

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

HAMMOCK DUNES OWNERS'  
ASSOCIATION, INC.,

Plaintiff,

Case No. 3:18-cv-00876-BJD-PDB

vs.

Hon. Brian J. Davis

FEDERAL EMERGENCY MANAGEMENT  
AGENCY, U.S. DEPARTMENT OF  
HOMELAND SECURITY, KIRSTJEN  
NIELSEN, and BROCK LONG, in their  
official capacities,

Mag. Patricia J. Barksdale

Defendants.

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**AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**PRELIMINARY STATEMENT**

1. On October 7, 2016, Hurricane Matthew caused significant damage and breaches to, among other areas, 2.34 miles of engineered and maintained public beach and dunes (“Facility” or “Flood Protection Facility”) that are owned and maintained by the Hammock Dunes Owners’ Association (“Plaintiff”).

2. The Facility works in tandem with Flagler County’s adjoining dunes and beach to function as Flagler County’s flood protection system.

3. Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”) and its pertinent regulations, Federal Emergency Management Act (“FEMA”) personnel carrying out federal major disaster or emergency assistance functions, including the distribution of supplies, the processing of the applications, and other relief and assistance activities, shall perform their work in an equitable and impartial manner.

4. As FEMA’s own website explains, the purpose of the Public Assistance (“PA”) Program is to help communities recover from major disasters and encourage protection against such disasters in the future.

5. FEMA’s own publications further recognize the federal government’s commitment to “protecting people and property” from flooding; that flood control is “a national priority”; and that flood protection is a “vital benefit.”

6. However, with respect to Plaintiff and the hundreds of homes, utilities, and other critical structures that are protected by its Facility, FEMA has abandoned its non-discretionary duties by discriminating against Plaintiff and denying Plaintiff’s eligibility to

apply for PA funding without any rational basis based on unwritten rules that change FEMA's regulations without following the proper notice and comment procedures.

### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1361, and 5 U.S.C. §§ 701, *et seq.*

8. Venue of this action is proper in this Court pursuant to 28 U.S.C. § 1391(a) in that Plaintiff's claims arose within Flagler County, Florida.

### **BASIS FOR RELIEF**

9. This action and the relief requested are authorized under 28 U.S.C. § 1361, 28 U.S.C. § 2201, 28 U.S.C. § 2202, 28 U.S.C. § 2412(b), 42 U.S.C. §§ 5151, 5165c, 5 U.S.C. §§ 701, *et seq.* and the federal regulations promulgated thereunder, and the Due Process Clause of the Fifth Amendment of the United States Constitution.

### **PARTIES**

10. Hammock Dunes is a planned community located on approximately 2,258 acres in the unincorporated area of Flagler County.

11. Hammock Dunes Owners' Association, Inc. ("Plaintiff") is a private nonprofit organization ("PNP"), as that term is defined in FEMA's regulations.

12. Plaintiff is the homeowners' association for Hammock Dunes, organized under Chapter 720, Florida Statutes, to operate, administer, manage, and maintain the community known as Hammock Dunes.

13. Plaintiff owns and is legally responsible for maintaining and repairing an engineered berm, dunes and beach (the "Facility").

14. Plaintiff's Facility, together with Flagler County's adjoining berm, dunes and beach, function as Flagler County's flood protection system.

15. Hammock Dunes is a Development of Regional Impact ("DRI") under Florida law.

16. Section 380.06, Florida Statutes, defines a DRI as "any development that, because of its character, magnitude or location, would have a substantial effect upon the health, safety or welfare of citizens of more than one county."

17. Pursuant to Article III of the Declaration of Protective Covenants, Conditions, and Restrictions for Hammock Dunes, Plaintiff is required to comply with the requirements of Flagler County's Resolution establishing the DRI, and is accordingly responsible for owning, maintaining, repairing, and replacing the Facility, in perpetuity.

18. Plaintiff maintains the Facility through sand restoration, sand fencing, plantings, environmental based fertilization, coordinated new house construction (to maintain the inland strength of the Facility), and re-engineering of the Facility based on changing beach and near shore conditions.

19. Plaintiff and the County are in a unique relationship in which Plaintiff works as a partner or instrumentality of the County, and maintains the Facility as directed by the County through the DRI, as amended.

20. The Federal Emergency Management Agency ("FEMA") is the federal agency designated by the President to administer the Public Assistance ("PA") Program in accordance with the provisions of the Stafford Act and the relevant lawfully promulgated federal regulations.

21. As an agency of the federal government, FEMA's actions are directed and carried out by other agencies and individuals. When used in this Complaint, the term "FEMA" shall be understood to refer not only to that agency, but to the Defendants below as well.

22. Defendant Department of Homeland Security ("DHS") has responsibility for numerous formerly separate agencies, including FEMA, which are now subsumed within DHS's Emergency Preparedness and Response branch.

23. Defendant Kirstjen Nielsen is the Secretary of the DHS, and is named only in her official capacity.

24. Defendant Brock Long is the Director of FEMA, and is named only in his official capacity.

### **STATEMENT OF FACTS**

#### **I. The FEMA Public Assistance Program.**

25. FEMA's PA Program provides federal assistance to government organizations and PNP organizations following a Presidential disaster declaration.

26. The PA Program is administered through a coordinated effort between FEMA, the State (or "grantee"), and the applicants (or "subgrantees") (*i.e.*, the local governments and PNP organizations that apply for PA grants).

27. 44 C.F.R. § 206.221(f) defines "private nonprofit organization" ("PNP") as: "any nongovernmental agency or entity that currently has" either: (1) "an effective ruling letter from the U.S. Internal Revenue Service [IRS], granting tax exemption under sections 501(c), (d), or (e) of the Internal Revenue Code"; or (2) sufficient evidence "that the

nonrevenue producing organization or entity is a nonprofit one organized or doing business under State law.”

28. FEMA confirmed that Plaintiff is a PNP on multiple occasions, both verbally and in writing when determining the appeals referenced below.

29. 44 C.F.R. § 206.221(e) defines “private nonprofit facility” as “any . . . facility providing essential governmental type services to the general public . . . .” 44 C.F.R. § 206.222(e)(7) also states that “[o]ther essential governmental service facility means . . . facilities which provide health and safety services of a governmental nature. All such facilities must be open to the general public.”

30. 44 C.F.R. § 206.222(b) provides that PNPs that “own or operate a private nonprofit facility as defined in 44 C.F.R. § 206.221(e)” (see above definition) “*are eligible* to apply for assistance under the State public assistance grant.” (Emphasis added.)

31. Under the Stafford Act, 42 U.S.C. § 5122(10), eligible “public facilities” are defined as including “[a]ny flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility.”

32. Under the Stafford Act, 42 U.S.C. § 5165c(a)(1), FEMA must “provide notice and opportunity for comment before adopting any new or modified policy that (A) governs implementation of the [PA Program]; and (B) could result in a significant reduction of assistance under the [PA Program].”

33. Under the Stafford Act, 42 U.S.C. § 5165c(a)(2), “[a]ny policy adopted under paragraph (1) shall apply only to a major disaster or emergency declared on or after the date on which the policy is adopted.”

34. Therefore, under 42 U.S.C. § 5165c, with respect to applicants seeking relief based on a particular major disaster or emergency, FEMA cannot rely on a policy that was not already published for public notice and comment before the declaration of the major disaster or emergency in question.

35. 42 U.S.C. § 5151(a) of the Stafford Act provides: “The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished *in an equitable and impartial manner*, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status.” (Emphasis added.)

36. 44 C.F.R. § 206.11(b) largely mirrors the language of 42 U.S.C. § 5151(a), providing: “All personnel carrying out Federal major disaster or emergency assistance functions, including the distribution of supplies, the processing of applications, and other relief and assistance activities, shall perform their work *in an equitable and impartial manner*, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.” (Emphasis added.)

## **II. Hurricane Matthew and Procedural Background**

37. On October 7, 2016, Hurricane Matthew caused significant damage to the entire coastline of Flagler County, including the 2.34 miles of engineered and maintained public beach, berm, and dunes that comprise the Plaintiff's Facility in question, as well as the surrounding areas.

38. During the hurricane, much of Plaintiff's Facility was lost, estimated at over 15.5 cubic yards per linear foot, requiring Plaintiff to fund and conduct emergency restoration of approximately 6 cubic yards per linear foot of emergency protective berm for most of the Facility prior to the 2017 hurricane season.

39. All six (6) miles north of the Facility had dune breaches and different degrees of flooding.

40. Ocean water flooded the Dunes Community Development District ("DCDD") utility system just one mile north of the Facility.

41. All ten (10) miles south of the Facility had severe dune erosion, and there was severe damage to State Route A1A, an emergency evacuation route, that kept it closed for over one month.

42. On October 4, 2016, the Chair of the Flagler County Board of Commissioners signed a Declaration of a Local State of Emergency, and the County Board of Commissioners has continuously extended the Local State of Emergency to the present.

43. On January 8, 2018, Flagler County identified the damaged dune system of the entire coastline of the County, including Plaintiff's Facility, as the primary reason the County continues to declare a State of Local Emergency to this date.

44. On October 8, 2016, the President declared a major disaster for the State of Florida under the Stafford Act.

45. The declaration authorized FEMA to provide various assistance measures to entities and individuals in certain counties within the State of Florida, including Flagler County.

46. On November 17, 2016, Plaintiff timely filed a Request for Public Assistance (the “Request”) with FEMA.

47. Plaintiff is a not for profit organization under the laws of the State of Florida, and submitted documentation to FEMA as part of its Request verifying its registered status as such with the State Division of Corporations.

48. On December 7, 2016, Plaintiff’s representatives met with Raymond Mason, the FEMA Public Assistance Crew Leader (“PACL”).

49. The following day, the Florida Department of Emergency Management (“FDEM”) notified Plaintiff that its eligibility was confirmed by FEMA, and that a funding agreement with the State (the “Funding Agreement”) was ready for the Plaintiff’s signature. See Exhibit A.

50. On December 15, 2016, Plaintiff submitted its application for a U.S. Small Business Administration (“SBA”) Disaster Loan.

51. The Funding Agreement was executed by Plaintiff and FDEM as of January 11, 2017.

52. The Funding Agreement, which serves as a contract between Plaintiff and FDEM, details both parties’ understanding that FEMA had determined Plaintiff to be eligible

to apply for PA funding, and that the necessary work to restore the Facility would be funded as determined by forthcoming project worksheets.

53. As Plaintiff's eligibility to apply for PA funding had been confirmed, the PACL informed Plaintiff that the project worksheets were being addressed and would be ready within a matter of weeks.

54. After the December 7, 2016 meeting with the PACL and in reliance on the Funding Agreement, Plaintiff prepared three Request for Proposals ("RFPs") for the Emergency Work Dunes Restoration Project ("Dunes Restoration Project").

55. Pursuant to FEMA's procurement guidelines, three RFPs (for the replacement of the sand, for the dunes plantings, and for the dunes walkovers) were prepared, publicly published, and bids were received and reviewed.

56. On January 11, 2017, Plaintiff's representatives had another meeting with the PACL to discuss the preparation of, and information needed for, the project worksheets.

57. Over the following several weeks, Plaintiff worked diligently to organize all invoices and other documentation of its disaster-related expenses, and also prepared estimates of expenses for work that still needed to be done.

58. Plaintiff submitted all of this documentation to the PACL, on January 13, 2017.

59. On January 17, 2017, Plaintiff submitted the RFP for the Dunes Restoration Project which detailed the damage the Facility suffered and the scope of work for the emergency repairs.

60. On February 3, 2017, Plaintiff submitted, to the PACL and to the FDEM consultant, its revised spreadsheets of the Hammock Dunes Disaster Damage Report and Cost Estimates, by categories.

61. Plaintiff secured financing and contracted for the repair of the Facility, and on February 26, 2017, work commenced to repair the Facility.

62. During this process, Plaintiff's counsel had numerous conversations with the PACL and FDEM regarding the procurement process and the necessary documentation for the project worksheets.

63. Plaintiff was also informed that it would be meeting with FEMA's environmental specialist, but despite at least three (3) requests for a meeting, none was ever granted.

64. On March 15, 2017, Plaintiff's counsel received a form email from FEMA-EMMIE@dhs.gov indicating that Plaintiff does not meet the definition of a public facility, critical facility, nor performs a critical function under the FEMA PA Program. See Exhibit B.

65. On March 23, 2017, Plaintiff received an official notice that FEMA had rescinded its initial confirmation of Plaintiff's eligibility to apply for PA funding. See Exhibit C.

66. The official notice was not particularly clear as to the claimed basis for FEMA's decision to rescind its initial confirmation of Plaintiff's eligibility to apply for PA funding, but the language cited in the outline attached to the notice suggested that FEMA believed the Facility to be recreational in nature.

67. The official notice also included information regarding the opportunity for a facilitated discussion with FEMA, and Plaintiff immediately contacted FEMA and FDEM to request a facilitated discussion.

68. In response to the rescission of FEMA's confirmation of Plaintiff's eligibility and upon request of a FEMA representative, on April 5, 2017, Plaintiff sent FEMA a letter clarifying that the Facility serves as part of a vital flood protection system, and therefore provides health and safety services of a governmental nature (and are not merely recreational). See Exhibit D.

69. The letter further requested that FEMA reinstate its initial eligibility determination or immediately schedule a facilitated discussion or mediation between the parties.

70. On April 12 and 13, 2017, Plaintiff's counsel spoke with Michael Robinson from the FEMA Field Office located in Jacksonville, Florida, concerning Plaintiff's request for a facilitated discussion or mediation between the parties.

71. On those calls, Mr. Robinson explained that FEMA follows an unwritten policy to automatically reject any Request for Public Assistance by a homeowners' association, without any analysis of whether the homeowners' association satisfies the eligibility criteria set forth in the Stafford Act and relevant regulations.

72. Mr. Robinson also informed Plaintiff's counsel that Plaintiff's request for a facilitated discussion would not be granted.

73. In emails dated April 13, 2017 and April 17, 2017, Plaintiff's counsel requested that FEMA provide Plaintiff with the legal authority that provided the basis for rescinding its confirmation of Plaintiff's eligibility.

74. FEMA never responded to these requests.

75. On May 9, 2017, Plaintiff appealed FEMA's decision to rescind its initial confirmation of Plaintiff's eligibility. See Exhibit E.

76. The First Appeal Letter explained that Plaintiff was an eligible PNP which had adequately documented the Facility's eligibility to apply for PA funding as a facility that provides health and safety services of a governmental nature to the public and that is open to the public.

77. On May 12, 2017, Plaintiff participated in a Congressional meeting (conference call) with representatives from FEMA and FDEM.

78. On that call, FEMA representatives admitted that Plaintiff was a PNP, but argued that Plaintiff was not eligible because it was a "private community," a term that is not found anywhere in the Stafford Act or relevant legally promulgated federal regulation.

79. During the call, Plaintiff again requested a facilitated discussion or some form of alternative dispute resolution, but was again refused.

80. On July 6, 2017, FDEM Director submitted a letter to FEMA requesting that FEMA grant Plaintiff's appeal and reinstate its eligibility. See Exhibit F.

81. On October 12, 2017, FEMA sent Plaintiff a Request for Information ("RFI"). See Exhibit G.

82. Realizing that it could no longer argue the Facility served a recreational purpose, FEMA stated in the RFI that “the administrative record does not contain sufficient information documenting that the [Plaintiff] is legally obligated to directly protect public resources or provide critical services to the community.”

83. FEMA further requested that the Plaintiff “provide documentation supporting that it owns and is legally responsible for maintaining the public resources (*i.e.*, public utilities and structures, conservation areas and trails, and oceanfront natural experience site) documented within its appeal” as well as the SBA’s response to Plaintiff’s request for a disaster business loan.

84. On November 23, 2017, Plaintiff submitted its response to the RFI, explaining and providing documentation evidencing that Plaintiff owned and was legally obligated to maintain the Flood Protection Facility that protects the various public resources; that there is no legal requirement for Plaintiff to own the public resources protected by the Flood Protection Facility, and that its SBA loan application remained pending. See Exhibit H.

85. On December 5, 2017, FEMA denied Plaintiff’s first appeal of FEMA’s decision to rescind its initial eligibility determination (the “First Appeal Denial”). See Exhibit I.

86. In an effort to continue coming up with new ways to refuse Plaintiff’s eligibility, FEMA stated in the First Appeal Denial that the appeal was denied because the Facility did not provide an essential governmental-type service.

87. To support this categorical exclusion of Plaintiff’s facility, FEMA relied on a never-before-mentioned argument that the Facility provides “incidental” and not “direct”

benefits to the public, a requirement which has no basis in the Stafford Act or relevant legally promulgated regulations.

88. On January 31, 2018, Plaintiff submitted its second appeal. See Exhibit J.

89. The Second Appeal Letter explained that there is no legal basis to support an argument that an eligible facility providing essential health and safety services of a governmental nature provide “direct” services, and that even there was such a requirement, the Facility provides permanent flood protection, an essential health and safety service of a governmental nature which cannot possibly be considered “incidental” or “indirect” under any rational analysis.

90. On March 19, 2018, Plaintiff’s counsel submitted a letter to FEMA requesting a meeting concerning the second appeal. See Exhibit K.

91. On April 2, 2018, FEMA denied Plaintiff’s request for a meeting. See Exhibit L.

92. On May 15, 2018, FEMA denied Plaintiff’s second appeal (the “Second Appeal Denial”). See Exhibit M.

93. FEMA’s Second Appeal Denial expressed an entirely new basis for denial, revealed to Plaintiff for the first time, that Plaintiff’s Facility must be a utility or emergency facility to be eligible.

**III. FEMA Had No Rational Basis to Rescind and Refuse to Reinstate its Initial Confirmation of Plaintiff’s Eligibility.**

94. In the analysis accompanying the Second Appeal Denial, FEMA claimed three (3) reasons for denying Plaintiff’s eligibility:

- a. “FEMA policy specifically excludes property owner associations, except those with utilities or emergency facilities, from being considered an eligible PNP.”
- b. “[T]he [Plaintiff] has not presented any evidence to show the substantial effect it has on Flagler County and other counties, other than assertions that if the dunes failed, it would be catastrophic.”
- c. “A tenuous relationship between a facility and other emergency or critical facilities is not enough to find that facility eligible.”

95. None of these statements are rationally supported by the law or the facts.

96. There is no published FEMA policy that eliminates eligibility for homeowners’ associations that do not own or operate utilities or emergency facilities. Such a position would be contrary to FEMA’s published policy, which expressly provides an example of an *eligible* PNP facility owned by a homeowners’ association that is *not* a utility or emergency facility (*i.e.*, a community center primarily used for social and educational activities).

97. FEMA’s suggestion that “a tenuous relationship between a facility and other emergency or critical facilities is not enough to find that facility eligible” relies on (1) FEMA’s irrational argument that flood protection is not a “direct” benefit, and (2) its wholly unsupported position that eligible health and safety services of a governmental nature must provide “direct” benefits.

98. By suggesting that flood control is not a direct benefit, FEMA ignores its own publications recognizing the federal government’s commitment to “protecting people and

property” from flooding; that flood control is “a national priority”; and that flood protection is a “vital benefit.”

99. Plaintiff presented FEMA with substantial evidence as to the effect the Facility has on Flagler County and the public. As explained in the record that was before FEMA, in accordance with the DRI, Plaintiff is legally required to ensure that the Facility performs, and the Facility does in fact perform, essential services of a governmental nature that reduce immediate threats to life, property, and public health and safety. These services include:

- a. Protecting a variety of public utility services and structures, including approximately 134 electrical transformers, several water treatment plants, several pump stations, and other facilities and structures relevant to providers of water, sewer services, and electricity, as required by the DRI.
- b. Protecting several conservation areas, wetlands and public trail systems.
- c. Protecting drainage basins, dry detention areas, exfiltration trenches, and maintaining the banks of approximately 182 acres of created lakes that serve as the storm water management system for approximately 2,200 acres of private and public land in Flagler County.
- d. Protecting the inland lake irrigation system from ocean water infiltration.
- e. Protecting a five (5) acre oceanfront natural experience site, required to be constructed and preserved pursuant to the DRI.
- f. Protecting 1220 residences from flooding, almost all of which are required to carry flood insurance from FEMA’s National Flood Insurance Program.

Pursuant to FEMA'S Publication No. P-1037 "Reducing Flood Risk to Residential Buildings that Cannot Be Elevated," dated September 2015, FEMA recommends the installation of barriers, such as floodwalls and levees, in order to protect residences from flooding. The 2.34 miles of Flood Protection Facility owned and maintained by Plaintiff are just such a barrier, as recognized on FEMA Floodplain maps of the areas.

- g. Protecting other upland communities, the Intracoastal Waterway to the Barrier Island upon which Hammock Dunes sits, and State Road A1A (an emergency evacuation route) from flooding. At the south end of the Facility, the dunes are the only barrier between the ocean and State Road A1A. During Hurricane Matthew, the dunes were breached all the way to A1A in many places. Without such a barrier, it is likely that a portion of State Road A1A would fail in the event of a disaster event, similar to what happened in areas not protected by the Facility.

100. If the Plaintiff did not maintain and repair the Flood Protection Facility, hundreds of homes would be flooded, utility systems would be damaged, electrical transformers would be destroyed, public streets and emergency access routes would be flooded, and the only bridge to the barrier island would be compromised.

101. During Hurricane Matthew, the Facility protected the public, utilities, and other structures from flooding. By comparison, it was reported that over 600 homes were flooded to the north of Hammock Dunes, where no Flood Protection Facility existed.

102. More recently, Plaintiff's maintenance and installation of plantings on the Facility protected the public from further washout and flooding. By comparison, just south of the community, in Flagler Beach, it was reported that the dunes had been rebuilt without plantings, and the area suffered a washout from a nor'easter.

103. Flagler County considers the Facility to be a vital part of its coordinated flood control system. The Facility accounts for thirteen percent (13%) (in terms of mileage) of the County's flood control system, and is the most critical portion of the system with respect to preventing flooding to an emergency evacuation route.

104. Flood control is an essential health and safety service of a governmental nature.

105. In addition to providing essential governmental services and reducing immediate threats to life, property, public health and safety, the Facility is also open to the general public.

106. Additionally, there are two public access points immediately adjacent to the Facility, to the north and to the south (the "Parks").

107. The Parks were created as part of the DRI for public access to the public beach system.

108. The Parks were donated and funded by the DRI and maintained and improved for public use by both the County and Plaintiff.

109. FEMA ignored the above facts, which clearly demonstrate that Plaintiff's Facility provides essential health and safety services of a governmental nature, and irrationally refused to reinstate its initial confirmation of Plaintiff's eligibility.

**IV. FEMA Granted Requests From Other Similarly Situated Entities.**

110. Despite rescinding its confirmation of Plaintiff's eligibility to apply for PA funding, FEMA has confirmed the eligibility of other similarly situated entities (other PNPs that satisfy the regulatory requirements of owning facilities that provide essential health and safety services of a governmental nature).

111. For example, following Hurricane Sandy, FEMA determined that the Ocean Grove Camp Meeting Association owned a facility that provided health and safety services of a governmental nature and was therefore eligible to apply for funding under the PA Program.

112. For example, following Hurricane Katrina, FEMA determined that the Hancock County Amateur Radio Association owned a facility that provided health and safety services of a governmental nature and was therefore eligible to apply for funding under the PA Program.

**COUNT I  
VIOLATION OF NON-DISCRETIONARY DUTIES  
(CARRYING OUT FUNCTIONS IN AN EQUITABLE AND IMPARTIAL MANNER)**

113. Plaintiff repeats, re-alleges, and incorporates by reference paragraphs 1 through 112 as stated herein.

114. 42 U.S.C. § 5151(a) of the Stafford Act provides: "The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished *in*

*an equitable and impartial manner*, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status.” (Emphasis added.)

115. 44 C.F.R. § 206.11(b) largely mirrors the language of 42 U.S.C. § 5151(a), providing: “All personnel carrying out Federal major disaster or emergency assistance functions, including the distribution of supplies, the processing of applications, and other relief and assistance activities, shall perform their work *in an equitable and impartial manner*, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.” (Emphasis added.)

116. As demonstrated above and in the record, FEMA and its relevant personnel have failed to carry out their functions in an equitable and impartial manner as required by 42 U.S.C. § 5151(a) and 44 C.F.R. § 206.11(b). This duty is non-discretionary.

117. Instead, FEMA personnel have inequitably refused to confirm the eligibility of Plaintiff based on unwritten policies that find no support in the Stafford Act or relevant regulations.

118. As demonstrated above and in the record, FEMA has refused to confirm Plaintiff’s eligibility even though Plaintiff satisfies the necessary PNP criteria and the Facility satisfies the relevant regulatory criteria of providing essential health and safety services of a governmental nature.

119. By refusing to confirm Plaintiff’s eligibility, FEMA has violated this non-discretionary duty.

**COUNT II**  
**VIOLATION OF NON-DISCRETIONARY DUTIES**  
**(ELIGIBILITY OF PLAINTIFF)**

120. Plaintiff repeats, re-alleges, and incorporates by reference paragraphs 1 through 112 as stated herein.

121. 44 C.F.R. § 206.221(e) defines “private nonprofit facility” as “any . . . facility providing essential governmental type services to the general public . . . .” 44 C.F.R. § 206.222(e)(7) also states that “[o]ther essential governmental service facility means . . . facilities which provide health and safety services of a governmental nature. All such facilities must be open to the general public.”

122. 44 C.F.R. § 206.222(b) provides that PNPs that “own or operate a private nonprofit facility as defined in 44 C.F.R. § 206.221(e)” (see above definition) “*are eligible* to apply for assistance under the State public assistance grant.” (Emphasis added.)

123. The regulatory language of 44 C.F.R. § 206.222(b) is clear and does not afford FEMA any discretion: PNPs that own facilities satisfying the regulatory criteria *are eligible* to apply for assistance under the State public assistance grant.

124. Plaintiff and its Facility satisfy the relevant regulatory criteria, and FEMA had no discretion to determine otherwise.

125. By refusing to confirm Plaintiff’s eligibility, FEMA has violated this non-discretionary duty.

**COUNT III**  
**VIOLATION OF NON-DISCRETIONARY DUTIES**  
**(PUBLIC NOTICE AND COMMENT FOR POLICIES)**

126. Plaintiff repeats, re-alleges, and incorporates by reference paragraphs 1 through 112 as stated herein.

127. Under the Stafford Act, 42 U.S.C. § 5165c(a)(1), FEMA must “provide notice and opportunity for comment before adopting any new or modified policy that (A) governs implementation of the [PA Program]; and (B) could result in a significant reduction of assistance under the [PA Program].”

128. Under the Stafford Act, 42 U.S.C. § 5165c(a)(2), “[a]ny policy adopted under paragraph (1) shall apply only to a major disaster or emergency declared on or after the date on which the policy is adopted.”

129. Therefore, under 42 U.S.C. § 5165c, with respect to applicants seeking relief based on a particular major disaster or emergency, FEMA cannot rely on a policy that was not published for public notice and comment before the declaration of the major disaster or emergency in question.

130. FEMA never followed these necessary and non-discretionary requirements, and Plaintiff was never given any notice or opportunity to comment on any rule or policy that mandates homeowners’ associations are no longer eligible to apply for PA funding unless the homeowners’ association owns or operates a utility or emergency facility.

131. FEMA never followed these necessary and non-discretionary requirements, and Plaintiff was never given any notice or opportunity to comment on any rule or policy that mandates PNP facilities providing health and safety services of a governmental nature are no

longer eligible to apply for PA funding unless the facility provides a “direct” benefit to the public.

132. FEMA never followed these necessary and non-discretionary requirements, and Plaintiff was never given any notice or opportunity to comment on any rule or policy that flood control is not considered a “direct” benefit or a governmental service.

133. FEMA nonetheless followed unwritten rules in refusing to confirm Plaintiff’s eligibility to apply for funding under the PA Program, violating its non-discretionary duty to provide public notice and comment of any such rules or policies.

**COUNT IV  
SUBSTANTIVE DUE PROCESS VIOLATION (EQUAL PROTECTION)**

134. Plaintiff repeats, re-alleges, and incorporates by reference paragraphs 1 through 112 as stated herein.

135. As demonstrated above, FEMA has intentionally treated Plaintiff differently than other similarly situated, and there is no rational basis for this treatment.

136. FEMA has confirmed the eligibility of other PNPs that are similarly situated to Plaintiff, but has refused to do so for Plaintiff.

137. Plaintiff and its Facility satisfy all the relevant criteria to be eligible to apply for PA funding under the Stafford Act and relevant regulations.

138. FEMA has applied unwritten rules to Plaintiff which it has not applied to or enforced with respect to other similarly situated persons and which are not supported by relevant law or policy.

139. By rescinding and refusing to confirm Plaintiff's eligibility, FEMA has violated Plaintiff's substantive due process right to equal protection in violation of the Fifth Amendment to the U.S. Constitution.

**COUNT V**  
**PROCEDURAL DUE PROCESS VIOLATION**

140. Plaintiff repeats, re-alleges, and incorporates by reference paragraphs 1 through 112 as stated herein.

141. Plaintiff has a property interest in its eligibility to apply for PA funding.

142. FEMA has denied Plaintiff this property interest based on unwritten rules that are not supported by the Stafford Act or existing regulations.

143. Under the Stafford Act, 42 U.S.C. § 5165c(a)(1), FEMA must “provide notice and opportunity for comment before adopting any new or modified policy that (A) governs implementation of the [PA Program]; and (B) could result in a significant reduction of assistance under the [PA Program].”

144. Under the Stafford Act, 42 U.S.C. § 5165c(a)(2), “[a]ny policy adopted under paragraph (1) shall apply only to a major disaster or emergency declared on or after the date on which the policy is adopted.”

145. Therefore, under 42 U.S.C. § 5165c, with respect to applicants seeking relief based on a particular major disaster or emergency, FEMA cannot rely on a policy that was not already published for public notice and comment before the declaration of the major disaster or emergency in question.

146. Additionally, under 5 U.S.C. §§ 552(a)(1)(B)-(E) and 553, federal agencies must publish for public notice and comment all of their substantive and procedural rules, policy statements, and amendments thereto.

147. Under 5 U.S.C. § 552(a)(1), “[e]xcept 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.”

148. FEMA never followed these necessary and non-discretionary requirements as set forth in the Stafford Act or Administrative Procedure Act, and Plaintiff was never given any notice or opportunity to comment on any rule or policy that mandates homeowners’ associations are no longer eligible to apply for PA funding unless the homeowners’ association owns or operates a utility or emergency facility.

149. FEMA never followed these necessary and non-discretionary requirements as set forth in the Stafford Act or Administrative Procedure Act, and Plaintiff was never given any notice or opportunity to comment on any rule or policy that mandates PNP facilities providing health and safety services of a governmental nature are no longer eligible to apply for PA funding unless the facility provides a “direct” benefit to the public.

150. FEMA never followed these necessary and non-discretionary requirements as set forth in the Stafford Act or Administrative Procedure Act, and Plaintiff was never given any notice or opportunity to comment on any rule or policy that flood control is not considered a “direct” benefit or a governmental service.

151. FEMA nonetheless established its unwritten rules and relied on those rules to refuse to confirm Plaintiff's eligibility to apply for funding under the PA Program.

152. FEMA's failure to follow these necessary procedures stripped Plaintiff of its eligibility to apply for funding under the PA Program in violation of Plaintiff's procedural due process rights and in violation of the Fifth Amendment to the U.S. Constitution.

**COUNT VI**  
**ADMINISTRATIVE PROCEDURES ACT**  
**(AGENCY ACTION UNLAWFULLY WITHELD)**

153. Plaintiff repeats, re-alleges, and incorporates by reference paragraphs 1 through 112 as stated herein.

154. Under 5 U.S.C. §706(1), a "reviewing court shall compel agency action unlawfully withheld or unreasonably delayed[.]"

155. Plaintiff and its Facility satisfy the relevant regulatory criteria for eligibility to apply for PA funding under 44 C.F.R. § 206.222(b), and FEMA had no discretion to determine otherwise.

156. FFEMA and its relevant personnel have failed to carry out their functions in an equitable and impartial manner as required by 42 U.S.C. § 5151(a) and 44 C.F.R. § 206.11(b). This duty is non-discretionary.

157. FEMA personnel have inequitably refused to confirm the eligibility of Plaintiff based on unwritten policies that find no support in the Stafford Act or relevant regulations.

158. These unwritten policies were followed despite FEMA's failure to satisfy the necessary public notice and comment procedures required by 42 U.S.C. § 5165c and 5 U.S.C. §§ 552(a)(1)(B)-(E) and 553.

159. FEMA's refusal to confirm Plaintiff's eligibility to apply for funding under the PA Program constitutes unlawfully withheld agency action.

**COUNT VII**  
**ADMINISTRATIVE PROCEDURES ACT**  
**(AGENCY ACTION CONTRARY TO CONSTITUTIONAL RIGHTS)**

160. Plaintiff repeats, re-alleges, and incorporates by reference paragraphs 1 through 112 as stated herein.

161. Under 5 U.S.C. § 706(2)(B), a "reviewing court shall hold unlawful and set aside agency action" that is "contrary to constitutional right, power, privilege, or immunity[.]"

162. As demonstrated above, FEMA has intentionally treated Plaintiff differently than other similarly situated, and there is no rational basis for this treatment.

163. FEMA has confirmed the eligibility of other PNPs that are similarly situated to Plaintiff, but has refused to do so for Plaintiff.

164. Plaintiff and its Facility satisfy all the relevant criteria to be eligible to apply for PA funding under the Stafford Act and relevant regulations.

165. FEMA has applied unwritten rules to Plaintiff which it has not applied to or enforced with respect to other similarly situated persons and which are not supported by relevant law or policy.

166. By rescinding and refusing to confirm Plaintiff's eligibility to apply for funding, FEMA has violated Plaintiff's substantive due process right to equal protection in violation of the Fifth Amendment to the U.S. Constitution.

167. Plaintiff also has a property interest in its eligibility to apply for PA funding.

168. FEMA has denied Plaintiff this property interest based on unwritten rules that are not supported by the Stafford Act or existing regulations, and did so without following the necessary public notice and comment procedures required by 42 U.S.C. § 5165c and 5 U.S.C. §§ 552(a)(1)(B)-(E) and 553.

169. FEMA's refusal to confirm Plaintiff's eligibility to apply for funding under the PA Program based on unwritten rules was contrary to Plaintiff's constitutional rights.

**COUNT VIII**  
**ADMINISTRATIVE PROCEDURES ACT**  
**(AGENCY ACTION IN EXCESS OF STATUTORY**  
**JURISDICTION AND AUTHORITY)**

170. Plaintiff repeats, re-alleges, and incorporates by reference paragraphs 1 through 112 as stated herein.

171. Under 5 U.S.C. § 706(2)(C), a "reviewing court shall hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]"

172. Plaintiff and its Facility satisfy the relevant regulatory criteria for eligibility to apply for PA funding under 44 C.F.R. § 206.222(b), and FEMA had no discretion to determine otherwise.

173. FEMA and its relevant personnel have failed to carry out their functions in an equitable and impartial manner as required by 42 U.S.C. § 5151(a) and 44 C.F.R. § 206.11(b). This duty is non-discretionary.

174. FEMA personnel have inequitably refused to confirm the eligibility of Plaintiff based on unwritten policies that find no support in the Stafford Act or relevant regulations, and which were never published for public notice and comment as required by 42 U.S.C. § 5165c and 5 U.S.C. §§ 552(a)(1)(B)-(E) and 553.

175. FEMA's refusal to confirm Plaintiff's eligibility to apply for funding under the PA Program based on unwritten rules was an agency action in excess of FEMA's statutory jurisdiction and authority.

**COUNT IX**  
**ADMINISTRATIVE PROCEDURES ACT**  
**(AGENCY ACTION WITHOUT OBSERVANCE**  
**OF PROCEDURE REQUIRED BY LAW)**

176. Plaintiff repeats, re-alleges, and incorporates by reference paragraphs 1 through 112 as stated herein.

177. Under 5 U.S.C. § 706(2)(D), a “reviewing court shall hold unlawful and set aside agency action” that is “without observance of procedure required by law[.]”

178. FEMA never followed the necessary and non-discretionary requirements set forth in 42 U.S.C. § 5165c and 5 U.S.C. §§ 552(a)(1)(B)-(E) and 553, and Plaintiff was never given any notice or opportunity to comment on any rule or policy that mandates homeowners' associations are no longer eligible to apply for PA funding unless the homeowners' association owns or operates a utility or emergency facility.

179. FEMA never followed the necessary and non-discretionary requirements set forth in 42 U.S.C. § 5165c and 5 U.S.C. §§ 552(a)(1)(B)-(E) and 553, and Plaintiff was never given any notice or opportunity to comment on any rule or policy that mandates PNP facilities providing health and safety services of a governmental nature are no longer eligible to apply for PA funding unless the facility provides a “direct” benefit to the public.

180. FEMA never followed the necessary and non-discretionary requirements set forth in 42 U.S.C. § 5165c and 5 U.S.C. §§ 552(a)(1)(B)-(E) and 553, and Plaintiff was never given any notice or opportunity to comment on any rule or policy that flood control is not considered a “direct” benefit or a governmental service.

181. FEMA nonetheless followed its unwritten rules in refusing to confirm Plaintiff’s eligibility to apply for funding under the PA Program, violating its non-discretionary duty to provide public notice and comment of any such rules or policies.

182. FEMA’s failure to follow these necessary procedures stripped Plaintiff of its eligibility to apply for funding under the PA Program and was agency action without observance of procedures required by law.

**PRAYER FOR INJUNCTIVE AND DECLARATORY RELIEF**

183. As set forth above, FEMA has caused and will cause Plaintiff to suffer irreparable harm and injury, in that it has refused to confirm Plaintiff’s eligibility to apply for funding under the PA Program and will in all likelihood continue to refuse to confirm such eligibility in the future, including its eligibility to apply for PA funding to repair damages more recently caused by Hurricane Irma.

184. Plaintiff has no other remedy at law to prevent the continuing wrong and irreparably injury caused by FEMA's acts and omissions.

185. An actual controversy exists between the parties in that Plaintiff contends FEMA has violated the Stafford Act, the federal regulations legally promulgated thereunder, the United States Constitution, and the Administrative Procedure Act and federal regulations legally promulgated thereunder. Unless there is a judicial declaration of Plaintiff's rights, FEMA's unlawful conduct will continue.

186. WHEREFORE, Plaintiff prays for the following relief:

a. A declaratory judgment that FEMA has violated its non-discretionary duties under the Stafford Act and relevant regulations by rescinding and refusing to confirm Plaintiff's eligibility under the PA Program based on unwritten rules;

b. A declaratory judgment that FEMA has violated Plaintiff's substantive due process right to equal protection by intentionally treating Plaintiff differently (*i.e.*, rescinding and refusing to confirm Plaintiff's eligibility under the PA Program) than other similarly situated entities without any rational basis;

c. A declaratory judgment that FEMA has violated Plaintiff's procedural due process rights by stripping Plaintiff of its eligibility under the PA Program without following the necessary notice and comment procedures set forth in the Stafford Act and Administrative Procedure Act;

d. A declaratory judgment that FEMA has violated the Administrative Procedure Act by unlawfully refusing to confirm Plaintiff's eligibility under the PA Program in reliance on unwritten rules that were never subject to proper public notice and comment;

- e. An order requiring FEMA to confirm and reinstate Plaintiff's eligibility under the PA Program;
  - f. An order that FEMA pay Plaintiff's litigation costs and attorney fees;
- and
- g. All other relief that the Court deems just and proper.

Respectfully Submitted,

Dated: July 24, 2018

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