UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FILED
U.S. DIST COURT
MIDDLE DIST. OF LA

2007 MAR 20 A 10: 18

STATE OF LOUISIANA

NO.: 06-821-JJB

VERSUS

CIVIL ACTION

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY, ET AL.

RULING ON MOTION TO DISMISS

The matter before the court is a motion to dismiss the complaint (doc. 14) filed by the defendant United States.[1] The plaintiff is the State of Louisiana, and it opposes the motion to dismiss (doc. 26).[2] No reply brief is filed. Oral argument is not necessary. The central issue in this case is whether Louisiana has a legal right to audit the records of FEMA pertaining to FEMA's disbursement of funds to the victims of hurricanes Katrina and Rita.

Relevant Factual Background

The court's recitation of facts is derived from the complaint, as is required on a motion to dismiss for failure to state a claim.

On Monday August 29, 2005, hurricane Katrina hit Louisiana as a category

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[1]Although defense counsel signed the motion as "Counsel for the United States," the court will hereinafter refer to the "United States" as the "Federal Emergency Management Agency," or "FEMA." As will become apparent throughout the ruling, the State of Louisiana challenges FEMA's refusal to permit an audit of its records pertaining to hurricanes Katrina and Rita.

[2]Louisiana first filed a motion for preliminary injunction, to which FEMA filed an opposition (doc. 13). FEMA also responded by filing the pending motion to dismiss (doc. 14). The motion for preliminary injunction has since been dismissed from the court's docket (doc. 21). All that remains pending is to decide the motion to dismiss. *See* doc. 29.

three hurricane. That same day, President George Bush declared a major disaster in Louisiana. On September 1, 2005, Louisiana Governor, Kathleen Blanco, and FEMA's regional director for Region VI, William Lokey, executed a "FEMA-STATE AGREEMENT" pursuant to the Stafford Act, codified as 42 U.S.C. §5121, *et seq*.

As disaster relief was being provided for the destruction caused by hurricane Katrina, another major hurricane, Rita, made landfall along the Louisiana-Texas border on September 23, 2005. Hurricane Rita also left massive damage to the lives and property of tens of thousands of Louisiana's citizens. One day later, President Bush declared another major disaster. Accordingly, on October 7 and October 11, 2005, Governor Blanco and FEMA's acting regional director, Gary Jones, respectively executed a "FEMA-STATE AGREEMENT" concerning the damages caused by hurricane Rita.

As part of both FEMA-STATE agreements, Louisiana opted to have FEMA administer the "Other Needs Assistance" ("ONA") program for the delivery of relief assistance under the Stafford Act. Under the Stafford Act, the President, in consultation with the governor of a state hit with a major disaster, may provide financial assistance to meet such disaster-related expenses including: medical, dental, funeral, personal property, transportation, and any other expenses or serious needs resulting from the major disaster. *See* 42 U.S.C. §5174(e). The FEMA-STATE agreements obliged FEMA to administer the ONA program in full. FEMA delivered assistance to victims of the hurricanes in Louisiana. Under the

Stafford Act, the federal-share of disaster-relief expenses is 75 percent, and the remaining 25 percent is to "be paid from funds made available by the State." Id. at §5174(g)(2).[3]

On November 15, 2005, Louisiana's legislative auditor, Steven Theriot, delivered a letter to the legislative liaison for the Department of Homeland Security, Robert Josephson. The purpose of the letter was to inquire when Louisiana would be billed for its cost-share and whether or not interest, penalties, and administrative fees would be assessed if payments could not be made by the due date. FEMA responded on December 29, 2005, by submitting two bills--one in the amount of $139,735,292.31 and the other in the amount of $15,979,352.06. FEMA also informed Louisiana that interest and penalties would be assessed if payment was not made by the due date.

On January 6, 2006, Mr. Theriot and Louisiana's attorney general, Charles Foti, wrote a letter to the Secretary of the United States Department of Homeland Security, Michael Chertoff. Louisiana requested that all bills that formed the basis of FEMA's demand, along with all interest and penalties, be waived pending a mutual agreement between Louisiana and FEMA. This was followed by Louisiana's request on February 7, 2006, that FEMA disclose all source documentation which supported and substantiated the coordination of disaster-relief assistance under the

[3]As of August 2006, FEMA's bill to Louisiana for ONA payments made was $383,126,752.36.

Stafford Act. Louisiana stated that it intended to audit FEMA's ONA records in order to ensure that it was not being required to pay back a percentage of any improper funds, such as duplicative benefits. *See id.* at §5155.[4]

FEMA initially refused to provide any source documentation to Louisiana. It asserted that Louisiana had no legal right to audit its ONA records. FEMA's position was, and is, that Louisiana is required to pay 25 percent of the total ONA program costs, regardless of whether any ONA awards were improperly made, or were made in violation of the Stafford Act. Louisiana persisted in attempting to obtain the source documentation. In July of 2006, FEMA relented somewhat and provided the Louisiana legislative auditor's office with access to certain ONA data. Not all ONA records were provided, however. Moreover, FEMA only made the ONA records available for examination during a four-week period.

The restrictions imposed by FEMA limited the scope of Louisiana's audit. Only 425 recipients of ONA awards were examined–out of a total of 289,916. Thus Louisiana only audited 0.15 percent of the awards, which amounted to approximately 0.13 percent of the total dollar amount awarded by FEMA. Louisiana reported that 18 applicants received ineligible awards, and 19 awards were unverifiable. From this small sample, the Louisiana auditor extrapolated that 5.8

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[4]It is now well-known that many of those receiving FEMA-funds as a result of hurricanes Katrina and Rita received "duplicative benefits" or defrauded FEMA, in violation of the Stafford Act. The on-going prosecutions of these individuals in federal courts throughout the region is a constant reminder that not all FEMA-payments were legitimate.

percent of all FEMA ONA awards appeared to be ineligible, and that 5.98 percent of FEMA-awards were unverifiable. On the basis of the audit, Louisiana refused to pay approximately $45 million of the total bill issued by FEMA.[5]

FEMA continues to maintain that Louisiana is obligated to pay 25 percent of the total amount it paid out in administering the ONA program to address the needs of Louisiana's citizens. FEMA's decision was memorialized in a letter by Margaret Young, FEMA's chief financial officer, to General Foti on August 22, 2006. FEMA's position was as follows:

> The State's cost share will be credited as any such payments are collected. However, this financial assistance having already been provided, the State's legal obligation to pay the non-Federal share is triggered by 42 U.S.C. §5174(g). FEMA does not intend to "penalize Louisiana" but FEMA did not obligate itself to cover 100 percent of payments made in error when agreeing to administer the program on the State's behalf, nor to pay 100 percent of all payments until such time as the State agrees to every payment made.
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> * * *
>
> For these reasons, FEMA finds no basis to further extend the due date [for payment]. Effective July 22, 2006, interest in the amount of $14,308.22 per day is accumulating on the outstanding bills for collection .... Further, if payment is not received by October 20, 2006, penalty in the amount of $55,723.11 per day will be added to the account balance retroactive to July 22, 2006.
>
> This decision does not constitute a notification with respect to the award or denial of assistance. Therefore, there is no right to appeal under 42 U.S.C. 5189a. I would further point out that we have been exchanging correspondence concerning this issue since January, 2006, and have offered the State ample time and

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[5]At the same time as the Louisiana-FEMA negotiations were taking place, the Louisiana legislature enacted La. Rev. Stat. 39:100.26. That statute mandates that payments pursuant to the Stafford Act shall only be made after either (1) "the legislative auditor has audited source documentation presented by [FEMA] and the legislative auditor has determined that the documentation supports the amount required to be paid;" or (2) "a court of competent jurisdiction has rendered a final non-appealable judgment or order that disbursements be made." La. Rev. Stat. 39:100.26.

opportunity to assert its position. We, therefore, must expect prompt remittance of your payment.

Louisiana refused to make payment as demanded by FEMA. Instead, the state filed the instant suit and deposited the disputed amount into the court's registry. Louisiana brings a three-count complaint. It claims in count-one that it has a legal right to audit FEMA's records pertaining to the ONA program under the Stafford Act. Louisiana avers that FEMA violated the Stafford Act by refusing to disclose its records. In count-two, it avers that a right to audit FEMA's records exists pursuant to 44 C.F.R. §206.16. Finally, it claims in count-three that FEMA is in violation of the Debt Collection Act of 1982 and/or the Debt Collection Improvement Act of 1996, 31 U.S.C. §3701, *et seq*.

FEMA maintains that no right to audit its records exists under the Stafford Act or 44 C.F.R. §206.16. FEMA argues that count-three is not ripe, and therefore, like counts one and two, must be dismissed.

Subject Matter Jurisdiction

FEMA has brought its motion to dismiss pursuant to FED. R. CIV. PRO. 12(b)(1) and 12(b)(6). A court must always address a motion to dismiss for want of jurisdiction before other challenges because without jurisdiction, the court has no power to entertain the case. *See* Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994). Subject matter jurisdiction is so vital that the court may raise the issue *sua sponte*. FED. R. CIV. PRO. 12(h); *see* MCG, Inc. v. Great W. Energy

Corp., 896 F.2d 170, 173 (5th Cir. 1990).

42 U.S.C. §5148 provides,

> The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter.

42 U.S.C. §5148.

FEMA is entitled to sovereign immunity only for its "failure to exercise or perform a *discretionary* function or duty." 42 U.S.C. §5148 (emphasis added); *see* Diversified Carting, Inc. v. City of New York, 423 F. Supp. 2d 85, 90 (S.D.N.Y. 2005). The Supreme Court has stated that "[w]hen a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply." Berkovitz v. United States, 486 U.S. 531, 544 (1988). In Berkovitz, the Supreme Court examined the discretionary function exception in relation to the duties of a federal agency and its employees in the context of the Federal Tort Claims Act. The court ruled that a two-prong analysis is required to determine whether the discretionary function exception applies. Id. at 536. First, the court asks whether the act involves an element of judgment or choice. Id. If yes, then the court goes on to ask whether that judgment is of the kind that the discretionary function exception was designed to shield. Id.

While the Fifth Circuit has not ruled on whether the Berkovitz analysis applies to the Stafford Act, courts have generally extended the analysis accordingly. *See*

McWaters v. FEMA, 408 F. Supp. 2d 221 (E.D. La. 2005); Dureiko v. United States, 209 F.3d 1345 (Fed. Cir. 2000); United Power Ass'n v. FEMA, 2000 WL 33339635 *1, *2 (D.N.D. Sept. 13, 2000); Graham v. FEMA, 149 F.3d 997 (9th Cir. 1998); Torres v. Gov't of the United States, 979 F. Supp. 1054 (D.V.I. 1997); Lockett v. FEMA, 836 F. Supp. 847 (S.D. Fla. 1993); Rosas v. Brock, 826 F.2d 1004 (11th Cir. 1987).

In the case *sub judice*, Louisiana charges that the Stafford Act requires FEMA to provide it with source documentation so that Louisiana can conduct an audit. Whether the Stafford Act actually mandates that FEMA must disclose source documentation relating to the ONA program is of no moment for purposes of determining whether the discretionary function exception applies. Either the statute requires it, or the statute does not–and that analysis is on the merits, not to determine subject matter jurisdiction.

Under the first prong of the Berkovtiz analysis, there is no element of choice. If the statute does not require handing over source documentation, there is no cause of action against FEMA. If the statute does require handing over source documentation, then there is no issue of discretion, and FEMA is not entitled to sovereign immunity. Accordingly, the court holds that subject matter jurisdiction exists. It is now permissible to address the merits of FEMA's 12(b)(6) motion to dismiss.

Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief May be Granted

A. Standard of Review

FEMA has filed a motion to dismiss for failure to state a cause of action. A motion to dismiss for failure to state a claim is viewed with disfavor and very rarely is granted. *Kaiser Alumni & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). The court should not grant a motion to dismiss for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his or her claim. *See* *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994). The court accepts all well-pleaded facts in the complaint as true and views them in a light most favorable to the plaintiff. *O'Quinn v. Manuel*, 773 F.2d 605, 608 (5th Cir. 1985). However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995).

In addition, courts should generally permit a plaintiff to amend its complaint, and hence avoid dismissal, when a cause of action exists, but is not alleged. *Dussouy v. Gulf Coast Inv. Corp*, 660 F.2d 594, 597-99 (5th Cir. 1981); *Schaeffer v. Ascension College, Inc.*, 964 F. Supp. 1067, 1073 (M.D. La. 1997); *Taylor v. Dallas County Hosp. Dist.*, 976 F. Supp. 437, 438 (N.D. Tex. 1996); *Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985).

B. Merits of Motion to Dismiss

1. Louisiana's Claim under the Stafford Act

As mentioned *supra*, Louisiana claims that the Stafford Act provides it with a right to audit FEMA's administration of the ONA program. The court has located no cases dealing with this issue, and thus this is a case of first impression. Louisiana claims that FEMA is bound under the Stafford Act to disclose its source documentation. FEMA, on the other hand, argues that the Stafford Act does not require it to provide Louisiana with source documentation. FEMA's position is that under the Stafford Act, Louisiana is obligated to pay 25 percent of the cost of the ONA program regardless of whether any awards were ineligible. FEMA contends that any ineligible awards that it recovers will be credited to Louisiana.

The issue is narrow: "Does a state in which a major disaster is declared have a legal right under the Stafford Act to audit FEMA's records pertaining to FEMA's administration of an ONA program under 42 U.S.C. §5174(e)?"

Although the discretionary function exception to the Stafford Act, 42 U.S.C. §5148, does not provide sovereign immunity to FEMA, Louisiana cannot assert a cause of action against FEMA for failure to disclose source documentation. Nothing in the Stafford Act provides for such a private right of action. *See e.g.*, Sierra Club v. United States Army Corps. of Eng'rs, 446 F.3d 808, 813 (8th Cir. 2006). The court must refrain from finding that the Stafford Act permits a private right of action in the case at bar because doing so would amount to judicial legislation. *See* Bourelsan

v. Aramco, 857 F.2d 1014, 1020-21 (5th Cir. 1988). If Congress intended to provide a private right of action based on FEMA's failure to turn over source documentation, it would have wrote that provision in the act. *See* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1982) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

Unless there is a strong indicia of congressional intent to the contrary, the Supreme Court is generally hesitant to read into statutes a right of action that is not explicit. *See e.g.*, *id.*; Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); California v. Sierra Club, 451 U.S. 287 (1981); Univ. Research Ass'n v. Coutu, 450 U.S. 754 (1981); Transamerica Mortgage Advisors, Inc.v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); *cf.* Merrill Lynch v. Curran, 456 U.S. 353 (1982) (finding an implied right of action but stating that such rights are found in limited circumstances, and "[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights."). Moreover, Louisiana has not pointed to any provision of the Stafford Act, or to any cases, that leads this court to believe that Congress intended for a private right of action against FEMA's refusal to disclose its ONA records. The court is constrained to hold that no cause of action against FEMA lies under the Stafford Act.

The court will not dismiss Louisiana's first claim, however, because it may still

state a cause of action under the familiar Chevron two-step analysis and/or the Administrative Procedures Act ("APA").[6] FEMA analyzes Louisiana's claim under Chevron and the APA in its memorandum, and thus the court will take the time to determine whether Louisiana can state a valid claim under those sources of law.[7]

In reviewing an agency action under the Chevron two-step analysis, the court first starts by asking if Congress directly spoke to the precise question at issue. Am. Airlines, Inc. v. Dep't. of Transp., 202 F.3d 788, 796 (5th Cir. 2000). In this case, the Stafford Act is silent on the issue of Louisiana's right to audit FEMA and as to requiring FEMA to disclose ONA records. Thus, the court must determine whether FEMA's action was based on a permissible construction of the Stafford Act. Alenco Communications, Inc. v. F.C.C., 201 F.3d 608, 619 (5th Cir. 2000).

FEMA maintains that in determining whether its decision was based on a "permissible construction" of the statute, the court should accord it full Chevron deference. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 1984). Chevron deference is a highly deferential standard such that the agency

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[6]Review of an agency action under the APA is slightly different than review under the Chevron two-step analysis. A court may reverse an agency action under the Chevron analysis when Congress' intent is silent and the agency's interpretation of the statute is not based on a "permissible construction." Tex. Coalition of Cities for Util. Issues v. F.C.C., 324 F.3d 802, 806-07 (5th Cir. 2003). The APA "empowers courts to reverse agency action that is arbitrary and capricious." Alenco Communications, Inc. v. F.C.C., 201 F.3d 608, 619 (5th Cir. 2000). Thus, "*Chevron* step-two focuses on the agency's interpretation of its statutory power, while APA arbitrary-and-capricious review focuses on the reasonableness of the agency's decision-making process pursuant to that interpretation." Id.

[7]FEMA recognizes that the APA and Chevron are sources of law through which FEMA may bring a cause of action.

action should be reversed only if it was arbitrary, capricious or manifestly contrary to the statute. Sierra Club v. U.S.A. E.P.A., 314 F.3d 735, 740-41 (5th Cir. 2002). However, at this stage in the litigation, the court disagrees that full Chevron deference should be afforded to FEMA's interpretation of the Stafford Act.

In United States v. Mead, 533 U.S. 218 (2001), the Supreme Court ruled that Chevron deference is required if Congress' intent is not clear from the text of the statute, and if "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." Mead, 533 U.S. at 226-27. First, the court notes that Congress' intent on the issue of whether Louisiana has a right to audit FEMA is not clear from the plain text of the statute. A statute's silence indicates an ambiguity. Bolen v. Dengel, 340 F.3d 300, 308 (5th Cir. 2003); Barnhart v. Walton, 535 U.S. 212, 218 (2002) (stating that silence on an issue in a statute normally creates an ambiguity instead of resolving it). However, there is nothing in the record at this point showing that FEMA's interpretation–that Louisiana has no right to review its ONA records–was promulgated through the exercise of Congress' delegated authority to make a rule carrying the force of law. In Henrikson v. Guzik, 249 F.3d 395, 398 (5th Cir. 2001), the Fifth Circuit stated,

> The Supreme Court and this Court have made clear that interpretations of statutes not arrived at by "formal adjudication or notice-and-comment rulemaking", e.g. opinion letters, "policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law–do not warrant *Chevron* style deference." These interpretations are entitled to respect, but only to the extent that

they have the "power to persuade."

Henrikson, 249 F.3d at 398 (citations omitted).

In the case at bar, there is no evidence at this time that FEMA's interpretation was derived through notice-and-comment rulemaking or a formal adjudication. The complaint alleges that FEMA's decision to withhold ONA records was made in a letter from Ms. Young to General Foti. The interpretation does not carry that force of law that the Chevron deference analysis contemplates. Therefore the court must review FEMA's action under what is known as Skidmore deference. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Under Skidmore, FEMA's interpretation of the Stafford Act is entitled not to deference but to a lesser "respect" based on the persuasiveness of its decision. Christensen v. Harris County, 529 U.S. 576, 587 (2000); Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 296 (5th Cir. 2000).

The court will now address whether FEMA's action in withholding ONA records was based on "persuasive" interpretation of the Stafford Act.

The first step in statutory interpretation is to start with the language of the statute. Henrikson, 249 F.3d at 398; First Am. Bank v. Resolution Trust Co., 30 F.3d 644, 647 (5th Cir. 1994). "The meaning of a particular word or phrase 'cannot be determined in isolation, but must be drawn from the context in which it is used.'" Henrikson, 249 F.3d at 398. The court must look to the structure and language of the statute as a whole. Id. Moreover, every word in a statute should generally be given some operative effect. Id. The court should also consider the objects and

policy of the law when interpreting a statute. Kokoszka v. Belford, 417 U.S. 642, 650 (1974).

The court begins its interpretation by examining the provision in the Stafford Act dealing with cost-sharing of the ONA program. 42 U.S.C. §5174(g) provides,

> **(g) Cost Sharing**
>
> **(1) Federal share**
>
> Except as provided in paragraph (2), the Federal share of the costs eligible to be paid using assistance provided under this section shall be 100 percent.
>
> **(2) Financial assistance to address other needs**
>
> In the case of financial assistance provided under paragraph (e) [Other Needs Assistance]–
>
> **(A)** the Federal share shall be 75 percent; and
>
> **(B)** the non-Federal share shall be paid from funds made available by the State.

Paragraph (2) above refers to the cost-sharing dichotomy relevant to the case at bar. Louisiana argues that paragraph (2), like paragraph (1), applies only to "eligible" costs. According to Louisiana, in order to determine which costs are "eligible," Louisiana must conduct an audit of FEMA's ONA records. FEMA counters by arguing that paragraph (2) unambiguously refers to "total" costs. According to FEMA, paragraph (2) requires Louisiana to pay 25 percent of all ONA program costs regardless of whether some costs may, in retrospect, be determined to be "ineligible."

FEMA is correct in pointing out that while paragraph (1) uses the words "costs eligible," similar language is absent from paragraph (2). However, §5174(g)(1) is also qualified with the language, "Except as provided in paragraph (2) ...." The clear

meaning of this qualification in paragraph (1) is that the language following the qualifying language "Except as provided in paragraph (2) ...." is *always true except as described in paragraph (2)*.

Accordingly, "the federal share of costs eligible to be paid using assistance ... shall be 100 percent," except "[i]n the case of financial assistance provided under" the ONA program. Under the ONA program, paragraph (2) provides the proper cost-sharing dichotomy to be used. Paragraph (2) mandates that the federal share is 75 percent and the state share is 25 percent. Thus, there are only two differences between paragraph (1) and paragraph (2). First, paragraph (2) only applies to the ONA program, and paragraph (1) does not apply to the ONA program. Secondly, paragraph (2) breaks up costs as 75/25 instead of 100 percent federal as in paragraph (1). In all other respects, paragraph (1) and paragraph (2) are equal. This means that the "costs" that paragraph (2) refers to are the same "costs" paragraph (1) refers to, namely "eligible costs to be paid." The court finds that a plain reading of the text of §5174(g)(2) shows that Congress intended the state-share under the ONA program to be 25 percent of "eligible costs."

More evidence of Congress' intent to limit §5174(g)(2) to eligible costs is found by examining other sections of the Stafford Act. Some cost-share provisions in the Stafford Act address "total" costs, while other provisions address "eligible costs." *See* §5133(h) (predisaster mitigation cost-share in terms of total costs); §5170(b) (essential assistance in terms of eligible costs); §5170(c)(4) (utilization of

Department of Defense resources in terms of total costs); §5174(b) (associated expenses in terms of eligible costs); §5173(d) (debris removal in terms of eligible costs); §5193(a) (emergency assistance in terms of eligible costs). After examining the Stafford Act as a whole, it is evident that Congress intended to distinguish between total costs and eligible costs.

FEMA posits that during any major disaster, not all costs of administering a relief program, such as the ONA program, will be "eligible costs." It will always be the case that duplicative payments will be made and ineligible recipients will take advantage of the crisis and defraud the government. If ineligible costs are always present, the argument goes, then FEMA would be paying more than 75 percent of the total costs of administering the ONA program (75 percent of eligible costs plus any additional ineligible costs).

The concern over payment of ineligible costs, however, deals with recoupment of ineligible awards, not with cost-sharing under §5174(g).[8] This is because §5174(g) only deals with *eligible costs*. Ineligible costs are taken out of the equation.

Congress intended the burden of recouping ineligible awards to rest upon the federal government's shoulders. When ineligible awards are made, it is the federal government, and not the states, that has the power to recover its costs. §5155 prohibits the President from awarding duplicative benefits. If duplicative benefits are awarded, the federal government has the power to recover those benefits. §5155(c).

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[8]Recouping ineligible awards is dealt with by 42 U.S.C. §§5155-5157.

Any person that knowingly misuses recovery benefits or defrauds FEMA may be prosecuted with civil penalties imposed. §5157. Thus the structure of the Stafford Act strongly suggests that when a cost-share provision is based on "eligible costs," the ineligible costs–which will always be present–are paid by the federal government. Then the federal government uses its power, which the states do not enjoy, to recoup improper awards. If Congress intended the states to shoulder some of the responsibility for ineligible costs, it would have granted them some power to recoup those costs. Accordingly, the court rules that the federal government must accept all "ineligible costs" of an ONA program, pursuant to §5174(g)(2).

If the state is only required to pay 25 percent of the "eligible costs" of an ONA program, as the court has ruled, the question is raised, "how can the state be assured that it is in fact only paying 25 percent?" The court notes that §5174(g)(2)'s cost-sharing provisions are strict. The federal share *shall* be 75 percent and the non-federal share *shall* be paid from state funds. Accordingly, the state share must be 25 percent, no more, no less. The federal share must be 75 percent, no more, no less.

FEMA's argument is that the states do not have a right to verify that only 25 percent of eligible costs are being paid. FEMA posits that it is the sole arbiter of how much the state must pay. According to FEMA, the state must pay 25 percent of the total costs of administering the ONA program, and then FEMA will recoup all ineligible awards to the best of its ability. As ineligible awards are recovered, FEMA

will credit the state with 25 percent of the ineligible costs.

The court, however, thinks it is unreasonable to construct the Stafford Act in such a manner. Doing so vests too much power in the executive branch. Congress has placed a check on the executive by mandating that states must pay *only* for eligible costs of an ONA program. §5174(g)(2). If FEMA's argument is accepted, the check on the executive branch is eviscerated. The executive would have *carte blanche* to control the amount the states pay through its discretion to pursue ineligible awards, and through its blanket power to determine which awards were in fact eligible and which were ineligible. One concern is that such open-ended power could be abused by improper political motives. There is the possibility that if FEMA's determinations go unchecked, it could deflate the number of ineligible awards to show to the people that it is a much more efficient agency than may be the case in reality. The possibility of deception to advance political gains, although not necessarily present in this case, is a consideration the court must take into account. The court is justified in doing so because "common sense" always serves as a guide for statutory interpretation. Buckley v. Valeo, 424 U.S. 1, 77.[9]

Moreover, §5174(f)(2) provides,

In providing assistance to individuals and households under this section, the President shall provide for the substantial and ongoing involvement of the States in which the individuals and households are located, including by providing to the

[9]If FEMA's argument is accepted, Louisiana will be subjected to payment for a debt with no questions asked. The court does not think vesting this much power in a creditor is either required by the law, or wise.

States access to the electronic records of individuals and households receiving assistance under this section in order for the States to make available any additional State and local assistance to the individuals and households.

While this section does not explicitly grant a state the right to audit FEMA's records, it shows that Congress intended the states to have an active role in verifying the assistance FEMA provides to eligible recipients.

In addition, an audit of FEMA does not run against the grain of sound public policy, as FEMA contends. FEMA argues that finding an implied right to audit its records will "paralyze the provision of crucial emergency aid in the aftermath of a disaster." FEMA posits that if states are not required to pay back any ineligible costs of an ONA program, then it will have to exhaust already-scarce resources to make sure that every award granted is "eligible." FEMA's position is that during a major disaster, it is limited in the amount of background investigation it can conduct before administering aid. The Ninth Circuit is one circuit that has recognized FEMA's limitations:

> FEMA, as with any other agency of government, is confronted with finite financial resources. Yet, when natural disasters occur, FEMA's policy says appropriately that "eligible assistance be delivered as expeditiously as possible consistent with Federal laws and regulations." 44 C.F.R. §206.200(b)[]. In following this policy, FEMA is necessarily limited in the amount of investigation it may undertake before making an initial determination of aid eligibility.

Pub. Util. Dist. Number 1 v. FEMA, 371 F.3d 701, 707 (9th Cir. 2004).

There is no doubt that FEMA has limited resources in investigating potential recipients of aid. Moreover, the problem of limited resources is magnified because

FEMA administers aid at the time of natural disasters. Nonetheless, the court does not think that relief efforts will be hampered if a state is permitted to audit FEMA's records. A decision to conduct an audit will usually only be made after FEMA tenders a bill to the state. This will usually be *after the exigencies of providing relief have subsided.*

FEMA is still required to deliver eligible assistance as expeditiously as possible. 44 C.F.R. §206.200(b). Once payments have been made, and the urgency of administering relief has passed, FEMA can pursue recovery of improper awards. §§5155-5157. Moreover, the court thinks that a carefully drafted FEMA-STATE agreement could account for when the state would be permitted to audit FEMA's records. This would ensure that FEMA fulfills its obligations in providing relief, and at the same time ensure that the state is only required to pay its share of eligible costs.

In the case at bar, Louisiana does not intend to avoid Congress' mandate that it pay 25 percent of eligible costs of the ONA program. However, Louisiana takes issue with FEMA's position that it owes payment for ineligible costs. The court finds that as a matter of law, Louisiana does not owe on "ineligible" costs under §5174(g)(2). Only by an audit can all parties be assured that Louisiana is only paying 25 percent of the eligible costs. Accordingly, the court holds that after reviewing the relevant provision–§5174(g), the Stafford Act as a whole, and considering public policy, (as well as considering *Skidmore* deference), FEMA's

decision to withhold ONA records is not based on a "persuasive" interpretation of the Stafford Act.

Another cause of action may be stated under the APA. The APA permits a federal court to set aside a final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. §706(a)(2).

Initially, the court must determine (1) whether a final agency action has taken place, and (2) whether there is no other adequate remedy in a court, because only then does the court have jurisdiction to review an agency action. 5 U.S.C. §704; *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 882 (1990). The second element is satisfied, as this court has already ruled that FEMA's decision to withhold its ONA records is not reviewable under the Stafford Act. As for the first element, three conditions must be satisfied in order for an agency action to be considered final. First, the action must mark the consummation of the agency's decision making process. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). This means that its decision "must not be of a merely tentative or interlocutory nature." *Id*. at 178. Secondly, the agency action "must be one by which 'rights or obligations have been determined' or from which 'legal consequences will follow.'" *Id*. (*quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Thirdly, the final agency action must be an identifiable decision or event. *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000).

It is undisputed that FEMA's decision to withhold its ONA records from Louisiana constituted a final agency action. FEMA's decision was more than tentative or interlocutory in nature. Ms. Young's letter to General Foti declared that Louisiana had no right to audit FEMA, and that if payment was not remitted by the due date, severe interest and penalties would accumulate. Thus, FEMA's decision purported to determine Louisiana's rights and obligations. Legal consequences certainly flowed from FEMA's action. Thus, Louisiana could state a cause of action pursuant to the APA if it states sufficient facts showing that FEMA's decision-making process, pursuant to its interpretation that the Stafford Act did not require it to disclose source documentation, was unreasonable. *Alenco Communications*, 201 F.3d at 619.

At this time, on a motion to dismiss, it suffices to say that FEMA has not proved beyond a doubt that Louisiana has failed to state a cause of action under *Chevron* and/or the APA. *See Conley*, 355 U.S. at 45-46. Louisiana, however, has not alleged a violation of either sources of law. The court therefore will permit it to amend its complaint so that a cause of action may be stated.

2. Louisiana's Claim Under 44 C.F.R. §206.16

Louisiana's second cause of action is that FEMA's refusal to disclose source documentation pertaining to the ONA program violates 44 C.F.R. §206.16. Like its claim under the Stafford Act, this claim cannot be brought directly under 44 C.F.R.

§206.16. Unlike its first cause of action, however, Louisiana fails to state a claim under the APA.

44 C.F.R. §206.16 is an interpretative rule that acts with the force of law. Accordingly, full Chevron deference is required. The court finds that FEMA's interpretation that 44 C.F.R. §206.16 does not provide Louisiana with a right to audit its records is based on a permissible construction of the provision.

In 1988, Congress amended the Stafford Act to include a new provision, §318, requiring the federal government to conduct audits of the uses of federal disaster relief, and empowering the federal government to do so. *See* PUB. L. 100-707, 100 STAT. 4689 (1988); 42 U.S.C. §5161. With this amendment, "the President shall conduct audits and investigations as necessary to assure compliance with" the Stafford Act, and he or she is authorized to "question such persons as may be necessary to carry out such audits and investigations." For purposes of these audits, the President and Comptroller General are authorized to "inspect books, documents, papers, and records of any person relating to any activity undertaken or funded" under the Stafford Act. 42 U.S.C. §5161(b). Finally, §318 authorizes the President to "require audits by State and local governments in connection with assistance under [the Stafford Act] when necessary to assure compliance with [the Stafford Act] or related regulations." *Id.* at §5161(c).

In 1989, FEMA promulgated 44 C.F.R. §206.16. This regulatory provision implemented the new amendments pertaining to the President's right to conduct

audits. §5161. *See* 54 Fed. Reg. 22162 (May 22, 1989) ("Section 206.16, Audits and Investigations, has been included to reflect the new authority given in section 318 of the [Stafford] Act."). 44 C.F.R. §206.16 provides,

> (a) ... the Associate Director or Regional Director shall conduct audits and investigations as necessary to assure compliance with the Stafford Act, and in connection therewith may question such persons as may be necessary to carry out such audits and investigations.
>
> (b) For purposes of audits and investigations under this section, FEMA or State auditors, the Governor's Authorized Representative, the Regional Director, the Associate Director, and the Comptroller General of the United States, or their duly authorized representatives, may inspect any books, documents, papers, and records of any person relating to any activity undertaken or funded under the Stafford Act.

This regulation implements §318 of the Stafford Act by delegating from the President to the Associate or Regional Director the requirement to conduct audits and investigations. 54 Fed. Reg. 22162. The authorization for state officials to conduct audits found in 44 C.F.R. §206.16(b) does not provide for an independent right to audit FEMA. Authorization for states to conduct an audit is appropriate, however, because "[t]he President may require audits by State and local governments ... to assure compliance with" the Stafford Act. 42 U.S.C. §5161(c). Thus 44 C.F.R. §206.16 does not provide states with a right to audit FEMA.

The court holds that Louisiana's second count is dismissed because it fails to state a claim upon which relief may be granted.

3. Louisiana's Claim Under the Debt Collection Act

Louisiana's third claim is that FEMA has violated, or will violate, the Debt Collection Act, 31 U.S.C. §3701, *et seq.*, by not following the procedures before

pursuing "administrative offsets." FEMA maintains that this claim is not ripe for adjudication because no administrative offset has been undertaken.

The Debt Collection Act governs the procedures for collection of debts purportedly owed to the federal government. 31 U.S.C. §3176(a) provides, in pertinent part, "[a]fter trying to collect a claim from a person under section 3711(a) of this title, the head of an executive, judicial, or legislative agency may collect the claim by administrative offset." An "administrative offset" consists of the "withholding [of] funds payable by the United States (including funds payable by the United States on behalf of a State government) to, or held by the United States for, a person to satisfy a claim." 31 U.S.C. §3701(a)(1). Once the federal government pursues administrative offsets to collect on a debt, it must provide the debtor with "an opportunity to inspect and copy the records of the agency related to the claim[.]" *Id.* at §3716(a)(2).

Louisiana asserts that this claim is ripe because FEMA has threatened to use administrative offsets with regards to its debt. Louisiana posits that although administrative offsets have not been undertaken, the threat of administrative offsets is sufficient to present a "real and immediate" threat of injury.

A dispute is ripe only where an "actual controversy" exists. *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). "Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United Transp. Union v. Foster*, 205 F.3d 851, 857

(5th Cir. 2000). In New Orleans Pub. Serv., Inc. v. Council of New Orleans, 833 F.2d 583, the Fifth Circuit set forth the prevailing standards for determining whether a dispute was ripe for adjudication. The court stated,

> A court should dismiss a case for lack of "ripeness" when the case is abstract or hypothetical. The key considerations are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.

New Orleans Pub. Serv., 833 F.2d at 586-87 (citations omitted).

Louisiana relies on Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298 (1979). In that case, the Supreme Court stated that "'[o]ne does not have to wait for the consummation of a threatened injury to obtain preventive relief.'" Babbitt, 442 U.S. at 298 (*quoting* Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)). However, the court also went on to state that preventive relief should be provided "'[i]f the injury is certainly impending ....'" Id.

In the case at bar, the court concludes that Louisiana's third claim is not ripe for review. The threat of administrative offsets is not "certainly impending." Id. At a status conference with the magistrate judge, FEMA told the court that it had made no decision as to whether it would pursue administrative offsets. (Doc. 29). FEMA also told the court that it would notify Louisiana before it undertakes administrative offsets. Further factual development is necessary (*i.e.*, FEMA's decision to pursue administrative offsets).

The court also notes that a motion for preliminary injunction against FEMA's use of administrative offsets has been filed in this case. FEMA informed this court that it was not pursuing administrative offsets, and thus the court postponed a hearing on the motion for injunctive relief to an indefinite date. (Doc. 22).

The court therefore dismisses Louisiana's third claim, without prejudice, because ripeness is a jurisdictional prerequisite. *See* *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000). Should FEMA notify Louisiana that administrative offsets will be pursued, Louisiana should immediately notify the court and the court will entertain the possibility of a temporary restraining order. Moreover, the court will consider holding a hearing on Louisiana's motion for preliminary injunction at that time. Until such future events occur, however, Louisiana's third count is dismissed for want of ripeness.

Conclusion

It is hereby ordered that FEMA's motion to dismiss (doc. 26) is hereby GRANTED IN PART AND DENIED IN PART. Louisiana's claim under 44 C.F.R. §206.16 is hereby dismissed for failure to state claim upon which relief may be granted. Louisiana's claim under the Debt Collections Act is hereby dismissed, without prejudice, for want of ripeness. Louisiana's claim under the Stafford Act is dismissed because no private right of action exists. Louisiana is ordered to file an amended complaint stating a cause of action under the *Chevron* two-step analysis and/or the APA, not inconsistent with this ruling, within 14 days from the date of this ruling. FEMA will be permitted to file a motion to dismiss if Louisiana still has not stated a cause of action; otherwise FEMA is ordered to file its answer within 20 days after the filing of the amended complaint.

It is so ORDERED.

Baton Rouge, Louisiana, March 19th, 2007.

JAMES J. BRADY, DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA