]he *Chevron* test applies to issues of how specifically an agency must frame its regulations,' and held that since the statute's language did not identify the degree of specificity required in the regulations, the relevant question was whether the regulations reasonably provided a methodology for determining the safety level of carriers." *Id.* at 224 (quoting *American Trucking Associations v. Department of Transportation*, 166 F.3d 374, 378–79 (D.C. Cir. 1999)). In *American Trucking*, the court "explain[ed] that its caselaw 'explicitly accorded agencies very broad deference in selecting the level of generality at which they will articulate rules.' " *Id.* (quoting *American Trucking*, 166 F.3d at 379)). The Fifth Circuit also quoted with approval another D.C. Circuit case that upheld a lease that did not address employee rights in greater detail than the enabling legislation because "judicial deference is at its highest in reviewing an agency's choice among competing policy considerations, including the choice here of the level of generality at which it will promulgate norms implementing a legislative mandate." *Id.* (quoting *Metropolitan Washington Airports Authority Professional Fire Fighters Association Local 3217 et al v. United States*, 959 F.2d 297, 300 (D.C. Cir. 1992)). The Fifth Circuit concluded that § 5174 "does not set out a given level of specificity that FEMA's regulations must meet." Rather, "where Congress does not require a certain level of specificity, the agency has discretion to decide how specific its regulations will be." *Id.*

The Fifth Circuit went on to note that "[a] regulation could always be more specific, and so it will always contain some vagueness that vests on-the-ground personnel with a level of discretion." *Id.* The court found that while FEMA's regulations for housing repair assistance were "especially vague" about the meaning of "disaster-related," the vagueness "does not automatically mean the regulations are invalid." *Id.* "Given the nature of FEMA's work and the compressed time it has to make individual determinations, the agency requires relatively wide discretion

for the ground-level workers who make initial assistance decisions." *Id.* A footnote provided:

> This, of course, does not mean that the regulations cannot be improved. Even FEMA seems to implicitly recognize that they are rather poor, and this court explicitly criticized them in *Ridgely*. One hopes that the new regulations FEMA is considering will give affected parties more guidance about whether the damage to their homes will count as "disaster-related."

Id. at 224 n.3 (discussing *Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727 (5th Cir. 2008)).

Although the Fifth Circuit held that the preliminary injunction was inappropriate because Plaintiffs could not make out a substantial likelihood of prevailing on the merits of their argument, the court declined to address Plaintiffs' alternate ground for deciding in their favor: that FEMA used an unpublished "deferred-maintenance" rule to decide which homes were damaged by the hurricane, which Plaintiffs argued runs afoul of 5 U.S.C. § 552(a)(1). *See id.*; *see also* 5 U.S.C. § 552(a)(1).[4] The Fifth Circuit stated that its decision not to address Plaintiffs' 5 U.S.C. § 552(a)(1) argument "in no way reflects" its view of the merit of the argument. *LUPE*, 608 F.3d at 224. The Fifth Circuit left the question of whether FEMA's regulations ran afoul of 5 U.S.C. § 552(a)(1) to this Court.

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[4] 5 U.S.C. § 552(a)(1) provides:

> Each agency shall make available to the public information as follows:
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> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--
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> [. . .]
>
> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
>
> (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) each amendment, revision, or repeal of the foregoing.
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. [. . .]

5 U.S.C. § 552(a)(1).

On March 30, 2011, this Court issued a Memorandum Opinion and Order denying Plaintiffs' motions for summary judgment, finding their claims to be controlled by the Fifth Circuit's decision in *LUPE* or unsupported by the summary judgment record then before the Court. *See* Mem. Op. and Order, Dkt. No. 75 at 1. Specifically, this Court held that Plaintiffs' facial challenge to the regulations under 42 U.S.C. § 5174(j) was foreclosed by the appellate court ruling in *LUPE*; that Plaintiffs could not recover for the denial of their individual applications for housing assistance;[5] and that the Fifth Circuit's holding in *LUPE* applied to Plaintiffs' vagueness claims based on the FEMA administrative record.[6] On Plaintiffs' 5 U.S.C. § 552(a) claim that FEMA utilized an unpublished deferred maintenance rule to deny housing assistance to disaster victims and that Plaintiffs were adversely affected by this unpublished rule, this Court found that FEMA's characterization at oral argument before the Fifth Circuit that it prepared disaster-specific items used to decide Hurricane Dolly "implie[d] that this claim may have some vitality." *Id.* at 15. After finding that FEMA's admission to the Fifth Circuit supported the application of the incompleteness exception to the rule against extra-record discovery, this Court granted in part Plaintiffs' motion to conduct discovery, permitting limited discovery on Plaintiffs' claim that FEMA utilized an unpublished rule in violation of 5 U.S.C. § 552(a) when it denied Plaintiffs' applications for housing repair assistance after Hurricane Dolly. *Id.*

On August 6, 2014, Plaintiffs filed an Unopposed Motion to Intervene pursuant to Federal Rule of Civil Procedure 24(b), which this Court granted, that added sixteen individual Plaintiffs. *See* Dkt. Nos. 150, 151. On September 30, 2015,

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[5] The Court agreed with FEMA's argument that the complaint "pleads only a facial challenge to FEMA regulations and Plaintiffs' individual claims under the existing regulations are not before the Court." Mem. Op. and Order, Dkt. No. 75 at 9–10. This Court held that "Plaintiffs have pleaded only a facial challenge to the regulations," but noted that even if Plaintiffs had challenged their individual denials, the Stafford Act's discretionary function exception bars judicial review of financial assistance determinations. *Id.*

[6] Plaintiffs contended that FEMA's lack of record during the informal rule-making process on the justification for the level of specificity used by FEMA to promulgate the disaster eligibility criteria found in 44 C.F.R. § 206.117(c) rendered the regulations arbitrary and capricious under the APA, 5 U.S.C. § 706(a)(2). *See* Dkt. No. 75 at 10.

this Court considered cross motions for summary judgment regarding whether materials used to teach a training course on what constituted "disaster-related" damage pursuant to 44 C.F.R. § 206.117(c) were unpublished substantive rules subject to the requirement of notice-and-comment rulemaking under 5 U.S.C. § 552(a) and 5 U.S.C. § 553. *See* 44 C.F.R. § 206.117(c) (2008). This Court referred to the contested portions of these materials as the "deferred-maintenance policy" for consistency. All 231 Hurricane Dolly inspectors took a training or refresher course using the materials containing the deferred-maintenance policy. Dkt. No. 118-3, FEMA Administrative Record ("A.R") 279. The "Disaster Housing Inspectors Training/Refresher Course" included the excerpt below:

> Items suffering from deferred maintenance that were not significantly worsened by the disaster are **not** to be listed in real property line items. . . . **Any deferred real property damage listed in line items must have been significantly worsened by the disaster event. Disaster damages to these items must be significant, obvious and without question [and] . . . should never be speculative.**

Dkt. No. 118-5, FEMA A.R. 504–05 (emphasis in original).

Following FEMA procedures, inspectors went to IHP applicants' primary residences and used tablet computers running FEMA-provided software to enter data to be sent to FEMA for eligibility determinations. *See, e.g.*, Dkt. No. 118-5, A.R. 427, 429, 597. The software on the tablet required the inspector to answer three yes-or-no questions FEMA deemed to correspond to the standards of 44 C.F.R. § 206.101 to make a habitability, and therefore overall eligibility, determination about the entire home. *See* Dkt. No. 118-4, A.R. 383–84; *see also* 44 C.F.R. § 206.101 (2008) ("Eligibility for assistance is based on need created by disaster-related unlivability of a primary residence . . . ."). The software presented the inspector with a series of "deferred maintenance" checkboxes corresponding to areas of real-property damage affecting living spaces. *See* Dkt. No. 118-5, A.R. 427, 429. Once an inspector checked off an area that constituted "deferred maintenance," the FEMA software did not require that the inspector detail the nature and extent of damage of those areas. *See*

id. FEMA indicated in the training materials that deferred maintenance "is a preexisting condition" such as an old and weathered roof covering that has developed leaks over the years because it has not been properly maintained. Dkt. No. 118-5, A.R. 433. The training materials instructed, "Because it is not disaster-related, deferred maintenance damage is not paid for . . . unless the inspector determines that the pre-existing damage was clearly made worse by the disaster." Dkt. No. 118-5, A.R. 434. FEMA's notes indicate that at the briefing of Hurricane Dolly inspectors, it emphasized the "importance of comments to support the habitability call when the specs are borderline." Dkt. No. 118-6, A.R. 510. The notes also reveal that FEMA told inspectors that for *colonias*,[7] they should "expect sub-standard construction, deferred maintenance, ownership and citizenship issues." *Id.*

FEMA denied 14,900 Hurricane Dolly IHP applications on the grounds that the applicants suffered insufficient disaster-related damage. Dkt. No. 122-8, Plaintiffs' Supplemental Administrative Record ("S.A.R.") 2975. Of those denials, more than fifty percent were due to a finding of deferred maintenance. S.A.R. 217:14–218:12. Inspectors recorded deferred maintenance in 24,027 Hurricane Dolly inspections. Dkt. No. 121-9, S.A.R. 1044.

This Court determined that FEMA used an unpublished definition of "deferred maintenance" that substantively altered the weight and sufficiency of evidence of damage and degree of causation that had to be shown to prove that damage was disaster-related and thus potentially remunerable under FEMA's regulations. Mem. Op. and Order, Dkt. No. 156 at 13, 27–43. The Court further determined that the policy adversely affected Hurricane Dolly applicants, including the individual Plaintiffs in this case. *Id.* at 43. Finally, the Court held that 5 U.S.C. §§ 552–553 required the policy to be adopted using the notice-and-comment rulemaking process because the policy affected applicants' substantive rights and

[7] *Colonias* are unincorporated subdivisions that are common along Texas's border with Mexico. *See* Declaration of LUPE Executive Director Juanita Valdez-Cox, Dkt. No. 162-5 at ¶ 1–4.

was neither an interpretative nor procedural rule. Accordingly, the Court entered partial summary judgment for Plaintiffs. This Court also granted Plaintiffs' motion to supplement the record for the limited purpose of shedding light on how FEMA utilized the policies at issue. This Court, however, did not reach the remainder of purported policies other than the "deferred maintenance" rule that Plaintiffs challenged,[8] finding that FEMA deserved the procedural benefit to respond to those allegations. The Court also declined at the time to reach the question of the proper remedy. *Id.*

The remaining issues to be ruled on by the Court are whether the following constitute rules within the meaning of the APA and should have been published and subject to notice-and-comment rulemaking under 5 U.S.C. § 552(a)(1):

1. A "primary cause" rule allegedly utilized by FEMA to determine which homes are deemed habitable under 42 U.S.C. § 5174(b)(1) and thus eligible for assistance;

2. An internal FEMA memorandum setting a fifty-dollar minimum for IHP damages; and

3. Provisions of three documents titled "IHP Inspection Guidelines," "Habitability Document," and "IHP Line Item Descriptions," given to inspectors in the wake of Hurricane Dolly.

Also to be decided is the proper scope of the remedy in regard to this Court's September 2015 granting of Plaintiffs' motion for summary judgment on the deferred maintenance rule (as well as the proper scope of the remedy in regard to any other policies this Court finds should have gone through notice-and-comment rulemaking).

[8] Plaintiffs' complaint generally alleged that FEMA used other undisclosed rules to deny their applications. *See* Compl. ¶ 26, 171.

II. Summary Judgment Standard

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant." *Piazza's Seafood World, L.L.C. v. Odom*, 448 F.3d 744, 752 (5th Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial and mandates the entry of summary judgment for the moving party." *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 337 (5th Cir. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)) (internal quotation marks omitted).

"Once the moving party has initially shown 'that there is an absence of evidence to support the non-moving party's cause,' the non-movant must come forward with 'specific facts' showing a genuine factual issue for trial." *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002) (quoting *Celotex*, 477 U.S. at 325). In other words, when a moving party has discharged its burden, the non-moving party must then "go beyond the pleadings," and by its own affidavits or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. The non-movant may not merely rely on conclusory allegations or the pleadings. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). The non-movant's burden is not satisfied by "conclusory allegations," "unsubstantiated assertions," or "by only a scintilla of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (internal quotation marks and citations omitted). Courts are not required to search the record on the non-movant's behalf for evidence that may raise a fact issue. *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988).

The summary judgment procedure is particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative agency. *Girling Health Care, Inc. v. Shalala*, 85 F.3d 211, 214–15 (5th Cir. 1996) (quoting 10A Charles Alan Wright, Arthur R Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2733 (1983)). The explanation of this lies in the relationship between the summary judgment standard of no genuine issue as to any material fact and the nature of judicial review of administrative decisions; the administrative agency is the fact finder, and judicial review has the function of determining whether the administrative action is consistent with the law. *Id.*

Judicial review of agency action under the APA is ordinarily confined to "the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)). A reviewing court "is not generally empowered to conduct a de novo inquiry into the matter being reviewed." *Id.* at 741; *see also Overton Park*, 401 U.S. at 420 (finding that judicial review "is to be based on the full administrative record that was before the Secretary at the time he made his decision"). A court may not base its review on "post hoc" rationalizations. *Overton Park*, 401 U.S. at 419.

III. Analysis

In this section, the Court examines whether the following were required to be published in the Federal Register and subject to notice-and-comment rulemaking pursuant to 5 U.S.C. § 552(a)(1): (1) a "primary cause" rule allegedly utilized by FEMA to determine which homes are deemed habitable under 42 U.S.C. § 5174(b)(1) and thus eligible for assistance; (2) an internal FEMA memorandum setting a fifty-dollar minimum for IHP damages; and (3) other provisions of three documents given to inspectors in the wake of Hurricane Dolly, such as those appearing under the heading Habitability Policy, IHP Line Item Descriptions, and IHP Inspection Guidelines. Plaintiffs argue that all of the aforementioned are rules that should have gone through notice-and-comment rulemaking pursuant to the APA. *See* 5 U.S.C. § 552(a)(1).

FEMA argues that none of the aforementioned were required to go through notice-and-comment rulemaking because: (1) the "primary cause" language merely mirrors the Stafford Act's statutory language or, in the alternative, is exempt from the APA's notice-and-comment requirement because the language is an interpretive rule; (2) the fifty-dollar minimum is exempt from the APA's notice-and-comment requirement because it is an interpretative rule; and (3) the other provisions in question are all exempt from the notice-and-rulemaking requirement because they are either interpretive or procedural.

A. Legal Standard under the Administrative Procedure Act

The APA declares that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1); *see also Shell Offshore Inc. v. Babbit*, 238 F.3d 622, 630 (5th Cir. 2001). For APA purposes, " 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4).

The APA, 5 U.S.C. § 553, prescribes a three-step procedure for so-called "notice-and-comment rulemaking." *See generally Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). First, the agency must issue a "[g]eneral notice of proposed rule making," ordinarily by publication in the Federal Register. 5 U.S.C. § 553(b). Second, if "notice [is] required," the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id*. An agency must consider and respond to significant comments received during the period for public comment. *Perez*, 135 S. Ct. at 1203 (citing *Overton Park*, 401 U.S. at 416). Third, when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." 5 U.S.C. §553(c). Rules issued through the notice-and-comment process are often referred to as "legislative rules" because they have the "force and

effect of law." *Perez*, 135 S. Ct. at 1203 (citing *Chrysler Corp. v. Brown,* 441 U.S. 281, 302–303 (1979)). Failure to provide appropriate notice will invalidate the rule or regulation. *See Notice of rule making*, Administrative Law Practice and Procedure § 4:3 (2016).

Not all "rules" must be issued through the notice-and-comment process. Section § 553(b)(A) of the APA provides that, unless another statute states otherwise, the notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A); *see also Perez*, 135 S. Ct. at 1203.

Although the APA does not provide a definition of "interpretive" rules, courts have developed general broad tests to determine the question. In *Brown Express Inc. v. United States*, the Fifth Circuit described regulations, substantive rules, or legislative rules as those which create law, whereas interpretive rules are statements as to what the administrative officer thinks the statute or regulation means. 607 F.2d 695, 700 (5th Cir. 1979); *see also Shell Offshore*, 238 F.3d at 628. Legislative or substantive rules are those which "affect individual rights and obligations." *Shell Offshore*, 238 F.3d at 628. Agencies need not provide notice and comment for every meaningful policy decision. *Id.* at 630 n.6. In *Brown Express*, the Fifth Circuit found that an agency's notice was not an interpretative rule because it (1) "did not purport to interpret a statute or regulation," (2) was "not a mere clarification," (3) "defined no ambiguous term," and (4) "gave no officer's opinion about the meaning of the statute or regulations." 607 F.2d at 700. "Rather, it effect[ed] a change in the method used by the Commission in granting substantive rights." *Id.*

"[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.' " *Perez*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995) (internal quotation marks omitted)). The absence of a notice-and-comment obligation makes the process of issuing

interpretive rules comparatively easier for agencies than issuing legislative rules. But, as the Supreme Court has announced, that convenience "comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.' " *Id.* (quoting *Shalala*, 514 U.S. at 99).

An agency's interpretation of its own rules must be given substantial deference, unless it is plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). To sustain an agency's interpretation, a court need not find that it is the only permissible construction that the agency might have adopted but only that the agency's understanding of this statute is sufficiently rational. *Chemical Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 125 (1985).

Additionally, a binding rule is not required to undergo notice and comment if it is one "of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). The "substantial impact test" is the primary means by which courts look beyond the label "procedural" to determine whether a rule is of the type Congress thought appropriate for public participation. *Texas v. United States*, 809 F.3d 134, 176 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *cert. granted*, 136 S. Ct. 906 (2016). "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." *Id.* (quoting *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984)); *see also Brown Express*, 607 F.2d at 701–03. The Fifth Circuit found in *Texas v. United States* that the Deferred Action for Parents of Americans ("DAPA") program undoubtedly met that test because it "conferr[ed] lawful presence on 500,000 illegal aliens residing in Texas" and "force[d] the state to choose between spending millions of dollars to subsidize driver's licenses and amending its statutes." 809 F.3d at 176. The Fifth Circuit analogized DAPA to the rules that changed the substantive criteria for evaluating station allotment counter-proposals in *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989) (per curiam), which held that notice and comment was required. In *Reeder*, the court held that the

procedural rule exception to the APA did not apply to Federal Communications Commission rules concerning submission of counterproposals during omnibus rule making with respect to allocation of nearly 700 new FM channels, where the rules changed the substantive criteria for substitution and permanently foreclosed certain parties with existing stations from pursing their upgrade plans. *Reeder*, 865 F.2d at 1305.

In contrast, as the Fifth Circuit noted, the APA's procedural exception applied in *JEM Broadcasting Co. v. Federal Communications Commission*, 22 F.3d 320, 327 (D.C. Cir. 1994), regarding an applicant's right to amend its application for a broadcasting license. *See Texas v. United States*, 809 F.3d at 177. In *JEM Broadcasting*, the court concluded that "a license applicant's right to a free shot at amending its application is not so significant as to have required the FCC to conduct notice and comment rulemaking, particularly in light of the Commission's weighty efficiency interests." *JEM Broad. Co.*, 22 F.3d at 327. The court held the APA's exemption for procedural rules applied to the FCC's new rules that deprived license applications of the opportunity to correct errors or defects in their filings, when the previous FCC regime gave applicants notice of errors and a window for redress. *Id.* at 326–27. "The APA's procedural exception embraces cases . . . in which the interests 'promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense.' " *Id.* at 327.

B. "Primary Cause" Rule

Plaintiffs contend that FEMA denies repair assistance altogether whenever it determines deferred maintenance, and not the disaster itself, to be the "primary cause" of a home's overall unsafe condition. *See* Dkt. No. 119-1 at 6. Plaintiffs argue that this amounts to a "primary cause" rule under the APA and that "[b]ecause this rule is generally applicable, § 552(a)(1) required FEMA to publish it." *Id.* at 26–27. First, as evidence of the purported rule, Plaintiffs point to one paragraph out of the Department of Homeland Security Office of the Inspector General's ("OIG") Audit of

FEMA's Individuals and Households Program in Miami-Dad County, Florida, for Hurricane Frances. *Id.* at 27 (citing S.A.R. 7148, Dkt. No. 126-17).[9] That audit report states: "FEMA uses the term 'deferred maintenance' to refer to pre-existing damages to a home caused by a lack of maintenance. FEMA reportedly informed contract inspectors that if deferred maintenance (and not disaster-related damages) is the primary cause of a home being unsafe, inspectors should not record the home as being unsafe for purposes of program eligibility." *See* S.A.R. 7148, Dkt. No. 126-17. Second, Plaintiffs cite to the transcript of the deposition of John Carleton ("Carleton"), SAR-49:16 to 51:16, but do not explain how this testimony establishes that FEMA employed a primary cause rule. *See* Dkt. No. 119-1 at 27.

This Court finds that neither of the aforementioned exhibits establishes a rule warranting notice and comment under the APA. First, the OIG Report is a third-party audit published before Hurricane Dolly; therefore, it necessarily made no finding that FEMA employed a "primary cause" rule in instructing Hurricane Dolly inspectors. Second, Carleton's testimony which used the phrase in describing disaster-related does not meet the APA's definition of a "rule." *See* 5 U.S.C. § 551(4). Plaintiffs do not show that there was any such "primary cause" statement "designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *See* 5 U.S.C. § 551(4).

The Court **DENIES** Plaintiffs' motion for summary judgment, Dkt. No. 119-1, and **GRANTS** FEMA's motion for summary judgment, Dkt. No. 161-2, on the issue of a purported primary cause rule.

C. Fifty-Dollar Minimum for IHP Damages

It is undisputed that on July 10, 2005, FEMA's Director of the Recovery Division issued a policy memo titled "Individuals and Households Program (IHP) – Minimum Award(s)." The memo stated that applicants who have sustained a total

[9] The audit, prepared in May 2005, "assesses the strengths and weaknesses of the department's Individuals and Households Program." S.A.R. 7121, Dkt. No. 126-17. "It is based on interviews with employees and officials of relevant agencies and institutions, direct observations, and a review of applicable documents." *Id.*

of fifty dollars or less of disaster-related expenses are ineligible for housing assistance. *See* S.A.R.-475, Dkt. No. 121-4. Under the heading "Scope and Audience," the memo reads: "This is a national policy to be implemented in all disasters declared after the effective date of this policy. All personnel are directed to follow these procedures." *Id.* Under the heading "policy," the memo states: "Although numerous instances of minimal damage may cause some inconvenience for applicants, it is reasonable to expect that applicants will address those losses without the benefit of supplementary Federal assistance." *Id.* As its bases for the policy, the memo points to Section 408 of the Stafford Act. *Id.*

Plaintiffs argue that the fifty-dollar minimum for IHP damages constitutes a rule under the APA and should have been subject to notice-and-comment rulemaking. *See* Dkt. No. 119-1 at 27, 40–41. FEMA argues that the fifty-dollar minimum policy is an interpretive rule and thus exempt from the notice-and-comment rulemaking requirements pursuant to § 553(b)(A). FEMA argues that "consistent with . . . statutory and regulatory limitations on eligibility, FEMA interprets repairs that total $50 or less as not eligible for federal disaster assistance funding through IHP." Dkt. No. 162-2 at 13.

Section 408 of the Stafford Act provides that "the President . . . may provide financial assistance, and, if necessary, direct services, to individuals and households in the State who, as a direct result of a major disaster, have necessary expenses and *serious needs* in cases in which the individuals and households are unable to meet such expenses or needs through other means." 42 U.S.C. § 5174(a)(1) (emphasis added). FEMA's implementing regulations state that "FEMA may only provide assistance" when "the individual or household has incurred a disaster-related necessary expense or *serious need* in the state in which the disaster has been declared." 44 C.F.R. § 206.113(a)(1) (emphasis added).

Plaintiffs do not allege in the briefings that one or more of them were "adversely affected" by the fifty-dollar minimum. *See* 5 U.S.C. § 552. As such, Plaintiffs do not demonstrate that they have standing to challenge this fifty-dollar

minimum. The "irreducible constitutional minimum of standing" contains three elements: First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. *Id.*; *see also Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43).

Here, Plaintiffs fail to set forth any specific facts to demonstrate that they suffered injury in fact by the fifty-dollar minimum, or that the fifty-dollar minimum is the cause of their injuries. Through the course of the briefings, Plaintiffs allege extensive damage in their respective homes. *See, e.g.*, Dkt. No. 119-1 at 8. The Plaintiffs argue that when FEMA found an applicant ineligible due to "insufficient damages," "FEMA gave the applicant a menu of possible reasons for ineligibility without ever stating which one applied in any case." Dkt. No. 119-1 at 13. "This text does not inform applicants whether they were denied assistance because Dolly did not damage their homes, because Dolly's damage was minor, or because Dolly's major damage did not affect the safety of their homes." *Id.* at 13–14. However, this complaint is one regarding the *specificity* of the notice provided to IHP applicants. It is not a complaint that alleges harm caused by the fifty-dollar minimum itself. While it is clear that the FEMA notices to individuals denying assistance failed to provide applicants with explanations that were sufficiently detailed to enable them to file a meaningful appeal with FEMA, the issue of a sufficient notice system to applicants is separate from any alleged grievances with a fifty-dollar minimum. As such, a ruling on the fifty-dollar issue would not provide Plaintiffs the redress they

seek. Therefore, the Court finds that Plaintiffs do not have standing to bring a challenge against FEMA for the alleged fifty-dollar minimum rule.[10]

The Court **DENIES** Plaintiffs' motion for summary judgment, Dkt. No. 119-1, and **GRANTS** FEMA's motion for summary judgment, Dkt. No. 161-2, on the issue of the fifty-dollar minimum for hurricane damages on the grounds that Plaintiffs do not have standing to challenge this issue.

D. Additional Provisions in Documents Provided to Inspectors

Plaintiffs allege that FEMA employed additional rules through three documents written for field inspectors titled "IHP Inspection Guidelines," "Habitability Policy," and "IHP Line Item Descriptions." Dkt. No. 119-1 at 27; *See* A.R. 511-528, Dkt. No. 118-6; A.R. 382-390, Dkt. No. 118-4; S.A.R. 6219-6247, Dkt. No. 125-20. Plaintiffs argue that these documents contain rules that should have gone through notice-and-comment rulemaking because they narrowed eligibility for IHP assistance. *See* Dkt. No. 119-1 at 27–31. In response, FEMA argues that the policies contained therein are either interpretive or procedural. The Court examines each in turn.

1. IHP Inspection Guidelines

The IHP Inspection Guidelines are a seventeen-page document outlining the process by which inspectors should insert information into the FEMA-provided software when inspecting homes affected by Hurricane Dolly. *See* A.R. 511-528, Dkt. No. 118-6. The document provides instructions for registering the applicant's biographical information—including name, address, phone numbers, e-mail address, insurance coverage, occupancy type, ownership of household, household composition, and names of co-owners or co-occupants. The document provides

[10] Furthermore, the Court notes that the fifty-dollar minimum would likely constitute an interpretative rule because it clarifies the meaning of "serious need(s)" contained in the Stafford Act and the Act's implementing regulations. See 42 U.S.C. § 5174(a)(1); 44 C.F.R. § 206.113(a)(1); *see also Brown Express*, 607 F.2d at 700. The fifty-dollar minimum, therefore, are likely interpretive because they were "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *See Perez*, 135 S. Ct. at 1204.

instructions for recording the high water mark and on which floor it was located, whether there is a basement, the number of stories in the dwelling, and general instructions such as "[p]lease use standard comments where possible" or "[r]ecord a quantity and cause of damage for each line item." *See, e.g.*, A.R. 514, Dkt. No. 118-6. The document also provides instructions for recording damage, such as the following:

- "For owners, record all real property damage to the entire dwelling as it existed immediately following the disaster";
- "For renters, record all real property damage to the entire dwelling as it existed at the time of the inspection. If all habitability repairs have been completed, comment 'repairs made', do not record any real property line items, and record Habitability Repairs Required as 'no' ";
- "Record a quantity and cause of damage for each line item";
- "For all condominiums, . . . record damages from the sheetrock in. If the condo is completely destroyed, record residence rebuild along with the required comment describing the damage";
- "Only record damages to unattached garages that contain necessary and functional appliances or mechanical units: water heater, furnace, washer, and dryer";
- For basements, "[w]hen the cause of damage is flood, sewer backup or ground saturation/seepage, do not record interior doors, floor covering, sheetrock or paint in a basement, except in rooms that are required for the occupation of the dwelling, and no other room in the dwelling meets the need."

A.R. 514, Dkt. No. 118-6.

The document also provides definitions, such as of the terms "flood," "landslide," and "seepage," and instructions on how to record issues with the furnace, heater, electric wall, decking, bridges, beams, windows, doors, travel trailers, motor homes, furnishings, and stored personal property. *See* A.R. 515-528, Dkt. No. 118-6. Among other things, the document provides instructions for testing personal property appliances damaged by a power surge and for recording the loss of prescriptions or other medical or dental items lost as a result of the disaster. *Id.*

This Court finds that these instructions to inspectors fit squarely within the interpretive and procedural exceptions to the APA's notice-and-comment

rulemaking requirement. *See* 5 U.S.C. § 553(b)(A). As demonstrated by the minute details of the guidance, these guidelines supplemented the FEMA software and provided step-by-step guidance to inspectors on the type of information to be inserted into the tablet's electronic fields. The provisions interpreted the Stafford Act and implementing regulation's call to limit assistance to those which are necessary to restore a residence to "a safe and sanitary living or functioning condition." *See* 42 U.S.C. § 5174(c)(2)(A); 44 C.F.R. § 206.117 (2008); *see also Brown Express*, 607 F.2d at 700.

The provisions also provide explicit procedures by which inspectors should enter information into the software on their individual tablets when conducting the inspections. The guidance does not "modif[y] substantive rights and interests," and thus—if rules at all—are not of the type Congress thought appropriate for public participation. *See Texas v. United States*, 809 F.3d at 176. The alleged "rules" here are far less significant than the broadcast licensing rules in *JEM Broadcasting*, which the District of Columbia Circuit Court of Appeals found to be procedural. *See JEM Broad. Co.*, 22 F.3d 320, 327 (D.C. Cir. 1994); *see also Texas v. United States*, 809 F.3d at 177 (citing *JEM Broadcasting* with approval).

Furthermore, the Fifth Circuit has already stated in relation to the Stafford Act that Section 408 "does not set out a given level of specificity that FEMA's regulations must meet" and that "where Congress does not require a certain level of specificity, the agency has discretion to decide how specific its regulations will be." *LUPE*, 608 F.3d at 224. This Court finds *LUPE*'s admonition that a "regulation [can] always be more specific, and so it will always contain some vagueness that vests on-the-ground personnel with a level of discretion" to be particularly relevant here. *See id.* The IHP Inspection Guidelines provide interpretive guidance and procedures to on-the-ground inspectors. The APA's exception applies to the provisions contained in these IHP Inspection Guidelines because the "considerations of effectiveness, efficiency, expedition and reduction in expense"

outweigh interests promoted by public participation in rulemaking. *See JEM Broad. Co.*, 22 F.3d at 327.

The Court **DENIES** Plaintiffs' motion for summary judgment, Dkt. No. 119-1, and **GRANTS** FEMA's motion for summary judgment, Dkt. No. 161-2, on the issue of whether the IHP Inspection Guidelines document was required to go through notice-and-comment rulemaking.

2. Field Inspector Manual's "Habitability Policy" Document

Plaintiffs also allege that the "Habitability Policy" chapter of the Field Inspector Manual, A.R. 382-390, Dkt. No. 118-4, constitutes a rule that should have been subject to notice-and-comment rulemaking. This policy, spanning eight pages, provides as its overview the following:

> Habitability – the livability of a home following a disaster – is central to FEMA's Individual Assistance Program. Applicants whose homes are deemed **uninhabitable** following a disaster **may be eligible** for Housing Assistance. Applicants whose homes are deemed **habitable** following a disaster **will not be eligible** for Housing Assistance.
> [. . .]
> In determining an applicant's eligibility, FEMA relies on the inspector's reasoned judgment as to whether an applicant's home has been made unlivable by a disaster."
>
> Habitability is not, and never will be, an exact science. You must rely on good judgment and common sense in arriving at a habitability determination for a damaged home. However, there are sound principles that will help you make your decision.
>
> The first is what FEMA commonly refers to as the SAFE, SANITARY, AND FUNCTIONAL test. If the home is safe, sanitary and functional and presents no disaster-related hazards to the occupants, it is a livable home. No federal assistance is needed.
>
> Second, even homes that have sustained some damage to what are commonly called habitability items (exterior doors, windows, and other items that could affect the home's safety, sanitation, or security) are not necessarily unlivable homes if the damage is minor.

A.R. 383, Dkt. No. 118-4 (emphasis and underlines in original).

The document then "provides more details about [the] habitability policy, along with some examples of damage that do and do not make a home unlivable." *Id.* Among these details is a definition of "habitable home:"

> FEMA defines a habitable home as one that is SAFE, SANITARY, and FUNCTIONAL. It presents no disaster-related hazards to the occupants. Safe is defined as (1) exterior is structurally sound to include windows, doors, and roof (2) functioning electricity, gas, heat, plumbing, etc. (3) Interior is structurally sound to include floors, walls, ceiling (4) Access and egress are possible (5) Septic and sewage are functioning properly (6) Wells are functioning. Sanitary is defined as free of disaster-related health hazards. Functional is defined as capable of operating or functioning.

A.R. 384, Dkt. No. 118-4.

Plaintiffs do not state which provisions of the Field Inspector Manual's "Habitability Policy" should have been submitted through notice-and-comment rulemaking. Dkt. No. 119-1 at 28. Rather, Plaintiffs provide generally that the Habitability Policy "state[s] many standards that inspectors use to decide which damages are disaster-related and which homes are unsafe." *Id.* at 28–29. As an example, Plaintiffs cite to the Habitability Policy's definition of "safe" (reproduced in the block quote *supra*).

FEMA responds by arguing that the Habitability Policy chapter of the Field Inspector Manual "provided inspectors with guidance on making habitability determinations consistent with the statutory and regulatory eligibility criteria that limit eligible repairs to those that are necessary to restore a residence "to a safe and sanitary living or functioning condition." Dkt. No. 161-2 at 9–10 (quoting 42 U.S.C. § 5174(c)(2)(A)(i); 44 C.F.R. § 206.117(c)(1)). FEMA argues that the contents of the Habitability Policy are interpretive, and therefore consistent with the APA. FEMA asserts that the provisions were meant to provide inspectors with guidance for making habitability determinations in a way that comported with the statutory purpose of federal disaster assistance and the standards that it and the implementing regulations establish for eligibility.

Beyond the conclusory allegation that "all of these policies only restrict eligibility for repair assistance," *see* Dkt. No. 119-1 at 32, Plaintiffs do not show how the provisions contained in the Habitability Policy "affect individual rights and obligations." *See Shell Offshore*, 238 F.3d at 628. Agencies need not provide notice and comment for every meaningful policy decision, *see id.* at 630 n.6, and the provisions in this document were meant to guide inspectors in abiding by the Stafford Act and implementing regulations' provisions regarding restoring residences to a safe, sanitary, and functional condition. 42 U.S.C. § 5174(c)(2)(A)(i); 44 C.F.R. § 206.117(c)(1). Furthermore, Section 206.111 of the implementing regulations defines a number of terms used in the home repair regulations, such as "safe" and "sanitary."[11] *See* 44 C.F.R. § 206.111. The Habitability Policy given to inspectors meets the *Brown Express* factors for an interpretative rule because it purports to interpret the Stafford Act and implementing regulations, including Sections 206.117(c)(1) and 206.111, clarifies the terms of the regulations, defines ambiguous terms, and gives an opinion about the meaning of the statute and regulations. *See Brown Express*, 607 F.2d at 700. Plaintiffs have not demonstrated how the Habitability Policy "effect[ed] a change in the method used by [FEMA] in granting substantive rights." *Id.*

The Court finds that the contents of the Habitability Policy given to Hurricane Dolly inspectors are interpretative in nature, and thus covered by the APA exception to the notice-and-comment rulemaking requirement. 5 U.S.C. § 553(b)(A). The Court therefore **DENIES** Plaintiffs' motion for summary judgment, Dkt. No. 119-1, and **GRANTS** FEMA's motion for summary judgment on the issue of whether the Habitability Policy document was required to go through notice-and-comment rulemaking, Dkt. No. 161-2.

3. IHP Line Item Descriptions

[11] The implementing regulations define "safe" as "secure from disaster-related hazards or threats to occupants" and "sanitary" as "free of disaster-related health hazards." 44 C.F.R. § 206.111 (2008).

The final document that Plaintiffs argue should have been subject to notice-and-comment rulemaking is the "IHP Line Item Descriptions." Dkt. No. 119-1 at 27; *see* S.A.R. 6219-6247, Dkt. No. 125-20. The document purports to "provide[ ] descriptions of line items utilized to provide a unique inventory of damages [and] record inspection specifications as well as the process for implementing revisions." S.A.R. 6219, Dkt. No. 125-20. The document lists several hundred codes that identify and categorize various construction items and establishes the method by which FEMA catalogs inspector-identified damage. *Id.* Several examples of the line items are pasted below:

> 5741 Debris, Remove UOM =Cubic Yards
> Debris removal will be limited to the minimum required to remove health & safety hazards, protect against additional damage to the dwelling or provide access and egress to the dwelling. Use to address disaster deposited debris such as mud, trees that have fallen, and damages presenting hazards to the dwelling. Do not record this line item in conjunction with Miscellaneous Chainsaw.
>
> 5742 Tree(s), Remove UOM =Each
> Use when a tree presents a clear danger to either the dwelling or access to the dwelling. Use only when the tree is still standing and will need to be cut down by a professional. If the tree has already fallen, use the Debris Removal line item. The line item is based on a tree up to 18 inches in diameter. If the tree is significantly larger, the quantity of this line item can be increased.
>
> 6844 Jack House, Reset on Foundation. UOM =Square Feet
> Use this line item when the house has moved laterally off the foundation. Includes cost associated with raising the dwelling, supporting the structure while repairs are made to the foundation and resetting the dwelling on the existing or repaired foundation.
>
> 7111 MF Low-Water Bridge, Replace UOM =Linear Feet
> Labor and materials to replace a low water bridge. Although only the approaches are usually damaged, the low water bridge is sometimes undermined and requires replacement. This type of bridge is typically found in shallow streams, and consists of a solid mass of concrete placed over small diameter culverts, with the road surface usually no more than a foot or so above the water. The approach will be addressed separately. This line item is for the bridge only (concrete and culverts). This is based on a 10 ft. maximum width.

In their motion for summary judgment Plaintiffs provide no argument as to why the IHP Line Item Descriptions are a substantive rule that should have been subject to notice-and-comment rulemaking. *See* Dkt. No. 119-1 at 27–33. Rather, Plaintiffs argue that "these documents" (referring to the IHP Inspection Guidelines, Habitability Document, and the IHP Line Item Descriptions) "state many caps and floors that limit eligibility for assistance." *Id.* at 27. One example is the 7111 line item (reproduced above), which mentions a "10 ft. Maximum width." FEMA argues that this description "distinguishes the type of bridge to which that line item applies from other types of bridges." Dkt. No. 161-2 at 11. Plaintiffs do not counter this argument and fail to show that this line item affects substantive rights, *see Brown Express, Inc.*, 607 F.2d at 700, or individual rights and obligations, *see Davidson*, 169 F.3d at 999. The Line Item Descriptions merely detail codes for identifying and categorizing construction items and establish the procedure for FEMA inspectors to categorize various construction items. Plaintiffs have failed to show if and how the IHP Line Item Descriptions make out any eligibility determinations. Requiring agencies to conduct notice-and-comment rulemaking for hundreds of items and their corresponding descriptions would severely hamper effectiveness, efficiency, expedition, and reduction in expense for little gain in the interests promoted by public participation in rulemaking. *See JEM Broad. Co.*, at 327. This is especially true "[g]iven the nature of FEMA's work and the compressed time it has to make individual determinations." *See LUPE*, 608 F.3d at 224.

The Court therefore **DENIES** Plaintiffs' motion for summary judgment, Dkt. No. 119-1, and **GRANTS** FEMA's motion for summary judgment, Dkt. No. 161-2, on the issue of whether the IHP Line Item Descriptions were required to go through notice-and-comment rulemaking.

V. Remedy

Having disposed of Plaintiffs' remaining claims against FEMA, the Court now considers the proper scope of remedy for this court's September 2015 holding

that FEMA's "deferred-maintenance" rule was substantive and should have been subject to notice-and-comment rulemaking pursuant to § 552(a)(1). *See* 5 U.S.C. § 552(a)(1). Plaintiffs seek (A) an order requiring FEMA to vacate the "deferred maintenance" rule through a published statement of how it actually decides which damages fit within that category, *see* Dkt. No. 170 at 5–6, and (B) remand for the agency to reconsider all IHP applications of (1) applicants who FEMA found eligible for some amount of repair assistance; (2) applicants, who FEMA found were ineligible for "insufficient damage" based on the deferred maintenance rule; and (3) applicants who appealed FEMA's denial of home repair assistance. *See* Dkt. No. 119-1 at 47.

A. Type of Remedy

This Court has already held that the deferred maintenance rule was substantive in nature and was required by the APA to go through notice and comment rulemaking. *See* Mem. Op. and Order, Dkt. No. 156. Under the APA, "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Shell Offshore*, 238 F.3d at 630 (quoting 5 U.S.C. § 552(a)(1)). In *Shell Offshore*, the Fifth Circuit held that because plaintiff Shell "cannot lawfully be affected" by a rule until the agency "properly promulgates a new regulation," Shell was entitled to proceed with filing the published tariff rate as was acceptable before the agency's impermissible rule change. *Id.* The Fifth Circuit held that this remedy was appropriate "[s]ince no party can be adversely affected by an agency rule that should have been but was not submitted for notice and comment." *Shell Offshore*, 238 F.3d at 631.

As in *Shell Offshore*, since no party can be adversely affected by an agency rule that should have been but was not submitted for notice and comment, the appropriate remedy is to allow Plaintiffs' IHP applications to be reviewed by FEMA without the requirement of the "deferred maintenance rule." FEMA is also enjoined from utilizing a deferred maintenance rule "until [FEMA] properly promulgates a

new regulation." *See id.* at 630. In another case involving retrospective review of FEMA's action regarding applications, the Northern District of Illinois granted relief to the plaintiffs by vacating the rule in question and ordering the agency to reconsider plaintiffs' applications. *See Orchard Hill Const. LLC v. Fed. Emergency Mgmt. Agency*, 2001 WL 185188 (N.D. Ill. 2001). In that case in which three plaintiffs challenged FEMA's denial of their request for a "Letter of Map Revision based on Fill" ("LOMR–F") that would exempt the owners from requirement that they purchase flood insurance, the court found that FEMA's decision was arbitrary and capricious under the APA's § 706 and held that the proper remedy was to "order[ ] FEMA to reconsider Plaintiffs' LOMR–F request" with respect to the two lots in question. *Id.* at *9. This Court adopts a similar remedy by remanding to the agency with instructions to review the applications of the individual Plaintiffs adversely affected by the deferred maintenance FEMA rule.

While FEMA argues that an order requiring FEMA to vacate the "deferred maintenance" rule "would serve no purpose" because "that guidance has been discontinued," Dkt. No. 165 at 22, FEMA has not expanded on this argument. In any case, even if FEMA were to make out a claim of mootness, an exception to a claim of mootness is a defendant's voluntary cessation of an alleged illegal practice which the defendant is free to resume at any time. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 892 (10th Cir. 2008) (applying this rule in the administrative law context). "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Laidlaw*, 528 U.S. at 189 (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)) (internal quotation marks omitted). The standard for determining whether a case has been mooted by the defendant's voluntary conduct is "stringent." *Id.* "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quoting *United*

States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203, (1968)). The "heavy burden" of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. *Id.* Here, FEMA has not "made it absolutely clear" that it will refrain from using some form of the deferred maintenance rule without proper promulgating through notice and comment rulemaking. *See Laidlaw*, 528 U.S. at 189.

The Court denies Plaintiffs' request for an order requiring a certain published statement, such as one that Plaintiffs attach as an exhibit. *See* Dkt. No. 162-4. "When a district court reverses agency action and determines that the agency acted unlawfully, ordinarily the appropriate course is simply to identify a legal error and then remand to the agency, because the role of the district court in such situations is to act as an appellate tribunal." *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012); *see also Bennett v. Donovan*, 703 F.3d 582, 589 n.3 (D.C. Cir. 2013). Such an order dictating how FEMA should define "deferred maintenance" or "disaster-related" would be reaching beyond the role of the district court.

B. Scope of FEMA Reconsideration of IHP Applications

Plaintiffs seek an order requiring FEMA to reconsider the IHP applications of (1) applicants, including Plaintiffs Alvarado and Lopez, who FEMA found eligible for some amount of repair assistance (9,461 applicants);[12] (2) applicants, including eight of the named Plaintiffs, who FEMA found were ineligible because of "insufficient damage" based on the deferred maintenance rule (11,744 applicants); and (3) applicants, including all Plaintiffs, who appealed FEMA's denial of home repair assistance (2,215 applicants).[13] Dkt. No. 119-1 at 48. Collectively, the remedy Plaintiffs seek would require FEMA to review 23,330 applications. Plaintiffs argue that such a remedy is required as a matter of basic fairness and to provide FEMA

[12] Plaintiffs' reason for including this category is "because FEMA provided these applicants with no notice of which damages were deemed eligible and which were not, and because FEMA directed inspectors to limit the . . . disaster-related damages . . . that satisfied FEMA's deferred maintenance rule." Dkt. No. 119-1 at 48.

[13] Plaintiffs state that this group is included because FEMA allegedly did not disclose its appeal standards and withheld applicant files that were necessary to know how to effectively appeal.

with the incentive to ensure that its future rules are published pursuant to § 552(a)(1). Dkt. No. 164 at 13; Dkt. No. 170 at 8–9.

Plaintiffs argue that they have standing to seek reconsideration of all 23,300 applications because (1) the individual plaintiffs in this case have third-party standing to seek relief benefiting nonparties and (2) LUPE has direct and representational standing[14] to seek relief benefiting non-parties. *See* Dkt. No. 164 at 15–41. FEMA argues that (1) Plaintiffs do not have third-party standing to assert rights of persons not before the Court, (2) Plaintiffs have not established associational standing, and (3) Plaintiffs have not established organizational standing. Dkt. No. 161-2 at 15–20.

The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The question before the court is the prudential question of whether Plaintiffs have third-party standing to assert the rights of others. *See id.* at 129. A party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The Supreme Court has long recognized a "general prohibition on a litigant's raising another person's legal rights." *Allen v. Wright*, 468 U.S. 737, 775 (2014).

In determining if a party may prevail on an argument for third-party standing, courts evaluate whether: (1) the party asserting the right has a "close" relationship with the person who possesses the right and (2) whether there is a "hindrance" to the possessor's ability to protect his own interests. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Here, Plaintiffs do not support with specific facts its claim that it has a "close relationship" with non-plaintiffs, nor do they demonstrate that

[14] Because in arguing standing, LUPE uses the standards and cites cases for "associational standing," this Court will address this argument for "representational standing" under the heading of "associational standing."

non-plaintiffs face a hindrance in protecting their own interests. Plaintiffs' claim to have third-party standing over thousands of IHP applicants necessarily fails.

The Court next considers whether Plaintiff LUPE has associational standing to assert the rights of its members, including those who are non-plaintiffs. Under associational standing, an organization may sue to redress its members' injuries, even without a showing of injury to the association itself. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 552 (1996). An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also Warth*, 422 U.S. at 511. In *Hunt*, the Supreme Court found the Washington State Apple Advertising Commission to have associational standing because the North Carolina statute in question caused direct injuries to the Commission so as to establish the requisite "case or controversy" between Washington apple producers and North Carolina. "[T]he Commissioner's attempt to remedy these injuries and to secure the industry's right to publicize its grading system" was "central to the Commission's purpose of protecting and enhancing the market for Washington apples;" and none of the causes of action asserted "requires individualized proof" and thus "are properly resolved in a group context." *Hunt*, 432 U.S. at 343–45. The Supreme Court also noted that "the interests of the Commission itself may be adversely affected by the outcome of this litigation" because the annual assessments paid to the Commission were tied to the volume of apples grown and packaged as "Washington Apples." The Supreme Court held that this "financial nexus" between the interests of the Commission and its constituents was enough to " 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Id.* at 345 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

In *Automobile Workers v. Brock*, the Supreme Court held that the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") had standing to challenge an agency's construction of a statute providing benefits to workers who lost their jobs because of competition from imports. 477 U.S. 274, 290 (1986). The union there did not allege any injury to itself, nor was it argued that the members' associational rights were affected. The Court held that the union had standing to bring the suit by evaluating the three *Hunt* factors. The Court found UAW had associational standing because "at least some members of the UAW would have had standing to bring this suit in their own rights," the UAW's Constitution stated that one of its goals was to work for legislation on a national scale and that, in pursuit of that goal, the leadership of the UAW "lobbied hard" for the establishment of the benefit program in question, and that neither the claims nor relief sought by UAW required the court to consider the individual circumstances[15] of any aggrieved UAW member because the "suit raise[d] a pure question of law." 477 U.S., at 281, 287–88.

The "doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Id.* at 290. "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all." *Id.* (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 187 (Jackson, J., concurring)). The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests. *Id.* While the Court recognized the concern that "associations allowed to proceed under *Hunt* will not always be able to represent adequately the interests of all their

[15] An example of a case where associational standing is not appropriate because of individual circumstances is a case such as *Warth*. In *Warth*, the Supreme Court held that an organization of construction firms could not seek damages for the profits and business lost by its members because "whatever injury might have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." 422 U.S. at 515–16.

injured members," the Court stated that the agency "has given us absolutely no reason to doubt the ability of the UAW to proceed here on behalf of its aggrieved members" and, therefore, the agency "fell short of meeting the heavy burden" of persuading the court to abandon settled principles of associational standing. *Id.*

In *NAACP v. City of Kyle, Texas*, the Fifth Circuit held that the NAACP did not have associational standing in a suit against the city of Kyle alleging that it violated the Fair Housing Act when it changed its zoning and subdivision ordinances governing new single-family residences. 626 F.3d 233, 237–38 (5th Cir. 2010). The Fifth Circuit found that "there is no evidence in the record showing that a specific number of the NAACP has been unable to purchase a residence in Kyle as a result of the revised ordinances that went into effect" and "[t]here is also no evidence showing when and how the revised ordinances may deprive a NAACP member of the opportunity to acquire a new residence in Kyle." *Id.* at 237. Instead, the plaintiffs "pointed only to evidence suggesting, in the abstract, that some minority members may be less able to afford such residences due to the revised ordinances." *Id.* The Fifth Circuit held this was insufficient for associational standing because the alleged injury is neither concrete nor imminent. *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. at 560).[16]

Here, LUPE demonstrates that it fulfills the first prong of the *Hunt* test because a number of LUPE members have standing to sue in their own right. *See* Affidavit of Maria Isabel Cano, Dkt. Nos. 162-6; Declaration of Sareth Garcia, Dkt. No. 162-7; Affidavit of Maria Cristela Gonzalez, Dkt. No. 162-8; Affidavit of Clara Martinez ("Martinez"), Dkt. No. 162-9; Declaration of Rosalva Salas ("Salas"), Dkt. No. 162-10. These sworn statements of LUPE members allege that Hurricane Dolly damaged the named affiants' homes, and that when these LUPE members applied for IHP assistance, FEMA sent letters stating that they were not eligible for any or all repair assistance. *See* Dkt. Nos. 162-6 to 162-10. The affidavits describe a range

[16] Having found that LUPE has associational standing to assert the rights of its members, this Court declines to analyze whether it also has organizational standing.

in the amount of assistance denied. The affidavit of Salas, for example, alleges that though Dolly damaged the house by "lifting up the roof and letting lots of water come inside," soaking the walls and damaging major appliances like the stove and refrigerator, Salas was denied any repair assistance. Dkt. No. 162-10 at 1. The affidavit of Martinez states that while FEMA provided $200 in repair assistance, this was far below the cost of the damage allegedly caused by Hurricane Dolly. Dkt No. 162-9.

For the second prong of the *Hunt* test, LUPE has shown that the interests that it seeks to protect are germane to LUPE's purpose. LUPE is an advocacy organization with membership of about 7,000 families (roughly 25,000 people) who mostly live in Cameron and Hidalgo Counties. Most LUPE members are recent immigrants of Mexico who speak limited English and have low incomes. *See* Declaration of LUPE Executive Director Juanita Valdez-Cox, Dkt. No. 162-5 at ¶ 1–4. LUPE's mission "is to serve and assist people in low-income immigrant communities to defend their rights as employees, consumers, and full participants in the civic affairs of the community." *Id.* at ¶ 1. LUPE also "works to be recognized in the community as the source for resolution of social and economic problems faced by individuals and the community at large." *Id.* One of LUPE's "core goals" has been to improve the quality of housing for low-income families, especially in *colonias*. LUPE has advocated for improved *colonia* housing since 2003, when LUPE began work in Texas. *Id.* The subject-matter of this lawsuit on the standards by which FEMA determined whether houses were damaged by Hurricane Dolly is directly related to LUPE's mission to advocate for those living in *colonias*. Finally, neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. Here, the relief sought—vacatur of the deferred maintenance rule and an order requiring FEMA to review the applications for all LUPE members denied all or partial IHP assistance—does not require the Court to consider individualized proof of the fact and extent of injury. *See Warth*, 422 U.S. at 515–16. For this reason, the Court holds that LUPE, like UAW in *Automobile*

Workers, has met the *Hunt* factors in establishing associational standing to seek relief on behalf of its members.

The Court briefly addresses FEMA's argument that a class action is the appropriate means to effectuate relief for LUPE members. In *Automobile Workers*, the Supreme Court rejected the agency's argument that members of an association who wish to litigate common questions of law or fact against the same defendant be permitted to proceed only pursuant to the class-action provisions of Federal Rule of Civil Procedure 23. *See* 477 U.S. at 288. The Court stated that the agency's argument failed to recognize "the special features, advantageous both to the individuals represented and to the judicial system as a whole that distinguish suits by associations on behalf of their members from class actions." *Id.* Organizations often have the financial and research resources and specialized expertise relating to the subject-matter of the lawsuit that individual plaintiffs lack. "The interest and expertise of this plaintiff, when exerted on behalf of its directly affected members, assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions." *Id.* (quoting *Harlem Valley Transportation Assn. v. Stafford*, 360 F. Supp. 1057, 1065 (S.D.N.Y. 1973) (internal quotation marks and brackets omitted).

The Court now addresses Plaintiffs' argument that they have standing to seek an order requiring review of all 23,300 individuals who Plaintiffs allege did not receive the full extent of their alleged Hurricane Dolly damages. *See* Dkt. Nos. 119-1 at 50–51; 164 at 15–35. Plaintiffs claim that the individually named Plaintiffs have standing to seek relief benefiting non-parties because the presumption against third-party standing does not apply in this case. *See* Dkt. No. 164 at 15–28. The essence of Plaintiffs' argument is that the individually named Plaintiffs are properly in court to ask that FEMA's use of unpublished rules be "set aside." *Id.* at 19 (citing 5 U.S.C. § 706). Plaintiffs argue that to "set aside" is to annul, make void, "just as [the item set aside] had never been." *Id.* at 20 (quoting *Migdol v. United States*, 298 F.2d 513, 516 (9th Cir. (1961)). The Plaintiffs argue that if only some of

the IHP applications are re-reviewed, FEMA's illegal action is not as it "had never been." *Id.* However, the *Migdol* case that Plaintiffs cite is inapposite to this case; it was a criminal case concerning a defendant's motion to vacate and set aside a sentence. The text that Plaintiffs quote is the Ninth Circuit's discussion of what it meant to "set aside" a forfeiture previously declared by the defendant—an issue of no relevance to this case.

Plaintiffs also contend that "[m]any courts have held that APA relief benefitting non-parties is proper to completely set aside federal agency action that is found to be illegal." Dkt. No. 164 at 20 (citing *Bresgal v. Brock*, 843 F.2d 1163, 1169–71 (9th Cir. 1987); *Vigil v. Andrus*, 667 F.2d 931, 938–39 (10th Cir. 1982); *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 17 (D.D.C. 2004)). However, these cases stand for the proposition that there is no general requirement that an injunction affect *only* the parties in the lawsuit. *See Doe v. Rumsfeld*, 341 F. Supp. at 17 ("Where, as here, an injunction is warranted by a finding of defendants' outrageous unlawful practices, the injunction is not prohibited merely because it confers benefits upon individuals who were not named plaintiffs or members of a formally certified class."); *Bresgal v. Brock*, 843 F.2d at 1169 ("There is no general requirement that an injunction affect only the parties in the suit."). While the court in *Doe v. Rumsfeld* stated that "[g]overnment-wide injunctive relief for plaintiffs and all individuals similarly situated can be entirely appropriate and it is well-supported by precedent, as courts frequently enjoin enforcement of regulations ultimately held to be invalid," 341 F. Supp. 2d at 17 (internal quotation marks and citations omitted), the court was discussing injunctive relief that would cause prospective benefits to non-plaintiffs. Similarly, the Ninth Circuit in *Bresgal v. Brock* was only contemplating prospective relief. *See* 843 F.2d at 1170. ("The fact that forestry labor contractors are not among the parties here does not prevent the district court, or this court, from issuing an injunction directed to the Secretary requiring him to enforce the act against forestry labor contractors."). Such cases do not support a retroactive order requiring FEMA to reconsider thousands of IHP applications.

Rather, they support the contention that an "[i]njunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit, even if it is not a class action, if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Id.*

Plaintiffs also contend that "[a]s a matter of basic fairness, all Dolly applicants who were adversely affected by FEMA's use of unpublished rules deserve the identical remedy." *See* Dkt. No. 164 at 13 (citing *Mahon v. U.S. Dep't of Agric.*, 485 F.3d 1247, 1251 (11th Cir. 2007); *Kapps v. Wing*, 404 F.3d 105, 126 (2d Cir. 2005). However, the case law cited does not support this proposition. In *Mahon*, for example, the Eleventh Circuit did not announce such a rule; instead, the Court merely vacated the district court's order denying two of the named Plaintiffs' motion for summary judgment and remanded to the district court for further proceedings consistent with the opinion. *Kapps* concerned a putative class action suit, which this case does not. Additionally, Plaintiffs' citing of case law regarding the APA's relaxed standards for bringing a suit misses the mark. While the APA confers standing upon an individual injured in fact by agency action if he can show that the interest he seeks to vindicate is arguably within the "zone of interests" to be protected or regulated by the statute in question, in this case non-plaintiffs do not have standing because they did not seek to assert such interests before the court.

Plaintiffs also claim that LUPE has standing to seek relief benefiting non-parties, regardless of whether they are LUPE members. *See* Dkt. No. 119-1 at 49 (citing *Ass'n of Cmty. Organizations For Reform Now (ACORN) v. FEMA*, 463 F. Supp. 2d 26, 37 (D.D.C. 2006)); Dkt. No. 164 at 33–35 (citing *Automobile Workers v. Brock*, 477 U.S. at 287). Plaintiffs state that they seek "the exact type and scope of disaster-wide relief against FEMA" as the court in *ACORN* provided. Dkt. No. 119-1 at 49. Of all the cases that Plaintiffs cite to support their proposition that LUPE has standing for individuals who are neither LUPE members nor named plaintiffs, *ACORN* is the strongest. However, it still falls short of supporting Plaintiffs' proposition that LUPE has standing to seek relief benefiting non-members. In

ACORN, national community organization and four individual hurricane evacuees brought action against FEMA, alleging that FEMA violated the due process rights of those hurricane evacuees who were denied long-term housing benefits under this same Section 408 of the Stafford Act by failing to provide them explanations that were sufficiently detailed to enable them to file a meaningful appeal. Plaintiffs contended that FEMA violated the due process rights of hurricane evacuees by failing to provide them explanations that were sufficiently detailed to enable them to file a meaningful appeal. *ACORN*, 463 F. Supp. 2d at 28. Plaintiffs sought declaratory and injunctive relief requiring FEMA to provide adequate, written notice for any decisions to deny housing assistance to these evacuees. *Id.* In that case, however, plaintiffs filed a temporary restraining order ("TRO") with the court seeking to restrain FEMA from terminating the temporary housing benefits to thousands of evacuees who had applied unsuccessfully for long-term assistance under the Stafford Act. Although the court denied the TRO, "it specifically warned FEMA that if they went ahead and terminated the evacuees' short-term housing benefits prior to this Court's ruling on the preliminary injunction, the Court may order back-payments from [the date after the filing of the TRO] through the appeals process." *Id.* at 30–31. Notwithstanding the court's warning, FEMA terminated the short-term benefits. When the court eventually granted plaintiffs' motion for a preliminary injunction, it also ordered FEMA to pay each of the evacuees the short-term assistance benefits they would have otherwise received. *Id.* at 37.

Here, unlike in *ACORN*, on June 2, 2010, the Fifth Circuit reversed this Court's order of a preliminary injunction requiring FEMA to publish standards for making home repair assistance decisions. This Court, therefore, did not have the opportunity to prospectively warn FEMA of the potential need to remedy a wide class of individuals adversely affected by the agency action, as occurred in *ACORN*. Plaintiffs' citation to *Automobile Workers* is not persuasive because the court in that case only found UAW to have associational standing to seek relief for its union members—not to a larger class of non-members. *See* 477 U.S. at 293. If LUPE wanted to assert relief to individuals who are neither plaintiffs nor LUPE members,

the proper vehicle to do so would have been through a Rule 23 class action. *See, e.g.*, *W.C. v. Bowen*, 807 F.2d 1502, 1505 (9th Cir.), *opinion amended on denial of reh'g*, 819 F.2d 237 (9th Cir. 1987) (affirming the district court's order that the Secretary of Health and Human Services reinstate favorable decisions of class members and pay retroactive disability benefits to the class members).

Plaintiffs' arguments as to how this type of broad remedy is practically possible[17] are not germane because Plaintiffs do not have standing to assert such a remedy. Additionally, as FEMA notes, FEMA's voluntary administrative re-review of Hurricane Sandy National Flood Insurance Program policyholders has no legal bearing because that was accomplished as part of a separate FEMA program. *See* Dkt. No. 165 at 10 (citing National Flood Insurance Act of 1968, Pub. L. No. 90-448, as amended by the Flood Disaster Protection Act of 1973, 42 U.S.C. §§ 4001-4129; 44 C.F.R. §§ 59.81-80.21).

C. Leave to Seek Rule 23 Class Certification

Plaintiffs request that if this Court denies its request to seek relief on behalf of all individuals who applied but did not receive any or all their requested IHP assistance, that it grant Plaintiffs twenty-one days within which to seek leave to amend their complaint to seek Rule 23 class certification. Dkt. No. 164 at 43. FEMA argues that leave to seek to amend the complaint to assert a class action should be denied, especially now that this Court has already issued partial summary judgment in Plaintiffs' favor per its September 2015 Memorandum Opinion and Order. According to FEMA, allowing leave to amend to assert class action at this late stage would constitute impermissible "one-way intervention" whereby "members of the claimed class could in some situations await developments in the

[17] Plaintiffs state that "FEMA may gather the facts it needs to reconsider applications by relying on applicant statements, photographs, receipts, canceled checks, past damage estimates submitted with appeals, and any re-inspection procedure that FEMA chooses to undertake." Dkt. No. 164 at 15. Furthermore, Plaintiffs state that FEMA's practical capacity to do this work is proved by the fact that FEMA recently implemented procedures to repeat 142,000 inspections of damaged homes that were found to have been improperly conducted following Hurricane Sandy. *Id.* (citing "FEMA Fact Sheet: National Flood Insurance Program," Dkt. No. 162-13).

trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests." *See* Dkt. No 165 at 20–21 (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 545–47 (1974)). The 1966 amendments to Rule 23 were designed, in part, to "assure that members of [a] class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *American Pipe & Constr. Co.*, 414 U.S. at 547. The Court finds that granting leave to amend the complaint is not appropriate at this stage of litigation because the Court has already entered a summary judgment ruling. Allowing Plaintiffs to amend the complaint at this late stage in litigation to allege class action status would amount to impermissible one-way intervention. *See id.*

VI. Conclusion

For the aforementioned reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motion for summary judgment, Dkt. No. 119-1, and **GRANTS IN PART** and **DENIES IN PART** Defendant's motion for summary judgment, Dkt. No. 161-2.

The Court **ORDERS** FEMA to vacate the "deferred maintenance" rule. The Court **ORDERS** FEMA to reconsider the IHP applications of Plaintiffs and LUPE members without consideration of the "deferred maintenance" rule.

The Court **DIRECTS** the Clerk of the Court to close the case.

IT IS SO ORDERED.

SIGNED this 15th day of February, 2017.

Hilda Tagle
Senior United States District Judge