

1-1-2014

# Weathering NEPA Review: Superstorms and Super Slow Urban Recovery

John Travis Marshall

*Georgia State University College of Law*, [jmarshall32@gsu.edu](mailto:jmarshall32@gsu.edu)

Follow this and additional works at: [https://readingroom.law.gsu.edu/faculty\\_pub](https://readingroom.law.gsu.edu/faculty_pub)

 Part of the [Administrative Law Commons](#), [Environmental Law Commons](#), and the [Land Use Law Commons](#)

---

## Recommended Citation

John Travis Marshall, *Weathering NEPA Review: Superstorms and Super Slow Urban Recovery*, 41 *Ecology L.Q.* 81 (2014).

This Article is brought to you for free and open access by the Faculty Publications at Reading Room. It has been accepted for inclusion in Faculty Publications By Year by an authorized administrator of Reading Room. For more information, please contact [mbutler@gsu.edu](mailto:mbutler@gsu.edu).

# Weathering NEPA Review: Superstorms and Super Slow Urban Recovery

*John Travis Marshall \**

*Delays in implementing long-term neighborhood housing recovery measures following urban disasters profoundly disrupt a city's revitalization and resurgence. Following recent large-scale urban disasters, some blame the National Environmental Policy Act environmental and historical review requirement for greatly slowing the long-term recovery process. They claim that the National Environmental Policy Act review is ill suited for the exigencies of disasters. Finding effective ways to advance urban disaster recovery as quickly as possible, while not compromising key environmental quality objectives, is a central challenge to implementing effective post-disaster recovery plans. This Article addresses how best to balance necessary regulation with critical disaster recovery objectives. Drawing on long-term recovery lessons from Hurricanes Katrina and Rita, and most recently, Hurricane Sandy, this Article articulates five principles that the federal government should incorporate in a new Unified Federal Review process.*

Introduction.....	82
I. NEPA: A Major Feature in the Long-Term Recovery Landscape .....	88

---

Copyright © 2014 Regents of the University of California.

\* Assistant Professor of Law, Georgia State University College of Law; J.D., 1997, University of Florida College of Law; M.A., 1994, University of Texas at Austin; B.A., 1990, University of Notre Dame. The author thanks his former colleagues at Yale Law School: Megan Barnett, Gene Fidell, Robin Golden, Steve Hudspeth, Doug Kysar, Annie Lai, Jeff Meyer, Noah Messing, Jean Koh Peters, J.L. Pottenger, Jr., Andrew Verstein, and Michael Wishnie for their encouragement, thoughtful comments, and suggestions. The members of the Natural Hazards Workshop at the University of Colorado, Boulder provided valuable feedback, as did John Costonis and the members of Clinical Law Review's Writers' Workshop, including Richard Boswell, Stacy Kaplow, Rachel Lopez, Juan Pablo Perez-Leon, and Jennifer Rosen Valverde. The author also thanks Krista Lois Colson, Victor J. Franckiewicz, Jr., Esq., Krista Nielson, Carey Shea, Shirley Smith, and Mike Woodbury for providing excellent insights concerning post-Katrina and Rita implementation of the environmental review requirement. This work could not have been completed without the generous support of Dean Steve Kaminshine, Julian Juergensmeyer, and Ryan Rowberry, Georgia State University College of Law. The author served as project manager and counsel with the New Orleans Redevelopment Authority from 2007 to 2011. The views expressed in this Article are, of course, the author's own.

- II. Understanding Impediments to Long-Term Recovery: Why NEPA Compliance, as Interpreted Post-Katrina, Proved a Significant Obstacle to Quicker and More Effective Neighborhood Recovery ..... 93
  - A. NEPA Non-Compliance Has High Stakes ..... 94
  - B. NEPA Compliance Requirements Contributed to Constricting Program Design Choices for Post-Disaster Housing Recovery ..... 96
  - C. Efficient Implementation of Required Lot-by-Lot Environmental Reviews Demanded Resources and Advance Planning Often Absent in the Post-Disaster Context ..... 98
  - D. Problems with Efficient Implementation of the NEPA-Required Lot-by-Lot Environmental Review Undermined the Long-Term Recovery’s Progress ..... 101
    - 1. Delayed Neighborhood Recovery:..... 101
    - 2. Slowed Capital Infusion..... 103
    - 3. Cost..... 107
- III. The Evolution of HUD’s NEPA Regulation: A Historical Backdrop to Post-Disaster Implementation Problems ..... 108
- IV. Climate Change and the Challenge of Regulatory Reform: Five Principles for Unified Environmental Review and Long-Term Recovery Projects..... 113
  - A. Appreciate the Disaster’s Scope and Appraise Innovative Approaches to Regulatory Compliance: Enlarge the Environmental Review’s Geographic Scope ..... 115
  - B. Allow As Little Delay As Possible: Using Available Technology and Mapping Resources to Prepare Earlier and More Efficient EAs ..... 118
  - C. Accommodate Use of Flexible Redevelopment Tools: Tax Sale Lien Purchases Exempt from Environmental Review ..... 121
  - D. Assign High-Level HUD Staff to Provide Technical Assistance and Navigate Unique Review Problems: Designate HUD Staff to Coordinate Early Environmental Review ..... 124
  - E. Avoid Categorical Exclusions: Proceed Cautiously in Making Disaster Recovery Efforts Categorically Excluded from Environmental Review..... 128
- Conclusion ..... 128

INTRODUCTION

In January 2013, Congress responded to the widespread devastation caused by Hurricane Sandy by passing The Disaster Relief Appropriations Act and Sandy Recovery Improvement Act of 2013.<sup>1</sup> The Sandy Recovery

---

1. See Pub. L. No. 113-2, 127 Stat. 5 (2013). President Obama signed the Sandy Recovery Improvement Act into law on January 29, 2013.

Improvement Act's goal was not only to send long-term recovery funds to battered New York, New Jersey, and Connecticut coastal areas but also to improve the way the federal government responds to large-scale disasters.<sup>2</sup> Mindful that one of the critical shortcomings with Hurricane Katrina and Rita long-term recoveries was the slow and redundant implementation of the federally required environmental and historic review process,<sup>3</sup> Congress mandated that federal agencies involved in disaster response and long-term disaster recovery begin devising a Unified Federal Review process to coordinate environmental and historic reviews required by several federal laws, most notably the National Environmental Policy Act (NEPA).<sup>4</sup>

Although NEPA serves the vitally important purpose of safeguarding natural and historic resources, the regulations implementing these requirements may be ill-suited for application to catastrophic urban disasters.<sup>5</sup> A poor fit between the environmental review requirement and the exigencies of large-scale disasters causes delays that grossly undermine the very values and resources the laws were designed to protect.<sup>6</sup>

Recent major disasters, including Hurricanes Katrina, Rita, and Sandy, have highlighted the significant role that NEPA and related environmental review requirements play in holding up certain long-term recovery projects.<sup>7</sup>

---

2. The Disaster Relief Appropriations Act and Sandy Recovery Improvement Act of 2013 call for establishment of a Unified Federal Review process to coordinate environmental reviews required by environmental and historic preservation laws, including the National Environmental Policy Act (NEPA). See Pub. L. No. 113-2 § 1106.

3. See *infra* notes 4, 8 and accompanying text.

4. National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370f (2006)). NEPA requires a broad overarching environmental review that includes confirming whether a project raises concerns protected by a range of other environmental and historic preservation laws, such as the National Historic Preservation Act and the Endangered Species Act.

5. See *Removing Obstacles to Gulf Coast Recovery: Hearing Before the Subcomm. on Disaster Recovery of the S. Comm. on Homeland Sec. and Gov't Affairs*, 110th Cong. (2007) (statement of Donna Fraiche, Chair, Long-Term Cmty. Planning Task Force, La. Recovery Auth.) (asserting generally that the environmental review requirement that attaches to projects funded with Community Development Block Grants (CDBG) may be feasible for typical housing and infrastructure projects, but is unworkable and inappropriate when dealing with thousands of properties).

6. See *id.* (explaining that logistical problems with navigating the environmental review requirements forced Louisiana to redesign the most important aspect of its Road Home homeowner compensation program, resulting in a program that would not serve homeowners as well, particularly with respect to the process for elevating one's home).

7. See, e.g., Editorial, *After Sandy, Feds Right to Step in on Climate Change: Editorial*, STARLEDGER (Oct. 29, 2013, 6:05 AM), [http://blog.nj.com/njv\\_editorial\\_page/2013/10/after\\_sandy\\_feds\\_are\\_right\\_to.html](http://blog.nj.com/njv_editorial_page/2013/10/after_sandy_feds_are_right_to.html) (explaining that Gov. Chris Christie blames what he views as the slow roll-out of federal recovery aid in part on federal requirements such as the environmental review requirement); Press Release, U.S. Rep. Yvette D. Clarke, Rep. Clarke Urges Fewer Restrictions on Sandy Relief (July 3, 2013), available at <http://clarke.house.gov/media-center/press-releases/rep-clarke-urges-fewer-restrictions-on-sandy-relief> [hereinafter Clarke Press Release] (noting that members of New York City's congressional delegation asked Secretary of Housing and Urban Development Shaun Donovan for relief from delays caused by NEPA's environmental review requirement by asking for its waiver); Press Release, U.S. Sen. Mary Landrieu, Landrieu Praises Passage of Disaster Relief Funding, Critical Reforms, (Jan. 28, 2013), available at [http://www.landrieu.senate.gov/?p=press\\_release&id=3580](http://www.landrieu.senate.gov/?p=press_release&id=3580)

Hurricanes Katrina and Rita revealed that just a few crucial pages in the Code of Federal Regulations could stifle the pace at which a street, neighborhood, and city achieve effective and meaningful long-term recovery following large-scale disasters.<sup>8</sup> Efforts to implement Hurricane Sandy long-term recovery plans show significant improvements in getting long-term recovery aid on the street quickly.<sup>9</sup> But the Sandy recovery has also recently given rise to troubling echoes of Hurricane Katrina and Rita frustrations with the implementation of the NEPA environmental review requirement in conjunction with implementation of long-term residential recovery projects.<sup>10</sup> This is a problem that the federal government and its state and local partners cannot afford to ignore.<sup>11</sup>

---

[hereinafter Landrieu Press Release] (commending passages of the Hurricane Sandy relief bill, noting that it would provide some limited form of relief from certain regulatory requirements, including environmental and historic preservation reviews, and stating that “[t]he victims of Hurricanes Katrina and Rita learned the hard way that these laws are needlessly rigid and shortsighted”).

8. See, e.g., *Gulf Coast Housing Program: Hearing Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 110th Cong. (2007) (singling out the federal environmental and historic reviews required when using CDBG funds as a major impediment to timely response to Louisiana's housing recovery following Hurricanes Katrina and Rita).

9. The Sandy Recovery Improvement Act, for example, clarifies that federal agencies implementing disaster recovery projects need not complete separate environmental reviews to satisfy requirements imposed by different regulatory regimes, such as FEMA and HUD administrative rules for environmental review. See Landrieu Press Release, *supra* note 7.

10. Frustration over project implementation delays caused by the NEPA environmental review requirement was heard in congressional oversight hearings following Hurricanes Katrina and Rita. See, e.g., *Removing Obstacles to Gulf Coast Recovery*, *supra* note 5 (statement of Donna Fraiche, Chair, Long-Term Cmty. Planning Task Force, La. Recovery Auth.); See *Road Home? An Examination of the Goals, Costs, Management, and Impediments Facing Louisiana's Road Home Program: Hearing Before the Ad Hoc Subcomm. on Disaster Recovery of the S. Comm. on Homeland Sec. & Gov't Affairs*, 110th Cong. (2007), available at <http://www.hsgac.senate.gov/subcommittees/disaster-recovery-and-inter-governmental-affairs/hearings/the-road-home-an-examination-of-the-goals-costs-management-and-impediments-facing-louisianas-road-home-program>). These concerns have been more recently articulated by members of New York City's congressional delegation concerning Hurricane Sandy. See Clarke Press Release, *supra* note 7.

11. Although the human and social costs associated with the delay in rolling out long-term neighborhood recovery projects are not easy to measure, they are undoubtedly highly significant. Financial costs are more easily quantified, such as the cost associated with maintaining properties bought from homeowners who decided to sell their homes rather than rebuild until those homes could be rehabilitated or demolished by the new owner. If an environmental review has not been performed on a property, it cannot be sold; however, it must be maintained, particularly if it has structures such as a storm-damaged home or swimming pool. Between 2007 and 2012, the Louisiana Land Trust (LLT), the entity that held and maintained the Road Home buyout properties, spent roughly \$86 million to maintain approximately 5100 abandoned Orleans Parish properties. See Cain Burdeau, *Millions Spent on Upkeep of Empty Lots*, ASSOCIATED PRESS, July 12, 2012, available at 2012 WLNR 15351375. Only a portion of this total maintenance and security cost may be due directly to delayed environmental review. But any delay in the state's ability to sell any of these properties carried an expensive price tag that averaged more than \$17 million per year in Orleans Parish alone. See *id.* There are other equal or much greater costs. Problems posed by the environmental review requirement forced Louisiana to shift its Road Home program from a repair program, where funds would be escrowed and dispersed incrementally to owners, to a compensation program where homeowners were generally given a lump sum payment to cover their repair costs. See *Road Home?*, *supra* note 10. This programmatic decision made Road Home program participants highly susceptible to contractor fraud and homeowner mismanagement. See *Community*

In an era in which climate change casts a long shadow over the nation's fiscal and economic health, the stakes associated with implementing smart, efficient, and cost-effective long-term recovery are mounting quickly.<sup>12</sup> Rigid interpretation of the Department of Housing and Urban Development's (HUD) NEPA implementing regulations has recently caused lengthy delays in returning former storm-damaged residential properties to residential uses, thus slowing return of population and economic stimulus to ailing neighborhoods and cities.<sup>13</sup> This Article recommends that a Unified Federal Review process incorporate the following five principles.<sup>14</sup>

First, the Unified Federal Review process should appraise and appreciate a disaster's scope by authorizing area-wide environmental reviews in urban settings. A Unified Federal Review process must specifically authorize federal agencies to conduct post-disaster urban environmental reviews at a neighborhood-wide or citywide level, reserving property-by-property environmental reviews for neighborhoods and circumstances raising special resource protection or environmental contamination concerns.

Second, allow as little delay as possible. The environmental review(s) must be completed as soon as possible after the disaster—if possible, in no more than one year—so that the reviews can meaningfully inform long-term neighborhood recovery decisions, allowing quick return of families and timely

---

*Development Block Program: Hearing Before the Subcomm. on Disaster Recovery of the S. Comm. on Homeland Sec. & Gov't Affairs*, 111th Cong. (2009), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg51779/html/CHRG-111shrg51779.htm> (statement of Dominique Duval-Diop, Senior Assoc., PolicyLink). A survey conducted by Louisiana State University and a local nonprofit recovery group estimated that between 2006 and 2009 more than 9000 Louisiana residents were victimized by contractor fraud, with the highest incidence among lower-income families. See *Community Development Block Program Hearing*, *supra* (statement of Dominique Duval-Diop, Senior Assoc., PolicyLink).

12. In monetary terms alone, federal outlays for long-term recovery programs have averaged in the multiple billions of dollars each year, representing—by far—the main source of government expenditure of CDBG funds. See Dorcas R. Gilmore & Diane M. Standaert, *Building Community Resilience Post-Disaster: An Introduction*, 22 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 61, 62 (2013). For its 2013 budget, HUD requested \$2.948 billion for its annual grants to states and cities across the country. See *id.* This annual budget request was dwarfed by congressional appropriation of CDBG funds for Hurricane Sandy relief, which was approximately \$16 billion—to address a single 2012 disaster. See *id.*

13. See Landrieu Press Release, *supra* note 7 (stating that “[t]he victims of Hurricanes Katrina and Rita learned the hard way that these laws are needlessly rigid and shortsighted”).

14. Congress has established July 2014 as its target for establishing a Unified Federal Review process. See Horst Greczmiel, Assoc. Dir. for NEPA Oversight, Council on Envtl. Quality, Open Letter 1 (May 17, 2013), available at <http://www.saa.org/Portals/0/SAA/GovernmentAffairs/Unified%20Federal%20Review%20Letter%2017May2013.pdf>. The long-term recovery consists not only of residential recovery projects, but also small business and infrastructure recovery projects. See, e.g., N.J. DEP'T OF CMTY AFF., COMMUNITY DEVELOPMENT BLOCK GRANT DISASTER RECOVERY ACTION PLAN 3-1 to 3-4 (2013), available at <http://www.state.nj.us/dca/announcements/pdf/CDBG-DisasterRecoveryActionPlan.pdf>. Residential recovery projects, due to their raw scale, best highlight NEPA-related impediments to recovery. The five principles set forth below are broadly applicable to all aspects of the urban recovery process, but this Article focuses primarily on the residential long-term recovery. Each of these five principles for informing a Unified Federal Review process are detailed *infra*, at notes 209–291 and accompanying text.

deployment of federal funds.

Third, accommodate use of flexible redevelopment tools. The Unified Review process should promote flexibility for local and state partners. One such example is allowing state or local grantees to bid on tax-delinquent properties at government tax lien sales—without completing an environmental review—as long as such activities do not involve obligating federal funds for purchase, but rather give the local government an option to acquire the property for redevelopment.

Fourth, assign high-level HUD staff to provide technical assistance and navigate unique environmental review problems. The Unified Federal Review process should create a federal environmental review “strike force,” which would provide state and local governments with immediate access to the tools and personnel necessary to complete the environmental review in the critical but chaotic months immediately following a large-scale disaster.

Fifth, avoid categorical exclusions. Some would like state governments to be able to sidestep environmental review when major disasters strike.<sup>15</sup> But disasters sometimes raise acute concerns for historic and environmental resources. Federal agencies, including HUD, should proceed cautiously before allowing post-disaster housing projects to be categorically excluded from the NEPA environmental review requirement.

It is important to be clear on one point at this Article’s outset. NEPA is not the only law or regulation that frustrated the pace of New Orleans’s long-term residential recovery. Nor is NEPA review solely responsible for the delays encountered with the recovery of New York City or New Jersey neighborhoods. Numerous other variables break the speed of a long-term recovery.<sup>16</sup> This Article addresses NEPA’s role in slowing long-term recovery, but separate papers could explore historic impediments associated with the Stafford Act’s restrictions on compensation for local government property losses and debris removal,<sup>17</sup> the limited capacity of local governments to

---

15. See, e.g., *The Role of the Community Development Block Grant Program in Disaster Recovery: Hearing Before the Ad Hoc Subcomm. on Disaster Recovery of the S. Comm. on Homeland Sec. & Gov’t Affairs*, 111th Cong. (2009), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg51779/html/CHRG-111shrg51779.htm> (statement of Charles S. Stone, Exec. Dir., State of Tex., Office of Rural Cmty. Affairs) (calling for states to receive exemptions from the environmental review requirement for up to a year following the disaster).

16. See, e.g., *Removing Obstacles to Gulf Coast Recovery*, *supra* note 5 (discussing the difficulties and “red tape” that the State of Louisiana encountered in administering the FEMA Hazard Mitigation Grant Program).

17. See, e.g., AMY LIU, FEDERAL POST-DISASTER RECOVERY: A REVIEW OF FEDERAL PROGRAMS 12 (2010), available at <http://www.urban.org/uploadedpdf/1001384-federal-post.pdf> (summarizing the concern expressed by local and state government officials that the federal government should “reduce the state match” requirement under the FEMA Public Assistance (PA) Program and “get rid of the reimbursement process”); JARED T. BROWN ET AL., CONG. RESEARCH SERV., R42991, ANALYSIS OF THE SANDY RECOVERY IMPROVEMENT ACT OF 2013, at 7 (2013) available at <https://www.fas.org/sgp/crs/misc/R42991.pdf> (describing congressional amendments to the PA Program based on experiences with “past disasters, most notably Hurricane Katrina” in which “the PA Program

effectively manage federal long-term recovery funds,<sup>18</sup> and the Stafford Act's provisions governing the Hazard Mitigation Grant Program.<sup>19</sup> In other words, in evaluating whether and how federal regulations may sidetrack long-term disaster recovery, we must appreciate that the problem is systemic and involves the interplay of a range of federal rules, state laws, and federal, state, and local agencies—all of which play roles in the recovery process.<sup>20</sup>

There are also other factors that have nothing to do with federal statutory and regulatory requirements that can shape post-disaster recovery. These factors include everything from local politics to the American political order. From the outset, New Orleans's recovery was characterized by a climate of intergovernmental dispute.<sup>21</sup> There was a lack of trust among the Mayor of the City New Orleans, the state's Democratic governor, and the Republican President George W. Bush.<sup>22</sup> This was not an environment where collaboration and cooperation could flourish.<sup>23</sup> Even if a spirit of cooperation prevailed following Katrina, it is widely acknowledged that a federal, democratic system

has been criticized for being cumbersome and too inflexible to address the needs of local government and communities”).

18. See, e.g., *Removing Obstacles to Gulf Coast Recovery*, *supra* note 5; TRANSITION NEW ORLEANS TASK FORCE, HOUSING 19 (2010) (reporting that “[c]ity agencies, both within and outside City Hall, are not currently staffed to operate quickly and efficiently. The Housing Task Force found no evidence of the coordination of resources amongst the City agencies . . .”); BROWN ET AL., *supra* note 17, at 16 (describing Hurricane Sandy-related amendments to the Stafford Act that “require[] the utilization of streamlined procedures in order to provide assistance more rapidly.”).

19. See, e.g., LIU, *supra* note 17, at 12 (recommending that FEMA’s Hazard Mitigation Grant Program “needs to be better applied to new construction [because] . . . [c]urrently, it is more conducive to repair than new building,” and recovery from a catastrophic disaster involves more rebuilding than from a normal disaster).

20. See generally Douglas A. Kysar & Thomas O. McGarity, *Did NEPA Drown New Orleans? The Levees, the Blame Game, and the Hazards of Hindsight*, 56 DUKE L.J. 179, 181 (2006) (cautioning that, among other things, it is a mistake to evaluate policy or to assign blame to a policy merely based on an over-the-shoulder study of a single law’s implementation).

21. See Lawrence J. Vale, *Restoring Urban Viability*, in REBUILDING URBAN PLACES AFTER DISASTER: LESSONS FROM HURRICANE KATRINA 149, 157 (Eugenie L. Birch & Susan M. Wachter eds., 2006).

22. See, e.g., ROBERT B. OLSHANSKY & LAURIE A. JOHNSON, CLEAR AS MUD: PLANNING FOR THE REBUILDING OF NEW ORLEANS 23–25 (2010) (“[T]he White House’s strategy was to shift blame for the bungled response rather than solve the recovery problem at hand.”); DOUGLAS BRINKLEY, THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST 530–31 (2006) (showing that New Orleans Mayor C. Ray Nagin generally expressed his frustration with the lack of decisive action by the federal and state governments, stating in an interview that he had “no idea what [President George W. Bush and Governor Kathleen Blanco] are doing. But I will tell you this . . . God is looking down on all this, and if they are not doing everything in their power . . . they are going to pay the price.”).

23. In fact, in evaluating Louisiana’s oversight of its disaster CDBG grantee, the city of New Orleans, and its subgrantee, the independent New Orleans Redevelopment Authority, HUD’s Inspector General made pointed reference to the “strained working relationship” between two entities serving the same geographic area. See U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF INSPECTOR GENERAL, 2010-AO-1005, AUDIT REPORT: THE STATE OF LOUISIANA’S, BATON ROUGE, LA, SUBRECIPIENT DID NOT ALWAYS MEET AGREEMENT REQUIREMENTS WHEN ADMINISTERING PROJECTS UNDER THE ORLEANS PARISH LONG TERM COMMUNITY RECOVERY PROGRAM 12 (2010), available at <http://www.hud.gov/offices/oig/reports/files/ig10a1005.pdf>.



of governance, which begets overlapping jurisdictions and responsibilities, causes natural friction among the various levels of government.<sup>24</sup> Federal aid to communities ravaged by Hurricane Sandy also fueled a political battle, causing significant delays in enactment of the federal recovery legislation.<sup>25</sup>

This Article proceeds as follows. Part I highlights NEPA's key statutory and regulatory provisions. Part II recounts how Hurricanes Rita and Katrina and now, more recently, Hurricane Sandy have demonstrated that critical long-term disaster recovery can be delayed by the current NEPA review implementation scheme. Part III explains why the disaster-related problems associated with NEPA environmental review requirements are not surprising, based on the statute and implementing regulation's purpose, as a statutory scheme focused on the environmental impact of distinct, largely discretionary federal projects. Part IV discusses the necessity for regulatory reform and revision, not just tougher regulations, in an era of climate change and articulates five principles to inform the Unified Federal Review process.

#### I. NEPA: A MAJOR FEATURE IN THE LONG-TERM RECOVERY LANDSCAPE

NEPA embodies a set of aspirations about Americans' role as responsible stewards of the human environment.<sup>26</sup> One of NEPA's fundamental premises is that, as a nation, we must be respectful of the environment and natural resources.<sup>27</sup> Specifically, NEPA applies to federal government actions and their impact on the environment.<sup>28</sup> It has been interpreted as a bedrock mandate for all federal government agencies, in addition to the agencies' own enabling laws and departmental regulations.<sup>29</sup> Every federal agency must comply with NEPA by examining the environmental impacts of its actions.<sup>30</sup>

NEPA accomplishes its broad purposes by flagging the requirements of other federal environmental statutes for agencies' consideration.<sup>31</sup> It is grafted into every federal agency's administrative regulations.<sup>32</sup> NEPA review does

---

24. See Vale, *supra* note 21, at 157–58.

25. See, e.g., Jonathan Weisman, *In Congress, Gridlock and Harsh Consequences*, N.Y. TIMES, July 8, 2013, at A3 (recounting that congressional gridlock and partisan politics prevented Congress from passing two essential bills relating to Hurricane Sandy—general Sandy relief and a bill increasing FEMA's borrowing authority).

26. See A. Dan Tarlock, *The Story of Calvert Cliffs: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, in ENVIRONMENTAL LAW STORIES 77, 83 (Richard J. Lazarus & Oliver A. Houck eds. 2005).

27. See *id.* at 84 n.22.

28. See *id.* at 85.

29. See National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006); DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 1.1 (2d ed. 2013).

30. See MANDELKER, *supra* note 29, § 1.3 (quoting Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971)).

31. See 24 C.F.R. § 58.5 (2013).

32. See MANDELKER, *supra* note 29, § 2.11. Each federal agency must adopt its own regulations for implementing NEPA's requirements.

not supplant compliance with other allied environmental statutes.<sup>33</sup> Rather, mindful that NEPA is situated within a regulatory landscape populated with many other environmental compliance responsibilities, the Council on Environmental Quality (CEQ) has promulgated regulations that require NEPA reviews to incorporate reviews mandated by other statutes and Executive Orders.<sup>34</sup> The CEQ, which oversees NEPA implementation, specifies that the agency's review must document compliance with applicable statutes and authorities including,<sup>35</sup> among others, the Fish and Wildlife Coordination Act,<sup>36</sup> the National Historic Preservation Act,<sup>37</sup> the Endangered Species Act,<sup>38</sup> President Carter's Executive Order on flood plains,<sup>39</sup> and President Clinton's Order requiring consideration of environmental justice concerns in relation to federal actions.<sup>40</sup>

Whether the federal investments are being made in cities or in pristine wilderness, NEPA directs agencies to examine the ways that the proposed project will impact the environment.<sup>41</sup> In reaching their development decisions, NEPA requires agencies to make an early determination about the consequences of its actions on natural resources and public health and safety risks.<sup>42</sup>

The principal means for ensuring these values are observed is the detailed environmental review, which agencies must prepare to assess the

---

33. NEPA is often referred to as an "umbrella law." See NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106, at 12 (2013), available at [http://www.achp.gov/docs/NEPA\\_NHPA\\_Section\\_106\\_Handbook\\_Mar2013.pdf](http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf). It requires that agencies engaging in federal actions complete an environmental review, if necessary, to evaluate whether the proposed action may implicate a range of federal environmental statutes, including the Clean Air Act, the Endangered Species Act, etc. See *id.* Compliance with the environmental review requirements does not, however, relieve the agency of responsibility for complying with the substantive requirements of each of those environmental laws. See *id.*

34. See *id.* ("NEPA regulations require NEPA documents . . . to integrate to the fullest extent possible [their] information gathering and analyses with other Federal environmental laws and executive orders . . .").

35. See LINDA LUTHER, CONG. RESEARCH SERV., RL34650, IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) FOR DISASTER RESPONSE, RECOVERY, AND MITIGATION PROJECTS 3 (2011).

36. Pub. L. No. 85-624, 48 Stat. 401 (codified as amended at 16 U.S.C. §§ 661-667e (2012)).

37. Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470-470x6 (2012)).

38. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (2012)).

See also MANDELKER, *supra* note 29, § 2.18.

39. See Executive Order No. 11,988, 42 Fed. Reg. 26,951 (1977); see also MANDELKER, *supra* note 29, § 2.27.

40. See Executive Order No. 12,898, 3 C.F.R. § 859 (2013); see also MANDELKER, *supra* note 29, § 2.28.

41. Since NEPA's enactment, the scope of what are considered environmental concerns has expanded considerably. See LYNTON KEITH CALDWELL, THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE xiv (1998). The Act's reach extends not only to the impact of federal actions on wilderness, but also on the urban living environment. See DANIEL M. STEINWAY ET AL., ENVIRONMENTAL LAW HANDBOOK 619 (Thomas F.P. Sullivan ed., 21st ed. 2011).

42. See *Kleppe v. Sierra Club*, 427 U.S. 390, 417 (1976).

environmental impact of major government actions.<sup>43</sup> This analysis forces the government to weigh the action's economic, environmental, and social costs.<sup>44</sup> Major actions most commonly involve large development projects but may be construed more broadly to include "substantial planning, time, resources, or expenditures."<sup>45</sup> Thus, if a state grantee is undertaking a project with HUD Community Development Block Grants (CDBG) funds, that state grantee must complete an environmental review before the funds are committed or expended.<sup>46</sup> Not a single CDBG dollar can flow from the federal government to reimburse state and local governments for recovery work until the NEPA environmental review is completed or until the grantee determines that the action is categorically excluded, and thus exempt from NEPA review.<sup>47</sup> That means homeowners repairing their residences post-storm who are looking for reimbursement offered by a state or local government's home rehabilitation project cannot receive reimbursement for repair costs until an environmental review has been performed on that homeowner's residence.<sup>48</sup>

Emergency situations provide a narrow exception to NEPA's environmental study requirement.<sup>49</sup> CEQ's NEPA implementing regulations provide guidance for all federal agencies on how NEPA should be applied in emergency situations.<sup>50</sup> These special CEQ regulations exempt government actions "necessary to control the immediate impacts of the emergency."<sup>51</sup> Government actions in the immediate wake of Hurricane Katrina fell under this exception, as described in a CEQ memorandum issued several days after Katrina.<sup>52</sup> The succinct memo explained that once the federal agency taking the action determines that the action would have significant environmental impact, but where the emergency circumstances make it clear that there will be no time for heeding applicable NEPA regulations, the agency "should consult with the Council about alternative arrangements."<sup>53</sup> CEQ is careful to state that this emergency exception should not be considered an "open door" to take actions

---

43. See Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH U. J.L. & POL'Y 293, 297 (2010).

44. See Ian C. Lindars, *The Future of the National Environmental Policy Act*, 32 REAL EST. L.J. 109, at text accompanying notes 22–24 (2003).

45. See *id.* and text accompanying note 30.

46. See MANDELKER, *supra* note 29, § 5.15; LUTHER, *supra* note 35, at 3.

47. See 24 C.F.R. § 58.22(a) (2013); see also MANDELKER, *supra* note 29, § 7.10.

48. See, e.g., Clarke Press Release, *supra* note 7 (describing contents of a letter to HUD Secretary Shaun Donovan from member of New York City's congressional delegation, asking that HUD "waive environmental reviews for homeowners to expedite repair").

49. CEQ has established guidelines for review of emergency response actions. See NANCY H. SUTLEY, MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES 1 (2010), available at [http://energy.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/G-CEQ-Emergencies.pdf](http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-Emergencies.pdf).

50. See *id.*

51. See 40 C.F.R. § 1506.11 (2013); see also MANDELKER, *supra* note 29, § 5.16.

52. See MEMORANDUM TO FEDERAL AGENCY CONTACTS: EMERGENCY ACTIONS AND NEPA (2005), available at [http://energy.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/G-CEQ-EmergencyGuidance.pdf](http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-EmergencyGuidance.pdf); see also MANDELKER, *supra* note 29, § 5.16.

53. See MEMORANDUM TO FEDERAL AGENCY CONTACTS, *supra* note 52, at Attachment 1.

beyond those determined absolutely necessary.<sup>54</sup> Agencies responding to Katrina were put on notice that the “[a]gencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency.”<sup>55</sup>

A NEPA environmental review is intended to inform an agency’s decision regarding its proposed action.<sup>56</sup> To this end, the CEQ states that an agency should complete the environmental review process as early as possible.<sup>57</sup> The goal is to “integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values [and] to avoid delays later in the process . . . .”<sup>58</sup> This means the environmental review should not be used merely to justify a decision that the agency has already made, but instead it should be used to help guide that decision.<sup>59</sup>

NEPA review forces government agencies to examine data concerning the impacts of a proposed government action and then gives the agency the opportunity to change course or alter the development proposal if the data suggests the impacts pose too far-reaching a threat.<sup>60</sup> The NEPA review helps inform the early stages of the development process, serving a valuable role in creating prudent and efficient post-disaster long-term recovery programs.<sup>61</sup>

The NEPA review process begins with two threshold questions. The first question is whether NEPA applies to the proposed government action.<sup>62</sup> NEPA does not apply if the proposed action has been deemed “exempt” by the federal agency.<sup>63</sup> HUD has defined exempt activities to include preparing architectural and engineering drawings or paying for technical assistance from a consultant to help an agency comply with HUD regulations.<sup>64</sup> The second question is whether the activity has been determined to have no significant environmental

---

54. See SUTLEY, *supra* note 49, at 2 (explaining that “[a]lternative arrangements” for NEPA compliance, “do not waive the requirement to comply with NEPA, but establish an alternative means for NEPA compliance”).

55. See MEMORANDUM TO FEDERAL AGENCY CONTACTS, *supra* note 52, at Attachment 1.

56. See, e.g., Patrick Parenteau, Op-Ed, *Don’t Gut Environmental Review*, RUTLAND HERALD, May 14, 2013, <http://www.rutlandherald.com/article/20130514/OPINION04/705149927> (noting that a New Orleans federal district court found the U.S. Army Corps of Engineers negligent in operation of the Mississippi River Gulf Outlet, which funneled storm surge into New Orleans during Hurricane Katrina, because of the Army Corps’ “failure to take account of risks identified in the environmental impact statement”).

57. See 24 C.F.R. § 58.30(b) (2013).

58. 40 C.F.R. § 1501.2 (2013); see also MANDELKER, *supra* note 29, § 7:9.

59. See 40 C.F.R. § 1502.5; see also MANDELKER, *supra* note 29, § 7:9.

60. One scholar describes NEPA as “the ultimate common sense law: Look before you leap. Do your homework. Consider your options. . . . Think long term. Properly done this leads to better decisions.” See Parenteau, *supra* note 56.

61. See, e.g., Greczmiel, *supra* note 14, at 3 (explaining that the federal government is studying ways to implement a Unified Federal Review process in part to “enhance the ability of the Federal environmental and historic preservation review process to inform and expedite disaster recovery decisions”).

62. See 24 C.F.R. § 58.34(a).

63. See *id.*

64. See *id.*

impact, and thus is subject to “categorical exclusion” from the statute’s requirements.<sup>65</sup> Each federal agency has defined the activities considered to be categorically excluded from environmental review.<sup>66</sup> Generally speaking, however, the types of activities subject to categorical exclusion are actions that, taken by themselves or aggregated, do not have any impact on the human environment.<sup>67</sup> According to HUD, these actions include small-scale projects, such as rehabilitation of residential structures containing four or fewer units where the rehabilitation neither changes the building’s land nor increases the building’s footprint in a floodplain.<sup>68</sup> Categorically excluded actions—or actions that HUD deems will not have significant environmental impact—are also considered to occur when the grantee is pursuing “[a]n individual action on up to four dwelling units” or “[a]n individual action on a project of five or more housing units developed on scattered sites when the sites are more than 2,000 feet apart.”<sup>69</sup>

Understanding the narrow scope of these categorical exclusions helps inform why they are largely inapplicable to large-scale disasters. If the proposed activity is not subject to a categorical exclusion, then NEPA review generally results in one of two outputs—an environmental assessment (EA) or an environmental impact statement (EIS). EAs are used when an agency action may be significant enough that a categorical exclusion would not be appropriate.<sup>70</sup> It also serves an exploratory purpose to determine whether the agency action will have so substantial an impact as to require an EIS, or alternatively, that the impact is relatively innocuous, in which case the agency would prepare a finding of no significant impact or “FONSI.”<sup>71</sup> On the other hand, if the EA indicates the proposed agency action will have significant environmental impacts, then the agency must proceed toward preparing an EIS.<sup>72</sup>

In the case of post-Katrina environmental reviews, HUD required an EA for each property that the State of Louisiana purchased from a homeowner that did not wish to rebuild or repair their home.<sup>73</sup> Following Katrina, the EA required an environmental contractor to visit the site, determine the site’s current use as a home or not a home, and document the visit with, among other

65. See 24 C.F.R. § 58.35(a).

66. See MANDELKER, *supra* note 29, § 5:15.

67. See 40 C.F.R. § 1508.4 (2013).

68. See 24 C.F.R. § 58.36(a)(3)(i).

69. 24 C.F.R. 58.35(a)(4)(i) & (ii).

70. See 40 C.F.R. §§ 1501.3, 1501.4(a)–(c).

71. See 40 C.F.R. § 1508.9; MANDELKER, *supra* note 29, § 7:11; see also Kevin H. Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. REV. 2312, 2320 (2004).

72. See 40 C.F.R. § 1508.22. Preparing an EIS begins with issuing a formal Notice of Intent (NOI) to prepare an EIS. See *id.*

73. Before the LLT could transfer the buyout properties back to Louisiana parishes for resale, the LLT was required to perform an environmental review on each lot. See John Moreno Gonzales, *Problems Plague Government Buyouts of Katrina Property*, AP ALERT—LA., Feb. 13, 2008.

documents, a photograph.<sup>74</sup> As part of the site visit and follow-up analysis, the contactors were required to consider whether the property presented concerns addressed by the following legal and regulatory issues: floodplain, wetlands, coastal zone management, historical preservation, threatened or endangered species, noise, airport zone, prime farm lands, aquifer protection, wild and scenic rivers, toxic chemicals and radiation, explosives and flammables, and levees.

The federal agency funding the action—in this case, HUD—charged the grantee, here the State of Louisiana, with NEPA compliance, and thus required the state to carry out the required review on its own.<sup>75</sup>

This Article focuses on NEPA and the HUD administrative regulations implementing its requirements. In order to prescribe new principles for the Unified Federal Review that might speed Sandy long-term recovery efforts and long-term recovery projects in other future large-scale disasters, this Article examines the application of NEPA's requirements to Louisiana's homeowner buyout program. It also examines how NEPA implementation played a role in frustrating long-term recovery efforts in New Orleans following Katrina.

## II. UNDERSTANDING IMPEDIMENTS TO LONG-TERM RECOVERY: WHY NEPA COMPLIANCE, AS INTERPRETED POST-KATRINA, PROVED A SIGNIFICANT OBSTACLE TO QUICKER AND MORE EFFECTIVE NEIGHBORHOOD RECOVERY

Compliance with applicable environmental laws, including NEPA, greatly concerned Congress in the initial December 2005 disaster recovery legislation, which sent billions in federal dollars to Louisiana to rebuild following Hurricanes Katrina and Rita.<sup>76</sup> As dire as New Orleans's situation may have

---

74. See, e.g., LA. LAND TRUST, SITE SPECIFIC REVIEW FOR THE BUYOUT PROGRAM app. A (2008) (on file with author); see also U.S. DEP'T OF HOUS. & URBAN DEV., NEPA ENVIRONMENTAL REVIEW CHECKLIST 8, 26–27 (2010), available at [https://www.onecpd.info/resources/documents/NEPA\\_Environment\\_Review\\_Checklist.DOC](https://www.onecpd.info/resources/documents/NEPA_Environment_Review_Checklist.DOC) [hereinafter NEPA CHECKLIST] (This environmental review checklist would have been used for land acquired or developed under HUD's NSP-2 program.). In January 2010, the New Orleans Redevelopment Authority was awarded \$29.7 million to develop housing and fight blight through HUD's NSP-2 program. See David Hammer, *NORA Makes Deadline for Federal Anti-Blight Grant Spending*, TIMES PICAYUNE, Feb. 14, 2012, [http://www.nola.com/politics/index.ssf/2012/02/nora\\_makes\\_deadline\\_for\\_federa.html](http://www.nola.com/politics/index.ssf/2012/02/nora_makes_deadline_for_federa.html). New Orleans Redevelopment Authority (NORA) used this funding to expand its efforts to revitalize neighborhoods post-Katrina.

75. The earliest HUD NEPA implementing regulations highlighted Congress's intent to delegate to HUD's state and local CDBG grantees the responsibility for performing environmental reviews. See Environmental Review Procedures for the Community Development Block Grant Program, 40 Fed. Reg. 1392, 1394 (Jan. 7, 1975) (to be codified at 24 C.F.R. pt. 58). Even though HUD acknowledges its discretion to perform environmental reviews, in the early 2000s, HUD stated its strong view that "such performance would be inconsistent with HUD's general direction to devolve this federal function . . . to state, local, and tribal governments." Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities, 68 Fed. Reg. 56,116, 56,118 (Sept. 29, 2003).

76. The State of Louisiana received \$13.4 billion in CDBG grant monies. See *The Role of the Community Development Block Grant Program in Disaster Recovery*, supra note 15 (opening statement of Sen. Mary Landrieu). The Hurricane Katrina and Rita recovery bills granted HUD Secretary's

been, Congress made it clear that all hurricane-rebuilding programs must comply with NEPA and other fundamental environmental laws.<sup>77</sup> Thus, HUD and the State of Louisiana knew months into the Katrina recovery that their planning for, and implementation of, NEPA compliance procedures would figure centrally in their recovery programs.<sup>78</sup> Despite this advanced warning and despite substantial HUD and State of Louisiana experience with this regulatory requirement, NEPA proved challenging to implement “in the field” across Louisiana’s storm-stricken parishes, and inside New Orleans in particular.<sup>79</sup> Thus, NEPA compliance efforts, as implemented following Katrina, emerged as one of the factors that slowed the progress of the city’s long-term recovery.

A close look at NEPA and the HUD regulations implementing NEPA provides clues to why the HUD regulations, as interpreted post-Katrina, may have been a source for delay.

#### A. NEPA Non-Compliance Has High Stakes

The level of destruction caused by Hurricane Katrina was as extensive as any disaster in modern American history.<sup>80</sup> The federal government’s response

---

discretion to waive compliance with certain regulations. See Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2745–82 (2005). Specifically excluded from this grant of waiver was the Secretary’s ability to waive regulations concerning the environment, as well as federal anti-discrimination and wage and hour requirements. See *id.*

77. See 119 Stat. 2680, 2780. In its testimony before Sen. Landrieu and the Ad Hoc Subcommittee, HUD noted specifically that the environmental review requirement was not one of the laws that Congress allowed to be waived. See *The Role of the Community Development Block Grant Program in Disaster Recovery*, *supra* note 15 (statement of Frederick Tombar, Senior Advisor, Office of the Sec’y for Disaster & Recovery Programs, U.S. Dep’t of Hous. & Urban Dev.). In the weeks immediately following Katrina, some members of Congress voiced opposition to calls for waiving the federal environmental review requirement. See, e.g., *Hurricane Katrina: Assessing the Present Environmental Status*, Hearing Before the Subcomm. on Env’t & Hazardous Materials of the H. Comm. on Energy & Commerce, 109th Cong. (2005) (statement of Rep. Hilda Solis) (expressing concern “about the rush to waive health provisions, safety, environmental, and social protections,” noting “that [these waivers] would undercut longstanding health and environmental standards”).

78. According to HUD, the State of Louisiana was informed in 2005—at the earliest stages of the Hurricane Katrina and Rita recoveries—that NEPA environmental review would be an issue critical to each of the CDBG-funded projects. See Ariella Cohen, *Road Home Properties in Louisiana Face Inspection Crunch*, NEW ORLEANS CITY BUSINESS, June 28, 2008, available at 2008 WLNR 14044910.

79. The State of Louisiana noted that the required federal environmental review process “severely impact[s] construction and repair programs in the disaster recovery process.” See *Road Home?*, *supra* note 10 (statement of Susan Elkins, State of La., Div. of Admin., Office of Cmty. Dev., Disaster Recovery Unit). State of Texas officials were exacting in their description of the delay caused by the environmental review requirement. See *The Role of the Community Development Block Grant Program in Disaster Recovery*, *supra* note 15 (statement of Charles S. Stone, Exec. Dir., State of Tex., Office of Rural Cmty. Affairs). It took the state 486 days to complete the environmental review process, contributing to an almost-two-year delay in the state’s ability to spend its first non-housing long-term recovery CDBG funds. See *id.*

80. Hurricane Katrina is the largest disaster in American history, and prior to Hurricane Sandy, Hurricane Rita, which struck the Gulf Coast just weeks after Katrina, ranked third on the all-time list.

to Katrina and its 2005 sister storms was also unprecedented in terms of the funds committed to New Orleans and the Gulf Coast region.<sup>81</sup> Between December 2005 and November 2007, Congress sent more than \$13.4 billion in CDBG funds to Louisiana alone for housing and long-term recovery programs.<sup>82</sup> That total is almost 40 percent of HUD's proposed 2005 annual budget of \$31.3 billion—a budget that funded a year's worth of HUD programs in every state and every major American city.<sup>83</sup>

It is not difficult to understand why NEPA requirements loomed so large and why the state would be particularly cautious in interpreting its application to long-term recovery projects. CDBG funds are not up-front cash funds.<sup>84</sup> They are generally not paid out to state and local governments to spend on materials or services.<sup>85</sup> Instead, they are disbursed to state and local grantees to *reimburse* them for bills already paid.<sup>86</sup> That means the grantee or its subgrantee or contractor sometimes must spend its own money or borrowed funds before it can secure reimbursement funds from the federal government. If a grantee spends any money prior to completing an environmental review or determining the applicability of the categorical exclusion, HUD will not pay for expenditures on that property or project.<sup>87</sup> Instead, HUD's grantee—in this

---

*See Community Development Block Grant Program: Hearing Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 111th Cong. (2009) (statement of Paul Rainwater, Executive Director, Louisiana Recovery Authority). Further, as Paul Rainwater, Executive Director of the Louisiana Recovery Authority, described in 2009, “[T]he combined impact of Hurricanes Katrina and Rita is the largest disaster in U.S. history. Measured only in terms of Stafford Act funds, it is larger than the next largest disaster—the Attack on America on September 11, 2001—by four times and it is larger than the remaining top 10 disasters combined.” *See id.*

81. The Hurricane Sandy recovery bill appropriated nearly \$51 billion to northeastern states for recovery from the superstorm. *See* David W. Chen, *U.S. to Release First Installment of \$51 Billion in Hurricane Sandy Aid*, N.Y. TIMES, Feb. 6, 2013, at A22. The congressional appropriation to the Gulf Coast states for damage inflicted by the 2005 hurricanes approached \$110 billion. Roughly \$59 billion of these federal recovery funds were committed to Louisiana. *See Removing Obstacles to Gulf Coast Recovery*, *supra* note 5 (statement of Donna Fraiche, Chair, Long-Term Cmty. Planning Task Force, La. Recovery Auth.).

82. *See The Role of the Community Development Block Grant Program in Disaster Recovery*, *supra* note 15 (opening statement of Sen. Mary Landrieu).

83. *See* U.S. DEP'T OF HOUS. & URBAN DEV., HUD FISCAL YEAR 2005 BUDGET SUMMARY (2005), available at [archives.hud.gov/budget/fy05/budgetsummary.pdf](http://archives.hud.gov/budget/fy05/budgetsummary.pdf).

84. *See, e.g.,* LA. DISASTER RECOVERY UNIT, USER GUIDE FOR THE GUSTAV/IKE GRANT PROGRAM: REQUEST FOR PAYMENT 2, available at [http://www.doa.louisiana.gov/cdbg/DR/PDF/Gustav-Ike/Draw%20Request%20Manual/DrawRequestGuide\\_7-11.pdf](http://www.doa.louisiana.gov/cdbg/DR/PDF/Gustav-Ike/Draw%20Request%20Manual/DrawRequestGuide_7-11.pdf) (stating that CDBG funds are paid out only when the work has been completed and an invoice supplied for that work).

85. *See id.*

86. *See id.*

87. *See, e.g.,* U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF INSPECTOR GEN., AUDIT REPORT NO. 2011-FW-1005, THE HOUSING AUTHORITY OF THE CITY OF PORT ARTHUR, TX, MISMANAGED ITS RECOVERY ACT FUNDING 13–14 (2011), available at <http://www.recovery.gov/Accountability/inspectors/Documents/HUD-OIG%20Audit%20-%20The%20Housing%20Authority%20of%20the%20City%20of%20Port%20Arthur%20TX.pdf> (recommending the Port Arthur Housing Authority be required to return to HUD more than \$67,640 already expended and return a \$725,546 allocation to the U. S. Treasury for, in part, failure to complete an environmental review prior to commencing site work).



case the State of Louisiana or its subgrantees—must refund the money to the U.S. Treasury or cover the prematurely expended funds from the state's general revenues.<sup>88</sup> In short, the environmental review represented a strict “red light” to any development activity. Any recovery projects that proceeded without the “green light” of environmental clearance would not be funded or, worse, would cause money to be refunded to the U.S. Treasury.<sup>89</sup>

*B. NEPA Compliance Requirements Contributed to Constricting Program Design Choices for Post-Disaster Housing Recovery*

Following Katrina, the most far-reaching implication of HUD's interpretation of NEPA implementation regulations were the changes the State of Louisiana was forced to make in the design of its overarching housing recovery program, the Road Home program.<sup>90</sup> The state intended the Road Home program to operate primarily as a homeowner repair and rehabilitation program, with the added dimension of a lender-administered construction management program.<sup>91</sup> HUD considered this type of plan a “construction” program.<sup>92</sup> That view would have an enormous impact on the recovery process for returning homeowners. The significance of HUD's programmatic classification is that, under the agency's applicable NEPA rules, each homeowner accepting federal funds would have to wait for the state to complete an environmental review on that individual homeowner's house

---

88. See, e.g., U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF INSPECTOR GEN., AUDIT REPORT NO. 2011-AO-1004, THE NEW ORLEANS REDEVELOPMENT AUTHORITY, LA, HAD NOT ADMINISTERED ITS RECOVERY ACT NEIGHBORHOOD STABILIZATION PROGRAM 2 IN ACCORDANCE WITH FEDERAL REGULATIONS 22 (2011), available at <http://www.hudoint.gov/reports-publications/audit-reports/new-orleans-redevelopment-authority-la-had-not-administered-its> (Recommendation 1K) (recommending that the New Orleans Redevelopment Authority repay the U.S. Treasury \$40,385 for failure to complete environmental reviews prior to purchasing tax sale liens for properties located in New Orleans). Neighborhood Stabilization Program 2 funds are governed by the same HUD environmental regulations as CDBG disaster funds. See *id.* at 32, 46 comment 2.

89. See LA. DISASTER RECOVERY UNIT, DISASTER RECOVERY CDBG ADMINISTRATION MANUAL 147 (2012), available at <http://www.doa.louisiana.gov/cdbg/dr/PDF/Env%20manual.pdf>. See also *supra* note 89.

90. See *Removing Obstacles to Gulf Coast Recovery*, *supra* note 5 (statement of Donna Fraiche, Chair, Long-Term Cmty. Planning Task Force, La. Recovery Auth.) (explaining that the state realized it could not make 123,000 homeowners incur the cost of waiting for an environmental review to be completed on their property so the State moved to a “compensation” program).

91. See *Road Home?*, *supra* note 10 (statement of Susan Elkins, State of La., Div. of Admin., Office of Cmty. Dev., Disaster Recovery Unit) (noting that the State of Louisiana had initially determined that a housing rehabilitation program would have provided the best assistance to Louisiana homeowners who suffered significant damage due to the twin 2005 hurricanes).

92. *Removing Obstacles to Gulf Coast Recovery*, *supra* note 5 (statement of Donna Fraiche, Chair, Long-Term Cmty. Planning Task Force, La. Recovery Auth.) (reasoning that while the environmental review requirement may be appropriate for large construction projects, it was inappropriate for home repairs not even intended to enlarge the footprint of a home that existed before the 2005 hurricanes).

before commencing repair and rehabilitation.<sup>93</sup> The State of Louisiana had no choice but to change its entire program based on HUD's conception of the Road Home program.<sup>94</sup> If the state jettisoned its plans for a repair and rehabilitation program, and instead, classified the Road Home program as a "compensation program," then no property-by-property environmental review would be required.

Putting aside consideration of the urgent need of displaced families to begin essential house repairs following a disaster, the logistical weight of this lot-by-lot environmental review burden would have been unprecedented.<sup>95</sup> In the city of New Orleans alone, more than 41,000 homeowners wished to stay in place and repair their homes.<sup>96</sup> As a result of the enormous number of environmental reviews that would have to be completed to allow the "construction" program to go forward, the state changed the homeowner assistance portion of their program to a "compensation" grant program.<sup>97</sup> The difference between the "construction" and "compensation" programs would appear, on the surface, to be just a matter of semantics. After all, in both cases, homeowners would receive tens of thousands of dollars to help them rebuild.<sup>98</sup> However, the impact "on the ground" of how the "compensation" program played out was far reaching. In planning the proposed, but later rejected, homeowner rehabilitation and repair program, the state had arranged for financial institutions to serve as escrow agents to hold grant funds and to disburse those funds in stages as work was completed.<sup>99</sup> However, the "compensation" program the state ultimately implemented involved homeowners receiving a lump sum check.<sup>100</sup> The homeowners then deposited

---

93. See *id.* (remarking that the state decided to shelve its plans for a repair program, despite its advantages, because it did not want to subject citizens to the cost and burden associated with delay caused by the environmental review. She added that "[t]his redesign of our program was unfortunately necessary so the program could be implemented as quickly as possible . . .").

94. See *Road Home?*, *supra* note 10 (statement of Susan Elkins, State of La., Div. of Admin., Office of Cmty. Dev., Disaster Recovery Unit).

95. On average, 50,000 EAs are completed nationwide each year. See *infra* note 144. Performing an EA on every property to which the State of Louisiana was giving a compensation grant would have resulted in more than 127,000 EAs—two-and-a-half times the number of EAs completed in all fifty states during any given year. See *infra* note 107.

96. See, TRANSITION NEW ORLEANS TASK FORCE, *supra* note 18, at 18.

97. *Removing Obstacles to Gulf Coast Recovery*, *supra* note 5 (statement of Donna Fraiche, Chair, Long-Term Cmty. Planning Task Force, La. Recovery Auth.).

98. *Id.* (explaining that "Road Home compensation benefits are determined by calculating the lesser of the uncompensated damage cost or the uncompensated loss of value up to \$150,000.").

99. See *Road Home?*, *supra* note 10 (statement of Susan Elkins, State of La., Div. of Admin., Office of Cmty. Dev., Disaster Recovery Unit) (recounting that Louisiana lending institutions had "agreed to manage disbursement accounts and provide construction management services" to homeowners participating in the then-proposed Road Home program).

100. LA. OFFICE OF CMTY. DEV., ACTION PLAN AMENDMENT 14 (FIRST ALLOCATION)—ROAD HOME HOMEOWNER COMPENSATION PLAN 2-5 (2007), available at [http://www.doa.louisiana.gov/cdbg/dr/plans/Amend14-Homeowner-Compensation\\_Approved\\_07-05-14.pdf](http://www.doa.louisiana.gov/cdbg/dr/plans/Amend14-Homeowner-Compensation_Approved_07-05-14.pdf). See also Gary Scheets, *Road Home Faces Detour*, TIMES PICAYUNE (Apr. 2, 2007), [http://blog.nola.com/topnews/2007/04/road\\_home\\_faces\\_detour.html](http://blog.nola.com/topnews/2007/04/road_home_faces_detour.html) (reporting that "[t]he federal department of Housing and Urban

that check in their personal bank accounts and were left to pay contractors. Unfortunately, many homeowners agreed to pay unscrupulous contractors up front.<sup>101</sup> A survey of homeowners who received these checks indicated that thousands may have been victimized by contractor fraud.<sup>102</sup>

*C. Efficient Implementation of Required Lot-by-Lot Environmental Reviews Demanded Resources and Advance Planning Often Absent in the Post-Disaster Context*

Unlike the homeowner “compensation” program following Katrina, the State of Louisiana did not have any alternative regarding compliance with the federal environmental review requirement in the case of properties purchased by the State of Louisiana through the Road Home program. The State of Louisiana was required to perform an EA on each property that it purchased from homeowners through the Road Home buyout program.<sup>103</sup> That interpretation meant that the state had to arrange for completing separate reviews of more than 10,600 homes throughout the state and more than 4700 in New Orleans alone.<sup>104</sup>

Another critical consideration preoccupied the State of Louisiana. Funded by federal CDBG grant dollars and named the Road Home program, Louisiana’s main housing recovery program offered homeowners whose houses were damaged by Katrina and Rita the opportunity to receive money to repair their homes or to sell their homes to the state.<sup>105</sup> The great majority of Louisiana homeowners decided to rebuild.<sup>106</sup> However, beginning in 2006, thousands decided to sell.<sup>107</sup> The state had an enormous challenge in rolling out

Development recently ruled that the rebuilding and buyout program for flood-damaged homes violated federal rules by mandating the installments without submitting to the costly environmental” review).

101. See *The Role of the Community Development Block Grant Program in Disaster Recovery*, *supra* note 15 (statement of D. Duval-Diop).

102. See *id.*; see also Richard Rainey, *Road Home Policy Changes Could Free More Aid for Louisiana Homeowners*, TIMES PICAYUNE, May 15, 2013, [http://www.nola.com/politics/index.ssf/2013/05/road\\_home\\_policy\\_changes\\_could.html](http://www.nola.com/politics/index.ssf/2013/05/road_home_policy_changes_could.html) (reporting that the State of Louisiana planned to assist certain homeowners who had initially received Road Home compensation grants but who lost all or a portion of those grants due to circumstances including contractor fraud).

103. See *The Role of the Community Development Block Grant Program in Disaster Recovery*, *supra* note 15 (opening statement of Sen. Mary Landrieu).

104. Mark Schleifstein, *Even Greater Recovery Ahead, Demographer Says \$20 Billion Remains to Be Invested in New Orleans*, TIMES PICAYUNE, Mar. 25, 2010, available at 2010 WLNR 6163752; see Telephone Interview with Cathleen Carney, La. Land Trust (Feb. 1, 2012).

105. The Road Home Program consisted of three choices: Option 1 (stay in your home and repair it, which is referred to in this Part of the Article as the “compensation” program), Option 2 (sell your home to the state but relocate in-state), and Option 3 (sell your home to the state but leave the state). See Kimberly Quillen, *Road Home Has Three Options*, TIMES PICAYUNE (Nov. 26, 2007, 3:28 PM), [http://blog.nola.com/answerspot/2007/11/road\\_home\\_has\\_three\\_options.html](http://blog.nola.com/answerspot/2007/11/road_home_has_three_options.html).

106. See *Removing Obstacles to Gulf Coast Recovery*, *supra* note 5 (statement of Donna Fraiche, Chair, Long-Term Cmty. Planning Task Force, La. Recovery Auth.) (noting that 123,000 Louisiana homeowners decided to participate in the state’s “compensation” program).

107. See *supra* note 104 and accompanying text.

its federally funded homeowner buyout and homeowner compensation programs.<sup>108</sup> Performing EAs on the buyout properties was not a priority.<sup>109</sup>

If homeowners chose to sell to the state, the Road Home program maintained the buyout property until the property could either be sold or transferred to the parish government for sale through parish-run programs.<sup>110</sup> More than 10,600 homeowners—or roughly one in twelve homeowners who suffered hurricane damage throughout Louisiana—sold to the state.<sup>111</sup> More than 4700 of those who opted for state buyouts lived in New Orleans.<sup>112</sup>

From its 2006 inception, the State's Road Home program intended that homeowner buyout properties would, in most cases, be returned to the parish government for redevelopment or community use.<sup>113</sup> However, no provision was then made to begin EAs.<sup>114</sup> This delay in commencing the reviews may have been due, in part, to the fact that completing an EA required the parish to designate a future use for the buyout properties. Thus, the state could not begin to return the first buyout property to the local government, here a parish, until it had approved a redevelopment and disposition plan,<sup>115</sup> and further, until the state<sup>116</sup> and the federal government approved the plan.<sup>117</sup> Then, finally, at that

---

108. The State of Louisiana's Road Home Program proved to be the largest single housing recovery program in American history. See Disaster Relief Unit, *Road Home Covenant Leases*, STATE OF LA., <http://www.doa.louisiana.gov/cdbg/DR/RHcovenantrelease.htm> (last visited Nov. 6, 2013); *Hearing Before the Ad Hoc Subcomm. on Disaster Recovery of the S. Comm. on Homeland Sec. and Gov't Affairs*, 111th Cong. (2010) (testimony of Paul Rainwater, Comm'r of Admin., State of La.), [www.hsgac.senate.gov/download/rainwater-testimony](http://www.hsgac.senate.gov/download/rainwater-testimony) (describing the Road Home Program as the "largest rebuilding program . . . in American history" serving "[m]ore than 127,000" people and dispensing more than \$8.6 billion).

109. See Cohen, *supra* note 78 (documenting State of Louisiana officials' acknowledgment of the regrettable delay in commencing environmental reviews despite the federal government's repeated urgings that the state begin the process).

110. Parishes had to wait until 2009 to begin receiving and disposing of the Road Home properties as the State of Louisiana had not processed the Road Home buyout properties through the environmental review process. See Mark Waller, *Parish Ready to Sell Road Home Lots But Officials Face State, Federal Blocks*, TIMES PICAYUNE, July 22, 2008, available at 2008 WLNR 12637562. The parishes then disposed of properties through sale to the public or held the properties for public use, including green space. See *id.*

111. See *supra* note 104 and accompanying text.

112. In March 2010, the Road Home Corporation held title to 10,168 properties. Approximately 48 percent of those properties were in New Orleans. See Schleifstein, *supra* note 104.

113. See LA. OFFICE OF CMTY. DEV., ACTION PLAN AMENDMENT ONE 5–6, 12 (2006), available at [http://www.doa.la.gov/cdbg/dr/plans/Amend1-RoadHome-Approved\\_06\\_05\\_11.pdf](http://www.doa.la.gov/cdbg/dr/plans/Amend1-RoadHome-Approved_06_05_11.pdf).

114. The state waited almost three years after Hurricane Katrina's landfall and more than two years after the inception of the Road Home Program to issue a request for proposal to retain an environmental consultant to complete the environmental reviews on the thousands of buyout properties. See Cohen, *supra* note 78.

115. See, e.g., PARISH REDEVELOPMENT AND DISPOSITION PLAN FOR LOUISIANA LAND TRUST PROPERTIES 6 (2007) (on file with author) [hereinafter PARISH REDEVELOPMENT PLAN] (recounting that the New Orleans City Council approved in December 2007 a disposition plan for the state, enumerating the New Orleans Redevelopment Authority's key disposition principles for returning the parish's 4700-plus Road Home properties to commerce).

116. See LA. OFFICE OF CMTY. DEV., ACTION PLAN AMENDMENT TWENTY 1 (2008), available at <http://www.doa.louisiana.gov/cdbg/dr/plans/Amend20-Approved-Property-Disposition-08-08-13.pdf>.

point, the state could commence the environmental review.

The future-use designation and disposition plan approval tasks assigned to each level of government do not seem that burdensome. Like the state, however, Louisiana's hurricane-devastated parishes were understandably preoccupied with picking up the pieces from the catastrophic impact of two hurricanes. While repairing and rebuilding their own homes, the local government staff members were focused on sewing together the basic fabric of municipal infrastructure: repairing traffic lights, repaving streets, cleaning debris from storm drains, and other such tasks. At a time when every local government and each state agency was overextended, the immense scale of the disaster-related tasks that required coordination, such as making future land use designations and approving disposition plans, were much harder to complete.

In December 2007, the state approved Orleans Parish's detailed property disposition plan to reuse and redevelop the 4700 Louisiana Land Trust (LLT) properties.<sup>118</sup> However, during this twenty-eight-month period following Katrina, no progress had been made in beginning the lot-by-lot EAs that would allow each of the thousands of properties to be sold and redeveloped.<sup>119</sup> More than thirty months following Hurricanes Katrina and Rita, the state and HUD were still working to resolve basic questions about who would conduct environmental reviews on thousands of properties acquired through the Road Home Program and how the review would be conducted.<sup>120</sup> It would be another seven months, November 2008, before the first batch of 137

---

117. The federal government had not approved the disposition plan almost three years after Katrina. See Mark Waller, *Parish Ready to Sell Road Home Lots But Officials Face State, Federal Blocks*, TIMES PICAYUNE, July 22, 2008, available at 2008 WLNR 13637562.

118. See LA. RECOVERY AUTH., A RESOLUTION TO APPROVE THE ORLEANS PARISH ROAD HOME PROPERTY DISPOSITION PLAN (2007), available at [http://lra.louisiana.gov/assets/other/by\\_month/Dec07/OrleansRHPropDispRes.pdf](http://lra.louisiana.gov/assets/other/by_month/Dec07/OrleansRHPropDispRes.pdf). In the city of New Orleans, more than 4700 homeowners would decide to sell to the Road Home Corporation between 2006 and 2010. This total constituted a very large inventory of homes for the New Orleans real estate market, more than two times the total number of housing units that sold in the private New Orleans market in an entire year. See NEW ORLEANS METROPOLITAN AREA ASS'N OF REALTORS, RESIDENTIAL SINGLE FAMILY HOME SALES 13-18 (2010) (on file with author) (reporting 2249 total home sales in Orleans Parish between April 2009 and March 2010).

119. See PARISH REDEVELOPMENT PLAN, *supra* note 115. The exact number of New Orleans residents who would sell to their homes through the Road Home program was not known in 2007. The program stopped accepting applications from homeowners seeking buyouts in July 2007. See Gary Scheets, *Road Home Closing Door July 31*, TIMES PICAYUNE (May 31, 2007, 8:38 AM), [http://blog.nola.com/topnews/2007/05/road\\_home\\_closing\\_door\\_july\\_31.html](http://blog.nola.com/topnews/2007/05/road_home_closing_door_july_31.html). The state, however, continued to close on properties located in New Orleans for months thereafter and the number of buyout properties purchased by the state grew from 4200 in July 2008 to approximately 4500 in July 2009. Cohen, *supra* note 78; David Hammer, *Aid Extended to Storm Recovery—HUD Reinterprets Stimulus Money Law*, TIMES PICAYUNE, July 14, 2009, available at 2009 WLNR 13354610.

120. Letter from Manuel T. Ochoa, Deputy Assistant Sec'y for Grant Programs to Suzie Elkins, Exec. Dir., Office of Cmty. Dev. (Apr. 21, 2008) (on file with author) ("This guidance incorporates and expands upon the previous guidance and focuses on two aspects of the environmental review for the disposition process . . . [including] [w]ho is responsible for conducting the required environmental review?").

environmental reviews were completed.<sup>121</sup> It would then be four more months before the LTT, the City of New Orleans, and the New Orleans Redevelopment Authority could finalize an agreement to allow for transfer of the first state-owned properties to developers.<sup>122</sup>

*D. Problems with Efficient Implementation of the NEPA-Required Lot-by-Lot Environmental Review Undermined the Long-Term Recovery's Progress*

The State's decision to require property-by-property NEPA EAs for each of the 10,600 LLT properties and its implementation of that decision had three impacts on New Orleans's progress toward long-term recovery: slower neighborhood recovery and repopulation, deferred private investment in neighborhoods, and financial cost.

*1. Delayed Neighborhood Recovery:*

The fifteen-month delay between the State's approval of Orleans Parish's LLT property disposition plan and the sale of the first LLT property retarded recovery of the city's hardest hit neighborhoods.<sup>123</sup> New Orleans's low-lying neighborhoods suffered the most storm damage.<sup>124</sup> These were also the neighborhoods with some of the highest concentrations of state buyout or LLT properties.<sup>125</sup> The lag in returning these LLT properties to commerce not only reinforced the neighborhood's blighted and dilapidated appearance,<sup>126</sup> but it negatively impacted the city's African American families living and trying to rebuild in those neighborhoods.<sup>127</sup> With a few notable exceptions, the

121. See Cohen, *supra* note 78. The LLT retained an environmental review contractor early in the fall of 2008 and the first 178 Orleans Parish environmental reviews were complete in November 2008, almost thirty-nine months after Katrina and the ensuing levee breaches destroyed much of New Orleans. See Bill Barrow, *Properties' Transfer to Parish OK'd—137 Parcels Are Storm-Damaged*, TIMES PICAYUNE, Nov. 19, 2008, available at 2008 WLNR 22059069.

122. See David Hammer, *State, Local Leaders Cheer Clearing of Pontilly Lots Citizen Involvement Called a Key Driver of Progress*, TIMES PICAYUNE, Mar. 21, 2009, available at 2009 WLNR 5359378.

123. See *supra* notes 119–122 and accompanying text.

124. A map of the low-lying neighborhoods that flooded when the levees breached may be found at GREATER NEW ORLEANS COMMUNITY DATA CENTER, ORLEANS PARISH SEPT 11TH FLOOD EXTENT WITH NEIGHBORHOODS & MAJOR ROADS (2005), available at <http://www.columbia.edu/itc/journalism/cases/katrina/GNOCDC/GNOCDC%20Orleans%20Flood%20Extent.pdf>.

125. Orleans Parish's 4700 LLT properties were almost all located in neighborhoods that flooded. Those neighborhoods are illustrated on the Greater New Orleans Community Data Center's map of the September 11 flood extent. See *id.*

126. See *The Role of the Community Development Block Grant Program in Disaster Recovery*, *supra* note 15 (statement of D. Duval-Diop). The neighborhoods in which the state bought a large proportion of homes through Road Home's buyout option are mired in blight. This has an effect on the people who have chosen to stay and rebuild and are already facing the adversity of not having quite enough money to fund complete rehab of their homes. See *id.*

127. Vacancy and abandonment also diminish home values and could potentially lead to higher insurance rates. In turn, diminished homeowner returns caused businesses to delay openings. In short, neighborhoods that have high rates of abandonment and vacancy put an economic drag on the

neighborhoods that endured the most severe flooding were home to lower- and middle-income African American families.<sup>128</sup> The greatest numbers, though certainly not all, of LLT properties were in these same neighborhoods, including the Seventh Ward, the Lower Ninth Ward, the Upper Ninth Ward, Leonidas, New Orleans East, Pontchartrain Park, and Gentilly Woods.<sup>129</sup> Although low- and middle-income families certainly faced financial hurdles to purchasing LLT properties in these neighborhoods, the LLT properties presented reasonably priced housing options.<sup>130</sup>

Some of the major forces in redevelopment of LLT properties in low- and middle-income neighborhoods were nonprofit corporations and foundations focused on rebuilding the affordable housing stock in New Orleans's hardest-hit neighborhoods.<sup>131</sup> These developers were unable to purchase LLT

---

community. See *Implementation of the Road Home Program Four Years After Hurricane Katrina: Field Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. (2009) (testimony of Ommeed Sathe, Dir. of Real Estate Strategy, New Orleans Redevelopment Auth.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hrg53250/html/CHRG-111hrg53250.htm>.

128. See Laurie A. Morin, *A Tale of Two Cities: Lessons Learned from New Orleans to the District of Columbia for the Protection of Vulnerable Populations from the Consequences of Disaster*, 12 UDC/DCSL L. REV. 45, 48 (2009). See also Larkin M. Moore, *Stranded Again: The Inadequacy of Federal Plans to Rebuild an Affordable New Orleans after Hurricane Katrina*, 27 B.C. THIRD WORLD L.J. 227, 233 (quoting James Dao, *Study Says 80% of New Orleans Blacks May Not Return*, N.Y. TIMES, Jan. 26, 2006, at A18). Eighty percent of New Orleans suffered significant flooding, impacting approximately 354,000 people in those flooded neighborhoods. The residents of those neighborhoods were overwhelmingly African American (75 percent), with a high level of poverty (29 percent), and a significant unemployment rate (10 percent). See Moore, *supra*, at 233.

129. These neighborhoods are shown on the Greater New Orleans Community Data Center's map of the September 11 flood extent. See GREATER NEW ORLEANS COMMUNITY DATA CENTER, *supra* note 124.

130. LLT buyout properties were all located in neighborhoods recovering from complete or widespread destruction. Therefore, the price points on the buyout properties became depressed compared to their pre-storm values. See NEW ORLEANS REDEVELOPMENT AUTH., SUSTAINABLE STABILIZATION: A PATH TO RECOVERY, NEW ORLEANS CONSORTIUM NSP-2 APPLICATION TO U.S. DEP'T OF HOUS. & URBAN DEV. 5 (2009), available at [http://www.noraworks.org/public/files/general-uploads/NSP2\\_NORA-APP-072209.pdf](http://www.noraworks.org/public/files/general-uploads/NSP2_NORA-APP-072209.pdf).

131. See THE NEW ORLEANS REDEVELOPMENT AUTHORITY, PARTNER, IMPLEMENT, EXECUTE 13-20 (on file with author). The New Orleans Redevelopment Authority supplemented programs selling buyout properties to individuals with initiatives that promoted clustered redevelopment through disposition of larger volumes of properties to nonprofit developers by competitive requests for proposals and land swaps. See *id.* The first sale of Orleans Parish LLT properties was to Make It Right Foundation, which was then beginning its commitment to build 150 affordable, highly energy efficient homes in the Lower Ninth Ward Neighborhood. See *infra* note 233. This project was spearheaded by actor Brad Pitt. See Annette Sisco, *Let Brad Do It: New Orleans Officials Should Continue Forging Partnership with Private Entities*, TIMES PICAYUNE (Mar. 29, 2009), [http://blog.nola.com/editorials/2009/03/let\\_brad\\_do\\_it.html](http://blog.nola.com/editorials/2009/03/let_brad_do_it.html). Other nonprofit developers and foundations had similar commitments to the city's flooded low- and middle-income neighborhoods. Project Home Again has completed its initial commitment to build 100 homes in the Gentilly neighborhood. See Rebecca Mowbray, *Project Home Again Finishes 100 homes in Gentilly—Plus 1 for Lagniappe*, TIMES PICAYUNE (Nov. 10, 2011), [http://www.nola.com/katrina/index.ssf/2011/11/project\\_home\\_again\\_finishes\\_10.html](http://www.nola.com/katrina/index.ssf/2011/11/project_home_again_finishes_10.html). Samaritan's Purse spearheaded rehabilitation of twenty properties in the Upper Ninth Ward neighborhood. See *infra* note 135.

properties and begin development activities until March 2009.<sup>132</sup> As a result, there were fewer homes in these neighborhoods available for purchase by low- and middle-income African American families.<sup>133</sup>

## 2. *Slowed Capital Infusion*

The delays associated with completing thousands of individual environmental reviews meant that private sector investments in LLT property redevelopment were slowed by up to a year or more.<sup>134</sup> It is also true that rehabilitating and developing homes during the 2008 financial crisis presented a special challenge for families and private developers who could not tap donations or philanthropic funds to finance construction.<sup>135</sup> House prices in recovering neighborhoods were substantially depressed from their pre-storm value.<sup>136</sup> Further, the LLT properties available for sale in Orleans Parish were available at appraised value, and the local government, with HUD approval, made substantial discounts available to qualified purchasers.<sup>137</sup>

---

132. See NEW ORLEANS REDEVELOPMENT AUTH., PRESENTATION TO LOUISIANA RECOVERY AUTHORITY BOARD MEETING 14, (2009), available at <http://www.lra.louisiana.gov/assets/docs/searchable/meetings/2009/Board%20Meeting%2010-21-09/NORALLT10-21-09.pdf>.

133. See Lolita Buckner Inniss, *A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina*, 27 B.C. THIRD WORLD L.J. 325, 333–34 (2007). Following Katrina, the slow rate of return of black residents to New Orleans was caused in part by the absence of affordable housing. See *id.* See also Justine M. Cannon, Comment, *Accountability in Reconstruction: The Need for Federal Involvement in Post-Disaster Reconstruction to Protect Housing Interests of Poor and Minority Residents*, 47 SANTA CLARA L. REV. 93, 104 (2007). In 2010, nearly 75 percent of the population (approximately 343,829 residents) had returned. The ranks of those who had not returned were disproportionately African American. More than 118,000 African Americans who called New Orleans home had not yet returned. See David A. Marcello, *Bringing New Orleans Home: Community, Faith, and Nonprofit-Driven Housing Recovery*, in RESILIENCE AND OPPORTUNITY: LESSONS FROM THE U.S. GULF COAST AFTER KATRINA AND RITA 101, 113 (Amy Liu et al. eds, 2011). Generally speaking, the housing crisis for renters and homeowners was more acute in the black population because “[a]long the Gulf Coast, about 46 percent of the population in damaged areas was black, compared with 26 percent in non-damaged areas.” Michelle R. Smith, *Study: New Orleans Could Lose Most of Black Population*, AP ALERT—LA., Jan. 26, 2006. See also Josephine Ross, *Still in Limbo: The Continuing Failed Response to Katrina*, 51 HOW. L.J. 565, 578–79 & n.65 (2008).

134. The New Orleans Redevelopment Authority’s (NORA) partnerships with nonprofit developers did not gain significant traction until March 2009, when the state made the first tranche of properties available for projects with partners including Project Home Again, Make It Right, and Samaritan’s Purse. See NEW ORLEANS REDEVELOPMENT AUTH., *supra* note 132, at 14.; Valerie Faciane, *Neighborhood Rising Again: A Ministry and a Church Team Up to Bring Back an Entire Community*, TIMES PICAYUNE, Apr. 12, 2009, <http://www.nola.com/timespic/stories/index.ssf?/base/news-12/1239514281234080.xml&coll=1> (describing Samaritan’s Purse’s wish to acquire fifty properties from NORA). However, only 200 closings on LLT properties had occurred by October 2009. See NEW ORLEANS REDEVELOPMENT AUTH., *supra*, at 14.

135. See, e.g., NEW ORLEANS REDEVELOPMENT AUTH. *supra* note 130, at 5 (summarizing that the financial crisis, which began in the fall of 2008, “exacerbate[ed] blight by impeding families’ ability to obtain rehabilitation loans from banks to restore storm damaged properties”).

136. See *id.*

137. The LLT properties in Orleans Parish, including the LLT properties offered under NORA’s Lot Next Door program, were sold for their appraised value. See *FAQs*, NEW ORLEANS REDEVELOPMENT AUTHORITY, <http://www.noraworks.org/index.php/faqs/P15> (last visited Aug. 9,



One of the most popular programs for selling LLT properties did not even involve building or rehabilitating LLT properties. The City of New Orleans's Lot Next Door Ordinance, which was enacted in April 2007, gave homeowners living immediately to the right or left of vacant LLT properties a limited right of first refusal to purchase the vacant home or lot.<sup>138</sup> The New Orleans Redevelopment Authority (NORA) created a special program to encourage participation in the Lot Next Door Program<sup>139</sup> that promoted redeveloping adjacent LLT properties as green space.<sup>140</sup> The "Growing Home" incentive program gave purchasers of LLT properties up to a \$10,000 discount on the price of a flood-damaged property, if purchasers agreed to invest the amount of their discount in greening and fencing the LLT property.<sup>141</sup> Considered individually, a homeowner's investment of up to \$10,000 in grading a lot and planting trees or shrubs would have a small impact on the local economy.<sup>142</sup> But when aggregated, these individual homeowner investments might result in significant cash flow to local retailers and small businesses, including home and garden centers.<sup>143</sup> Further, a slow residential recovery and a slow return of families to New Orleans's flooded neighborhoods also hindered commercial recovery.<sup>144</sup> Retailers and business owners were hesitant to invest in

---

2013). See also Deidra L. Godfrey, La. Bd. of Ethics, Ethics Advisory Opinion to Chris Gobert, Counsel, New Orleans Redevelopment Auth., (Aug. 20, 2010), available at <http://domino.ethics.state.la.us/EthicRu2.nsf/ecfd553acd8f6446862567f9006e60b6/a72888f65b81574e862577ac00508136> (stating NORA's policy that the purchase price for LLT properties is based on an appraisal of fair market value and is nonnegotiable). Under NORA's Lot Next Door Growing Home program, Orleans Parish residents may receive up to a \$10,000 discount on the lot price below the fair market value. See *NORA News: Q & A with NORA's New Executive Director*, NEW ORLEANS REDEVELOPMENT AUTHORITY, <http://dev2.noraworks.org/news/q-a-with-noras-new-executive-director> (last visited Aug. 9, 2013).

138. See NEW ORLEANS, LA., ORDINANCE 22605 (2007), available at [http://www.noraworks.org/public/files/general-uploads/LND\\_Ordinance1.pdf](http://www.noraworks.org/public/files/general-uploads/LND_Ordinance1.pdf).

139. See *Replanting New Orleans*, AM. CITY & COUNTY, Sept. 1, 2010, <http://americancityandcounty.com/administration/new-orleans-greenspace-201009>.

140. See *infra* note 142 and accompanying text.

141. See NEW ORLEANS REDEVELOPMENT AUTH., LOT NEXT DOOR POLICIES AND PROCEDURES 6 (2010) (on file with author) [hereinafter LOT NEXT DOOR POLICIES AND PROCEDURES] ("Through 'Growing Home' [Lot Next Door] purchasers can receive up to a \$10,000 credit towards a qualifying Lot Next Door property for landscaping improvements.").

142. See *id.* NORA estimated the average Lot Next Door Growing Home Program credit at \$8,000 to \$9,000. See Michelle Krupa, *Anti-Blight Program Lot Next Door Reaches 1,000 Purchase Agreements in New Orleans*, TIMES PICAYUNE, June 13, 2011, [http://www.nola.com/politics/index.ssf/2011/06/anti-blight\\_program\\_lot\\_next\\_d.html](http://www.nola.com/politics/index.ssf/2011/06/anti-blight_program_lot_next_d.html).

143. Between 2009 and 2011 NORA agreed to sell 1000 LLT properties to adjacent property owners through the Lot Next Door Program. See Krupa, *supra* note 142. If the average Lot Next Door Growing Home participant spends his \$8,000 to \$9,000 credit locally, then the total impact to the local economy could have approached \$8 million to \$9 million.

144. Part of the blame for the glacially slow return of businesses and stores to flood-damaged neighborhoods falls on the City of New Orleans. The city government did not make early progress in bringing back the commercial and personal services resources that help bring families back to neighborhoods, including grocery stores, health clinics, etc. See ANNA LIVIA BRAND & KARL SEIDMAN, MASS. INST. OF TECH., *ASSESSING POST-KATRINA RECOVERY IN NEW ORLEANS: RECOMMENDATIONS FOR EQUITABLE REBUILDING 4-5* (2008) (research report for the Massachusetts Institute of Technology

neighborhoods that failed to show reinvestment activity.<sup>145</sup>

There are many statistics that help assess New Orleans's long-term recovery.<sup>146</sup> Some data highlight the factors that have promoted recovery and other data identify those that have not. One statistic that deserves close examination concerns the results of the State of Louisiana's NEPA EAs. After receiving more than 10,600 reviews on the storm-damaged residential properties, the LTT learned that just one of those properties—0.001 percent of those studied—could not be redeveloped as a residential property.<sup>147</sup> That one home, located in rural Terrebonne Parish, was found to be sited in a known floodway.<sup>148</sup>

The results of the post-Katrina EAs on single-family, largely urban and suburban home sites are not surprising. In performing an EA on urban and suburban lots improved as single-family residential homes for a minimum of thirty years and up to 180 years, it is unlikely that recommitting properties to residential uses is going to implicate NEPA's concerns with considerations such as wetlands, prime farmlands, or wild and scenic rivers.<sup>149</sup> The most significant EA concerns, and the ones easiest to isolate, were whether a property was located in an historic district or was situated in a place with known archaeological resources.<sup>150</sup> In short, where a sample size of 10,600

Department of Urban Studies and Planning). Retailers and restaurants count rooftops. Lydia DePillis, *If You Rebuild It, They Might Not Come: Brad Pitt's Beautiful Houses Are a Drag on New Orleans*, NEW REPUBLIC, Mar. 13, 2013, <http://www.newrepublic.com/article/112620/brad-pitts-make-it-right-houses-drag-new-orleans> (arguing that “[r]etailers and restaurants need to see earning potential in order to invest in a neighborhood, and at this point, the roster of returnees isn't deep”).

145. See DePillis, *supra* note 144.

146. See, e.g., ALLISON PLYER ET AL., GREATER NEW ORLEANS CMTY. DATA CTR., NEW ORLEANS INDEX AT EIGHT: MEASURING GREATER NEW ORLEANS' PROGRESS TOWARD PROSPERITY (2013), available at [https://gnocdc.s3.amazonaws.com/reports/GNOCDC\\_NewOrleansIndexAtEight.pdf](https://gnocdc.s3.amazonaws.com/reports/GNOCDC_NewOrleansIndexAtEight.pdf); News Release: *Facts for Features: Hurricane Katrina Impact*, GREATER NEW ORLEANS CMTY. DATA CTR., <http://www.gnocdc.org/Factsforfeatures/HurricaneKatrinaImpact/index.html> (last updated Aug. 14, 2013) (In December 2005, less than four months following Hurricane Katrina, the Brookings Institution Metropolitan Policy Program began publishing *The Katrina Index*. The purpose of the index is to track the recovery of the New Orleans metro area with indicators measuring population, economy, housing, and infrastructure. In 2007, the Greater New Orleans Community Data Center began to co-publish the index. The last iteration of the Index was published in August 2013.).

147. Roughly 50,000 environmental assessments are completed in any one year. See *Environmental Assessment*, NAT'L PRESERVATION INST., <http://www.npi.org/NEPA/assessment> (last visited Feb. 10, 2014). This suggests that, during the 2008, 2009, and 2010 calendar years, a significant portion of the nation's environmental assessments were completed in southern Louisiana.

148. See Telephone Interview with Cathleen Carney, *supra* note 104.

149. See 24 C.F.R. § 58.5 (2013). In completing the EA, the state must certify that its sale of the former residential property for future residential purposes does not run afoul of federal laws protecting wetlands, clean air, clean water, endangered species, and other laws and executive orders. See *id.* The state must complete the review even though the property subject to review is located within a redeveloping urban neighborhood.

150. The locations of New Orleans historic properties are well known to the local government. See BRING NEW ORLEANS BACK COMM'N, URBAN PLANNING COMM., ACTION PLAN FOR NEW ORLEANS: THE NEW AMERICAN CITY 9 (2006) (noting that New Orleans includes nineteen historic districts on the National Register, which contain 38,000 properties, and Hurricane Katrina's winds and floodwaters damaged up to 25,000 of those properties); see also Michelle Krupa, *New Orleans Neighborhoods That*

EAs yields a single undevelopable residential property, there is a question whether HUD's regulations should permit an area-wide EA, as opposed to a lot-by-lot EA. The current NEPA environmental review process's failure to fully appreciate the existence of well-documented urban conditions may have delayed a critical part of New Orleans recovery.

One of the major challenges for a city's long-term recovery following a disaster is to recover its pre-storm population that was temporarily displaced or permanently lost.<sup>151</sup> Lacking residents, cities cannot support as many businesses that operated prior to the disaster. However, local governments with a diminished tax base are forced to serve a city that has not contracted its boundaries.<sup>152</sup> New Orleans's progress toward recovery eight years after Katrina is mixed.<sup>153</sup> The city is lagging in the very same area—housing—where the federal government made its unprecedented investment in housing and neighborhood recovery.<sup>154</sup> New Orleans's challenge in recovering its pre-storm population numbers raises an important question for the future: What improvements can be made to remove impediments to the federally funded recovery process? This is a question that may no longer be critical in New Orleans, but is of considerable importance to jurisdictions in New York, New Jersey, and Connecticut recovering from Hurricane Sandy, as well as communities that may be caught in the crosshairs of the next hurricane,

---

*Suffered Worst Flooding Lost Most Residents, Census Data Show*, TIMES PICAYUNE, Feb. 6, 2011, [http://www.nola.com/politics/index.ssf/2011/02/new\\_orleans\\_neighborhoods\\_that.html](http://www.nola.com/politics/index.ssf/2011/02/new_orleans_neighborhoods_that.html) (explaining that flood waters spread persistent blight beyond older neighborhoods west of the Industrial Canal into the city's newer neighborhoods, such as Gentilly and Lakeview).

151. New Orleans suffered an enormous population loss following Katrina. *See Press Release: Hurricane Katrina Impact*, GREATER NEW ORLEANS COMMUNITY DATA CENTER (Aug. 19, 2011), <http://www.gnocdc.org/Factsforfeatures/HurricaneKatrinaImpact/index.html> (explaining that Katrina caused the displacement of nearly the city's entire population and a year after the storm was still less than half its pre-storm size, as evidenced by New Orleans's population falling "from 484,674 before Katrina . . . to an estimated 208,548 after Katrina"). New Orleans had regained roughly half its population loss by the 2010 Census. *See Michelle Krupa, New Orleans Official 2010 Census Population is 343,829, Agency Reports*, TIMES PICAYUNE, Feb. 22, 2011, [http://www.nola.com/politics/index.ssf/2011/02/new\\_orleans\\_officials\\_2010\\_pop.html](http://www.nola.com/politics/index.ssf/2011/02/new_orleans_officials_2010_pop.html).

152. *See, e.g., After Katrina*, URB. INST., <http://www.urban.org/afterkatrina/index.cfm> (last visited Aug. 8, 2013) (claiming that Katrina exacerbated New Orleans pre-storm troubles with a weak tax base).

153. On the one hand, New Orleans residents still report that they feel vulnerable and do not fully trust that government has addressed the fundamental oversights that precipitated Katrina's levee breaches and the resulting damage. *See Ingrid Norton, Reports from the Frontlines of Disaster Recovery & Community Resilience*, in BUILDING COMMUNITY RESILIENCE POST-DISASTER xxxv-vi (Dorcas R. Gilmore & Diane M. Standaert eds., 2013). On the other, there are positive indicators associated with the recovery, including a budding entrepreneurial community. *See Mark Waller, The Atlantic Magazine Finds Much Enthusiasm for Entrepreneurship in New Orleans, But a Start-up Hub Still in Its Infancy*, TIMES PICAYUNE, Apr. 8, 2013, [http://www.nola.com/business/index.ssf/2013/04/the\\_atlantic\\_magazine\\_finds\\_mu.html](http://www.nola.com/business/index.ssf/2013/04/the_atlantic_magazine_finds_mu.html).

154. To be sure, some of the recovery's shortcomings can be attributed to the 2008 economic meltdown, which included the collapse of the housing sector and contraction of credit markets as well as the mortgage foreclosure crisis, and the 2010 Deepwater Horizon oil well explosion and spill. *See Amy Liu, New Orleans's New Winds of Change*, NEW REPUBLIC, Aug. 28, 2009, <http://www.newrepublic.com/blog/the-avenue/new-orleans%E2%80%99-new-winds-change>.

earthquake, or tsunami.

### 3. Cost

Recovering communities incur expense complying with regulatory requirements. The 10,600 required NEPA environmental reviews cost the State of Louisiana millions in federal CDBG long-term recovery funds.<sup>155</sup> Considering not a single property in the city of New Orleans was determined by the review to be undevelopable, it bears evaluating what would be the most efficient and cost effective manner to carry out this regulatory requirement.<sup>156</sup> To be sure, NEPA review promotes valuable discussion among local, state, and federal officials about how redevelopment should happen following a disaster. The review can also highlight concerns potentially meaningful to future individual property owners.<sup>157</sup> But only one property in the state of Louisiana was determined to be undevelopable because of its presence in a floodway.<sup>158</sup> Significantly, that property's presence in the floodway was a fact known before the environmental review process was commenced.<sup>159</sup> Not surprisingly, the reviews identified properties that were already known to be located in historic districts, flood plains, and areas of archaeological significance. These results were not unexpected in a historic, low-lying city such as New Orleans. But the results raise the question of whether there are modifications to the federal environmental review process in urban settings that could allow the same information to be gathered more quickly and at lower cost.

Urban redevelopment decisions rarely proceed at the single-lot level, but are instead based on revitalization objectives for streets, blocks, or neighborhoods. New Orleans's experience suggests that environmental reviews conducted in urban residential areas will more than likely allow large-scale redevelopment to proceed. While still obliging discussion about redevelopment

---

155. The State of Louisiana spent more than \$6.7 million on the required federal environmental reviews for all range of its housing, infrastructure, and other Hurricane Katrina and Rita programs, including the 10,600 reviews performed on the LLT properties. See LA. LEGISLATIVE AUDITOR, STATUS OF COMMUNITY DEVELOPMENT BLOCK GRANT DISASTER RECOVERY FUNDING AS OF DECEMBER 31, B3 (2011), available at [http://app1.la.state.la.us/PublicReports.nsf/C23B3F5D365E0D6086257A4B007B2FEE/\\$FILE/0002B9B0.pdf](http://app1.la.state.la.us/PublicReports.nsf/C23B3F5D365E0D6086257A4B007B2FEE/$FILE/0002B9B0.pdf). The costs of environmental reviews for the LLT properties were covered by a \$5.28 million tranche of state funds set aside for the federally mandated environmental reviews. See, e.g., STATE OF LA., DISASTER RECOVERY GRANT REPORTING (DRGR) SYSTEM, GRANT B-06-DG-22-0001, OCT. 1, 2009 THRU DEC. 31, 2009 PERFORMANCE REPORT 15-16 (2009), available at [http://doa.louisiana.gov/cdbg/DR/Reports/KatrinaRita\\_First\\_App/Grant%201%204th%20Quarter%202009.pdf](http://doa.louisiana.gov/cdbg/DR/Reports/KatrinaRita_First_App/Grant%201%204th%20Quarter%202009.pdf) (describing that during the third quarter of 2008, the state "began the environmental reviews on 251 Louisiana Land Trust properties in Orleans parish" as part of a lengthy list of activities covered by the State's budget for certain types of federally required environmental reviews).

156. See Telephone Interview with Cathleen Carney, *supra* note 104.

157. See, e.g., U.S. DEP'T OF HOUS. & URBAN DEV., NEPA CHECKLIST, *supra* note 74, at 8, 26, 27; LA. LAND TRUST, *supra* note 74.

158. See Telephone Interview with Cathleen Carney, *supra* note 104.

159. See *id.*

guidelines for sensitive individual properties, a high-level environmental review of New Orleans's neighborhoods could have been produced using the same existing maps of historic districts, archaeological sites, and flood plains that the state may have used to complete the post-Katrina environmental reviews. For example, by overlaying these maps on a detailed map of the city's 4700 LLT properties, this particular type of critical property is quickly identified. In New Orleans, of the thousands of structures damaged by Katrina, just 253 properties located in city historic districts suffered significant storm damage.<sup>160</sup>

### III. THE EVOLUTION OF HUD'S NEPA REGULATION: A HISTORICAL BACKDROP TO POST-DISASTER IMPLEMENTATION PROBLEMS

Recent post-disaster difficulties with implementation of HUD's environmental review requirement stem, in part, from its genesis.<sup>161</sup> HUD first drafted and implemented the environmental review rule in the mid-1970s, amid that decade's pressing urban redevelopment challenges.<sup>162</sup> The context was much different than the vast, chaotic post-disaster landscape created by Katrina's epic levee failures or Hurricane Sandy's storm surge.<sup>163</sup> It is easier to understand how the environmental review requirement slowed the Katrina and Rita long-term recoveries after examining the origins of the current environmental review rules.

NEPA and the early administrative regulations implementing its requirements were part of a broader response to urgent popular concern about federally funded development projects causing environmental degradation.<sup>164</sup> NEPA memorialized the resolve of Congress that federally funded projects would not proceed without consideration of certain types of environmental impacts.<sup>165</sup> The statute required that federal agencies examine their projects prior to development to ensure that they did not cause significant environmental harm.<sup>166</sup>

---

160. The vast majority of New Orleans's historic structures are built on high ground and thus did not suffer flooding damage that ravaged 80 percent of the city. See Annie Christoff, *House of the Setting Sun: New Orleans, Katrina, and the Role of Historic Preservation Laws in Emergency Circumstances*, 95 GEO. L.J. 781, 787-88 & nn.51-52 (2006) (citing Deon Roberts, *Few Homes/Buildings in New Orleans Historic Districts Destroyed by Hurricane Katrina*, NEW ORLEANS CITYBUSINESS, Jan. 16, 2006).

161. HUD first promulgated a rule for implementation of the environmental review requirement in 1975. See Environmental Review Procedures for the Community Development Block Grant Program, 40 Fed. Reg. 1392 (Jan. 7, 1975) (to be codified at 24 C.F.R. pt. 58).

162. The federal government embarked on an ambitious mission to push back against the tide of urban decay through expanded housing programs and a new CDBG aimed largely at assisting urban areas. See John D. Landis & Kirk McClure, *Rethinking Federal Housing Policy*, 76 J. AM. PLAN. ASS'N 319, 321-22 & tbl.1 (2010).

163. See *id.*

164. See Tarlock, *supra* note 26, at 77, 83-85.

165. See *id.*

166. See *id.*

HUD's responsibility for furnishing federal disaster aid receives only passing mention in the agency's regulations implementing the HUD-managed CDBG program.<sup>167</sup> Early regulations do not indicate that supporting comprehensive and quick long-term disaster recovery programs was either a critical HUD programmatic concern or a need that CDBG was particularly well suited to address.<sup>168</sup>

The 1960s and early 1970s continued an era of muscular federal efforts to redevelop and revitalize inner-city communities.<sup>169</sup> The pressing redevelopment challenge was turning back the trend of urban disinvestment and decay that became a pressing national concern in the decades following World War II.<sup>170</sup> HUD played the lead role in these efforts following its establishment in 1965.<sup>171</sup> It awarded large grants each year to American cities.<sup>172</sup> Initially, monies were dispensed through a complex set of categorical grant programs for urban renewal projects to redevelop "slums," construct sewer systems, or finance urban green space land purchases.<sup>173</sup> In 1974, Congress consolidated these urban revitalization programs into a single HUD-administered CDBG program.<sup>174</sup> The CDBG program was intended to be a single flexible funding source for cities seeking money to pursue community development projects aimed at helping low- and middle-income communities.<sup>175</sup> Depending on an urban community's need, the CDBG program provided grants for a range of

---

167. The Housing and Community Development Act of 1974 established the CDBG program. HUD's regulations governing the CDBG program only generally reference the grant fund's possible use for "meeting emergency community development needs caused by federal recognized disasters." See Community Development Block Grants, 40 Fed. Reg. 24,692, 24,706 (June 9, 1975) (to be codified at 24 C.F.R. pt. 570). The regulations do not explain what kinds of projects would be included under the umbrella of "emergency community development projects." See *id.*

168. See OLSHANSKY & JOHNSON, *supra* note 22, at 230 ("[B]ecause [the CDBG] program was not designed for disasters, its requirements are not always appropriate.").

169. The 1950s and 1960s gave rise to major federal housing acts that guided federal programs through the 1970s and beyond. These acts included the 1954 Housing Act (and its urban renewal title), the 1961 Housing Act, and the 1968 Fair Housing Act. See generally Landis & McClure, *supra* note 162. Congress created the U.S. Department of Housing and Urban Development in 1965. See *id.*

170. See *id.* HUD initially awarded money to urban communities through a set of categorical grant programs, including grants for urban renewal. The Housing and Community Development Act of 1974 replaced the several categorical grant programs with a single grant program, called the Community Development Block Grant program. See *id.*

171. See *id.*

172. See *id.*

173. HUD initially awarded funds through categorical grants for "water and sewer facilities," "urban renewal," and "neighborhood facilities," etc. See Community Development Block Grants, 40 Fed. Reg. 24,693, 24,693-94 (June 9, 1975) (to be codified at 24 C.F.R. pt. 570). In 1974, HUD moved from its current block grant approach to awarding monies to cities and states for community and economic development projects. See *id.*

174. Congress created the CDBG program to advance "the development of a national urban growth policy by consolidating a number of complex and overlapping programs of financial assistance . . ." See *id.* at 24,694.

175. See *id.* Eighty percent of CDBG funds were to be used each year for projects in metropolitan areas. See *id.* at 24,695. The remainder of the block grant funds could be used for projects outside metropolitan areas. See *id.*

projects that would help sustain the city, including preserving community facilities, eliminating unhealthy or unsafe living conditions, conserving and expanding housing stock, and restoring and preserving historic properties.<sup>176</sup>

In January 1975, HUD adopted regulations implementing the NEPA environmental review requirement.<sup>177</sup> The main purpose of HUD's NEPA-implementing regulations was to ensure that HUD initiatives protected and improved environmental quality.<sup>178</sup> HUD's environmental review regulations cover a range of block-grant-funded development activities,<sup>179</sup> but the new 1975 NEPA-implementing rules did not address projects approaching the scale required to reconstruct or rehabilitate significant parts of entire cities following a disaster.<sup>180</sup> After all, American cities faced other significant challenges in the 1970s. HUD block grant funds purchased dilapidated urban properties, constructed neighborhood community centers and streets, and rehabilitated old buildings.<sup>181</sup> These were generally distinct development projects—sometimes several proceeded at one time in a single city. HUD's NEPA-implementing rules required that an environmental review be completed before a city made an investment in any single redevelopment project.<sup>182</sup>

During the 1970s, 1980s, and 1990s, HUD implemented new types of housing and community development programs to tackle the continuing challenge of urban disinvestment and the lack of safe and decent housing for low- and middle-income families.<sup>183</sup> HUD's environmental review requirements also evolved during this time.<sup>184</sup> Revisions to the environmental

---

176. *See id.* at 24,694.

177. *See* Environmental Review Procedures for the Community Development Block Grant Program, 40 Fed. Reg. 1392 (Jan. 7, 1975) (to be codified at 24 C.F.R. pt. 58).

178. *Id.* at 1394.

179. *See* Community Development Block Grants, 40 Fed. Reg. at 24,698.

180. HUD's initial NEPA-implementing regulations mandated the highest level of environmental review—completion of an EIS—for projects that involved demolition, conversion, or construction of 500 dwelling units or development of water and sewer systems serving 100 or more acres of undeveloped land. *See* Environmental Review Procedures for the Community Development Block Grant Program, 40 Fed. Reg. at 1398. In New Orleans, Hurricane Katrina destroyed more than 134,000 housing units. *See Press Release: Hurricane Katrina Impact*, *supra* note 151. New York City's Action Plan estimates that 63,000 structures were damaged and may require federal funds for rehabilitation. *See* CITY OF N.Y., COMMUNITY DEVELOPMENT BLOCK GRANT—DISASTER RECOVERY, PARTIAL ACTION PLAN A, at 36 (2013), available at [http://www.nyc.gov/html/cdbg/downloads/pdf/cdbg-dr\\_full.pdf](http://www.nyc.gov/html/cdbg/downloads/pdf/cdbg-dr_full.pdf).

181. *See* Community Development Block Grants, 40 Fed. Reg. at 24,698–99.

182. *See* Environmental Review Procedures for the Community Development Block Grant Program, 40 Fed. Reg. at 1397 (“During the environmental review process and pending completion of the appropriate environmental clearance procedures, the applicant may not use any funds to take any action with respect to the project under review . . .”).

183. *See* Landis & McClure, *supra* note 162.

184. Substantial revisions to the HUD rule implementing the environmental review requirement have been made over the past thirty-eight years, including September 1978, May 1979, April 1996, and September 2003. *See, e.g.*, Environmental Review Procedures, Community Development Block Grant Program, 44 Fed. Reg. 30,260 (May 24, 1979) (to be codified at 24 C.F.R. pt. 58); Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities, 61 Fed. Reg. 19,129 (Apr. 30, 1996) (to be codified at 24 C.F.R. pt. 58); Environmental Review Procedures for Entities

review rule generally involved providing grantees more detailed guidance regarding the circumstances under which the environmental review requirement should be implemented. For example, HUD expanded the list of activities that it was willing to “exempt” from the environmental review requirement.<sup>185</sup> HUD also increased the threshold number of housing units at which a grantee would presumptively have to prepare an EIS.<sup>186</sup> For example, a city with New Orleans’s pre-Katrina population of 465,000 would have been required to prepare an EIS if it removed, demolished, converted, or “emplaced” just 1000 units of housing.<sup>187</sup> One thousand housing units is a large development by any definition. But it is a very small number when considering the quantum of devastation associated with a natural disaster. Even this increased 1000-unit threshold would likely require an EIS for housing damage associated with a catastrophic disaster.<sup>188</sup> However, neither the revised thresholds nor any other part of the regulations indicate how HUD would work with state and local governments to repair or redevelop an exponentially bigger number of homes, such as the 134,000 housing units<sup>189</sup> damaged in New Orleans and the 63,000 damaged by Sandy in New York City.<sup>190</sup>

HUD’s CDBG program has, since its inception, been a source for funding recovery efforts associated with large-scale disasters.<sup>191</sup> In response to manmade as well as several major natural disasters during the 1990s, Congress appropriated disaster recovery monies to HUD in the form of special “disaster” CDBG funds.<sup>192</sup> This began with Hurricane Andrew in 1992, continued through the 1994 Northridge earthquake, included the 1998 Grand Forks, North Dakota floods, and ultimately the 9/11 terrorist attacks.<sup>193</sup> Following these disasters, and during the disaster recovery period, it appears that local and state governments were not urging HUD to make special changes to the

---

Assuming HUD Environmental Responsibilities, 68 Fed. Reg. 56,116 (Sept. 29, 2003) (to be codified at 24 C.F.R. pts. 50, 58, 574, 582, 583, 970).

185. HUD classified a long list of activities as “exempt” from performing the environmental review requirement. *See* Environmental Review Procedures, Community Development Block Grant Program, 44 Fed. Reg. at 30,260. But this exemption did not relieve grantees from the obligation of having to review projects for compliance with certain historic preservation and environmental statutory requirements, such as the Historic Preservation Act and certain flood plain and wetlands requirements. *See id.* at 30,273.

186. *See id.* at 30,274, tbl.1.

187. *See id.*

188. Hurricane Sandy, a Category 1 hurricane, destroyed or damaged 63,000 homes in New York City alone. *See* CITY OF N.Y., *supra* note 180, at 36. Hurricane Katrina, a Category 3 hurricane, destroyed or damaged 134,000 homes in Orleans Parish alone. *See Press Release: Hurricane Katrina Impact*, *supra* note 151.

189. *See id.*

190. *See* CITY OF N.Y., *supra* note 180, at 36.

191. *See* Community Development Block Grants, 40 Fed. Reg. 24,692, 24,706 (June, 9, 1975) (to be codified at 24 C.F.R. pt. 570).

192. *See The Role of the Community Development Block Grant Program in Disaster Recovery*, *supra* note 15 (opening statement of Sen. Mary Landrieu).

193. *See id.*



environmental review requirement.<sup>194</sup> The majority of HUD's 1996 and 2003 environmental review rule revisions focused on the scope of the environmental review requirements.<sup>195</sup> HUD grantees were asking questions about whether and how actions required under certain other (non-CDBG) HUD programs or other federal statutes should fall within the ambit of HUD's environmental review requirement.<sup>196</sup> The balance of the other changes sought to clarify the rule's language<sup>197</sup> with a few questions relating to the process for implementing the proposed rule revision.<sup>198</sup>

Several aspects of the two rule changes in 1996 and 2003 concern the burden the environmental review requirement places on local and state governments, but even following Hurricane Andrew, the Northridge, California earthquake, the Grand Forks, North Dakota flood, and 9/11, the rule changes show no sign of addressing questions about whether the environmental review requirement can workably be implemented in the context of a large-scale long-

---

194. The final rule adopted in 1996 modifying the environmental review requirement was intended to "mak[e] the environmental review procedures consistent under the various programs to which [the environmental review] regulations apply." Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities, 61 Fed. Reg. 19,120 (Apr. 30, 1996). The final rule adopted in 2003 focuses on clarifying the instances in which entities outside of HUD, such as state or local government entities or agencies, "may assume HUD's environmental responsibilities." Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities, 68 Fed. Reg. 56,116 (Sept. 29, 2003). Even a 1998 notice announcing HUD's special "Disaster Recovery Initiative" for HUD funds appropriated to address natural disasters that struck in 1998 is silent on the issue of possible impediments associated with NEPA review and implementation. See 1998 HUD Disaster Recovery Initiative, 63 Fed. Reg. 56,764 (Oct. 22, 1998). The notice's only significant mention of environmental review was its confirmation that the environmental review requirement had not been waived and must be implemented. See 63 Fed. Reg. at 56,767, 56,771.

195. HUD revised its rule concerning the environmental review requirement at least two times during this period. One revision was promulgated in 1996. See 61 Fed. Reg. 19,120. The second revised rule was issued in 2003. See 68 Fed. Reg. 56,116.

196. See, e.g., 61 Fed. Reg. at 19,121 (inquiring whether payment of interest on a federal loan subjects a project to the environmental review requirement (answer: no); asking if HUD could somehow give communities additional latitude in interpreting the requirements of the National Historic Preservation Act, whose requirements are evaluated in the context of the environmental review (no); suggesting that HUD's Part 58 environmental review requirement should be applied to the Department of Health and Human Services Housing Opportunities for Persons with AIDS program (HUD has no authority to do so)); 68 Fed. Reg. at 56,117 (asking whether the environmental review requirement applies to HUD mortgage insurance programs).

197. See, e.g., 61 Fed. Reg. at 19,121 (asking HUD to clarify what the environmental review rule means when it refers to "adequate local news media"); 68 Fed. Reg. at 51,120-21 (requesting HUD define the term "any participant in the development process"); 68 Fed. Reg. at 56,125 (seeking clarification of what HUD means by the phrase "except in extraordinary circumstances").

198. See, e.g., 68 Fed. Reg. at 56,120 (opining that HUD should "create positive incentives" for federal, state, and local certifying partners "to expedite environmental review"); *id.* at 56121 (one commenter suggesting that a city or state entity responsible for ensuring the environmental review is completed, i.e. a "responsible entity," should only have to complete a second environmental review for a project if another responsible entity has already completed an environmental review for the same original project, and another commenter arguing that a HUD grantee should be able to "commit" HUD funds to a development project prior to completing an environmental review, but merely refrain from "expending" those funds until the result of the review have been received).

term disaster recovery effort.<sup>199</sup>

In short, new amendments in 1996 and 2003 to HUD's environmental review rule were focused on the customary target for CDBG funds—efficient administration of elective development projects that states and cities planned for and completed year-in and year-out.<sup>200</sup> The amendments rarely raised issues that explicitly concerned funding of disaster recovery initiatives. But even when HUD published a notice concerning the environment review requirement and CDBG disaster-related expenditures, there was no discussion of the logistical problems that might be associated with disasters.<sup>201</sup>

#### IV. CLIMATE CHANGE AND THE CHALLENGE OF REGULATORY REFORM: FIVE PRINCIPLES FOR UNIFIED ENVIRONMENTAL REVIEW AND LONG-TERM RECOVERY PROJECTS

This Part posits five principles that should help inform any future Unified Federal Review process. These principles speak not just to NEPA reform. They also address the larger issue of the importance of stepping back and looking broadly at U.S. disaster response and long-term recovery policy in an era of climate change.

The scope of challenges presented by climate change necessitates implementation of solutions that require a more cooperative federal-state-local relationship. Pursuing public policies that address the causes of climate change, such as the regulation of greenhouse gases and increased use of renewable energy resources, must be accompanied by policies that smartly manage the effects of climate change. Increasingly frequent and increasingly severe weather events appear to be two climate change challenges we are now facing.<sup>202</sup>

---

199. One commenter argued that HUD should not make local and/or state governments responsible for performing environmental reviews for HOPE VI ("HOPE" stands for Housing Opportunities for People Everywhere) housing developments because this delegation of responsibility from HUD to local and state governments "diverts limited administrative staff time . . ." 68 Fed. Reg. at 56,118. Two commenters expressed concern the obligation to perform an environmental review on a property could later expose state or local governments that oversaw the review to liability for potentially missing the existence of hazardous conditions. 68 Fed. Reg. at 56,119–20.

200. See *supra* notes 192–197.

201. For example, in 1998 HUD made CDBG funds available through a special disaster recovery initiative. See Notice of HUD Disaster Recovery Initiative, 65 Fed. Reg. 56,764 (Oct. 22, 1998). This initiative focused generally on helping communities impacted by natural disasters, primarily by "support[ing] the activities of other Federal agencies . . ." See *id.*

202. There is a broad consensus that sees a tie between the increased frequency and severity of storm events and climate change. See, e.g., Patrick Rucker, *Obama Gives Unexpected Nod to Climate as Second Term Priority*, THE ENVTL. COUNSELOR, Feb. 2013 (quoting the President, who urges that "[s]ome may still deny the overwhelming judgment of science, but none can avoid the devastating impact of raging fires, and crippling drought, and more powerful storms"); Jeffrey Thaler, *Fiddling as the World Floods and Burns: How Climate Change Urgently Requires a Paradigm Shift in the Permitting of Renewable Energy Projects*, 42 ENVTL. L. 1101, 1113 (2012) (estimating "that each degree Celsius increase will produce double to quadruple the area burned by wildfires in the western United

Better public policy does not necessarily mean tougher regulation. Nor does it mean gutting regulation. Rather, as witnessed with New Orleans's frustrating road to recovery from Katrina's devastation, "better" regulations for the climate change era may mean a more dynamic partnership between federal, state, and local governments.<sup>203</sup> This new partnership cannot afford to be the "old" partnership of devolving as much responsibility as possible for implementing federal requirements to state and local partners.<sup>204</sup> It also cannot succeed if it is a partnership that prioritizes the federal government's necessary, but stern, audit function<sup>205</sup> over its even more important but comparatively less valued technical assistance function.<sup>206</sup>

In short, when disaster strikes, the federal government can no longer distance itself from regulatory requirements associated with long-term recovery. The federal government must be an active "coach and mentor," not just a delegator and auditor.<sup>207</sup> It is an important task to define exactly and specifically what the federal "coach and mentor" role entails. The inquiry will involve distinct analyses of the different regulatory regimes that touch and concern FEMA, HUD, and other federal agencies that participate in a city's long-term recovery in the post-disaster context.

This Article uses HUD's implementation of the NEPA environmental review requirement to provide concrete examples of the types of steps an agency can take to build a more effective recovery partnership with state and local governments. As the CEQ and Advisory Council on Historic Preservation formulate a proposal for unified federal environmental review for post-disaster recovery projects, there are five key principles that should serve as guides for reform, as drawn from Hurricane Katrina, Rita, and Sandy long-term

---

States, a 5%–15% reduction in crop yields, more destructive power from hurricanes, greater risk of very hot summers, and more changes in precipitation frequency and amounts . . .").

203. See *infra* Parts IV.A–IV.E.

204. See, e.g., Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities, 68 Fed. Reg. at 56,118 (demonstrating HUD's acknowledgment of its discretion to perform environmental reviews by stating its strong view that "such performance would be inconsistent with HUD's general direction to devolve this federal function . . . to state, local, and tribal governments"); Cohen, *supra* note 78 (quoting a HUD official that pinned the blame for the State of Louisiana's failure to begin environmental reviews solely on the state, suggesting that HUD had fulfilled its responsibility to ensure timely completion of thousands of environmental reviews by repeatedly warning the state that it needed to complete the reviews).

205. Congress's supplemental bill sending long-term recovery funds to the Gulf Coast specifically set aside \$9 million for the HUD Inspector General. The Inspector General did not waste time putting those funds to use. According to HUD official Fred Tombar, the state Road Home Program was audited more than fifty-two times between June 2006 and August 2009. See *Implementation of the Road Home Program Four Years After Hurricane Katrina*, *supra* note 127 (testimony of Frederick Tombar, Senior Advisor for Disaster Recovery, U.S. Dep't of Hous. & Urban Dev.).

206. The only specific mention of technical assistance to the State of Louisiana and its local governments in the initial Hurricanes Katrina and Rita recovery bills is a \$400,000 earmark. See Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2780 (2005).

207. See LIU, *supra* note 17, at 3.

recoveries.<sup>208</sup>

*A. Appreciate the Disaster's Scope and Appraise Innovative Approaches to Regulatory Compliance: Enlarge the Environmental Review's Geographic Scope*

A critical question surrounds the necessary geographic breadth of the environmental review requirement. Is the environmental review most appropriately performed on a lot-by-lot, block-by-block, census-tract-by-census-tract, neighborhood-by-neighborhood, or even citywide basis? The Louisiana, New York, and New Jersey State Action Plans implementing Hurricane Katrina, Rita, and Sandy recovery projects call for environmental reviews at the individual property level.<sup>209</sup> That means an environmental review must be performed for each property the state or local governments purchase or rehabilitate with disaster CDBG funds.<sup>210</sup> This type of granular, parcel-by-parcel level of review provides a rational, discrete basis for conducting the review. But is this level of review appropriate for urban areas consisting of small parcel sizes where conditions are unlikely to vary significantly from address to address?<sup>211</sup>

The State of Louisiana's Road Home buyout option yielded purchases of more than 10,600 homes statewide, approximately 4700 of which were located in Orleans Parish.<sup>212</sup> Many of the neighborhoods that suffered acutely from Katrina's flood waters, including Central City and the Seventh Ward, were also densely settled urban neighborhoods with between twenty and twenty-three dwelling units per acre.<sup>213</sup> It appeared that HUD rejected the state's request for a high-level, programmatic environmental review due to a conceptual disagreement about the Road Home buyout program's impact.<sup>214</sup> HUD considered the program and the ensuing return of each of the buyout properties

---

208. See Greczmiel, *supra* note 14, at 1.

209. See LA. OFFICE OF CMTY. DEV., LA. RECOVERY AUTH., LOUISIANA ACTION PLAN AMENDMENT 31 (FIRST ALLOCATION)—ROAD HOME HOMEOWNER COMPENSATION PLAN 10 & n.7 (2008), available at <http://www.lra.louisiana.gov/assets/docs/searchable/meetings/2008/11/Amend31SoldHomeDeadline.pdf>; City of N.Y., *supra* note 180, at 65, 131–32, 138; N.J. DEP'T OF CMTY. AFF., *supra* note 14, at 4-27, 4-28, 5-1, 6-4, 6-5.

210. See Ochoa, *supra*, note 120.

211. See LIU, *supra* note 17, at 8.

212. Schleifstein, *supra* note 104. The estimated number of Orleans Parish Road Home program buyout properties transferred from the LLT to NORA has grown over time. See, e.g., NEW ORLEANS REDEVELOPMENT AUTH., PARTNERING FOR SUCCESSFUL NEIGHBORHOOD REDEVELOPMENT: PRESENTATION TO AMERICAN PLANNING ASSOCIATION NATIONAL PLANNING CONFERENCE 3 (2010) (on file with author) (stating that NORA is charged with the disposition of “[a]lmost 5,000” LLT properties).

213. CITY OF NEW ORLEANS, PLAN FOR THE 21ST CENTURY 2.26 (2009), available at <http://www.nola.gov/getattachment/080c091d-7caf-441c-96e2-671d5662c8d1/Vol-3-Ch-2-Population-and-Land-Use-Trends/>.

214. See *The Role of the Community Development Block Grant Program in Disaster Recovery*, *supra* note 15 (opening statement of Sen. Mary Landrieu).

to Louisiana's parish governments as not one project or several projects, but 10,600 separate projects<sup>215</sup> requiring a separate and specific environmental review.<sup>216</sup> A very reasonable alternative interpretation of the Road Home program, however, was that the program's buyout option constituted a single project that consisted of an aggregation of very small constituent elements, each with no or very low potential for causing environmental risk or impact. This interpretation was borne out after the fact.

To be sure, property-by-property environmental reviews prompt important discussions between and among local, state, and federal governments about the long list of issues raised by the environmental review process.<sup>217</sup> The review process requires the state entity responsible for completing the environmental review, as well as its environmental consultants, to evaluate whether recovery decisions could impact historic properties, archaeological resources, flood plains, agricultural lands, and other relevant considerations.<sup>218</sup> The State of Louisiana then ultimately provides a standard form to prospective purchasers of LLT properties listing the full range of environmental, historic, and natural resources issues reviewed.<sup>219</sup> The types of environmental and historic factors considered include a range from whether a property is located in the hundred-year flood plain or located within one mile of a facility listed as being subject to Chemical Accident Prevention Regulations, to whether the property is "eligible for inclusion as a historical site under Section 106 of the National Historic Preservation Act."<sup>220</sup> This is important information, but it is questionable whether the information could not have been gathered by the federal government within weeks or months of the disaster event, based on online data and FEMA inspection information. Further, there is also a question whether possible environmental concerns associated with recovery activities are best identified by environmental reviews in an urban setting at the individual property level.

For environmental reviews to meaningfully inform disaster recovery planning, the reviews must provide information on a high enough level to constructively influence decision making about neighborhood recovery and

---

215. *See id.*

216. *See id.*

217. Telephone Interview with Thomas C. Lasher, Senior Grants Manager, New Orleans Redevelopment Auth. (Feb. 4, 2012).

218. *Id.*

219. *See* LA. LAND TRUST, DISCLOSURE OF ENVIRONMENTAL FACTORS (on file with author). If a person purchases a Road Home buyout property from the LLT, the prospective purchaser is furnished with a template disclosure form, which tells the purchaser that "[b]ased on the State of Louisiana's Office of Community Development's review of all residential properties sold to the State of Louisiana under Option 2 and 3 of the Road Home Program, a review of environmental data bases, site reconnaissance, and comments received from various federal, state and local agencies, a number of environmental factors and conditions were identified for certain properties that may warrant disclosure." *See id.* The form then provides several lines for the LLT to check if the subject property implicated any of the environmental or historic review factors. *See id.*

220. *See id.*

redevelopment.<sup>221</sup> Lot-by-lot reviews are not only of limited value in an urban setting, but they document conditions at a level of granularity that requires more work without necessarily producing critical information about whether residential redevelopment can or should occur on a particular property.

The State of Louisiana's review of its more than 10,000 buyout properties or LLT properties illustrates the limited value of the property-by-property review following a disaster.<sup>222</sup> The property-by-property environmental review culled a single address from more than 10,000 total properties reviewed due to that single property's presence in a floodway.<sup>223</sup> Further, this result was not a surprise and could have been determined by consulting applicable flood maps soon after Hurricanes Katrina and Rita.<sup>224</sup>

The focus of an environmental review in an urban area should, at a minimum, be at a neighborhood level or an aggregation of functionally associated neighborhoods. This is the same level of urban organization used for historic districts and often for coherent city planning or zoning districts.<sup>225</sup> Further, neighborhood-wide environmental reviews would yield information useful to many about the valuable assets and potential problems associated with a neighborhood. In a city such as New Orleans, where there could be as many as one to two dozen dwelling units per acre,<sup>226</sup> there is a question whether performing lot-by-lot environmental reviews efficiently allocates resources and helpfully frames problems. In a tightly developed urban setting, the type of environmental conditions analyzed through the lens of a NEPA environmental

---

221. Orleans Parish completed its plan for redeveloping and rehabilitating storm-damaged properties in December 2007. See PARISH REDEVELOPMENT PLAN, *supra* note 115. The initial environmental reviews were not completed until November 2008. See Barrow, *supra* note 121. In short, the city formulated its redevelopment plan without the benefit of the environmental reviews.

222. The State of Louisiana purchased more than 10,000 homes from families that decided to move away from the devastation caused by Katrina and Rita. See LA. LAND TRUST, CURRENT PROPERTY LISTING AS OF 2/7/2014 (2014), available at [http://www.lalandtrust.us/RFP/Website\\_LLTProp\\_Report\\_2\\_7\\_14.xls](http://www.lalandtrust.us/RFP/Website_LLTProp_Report_2_7_14.xls).

223. See Telephone Interview with Cathleen Carney, *supra* note 104. A floodway is "the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height." See *Floodway: National Flood Insurance Program (NFIP) Policy Index*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/national-flood-insurance-program-2/floodway> (last visited Aug. 9, 2013). The required EA did, however, raise a number of other less serious issues that might impact decisions relating to a property's redevelopment, including that a property is located within 1500 feet of a flood wall or levee or that a property is an historic structure located within an historic district. See LA. LAND TRUST, *supra* note 219.

224. Telephone Interview with Cathleen Carney, *supra* note 104.

225. New Orleans's historic districts are, for example, roughly coextensive with underlying neighborhoods, such as the French Quarter, Treme, and the Warehouse District. See, e.g., *Historic District Maps & Location Information*, CITY OF NEW ORLEANS, <http://www.nola.gov/hdlc/map/> (last visited Feb. 11, 2014). The city's planning districts are generally an aggregation of several geographically proximate neighborhoods. See, e.g., *Draft Comprehensive Zoning Ordinance and Maps*, CITY OF NEW ORLEANS, [http://www.nola.gov/city-planning/draft-comprehensive-zoning-ordinances-\(czo\)/full-czo-text/](http://www.nola.gov/city-planning/draft-comprehensive-zoning-ordinances-(czo)/full-czo-text/) (last visited Feb. 11, 2014) (listing city planning district maps for the city's thirteen planning districts).

226. See *supra* note 194.

review—historic resources, archaeological resources, flood plain, noise, agricultural lands, and endangered species—would similarly impact many homes in any given area.

It is, of course, true that every urban community presents unique historical and environmental concerns. New Orleans's architecture is considered a national treasure. Portland, Oregon's wildlife resources make it a special place to live. Federal, local, and state governments can and should retain the discretion to delay environmental reviews in neighborhoods with special assets or acute problems. However, the overall progress of completing environmental reviews for the balance of a city should not be impeded to raise and engage issues demonstrably not relevant to those neighborhoods.<sup>227</sup>

*B. Allow As Little Delay As Possible: Using Available Technology and Mapping Resources to Prepare Earlier and More Efficient EAs*

Long-term recovery delayed can be a recovery denied for residents of storm-ravaged neighborhoods.<sup>228</sup> The long road of rebuilding from a disaster is about recreating a sense of community—bricks, mortar, and personal community—out of the pieces that remain of the pre-storm community. This process starts for many with repairing their homes and businesses or relocating to a neighborhood, buying a property, and building or rehabilitating a damaged home. Federal financial assistance is critical for most cash-strapped families, and as presently regulated, that assistance cannot start flowing until an environmental review is complete.<sup>229</sup>

In New Orleans, there was a long delay in beginning and, thus, completing environmental reviews for the 4700 state buyout properties.<sup>230</sup> Families that may have wanted to return to the city to purchase a new or rehabilitated buyout property had to wait until March 2009 for the first lots to clear environmental review and become available for rehabilitation or reconstruction.<sup>231</sup> At the earliest, the homes were not ready to be occupied until the end of 2009, more than four years following Katrina.<sup>232</sup> Many families did not wait, instead

---

227. See, e.g., Christoff, *supra* note 160, at 787–88 (explaining that damaged historic structures in New Orleans's historic districts made up just over 250 of the tens of thousands of structures despoiled by Katrina).

228. The quotation “justice delayed is justice denied” is attributed to, among others, Martin Luther King, in his Letter from a Birmingham Jail. See Martin Luther King, Jr., *Letter from a Birmingham Jail*, U. PA., [http://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) (last visited Feb. 11, 2014).

229. Although it is true that the goal of recovery spending is not just to get funds “out the door” quickly, the recovery has the best chance of helping those who lost everything if those people can plug into resources and opportunities in the local market as soon as possible. See Liu, *supra* note 154.

230. It took approximately thirty-nine months for the State of Louisiana to begin and complete the first small batch of environmental reviews. See *supra* text accompanying notes 105–108.

231. See *id.*

232. The New Orleans Redevelopment Authority, through the LLT, closed on the sale of the first group of sixteen LLT properties to The Make It Right Foundation in March 2009. See ESCROW AGREEMENT BETWEEN MAKE IT RIGHT—NEW ORLEANS HOUSING, LLC, NEW ORLEANS REDEVELOPMENT AUTHORITY, AND BALDWIN TITLE COMPANY OF LOUISIANA, LLC (2009) (on file

finding other places to live, in other neighborhoods, cities, or states.

A similar concern is emerging in New York following Hurricane Sandy.<sup>233</sup> In July 2013, the members of New York's congressional delegation sent a bipartisan letter to HUD Secretary Shaun Donovan warning that the NEPA environmental review requirement was an obstacle to their constituents' road to recovery.<sup>234</sup> They asked Donovan to waive the environmental review requirement so that residents might commence or complete home repairs.<sup>235</sup>

NEPA implementing regulations have long emphasized the importance of completing environmental reviews as early as possible.<sup>236</sup> This goal is easier to attain when the project involves a single housing development or infrastructure project that has been planned for months or years. It is much harder to accomplish when the project requires the gutting, repairing, demolishing, or rebuilding of tens of thousands of homes, on hundreds of streets, in dozens of neighborhoods across an entire city following a disaster.

The enormous scale of this challenge does not, however, have to be considered an obstacle to thorough, immediate, efficient, and highly informative environmental review. The results of the 4700 EAs performed on state buyout properties across the city of New Orleans suggest a way forward. The New Orleans Redevelopment Authority pledged to redevelop these former residential properties for residential or less intensive uses, such as green space or water retention and detention uses.<sup>237</sup> Given the similar pre- and post-storm residential uses designated for the great majority of these properties, it is not surprising that all 4700 properties were cleared for resale and redevelopment according to NORA's disposition plan.<sup>238</sup>

When considering the HUD-required checklist of environmental review criteria, urban settings are not likely to yield many surprising results. Historic

---

with author). Make It Right broke ground on that initial group of twenty-one properties in April and May 2009. See NEW ORLEANS REDEVELOPMENT AUTH., OUR ROLE IN IMPROVING NEW ORLEANS' NEIGHBORHOODS 12 (2009) (on file with author). The first homes were completed by the end of 2009.

233. The bipartisan group of legislators, which included both of New York's senators, claimed that their constituents were facing several significant impediments to recovery, including a cumbersome environmental review process. See Clarke Press Release, *supra* note 7.

234. See *id.*

235. See *id.*

236. See, e.g., Environmental Review Procedures; Community Development Block Grant Program, 44 Fed. Reg. 36,260, 36,264 (May 24, 1979) (to be codified at 24 C.F.R. pt. 58) (noting that "[t]he proposed revisions and amendments of 1978 emphasize that comprehensive environmental reviews should be undertaken by CDBG applicants early in the planning and programming of its Block Grant projects and activities"); Environmental Review Procedures for the Community Development Block Grant Program, 40 Fed. Reg. 1392, 1395 (Jan. 7, 1975) (to be codified at 24 C.F.R. pt. 58).

237. See PARISH REDEVELOPMENT PLAN, *supra* note 115, at 3-4, 13; NEW ORLEANS REDEVELOPMENT AUTH., *supra* note 134, at 9.

238. All Orleans Parish LLT properties cleared environmental review. See Telephone Interview with Cathleen Carney, *supra* note 104. The single property that did not clear NEPA environmental review was located in rural Terrebone Parish.



resources, as well as flood plains, are generally well mapped.<sup>239</sup> The existence of noise sources, sensitive natural resources, archaeological resources, and wildlife resources are generally well known, as are the hazardous waste sites that would be critical for evaluating environmental justice considerations.<sup>240</sup>

Thus, I suggest that the federal government's Unified Environmental Review should incorporate the following five features. The first is to confirm that FEMA uses geocoding and other information technology tools to locate and designate properties that present environmental concerns, including hazardous waste, ruptured fuel tanks, or compromised historic or archaeological resources.<sup>241</sup> The second is to provide for a quicker way for communities to establish the future use of properties, as is currently required to complete an environmental review. In many cases, the city will already know the future use, as in the case of returning homeowners repairing their own homes. Alternatively, the Unified Review should allow the city to establish future uses for the properties consistent with either the community's existing zoning, future land use designations for the damaged properties, or the community's disaster element of its comprehensive plan. The third is to encourage federal, state, and local governments to work together to maximize use of the reams or megabytes of information at their disposal to evaluate environmental and historic concerns relevant to the environmental review. The fourth is to allow for a presumption that citywide or neighborhood-wide environmental reviews can be completed using existing mapping and data available to the city (zoning, future land use designation—a legislative action

---

239. Information on historic districts and the location of historic landmarks is generally available online. See, e.g., *Historic District Maps & Location Information*, *supra* note 125. Federal Emergency Management Agency (FEMA) flood plain maps for New Orleans can also be accessed online at *FEMA Region VI Updating Flood Maps in the Greater New Orleans Area*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/fema-region-vi-updating-flood-maps-greater-new-orleans-area> (last updated Apr. 2, 2013).

240. For information on Louisiana's archaeological resources see generally *Archaeology Database*, LA. DIVISION ARCHAEOLOGY, <http://www.crt.state.la.us/archaeology/databases.aspx> (last visited Feb. 11, 2014). The U.S. Fish and Wildlife Service specifies the endangered species found in Louisiana's parishes. See *Endangered Species*, U.S. FISH & WILDLIFE SERV., [http://www.fws.gov/lafayette/es/endangered\\_species.html](http://www.fws.gov/lafayette/es/endangered_species.html) (last visited Feb. 11, 2014). The Louisiana Department of Wildlife and Fisheries maps a range of natural resources, including the state's scenic rivers. See *Louisiana Natural and Scenic Rivers Descriptions*, LA. DEP'T WILDLIFE & FISHERIES, <http://www.wlf.louisiana.gov/louisiana-natural-and-scenic-rivers-descriptions-and-map> (last visited Feb. 11, 2014). Public and private databases contain mapping and site listing resources to identify proximity to properties impact by hazardous and toxic waste. See, e.g., *TOXMAP Environmental Health e-Maps*, NAT'L INSTS. HEALTH, <http://toxmap.nlm.nih.gov/toxmap/main/index.jsp>.

241. By requiring geocoding for properties, the Federal Unified Review process can give purchasers notice that they are within a set distance of an airport runway, a flood zone, or a site known to have environmental contamination. Public information about specific environmental problems and concerns can also be disseminated more generally through community input meetings that are a required part of developing any post-disaster recovery plan. Further, the data used to create information sheets for each property could also be used to create maps that could be posted at public meetings or public places including neighborhood grocery stores, churches, fire stations, police stations, and other neighborhood facilities that are often the first neighborhood assets to return following disasters.

about the desired future development of the community, historic preservation, flood maps, and archaeological maps). The fifth feature that should be incorporated into a Unified Federal Review is to allow cities to elect lot-by-lot environmental reviews if the city has reason to believe redevelopment of a property would have significant environment and historic impacts, or alternatively, allow cities to delay environmental review for certain properties or neighborhoods until environmental concerns can be resolved.

By designing a swifter environmental review, the Federal Unified Review process, the federal government is also giving communities an opportunity to use the environmental review process to inform their post-disaster development decisions. A large-scale disaster like a flood often prompts discussions concerning resettlement.<sup>242</sup> Early environmental review increases the chance that information obtained through the review process can influence large-scale development decisions that conserve environmental and historic resources and create better living conditions for a community's poorest families.<sup>243</sup> If the government buys out properties with the intent to make some or all of those properties available for redevelopment, then the federal, state, and local governments can help guide redevelopment to preferred neighborhoods. Without government leadership, redevelopment is more likely to occur scattershot throughout a disaster area.<sup>244</sup>

C. *Accommodate Use of Flexible Redevelopment Tools: Tax Sale Lien Purchases Exempt from Environmental Review*

Following a disaster, it is critical for local governments to collect property tax revenue to cover the extraordinary expenses associated with disaster response and to pay for capital projects required to fuel long-term recovery.<sup>245</sup> Further, failure to pay local property taxes often comes hand-in-hand with failure to maintain a property.<sup>246</sup> Dilapidated, tax-delinquent properties undermine neighborhood recovery efforts by discouraging new investment.<sup>247</sup>

---

242. See, e.g., Lawrence N. Powell, *What Does American History Tell Us About Katrina and Vice Versa?*, 94 J. AM. HIST., 863 (2007) (describing that Hurricane Katrina precipitated a vigorous and at times rancorous political and social debate about how the city should be rebuilt and who should decide which neighborhoods should be resettled).

243. This suggestion is consistent with HUD's historic policy position that the environmental review process should commence as early as possible. See Environmental Review Procedures; Community Development Block Grant Program, 44 Fed. Reg. 30,260, 30,273 (May 24, 1979) (to be codified at 24 C.F.R. pt. 58). HUD's early statements on timeliness did not, however, contemplate the exigencies and obstacles associated with a large-scale disaster event. See *id.*

244. See DePillis, *supra* note 144.

245. The city of New Orleans lost a large portion of its population following Hurricane Katrina. As a result, property tax revenues declined significantly from \$80.1 million in 2004 to \$68.2 million in 2007, leaving the city dependent on federal block grant monies. See Michael Kunzelman, *New Orleans Homeowners Worry About Taxes*, FORBES.COM (July 10, 2007), available at <http://www.bgr.org/news/archives/n.o.-homeowners-worry-about-taxes/>.

246. See FRANK ALEXANDER, *LAND BANKING AS METROPOLITAN POLICY* 8, 10–12 (2008).

247. See *id.*

Comprehensive and transformative long-term disaster recovery requires that local and state governments and their redevelopment partners take prudent advantage of all available tools to assemble dilapidated properties and redevelop neighborhoods.<sup>248</sup> This is particularly true in cities, such as New Orleans, which have a significant number of so-called weak real estate market neighborhoods.<sup>249</sup> These neighborhoods trend toward disinvestment, where sales are slow, and generally speaking, there are significant numbers of abandoned and/or tax delinquent properties.<sup>250</sup>

Purchasing tax lien certificates can be a tool for post-disaster neighborhood redevelopment.<sup>251</sup> It complements other important land assembly tools, such as open-market real estate purchases, foreclosure of city liens for unremedied health and safety code violations, and eminent domain or expropriation. To secure payment of past due property taxes, local governments conduct public sale of tax liens or tax certificates.<sup>252</sup> In exchange for paying a property's back taxes, third-party tax lien purchasers are entitled to receive from the property's owner repayment of the lien amount plus interest at a favorable statutory interest rate.<sup>253</sup>

In some jurisdictions, such as Louisiana, purchase of a tax lien does not convey to purchasers any interest in the tax delinquent property.<sup>254</sup> In other words, tax lien purchasers do not have an ownership interest in the property, and they do not assume obligations that attach to ownership, such as the responsibility to continue paying taxes.<sup>255</sup> That is why tax lien purchasers are

---

248. See, e.g., NEW ORLEANS REDEVELOPMENT AUTH., TRANSITION REPORT 4–11 (2010) (on file with author) (outlining in detail NORA's strategy for using federal funds to implement its several programs through a strategic framework to counter blight and abandonment).

249. See *id.* at 5–11 (detailing NORA's redevelopment strategy for New Orleans's weak-, intermediate-, and stronger-market neighborhoods).

250. See *id.* at 7.

251. See, e.g., U.S. DEP'T OF HOUS. & URBAN DEV., THE NEW ORLEANS REDEVELOPMENT AUTHORITY, LA, HAD NOT ADMINISTERED ITS RECOVERY ACT NEIGHBORHOOD STABILIZATION PROGRAM 2 IN ACCORDANCE WITH FEDERAL REGULATIONS 32 (2011), available at <http://www.hudoig.gov/reports-publications/audit-reports/new-orleans-redevelopment-authority-la-had-not-administered-its> (responding to the HUD OIG's recommendation that NORA's purchase of tax sale liens be refunded to the U.S. Treasury by explaining that NORA's involvement at the recent tax sale is part of its development of a broader land banking plan and strategy as well as a key step in preventing and eliminating title defects, which discourage post-disaster redevelopment).

252. These tax lien sales are often online sales conducted one time each year through a website hosted by a private vendor. See, e.g., *City of New Orleans Will Hold Online Tax Title Sale*, CITY OF NEW ORLEANS, <http://www.nola.gov/mayor/press-releases/2012/20120921-city-of-new-orleans-will-hold-online-tax/> (last visited Aug. 10, 2013).

253. See *id.*

254. See, e.g., U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 251, at 32 & n.2 (restating to the OIG Louisiana law on tax sale purchases, namely that "Louisiana State Law is clear that '[n]o tax sale shall transfer or terminate the property interest' until after the redemption and notification periods (18 months for blighted properties but as long as 3 years for nonblighted) have expired. The law is also clear that tax sale lien purchasers do not have clear title to the property and typically cannot enter the premises") (internal citations omitted).

255. See *id.*

frequently private speculators who purchase the liens solely to collect the repayment plus the statutory interest.<sup>256</sup> In other words, private tax lien purchasers are generally not interested in owning or redeveloping tax-delinquent properties.<sup>257</sup> Thus, they rarely take advantage of their ability under applicable state law to file an action to obtain title to the property once the property owner's statutory period for paying or "redeeming" the tax certificate has expired—generally a three-year redemption period.<sup>258</sup> As a result, private tax sale purchasers do not generally contribute to a neighborhood's redevelopment of a storm-damaged property.

HUD's rules governing the environmental review process do not provide clear guidance on whether an environmental review must be performed when a local, state, or private entity uses CDBG funds to purchase a tax lien. However, the rules are clear that no environmental review is required if CDBG funds are used to obtain a nonbinding option agreement to purchase a property.<sup>259</sup> Similarly, the rules unambiguously state that an environmental review is required if the HUD grantee is using CDBG funds to purchase an interest in real property.<sup>260</sup> This regulatory "gray area" regarding applicability of the environmental review requirement to tax lien purchases jeopardized a significant element of the NORA's post-Katrina neighborhood stabilization strategy.<sup>261</sup>

Following Hurricane Katrina, NORA used HUD CDBG grant funds provided by the Neighborhood Stabilization Program—2 to fund one part of the authority's neighborhood revitalization strategy.<sup>262</sup> Without explicit approval from HUD, NORA, an independent state-created redevelopment agency, decided to bid alongside private entities in the City of New Orleans's online tax

---

256. See Daniel Wagner, *Some Lose Homes Over a Pittance in Back Taxes*, TIMES PICAYUNE, July 10, 2012, [http://www.nola.com/business/index.ssf/2012/07/some\\_lose\\_homes\\_over\\_a\\_pittanc.html](http://www.nola.com/business/index.ssf/2012/07/some_lose_homes_over_a_pittanc.html).

257. See *id.*

258. Louisiana's statutory scheme for property tax foreclosure provides for public auction of tax deeds for tax-delinquent properties. See Frank S. Alexander, *Louisiana Land Reform in the Storms' Aftermath*, 53 LOY. L. REV. 727, 752–54 (2008). The law gives Louisiana landowners up to three years—eighteen months in New Orleans if the property has been designated blighted—to redeem their property and avoid losing title. See *id.* It is common for tax-delinquent property owners to redeem their property during this three-year period. See Stephanie Riegel, *Ends and Means*, GREATER BATON ROUGE BUS. REP. (Sept. 16, 2013), <http://www.businessreport.com/article/20130916/BUSINESSREPORT0401/309169989>. Over 90 percent of tax-delinquent landowners redeemed their properties in East Baton Rouge Parish, which is Louisiana's largest parish. See *id.*

259. An environmental review is required any time CDBG funds are used to complete a "choice-limiting" action relating to acquisition of a property, such as a purchase and sale agreement. See U.S. DEP'T OF HOUS. & URBAN DEV., BASICALLY CDBG FOR STATES 11-3 TO 11-4 (2010), available at [http://portal.hud.gov/hudportal/documents/huddoc?id=cdbg\\_bas\\_11.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=cdbg_bas_11.pdf).

260. See *id.*

261. See U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 251, at 22 (1)(K), 32 (2011) (recommending to HUD that the New Orleans Redevelopment Authority be required to refund to the U.S. Treasury CDBG grant funds that NORA paid for the tax liens).

262. See *id.*

lien sale.<sup>263</sup> On September 22, 2010, NORA purchased an initial group of twenty-two tax liens on properties located within NORA's strategic redevelopment areas.<sup>264</sup> NORA hoped that the property owners would redeem the tax-delinquent properties and rehabilitate them, but in the event that that did not occur, NORA planned to file a civil action to take ownership of the property upon expiration of the owner's statutory redemption period.<sup>265</sup>

HUD's Office of the Inspector General reviewed NORA's Neighborhood Stabilization Program—2 implementation in April 2011.<sup>266</sup> The Inspector General disallowed NORA's tax sale lien purchase expenditure and called for the redevelopment agency to repay HUD funds spent on the tax sale lien purchases.<sup>267</sup> A purchase of a tax-sale lien was, in the Inspector General's opinion, a purchase of an interest in real property.<sup>268</sup> Thus, the Inspector General reasoned that NORA's tax lien purchase should have occurred only after NORA completed an environmental review on each of the tax sale lien properties.<sup>269</sup>

The Inspector General's opinion did not cite legal authority in reaching its conclusions.<sup>270</sup> Rather, the Inspector General seemed concerned that there was no clear precedent in support of NORA's decision to participate in the tax lien sale.<sup>271</sup> The Inspector General's unfavorable determination underscores the importance of HUD rules governing environmental review for the local and state government entities doing work "on the ground." The Inspector General's determination effectively removed an important post-disaster redevelopment tool from NORA's "tool chest."

*D. Assign High-Level HUD Staff to Provide Technical Assistance and Navigate Unique Review Problems: Designate HUD Staff to Coordinate Early Environmental Review*

Implementing federal programs post-disaster demands a close-knit partnership between HUD, state, and local governments responsible for devising, implementing, and overseeing disaster recovery programs.<sup>272</sup> This Article recommends that HUD—or potentially another responsible federal agency under the proposed Unified Federal Review process—create a post-

263. *See id.*

264. *See id.* at 7.

265. *See* NEW ORLEANS REDEVELOPMENT AUTHORITY TRANSITION REPORT, *supra* note 248, at 7, 8, 9, 10, 15.

266. *See* U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 251, at 1.

267. *See id.* at 22(1)(K).

268. *See id.* at 46–47.

269. *See id.*

270. *See id.* The Inspector General relied on promotional and explanatory text from the third-party vendor that operated the tax-sale website for the City of New Orleans. *See id.*

271. *See id.* at 46–47.

272. *See, e.g.,* LIU, *supra* note 17, at 4 (urging that "[f]ederal leaders and staff must serve as partners, not narrow rule interpreters").

disaster “strike team” and embed the team in the disaster area until the environmental review and/or all long-term recovery programs have been formulated and implemented. The embedded HUD staff would serve in an advisory capacity to state and local staff and have broad decision-making authority.<sup>273</sup>

Hurricane Katrina presented a crisis situation. The State of Louisiana had numerous pressing concerns related to making sure that homeowners impacted by the storm received immediate assistance. In addition, the State of Louisiana had no prior experience designing and implementing complex housing programs. In 2004, the year before Katrina, Louisiana was responsible for deploying only \$10 million per year in CDBG funds for a handful of small projects.<sup>274</sup> To avoid regulatory logjams that stifle the recovery’s progress, such as the one that caused the long delay in implementation of the required NEPA environmental review following Katrina, HUD must offer to furnish state governments with the capacity to carry out proper planning. Some state and local governments that handle tens of millions in federal housing funds might be capable of handling an enormous volume of recovery funds, but many state and local governments cannot be expected to handle the funding volume of, and programmatic complexity associated with, disaster response projects.

Expertise with disaster recovery is much more likely to reside with a federal government agency that oversees implementation of disaster recovery efforts nationally.<sup>275</sup> This expertise includes detailed knowledge of the types of environmental and historic preservation issues salient to particular urban areas—such as historic properties in New Orleans and fish and wildlife resources in Portland, Oregon. It is not practical to count on local and state officials to navigate the complex regulatory schemes and make programmatic decisions that will best advance the recovery.

Feedback from Gulf Coast local government officials confirmed the need for a more involved federal presence.<sup>276</sup> Those local officials report that the federal government is needed in the role of “coach” and “mentor” and not just a twice-yearly programmatic compliance visit.<sup>277</sup> Local and state governments may have a basic proficiency with federal programs, but it is not common for

---

273. See generally *id.* (recommending that the federal government “[c]reate a long-term recovery office, outside of [the Department of Homeland Security], that provides capacity, technical assistance, shared data, best practices, and cross-program coordination and brokering on community recovery planning”).

274. The year before Katrina, the State of Louisiana was responsible for spending approximately \$10 million in CDBG funds. Following Katrina, the state was responsible for administering \$10 billion in funds. See *Implementation of the Road Home Program Four Years After Hurricane Katrina*, *supra* 127 (testimony of Frederick Tombar, Senior Advisor for Disaster Recovery, U.S. Dep’t of Hous. & Urban Dev.). The majority of the state’s CDBG funds were spent on infrastructure projects, not thousands and thousands of single family home purchases and sales.

275. See LIU, *supra* note 17, at 5.

276. See *id.* at 3.

277. See *id.*

local and state governments to have the knowledge and experience to implement and navigate a wide range of regulatory requirements. The federal government can play a critical post-disaster role in supporting state and local capacity building.<sup>278</sup> In the wake of Hurricane Katrina, the federal government's most active oversight role appeared to be in the quasi-adversarial role of program auditor.<sup>279</sup> According to HUD official Fred Tombar, the state Road Home Program was audited more than fifty-two times between June 2006 and August 2009.<sup>280</sup>

A stronger federal role is needed in overseeing implementation of the environmental review requirement because no state or local jurisdiction is going to develop a proficiency for administering a process that involves tens of thousands of properties. Catastrophic events like Hurricanes Katrina, Rita, and Sandy rarely occur in any one place, so their highly destructive force understandably overwhelms the ability of local and state governments to respond effectively.<sup>281</sup> Immediate and longer-term access to federal resources facilitates shepherding disaster-stricken states, regions, and cities from initial disarray to widespread neighborhood rebuilding. This call for better federal leadership is not a call for more money, but instead for better coordination and planning.<sup>282</sup>

HUD and the State of Louisiana did not plan efficiently for NEPA implementation on the buyout properties.<sup>283</sup> State and local officials did not carefully consider how NEPA environmental review would fit into a high-level timeline for returning properties to commerce so that neighborhoods could redevelop as quickly as possible.<sup>284</sup> It is reasonable to expect that it would take

---

278. *See id.* at 4.

279. *See Implementation of the Road Home Program Four Years After Hurricane Katrina*, *supra* note 127 (testimony of Frederick Tombar, Senior Advisor for Disaster Recovery, U.S. Dep't of Hous. & Urban Dev.). The 2006 installment of federal recovery legislation, which was the first "supplemental" appropriation, provided modest funding for technical assistance. Although HUD officials stated that the department's strategy from the beginning of the Katrina and Rita recoveries was primarily to provide technical assistance and to monitor the expenditures of the funds, *see The Role of the Community Development Block Grant Program in Disaster Recovery*, *supra* note 15 (statement of Frederick Tombar, Senior Advisor, Office of the Sec'y for Disaster & Recovery Programs, U.S. Dep't of Hous. & Urban Dev.), it is not clear how much technical assistance can be provided for with \$400,000, under circumstances where a state is receiving \$19 billion in federal disaster assistance.

280. *See id.*

281. *See* MONICA FARRIS ET AL., *ACHIEVING SUCCESSFUL LONG-TERM RECOVERY AND SAFETY FROM A CATASTROPHE: RECOMMENDATIONS FROM HURRICANE KATRINA—EXECUTIVE SUMMARY 2* (2010), available at [http://scholarworks.uno.edu/chart\\_pubs/8](http://scholarworks.uno.edu/chart_pubs/8).

282. *See id.*; *see also* LIU, *supra* note 17, at 5 (urging that "the federal government should incentivize and reward, if not require, advance disaster recovery planning").

283. *See, e.g.,* Moreno Gonzales, *supra* note 73 (noting the Louisiana Land Trust's concern that two-and-a-half years after Katrina, the properties purchased through the State's buyout program were overgrown and abandoned).

284. *See, e.g.,* Cohen, *supra* note 78 (quoting Louisiana Recovery Authority Executive Director expressing regret at the state's delay in completing the environmental reviews, offering that the "[Louisiana Recovery Authority], Land Trust and parishes will have to work together in the coming

a significant period of time to complete environmental reviews, but the process for commissioning and completing the first batch of reviews took more than three years following Katrina and almost a year following the initial parish approval for disposition plans for the Road Home buyout properties.<sup>285</sup> The long delay was due, in large part, to the fact that the State of Louisiana had to wait for each parish to designate future uses for properties. The first parish did not complete its disposition plan until twenty-seven months after Katrina.<sup>286</sup> The disposition approval process could be truncated dramatically if HUD required or incentivized states and cities to include in their comprehensive plans an element that designates future uses for neighborhoods impacted by disasters.

It is tempting to characterize the state's planning oversights as purely a staffing capacity issue, but that is not likely the case here. Louisiana had experience deploying CDGB funds.<sup>287</sup> The critical issue appears to be that disasters present the unforeseen, novel issues that no single state or local agency is equipped to address on its own.<sup>288</sup> In the disaster context, the community redevelopment needs are overwhelming.<sup>289</sup> These needs are well beyond a state or local jurisdiction's normal scope of spending CDBG money. Thus, even a state's CDBG experts were pushed to their limits and did not have all the answers in the disaster recovery context. A federal long-term recovery

---

months to 'play catch up' and get the mandated reviews done before there is any further delay . . . . 'The fact is they should have begun last year but they weren't . . . .')

285. An initial batch of environmental reviews was completed in November 2008, thirty-eight months after Katrina's landfall. See Barrow, *supra* note 121. The LLT transferred the first buyout properties to developers working in Orleans Parish in March 2009. See NEW ORLEANS REDEVELOPMENT AUTH., *supra* note 134, at 14.

286. See PARISH REDEVELOPMENT PLAN, *supra* note 115.

287. The State of Louisiana OCD has a long history with federal CDBG funds. See *Road Home?*, *supra* note 10 (statement of Susan Elkins, State of La., Div. of Admin., Office of Cmty. Dev., Disaster Recovery Unit). Susan Elkins testified that "[m]ost of the key staff members in OCD have over twenty years' experience working with the CDBG program." She further added that "[t]he State has never received an audit or monitoring finding by the Department of Housing and Urban Development (HUD), the Office of Inspector General (OIG), or the [State of Louisiana] Legislative Auditor on the State's CDBG program or any other federal program that it administers." *Id.*

288. The urgent circumstances associated with implementing post-disaster recovery programs as well as conflicting rules among federal agencies involved in the recovery made it extremely difficult for the state to move disaster projects forward quickly. See, e.g., *id.* ("The imposition of federal statutes and regulations that work in normal times but not in times of crisis, contributed to the undoing of a partnership [for implementing the Road Home housing assistance program] that would have benefited everyone." The major problem the state encountered was with "[t]he environmental regulations . . . that are good and work in normal times, but they severely impact construction and repair programs in the disaster recovery process.").

289. A catastrophic urban disaster leaves a city scrambling to cover deficits caused by the loss of tax base from residents who abandon homes or leave for extended periods of time. Large disasters can temporarily close private and nonprofit institutions, such as universities, that employ large numbers of residents and patronize local small businesses. Day-to-day living is made almost impossible due to thoroughfares clogged with debris, closed stores, nonfunctioning utilities, and perhaps most importantly, shuttered schools. These are a few of the many critical community development obstacles that faced New Orleans following Katrina. See, e.g., OLSHANSKY & JOHNSON, *supra* note 22, at 39–41, 73–75.



“strike force” can ensure that states have the core knowledge and resources necessary to move forward immediately with planning and implementation of long-term recovery housing projects. In particular, the strike force can support the full range of activities necessary to complete the environmental review process and effectively use and disseminate the findings the review process produces.

*E. Avoid Categorical Exclusions: Proceed Cautiously in Making Disaster Recovery Efforts Categorically Excluded from Environmental Review*

A categorical exclusion is a determination that a particular type of activity, such as post-disaster residential redevelopment, is not likely to result in significant harm to the environment.<sup>290</sup> Given that the range of environmental problems seen during a catastrophic disaster and that disaster-associated destruction could impact the environment in a way that would significantly influence post-disaster redevelopment decisions, it could be misleading to a community—to residents as well as local and state governments—to suggest that skipping the environmental review is a safe or appropriate course of action.

One of the principal reasons that a categorical exclusion is valued is that it allows a project to proceed more quickly than if an environmental review is required. The principles articulated in this section of the Article highlight, however, that there should be minimal time delay in completing an *area-wide environmental review* following a major disaster. This review should not be an obstacle to development, but rather an early and valuable source of information from which critical information can be disseminated to residents and better post-disaster planning can be done by local and state governments in conjunction with federal partners.<sup>291</sup>

#### CONCLUSION

We take for granted that cities will recover from disasters and return to “normal.” We have faith that millions or billions in government resources will rebuild cities from the pre-disaster pieces that remain. But disaster events leave cities at a crossroads. One path may lead to a fresh start, rebuilding better than before. But there is also another path, which is the possibility of a poor outcome—a city wanting for pre-disaster community assets and a city that emerges more inequitable socially and economically than before the disaster

---

290. See 24 C.F.R. § 58.35(a) (2013); *supra* text accompanying notes 57–61. Under HUD’s NEPA implementing regulations, categorically excluded activities generally include activities that do not have a “physical impact” on the environment or specific activities that HUD’s NEPA implementing regulations have determined do not have a significant impact on the environment. See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 259, at 11-6 to 11-8.

291. The federal government considers an improved federal-state-local post-disaster partnership one of the important considerations in creating a new Unified Federal Review process. See Greczmiel, *supra* note 14, at 1.

event. One of the reasons the more promising avenue to recovery could be foreclosed to some cities is the obstacles that lie in the way. The roadblocks to recovery are many: rebuilding schools, gutting damaged homes, pressing commercial shopping center owners to reopen as quickly as possible, negotiating with insurers, and finding documentation to apply for homeowner FEMA assistance. These fundamental and urgent city rebuilding concerns touch the lives of virtually every resident of the rebuilding city. They also underscore exactly why it is critical that post-disaster long-term recovery programs must be as simple, efficient, and clear as possible.

Disasters expose broken or poorly working systems, and as a result, federal, state, and local governments have an opportunity to diagnose and fix problems for the long term that may have historically compromised local government effectiveness. The federal government appropriated billions of dollars to rebuild the Gulf Coast and New Orleans without informed knowledge of whether the local communities could implement the recovery and without ensuring that those local communities would have the technical assistance necessary to spend federal funds quickly and effectively.

Eight years following Katrina, we can see more clearly that one of the recovery challenges needing improvement is planning for and implementing the NEPA environmental review process. Make no mistake: there are also other federal legal and regulatory requirements that could be singled out for change and improvement in responding to future disasters. Reflecting on the Louisiana storms of 2005, and highlighting NEPA, this Article discusses just one of many opportunities to learn from what happened on the ground: a chance to study and practice what must be done to revive, rehabilitate, and reinvent a city in a crisis.

This discussion about how to improve the oversight and implementation of federal regulations applicable to long-term disaster recovery is relevant well beyond New Orleans. It is a question that will again emerge. Scholars and planners are in agreement that there are a number of other American cities vulnerable to large-scale disasters.<sup>292</sup> The West Coast of the United States, from Washington State to the border with Mexico, is vulnerable to earthquakes, as are the St. Louis area; Charleston, South Carolina; and Boston.<sup>293</sup> The entire East Coast and Gulf Coast of the United States could fall in the path of a hurricane.<sup>294</sup>

Given the magnitude of the federal investment in disaster recovery, the federal government has an obligation as a responsible fiscal steward to make

---

292. See Jonathan Barnett & John Beckman, *Reconstructing New Orleans: A Progress Report*, in *REBUILDING URBAN PLACES AFTER DISASTER: LESSONS FROM HURRICANE KATRINA* 290 (Eugenie L. Birch & Susan M. Wachter eds., 2006).

293. See *id.*

294. As learned when Hurricane Sandy struck New York in October 2012, it does not even take a Category 3 hurricane to severely damage New York's transportation and electrical distribution infrastructure. See *id.*

sure money is well spent. Just as important to the long-term recovery is elimination of the regulatory red tape that can sidetrack the recovery. Federal, state, and local partners can then better focus on rebuilding and bringing families home. It is essential that the federal government and its state and local partners ensure that the regulatory gates that guard access to federal funds are updated and fine-tuned to operate as efficiently as possible. No regulatory gate should be allowed to function as a bottleneck to critical federal programs. The stakes are too high. Long-term disaster recovery presents an opportunity to create stronger cities and regions, an opportunity not merely to cope with crisis or disaster, but to overcome destruction and thrive.