

In the Matter of the State of Texas Proposed  
Amended Plan for Disaster Recovery Under the  
Consolidated Security, Disaster Assistance and  
Continuing Appropriations Act, Public Law 110-329

## **ADMINISTRATIVE COMPLAINT**

October 28, 2009

TO THE HONORABLE SHAUN DONOVAN  
Secretary, United States Department of Housing and Urban Development

This Complaint is submitted on behalf of low and moderate income Texas families by the organizations and individuals listed below. The State of Texas's proposed Amendment to the Plan for Disaster Recovery Under the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Public Law 110-329 fails to comply with applicable law and regulations and is insufficient to support the obligation of CDBG funds.

We ask Secretary to deem Texas's proposed Amended Plan for Disaster recovery insufficient to support the obligation of CDBG funds at this time, and to require revision and resubmission of the Plan, or portions thereof, until Texas' Action Plan is in full compliance with applicable laws and regulations, and is consistent with the intent of Congress as declared in the Housing and Community Development Act of 1974 and the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, §122 Stat. 3574, 3599-3601 (2008).<sup>1</sup>

### **Request for Response from HUD**

We respectfully request a response to the substantive issues raised in this complaint from HUD directly. Our previous Administrative Complaint regarding the February 2009 State of Texas Action Plan for Disaster Recovery (submitted February 27, 2009) was forwarded to the Office of Rural Community Affairs (now the Texas Department of Rural Affairs) on March 26, 2009 "in accordance with HUD's procedures for handling citizen's complaints." To date, we have received no response from ORCA/TDRA to our Complaint, in violation of the alternative citizen participation requirements set out in the Federal Register. 74 Fed. Reg. 7244, 7250; 74 Fed. Reg. 41146, 41149. ("The grantee will provide a timely written response to every citizen complaint. Such response will be provided within 15 working days of the receipt of the complaint, if practicable.")

### **HUD's Authority and Oversight Obligations**

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<sup>1</sup> "The state may submit an initial partial Action Plan and amend it one or more times subsequently until the Action Plan describes uses for the total grant amount." Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for Community Development Block Grant (CDBG) Disaster Recovery Grantees Under 2008 Supplemental CDBG Appropriations, 74 Fed. Reg. 7244, 7246 (February 13, 2009).

Under the Annual Community Development Block Grant Program the Secretary of Housing and Urban Development (HUD) has not only the authority, but the obligation, to enforce compliance with the statutory purposes of the Housing and Community Development Act of 1974 (HCDA), 42 U.S.C. §5301 *et. seq.*, and its implementing regulations.<sup>2</sup> Under the HCDA, the Secretary has authority to make grants “only if” grantees make certain submissions and certifications.<sup>3</sup>

Congress appropriated \$6.5 billion in supplemental CDBG funds for “necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization in areas affected by hurricanes, floods, and other natural disasters occurring during 2008” through the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act. (Appropriations Act). Beyond the specific language of the appropriating act and program rules published in the Federal Register, all regular statutory and regulatory rules for CDBG program funds also apply to CDBG disaster recovery funds. The same language appears in both Federal Register Notices applicable to these funds: “[e]xcept as described in this Notice, statutory and regulatory provisions governing the CDBG program for states, including those at 24 CFR part 570, shall apply to the use of these funds.” 74 Fed. Reg. 7244, 7245; 74 Fed. Reg. 41146, 41146-41147.

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<sup>2</sup> As recently as May 7, 2009, HUD rejected a fair housing certification from Westchester County as insufficient, thereby refusing to obligate more than \$15 million in CDBG grant funds. See Gerald McKinstry, *HUD blocks funding for Westchester*, THE JOURNAL NEWS (Westchester Co., New York), May 7, 2009, available at <http://www.lohud.com/article/2009905070407>

<sup>3</sup> See, eg. 42 U.S.C. §5302 (“The Secretary is authorized to make grants to States, units of general local government, and Indian tribes **to carry out activities in accordance with the provisions of this chapter.**”); 42 U.S.C. §5304 (a) “Statement of objectives and projected use of funds by grantee **prerequisite to receipt of grant**; publication of proposals by grantees; notice and comment; citizen participation plan (1) **Prior to the receipt in any fiscal year of a grant . . . the grantee shall** have prepared a final statement of community development objectives and projected use of funds and **shall** have provided the Secretary with the certifications required in subsection (b) of this section and, where appropriate, subsection (c) of this section.”; 42 U.S.C. §5304(b) “Any grant . . . shall be made **only if** the grantee certifies to the satisfaction of the Secretary that-- the grantee is in full compliance with the requirements of subsection (a)(2)(A), (B), and (C) of this section and has made the final statement available to the public;” (emphasis added) These statutory requirements have been codified, see 24 C.F.R. § 91.325(a) and 24 C.F.R. § 91.325(b)(4)(ii) (applicants must certify that they are affirmatively furthering fair housing and primarily benefiting LMI persons, among other requirements); 24 C.F.R. § 91.5 (certifications must be assertions based on “supporting evidence”); 24 C.F.R. § 91.500(a) and 24 C.F.R. § 91.5 (HUD “will review” the plan in which certifications must appear, and has the authority to inspect the evidence on which certifications are based); 24 C.F.R. § 570.485(c) (HUD may determine that a certification is not “satisfactory to the Secretary” based on evidence); 24 C.F.R. § 91.500(b) (HUD may “**disapprove**” any plan or portion thereof that is substantially incomplete, contains a certification that is not satisfactory to the Secretary within the meaning of 24 CFR 570.485(c), or is “inconsistent with the purposes of the Cranston-Gonzalez National Affordable Housing Act, 42 USC §12703); 24 C.F.R. § 570.485(c) (HUD may require a state to submit further assurances as the Secretary deems necessary to find the grantee’s certification satisfactory.) The purpose of the Cranston-Gonzalez National Affordable Housing Act is “to expand the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing, for very low-income and low-income Americans;” and “to mobilize and strengthen the abilities of the States and units of general local government throughout the United States to design and implement strategies for achieving an adequate supply of decent, safe, sanitary, and affordable housing.” (42 U.S.C. §12722)

Before funds can be obligated, a State must submit an Action Plan for Disaster Recovery or Action Plan Amendment (Action Plan) to the Secretary as an “Application for Allocation.” Pub. L. No.110-329, §122 Stat. 3574, 3599-3601 (2008); 74 Fed. Reg. 7244, 7246; 74 Fed. Reg. 41146, 41151. The Appropriations Act requires an Action Plan to “detail[] the proposed use of all funds, including criteria for eligibility and how the use of these funds will address long-term recovery” Pub. L. No.110-329, §122 Stat. 3574, 3599-3601 (2008). The plain language of the appropriating statute sets out specific requirements that states must meet before funds are obligated by the Secretary. The language of the statute is mandatory, not permissive. (“**[P]rior to the obligation of funds each State shall submit a plan to the Secretary[.]**” Pub. L. No.110-329, §122 Stat. 3574, 3599-3601 (2008) (emphasis added). States cannot receive the funds that make up their allocation (in other words, those funds cannot be obligated) until an Action Plan has been submitted to and *approved by* the Secretary. Plainly, Congress intends the Secretary’s control over the obligation of funds to act as an enforcement mechanism for mandatory requirements imposed on the states, just as the Secretary must refuse to obligate funds until a state has met all mandatory requirements under the annual CDBG program.

The Appropriations Act also gave the Secretary the authority to “waive, or specify alternative requirements for, any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or the use by the recipient of these funds or guarantees.” Pub. L. No.110-329, §122 Stat. 3574, 3599-3601 (2008). In granting affected states a waiver to carry out activities directly, for example, HUD states that it “is applying the regulations at 24 CFR 570.480(c) with respect to the basis for HUD determining whether the state has failed to carry out its certifications so that such basis shall be that the state has failed to carry out its certifications in compliance with applicable program requirements.” 74 Fed. Reg. 7244, 7251. The plain language of a regulation that HUD specifically states is applicable to the 2008 CDBG disaster recovery funds recognizes “the **Secretary’s obligation and responsibility** to review a state’s performance . . . and the **Secretary’s obligation to enforce compliance with the intent of the Congress** as declared in the Act.” 24 C.F.R. §570.480(c) (emphasis added). Congress granted the Secretary authority to waive certain requirements and to specify alternatives *because* those requirements would otherwise be mandatory and the Secretary would be obligated and responsible for denying the obligation of CDBG funds to the states.<sup>4</sup> Any deference the Secretary gives to a state’s interpretation of statutory and regulatory requirements is limited by his obligation to enforce consistency and compliance with the intent of Congress and the HCDA.

HUD also elucidates its oversight obligations and authority to compel compliance with statutory requirements directly in the February 13, 2009 Federal Register Notice allocating 2008 CDBG disaster recovery funds:

The Second 2008 Act **requires funds be used only for specific purposes**. The

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<sup>4</sup> Among other alternative certifications, “[t]he state certifies that it will comply with applicable laws.” 74 Fed. Reg. 7244, 7255. Certifications are a material condition of the receipt of CDBG funds, therefore, a state that submitted such certification but did not comply with the statutory purposes and legal requirements applicable to 2008 CDBG disaster recovery would not be eligible to receive such funds.

statute directs that each grantee will describe, in its Action Plan for Disaster Recovery, **criteria for eligibility and how the use of the grant funds will address long-term recovery** and infrastructure restoration, housing, and economic revitalization. HUD **will monitor compliance** with this direction and **may be compelled to disallow expenditures if it finds uses of funds do not meet the statutory purposes, or that funds allocated duplicate other benefits.** 74 Fed. Reg. 7244, 7426 (emphasis added).

The position that HUD cannot refuse to obligate funds when a state has not complied with legal or program requirements is contradicted not only by logic, but by the plain language of the statutes and regulations appropriating and implementing 2008 CDBG disaster recovery funds, the statutes and regulations of the annual CDBG program, and the history of the administration of CDBG funds.

Under all applicable laws and regulations, the Secretary has not only the authority, but also the obligation and responsibility to review the State of Texas' submissions and certifications in application for funds allocated by Pub. L. No.110-329, §122 Stat. 3574, 3599-3601 (2008) and to enforce compliance with CDBG program requirements and the intent of Congress.

**A. The State of Texas' proposed Amended Plan for Disaster Recovery fails to meet the standards set out in federal law and regulation and the alternative requirements set out in the Federal Register.**

HUD's *Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for Community Development Block Grant (CDBG) Disaster Recovery Grantees Under 2008 Supplemental CDBG Appropriations* published in the Federal Register on February 13, 2009 provided:

Prerequisites to a grantee's receipt of CDBG disaster recovery assistance include adoption of a citizen participation plan; publication of its proposed Action Plan for Disaster Recovery; public notice and comment; and submission to HUD of an Action Plan for Disaster Recovery, including certifications. Except as described in this Notice, statutory and regulatory provisions governing the CDBG program for states, including those at 42 U.S.C. §5301 *et seq.* and 24 CFR part 570, shall apply to the use of these funds.<sup>5</sup>

Texas' Amended Plan for Disaster Recovery fails to meet a number of these prerequisites, including publication of an Action Plan for public comment and submission of an Action Plan for Disaster Recovery and certifications to HUD.

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<sup>5</sup> 74 Fed. Reg. 7244, 7249. Under the Federal Register Notice Published August 14, 2009, "[t]he waivers, alternative requirements, and statutory changes described in the February 13, 2009, Federal Register Notice (74 FR 7244) apply to all of the CDBG supplemental disaster recovery funds appropriated in the Second 2008 Act. (Pub. L. 110-329)." 74 Fed. Reg. 41146, 41149.

**I. Texas has failed to submit a plan within the meaning of PL 110-329 and implementing regulations.**

The State's submitted Action Plan fails to meet federal standards. Primarily, the Plan does not "detail[] the proposed use of all funds, including criteria for eligibility," as mandated by the appropriating statute. Under the Appropriations Act, a state must submit this plan "prior to the obligation of funds."<sup>6</sup> Because the State of Texas has not submitted a plan that meets statutory requirements, funds cannot be obligated to the State.

Texas's submitted Action Plan repeatedly *defers* decisions on how disaster recovery grant funds will be used. "For all aspects of this Action Plan Amendment, local choice shall be emphasized, and the COGs shall have the right . . . to make determinations as to the allocations of funds within their regions among housing, infrastructure, and economic development."<sup>7</sup> The Amendment sub-allocates \$3 billion in cumulative CDBG funds (Rounds 1 and 2) to four regional Councils Of Government (COGs) and creates a competitive funding pool for the other seven COGs, leaving to the COGs all decisions on how the money will be used. Both decisions concerning how the funds will be used and adoption of the "criteria for eligibility" required by the Appropriations Act are explicitly deferred: "[r]ecommended housing and non-housing allocations are provided within this amendment, but regions will be allowed to move funds between housing and non-housing interchangeably in the development of [Methods of Distribution] MODs. . . . Once final allocation decisions are made, the COGs and other eligible subrecipients . . . shall have the opportunity to designate housing programs" and to provide "specific programmatic benchmarks, eligibility requirements, and information regarding their capacity."<sup>8</sup>

The Amended Plan does not detail the proposed use of funds or eligibility criteria required by statute, because the State does not know how CDBG funds will be used or what the eligibility criteria will be. The State will not know how funds will be used until it receives MODs and applications from the COGs. Texas' Round 1 Action Plan was approved by HUD on March 10, 2009, five months later TDRA approval of some MODs was still "conditional."<sup>9</sup> Decisions that should have been made before the Plan was submitted to the Secretary for approval will not be made until further into the distribution process. This does not comply with the text, structure, history, or purpose of the statute.

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<sup>6</sup> See, 74 Fed. Reg. 41146, 41148 ("The statute directs that each grantee **will describe in its Action Plan** for Disaster Recovery **criteria for eligibility** and **how the use of grant funds will address long-term recovery** and infrastructure restoration, housing, and economic revitalization in the affected areas."); 74 Fed. Reg. 41146, 41151, emphasis added. ("Prerequisites to a grantee's receipt of CDBG disaster recovery assistance include adoption of a citizen participation plan; publication of its proposed Action Plan for Disaster Recovery; public notice and comment; and submission to HUD of an Action Plan for Disaster Recovery, including certifications.")

<sup>7</sup> TEXAS DEPARTMENT OF RURAL AFFAIRS (TDRA), STATE OF TEXAS AMENDED PLAN FOR DISASTER RECOVERY at 11, (submitted to the U.S. Department of Housing and Urban Development September 30, 2009) [hereinafter Amended Plan].

<sup>8</sup> Amended Plan at 12, 7.

<sup>9</sup> TDRA, TDRA METHOD OF DISTRIBUTION SUMMARY REPORT (August 18, 2009) available at [http://www.tdra.state.tx.us/pdfs/Method\\_of\\_Distribution\\_Summaries\\_8\\_19\\_2009.pdf](http://www.tdra.state.tx.us/pdfs/Method_of_Distribution_Summaries_8_19_2009.pdf)

Sub-allocation to units of local government cannot by itself be a “use” of funds because sub-allocation alone provides no basis for determining “how the use of [the] funds will address long term recovery and restoration of infrastructure.” Sub-allocation only renders this determination more difficult by multiplying levels of authority and decision making. Moreover, if sub-allocation alone were a “use,” states could render the statute meaningless at will. Accordingly, HUD regulations indicate that a Plan is only sufficient if it identifies which *activities* and which *beneficiaries* will receive funding. *See* 74 Fed. Reg. 7244, 7250 ¶5.b. Texas’s Plan identifies neither activities nor beneficiaries, and therefore fails to state proposed “uses” for the money as required by the statutory text.

Texas may argue that by requiring COGs to follow federal statutes and regulations in deciding how to use each sub-allocation, its plan does identify activities and beneficiaries. However, all recipients and subrecipients of CDBG funds are bound by CDBG statutes and regulations regardless of the inclusion of language stating as much in an Action Plan.

Texas has demonstrably failed to require subrecipients to follow federal statutes and regulations. Funding allocation decisions and project applications related to Round 1 of the 2008 CDBG disaster recovery allocation failed to meet one of the primary national objectives of the CDBG program – that 50% of funds are used to primarily benefit low and moderate income families.<sup>10</sup> Texas’ Amended Plan offers little more than assertions that programs will comply with requirements that are already mandatory through federal statutes and regulations; requirements with which it has already failed to comply. The Plan does not include information that demonstrates how these requirements and objectives will be met.

Texas’s proposed sub-allocation is also inconsistent with the structure of the appropriations statute and regulations. These laws require non-duplication of other benefits, a 50% floor for benefit to low and moderate income families, a 10% rental housing floor, affirmative efforts to promote non-discrimination, adherence to the three CDBG national objectives, and citizen participation in deciding how the funds will be spent. Failure to comply with these requirements is not merely procedural; it has substantive consequences, particularly for low income households and populations protected under the Fair Housing Act.

## **II. Failure to provide an opportunity for public comment.**

Among the common waivers HUD published on February 13, 2009 was a waiver of “the requirement that the grantee follow its citizen participation plan to the extent necessary to allow for a grantee to submit an Action Plan for Disaster Recovery in an expedited manner.” HUD shortened the minimum time for citizen comments from 30 days to 7 and removed the requirement for public hearings in order to “permit a more streamlined public process, but one that still provides for reasonable public notice, appraisal, examination, and comment on the activities proposed for the use of CDBG disaster recovery grant funds.” Under the alternative citizen participation requirements, states

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<sup>10</sup> Amended Plan at 6.

must publish the proposed Action Plan for Disaster Recovery and any subsequent amendments “by the usual methods” and on the grantee’s official web site “for no less than 7 calendar days of public comment.”<sup>11</sup>

Texas has displayed a commendable commitment to providing public hearings, holding eight public hearings on the Amended Plan; five on the original Amendment and three on a revised version.<sup>12</sup> However, the key element of citizen participation is neither public hearings nor a specific number of days for comments, but that the process is “one that still provides for reasonable public notice, appraisal, examination, and comment **on the activities proposed for the use of CDBG disaster recovery grant funds.**” 74 Fed. Reg. 7244, 7249-7250.<sup>13</sup> Neither the original Plan for Disaster Recovery nor the Amended Plan describe the “activities proposed for the use of CDBG disaster recovery grant funds” beyond set asides for state planning and administration (\$123 million) and four state-run programs: Healthcare Facilities Program (\$17 million), Rapid Housing Recovery Pilot (\$6 million), Affordable Rental Housing Program (\$342 million), and Title Clearance and Legal Assistance Program (\$500,000). The overwhelming majority of CDBG disaster recovery funds, almost \$2.5 billion of a \$3 billion total allocation, have been sub-allocated for “[a]ll activities allowed under CDBG.”<sup>14</sup> Stating that funds can be used for “all activities allowed under CDBG,” merely affirms requirements that are already attached to this grant; it does not constitute a statement of “activities proposed for the use of CDBG disaster recovery grant funds.” Texas may have provided public hearings, but it has not provided an Action Plan for the public to comment on within the meaning of the Appropriations Act or federal requirements.

Because Texas has not published an Action Plan that describes activities proposed for the use of CDBG disaster recovery funds, it has not provided “reasonable public notice, appraisal, examination, and comment on the activities proposed for the use of CDBG disaster recovery grant funds,” in violation of federal requirements.<sup>15</sup>

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<sup>11</sup> 74 Fed. Reg. 7244, 7247.

<sup>12</sup> Amended Plan at 14-15. However, TDRA also claims that its Public Participation plan for Round 1 included 149 community meetings and 14 regional meetings led by HNTB. HNTB, ORCA DISASTER RECOVERY PROGRAM: HURRICANE IKE SUMMARY REPORT (Revised Draft) at 11-13. Neither the 149 community meetings nor the 14 regional meetings included the public – both types of meetings included local governments, and engineering and grant administration consultants who are potential bidders on contracts for CDBG-funded activities.

<sup>13</sup> 74 Fed. Reg. 7244, 7247 (emphasis added).

<sup>14</sup> Amended Plan at 10-11.

<sup>15</sup> See also 74 Fed. Reg. 7244, 7250 ¶5 (a) (“The grantee’s plans to minimize displacement of persons or entities and to assist any persons or entities displaced must be published with the Action Plan.”); Amended Plan, Appendix B-2 (Texas’ Amended Plan adopts by reference “Ongoing elements of the action plan” including “Anti-displacement and Relocation.”); STATE OF TEXAS PLAN FOR DISASTER RECOVERY at 20, (approved by HUD March 4, 2009). The state’s initial plan includes the following sentence, which is evidently the whole of Texas’ plan to minimize displacement and assist those displaced: “Grantees must certify that they will minimize displacement of persons or entities and assist any persons or entities displaced in accordance with the Uniform Anti-Displacement and Relocation Act as amended for this appropriation and consistent with law and local policy.” Texas’ failure to publish an anti-displacement and relocation plan with the Action Plan is another way in which the state has failed to meet federal requirements related to citizen participation.

**B. The State has failed to meet the substantive requirements for mandatory certifications.**

HUD has waived Section 91.325 of Title 24 of the Code of Federal Regulations, which sets out the certifications a state grantee must make in order to receive CDBG funds, and substituted alternative certifications that are “tailored to CDBG disaster recovery grants and remove certifications and references that are redundant or appropriate to the annual CDBG formula program.” 74 Fed. Reg. 7244, 7249-7255 ¶24.a.-n. “Submission to HUD of an Action Plan for Disaster Recovery, **including certifications,**” is a “prerequisite to a grantee’s receipt of CDBG disaster recovery assistance.” 74 Fed. Reg. 7244, 7249 (emphasis added).

These certifications are mandatory, “[e]ach state must make the following certifications prior to receiving a CDBG disaster recovery grant,” 74 Fed. Reg. 7244, 7254 (emphasis added) and the Secretary cannot approve an Action Plan and obligate funds unless the Action Plan contains all required certifications *and* those certifications are credible and accurate. CDBG grants shall be made “only if” the grantee makes required certifications “to the satisfaction of the Secretary.” 42 USC §5304(b).

The existing substantive requirements for “certifications” apply to the alternative certifications specified in both the February 13, 2009 and August 14, 2009 Federal Register Notices. Certifications must be (1) in writing; (2) based on supporting evidence; (3) the evidence must be kept available for inspection by HUD; and (4) HUD has the ability to determine that a certification is not supported by the evidence provided. 24 C.F.R. §91.5.

With respect to the basis for “determining whether a state has failed to carry out its certifications,” the Federal Register states that HUD “is applying the regulations at 24 CFR 570.480(c).” 74 Fed. Reg. 7244, 7251.

In exercising the Secretary’s obligation and responsibility to review a state’s performance, the Secretary will give maximum feasible deference to the state’s interpretation of the statutory requirements and the requirements of this regulation, **provided that these interpretations are not plainly inconsistent with the Act and the Secretary’s obligation to enforce compliance with the intent of the Congress as declared in the Act.** The Secretary will not determine that a state has failed to carry out its certifications in compliance with requirements of the Act (and this regulation) unless the Secretary **finds that procedures and requirements adopted by the state are insufficient to afford reasonable assurance that activities undertaken by units of general local government were not plainly inappropriate to meeting the primary objectives of the Act, this regulation, and the state’s community development objectives.**

24 C.F.R. §570.480(c) (emphasis added.)

Even under the standard of 24 C.F.R. §570.480(c), which gives maximum feasible deference to the state’s interpretation of statutory and regulatory requirements, Texas has failed to make at least two of the mandatory certifications that are a material condition for the receipt of CDBG disaster recovery grant funds, and, therefore, is not eligible for the obligation of funds.

Texas is unable to certify the following:

- a. The state certifies that it will affirmatively further fair housing, which means that it has or will conduct an analysis to identify impediments to fair housing choice within the state, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard. (See 24 CFR 570.487(b)(2)); and . . .
- i. The state certifies that it is complying with each of the following criteria:
  - (1) Funds will be used solely for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in areas covered by a declaration of a major disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) as a result of natural disasters that occurred and were declared in 2008.
  - (2) With respect to activities expected to be assisted with CDBG disaster recovery funds, the Action Plan has been developed so as to give the maximum feasible priority to activities that will benefit low- and moderate-income families.
  - (3) The aggregate use of CDBG disaster recovery funds shall principally benefit low- and moderate-income families in a manner that ensures that at least 50 percent of the amount is expended for activities that benefit such persons during the designated period.  
74 Fed. Reg. 7244, 7254.

**I. The State cannot certify that “funds will be used solely for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in areas covered by a declaration of major disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) as a result of natural disasters that occurred and were declared in 2008.”**

The State’s use of a funding allocation scheme that fails to account for actual damage or unmet disaster recovery needs is insufficient to afford reasonable assurances that activities undertaken by units of general local government are not plainly inappropriate to meeting the primary objectives of the Act, the federal regulations, and the objectives of the Appropriations Act and implementing regulations. The State openly admits the insufficiency of its procedures and requirements in its submitted Action Plan: “[j]urisdictions have prioritized projects other than those serving LMI residents” to the

extent that “the State’s ability to fulfill its obligation to expend 50% of the total funds to meet the LMI national objective” is unmet.<sup>16</sup> The State has admitted the finding necessary under 24 C.F.R. §570.480(c) for a determination that it has failed to carry out its certifications in compliance with the requirements of federal law. The State has, therefore, failed to make a required certification that is a material condition of its eligibility to receive CDBG funds, and the Secretary cannot obligate CDBG disaster recovery funds to Texas.

### **1. CDBG Disaster Recovery funds are allocated to address unmet needs based on damage data.**

CDBG disaster recovery funds have traditionally been allocated using FEMA damage estimates and other federal data. The Appropriations Act specifically required HUD to allocate funding “based on the best estimates available of relative damage and anticipated assistance from other Federal sources.” The author of the bill, Senator Mary Landrieu, has confirmed that Congress intended this instruction to apply to grantees as well: “Congress's intent that damage should serve at all levels of government as the basis for distribution of funding is clear.”<sup>17</sup> Both the appropriating legislation and HUD’s Federal Register Notices are unambiguous: the phrase “necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization” is not a catch-all for state wish-lists, but has a specific meaning that incorporates both actual disaster recovery needs and whether those needs have or can be met by other Federal disaster assistance.<sup>18</sup> HUD allocated Texas half of the total 2008 CDBG disaster recovery funding appropriated by Congress using available data on observed damages in a formula designed to estimate unmet need.<sup>19</sup> The Round 1 formula

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<sup>16</sup> Amended Plan at 6.

<sup>17</sup> Letter from Senator Marry Landrieu, Chairman, Disaster Recovery Subcommittee, United States Senate Committee on Homeland Security and Governmental Affairs, to Rick Perry, Governor of Texas (September 30, 2009) (carbon copy on file with the Department of Housing and Urban Development).

<sup>18</sup> The Appropriations Act mandates that funds be allocated “on the best estimates available of relative damage and anticipated assistance from other Federal sources.” Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, §122 Stat. 3574, 3599-3601 (2008) (emphasis added); 74 Fed. Reg. 41146, 41147 (allocation between states is based on estimated unmet needs), and 74 Fed. Reg. 41146, 41153-41156, Appendix 1 (detailing HUD’s formula for allocating CDBG disaster relief funding appropriated by PL 110-239); and 74 Fed. Reg. 7244, 7245 (“In the first quarter of calendar year 2009, HUD will make a final review of long-term disaster recovery needs for all states affected by disasters in 2008 to allocate the remaining \$3.972 billion. This review will include unmet housing, infrastructure, and economic revitalization needs.”)

<sup>19</sup> The Appropriations Act provides “[t]hat the Secretary shall allocate to the states not less than 33 percent of the funding provided under this heading within 60 days after the enactment of this Act based on the best estimates available of relative damage and anticipated assistance from other Federal sources.” Pub. L. No. 110-329, §122 Stat. 3574, 3599-3601 (2008). HUD used available FEMA damage estimate data, and focused on two factors to make this first round allocation: (1) Unmet housing needs. This is each State’s relative share of estimated unmet housing need for property owners experiencing serious damage to their homes; and (2) Concentrated damage. To determine infrastructure and economic revitalization needs, HUD focused on areas of particular concentration of damage – specifically, each State’s share of seriously damaged homes in areas where more than 20 percent of the homes experienced damage. To allocate the second round of funding, HUD used FEMA Individual Assistance program data on housing unit damage, Small Business Administration (SBA) disaster loan program data on both housing and business repair and

used the amount and severity of unmet housing need as a proxy for the state's overall level of unmet need, and the Round 2 formula used available data on observed damages from FEMA's Individual and Public Assistance programs and the SBA disaster loan program to calculate unmet need not only for housing, but for infrastructure and economic development as well. Clearly, not only can a model and formula that use actual data to estimate unmet need and allocate CDBG funds be created, but HUD has already created and used that model, and there is available information quantifying unmet housing, infrastructure, and economic revitalization disaster recovery needs in Texas.<sup>20</sup>

While HUD's Round 2 formula is more comprehensive than previous allocation models, the fact that CDBG disaster recovery funds are appropriated and allocated for unmet needs is not new to the 2008 Appropriations Act. The agency's own website states that "HUD generally awards noncompetitive, nonrecurring Disaster Recovery grants by a formula that considers disaster recovery needs unmet by other Federal disaster assistance programs."<sup>21</sup> Following appropriations related to Hurricanes Katrina and Rita, Federal Register guidance stated that "[f]unds allocated are intended by HUD to be used toward meeting unmet housing needs in areas of concentrated distress," and allocated a second appropriation using "data from FEMA and the Small Business Administration on the extent and concentration of housing damage in each State. . . . [e]ach state was then invited to provide their data on remaining recovery needs not accounted for in HUD's data, including the unmet needs of businesses, evacuees, and infrastructure."<sup>22</sup> Representatives from Texas met with HUD "to discuss [the] state's unmet needs and priorities for recovery" related to CDBG disaster recovery appropriations for Hurricane Rita.<sup>23</sup>

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replacement loan applications, and FEMA Public Assistance program data. "The allocation was based on two factors: (i) The sum of estimated unmet housing, infrastructure, and business needs, adjusted by (ii) a HUD calculated risk level for recovery challenge. HUD used this funding allocation model for the full \$6.1 billion appropriation, and then allocated Round 2 funding based on the model results and states' Round 1 allocations. 74 Fed. Reg. 7422 and 74 Fed. Reg. 41146, 41147 (Appendix 1).

<sup>20</sup> Senator Landrieu and the Committee on Homeland Security and Governmental Affairs praised HUD's formula as both more comprehensive than previous allocation formulas and as "a significant advance in ensuring the overall fairness of the process." Letter from Senator Marry Landrieu, Chairman, Disaster Recovery Subcommittee, United States Senate Committee on Homeland Security and Governmental Affairs, to Rick Perry, Governor of Texas (September 30, 2009) (carbon copy on file with the Department of Housing and Urban Development).

<sup>21</sup> See also HUD OFFICE OF COMMUNITY PLANNING AND DEVELOPMENT (CPD), DISASTER RECOVERY ASSISTANCE QUICK FACTS, (CDFA #: 14.218, 14.228, August 25, 2009). ("Grant funds are made available to states and units of general local government, Indian tribes, and Insular areas, unless provided otherwise by supplemental appropriations statute **based on their unmet disaster recovery needs.**") (emphasis added.); HUD CPD, CDBG DISASTER RECOVERY ASSISTANCE, (September 22, 2009) <http://www.hud.gov/offices/cpd/communitydevelopment/programs/drsi/index.cfm> ("HUD generally awards noncompetitive, nonrecurring Disaster Recovery grants **by a formula that considers disaster recovery needs unmet by other Federal disaster assistance programs** . . . These communities **must have significant unmet recovery needs** and the capacity to carry out a disaster recovery program.") (emphasis added.)

<sup>22</sup> 71 Fed. Reg. 7244, 7666; Press Release, HUD, Jackson & Powell Announce \$973 Million to Promote Long-Term Recovery in Alabama, Florida, Mississippi, and Texas (HUD No. 06-099, August 18, 2006).

<sup>23</sup> HUD No. 06-099

Despite the fact that Texas was awarded over half of the available CDBG disaster recovery funds based on actual damage and unmet disaster recovery needs, the State has chosen to distribute that \$3 billion without any reference to actual damage or unmet disaster recovery needs - over the objections of disaster-affected communities, elected officials, affected citizens, advocacy groups, and members of Congress.

## **2. Texas' weather-based model does not estimate actual damages or unmet need and is unsuited to the allocation of CDBG Disaster Recovery funds.**

The Texas Department of Rural Affairs (TDRA, formerly ORCA) claims to be using an alternative distribution model because FEMA data is “inaccurate.”<sup>24</sup> However, the proposed model not only fails to compensate for known flaws in FEMA data, it produces a distribution that recreates those flaws on an exponentially larger scale. The TDRA/ORCA Funding Allocation Model (ORCA Model) looks solely at weather data and high water maps *without taking into account actual damage*, population numbers in affected areas, housing density, types of economic activity, or community demographics.<sup>25</sup> The ORCA Model does not use any observed data on damage or unmet need, instead basing allocations on wind speed, rainfall, and storm surge.<sup>26</sup>

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<sup>24</sup> HNTB, OFFICE OF RURAL COMMUNITY AFFAIRS (ORCA) FUNDING ALLOCATION MODEL at 2, (2009) available at <http://www.tdra.state.tx.us/index.php/Home/HURRICANE+RECOVERY>. (“[T]he 2008 Texas hurricane events rendered the FEMA damage assessments method inaccurate, because Hurricane Ike hit before the Hurricane Dolly damage assessments were complete, and FEMA personnel were mobilized away from conducting assessments in the area affected by Hurricane Dolly to attend to the needs of the region affected by Hurricane Ike.”) We do not dispute that FEMA damage estimates for Hurricanes Ike and Dolly are inaccurate, and not solely because damage estimates for Hurricane Dolly were incomplete. Both the State’s experience with Hurricane Rita CDBG disaster recovery funding and publicly acknowledged problems with FEMA’s housing assistance programs after Hurricanes Ike and Dolly demonstrate that FEMA has consistently underestimated housing damage, particularly in low-income communities. FEMA denied over 22,000 applications for individual assistance out of a total of 38,000 applications after Hurricane Dolly. About 15,000 of these were denials of home repair assistance due to “deferred maintenance,” and were made under regulations that a Federal District Court has held failed to provide legally sufficient eligibility standards *LUPE v. FEMA*, 08-847 (S.D. Texas). See Exhibit 2 to Plaintiff’s Motion for Preliminary Injunction and Exhibit 14 to Plaintiff’s Motion for Partial Summary Judgment (7-09) and *LUPE v. FEMA*, 08-847 (S.D. Texas); Order Granting Preliminary Injunction, May 13, 2009 and Preliminary Injunction, August 06, 2009. (Defendants filed a Notice of Filing of Appeal on September 22, 2009.) Following Hurricane Ike, FEMA denied at least 85% of over 578,000 applications for housing assistance using the same insufficient regulations.. (Email from FEMA External Affairs to the Houston Chronicle, June 26, 2009) (on file with author).

<sup>25</sup> HNTB, OFFICE OF RURAL COMMUNITY AFFAIRS (ORCA) FUNDING ALLOCATION MODEL at 4, (2009) (types of data used and a description of model development).

<sup>26</sup> HNTB, ORCA FUNDING ALLOCATION MODEL at 4, 10-12. Although the Funding Allocation Model is being used to distribute the second round of CDBG disaster recovery funds, TDRA applied the Model to the full allocation of \$3 billion and based Round 2 allocations on that distribution. (“After the development of the Model and consideration of additional data gathered, ORCA determined that this Model would be used to determine the Round 2 allocation, including adjustments for each region to provide an aggregate distribution of funds that would align with the model results. The totals of Round 1 and Round 2 funding allocations will allocate 87% to Ike disaster areas and 13% to Dolly disaster areas. . . . This approach allows for adjusting Round 1 funding allocations, which used the best information available at the time, to provide a fair and reasonable total allocation of funds from Round 2.”) The model as used in a previous draft of the Amended Plan also included an “Impact Zone” factor “in order to take into account

Weather intensity is a poor predictor of storm damage, and it is an even poorer proxy for the unmet needs that the CDBG disaster relief program is intended to address.<sup>27</sup> The ORCA Model tracks where the weather was most intense, not where damage occurred or where there are CDBG-eligible unmet disaster recovery needs. For example, Ike storm surge was higher in Chambers County than in Galveston County. However, much of Chambers County is pasture land - according to FEMA data, Chambers County has approximately 3,700 damaged homes while Galveston County has approximately 37,000 – the fact that the weather model assigns a “surge damage factor” of 29.19% to Chambers County, but one of only 17% to Galveston County illustrates the misfit between the allocation methodology and the recovery need.<sup>28</sup> The State cannot certify that CDBG disaster recovery funds will be used “for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization in areas affected by hurricanes, floods, and other natural disasters” when it has refused to use available data or appropriate methodology to estimate those expenses within the meaning of the applicable statutes and regulations.

The adoption of a funding allocation model based on weather intensity is both plainly inconsistent with the Act and the intent of Congress, and insufficient to afford reasonable assurance that the activities undertaken by units of general local government are not plainly inappropriate to meeting the primary objectives of all applicable CDBG laws and regulations. TDRA’s failure to make the actual model public, and its continued “calibration” of the allocation according to factors external to the model and completely undefined raises troubling questions about both the validity of the model and whether TDRA is using a funding allocation model at all.

### **3. The Texas allocation model is not only inapt; it is defective as a model.**

The published “Funding Allocation Model” includes neither the input data nor the calculations on which the model is based.<sup>29</sup> The model also fails to show the basis for

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the exponential damage caused by the eye of the storm’s impact to the Texas coastline and to adequately estimate storm damage.” However, that factor was discarded in the revised Amended Plan and replaced with an undefined “LMI population” factor. The “exponential” damage experienced by coastal counties in the Ike eyewall is no longer accounted for in the current model.

<sup>27</sup> The Appropriations Act (Pub. L. No. 110-329, §122 Stat. 3574, 3599-3601 (2008).) mandates that funds be allocated “on the best estimates available of relative damage and anticipated assistance from other Federal sources.” *See also*, 74 Fed. Reg. 41147 (allocation between states is based on estimated unmet needs); 74 Fed. Reg. 41153-41156, Appendix 1 (detailing HUD’s formula for allocating CDBG disaster relief funding appropriated by PL 110-239); and 74 Fed. Reg. 7245 (“In the first quarter of calendar year 2009, HUD will make a final review of long-term disaster recovery needs for all states affected by disasters in 2008 to allocate the remaining \$3.972 billion. This review will include unmet housing, infrastructure, and economic revitalization needs.”)

<sup>28</sup> Gulf Coast Interfaith analysis. FEMA data available by county at <http://www.fema.gov/hazard/hurricane/2008/ike/portal.shtm>.

<sup>29</sup> Kevin G. Jewell, Public Comment on Amended Plan for Disaster Recovery (Draft One), Comments on ORCA Funding Allocation Model for Texas Appleseed, September 14, 2009 (on file with author) (“While an observer could attempt to follow the spirit of calculations outlined in this description, the calculation steps are not explicitly presented and may contain unstated assumptions or error. The report’s failure to

various ad-hoc assumptions it incorporates.<sup>30</sup> The “model calibration” section provides further evidence of the ad-hoc nature of the model and the inconsistency of its results with the stated goal of allocating funds by amount of storm damage. This section indicates that the model will be ignored for seven COGs because hearing testimony indicated “[these] regions would not require significant funding during Round 2.”<sup>31</sup> The model allocates these seven COGs 12.4% of disaster recovery funding, but the ‘calibration’ reduced the funding of these (primarily rural) COGs to 3.9%. This indicates that the ORCA Model over-estimated damages for the least-impacted COGs by at least 300% and confirms that the model over-allocates funds to low storm impact areas.<sup>32</sup>

Even an empirical comparison of the model’s predictions with informal real world data invalidates the model. TDRA issued a revised proposed Amendment on September 16, 2009, in response to widely criticized misallocations of CDBG disaster recovery funding.<sup>33</sup> The proposed Amendment substitutes an undefined “LMI population factor” for the “Impact Zone” factor used to adjust for the greater damage inflicted by the eyewall of Hurricane Ike in the first version of the ORCA Model, but does not address the fundamental problems of the allocation model. TDRA/ORCA claims to be adjusting the ORCA Model, but all allocation changes are funded by transferring \$335 million from State administered programs to locally controlled programs, and by allocating the federally mandated affordable rental housing set-aside according to the ORCA Model instead of administering it at the state level. The result is that the Houston-Galveston region, which had more than 70% of homes damaged, received more than 70% of FEMA individual assistance, and more than 75% of all SBA disaster loans, sees its allocation drop from 70% of the total funding under the original Action Plan to less than 60% of the total allocation under the ORCA Model. Every other affected region, however, receives an increased percentage of CDBG funding and ends up with a greater percentage of total funding than the percentage of damage estimated by the ORCA Model.<sup>34</sup>

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‘show the work’ of the Model makes the fund allocation process non-transparent. Citizens impacted by this model have no way to verify the process has not been affected by error or unelaborated assumption.”)

<sup>30</sup> “For example, a storm surge of 10-12 feet is assumed to be 1.7 times more damaging than one of 8-10 feet, while a storm surge of 12-14 feet is assumed to be only 1.1 times more damaging than one of 10-12 feet. Elsewhere a wind-speed of 85-95 mph is assumed to be 4.5 times more damaging than a wind speed of 65-75 mph. While such assumptions may be justified by empirical data, no such empirical data was presented - in fact, page 5 of the report states ‘[t]his Model determined that the higher sustained winds generated a greater overall wind speed damage factor.’ when in actuality the presented evidence suggests the model assumed this fact in its construction. This wording is misleading.” Kevin G. Jewell, Comments on ORCA Funding Allocation Model

<sup>31</sup>HNTB, ORCA FUNDING ALLOCATION MODEL at 11.

<sup>32</sup> Jewell, Comments on ORCA Funding Allocation Model *supra* note 26.

<sup>33</sup> See, e.g. Rick Casey, Commentary, *Is God good at politics?*, HOUSTON CHRONICLE, September 5, 2009.; Heber Taylor, Opinion, *A formula to heap injury on injury*, GALVESTON DAILY NEWS, September 23, 2009.; Mike Snyder, “County may oppose storm recovery plan Allocation of \$1.7 billion to fix hurricane damage is called flawed FUNDS: New proposal is second parcel of federal recovery funds,” *Houston Chronicle*, August 25, 2009, Section B, Page 1.; Mike Snyder, *HURRICANE IKE: ONE YEAR LATER Recovery funds get second look Officials to review process to distribute money*, HOUSTON CHRONICLE, September 15, 2009, Section B, Page 3.; Mike Snyder, *Area welcomes change in storm recovery plan Nonprofits still see problems with distributing funds MONEY: Houston has special interest in rental housing*, HOUSTON CHRONICLE, September 17, 2009, Section B, Page 1.

<sup>34</sup> Amended Plan, Appendix E-2.

TDRA's determination to use a weather-based scheme is plainly inconsistent with both the HCDA and Appropriations Act.

**4. There are further indicators that Texas has not adopted sufficient procedures to ensure compliance with CDBG requirements.**

Further casting doubt on the sufficiency of the procedures used by TDRA/ORCA to provide reasonable assurances that both the state and local units of government are in compliance with federal requirements is (1) the state's unequal provision of CDBG-funded technical assistance to only certain local governments and for only infrastructure projects, and (2) the use of the same engineering firm to both provide selective technical assistance and to create the "funding allocation model" (the ORCA Model) for all CDBG disaster recovery funds.

The engineering firm HNTB is the beneficiary of a \$16.6 million contract with TDRA/ORCA (which TDRA/ORCA has indicated is part of its disaster recovery CDBG-eligible costs) to provide technical assistance to help some local jurisdictions "understand the program and identify [infrastructure] projects that were critical to their community's recovery" because "many of the leaders of these small communities needed guidance to fully understand the underlying engineering, environmental, and implementation issues associated with their projects."<sup>35</sup> HNTB also created the "ORCA Funding Allocation Model." The ORCA Model touts a panel of experts that "independently and collectively reviewed and confirmed that the calculations of wind speed damage, rainfall damage and storm surge damage were significant and are appropriate factors to use in measuring the effects of Hurricanes Dolly and Ike," that not only failed to include experts on housing, community development, or economic development, but consists largely, if not entirely, of employees of the firm that developed the model. At least three of the six experts listed are employees of HNTB, but that affiliation is not disclosed in the published "Funding Allocation Model."<sup>36</sup>

Even within disaster-affected jurisdictions, the failure to use actual data and a valid allocation model raises serious questions about whether CDBG disaster recovery funds will be spent on "necessary expenses related to disaster relief." For example, HUD's allocation formula estimates unmet infrastructure need using data from only certain categories of FEMA Public Assistance (PA) eligible activities. HUD assumes that PA

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<sup>35</sup> HNTB, ORCA DISASTER RECOVERY PROGRAM: HURRICANE IKE SUMMARY REPORT (Revised Draft) at 12. While TDRA acknowledges that "almost all communities in the region impacted by Hurricanes Ike and Dolly would need assistance," no assistance was provided to any jurisdiction affected by Hurricane Dolly, and neither the City of Galveston nor the City of Houston were included in the survey. HNTB IKE SUMMARY REPORT at 2-4. Similarly, TDRA offered technical assistance for infrastructure projects to the exclusion of all other disaster recovery needs, though the majority of initial calls to a disaster recovery hotline set up by TDRA and HNTB were requests for housing assistance. Callers for housing assistance were given the address of the TDHCA website. It is unclear how individuals in tents or FEMA trailers were expected to access the website. HNTB IKE SUMMARY REPORT at 16.

<sup>36</sup> HNTB, ORCA FUNDING ALLOCATION MODEL at 4. The professional affiliations of three members of the panel were confirmed by a search on the professional social networking site LinkedIn.

funds for “Categories A (Debris Removal) and B (Protective Measures) are largely expended immediately after a disaster and reflect interim recovery measures, rather than the long-term recovery measures the CDBG funds are generally used for.” 74 FR 41154, Appendix 1. Three counties in Texas - Cameron, Hidalgo, and Willacy - were designated as disaster areas for FEMA Individual Assistance, indicating damaged housing. None of these counties were designated eligible for FEMA Public Assistance in any Category other than A (Debris Removal) or B (Protective Measures). According to HUD’s data and experience-based allocation model, these counties, represented by the Lower Rio Grande Valley Development Council (LRGVDC), should have low levels of unmet infrastructure need, and high levels of unmet housing recovery need, yet the LRGVDC is spending 86.5% of its Round 1 allocation on infrastructure projects and only 13.6% of CDBG disaster recovery funds on housing recovery. On its face, this distribution is plainly inappropriate to meeting the primary objectives of the CDBG program, and has been facilitated by the procedures and requirements (or lack thereof) adopted by the State.

In addition to the facts presented above illustrating the insufficiency of the State’s procedures and requirements, the State has admitted the finding necessary under 24 C.F.R. §570.480(c) for a determination that it has failed to carry out its certifications in compliance with the requirements of federal law and, therefore, has failed to make a required certification that is a material condition of its eligibility to receive CDBG funds. The Secretary cannot obligate CDBG disaster recovery funds to Texas.<sup>37</sup>

**II. The State cannot certify that “with respect to activities expected to be assisted with CDBG disaster recovery funds, the Action Plan has been developed so as to give the maximum feasible priority to activities that will benefit low- and moderate-income families,” or that the “aggregate use of CDBG disaster recovery funds shall principally benefit low- and moderate-income families in a manner that ensures that at least 50 percent of the amount is expended for activities that benefit such persons during the designated period.”**

The State’s proposed Amendment, like the initial Action Plan, allocates CDBG disaster recovery funds among 11 COGs without specifying an amount that must be spent on housing recovery or providing guidance or enforcement mechanisms to ensure that local government subrecipients prioritize activities that primarily benefit low and moderate income families. TDRA/ORCA has not adjusted the distribution or administration of CDBG funds, despite its concrete knowledge that in Round 1 “[j]urisdictions have prioritized projects other than those serving LMI residents” to such an extent that “the State’s ability to fulfill its obligation to expend 50% of the total funds to meet the LMI national objective” is unmet.<sup>38</sup> Texas cannot certify that its Amended Action Plan for

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<sup>37</sup> Amended Plan at 6. (“Jurisdictions have prioritized projects other than those serving LMI residents” and “the State’s ability to fulfill its obligation to expend 50% of the total funds to meet the LMI national objective” is unmet.)

<sup>38</sup> Amended Plan at 6.

Disaster Recovery “has been developed so as to give the maximum feasible priority to activities that will benefit low- and moderate income families,” and that “[t]he aggregate use of CDBG disaster recovery funds shall principally benefit low- and moderate-income families in a manner that ensures that at least 50 percent of the amount is expended for activities that benefit such persons during the designated period.”<sup>39</sup>

Further, the State has admitted the finding necessary under 24 C.F.R. §570.480(c) for a determination that it has failed to carry out its certifications in compliance with the requirements of federal law and has, therefore, failed to make a required certification that is a material condition of its eligibility to receive CDBG funds. The Secretary cannot obligate CDBG disaster recovery funds to Texas.

**1. The Amended Plan will not ensure that at least 50 percent of CDBG funds benefit low and moderate income persons.**

TRDA does state in the proposed Amended Plan that “[i]f the requirement of \$1,528,995,720 for LMI activities has not been met TDRA will require the COGs not meeting the 50% LMI requirement to amend their MODs to ensure the requirement is achieved. All allocations made by the regional COG MODs will be conditional until the State of Texas reaches the 50% LMI requirement for the entire allocation.”<sup>40</sup> However, the State has not adopted procedures or requirements sufficient to afford reasonable assurances that activities undertaken by units of local government will comply with the low and moderate income benefit requirement or other objectives of the CDBG program.

The requirement that 50% of activities funded must primarily benefit low and moderate income individuals has always been attached to these funds, yet the state took no steps to ensure that subrecipients complied with federal law under the initial Action Plan. Second, Texas has already requested and been granted waivers for a number of program requirements related to programs serving low and moderate income families, including an overall waiver of the 70% LMI benefit requirement, one-for-one replacement of lower income housing units, and calculation of the LMI benefit related to economic development programs.<sup>41</sup> Third, local and regional jurisdictions have publicly objected to having to meet even a reduced low and moderate income benefit requirement. For example, Lufkin Assistant City Manager Keith Wright expressed concern to the Lufkin Daily News about the requirement because “Hurricane Ike was an 'equal opportunity' disaster” and stated that “[t]here are projects we will not be able to do because we don't meet the criteria,” including the extension of a highway feeder road.<sup>42</sup> This statement demonstrates a fundamental misunderstanding - despite the regional COGs four years of experience administering CDBG disaster recovery funding - of the federal statute's requirement that priority must go to projects serving low- and moderate- income persons.

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<sup>39</sup> 74 Fed. Reg. 7254 et. seq.; 74 Fed. Reg. 41151-41152 (alternative certifications).

<sup>40</sup> Amended Plan at 9.

<sup>41</sup> 74 Fed. Reg. 7244; 72 Fed. Reg. 41146.

<sup>42</sup> Jessica Cooley, *DETCOG lobbied for control of hurricane funding*, LUFKIN DAILY NEWS, September 2, 2009.

Local jurisdictions' admissions that the projects they want to spend CDBG funds on do not meet the national objectives also illustrate that the TDRA Funding Allocation Model steers money away from the areas of the state with the most hurricane damage and the highest poverty levels. Coastal counties in Texas, which bore the brunt of Hurricane Ike, tend to have higher poverty rates than the state as a whole.<sup>43</sup> Of the thirty-seven counties where individuals were eligible to receive Individual Assistance from FEMA after either Dolly or Ike, twenty-two have poverty rates higher than the overall poverty rate for Texas (16.3%) and all three counties struck by Hurricane Dolly have poverty rates over 30%.<sup>44</sup> Even within affected counties that have lower overall poverty rates, affected populations are often disproportionately low income. Galveston County has an overall poverty rate of 12.4%, for example, but the City of Galveston, which was devastated by Hurricane Ike, has a poverty rate of 22%, and all four non-senior public housing developments on the island were rendered uninhabitable by Hurricane Ike.<sup>45</sup> A funding allocation formula that steers money to jurisdictions who cannot use it in compliance with CDBG low and moderate income requirements has not, and will not, ensure that at least 50 percent of CDBG funds benefit low and moderate income families, nor has it been developed to give maximum feasible priority to activities that will benefit those families.

## **2. The Action Plan was not developed to give maximum feasible priority to activities that will benefit low and moderate income persons.**

TDRA has also steered resources away from activities benefiting low and moderate income households (1) by providing extensive technical assistance to identify and fund infrastructure projects that generally assist mixed income communities, and (2) by providing that technical assistance on a selective and unequal basis. This technical assistance gives certain communities an advantage in competing for CDBG funds that has been denied to affected jurisdictions in the Rio Grande Valley and on the Gulf Coast. Not only certain jurisdictions, but certain types of recovery activities, and certain populations have been excluded from the process.<sup>46</sup> Neither housing recovery nor low income populations have received this type of assistance, despite their priority status under the CDBG program and critical levels of need. Low-income homeowners are not only living in housing rendered substandard by hurricane damage, but are currently facing both homelessness and the loss of their property to local government condemnation proceedings, while other disaster victims face pressure from FEMA to

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<sup>43</sup> Daniel Sutter, *Ensuring Disaster: State Insurance Regulation, Coastal Development, and Hurricanes*, 11-12, (Mercatus Policy Series Policy Comment No. 14, 2007). The data collected is from the 2000 census and may underestimate poverty rates in light of Hurricane Katrina and the current recession. Texas poverty rate data from: Small Area Income and Poverty Estimates, 2007. Available: <http://www.census.gov/cgi-bin/saie/saie.cgi>

<sup>44</sup> Poverty data from the Small Area Income and Poverty Estimates, 2007. Available: <http://www.census.gov/cgi-bin/saie/saie.cgi>

<sup>45</sup> Poverty data from the Small Area Income and Poverty Estimates, 2007. Available: <http://www.census.gov/cgi-bin/saie/saie.cgi>

<sup>46</sup> HNTB, *Supra* note 12.

move out of temporary housing units even though they have no permanent housing options.<sup>47</sup>

The state has spent at least \$16.6 million, starting two months after Hurricane Ike, to find and estimate infrastructure projects, but has failed to provide any such assistance for housing recovery. TDRA provided technical assistance to help some local jurisdictions “understand the program and identify [infrastructure] projects that were critical to their community’s recovery” because “many of the leaders of these small communities needed guidance to fully understand the underlying engineering, environmental, and implementation issues associated with their projects.”<sup>48</sup> The State also points to these capacity issues in its draft Consolidated Plan for 2010-2014,

[t]he most commonly cited obstacle to meeting the underserved community development needs of Texas cities (aside from inadequate funding) is the **limited administrative capacity of the small rural towns and counties the CDBG program serves** . . . [n]ot only does a lack of funding limit the capacity of service providers, but service providers may also lack organizational capacity. Because of the remote nature of and smaller communities in rural areas, many of these communities are not aware of public or private resources or do not know how to successfully obtain them. The service providers in these communities may not know when or where to apply for funding, have availability of qualified staff, or have experience completing a successful housing program.<sup>49</sup>

However, in the wake of two natural disasters that placed additional strain on the capacity and resources of affected jurisdictions, the State has chosen to provide technical assistance on infrastructure projects, but to treat the same jurisdictions as if they have both (1) the capacity to identify, assess, estimate, and implement even more complex housing and economic development recovery programs, and (2) the capacity to prioritize community recovery needs in accordance with federal program requirements. TDRA

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<sup>47</sup> Rhiannon Meyers, *Homeowners Face Losing Ike-Damaged Property*, GALVESTON DAILY NEWS, October 4, 2009; Michael A. Smith, Editorial, *Where is Money for the Suffering?*, GALVESTON DAILY NEWS, October 4, 2009; Theresa Barrett, *County Remains Silent as FEMA Steps Up the Pressure*, ANAHUAC PROGRESS, October 7, 2009; T.J. Aulds and Rhiannon Meyers, *FEMA Mobile Home Residents Face Eviction*, GALVESTON DAILY NEWS, October 25, 2009.

<sup>48</sup> Amended Plan at 4. (“In response to stakeholder feedback regarding the validity of FEMA damage assessments and concurrent with development of the MODs, TDRA engaged the engineering firm to identify and assess potential projects and provide documentation of damage, scoping and cost estimating services in 29 counties most affected by Hurricane Ike. HNTB’s technical assistance was targeted to non-entitlement communities during the immediate aftermath of the storm to provide independent analysis of damage and preliminary screening and specifications for selected projects. This formed the basis for additional opportunities for requests for FEMA funding, documentation of urgent need, and project descriptions for grant applications. The 2,751 individual projects assessed by HNTB formed a database of needs and overall non-housing damage for these communities.) *Also* HNTB, ORCA DISASTER RECOVERY PROGRAM: HURRICANE IKE SUMMARY REPORT (Revised Draft) at 12, available at <http://www.tdra.state.tx.us/index.php/Home/HURRICANE+RECOVERY>

<sup>49</sup> TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, STRATEGIC PLAN: AFFORDABLE HOUSING 2010-2014 STATE OF TEXAS CONSOLIDATED PLAN at 112, available at <http://www.tdhca.state.tx.us/housing-center/docs/10-14-DraftConsPlan.pdf>

continues to rely on this assumption in the Amended Plan, despite concrete evidence that most subrecipient jurisdictions do not have, or choose not to exercise, this capacity. Beyond the State's failure to provide (or permit local government units to provide) assistance with housing recovery as a pre-agreement cost under 24 C.F.R. §570.49, the State has failed to adopt procedures and requirements as part of its Action Plan sufficient to afford reasonable assurance that activities undertaken by units of general local government are not plainly inappropriate to meeting the primary objectives of the Act.

Texas' submission emphasizes that “[f]or all aspects of this Action Plan Amendment, local choice shall be emphasized, and the COGs shall have the right . . . to make determinations as to the allocations of funds within their regions among housing, infrastructure, and economic development programs, except as provided by the requirements of the pooled competitions.”<sup>50</sup> The Action Plan “recommend[s]” that Round 2 funds be split equally between housing and non-housing activities, but imposes no requirement that COGs meet this “goal[1].”<sup>51</sup> The proposed Amendment in fact specifically contemplates allowing regions to utilize housing funds for other activities “[i]f it is determined that the unused housing funds cannot be utilized within the region.”<sup>52</sup>

Again, the State has admitted the finding necessary under 24 C.F.R. §570.480(c) (“Jurisdictions have prioritized projects other than those serving LMI residents” to such an extent that the State’s “obligation to expend 50% of the total funds to meet the LMI national objective” is unmet) for a determination that it has failed to carry out its certifications in compliance with the requirements of federal law. There is both concrete evidence and an admission by the State that the Action Plan does not “give maximum feasible priority to activities that will benefit low- and moderate-income families,” and that the aggregate use of CDBG funds will not “principally benefit low- and moderate-income families in a manner that ensures that at least 50 percent of the amount is expended for activities that benefit such persons.” There are minimal changes in the Amended Plan that create any reasonable expectation that the state will encourage increased compliance with federal law and regulations, and HUD’s own experience with the additional challenges to recovery once a year has passed since a disaster reinforces the inadequacy of the State’s submission. The State has failed to make a required certification that is a material condition of its eligibility to receive CDBG funds, and the Secretary, therefore, cannot obligate CDBG disaster recovery funds to Texas.<sup>53</sup>

**III. The state cannot certify that it “will affirmatively further fair housing, which means that it has or will conduct an analysis to identify impediments to fair housing choice within the state, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain**

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<sup>50</sup> Amended Plan at 11.

<sup>51</sup> Amended Plan at 6 and 2.

<sup>52</sup> Amended Plan at 13.

<sup>53</sup> Amended Plan at 6.

**records reflecting the analysis and actions in this regard. (See 24 CFR 570.487(b)(2).)**

**1. The State cannot certify that it is affirmatively furthering fair housing.**

Before receiving CDBG disaster recovery funding, Texas must certify that it “will affirmatively further fair housing.”<sup>54</sup> Under federal regulations, this means that the state must truthfully certify that it (a) has or will conduct an analysis to identify impediments to fair housing choice within the state, (b) take appropriate actions to overcome the effects of any impediments identified through that analysis, and (c) maintain records reflecting the analysis and actions in this regard. *See* 24 CFR §570.487(b)(2); 74 Fed. Reg. 7254. The State in fact has a *dual responsibility* to affirmatively further fair housing. It must engage in its own activities that affirmatively further fair housing, and must also ensure that any subrecipient jurisdictions to which it is providing funds comply with their individual certifications in order to affirmatively further fair housing.<sup>55</sup>

A fair housing certification “is not satisfactory to the Secretary” when HUD reviews applicable documents and data and concludes that “(1) the jurisdiction does not have an AI, (2) an AI was substantially incomplete, (3) no actions were taken, (4) the actions taken were plainly inappropriate to address identified impediments, or (5) the jurisdiction has no records.”<sup>56</sup> In reviewing certifications, “HUD will consider **whether a program participant has made appropriate revisions to update the AI.**”<sup>57</sup>

An Analysis of Impediments to Fair Housing Choice (AI) involves the following:

1. An extensive review of a State or Entitlement jurisdiction's laws, regulations, and administrative policies, procedures, and practices;
2. An assessment of how those laws affect the location, availability, and accessibility of housing;
3. An evaluation of conditions, both public and private, affecting fair housing choice for all protected classes; and
4. An assessment of the availability of affordable, accessible housing in a range of unit sizes.<sup>58</sup>

HUD’s guidance reminds grantees that “each jurisdiction . . . should update, where appropriate, its Analysis of Impediments to Fair Housing Choice,” and “it is appropriate to update their AIs to reflect the current fair housing situation in their communities.”<sup>59</sup>

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<sup>54</sup> 74 Fed. Reg. 7254 citing 24 C.F.R. §570.487(b)(2)

<sup>55</sup> *See e.g.* HUD OFFICE OF FAIR HOUSING AND OPPORTUNITY (FHEO), FAIR HOUSING PLANNING GUIDE: VOLUME 1 at 3.3-3.49, Chapter 3: Fair Housing Planning Guidelines for States and State-Funded Jurisdictions, (#HUD-1582B-FHEO).

<sup>56</sup> HUD, GUIDANCE MEMORANDUM; ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE REISSUANCE, (September 2, 2004).

<sup>57</sup> HUD, GUIDANCE MEMORANDUM; ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE REISSUANCE, (September 2, 2004) (emphasis added).

<sup>58</sup> HUD FHEO, PROMOTING FAIR HOUSING, (January 28, 2008).

Texas last revised a statewide Analysis of Impediments to Fair Housing Choice in January 2003. Since that date, Texas has experienced three major hurricanes, and a population increase of 3% tied directly to an influx of refugees from Hurricane Katrina in Louisiana.<sup>60</sup> The particular impact of these disasters on the housing needs of persons of color and persons with disabilities is undeniable, yet the State's AI has not been updated to reflect the current fair housing situation in affected communities. The State does not appear to be updating its AI even as part of a new Consolidated Plan process: fair housing is mentioned only once in the Draft 2010 Consolidated Plan.<sup>61</sup>

## 2. Subrecipients cannot certify that they are affirmatively furthering fair housing: The City of Galveston

Nor is the State taking steps to ensure that subrecipients or other grantees are in compliance with mandatory certifications regarding fair housing. The City of Galveston, for example, as an entitlement community under the Annual CDBG program, has its own Consolidated Plan, last updated in 2005. The City's AI is summarized in one sentence; "The City found that there were no policies that contributed to the concentration of racial/ethnic minorities and that city building codes or ordinances did not impede or limit the development or improvement of affordable housing in Galveston."<sup>62</sup> The City's Post-Ike *Long Term Community Recovery Plan* also fails to address fair housing issues.<sup>63</sup> Public response to plans to rebuild affordable and subsidized housing, however, suggests that Galveston's AI is "substantially incomplete" at best.<sup>64</sup>

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<sup>59</sup> HUD, GUIDANCE MEMORANDUM; ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE REISSUANCE, (September 2, 2004).

<sup>60</sup> Eugene Boyd, *CRS Report for Congress: Community Development Block Grant Funds in Disaster Relief and Recovery* at 8 (April 25, 2006) (Order Code RL 33330. 8.); TEXAS HHSC, HURRICANE KATRINA EVACUEES IN TEXAS at 3 (August 2006), available at, [http://www.hhsc.state.tx.us/survey/KATRINA\\_0806\\_FinalReport.PDF](http://www.hhsc.state.tx.us/survey/KATRINA_0806_FinalReport.PDF) (Evacuees in Texas a year after Hurricane Katrina were 81% African-American, 54% lived in households with children, and 24% of households included a member with a physical or mental disability – all protected classes under the Fair Housing Act.)

<sup>61</sup> CITY OF GALVESTON GRANTS AND HOUSING DEPARTMENT, CITY OF GALVESTON, TEXAS DRAFT 2010-1014 CONSOLIDATED PLAN at 161 (2009).

<sup>62</sup> CITY OF GALVESTON GRANTS AND HOUSING DEPARTMENT, CITY OF GALVESTON, TEXAS 2005 CONSOLIDATED PLAN ES.5 (2005)

(The Consolidated Plan does, however, describe a critical need for affordable housing generally, and subsidized housing in particular; "The most recent post-Census count for renter households in the City of Galveston is 13,689. Of these, 29 percent have incomes that are less than 30 percent of the MSA's median income; another 17.3 percent have incomes between 30 and 49 percent; and 21.2 percent have incomes between 50 and 79 percent. Therefore, 67.5 percent of all City renters are very low-, low- or moderate-income and qualify for housing subsidies . . . [d]ue to the length of public housing [three years] and Section 8 [five years] waiting lists and the limited number of affordable rental units, low-income renters cannot afford to lease units without becoming cost burdened.")

<sup>63</sup> GALVESTON COMMUNITY RECOVERY COMMITTEE (GCRC), LONG TERM COMMUNITY RECOVERY PLAN(April 9, 2009)..

<sup>64</sup> See e.g. Leigh Jones, *Attorney Claims Board Seat Denied Over Race*, GALVESTON DAILY NEWS, July 23, 2009. ("Thomas described Herz's claims as distressing, **especially in light of the racially charged response to the housing authority's plans to rebuild the four public housing developments damaged by Hurricane Ike. Many people who signed an online petition against the rebuilding made**

Hurricane Ike damaged more than 80 percent of the homes on the Island, including 569 public housing units that were declared uninhabitable.<sup>65</sup> The Galveston Housing Authority (GHA) initially planned to rebuild the destroyed public housing units and then develop an additional 1,500 non-public affordable housing units within 10 years, but abandoned that rebuilding plan because of public opposition, based in large part on the race of the people to be housed.<sup>66</sup>

More than 2000 people signed the following petition to oppose rebuilding public housing on Galveston Island. Many signatories also expressed opposition to any subsidized or affordable housing.

To: Galveston City Representatives

We are against rebuilding the public housing on Galveston Island.

The Island is in a flood zone and is not an appropriate place for public housing as everyone has seen after Hurricane Ike. Building structures on the island is more costly because of hurricane building standards and insurance is much more costly. Evacuating low income residents is costly and dangerous to everyone involved.

Also, There are very few if any jobs for low income families on the Island. It is very difficult and almost impossible to improve one's situation without opportunity.

The island is a tourist destination and the public housing unfortunately was linked with crime, prostitution, drugs, vagrancy, public drunkenness and loitering in city streets. People felt unsafe especially at night in some areas. There were also brothels in plain view on the strand that should be removed.

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**inflammatory racial statements about public housing residents, whom they labeled as either lazy or criminal.** . . . During the 1990s, Herz was a member of the board that helped bring the housing authority out of financial disarray and out from under a **federal lawsuit brought for segregating developments in only one part of the city.**"); Dolph Tillotson, Editorial, *GHA's Public Housing Plan a Recipe for Disaster*, GALVESTON DAILY NEWS, October 4, 2009; Leigh Jones, *GHA Delays Plans to Rebuild*, GALVESTON DAILY NEWS, October 14, 2009. ("The agency should consider whether it's appropriate to rebuild any subsidized housing on an island with so much vacant property, where it's hard even for self-sufficient residents to survive.")

<sup>65</sup> GALVESTON COMMUNITY RECOVERY COMMITTEE (GCRC), LONG TERM COMMUNITY RECOVERY PLAN 52 (April 9, 2009). (The City found that a total of 1,237 parcels were "substantially damaged or destroyed," that 603 of those parcels were homestead properties, and that "[b]ecause of the extent of damage and/or lack of flood insurance, many homes will be abandoned or need to be replaced." The Galveston Housing Authority owned 948 units of which 528 apartments units were substantially damaged or destroyed, and FEMA received more than 29,000 requests for individual assistance indicating unmet housing needs.) Under an agreement with Lone Star Legal Aid, GHA will rebuild public housing units on a one-for-one replacement basis, and provided displaced tenants with vouchers.

<sup>66</sup> Leigh Jones, *GHA Abandons plans for 1,500 new homes*, GALVESTON DAILY NEWS, May 2, 2009. ("The change in plans was a response to ongoing criticism from some community members who said the island did not need any more subsidized housing. About 2,000 people signed an online petition opposing the plan. Many also left derogatory comments about public housing residents.")

What does that say about city leadership? What do these problems project to developers and vacationers? People will not buy houses, start businesses, or vacation in that environment the way they would in a clean, safe, world class vacation destination and city.

Please take a look at Kemah if you would like to see a tourist town ran properly. It is clean, safe, and pleasant.<sup>67</sup> Businesses came in droves. Housing is being developed. It is a great addition to the Houston area and Galveston should be as well.

Please use the funds wisely to rebuild a healthy, clean, safe tourist destination so the businesses, tourists, and homeowners will return. Infrastructure as well as assistance in rebuilding hurricane damaged property is a better use of the funds. Limited public housing for the elderly or disabled is fine but the majority should be built on the mainland where more opportunity exists and hurricanes are less of a risk. The proposal to bring thousand of public housing units to the island is not prudent and will be counter productive to the rebuilding of the island and the future of Galveston.

Sincerely,

The Undersigned<sup>68</sup>

Comments attached to signatures on the petition included numerous references to residents of public and subsidized housing as criminals, lazy, undesirable, and as an impediment to creating a tourist-friendly “middle class” Galveston.<sup>69</sup>

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<sup>67</sup> According to 2000 Census data, the city of Kemah has a total population of 2,330, 75.4% White and 3.8% African-American. The city of Galveston has a total population of 57,243, 74.1% White and 25.5% African-American.

<sup>68</sup> *Stop the GHA*, petition, <http://petitiononline.com/NoToGHA/petition.html> (last accessed October 23, 2009)

<sup>69</sup> Petition signatures and comments (emphasis added), [http://www.petitiononline.com/mod\\_perl/signed.cgi?NoToGHA&1251](http://www.petitiononline.com/mod_perl/signed.cgi?NoToGHA&1251) (last accessed October 23, 2009). (For example: “Public Housing only for the elderly and dissabled. [sic] Get rid of the freeloaders”; “The perception of this island is a bunch of poor Black people – who wants to live with or near poverty!”; “Public housing breeds undesirables”; “One of the only positive aspects of Hurricane Ike was that we have an opportunity to clean up our island.”; “those "type" of people will not attempt to better themselves or adjust to have a better make it safer, cleaner and a place where people will want to visit.”; “Many of the GHA residents are just chosing [sic] to let us tax payers provide there [sic] housing.”; “Katrina/New Orleans, need I say more?”; “Everyone knows that concentrated public housing projects invite crime and drugs. Enough already, this is our chance to reduce the public housing on the island. As it is, you can find a drug dealer on most every street. Why invite more?”; “It is well documented the problems, crime, filth and general disregard of property maintanance [sic] in the low income housing areas”; “I would much prefer Galveston to be viewed as a middle class to upscale living environment that draws friendly families and savvy shoppers to its beaches and establishments”; “Public housing and living "on the dole" are family traditions for many people in Galveston”; “teenagers living in the public housing joyride at all hours with boomboxes blaring.”; “if these people are going to live on the dole, they should live where we elect to send

Nor were comments equating public and subsidized housing with crime and laziness limited to the online petition. An October 4, 2009 editorial by the editor and publisher of The Galveston Daily News warned the city not to build “huge, multifamily warehouses for the poorest among us and recreate the **ghettos** of yesterday.” He went on to describe pre-storm public housing as a place “where each family is uniformly hopeless and where no family has an economic incentive to maintain the neighborhood” and state that multifamily public housing developments “will **invariably become breeding grounds for crime, drug abuse and blight.**”<sup>70</sup> Some Galveston residents have expressed opposition not just to public housing, but to all subsidized housing: “The agency should consider whether it’s appropriate to rebuild any subsidized housing on an island with so much vacant property, where it’s hard even for self-sufficient residents to survive.”<sup>71</sup>

As the Eastern District of Louisiana recently pointed out in discussing a similar editorial and comments in a fair housing case related to building affordable housing in St. Bernard Parish after Hurricane Katrina:

The references to “ghetto,” “crime,” “blight,” and “shared values” are similar to the types of expressions that courts in similar situations have found to be nothing more than “camouflaged racial expressions.” *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982) (affirming that statements about “undesirables,” and concerns about personal safety due to “new” people are “camouflaged racial expressions”); *Atkins v. Robinson*, 545 F. Supp. 852, 871-72 (E.D. Va. 1982) (finding statement that she “feared the projects ‘would degenerate to slum-like conditions, with an abundance of crime’ to be a veiled reference to race). In the Title VII hostile work environment context, “ghetto” is repeatedly associated with race. See e.g., *Turner v. Baylor Richardson Medical Center*, 476 F.3d 337, 348 (5th Cir. 2007) (noting isolated references to “ghetto children” as “perhaps racially inappropriate”); *Harrington v. Disney Regional Entm’t, Inc.*, 276 Fed.Appx. 863, 876-877 (11th Cir. 2007) (indicates “ghetto” was a racial slur); see also *Clark ex rel T.M.J. v. Pielert*, 2009 WL 35337 (D.Minn. 2009) (noting “ghetto” was a “racially charged term” in the §1983 context preventing summary judgment on qualified immunity).<sup>72</sup>

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them.; not public housing which on this Island is full of crack dealers and the like.”; “absolutely not!!! We have enough roaches!!!”; “public housing consist [sic] of lazy drug dealing thugs”; “Who wants to vacation in the ghetto. Build your hud [sic] homes in Austin”; “What I do not support is using the tax dollars of hard working people who bust their butts everyday to make ends meet so that the people who do nothing to help themselves can sit back and relax on the front porch drinking 40 oz., and playing cards and dominoes all day.”; “how ill we ever attract families and tourists if the island is nothing but section 8?”; “We can never rebuild a great city with this garbage added back.”; “Galveston was a dump before Ike and will be a dump after Ike if it is not cleaned up and the people removed that are sucking the life out of the island.”)

<sup>70</sup> Dolph Tillotson, Editorial, *GHA’s Public Housing Plan a Recipe for Disaster*, GALVESTON DAILY NEWS, October 4, 2009.

<sup>71</sup> Leigh Jones, *GHA Delays Plans to Rebuild*, GALVESTON DAILY NEWS, October 14, 2009.

<sup>72</sup> *Greater New Orleans Fair Housing Action Center, et. al. v. St. Bernard Parish, et. al.*, Civil Action No: 06-7185, (E.D. LA., 2006) Order Granting Plaintiff’s Motion to Enforce Consent Order and Reasons, filed March 25, 2009 at 12-13. St. Bernard Parish has repeatedly sought to prevent the construction of

An October 19, 2009 public meeting on the Housing Authority's plans to rebuild public housing ended in what news coverage described as a "shouting match" between opponents of the plan who were largely white and supporters of the plan who were largely African-American.<sup>73</sup> Public housing residents in Galveston, before Hurricane Ike, were 85% minority and 72% Black. The census tracts surrounding public housing were also 72% minority, with 42% of households under the federal poverty level. Galveston public housing also has a high percentage of elderly and disabled residents: 42% are over 62 years old and 31% of those households have a disabled head of household or spouse. In 26% of households where the residents are under 61, the head of household or a spouse is disabled. Both public housing residents and Section 8 Voucher recipients in Galveston are extremely low-income, with 80% of households or more making less than 30% of local area median family income, and over 90% making less than 50% of local area median family income. Households where the majority of the household income came from wages made up 24% of public housing residents and 46% of voucher recipients. Only 8% of public housing households and 6% of Section 8 households derived the majority of their income from Temporary Assistance to Needy Families (TANF) or any other program which might be characterized as "welfare." The majority of Galveston residents living in subsidized housing derived the majority of their income from a source "other than wages and welfare" such as Social Security Retirement or Social Security Disability benefits.<sup>74\*</sup>

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multifamily affordable housing using zoning ordinances and construction moratoria. The week of October 21, 2009, St. Bernard Parish indicated that it was reconsidering the ballot measure that is at issue in the most recent motion for contempt based on the Parish's understanding that its failure to comply with federal housing laws could lead to the loss of federal funding, including CDBG funds. Chris Kirkham, *St. Bernard Parish Council might remove apartment ban from November ballot*, NEW ORLEANS TIMES-PICAYUNE, October 21, 2009. ("Some of the concern about financing for redevelopment projects in the parish came after Parish President Craig Taffaro met in Washington with officials from the Department of Housing and Urban Development. HUD controls both the low-income housing tax credits that are financing the Provident developments and the Community Development Block Grant money that is being used to pay for projects such as a new hospital. Taffaro said this week that after talking with HUD officials, his impression was the agency believed the parish was out of step with federal housing laws and that more could be at stake if the parish continued to thwart multifamily housing.")

<sup>73</sup> Leigh Jones, *Meeting on Housing Plan Ends in Shouting Match*, GALVESTON DAILY NEWS, October 20, 2009.

<sup>74</sup> Statistics taken from, A PICTURE OF SUBSIDIZED HOUSEHOLDS – 2000, using the Data Query Tool. Available: <http://www.huduser.org/picture2000/> (\*These statistics are the most comprehensive the author could find for pre-Ike subsidized housing in Galveston, and we believe they are an accurate representation. We encourage HUD to look at other data in its possession, for example the Recipient Characteristics Report for August, 2008.) ; HOUSING AUTHORITY OF GALVESTON, TEXAS, REDEVELOPMENT PLAN 56-57, (October 19, 2009), <http://www.ghatx.org/Documents/DEVPLANwAPPENDIX.pdf> ("[I]ncome in the public housing units was generally below 20% of median income prior to Hurricane Ike . . . To be able to take on conventional debt to pay for the development costs GHA will have to tier the resident incomes higher." The graph accompanying this statement predicts that the GHA will go from renting over 500 units to households with incomes under \$19,150 and the remainder to households with income under \$31,900, to renting "10% at 20% of median income, 30% at 50% of median income, 30% at 60% of median income and 30% at 80% of median income." REDEVELOPMENT PLAN at 57. This is troubling, as there are no indicators that fewer families are very low income, and because according to the *American Community Survey 2005-2007* (3

Galveston's Analysis of Impediments is stunningly inadequate. It simply states that "there were no policies that contributed to the concentration of racial/ethnic minorities and that city building codes or ordinances did not impede or limit the development or improvement of affordable housing in Galveston."<sup>75</sup> Jurisdictions are required to go beyond a review of policies, codes, and ordinances in conducting an Analysis of Impediments, and the racially charged opposition to subsidized and affordable housing, along with policy decisions that have substantially reduced the number of affordable housing units that will be built in Galveston, demonstrates that there are in fact impediments to fair housing choice, and that neither the City nor the State has taken actions to address these impediments.

CDBG grant funds are expressly conditioned on a jurisdiction's certification that it will affirmatively further fair housing. "The AFFH certification [is] not mere boilerplate formality, but rather a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring the [jurisdiction] to conduct an AI, take appropriate actions in response, and to document its analysis and actions." *United States of America ex rel. Anti-Discrimination Center of Metro New York, Inc., v. Westchester County*, Case 1:06-CV-02860-DLC, Document 118 at 50-51, (S.D.N.Y, February 24, 2009).<sup>76</sup> The Secretary cannot obligate funds when a grantee has failed to make a certification that is material to its eligibility to receive CDBG funds.

Neither Galveston, as an example, or the State, has submitted or can submit a fair housing certification that can be "satisfactory to the Secretary."

The State's failure to conduct the AI necessary to make a fair housing certification is particularly troubling considering the long history of race-based housing discrimination in a number of the jurisdictions that will be receiving CDBG disaster recovery funding

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*Year Estimates*), 2009 median income for the City of Galveston is \$35,049. GHA in fact quotes these figures on page 24 of its Redevelopment Plan, but is using an entirely different median income to calculate the income tiers in its redevelopment plan. GHA defines 80% of median income as income of up to \$51,050, a figure almost \$10,000 more than 120% of median income for the City of Galveston. Under the Redevelopment Plan, 90% of public housing units will be unaffordable to previous residents. REDEVELOPMENT PLAN at 24.

<sup>75</sup> CITY OF GALVESTON GRANTS AND HOUSING DEPARTMENT, CITY OF GALVESTON, TEXAS 2005 CONSOLIDATED PLAN ES.5 (2005). The Consolidated Plan describes a critical need for affordable housing generally, and subsidized housing in particular; "The most recent post-Census count for renter households in the City of Galveston is 13,689. Of these, 29 percent have incomes that are less than 30 percent of the MSA's median income; another 17.3 percent have incomes between 30 and 49 percent; and 21.2 percent have incomes between 50 and 79 percent. Therefore, 67.5 percent of all City renters are very low-, low- or moderate-income and qualify for housing subsidies." "Due to the length of public housing [three years] and Section 8 [five years] waiting lists and the limited number of affordable rental units, low-income renters cannot afford to lease units without becoming cost burdened."

<sup>76</sup> "[A]n individual government employee's decision to approve or continue such funding, even with full access to all relevant information or knowledge of the falsity of the applicants certification does not demonstrate that the falsity was not material . . . the assertion that certain HUD bureaucrats reviewed the County's submissions and continued to grant the County funding cannot somehow make the false AFFH certifications immaterial, where the funding was explicitly conditioned on the certifications." *ADC v. Westchester County* at 53.

under the submitted Action Plan, including the City of Galveston and a thirty-six county area of East Texas.<sup>77</sup> In addition to demonstrating the insufficiency of the State's procedures and requirements, these facts - the history of racial discrimination and fair housing violations in grantee jurisdictions, the State's failure to update its AI to reflect the current fair housing situation as a result of several natural disasters, and ongoing race-based resistance to multifamily affordable housing in at least one major subrecipient jurisdiction - constitute "evidence, not directly involving the grantee's past performance under this program, that tends to challenge in a substantial manner the grantee's certification of future performance" sufficient to support a determination that Texas has not made a certification that it will affirmatively further fair housing satisfactory to the Secretary. 24 C.F.R. §570.304 (2008).

## **Conclusion**

When Congress appropriates supplemental CDBG funds for disaster recovery, the primary purpose of the federal CDBG program remains the "development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. §5301(c). "The primary means towards this end is to extend and strengthen partnerships . . . in the production and operation of affordable housing." 24 C.F.R. §91.1 (2008) (emphasis added.) Low income families and communities are disproportionately affected by disasters, and face more barriers to recovery.<sup>78</sup>

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<sup>77</sup> On February 5, 1997, HUD issued a Letter of Findings of Noncompliance to the Housing Authority of the City of Galveston. (Case File No: 06-95-03-002-340) HUD found that the Galveston Housing Authority (GHA) was in statutory noncompliance with Title VI of the Civil Rights Act of 1964 and the Title VI Regulation at 24 C.F.R. §1.4 having developed and built racially segregated housing, failed to take reasonable action to remove or overcome the consequences of previous segregation, and continued to develop and build segregated housing, including attempting to sell property it owned in predominantly non-minority areas of Galveston rather than develop low-income housing on those properties. In 1985, Housing Authorities in a thirty-six county area of East Texas were found liable for knowingly and continually maintaining a system of segregated housing. *Young v. Pierce*, 544 F.Supp. 1010 (E.D. Tex. 1982), 628 F.Supp. 1037 (E.D. Tex. 1985), 640 F.Supp. 1476 (E.D. Tex. 1986); 822 F.2d 1368, 1376 (5th Cir. 1987.) In total, the case was pending for 23 years; an Order Modifying Final Judgment was issued in January 2004. *Young v. Martinez*, Case No. P-80-8-CA, Doc. 790, filed January 13, 2004. (E.D. Tex. 2004)

<sup>78</sup> See, e.g. Fothergill, Alice and Peek, Lori, *Poverty and Disasters in the United States: A Review of Recent Sociological Findings*, (2004), as cited in, Ballen Debra, *Vulnerable Populations* (fact sheet), THE INSTITUTE FOR BUSINESS AND HOME SAFETY, (March 2009), available at, [http://www.disastersafety.org/resource/resmgr/pdfs/vulnerable\\_populations.pdf](http://www.disastersafety.org/resource/resmgr/pdfs/vulnerable_populations.pdf); HUD Office of Community Planning and Development, *CDBG Disaster Recovery Assistance*, (last modified September 22, 2009), <http://www.hud.gov/offices/cpd/communitydevelopment/programs/drsi/index.cfm> ("CDBG Disaster Recovery grants primarily benefit low-income residents in and around communities that have experienced a natural disaster. Generally, grantees must use at least half of Disaster Recovery funds for activities that principally benefit low-and moderate-income persons. These can be either activities in which all or the majority of people who benefit have low or moderate incomes or activities that benefit an area or service group in which at least 51 percent of the populous are of low- and moderate-income.") (emphasis added)

Accordingly, supplemental CDBG funds to assist with disaster recovery are not exempt from program requirements, or disassociated from the primary objective of the CDBG program.<sup>79</sup>

There can be no claim of ambiguity about the intent of Congress to require that CDBG disaster recovery funds be used 1) in accordance with statutory and regulatory requirements; 2) to meet the most urgent unmet disaster recovery needs, and 3) primarily for the benefit of low and moderate income families. Members of Congress have made numerous statements related to prior appropriations of CDBG disaster recovery funds to the Gulf Coast affirming the intent of Congress to prioritize the unmet needs of low and moderate income persons, particularly for housing recovery. In addition to the plain language of the statutes, the Senate Committee on Homeland Security and Governmental Affairs responded to testimony on the inadequacy of Texas' Action Plan specifically with a letter expressing the belief that parts of Texas' proposed Action Plan is inconsistent with the purposes of the Appropriations Act. In a September 30, 2009 letter to Governor Rick Perry, Senate Disaster Recovery Subcommittee Chair Mary Landrieu wrote, "Congress's intent that damage should serve at all levels of government as the basis for distribution of funding is clear," and asked the State to reconsider using a distribution formula based on weather intensity rather than storm damage.<sup>80</sup> Congress has already clearly signaled that Texas' proposed use of CDBG funds is not consistent with the statutory purposes of the Appropriations Act.

Under all applicable laws and regulations, the Secretary has not only the authority, but the obligation and responsibility to review the State of Texas' submissions and

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<sup>79</sup> The HCDA contemplates broad waiver authority related to the use of CDBG funds for disaster recovery ("For funds designated under this chapter by a recipient to address the damage in an area for which the President has declared a disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. 5170 et seq.], the Secretary may suspend all requirements for purposes of assistance under section 5306 of this title for that area, except for those related to public notice of funding availability, nondiscrimination, fair housing, labor standards, environmental standards, and requirements that activities benefit persons of low- and moderate-income." 42 U.S.C. §5321 but prohibits the waiver of requirements related to fair housing and the LMI benefit in particular. The Appropriations Act gave HUD more flexibility than the enabling statute, allowing HUD to waive public notice requirements and to generally modify the LMI benefit to require grantees to use 50% (rather than 70%) for the benefit of LMI persons "upon a request by a State explaining why such waiver is required to facilitate the use of such funds or guarantees, if the Secretary finds that such waiver would not be inconsistent with the overall purpose of title I of the Housing and Community Development Act of 1974." Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, §122 Stat. 3574, 3599-3601 (2008). The Appropriations Act also allowed HUD to waive the LMI requirement entirely, but only in specific cases and upon "a finding of compelling need." Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, §122 Stat. 3574, 3599-3601 (2008). This waiver authority is permissive, rather than mandatory, and only waivers and alternative requirements published in the Federal Register apply to this appropriation.

<sup>80</sup> Letter from Senator Marry Landrieu, Chairman, Disaster Recovery Subcommittee, United States Senate Committee on Homeland Security and Governmental Affairs, to Rick Perry, Governor of Texas (September 30, 2009) (carbon copy on file with the Department of Housing and Urban Development).

certifications in application for funds allocated by Public Law 110-329, and to enforce compliance with CDBG program requirements and the intent of Congress.

For the reasons set out above, we ask you to deem Texas's Plan insufficient to support obligation of CDBG funds at this time, and require revision and resubmission of the Plan in accordance with applicable federal laws and regulations.

Respectfully submitted,

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