UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*, Defendants.	No. 1:08-cv-1938-HHK

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND MOTION TO TRANSFER

Plaintiffs Greater New Orleans Fair Housing Action Center *et al.* respectfully submit this memorandum of law opposing (1) the U.S. Department of Housing and Urban Development's motion to dismiss (Dkt. 22); (2) Paul Rainwater's motion to dismiss (Dkt. 28); and (3) Paul Rainwater's motion to transfer pursuant to 28 U.S.C. § 1404(a) (Dkt. 28).

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INTRODUCTION

This case involves claims of racial discrimination in the design and operation of the Road Home program, an $11 billion recovery program designed to help homeowners affected by Hurricanes Katrina and Rita. The Road Home program is the largest single housing redevelopment plan in United States history.

The Plaintiffs—two fair housing organizations and a proposed class of approximately 20,000 African American homeowners—allege that the Road Home program awards smaller grants to African American families than to white families with comparable homes that suffered similar damage. This disparity leaves African American families with a larger gap between the grant amount and the cost to rebuild their homes, disproportionately harming African Americans who seek to return to their homes in New Orleans. Plaintiffs allege that by developing, implementing, and overseeing the Road Home program, both the U.S. Department of Housing and Urban Development ("HUD") and Paul Rainwater, Executive Director of the Louisiana Recovery Authority ("LRA"), have violated the nondiscrimination and affirmative fair housing provisions of Title VIII of the Civil Rights Act of 1968, *see* 42 U.S.C. §§ 3604, 3605, and 3608 (the "Fair Housing Act" or "Title VIII"), and the Housing and Community Development Act of 1974, *see* 42 U.S.C. § 5304 (the "HCDA").

HUD and Rainwater have moved to dismiss the Complaint for lack of subject-matter jurisdiction and failure to state a claim; and Rainwater also moves to transfer this action from this Court to the United States District Court for the Middle District of Louisiana. For the reasons stated herein, defendants' motions should be denied.

BACKGROUND

The CDBG Disaster Recovery Grant program is a $19.7 billion program for which Congress allocated Community Development Block Grant ("CDBG") funds for necessary

expenses related to disaster relief, long-term recovery, and rebuilding in the areas in the Gulf of Mexico most affected by Hurricanes Katrina and Rita in 2005. Compl. ¶¶ 5, 33-36, Dkt. 1 (Nov. 12, 2008). Congress created and funded the Disaster Recovery Grant program through three appropriations statutes passed in 2005, 2006, and 2007. *See* Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2779-81 (Dec. 30, 2005) (the "2005 Act") (Ex. A); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006, Pub. L. No. 109-234, 120 Stat. 418, 472-73 (June 15, 2006) (the "2006 Act") (Ex. B); Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, 121 Stat. 1295, 1343-44 (Nov. 13, 2007) (the "2007 Act") (Ex. C).[1]

The first two statutes appropriated a combined $16.7 billion to the five affected states—Louisiana, Mississippi, Texas, Florida, and Alabama—for activities authorized under the CDBG statute. *See* 2005 Act, 119 Stat. at 2779-81 ($11.5 billion appropriation); 2006 Act, 120 Stat. at 472-73 ($5.2 billion appropriation). From the overall $16.7 billion appropriation in the 2005 and 2006 Acts, HUD allocated $10.41 billion to Louisiana for disaster recovery expenses. *See* 71 Fed. Reg. 7666, 7666 (Feb. 13, 2006) (Ex. D) (allocating $6.21 billion of the $11.5 billion from the 2005 Act to Louisiana); 71 Fed. Reg. 63,337, 63,338 (Oct. 30, 2006) (Ex. E) (allocating $4.2 billion of the $5.2 billion from the 2006 Act to Louisiana). Congress passed the third appropriations statute in late 2007, authorizing an additional $3 billion for supplemental CDBG grants to Louisiana. *See* 2007 Act, 121 Stat. at 1343-44. Accordingly, $13.41 billion of the total amount appropriated by Congress for the CDBG Disaster Recovery Grant program has been allocated to Louisiana.

[1] For the Court's convenience, the relevant CDBG Disaster Recovery Grant statutes and regulations are attached as exhibits A through G.

The Disaster Recovery Grant program is governed by the general statutory and regulatory framework that governs regular CDBG funds.[2] *See* 2005 Act, 119 Stat. at 2779-80; 2006 Act, 120 Stat. at 472-73. In administering the Disaster Recovery Grant program, HUD may waive certain CDBG program requirements if requested by a state, but may not waive requirements relating to fair housing, nondiscrimination, labor standards, and the environment. *See* 2005 Act, 119 Stat. at 2780; 2006 Act, 120 Stat. at 472-73.

The appropriations statutes include a reporting and monitoring framework that supplements the regular CDBG program requirements. The 2005 Act and 2006 Act provide that "prior to the obligation of funds each State shall submit a plan to the Secretary [of HUD] detailing the proposed use of all funds, including criteria for eligibility and how the proposed use of all funds . . . will address long-term recovery and restoration of infrastructure." 2005 Act, 119 Stat. at 2780; 2006 Act, 120 Stat. at 473; *see also* 42 U.S.C. § 5304(a)(1). HUD's implementing regulations require that grantees submit an "action plan" to fulfill this obligation. *See* 71 Fed. Reg. at 7669; 71 Fed. Reg. at 63,338-39; 72 Fed. Reg. 70,472, 70,472-73 (Dec. 11, 2007) (Ex. F). In addition to detailing the intended uses of all grant funds, the action plan must include a number of certifications,[3] including assurances that the grantee will comply with the Fair Housing Act and will affirmatively further fair housing. 71 Fed. Reg. at 7671; 71 Fed. Reg. at

[2] The regular CDBG program provides annual block grants to local and state governments for housing and housing-related development activities. 42 U.S.C. § 5301. The primary objective of the CDBG program is to develop "viable urban communities[] by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." *Id.* § 5301(c). The statutory requirements for the regular CDBG program are established in Title I of the HCDA. *Id.* §§ 5301-5318.

[3] "Certification" is defined in HUD regulations to mean: "A written assertion, based on supporting evidence, that must be kept available for inspection by HUD, by the Inspector General of HUD, and by the public." 24 C.F.R. § 91.5.

63,339; 72 Fed. Reg. at 70,472. HUD is required to review and approve these certifications before it obligates any grant funds. 42 U.S.C. § 5304(b).

The Louisiana Recovery Authority ("LRA") is a Louisiana state agency created to administer funds for recovery from Hurricanes Katrina and Rita, including CDBG Disaster Recovery Grant funds. Defendant Paul Rainwater is the LRA's Executive Director. Compl. ¶ 19. From its total of $13.41 billion in Disaster Recovery Grant funds, the LRA designated approximately $11 billion for housing programs known collectively as the Road Home program. *Id.* ¶ 41. The largest Road Home component is the Homeowner Assistance Program,[4] which provides rebuilding assistance to homeowners whose homes were destroyed or suffered major damage as a result of Hurricanes Katrina and Rita. *Id.* ¶¶ 43-44.

Homeowners who agree to use Road Home funds to rebuild or repair their homes are eligible for grants of up to $150,000. *Id.* ¶¶ 45-46. The grant amount is calculated using the lower of two baseline values: the home's pre-storm or the cost of damage to the home. *Id.* ¶ 47. Consistent with the statutory and regulatory framework described above, the LRA proposed and developed the Road Home grant formula and the details of the Road Home program in consultation with HUD and subject to HUD's ongoing approval and oversight. *Id.* ¶¶ 49-51.

The requirement that Road Home grant awards not exceed the pre-storm value of the home has a discriminatory disparate impact on African Americans. *Id.* ¶¶ 52-60. Homes in predominantly African American communities had lower values than those in white communities, even when the condition, style, and quality of the homes are comparable. *Id.* ¶¶ 53-54. As a result, African American homeowners have been more likely than whites to receive a Road Home grant that is based on the pre-storm value of their home rather than on the

[4] This memorandum will refer to the Road Home Homeowner Assistance Program as the "Road Home" program for brevity.

cost of damage and are, therefore, more likely than white homeowners to have a gap between their rebuilding resources and the cost to rebuild. *Id.* ¶¶ 55-60.

Accordingly, the operation of this program violates both Title VIII (42 U.S.C. §§ 3604, 3605, and 3608) and the HCDA (42 U.S.C. § 5304). *Id.* ¶ 74-77. Section 3604(a) of Title VIII makes it unlawful to "make unavailable or deny" housing to any person because of race. 42 U.S.C. § 3604(a). Section 3605(a) of Title VIII makes it unlawful to discriminate on the basis of race in the availability, terms, or conditions of residential real estate-related transactions. *Id.* § 3605(a). And § 3608(e)(5) of Title VIII requires HUD and recipients of federal funds to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" fair housing.[5] *Id.* § 3608(e)(5). Finally, § 5304(b)(2) of the HCDA requires that the use of all CDBG funds be conducted in a manner that "affirmatively further[s] fair housing." *Id.* § 5304(b)(2). Plaintiffs allege that by designing, implementing, and overseeing a program that has a disparate impact on African American families as compared to white families, both HUD and Rainwater violated the anti-discrimination provisions of § 3604(a) and § 3605(a), and failed to fulfill their affirmative obligations under § 3608(e)(5) and § 5304(b)(2).

The discriminatory disparities in the application of the Road Home formula give rise to this action for declaratory and injunctive relief to end the discriminatory operation of the Road

[5] Plaintiffs' Complaint alleges that the defendants violated § 3608(d) in addition to § 3608(e)(5) of the Fair Housing Act. Compl. ¶ 76. As HUD notes, § 3608(d) and § 3608(e)(5) impose an identical obligation to administer housing programs "in a manner affirmatively to further" fair housing policies. Defendant HUD's Motion to Dismiss 36, Dkt. 22 (Mar. 6, 2009) ("HUD Br."). This memorandum will refer only to § 3608(e)(5) in discussing Plaintiffs' allegations that the defendants violated their affirmative obligations under both § 3608(d) and § 3608(e)(5) of the Fair Housing Act.

Home program and to direct the Defendants to develop and apply a new nondiscriminatory grant formula.

ARGUMENT

I. Defendants' motions to dismiss for lack of subject-matter jurisdiction should be denied.

HUD and Rainwater each move to dismiss Plaintiffs' claims under Rule 12(b)(1) for lack of subject-matter jurisdiction. HUD argues (1) that Plaintiffs do not have standing to challenge the Road Home formula because Plaintiffs' injuries will not be redressed by a favorable judgment; (2) that Plaintiffs' claims are moot as to those Disaster Recovery Grant funds that HUD has already obligated to Louisiana; and (3) that Plaintiffs' Complaint fails to allege a waiver of sovereign immunity. Defendant HUD's Motion to Dismiss 20-31, Dkt. 22 (Mar. 6, 2009) ("HUD Br."). Rainwater separately argues that this Court lacks subject-matter jurisdiction because the Eleventh Amendment bars Plaintiffs' claims against Rainwater. Defendant Paul Rainwater's Motion to Dismiss and Motion to Transfer 3-18, Dkt. 28 (May 5, 2009) ("Rainwater Br."). None of these arguments has merit and each should be rejected.

In evaluating a motion to dismiss for lack of subject-matter jurisdiction, this Court must construe all reasonable inferences in favor of the plaintiff. *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999). The Court may rely on matters outside the pleadings only if the facts are undisputed or if the Court provides Plaintiffs an opportunity to discover the facts necessary to establish jurisdiction. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 198 (D.C. Cir. 1992).

A. Plaintiffs have standing to challenge HUD's unlawful conduct.

The jurisdiction of federal courts is limited to actual cases or controversies between proper litigants. U.S. Const. art. III, § 2. Constitutional standing requires that a party have suffered an actual or threatened injury, which may be fairly traced to the challenged action and

which is "likely to be redressed by a favorable decision" of the court. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 661 (D.C. Cir. 1996) (en banc) (quoting *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). HUD argues that Plaintiffs cannot show that a favorable judgment would redress the harm caused by HUD's approval and continued oversight of the discriminatory Road Home grant formula. *See* HUD Br. 19-27. The Court should reject this argument, because Plaintiffs' Complaint easily establishes that the alleged harms would be redressed by a favorable judgment.

In order to satisfy the redressability requirement, Plaintiffs must establish that it is likely, as opposed to merely speculative, that a favorable decision by this Court will redress the injury suffered. *America's Cmty. Bankers v. FDIC*, 200 F.3d 822, 827 (D.C. Cir. 2000); *Fla. Audubon Soc'y*, 94 F.3d at 663-64 ("Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff."). Plaintiffs are not required to prove to a certainty that the alleged injuries will be redressed by a favorable decision. *See W. Va. Ass'n of Cmty. Health Ctrs., Inc. v. Heckler*, 734 F.2d 1570, 1575 (D.C. Cir. 1984) ("[O]nce appellants demonstrated that they would qualify to receive . . . funds, they need not shoulder the additional burden of demonstrating that they are certain to receive funding.").

Here, Plaintiffs have alleged sufficient facts to demonstrate that a favorable ruling would likely redress the injuries alleged in this suit. Any order from this Court that invalidates the Road Home grant formula would compel Rainwater to develop, and HUD to evaluate and approve, a new housing recovery formula that would treat African American homeowners fairly in the New Orleans redevelopment process. HUD disputes that such an order would remedy Plaintiffs' injuries by downplaying its role in the Road Home program. But the Complaint

alleges, and the statutory scheme provides, that HUD is responsible for the administration, funding, and supervision of federal low-income housing programs, including the regular CDBG program and the CDBG Disaster Recovery Grant program. Compl. ¶¶ 18, 33-37. All grantees, including Rainwater, must submit an action plan to HUD that explains the intended uses of the funds and promises to comply with the Fair Housing Act. HUD must approve this action plan before disbursing any funds. *Id.* ¶¶ 37-38; 42 U.S.C. § 5304(b); 71 Fed. Reg. at 7671; 71 Fed. Reg. at 63,339; 72 Fed. Reg. at 70,472; 73 Fed. Reg. 46,312, 46,314 (Aug. 8, 2008) (Ex. G). The existing Road Home grant formula was proposed and developed in consultation with HUD, was approved by HUD as a condition of the distribution of grant funds, and is subject to HUD's continuing oversight and approval. Compl. ¶¶ 49-51.

Plaintiffs therefore seek an order setting aside HUD's approval of the discriminatory formula and requiring HUD to oversee the development of a new, nondiscriminatory formula. The D.C. Circuit has found in the analogous context of agency rule promulgation that a court order requiring an agency to vacate a rule and develop a new one would redress the claims of plaintiffs who had challenged that rule. *See, e.g.*, *America's Cmty. Bankers*, 200 F.3d at 828-29 ("Where an agency rule causes the injury, the redressability requirement may be satisfied . . . by vacating the challenged rule and giving the aggrieved party the opportunity to participate in a new rulemaking, the results of which might be more favorable to it."); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 457-58 (D.C. Cir. 1998); *cf. Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1334 (D.C. Cir. 1986) (redressability prong satisfied where a favorable decision could trigger a series of penalties that would force third parties to take specific actions). Plaintiffs' claims are therefore sufficient to establish standing.

HUD relies on *Allen v. Wright*, 468 U.S. 737 (1984), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), to argue that Plaintiffs' likelihood of obtaining redress is speculative. The plaintiffs in *Allen* and *Simon*, however, requested relief that could not be ordered by the court, because the relief depended upon the independent actions of third parties that were not parties to the litigation. *See Allen*, 468 U.S. at 743-46; *Simon*, 426 U.S. at 41-42. In particular, both cases involved challenges to favorable tax treatment that was alleged to affect the third party's incentives. *See Allen*, 468 U.S. at 743-36; *Simon*, 426 U.S. at 33. The D.C. Circuit has explained that both cases establish the principle that "speculative claims dependent upon the actions of third parties do not create standing for the purposes of establishing a case or controversy under Article III." *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 435 (D.C. Cir. 2002) (discussing *Allen* and *Simon*); *see also Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 938 (D.C. Cir. 1986) ("In the [*Simon*] line of cases, causality and remediability were doubtful because the plaintiffs' injury resulted from the action of third parties not before the court . . . .").[6] No such problem arises in this case, as Plaintiffs need not rely on any indirect effect on a third party. All of the parties necessary to accord the relief that Plaintiffs seek—HUD and Rainwater—are defendants before this Court.

[6] The lower court decisions relied upon by HUD feature complainants with similarly flawed arguments. *See US Ecology, Inc. v. U.S. Dep't of the Interior*, 231 F.3d 20, 24-25 (D.C. Cir. 2000) (action challenging decision of federal agency to rescind the sale of land to third party not before the court); *Univ. Med. Ctr. of S. Nev. v. Shalala*, 173 F.3d 438, 439-40 (D.C. Cir. 1999) (holding that the plaintiff did not have standing where relief depended upon whether third parties not involved in the litigation would opt to make retroactive payments to appellants); *Freedom Republicans v. FEC*, 13 F.3d 412, 414, 417-19 (D.C. Cir. 1994) (action against the FEC to block funding for the Republican National Convention because of alleged discrimination by the Republican Party); *see also Linda R. S. v. Richard D.*, 410 U.S. 614, 614-16 (1973) (action by mother seeking to challenge a local prosecutor's decision to decline prosecution of a "deadbeat" father who failed to pay child support).

In addition, HUD's authority over Rainwater through HUD's direct grant-making and regulatory authority distinguishes this case from the more attenuated remedial proposals at issue in *Allen* and *Simon*. The D.C. Circuit has consistently upheld plaintiffs' standing to challenge federal agency decisions in similar circumstances. *See, e.g.*, *Ctr. for Auto Safety*, 793 F.2d at 1334 (holding that consumer organizations had standing to challenge automobile fuel economy standards because the claimed injury—the lack of fuel-efficient vehicles—would be redressed by a ruling that required the agency to adopt regulations mandating increased fuel efficiency); *Action Alliance*, 789 F.2d at 936-39 (holding that plaintiffs had standing where the requested relief—a court order requiring that agency-specific regulations be modified to be compatible with government-wide regulations—would redress the alleged injury of organizational plaintiffs).

HUD contends that it does not in fact have authority to impose fair housing conditions on grant recipients, arguing that it has a "limited role in approving CDBG funds." HUD Br. 22-23 (citing Declaration of Jessie Handforth Kome Submitted in Support of Defendant HUD's Motion to Dismiss ¶¶ 3, 9, 13, Dkt. 22, Attachment (Mar. 3, 2009), ("Kome Decl.")). This argument not only is foreclosed by the mandatory statutory and regulatory scheme described above, but also was rejected unanimously by the Supreme Court over thirty years ago in *Hills v. Gautreaux*, 425 U.S. 284 (1976). In *Gautreaux*, HUD argued that no remedy could be ordered for HUD's approval of discriminatory local housing practices in Chicago on the ground that the "practical operation" of many HUD-funded programs is "in a significant degree under local control." *See* Br. for the Pet'r 29-34, *Hills v. Gautreaux*, No. 74-1047 (filed Nov. 8, 1975), *available at* 1975 WL 173594. The Supreme Court rejected this argument, holding that the district court could order a remedy requiring HUD to impose and enforce civil rights conditions on the use of federal

housing funds. *Gautreaux*, 425 U.S. at 301-06 ("[A] metropolitan area relief order directed to HUD . . . would have the same effect on the suburban governments as a discretionary decision by HUD to use its statutory powers to provide the respondents with alternatives to the racially segregated Chicago public housing system . . . ."); *see also, e.g.*, *NAACP v. HUD*, 817 F.2d 149, 155, 157 (1st Cir. 1987) (Breyer, J.) ("Clearly, HUD possesses broad discretionary powers to develop, award, and administer its grants and to decide the degree to which they can be shaped to help achieve Title VIII's goals."); *Shannon v. HUD*, 436 F.2d 809, 820-23 (3d Cir. 1970); *NAACP, Boston Chapter v. Kemp*, 721 F. Supp. 361, 367 (D. Mass. 1989) ("[HUD's] control of current and future [CDBG] grant funds gives the agency leverage to remedy past and current noncompliance with fair housing goals.").[7]

HUD also argues that the possibility a favorable judgment will result in replacing the discriminatory formula with a particular alternative—a cost-of-damage formula—is too speculative to establish standing. HUD Br. 24. But the relief Plaintiffs seek does not depend on the Court's ordering use of a *particular* formula. Rather, Plaintiffs simply ask the Court to direct HUD to rescind approval of the discriminatory formula currently in use and replace it with a nondiscriminatory one. *See* Compl. p.17 (requesting that the Court order HUD and Rainwater "to cease immediately their violation of Plaintiffs' rights, and to remedy the invidious effects of their violations by recalculating Road Home homeowner grants in a nondiscriminatory manner"). The Complaint's reference to the cost-of-damage calculation is simply an illustration of one way of recalculating grant awards to remedy racial disparities in the existing formula. *See id.* ¶ 60. This claim suffices to establish standing, because Plaintiffs need only show that a favorable

[7] Should the Court be inclined to credit the assertions in the Kome Declaration regarding the nature of HUD's authority over Rainwater and other state grantees, *see* Kome Decl. ¶¶ 3, 9, 13, Plaintiffs reserve the right to seek expedited discovery regarding those jurisdictional facts. *See Herbert*, 974 F.2d at 198.

judgment would compel HUD to devise an alternative, nondiscriminatory calculation. *See CC Distribs., Inc. v. United States,* 883 F.2d 146, 151 (D.C. Cir. 1989) (holding that plaintiff had standing to challenge a Department of Defense contracting decision because the requested relief—requiring the defendant to conduct re-competitions and cost comparison studies—would redress plaintiffs' claims, not by guaranteeing that they would be awarded the contracts, but by giving them the opportunity to compete for the contracts); *W. Va. Ass'n.*, 734 F.2d at 1574 (holding that plaintiff community health centers who challenged a federal grant decision "need not demonstrate that they would actually receive the additional funding" in order to show redressability, and instead it sufficed that plaintiffs alleged the denial of the "opportunity to compete for . . . increased funding").

Because a favorable judgment will likely redress Plaintiffs' injuries, this Court should deny HUD's motion to dismiss for lack of standing.

B. The case is not moot.

HUD next asserts that the Court lacks subject-matter jurisdiction because Plaintiffs' claims are moot. HUD Br. 27-28. This assertion ignores that Plaintiffs' claims can be satisfied without requiring HUD to reallocate or obligate any additional federal funds. Plaintiffs need not ask the Court to order the expenditure of federal funds that were previously dedicated to homeowners other than Plaintiffs, or the reallocation of funds already obligated to other states. *See City of Houston v. HUD*, 24 F.3d 1421, 1424-27 (D.C. Cir. 1994); *W. Va. Ass'n*, 734 F.2d at 1577 & n.8; *cf. Population Inst. v. McPherson*, 797 F.2d 1062, 1081 (D.C. Cir. 1986). Rather, Plaintiffs ask the Court to order HUD to use its existing authority to force Rainwater to conform the Road Home program with federal law. Thus, no part of this action is moot.

Contrary to HUD's assertion, the mootness principles of *City of Houston* and *West Virginia* have no relevance in this action. *See* HUD Br. 27-28. In *City of Houston*, HUD had

reduced Houston's CDBG grant for fiscal year 1986 by $2.6 million and reallocated the $2.6 million to other grantees. 24 F.3d at 1424-25. Houston claimed its grant could not be reduced without a hearing and sought a court order compelling HUD to increase its grant by $2.6 million. *Id.* But because HUD had already contractually obligated all of its 1986 CDBG appropriations before the action was filed, the court lacked the power to order the further expenditure of those funds. *Id.* at 1426-27. As the D.C. Circuit explained, "when an appropriation has lapsed or has been fully obligated, federal courts cannot order the expenditure of funds that were covered by that appropriation." *Id.* at 1424; *see id.* at 1428 (rejecting the city's assertion that its grant could be increased from funds recouped from other grantees).

Similarly, in *West Virginia*, an association of community health centers challenged a federal agency's allocation formula for the federal Primary Care Block Grant and sought an order compelling the agency to increase West Virginia's 1983 block grant. 734 F.2d at 1572-73. The action was deemed moot, however, because plaintiffs "concede[d] that *all* FY83 PCBG funds have been awarded by the Secretary to various recipients." *Id.* at 1577. Thus, in both *City of Houston* and *West Virginia*, plaintiffs' injuries could only be redressed by a court order compelling a federal agency to increase a state's grant from a source of funds that had already been fully obligated. *See City of Houston*, 24 F.3d at 1426.

Here, Plaintiffs' claims can be redressed *without* a court order compelling HUD to spend any additional CDBG "funds that were covered" by the 2005, 2006, and 2007 Acts, because the court may order HUD to exercise its extant authority to impose fair housing conditions on Rainwater's continued operation of the Road Home program. *Id.* at 1424, 1426. In particular, HUD has the authority to require Rainwater to use the funds that HUD has already disbursed and obligated to LRA (though not yet awarded to particular homeowners), to (1) award Road Home

grants based on a nondiscriminatory formula to homeowners who have not yet received grants, and (2) recalculate awards for homeowners who previously received grants under the discriminatory formula. 42 U.S.C. §§ 5304, 5311; *see also Kemp*, 721 F. Supp. at 367 ("[T]he fact that the 1977-81 funds have been disbursed does not deprive HUD of all leverage over its grantees. Its control of current and future grant funds gives the agency leverage to remedy past and current noncompliance with fair housing goals.") (citing 42 U.S.C. §§ 5304, 5311 and *Davis v. HUD*, 627 F.2d 942, 945 (9th Cir. 1980) (Kennedy, J.) (rejecting HUD's contention that an action under the HCDA was "moot because block grant funds have been disbursed to the City which has already expended most of them")). Thus, each class plaintiff can obtain relief in the absence of a court ordering the expenditure of additional federal funds. Accordingly, the "fully obligated" standard of *City of Houston* does not apply here. *See* 24 F.3d at 1424.[8]

Even if the Court were to apply *City of Houston*, it still could not conclude that Plaintiffs' action is moot. Under *City of Houston*, an action seeking the expenditure of appropriated funds may become moot "when an appropriation has lapsed or has been *fully* obligated." *Id.* (emphasis added). Here, the relevant appropriations have neither lapsed nor been fully obligated. As HUD concedes, Congress expressly stated that the CDBG funds at issue here shall not lapse. HUD Br. 28 n.10; 2005 Act, 119 Stat. at 2779-80; 2006 Act, 120 Stat. at 472; 2007 Act, 121 Stat. at 1343. And because HUD has obligated only a portion of the relevant CDBG funds to the Road Home program, with $1 billion yet to be obligated to Louisiana, HUD clearly has not *fully* obligated all of the relevant funds. *Compare City of Houston*, 24 F.3d at 1427 (granting summary judgment to HUD where it was undisputed that funds had been contractually obligated in their entirety at

[8] Because the relief Plaintiffs seek does not require the expenditure of additional federal funds, Plaintiffs need not, as HUD suggests, "seek a preliminary injunction preventing the agency from disbursing those funds." HUD Br. 28.

least six months prior to initiation of suit), *with* Kome Decl. ¶ 25 ("Of the remaining funds that Congress has appropriated for disaster recovery, HUD has not yet obligated $1,000,000,000 to Louisiana."). Until all of the relevant appropriated funds have been obligated, this Court retains the authority to "order the expenditure of funds covered by that appropriation." *City of Houston*, 24 F.3d at 1424; *see also Nat'l Ctr. for Mfg. Scis. v. Dep't of Defense*, 199 F.3d 507, 509-10 (D.C. Cir. 2000) (holding that an action was not moot where the plaintiff's claim could be satisfied with unobligated funds from the same appropriations act as the challenged provision); *cf. W. Va. Ass'n*, 734 F.2d at 1577 (holding an action moot since all funds had already been obligated); *Hegna v. Snow*, No. 03-01479, 2005 WL 3276307, at *3 (D.D.C. Sept. 27, 2005) (Kennedy, J.) (same).[9] Therefore, even if *City of Houston* applies, this action is not moot.[10]

Finally, even if, *arguendo*, the Court were to accept HUD's flawed argument—supported by not a single case in this Circuit or elsewhere—that Plaintiffs' action is moot because a *portion* of the relevant funds has been obligated already, Plaintiffs' challenge to HUD's continuing approval and oversight of LRA's discriminatory *policies* in the Road Home program is clearly not moot, as HUD itself concedes. HUD Br. 28 n.11; *see also Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1015 (D.C. Cir. 1997) (citing *City of Houston*, 24 F.3d at 1428).

C. Neither the sovereign immunity of the United States nor the Eleventh Amendment immunity of Louisiana bars this suit.

Both HUD and Rainwater move to dismiss this action for lack of subject-matter jurisdiction on sovereign immunity grounds. HUD argues that Plaintiffs' claims should be

[9] Should the Court deem *City of Houston* applicable, Plaintiffs reserve the right to seek expedited discovery to support a possible motion for a preliminary injunction to preserve the remaining unobligated funds.

[10] Because these unobligated funds originated from the same source that HUD used to fund the Road Home program, there can be no concern that an injunction ordering HUD to use these funds would "constitute monetary damages rather than specific relief" under the waiver of sovereign immunity in 5 U.S.C. § 702. *See City of Houston*, 24 F.3d at 1428; *infra* Part I.C.1.

dismissed, because Plaintiffs did not allege a waiver of sovereign immunity in the Complaint. HUD Br. 29-31. Rainwater argues that Plaintiffs' suit is barred by the Eleventh Amendment to the Constitution. Rainwater Br. 3-18. For the reasons discussed below, neither argument provides a basis for dismissal here.

1. Congress has waived the immunity of the United States in actions, like this one, that seek relief other than money damages.

HUD argues that the Court lacks jurisdiction because the Complaint does not expressly allege a waiver of sovereign immunity by the United States. *See* HUD Br. 29-31. Plaintiffs have properly invoked sufficient bases for this Court's subject-matter jurisdiction, and HUD's motion to dismiss on this ground should therefore be denied.

HUD acknowledges that Congress has waived the immunity of the United States in any action "seeking relief other than money damages." 5 U.S.C. § 702; *see* HUD Br. 29-31. HUD nonetheless argues that because Plaintiffs do not specifically cite § 702 in the Complaint, the Complaint should be dismissed for lack of subject-matter jurisdiction. *See* HUD Br. 29-31. But § 702 is not an independent grant of jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105-07 & n.6 (1977). Rather, subject-matter jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), and 42 U.S.C. § 3613(a), as Plaintiffs' Complaint properly states. *See* Compl. ¶ 8; *see also* 14A Wright & Miller, *Federal Practice & Procedure* § 3659, at 51 (3d ed. 1998 & Supp. 2009) ("[I]t is now quite clear that plaintiffs seeking specific relief are given the right to sue the government in federal court by the Administrative Procedure Act but the subject matter jurisdiction basis is the general federal question statute."). Plaintiffs' Complaint thus meets the requirement that a pleading contain "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1).

Nor is it necessary for Plaintiffs' Complaint to specifically invoke the right of judicial review provided by § 702. A complaint is simply required to give the defendant fair notice of the plaintiff's claim and the grounds on which it rests, and HUD's response makes clear that it is on notice of Plaintiffs' claims. *See Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008) ("The contention that his complaint's omission of a citation to RLUIPA precludes [the plaintiff] from advancing legal arguments based on that statute is entirely meritless. . . . [The plaintiffs'] complaint and subsequent filings provided appellees with 'fair notice' of that claim, even though the statute was not cited in the complaint itself." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007))); 2 *Moore's Federal Practice* §§ 8.03[3] n.19, 8.04[3] n.13 (3d ed. 1997 & Supp. 2009) (citing cases); *see also* Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice.").[11]

Plaintiffs have brought this action seeking declaratory and injunctive relief to enforce HUD's statutory mandate to ensure its grantees comply with federal anti-discrimination laws. *See* Compl. ¶¶ 7, 9. Accordingly, on its face, this action seeks "relief other than money damages" that squarely fits within the § 702 waiver of sovereign immunity. Plaintiffs' action seeks specific relief in the form of an order setting aside HUD's approval of the discriminatory formula and requiring HUD to oversee the development of a new, nondiscriminatory formula. *See* Compl. ¶ 17. Binding precedent has long recognized that actions for specific relief, even where they would result in the payment of money due, fall within the sovereign immunity waiver of§ 702. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 893-901 (1988) (adopting reasoning in *Maryland. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441 (D.C. Cir.

[11] If this Court believes that the lack of specific citation to § 702 in the Complaint deprives the Court of subject-matter jurisdiction, Plaintiffs will amend the Complaint to so plead. *See* Fed. R. Civ. P. 15(a)(1)(A); *see also* 6 Wright & Miller, *Federal Practice & Procedure* § 1483 & n.15, at 587-88.

1985)). These decisions have explained that "money damages represent compensatory relief, an award given to a plaintiff as a substitute for that which has been lost; specific relief in contrast represents an attempt to restore to the plaintiff that to which it was entitled from the beginning." *America's Cmty. Bankers*, 200 F.3d at 829; *see Bowen*, 487 U.S. at 893-901. As the D.C. Circuit has emphasized, "[w]here a plaintiff seeks an award of funds to which it claims entitlement under a statute, the plaintiff seeks specific relief, not damages." *America's Cmty. Bankers*, 200 F.3d at 829; *Nat'l Ass'n of Counties v. Baker*, 842 F.2d 369, 373 (D.C. Cir. 1988) (release of sequestered funds was not money damages as plaintiffs "are seeking funds to which a statute allegedly entitles them rather than money in compensation for the losses they may have suffered by virtue of the withholding of those funds"); *see also Esch v. Yeutter*, 876 F.2d 976, 983-85 (D.C. Cir. 1989) (finding farmers' claim for a redetermination of their entitlement to a federal subsidy in compliance with the subsidy statutes did not seek "money damages").[12]

In *Bowen*, the state of Massachusetts sought to enjoin the Department of Health and Human Services from refusing to reimburse the state for Medicaid expenditures under an improper interpretation of its statutory mandate. *Bowen*, 487 U.S. at 889. The Court explained that the relief Plaintiffs sought—a reversal of the decision to disallow the reimbursements—was not "damages" but rather an adjustment in the size of the federal grant due. *Id.* at 893. The Court held that § 702's waiver of sovereign immunity permitted the action, because the suit sought "to enforce the statutory mandate itself, which happens to be one for the payment of

[12] *Hubbard v. Administrator, EPA*, 982 F.2d 531 (D.C. Cir. 1992) (en banc), similarly recognized this distinction between specific relief and monetary damages. The court held that a suit for back pay as compensation for the refusal to hire constituted "money damages," as the harm suffered was the lost opportunity to perform the job and, thus, the specific relief sought was instatement. *Id.* at 532, 534. The court observed that back pay might well be properly categorized as specific relief where a plaintiff had been hired and worked for a year without being paid, as in that circumstance the money he had "a right to receive in exchange for his labor might well be the very thing that was taken from him." *Id.* at 534 n.4.

money." *Id.* at 900. Thus, the plaintiff sought the "very thing" to which the state was entitled. *Id.* at 910.

Here, Plaintiffs seek to obtain relief in the form of an order setting aside HUD's approval of the discriminatory formula and requiring HUD to oversee the development of a new, nondiscriminatory formula. This would provide to Plaintiffs the specific thing to which they were originally entitled. HUD apparently concedes as much, characterizing the relief Plaintiffs seek as "prospective relief," not money damages. *See* HUD Br. 21. Accordingly, this action is authorized to proceed under the United States's waiver of sovereign immunity in § 702.

Because § 702 waives the sovereign immunity of the United States in this action and because Plaintiffs' Complaint gives HUD ample notice of the basis of Plaintiffs' claims, the motion to dismiss on sovereign immunity grounds should be denied.

2. This Court has subject-matter jurisdiction over Plaintiffs' claims against Rainwater because they are claims against a state officer for prospective relief from unlawful acts.

Rainwater moves to dismiss Plaintiffs' claims for lack of subject-matter jurisdiction on the ground that the Eleventh Amendment bars Plaintiffs' suit. *See* Rainwater Br. 3-18. The Eleventh Amendment poses no obstacle to the relief sought here. As the Supreme Court held in *Ex parte Young*, 209 U.S. 123 (1908), "[a] federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land." *Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008) (quoting 17A Wright & Miller, *Federal Practice & Procedure* § 4232). This case is a

straightforward application of that doctrine: Plaintiffs seek an injunction against a state officer, Rainwater, alleging that his actions violate several federal statutes.[13]

a. *Ex parte Young* applies because Plaintiffs seek no funds from the state treasury.

Rainwater's leading argument against application of *Ex parte Young* rests on the irrelevant and undisputed fact that the LRA as an entity—and not Rainwater alone—designed the formula at issue and administers the Road Home Program. Rainwater Br. 5-7, 11-12. According to Rainwater, this means that the state "is the real party in interest." *Id.* at 4. But the Supreme Court rejected this very argument in *Ex parte Young*. There, Young was the attorney general of Minnesota and, notwithstanding that the policy in question was set out by the state legislature, the Court held that if Young's actions violated federal law, "[t]he state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Ex parte Young*, 209 U.S. at 159-60. The D.C. Circuit rejected this very argument just last year, as it explained: "the Cherokee Nation argues that tribal sovereign immunity bars the suit against its officers because the requested relief really runs against the tribe itself. This is reminiscent of the losing argument in *Ex parte Young*. The argument is no more persuasive a century later." *Vann*, 534 F.3d at 750 (citation omitted).[14]

[13] To the extent that Rainwater suggests, without any authority, that Plaintiffs must "address the issue of sovereign immunity in their Complaint" and "invoke the doctrine of *Ex parte Young* in their Complaint," to invoke the subject-matter jurisdiction of this Court, *see* Rainwater Br. 7 (citation omitted), the Court should reject this argument for the same reasons given above. *See supra* Part I.C.1. The basis for federal jurisdiction is the same against Rainwater as against HUD, and adequately pleaded in the Complaint.

[14] Rainwater further misinterprets *Ex parte Young* by arguing that "the instant case can easily be distinguished from the facts of *Ex parte Young* where a state official allegedly violated state law." Rainwater Br. 12. *Ex parte Young* involved no violation of state law, but rather an injunction preventing the attorney general from *enforcing* a state law alleged to contravene *federal* law. *Ex parte Young*, 209 U.S. at 132. Here, as in *Ex Parte Young*, the Plaintiffs seek to enjoin a state officer from violating federal law.

As even Rainwater ultimately acknowledges, the immunity provided by the Eleventh Amendment is limited to protection against remedies requiring payment of state funds. Rainwater Br. 4-5 (admitting that the Eleventh Amendment's "sovereign immunity bars suits whose direct outcome will diminish the public treasury through the award of retroactive damages" (citing *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945))). Put another way, if the relief the Plaintiffs sought required payment from funds in the state treasury, the Eleventh Amendment would apply regardless of whether Rainwater or the state was named as the defendant. As the relief the Plaintiffs seek here relates to the use of federal funds and will not require payment of any state monies, there is no basis to invoke the immunity provided by the Eleventh Amendment.

In his argument that *Ex parte Young* is inapplicable, Rainwater cites only two cases in which the relief sought was unavailable under *Ex parte Young*, and in each case the plaintiffs sought payment of money from the state treasury. *See* Rainwater Br. 10-16 (citing *Edelman v. Jordan*, 415 U.S. 651 (1974); *Papasan v. Allain*, 478 U.S. 265 (1986)).[15] This is no coincidence. In *Edelman*, relied on heavily by Rainwater, the Supreme Court noted repeatedly that the plaintiffs sought an expenditure of state funds to compensate them for a past loss. The Court emphasized that the requested relief "in practice resemble[d] a money judgment payable out of the state treasury," *id.* at 666, and that it "require[d] payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal question determination, but as

[15] In three of the other cases Rainwater cites in that section, the plaintiffs were permitted to rely on *Ex parte Young*. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645-48 (2002); *Quern v. Jordan*, 440 U.S. 332, 347-49 (1979); *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977). In two others, the case turned not on the relief sought but on other issues not relevant here. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73-76 (1996) (comprehensive remedial scheme); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (*Ex parte Young* inapplicable to violations of state law).

a form of compensation." *Id.* at 668. Similarly, in *Papasan*, on which Rainwater also heavily relies, the Court stressed that the state would be required "to use its own resources to take the place of the [lost trust] corpus or the lost income from the corpus."[16] *Papasan*, 478 U.S. at 281.

In an effort to invoke the Eleventh Amendment, Rainwater seeks to characterize the relief the Plaintiffs seek as retrospective merely because Plaintiffs seek to correct decisions that were made in the past. Rainwater Br. 15-16. But that is not nearly enough to invoke the Eleventh Amendment's immunity. In *Milliken v. Bradley*, 433 U.S. 267 (1977), the Supreme Court affirmed an award of compensatory and remedial education programs to remedy past *de jure* school segregation. Although the segregation had originated in the past, the relief sought was not tantamount to an award of damages from the state treasury and was therefore labeled prospective: "That the programs are . . . 'compensatory' in nature does not change the fact that they are part of a plan that operates *prospectively*." *Id.* at 290. In fact, even if the order had "a direct and substantial impact on the state treasury," *id.* at 289—something Rainwater has not shown here—it was nonetheless permissible because of its prospective nature.

Milliken thus reinforces the distinction between the various types of prospective relief *Ex parte Young* authorizes and the raids on state treasuries *Edelman* prohibits. As one court put it, in *Milliken* the Supreme Court "solidified the distinction it has drawn between prospective and retroactive relief in setting the boundaries of the Eleventh Amendment's bar on suits against a state in federal court. The distinction accommodates an individual's right to obtain relief in federal court from state officials' unconstitutional actions with the states' right not to have their

[16] Even Rainwater's own argument based on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), though misguided in several ways as discussed below, *see infra* Part I.C.2.b, recognizes the importance of a direct impact on state funds as a critical part of the analysis. *See* Rainwater Br. 17-18.

public coffers depleted with large retroactive damage awards." *Santiago v. N.Y. State Dep't of Corr. Servs.*, 945 F.2d 25, 29 (2d Cir. 1991).[17]

This case falls comfortably on the "prospective" side of that line. Plaintiffs seek to correct grant calculations awarded pursuant to a formula that relies upon discriminatory housing conditions and to ensure any future use of federal funds will not promote such discrimination. Louisiana's public coffers face no risk of a retroactive damage award, because the relief can be awarded entirely through grants of *federal* funds. *See* 2005 Act, 119 Stat. at 2779-81; 2006 Act, 120 Stat. at 472-73; 2007 Act, 121 Stat. at 1343-44; 71 Fed. Reg. at 7666 (allocating funds from the 2005 Act to Louisiana); 71 Fed. Reg. at 63,337 (allocating funds from the 2006 Act to Louisiana). Should Plaintiffs prevail on the merits, a remedial order would therefore be not a raid on the Louisiana state treasury but instead a directive to correct the Road Home program's discriminatory formula using only federal funds. Such relief is unequivocally prospective.

b. The decision in *Coeur d'Alene* is inapplicable.

Perhaps recognizing that Plaintiffs here seek prospective relief, Rainwater argues that "even prospective relief . . . [is] barred if the relief sought is the functional equivalent of relief otherwise barred by the Eleventh Amendment and 'special sovereignty interests' are implicated." Rainwater Br. 16 (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997)). Rainwater nowhere describes, however, what form of relief barred by the Eleventh Amendment is the "functional equivalent" of the relief sought here. Nor is Rainwater's analogy to *Coeur d'Alene* availing. In *Coeur d'Alene*, the plaintiffs sought to tread on the state's core sovereign

[17] If Rainwater's statement that "this lawsuit does not challenge the constitutionality of Mr. Rainwater's actions," Rainwater Br. 10, seeks to distinguish between statutory and constitutional claims, it is misguided. *Ex parte Young* applies equally to statutory and constitutional claims. *See, e.g., Verizon Md.*, 535 U.S. at 645 (applying *Ex parte Young* to a claim that state officers violated the Telecommunications Act of 1996 and a Federal Communications Commission ruling).

power: the power to exercise control over the lands and waters of the state. As the Supreme Court described it, "[t]he requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters," and "diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory." *Coeur d'Alene*, 521 U.S. at 282. Requiring Road Home grants to be administered in a way that is fair to African American homeowners is a far cry from extinguishing a state's control over its own sovereign territory.

Nor can *Coeur d'Alene* be stretched to apply to this case. The D.C. Circuit has declined to "extend *Coeur d'Alene* beyond its 'particular and special circumstances,' which involved the protection of a State's land." *Vann*, 534 F.3d at 756 (citation omitted). Instead, it "le[ft] it for the Supreme Court to decide whether to add additional sovereign interests to the core concerns discussed in *Coeur d'Alene*." *Id.*[18] Against this controlling precedent, the best authority Rainwater can muster for his tortured analogy is a single case in which the plaintiffs sought to exercise control over state funds "where Congress has expressly enacted that states may allocate such funds as they please." *Barton v. Summers*, 293 F.3d 944, 951 (6th Cir. 2002). But *Barton* simply echoes the point highlighted above: the Eleventh Amendment acts as a bar when the relief sought constitutes a raid on the state's general revenues. Put simply, *Coeur d'Alene* affords the same protection to a state's land that *Edelman* provides to its treasury. *See Vann*, 534

[18] *See also* 17A Wright & Miller, *Federal Practice & Procedure* § 4232 & n.41 ("Lower courts have been reluctant to use the special state sovereignty interest rationale to limit *Ex Parte Young* relief.") (collecting cases); *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007) (recognizing that "the Supreme Court in *Verizon Maryland* clarified that the courts of appeals need not (and should not) linger over the question whether 'special' or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought."); *Cardenas v. Anzai*, 311 F.3d 929, 938 (9th Cir. 2002) ("Applying the *Coeur d'Alene* exception to bar this action because it affects the state's interest in providing for the public health and welfare would allow the *Coeur d'Alene* exception to swallow the *Ex parte Young* rule.").

F.3d at 756 ("*Coeur d'Alene* closely aligns with earlier decisions holding that *Ex parte Young* cannot be used to gain access to the State's treasury.").

In short, this case fits comfortably within the *Ex parte Young* doctrine, and Rainwater's Eleventh Amendment argument is meritless.

c. There can be no Eleventh Amendment immunity for violations of the HCDA.

In addition, as to Plaintiffs' claims arising under the HCDA, Rainwater can assert no Eleventh Amendment immunity at all. Under 42 U.S.C. § 2000d-7, "A State shall not be immune under the Eleventh Amendment . . . for a violation of . . . the provisions of any . . . Federal statute prohibiting discrimination by recipients of Federal financial assistance." As discussed in more detail *infra* Part II.A.1, the HCDA prohibits discrimination by recipients of CDBG grants. *See* 42 U.S.C. §§ 5304(b)(2), 5306, 5309(a). Rainwater can therefore assert no immunity for claims under that section.

* * *

Neither defendant has raised a persuasive argument that this Court lacks subject-matter jurisdiction to hear Plaintiffs' claims. The motions to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) should be denied.

II. Defendants' motions to dismiss for failure to state a claim should be denied.

Both Defendants also move to dismiss the Complaint under Rule 12(b)(6) for failure to state a claim. Rainwater argues that the Fair Housing Act does not apply to the Road Home program, and that Plaintiffs may not enforce the HCDA in court. Rainwater Br. 25-31, 33-38. HUD argues that its conduct is unreviewable under the Administrative Procedure Act. HUD Br. 31-40. In addition, both Defendants argue that Plaintiffs have not alleged sufficient facts to state a violation of Title VIII. Rainwater Br. 31-33; HUD Br. 40-45.

For the reasons discussed below, Plaintiffs' claims are reviewable by this Court and are adequately pleaded.

A. Rainwater is subject to the requirements of both the Fair Housing Act and the HCDA.

Rainwater moves to dismiss for failure to state a claim under Rule 12(b)(6) on the grounds that (1) the Road Home program is not subject to the requirements of the Fair Housing Act, and (2) Plaintiffs cannot enforce the requirements of the HCDA. Rainwater Br. 25-31, 33-36. Rainwater's first argument is frivolous: his own certifications demonstrate the applicability of the Fair Housing Act to the Road Home program, and Plaintiffs have alleged an effect on the availability of housing sufficient to establish the applicability of Title VIII in any event. Rainwater's second argument must likewise be rejected, because Plaintiffs have a clear right to enforce the HCDA in this action.

1. This Court must reject Rainwater's disingenuous argument that the Road Home program is beyond the reach of the Fair Housing Act.

Rainwater first argues that the Fair Housing Act does not apply to the Road Home program because it is a "compensation grant program," and not a "housing program." Rainwater Br. 19-30. This is an astonishing argument for Rainwater to make, given that he was required to certify to HUD—before receiving any CDBG Disaster Recovery Grant funds under the appropriations acts—that all of those funds would be administered in compliance with the Fair Housing Act. Even apart from Rainwater's certification, the case law makes clear that the Road Home program is subject to the requirements of the Fair Housing Act.

The statutes that funded the CDBG Disaster Recovery Grant program authorized appropriations "for activities authorized under title I of the Housing and Community Development Act of 1974." 2005 Act, 119 Stat. at 2779-80; *see also* 2006 Act, 120 Stat. at 472 (same). The HCDA provides block grants to state and local governments for housing and

housing-related development activities. 42 U.S.C. §§ 5301, 5305(a) (enumerating a list of eligible housing and housing-related activities). The HCDA further specifies that the use of grant funds "will be conducted and administered in conformity with . . . the Fair Housing Act . . . ." *Id.* § 5304(b)(2). Because the appropriations acts expressly limited the use of Disaster Recovery Grant funds to housing-related activities authorized under the HCDA, and because the HCDA requires that all funds be spent in conformity with the Fair Housing Act, it is hard to conceive how Rainwater can claim the Road Home program is not subject to the Fair Housing Act.

Rainwater's argument is made even more incredible by the requirement that he agree to comply with the Fair Housing Act as a condition of receiving the funds. The HCDA provides that prior to the receipt of grant funds, grantees must (among other requirements) certify that the grantee will comply with the Fair Housing Act and will affirmatively further fair housing. *Id.* § 5304(b)(2). To effectuate these statutory requirements, HUD has promulgated a detailed regulatory framework governing a grantee's use of CDBG Disaster Recovery Grant funds. That framework requires any state receiving Disaster Recovery Grant funds to certify both that the state "will affirmatively further fair housing," and that "the grant will be conducted and administered in conformity with . . . the Fair Housing Act . . . and implementing regulations." 71 Fed. Reg. at 7671 (regulations applying to the 2005 Act); *see also* 71 Fed. Reg. at 63,339 (providing that all regulations that apply to the 2005 Act will also apply to the 2006 Act); 72 Fed. Reg. at 70,472 (providing that all program requirements that apply to the 2005 and 2006 Acts will also apply to the 2007 Act); 73 Fed. Reg. at 46,314 (reconsidering and reauthorizing the certification requirements applicable to all three appropriations).

In other words, as a condition of receiving the CDBG Disaster Recovery Grant funds that Rainwater used to establish the Road Home program, Rainwater was required to certify to HUD that all uses of the funds would be conducted in conformity with the Fair Housing Act. For Rainwater now to contend that the Fair Housing Act does not apply is hard to reconcile with, and indeed calls into question, Rainwater's prior certifications that he would comply with this law. *See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc., v. Westchester County,* No. 06-2860, 2009 WL 455269, at *2, *13-16 (S.D.N.Y. Feb. 24, 2009) (rejecting Westchester County's motion for summary judgment in a *qui tam* action in which the relators alleged that the County falsely certified that it would use CDBG grant funds in compliance with the Fair Housing Act).

In any event, Rainwater's assertion that the Fair Housing Act does not apply to the Road Home program because it is a "compensation program" is incorrect. The stated purpose of the Road Home program is to rebuild hurricane-affected communities, and the challenged Road Home formula provides grants to homeowners who agree to use the funds to rebuild or repair their homes. Compl. ¶¶ 44-46. Each of the individual Plaintiffs alleges that he or she has been unable to complete home repairs, and in some cases has been unable to return to the dwelling at all, because of the discriminatory disparate impact of the Road Home formula. Compl. ¶¶ 61-65. These allegations are sufficient to state a claim that Rainwater has "ma[de] unavailable or den[ied]" housing to African American homeowners in violation of § 3604(a). This Court has held that § 3604(a) must be read broadly to reach any conduct that hinders access to housing on the basis of race. *See, e.g., Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co.,* 208 F. Supp. 2d 46, 56 (D.D.C. 2002) ("[T]he broad, general language—reflected in phrases such as 'otherwise make unavailable or deny'—was intended to be flexible enough to cover multiple

types of housing-related transactions."); *see also Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 573 F. Supp. 2d 70, 76-77 (D.D.C. 2008) ("*NCRC*"); *Nat'l Cmty. Reinvestment Coal. v. Novastar Fin., Inc.*, No. 07-0861, 2008 WL 977351, at *2-3 (D.D.C. Mar. 31, 2008). Because the Road Home formula operates to deny black families sufficient rebuilding assistance compared to white families, it hinders access to housing on the basis of race and is comfortably within the scope of conduct prohibited by § 3604(a).

Rainwater argues that § 3604(a) applies only to prospective homeowners, and does not apply to Plaintiffs here because they were already homeowners before Hurricane Katrina. This argument is incorrect. This Court has held that § 3604(a) applies to conduct that puts existing homeowners at risk of losing their property. *See 2922 Sherman Ave.*, 444 F.3d at 682; *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000). Rainwater also argues that § 3604(a) does not prohibit conduct, unrelated to housing, that may diminish home values on the basis of race. Rainwater Br. 26-29 (citing *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999), and *Cox v. City of Dallas*, 430 F.3d 734, 740 (5th Cir. 2005)). Even assuming this to be correct, Plaintiffs do not allege that the Road Home program diminishes the value of their homes—they allege that the grant formula has made housing unavailable to them because of their race. Compl. ¶¶ 44-46, 61-65.

Finally, Rainwater asserts in a footnote that the requirement to affirmatively further fair housing in 42 U.S.C. § 3608(e)(5) applies only to HUD and not to state grantees. *See* Rainwater Br. 25 n.7. This argument is foreclosed by the terms of the HCDA as well as more than three decades of case law. *See Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1133-34 (2d Cir. 1973) (describing "the affirmative duty placed on the Secretary of HUD by [§ 3608(e)(5)] and through him on other agencies administering federally-assisted housing programs"); *Langlois v. Abington*

Hous. Auth., 234 F. Supp. 2d 33, 73 (D. Mass. 2002) ("When viewed in the larger context of Title VIII, the legislative history, and the case law, there is no way—at least, none that makes sense—to construe the boundary of the duty to affirmatively further fair housing as ending with the Secretary [of HUD]." (citing *Otero*, 484 F.2d at 1133-34)); *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1015-17 (E.D. Pa. 1976) (holding that the affirmative obligation to promote fair housing in § 3608(e)(5) "applies not only to HUD but applies as well to other governmental agencies administering federally financed housing programs").

Accordingly, this Court should reject Rainwater's attempt -- after certifying to HUD that he would administer the Road Home program in compliance with the Fair Housing Act -- to evade his obligation to comply with that statute.

2. Plaintiffs may enforce 42 U.S.C. § 5304(b) against Rainwater through a direct right of action or under 42 U.S.C. § 1983.

Rainwater concedes that the Road Home program is subject to the HCDA, but contends that Plaintiffs have no right of action to enforce § 5304(b). *See* Rainwater Br. 33-38. This argument should be rejected, because Plaintiffs may enforce § 5304(b) directly through an implied right of action or, in the alternative, under 42 U.S.C. § 1983.

a. Congress intended the HCDA to be directly enforceable through an implied right of action.

Courts weigh four factors in determining whether plaintiffs have an implied right of action to enforce a statute: (1) whether the plaintiff is part of the class for whose benefit the statute was enacted; (2) whether the legislature intended to create a private remedy; (3) whether a private remedy is consistent with the purposes of the legislation; and (4) whether the cause of action is not founded on an area traditionally relegated to state law. *Tax Analysts v. IRS*, 214 F.3d 179, 185-86 (D.C. Cir. 2000) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)). This Court has explained that of these factors, "the most important consideration is whether the legislature

intended to create a private right of action." *Am. Fed'n of Gov't Employees v. Hawley*, 543 F. Supp. 2d 44, 47 (D.D.C. 2008) (quoting *Dial A Car, Inc. v. Transp., Inc.*, 132 F.3d 743, 744 (D.C. Cir. 1998)). Moreover, "there is no need for [the Court] to 'trudge through all four of the factors when the dispositive question of legislative intent has been resolved.'" *Nat'l Postal Prof'l Nurses v. U.S. Postal Serv.*, 461 F. Supp. 2d 24, 32 n.1 (D.D.C. 2006) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 388 (1982)).

Here, Congress's intent to provide a remedy for violations of the HCDA is apparent from the legislative history. The House Report to the 1987 amendments to the HCDA expressly states this intent:

> The assisted housing programs have been created specifically to assure lower income households have greater access to decent and affordable housing than their limited incomes would otherwise permit. *The Committee intends, and has always intended, that applicants and tenants who are adversely affected by violations of these statutory provisions should have a cause of action to enforce the statute in federal court. . . .* [T]he Committee wishes to clarify its long-standing intention in favor of private enforcement.

H.R. Rep. No. 100-122(I), at 53 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 3317, 3369 (emphasis added). Rainwater's assertion that there is nothing in the legislative history to demonstrate Congress's intent to provide a right to sue, Rainwater Br. 35, is therefore false.

Also false is Rainwater's assertion that "no court has found that the HCDA affords a private cause of action." Rainwater Br. 37. The Fifth Circuit has specifically held that the HCDA provides plaintiffs with a right of action to enforce anti-discrimination provisions of the statute.[19] *Montgomery Improvement Ass'n v. HUD*, 645 F.2d 291, 295 (5th Cir. 1981) ("[W]here

[19] *But cf. Latinos Unidos De Chelsea En Accion (LUCHA) v. HUD*, 799 F.2d 774, 795 (1st Cir. 1986) (finding no private right of action to enforce certain provisions of the HCDA); *Chan v. City of N.Y.*, 1 F.3d 96, 102 (2d Cir. 1993) (same); *Freeman v. Fahey*, 374 F.3d 663 (8th Cir.

Congress enacts legislation for a particular purpose and forbids the expenditure of federal funds in a manner that will discriminate against members of designated classes in the execution of that purpose . . . [m]embers of those groups . . . may bring an action in federal court to seek redress for such discrimination."). The Fifth Circuit specifically concluded, as Plaintiffs contend here, that Congress intended to create a private right of action to enforce the nondiscrimination provisions of the HCDA. *See id.* at 296-97 ("It is clear from the [HCDA] that Congress granted 'persons of low and moderate income' certain rights and expressly forbad discrimination or exclusion from benefits based on race, color, national origin, or sex. There is nothing in the Act to suggest any congressional purpose to deny a private cause of action.").[20]

In light of the clear legislative history, this Court's analysis could end here. *Nat'l Postal Prof'l Nurses*, 461 F. Supp. 2d at 32 n.1. However, Plaintiffs' argument that the HCDA may be enforced through an implied right of action is further supported by examination of additional factors. Like the plaintiffs in *Montgomery*, Plaintiffs here—low- and moderate-income beneficiaries of a federal housing program—are clearly part of the "class for whose especial benefit the statute was enacted." *Cort*, 422 U.S. at 78. Indeed, even in the principal case upon which Rainwater relies to support his argument that the HCDA does *not* provide plaintiffs with a

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2004) (same). The D.C. Circuit has not yet addressed the issue of whether the HCDA provides an implied right of action.

[20] Rainwater relies on *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), to claim that because the HCDA was enacted pursuant to Congress's spending clause authority, there is no private right of action. *See* Rainwater Br. 37. But in *Pennhurst*, the Court concluded that the statute at issue did not create a private right of action because it was merely a funding statute, and the language in "no way suggests that the grant of federal funds is 'conditioned.'" 451 U.S. at 23. By contrast, the grant of CDBG funds is specifically and unequivocally conditioned upon the grantee's compliance with the statute's mandates. *See* 42 U.S.C. § 5304(b)(2); *see also Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 (1990) (concluding that a provision of the Medicaid Act provided an enforceable private right and distinguishing *Pennhurst* on the ground that "neither the statute nor the corresponding regulations made compliance with the provision a condition of receipt of federal funding").

private right of action, the court concluded that low- and moderate-income individuals, as the "intended occupants of the contemplated housing," are "within the primary protection of the [HCDA]." *People's Hous. Dev. Corp. v. City of Poughkeepsie*, 425 F. Supp. 482, 491 (S.D.N.Y. 1976). Although the court ultimately concluded that the HCDA did not provide the plaintiff with a private right of action, it did so primarily because the *only* plaintiff was an organization, which could not "be characterized as 'one of the class for whose especial benefit' the [HCDA] was enacted." *Id.* (citing *Cort*, 422 U.S. at 78). By contrast, Plaintiffs here include a class of low- and moderate-income individuals who *are* the "intended occupants of the contemplated housing." *Id.*

Given Congress's clear intent to protect persons of low and moderate income, a private remedy is also consistent with the purposes of the HCDA. Rainwater's argument that the "sole remedies" for violations of the HCDA are contained in 42 U.S.C. § 5311 is without merit. *See* Rainwater Br. 34-35. Although § 5311 does provide for certain enforcement measures to be undertaken by the Secretary of HUD or the Attorney General, these federal enforcement options cannot be read to preclude private enforcement in light of the clear congressional intent to the contrary. *See People's Hous. Dev. Corp.*, 425 F. Supp. at 491 (holding that the § 5311 enforcement measures "do not necessarily preclude *private* rights of action"); *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 424 (1987) (rejecting argument that enforcement scheme in Housing Act of 1937 demonstrated Congress's intent to foreclose a private action because the Act and its "legislative history [were] devoid of any express indication that exclusive enforcement authority was vested in HUD").

b. Plaintiffs may enforce the HCDA against Rainwater under 42 U.S.C. § 1983.

Even if this Court concludes that Plaintiffs do not have an implied right of action under the HCDA, Plaintiffs' § 5304(b) claim is enforceable against Rainwater under 42 U.S.C. § 1983. *See Price v. City of Stockton*, 390 F.3d 1105, 1114-15 (9th Cir. 2004) (holding that plaintiffs' claims under § 5304(d)(2)(A)(iii) and (iv) of the HCDA were enforceable under § 1983); *Chan v. City of N.Y.*, 1 F.3d 96, 106 (2d Cir. 1993) (holding that plaintiffs' claims under § 5310 of the HCDA were enforceable under § 1983).

The central inquiry in determining whether a statutory provision is enforceable under § 1983 is "whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002). To determine whether, in enacting a particular statutory provision, Congress intended to create rights enforceable by private parties pursuant to § 1983, courts consider "(1) whether Congress intended the provision in question to benefit the plaintiff; (2) whether the plaintiff has demonstrated that the asserted right 'is not so vague and amorphous that its enforcement would strain judicial competence'; and (3) whether the provision giving rise to the right is 'couched in mandatory, rather than precatory, terms.'" *Price*, 390 F.3d at 1109 (quoting *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)). The § 1983 inquiry "begins with a presumption in favor of the right to bring suit, for the 'general rule' is that § 1983 provides a remedy for violations of federal statutory rights unless 'Congress has affirmatively withdrawn the remedy.'" *Chan*, 1 F.3d at 103 (quoting *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 n. 9 (1990)); *see also Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 106 (1989) ("[T]he coverage of [§ 1983] must be broadly construed.").

All elements of the congressional-intent inquiry are met here. First, it is beyond question that Congress intended the HCDA to benefit low- and moderate-income individuals, such as

Plaintiffs, who are beneficiaries of federal housing programs. *See* 42 U.S.C. § 5301(c) ("The primary objective of [the HCDA] is 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."); *see also Chan*, 1 F.3d at 104 (holding that the plaintiffs were the intended beneficiaries of one provision of the HCDA).

Second, it does not "strain judicial competence" for a court to determine whether a grantee has administered federal funds in a discriminatory manner, or has failed to affirmatively further fair housing. *See, e.g.*, *NAACP*, 817 F.2d at 158-59 (holding that courts are capable of determining whether "HUD's pattern of activity reveals a failure to live up to is obligation . . . to affirmatively further the policies of fair housing," and noting that this determination is not "any more difficult than other civil rights cases in which courts have judged the lawfulness of agency behavior against roughly analogous standards"); *Anderson v. Jackson*, No. 06-3298, 2007 WL 458232, at *3 (E.D. La. Feb. 6, 2007) (holding that the duty to affirmatively further fair housing is not "too vague and amorphous for the courts to enforce" (quoting *Langlois*, 234 F. Supp. 2d at 72)); *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710, 719 (N.D. Ill. 2003) (noting that the "parties [cannot] seriously contend" that a claim under § 3608(e)(5) "strains judicial competence").

Third, § 5304(b)(2) of the HCDA is "couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 341. The statute provides that "[a]ny grant . . . shall be made *only if* the grantee certifies" that the nondiscrimination and fair housing certification requirements will be met. 42 U.S.C. § 5304(b)(2) (emphasis added). This language unambiguously imposes a binding obligation on grantees. *See Chan v. City of N.Y.*, 803 F. Supp. 710, 725 (S.D.N.Y. 1992)

(holding that the use of the term "shall" in § 5310 of the HCDA "indicates that Congress sought to create a binding obligation on the governmental unit"), *aff'd*, 1 F.3d at 104.

Although, as noted above, the HCDA does provide for limited HUD enforcement, *see* 42 U.S.C. § 5311, these enforcement provisions are not sufficiently comprehensive to indicate that Congress intended for HUD enforcement to be the exclusive remedy. *See Wright*, 479 U.S. at 428 ("HUD's authority to audit, enforce annual contributions contracts, and cut off federal funds . . . are generalized powers [that] are insufficient to indicate a congressional intent to foreclose § 1983 remedies."); *Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356, 366 (5th Cir. 2006) (noting that "[b]oth methods of enforcement, *i.e.*, HUD oversight and private actions under § 1983, may coexist if Congress so intends"); *Price*, 390 F.3d at 1114 ("The [HCDA] does not expressly preclude suits under Section 1983, nor does it provide a comprehensive remedial scheme incompatible with private enforcement."); *Chan*, 803 F. Supp. at 728.

Because Plaintiffs are among the intended beneficiaries of the § 5304(b)(2) requirement that Disaster Recovery Grant funds be administered to affirmatively further fair housing, the statute may be enforced under § 1983.

B. The Administrative Procedure Act does not preclude Plaintiffs' claims against HUD.

HUD argues that §§ 704 and 706 of the APA bar Plaintiffs' claims because (1) Plaintiffs have an adequate remedy in court against HUD's co-defendant Rainwater, *see* HUD Br. 32-35; (2) Plaintiffs have failed to allege a final agency action, *see id.* at 39; and (3) HUD's statutory obligation to affirmatively further fair housing does not entail any discrete agency action that HUD is required to undertake, *see id.* at 36-40.

As an initial matter, HUD's arguments erroneously assume that Plaintiffs' claims must be assessed under the APA. But the express waiver of sovereign immunity in 5 U.S.C. § 702

applies to all actions brought against federal agencies for relief other than money damages, and does not constrain Plaintiffs to proceed under the APA. *Schnapper v. Foley*, 667 F.2d 102, 107 (D.C. Cir. 1981) (citing the legislative history of § 702); *see also* Fallon, Meltzer, & Shapiro, *Hart & Wechsler's The Federal Courts & The Federal System* 968-69 (5th ed. 2003) ("Though codified in the APA, the [§ 702] waiver applies to any suit, whether under the APA, § 1331, . . . or any other statute."). Thus, because both Title VIII and the HCDA provide Plaintiffs with a direct right of action to challenge HUD's discriminatory conduct, Plaintiffs need not proceed under the APA at all, and HUD's motion to dismiss based on various APA requirements should be denied.

Even if Plaintiffs' claims for relief may only be brought under the APA, the motion to dismiss should be denied because Plaintiffs' claims against Rainwater are not an adequate alternative to a remedy for HUD's distinct discriminatory conduct, and because the "discrete agency action" requirement does not preclude review of HUD's actions in this case.

1. Title VIII and the HCDA directly confer a right of action to challenge HUD's discriminatory conduct.

As noted, Plaintiffs allege that HUD violated the anti-discrimination provisions of Title VIII, 42 U.S.C. §§ 3604(a) and 3605(a), and that HUD has failed to fulfill its affirmative obligations under § 3608(e)(5) of Title VIII and § 5304(b)(2) of the HCDA. Compl. ¶¶ 74-77.

Plaintiffs' claims under 42 U.S.C. §§ 3604(a) and 3605(a) are directly enforceable against HUD by the express terms of Title VIII. Section 3613 of Title VIII provides a right of action in federal court to redress "an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). The statute further defines discriminatory housing practice to include "an act that is unlawful under section 3604 [or] 3605 . . . of this title." 42 U.S.C. § 3602(f). Because

Plaintiffs specifically allege that HUD engaged in discriminatory activity in violation of §§ 3604 and 3605, they may raise such claims under the express grant of jurisdiction pursuant to § 3613.

Plaintiffs' claims under § 3608(e)(5) are also directly enforceable against HUD under § 3613. *See Young v. Pierce*, 544 F. Supp. 1010, 1017-18 (E.D. Tex. 1982). In *Young*, the district court held that § 3608(e)(5) was directly enforceable against HUD because the nature of the § 3608(e)(5) obligation made HUD's failure to meet that obligation a "discriminatory housing practice" enforceable under § 3613:

> [I]t seems axiomatic that violations of [§ 3608(e)(5)] through inaction or indolence must be actionable. Failure of HUD "affirmatively to further the policies of [Title VIII]" is illegal in a fundamental sense. . . . Viewed another way, the failure of HUD to perform its legal duties mandated by [§ 3608(e)(5)] constitutes a discriminatory housing practice, in itself.

Id. at 1018.[21] In reaching this conclusion, the court noted the scope and breadth of HUD's obligations under Title VIII, and reasoned that the statute's enforcement provisions must also be construed expansively. *Id.* at 1017 ("The scope of the Civil Rights Act of 1968 is majestic, and its enforcement provisions are commensurately broad."). A broad reading of Title VIII's enforcement provisions is consistent with the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *see also Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 646 (6th Cir. 1991) ("Courts have given a broad reading to the

[21] Plaintiffs recognize that a different judge of this Court has held that § 3608(e)(5) may only be enforced through the APA and cannot be enforced through § 3613. *See Jones v. Office of the Comptroller of the Currency*, 983 F. Supp. 197, 202-03 & n.8 (D.D.C. 1997) (Friedman, J.). *Jones* was affirmed after a *pro se* appeal to the D.C. Circuit in an unpublished, per curiam order "substantially for the reasons stated by the district court." *Jones v. Office of the Comptroller of the Currency*, No. 97-5341, 1998 WL 315581, at *1 (D.C. Cir. May 12, 1998). Under the rules of the D.C. Circuit, the unpublished affirmance of *Jones* does not have precedential effect on this or any Court, *see* Circuit Rule 32.1(b)(1)(A), and Plaintiffs respectfully submit that the better reading of Title VIII is that applied by the Eastern District of Texas in *Young*.

[Fair Housing Act] in order to fulfill its remedial purpose."); *cf. City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) ("We also note precedent recognizing the [Fair Housing Act's] 'broad and inclusive' compass, and therefore according a 'generous construction' to the Act's complaint-filing provision." (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972))).

In addition, as demonstrated *supra* Part II.A.2.a, Plaintiffs can enforce 42 U.S.C. § 5304(b)(2) directly against HUD through an implied right of action. *See Montgomery*, 645 F.2d at 293-97.

2. Plaintiffs' claims against HUD are reviewable under 5 U.S.C. § 704.

If Plaintiffs' § 3608(e)(5) and § 5304(b)(2) claims may only be reviewed under the APA, 5 U.S.C. § 704 permits those claims to proceed against HUD because Plaintiffs have no other adequate remedy in a court. Section 704 provides, in pertinent part, that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. HUD contends that Plaintiffs' § 3608(e)(5) and § 5304(b)(2) claims are not reviewable, both because Plaintiffs could have an adequate alternative remedy by asserting discrimination claims against the responsible Louisiana state officials and because Plaintiffs do not challenge a final agency action. HUD Br. 32-35. Both arguments are incorrect.

a. Plaintiffs have no adequate remedy for HUD's discriminatory conduct other than a remedy from HUD.

HUD first argues that its conduct is unreviewable under § 704 because Plaintiffs have an adequate remedy against Louisiana state officials. HUD Br. 32-35. But even if Plaintiffs prevail on their discrimination claims against Rainwater, any remedy fashioned against Rainwater alone would be ineffective without a judgment against HUD. Put simply, because HUD and the state

of Louisiana are jointly responsible for the program's implementation, proper remedial action may be ensured only by a court order applicable to both entities.

Congress's purposes in enacting § 704 were (1) to codify the "proposition that '[o]ne need not exhaust administrative remedies that are inadequate,'" and (2) to make clear that "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen*, 487 U.S. at 902-03 (quoting Davis, *Administrative Law* § 26:11, at 464 (2d ed. 1983)). Plaintiffs' remedies against Rainwater are not an adequate substitute for redress from *HUD's* violation of the unique obligation that it is required to fulfill under federal fair housing law, and this Court's review of HUD's compliance with its fair housing obligations will not "duplicate existing procedures" for review of agency action. *Id.*

Section 3608(e)(5) of the Fair Housing Act requires the Secretary of HUD to affirmatively further fair housing. 42 U.S.C. § 3608(e)(5). It is well-established that this statutory mandate requires HUD to take active, affirmative steps—steps beyond its obligation to avoid discrimination—to promote fair housing and desegregation in its programs and activities. *See NAACP*, 817 F.2d at 155; *Lee v. Pierce*, 698 F. Supp. 332, 342 (D.D.C. 1988) (noting that under § 3608(e)(5), "HUD is obliged to do more than simply refrain from discriminating"). Similarly, the HCDA imposes an affirmative duty on HUD that is distinct from the obligations of HUD's grantees. Under § 5304(b)(2), HUD must ensure that block grants distributed under the HCDA "will be conducted and administered in conformity" with Title VI and Title VIII, and that "the grantee will affirmatively further fair housing." 42 U.S.C. § 5304(b)(2).

In accordance with these requirements, HUD has promulgated a detailed regulatory framework to oversee the administration of regular CDBG and Disaster Recovery Grant funds. *See* 24 C.F.R. Parts 91 and 570; 71 Fed. Reg. at 7666-72; 71 Fed. Reg. at 63,337-40; 72 Fed.

Reg. at 70,472-74; 73 Fed. Reg. at 46,312-22. The regulatory scheme recognizes HUD's expertise and obligation to monitor grant recipients for compliance with civil rights and other program requirements, as the Kome Declaration submitted with HUD's motion to dismiss acknowledges. *See, e.g.*, 71 Fed. Reg. at 7668, 7670 (describing HUD's oversight process and role in providing "technical assistance" to grantees); Kome Decl. ¶¶ 16-17, 19, 22 (describing Louisiana's reliance on technical assistance from HUD, based on HUD's expertise in monitoring the administration of CDBG funds in other jurisdictions). HUD's supervisory role thus is not only essential but required to ensure that grantees such as Rainwater comply with their affirmative anti-discrimination obligations.

In light of HUD's role in ensuring that Rainwater's use of Disaster Recovery Grant funds complies with fair housing law, Plaintiffs' claims against Rainwater alone cannot provide an adequate remedy to redress the harm caused by HUD's failure to comply with its own obligations to further fair housing. A complete remedy would require both that Rainwater develop a nondiscriminatory formula, and that HUD approve and oversee the administration of that formula. *See* 2005 Act, 119 Stat. at 2780 (requiring grantees to submit and HUD to approve a plan detailing the proposed use and criteria for eligibility of all Disaster Recovery Grant funds); 2006 Act, 120 Stat. at 473 (same); *see also* 42 U.S.C. § 5304(a)(1); 71 Fed. Reg. at 7669, 7671; 71 Fed. Reg. at 63,339; 72 Fed. Reg. at 70,472.

For this reason, several courts applying § 3608(e)(5) have expressly rejected HUD's argument that relief from a HUD grantee is an adequate substitute for relief against HUD. *Thompson v. HUD*, 348 F. Supp. 2d 398, 422 (D. Md. 2005) ("[T]he Court does not construe § 704 to foreclose Plaintiffs' access to the APA with respect to HUD's alleged Title VIII violations."); *Dean v. Martinez*, 336 F. Supp. 2d 477, 487 (D. Md. 2004) ("Because APA review

of HUD's [Fair Housing Act] compliance . . . addresses a different harm from the plaintiffs' claims against the City . . . such claims are within the court's jurisdiction."); *cf. Henry Horner Mothers Guild v. Chi. Hous. Auth.*, 824 F. Supp. 808, 819-20 (N.D. Ill. 1993); *Tinsley v. Kemp*, 750 F. Supp. 1001, 1009 (W.D. Mo. 1990).[22] The district court's analysis in *Tinsley* is particularly instructive. In that case, public housing residents sued both HUD and their local public housing authority (the Housing Authority of Kansas City, or HAKC) under the Housing Act, claiming that the defendants were permitting deterioration of residential units amounting to illegal demolition. *Tinsley*, 750 F. Supp. at 1003. HUD argued in *Tinsley*, as here, that § 704 barred review of HUD's actions because an adequate remedy was available by proceeding against the housing authority alone. *Id.* at 1009. The court flatly rejected this argument, holding:

> The pervasive regulation, the frequent and close oversight, and the funding provided by HUD to HAKC illustrates that HAKC could not correct alleged problems to any significant degree without HUD cooperation, supervision, approval and funding. A remedy directed only at HAKC could be nearly worthless in these circumstances. Any meaningful remedy could be achieved only with HUD's involvement, so Section 704 does not preclude judicial review here.

Tinsley, 750 F. Supp. at 1009; *see also Henry Horner Mothers Guild*, 824 F. Supp. at 819-20. The approach of these courts is consistent with the Supreme Court's direction that § 704 "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." *Bowen*, 487 U.S. at 903-04 (noting that the APA's "'generous review provisions' must be given a 'hospitable' interpretation" (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967))).

[22] Numerous other courts have implicitly rejected HUD's § 704 argument by adjudicating claims against HUD for § 3608(e)(5) and § 5304(b) violations even though the plaintiffs in those cases also sued HUD grantees. *See, e.g.*, *Davis v. HUD*, 627 F.2d 942, 945 (9th Cir. 1980); *Mejia v. HUD*, 518 F. Supp. 935, 937 (N.D. Ill. 1981); *Colony Fed. Sav. & Loan Ass'n v. Harris*, 482 F. Supp. 296, 304 (W.D. Pa. 1980).

HUD cites the following cases as being to the contrary: *American Disabled for Attendant Programs Today (ADAPT) v. HUD*, 170 F.3d 381 (3d Cir. 1999), *Washington Legal Foundation v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993), and *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990). *See* HUD Br. 33-34. Each of the cited cases involved a plaintiff's allegation that HUD violated the law by failing to enforce compliance by federal-funding recipients with nondiscrimination requirements. *See ADAPT*, 170 F.3d at 384-85; *Washington Legal*, 984 F.2d at 484; *Women's Equity*, 906 F.2d at 748. The court in each case held that because the plaintiffs had a right of action against the third parties to redress the claims of discrimination, there was a judicial alternative to a suit against HUD and review was therefore barred by § 704. *See ADAPT*, 170 F.3d at 390; *Washington Legal*, 984 F.2d at 487-88; *Women's Equity*, 906 F.2d at 750. But the instant case does not seek to compel HUD to investigate another party's fair housing violations. Rather, Plaintiffs seek declaratory and mandatory injunctive relief to redress HUD's own conduct in which it failed to perform its affirmative obligations under fair housing law. *See, e.g., Vaughn v. Consumer Home Mortgage, Inc.*, 293 F. Supp. 2d 206, 213 (E.D.N.Y. 2003) (distinguishing *ADAPT* and *Washington Legal*, and holding that relief against federal-funding recipients is not an adequate alternative under § 704 to review of HUD's compliance with its own obligations); *Lattimore v. Nw. Coop. Homes Ass'n*, No. 90-0049, 1992 WL 118383, at *7 (D.D.C. May 19, 1992) (concluding that the plaintiff's claims against private defendants did not provide her with an "adequate remedy" where "Defendant HUD has not identified any other mechanism that would insure that plaintiff could obtain appropriate relief *against the government*").

Plaintiffs' claims against Rainwater are distinct from the claims against HUD, and relief against Rainwater would not redress the specific harm that the Plaintiffs have incurred because

of HUD's own conduct. HUD's participation is necessary to remedy the unlawful conduct at issue in this case. Plaintiffs' claims against HUD for violations of § 3608(e)(5) and § 5304(b) are therefore reviewable under the APA, because "there is no other adequate remedy in a court." 5 U.S.C. § 704.

b. Plaintiffs challenge final agency action.

HUD argues in a single paragraph that review is barred by § 704 because Plaintiffs have not alleged any final agency action. HUD Br. 39. This argument is also incorrect.

The final agency action limitation is intended to ensure that courts are not asked to supervise an agency's "continuing (and thus constantly changing) operations," but instead to intervene only to correct agency actions or inactions that have "an actual or immediately threatened effect." *Nat'l Wildlife Fed'n*, 497 U.S. at 890, 894. Plaintiffs' Complaint alleges that HUD assisted in developing, and then approved, the racially discriminatory Road Home grant formula. Compl. ¶ 50. Plaintiffs also allege actual effects from these final actions, including that African American homeowners in New Orleans are burdened by a discriminatory disparity in access to rebuilding resources compared to white homeowners. *Id.* ¶¶ 52-60. HUD does not suggest that its approval of the discriminatory Road Home grant formula is likely to change, and Plaintiffs have therefore stated a challenge to a final agency action. *See Nat'l Wildlife Fed'n*, 497 U.S. at 890, 894; *Thompson v. HUD*, No. 95-309, 2006 WL 581260, at *5-6 (D. Md. Jan. 10, 2006).

3. The "discrete agency action" requirement does not preclude review of HUD's actions in this case.

HUD argues that its compliance with § 3608(e)(5) and § 5304(b)(2) may not be reviewed under the APA, because there is no discrete agency action that HUD was required to take. HUD cites *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) ("*SUWA*"), for the

proposition that § 706(1) of the APA precludes review of HUD's actions in this case. *See* HUD Br. 36. This argument should be rejected because HUD's conduct is properly reviewed under § 706(2), not § 706(1), and *SUWA* therefore does not apply. Moreover, even if this Court were to evaluate HUD's actions under the § 706(1) scope of review framework, the *SUWA* standard is met here.

a. HUD's conduct is properly reviewed pursuant to § 706(2).

The APA provides that federal courts may review agency action pursuant to two distinct scope of review provisions. Where agency action is otherwise reviewable:

> The reviewing court shall—
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or]
> . . .
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .

5 U.S.C. § 706. HUD assumes without discussion that Plaintiffs' claims should be reviewed under § 706(1). Plaintiffs' claims are properly reviewed under § 706(2), not § 706(1), because Plaintiffs ask the Court to set aside agency action that is arbitrary and capricious or that is in excess of HUD's statutory authority.

Plaintiffs specifically allege that certain HUD actions have violated § 3608(e)(5) and § 5304(b)(2). Compl. ¶¶ 74-77. Plaintiffs allege that HUD is responsible for the administration, funding, and supervision of federal low-income housing programs, including the CDBG Disaster Recovery Grant program, and that HUD may not waive fair housing or nondiscrimination requirements in its administration of the Disaster Recovery Grant program. *Id.* ¶¶ 6, 18, 37. Plaintiffs allege that HUD consulted with the LRA on the design and development of the Road

Home grant formula; that HUD approved the grant formula and other Road Home program details; and that HUD is engaged in continuing oversight and approval of the Road Home program. *Id.* ¶¶ 49-51. Plaintiffs further allege that because of these actions by HUD, the individual and organizational plaintiffs have suffered illegal racial discrimination in violation of Title VIII and the HCDA. *Id.* ¶¶ 52-73.

Properly considered, then, Plaintiffs' claims are based on affirmative decisions and actions undertaken by HUD that have violated § 3608(e)(5) and § 5304(b), and are therefore reviewable under § 706(2). *See, e.g.*, *NAACP*, 817 F.2d at 160-61; *Thompson*, 2006 WL 581260, at *3-4; *M&T Mortgage Corp. v. White*, No. 04-cv-4775, 2006 WL 47467, at *11-14 (E.D.N.Y. Jan. 9, 2006).

HUD repeatedly suggests that Plaintiffs have only alleged agency *inaction*. *See* HUD Br. 37-38. As noted, the Complaint clearly alleges unlawful action and decisions by HUD. Compl. ¶¶ 6, 18, 37, 49-73. And in any event, agency inaction is reviewable under § 706(2) as well when, as here, Congress has imposed affirmative statutory obligations. *See, e.g.*, *NAACP*, 817 F.2d at 160 (explaining that "[t]he purpose of § 706(2)(A) is to provide for judicial review of agency action *and inaction* that falls outside its statutory powers" (emphasis added)); *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987) ("[T]his case requires a determination of whether the Secretary's *failure to act* was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' under 5 U.S.C. § 706(2)(A)." (emphasis added)); *see also* 5 U.S.C. § 551(13) ("For the purpose of this subchapter . . . 'agency action' includes . . . failure to act.").

Because Plaintiffs' claims are reviewable under § 706(2), HUD's discussion of *SUWA* should be disregarded. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F.

Supp. 2d 1, 9-10 (D.D.C. 2007) (Kennedy, J.) ("*SUWA* addresses only attempts to 'compel agency action' pursuant to § 706(1) and does not reach claims encompassed within § 706(2), which merely seek to 'hold unlawful and set aside' arbitrary or capricious 'agency action[s].'").[23] Indeed, *SUWA* could not reach claims brought under the § 706(2) scope of review provision, because the plaintiffs in *SUWA* only sought § 706(1) review. *See S. Utah Wilderness Alliance v. Babbitt*, No. 99-852, 2000 WL 33347722, at *2 (D. Utah Dec. 22, 2000) ("Plaintiffs' claims are all brought under section 706(1) of the Administrative Procedure Act . . . ."). HUD's effort to extend the *SUWA* analysis to this case should therefore be rejected.[24]

b. Even if HUD's actions can only be reviewed pursuant to § 706(1), the "discrete agency action" requirement is met here.

Even if HUD is correct that § 706(1) provides the proper scope of review of HUD's conduct in this case, Plaintiffs meet the standard established in *SUWA*.

In *SUWA*, the plaintiffs alleged that the Bureau of Land Management ("BLM") violated a statute requiring that certain wilderness study areas be managed "so as not to impair their suitability for preservation as wilderness," by failing to act to protect public lands in Utah from environmental damage caused by off-road vehicles. *SUWA*, 542 U.S. at 58-59 (quoting 43 U.S.C. § 1782(c)). The Supreme Court held that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64. Because banning off-road vehicles from wilderness study areas was not an

[23] For the same reason, HUD's argument that the First Circuit's *NAACP* decision was implicitly overruled by *SUWA*, *see* HUD Br. 38, should be rejected. The First Circuit held in *NAACP* that review of HUD's compliance with its § 3608(e)(5) obligations was proper under both § 706(1) *and* § 706(2). *NAACP*, 817 F.2d at 160-61. Because *SUWA* only addressed the § 706(1) scope of review provision, *NAACP* is still good law.

[24] Despite HUD's suggestion to the contrary, Plaintiffs are not seeking a court order telling HUD how to exercise its discretion in awarding *unobligated* funds. *See* HUD Br. 39. Instead, Plaintiffs seek an injunction providing, *inter alia*, that HUD must exercise its mandatory fair housing obligation with respect to funds that it obligates—or has already obligated—to LRA.

action that BLM was specifically required to take in order to meet its statutory obligation, the Supreme Court rejected the plaintiffs' claim. *Id.* at 65-67. *SUWA* thus limits justiciable challenges under § 706(1) to those in which an agency is under a non-general legal duty to act.

The purpose of the discrete-agency-action limitation is to "protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Id.* at 66. The limitation thus precludes "the kind of broad programmatic attack we rejected in *Lujan v. National Wildlife Federation*." *Id.* at 64 (internal citation omitted).

HUD argues that its obligations under § 3608(e)(5) and § 5304(b) are too general to be enforced under the APA. However, in light of the purposes of the discrete-agency-action limitation, Plaintiffs have properly alleged that HUD failed to take discrete actions it is required to take, and are not seeking to bring an impermissibly broad programmatic attack.

First, the Fair Housing Act establishes a specific legal duty on HUD to act affirmatively to promote fair housing. As noted, § 3608(e)(5) provides that "[t]he Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." 42 U.S.C. § 3608(e)(5). The policies of the Fair Housing Act are not abstract or imprecise, but rather are specific and categorical. They include "to provide . . . for fair housing throughout the United States," 42 U.S.C. § 3601; to replace concentrated African American ghettos with "truly integrated and balanced living patterns," 114 Cong. Rec. 3422 (statement of Sen. Mondale); and to "remove the walls of discrimination which enclose minority groups," 114 Cong. Rec. 9563 (statement of Rep. Celler). Thus, HUD has, "at a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely

open housing." *NAACP*, 817 F.2d at 156. Put simply, "the Act's fair housing policy requires something more of HUD than simply to refrain from discriminating itself or purposely aiding the discrimination of others." *Id.* at 154.

HUD's obligations pursuant to § 3608(e)(5) are therefore simply not comparable to the statute at issue in *SUWA*. Unlike the challenge in *SUWA*, where the Supreme Court held that imposing on BLM an obligation to ban off-road vehicles would interfere with its discretion in meeting its wilderness-preservation mandate, Plaintiffs' effort to require HUD to promote fair housing as required by § 3608(e)(5) does not require undue judicial interference with HUD's lawful discretion. Rather, remedies may be devised that take account of the nature of HUD's statutory violations while acknowledging agency discretion in day-to-day management. Although HUD has discretion to determine precisely how it will meet its fair housing and nondiscrimination mandate, it does not have discretion, as HUD seems to assert, to decide *not* to meet that mandate by allowing federal funds to be used in a way that works against fair housing goals. Plaintiffs have thus properly alleged that (in addition to the improper actions described above) HUD failed to take acts that it was specifically required to take. *Cf. Natural Res. Def. Council v. Patterson*, 333 F. Supp. 2d 906, 916 (E.D. Cal. 2004) (distinguishing *SUWA* and holding that an agency's statutory obligation to "reestablish and maintain" the historic fisheries in certain California waterways was a "specific legal duty [that was] a far cry from the general statutory directive that the government endeavor to manage certain of its lands 'so as not to impair their suitability for preservation as wilderness.'" (quoting 43 U.S.C. § 1782(c))).

Second, Plaintiffs have not raised an impermissibly broad programmatic attack that would entangle this Court in abstract policy disagreements. *See SUWA*, 542 U.S. at 64; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890-94 (1990). Courts have read *National Wildlife*

Federation to foreclose challenges to "broad ill-defined programs that do not cause concrete effects." *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 669 (9th Cir. 1998). Plaintiffs here have not challenged an ill-defined program without concrete effects, but rather have challenged a specific set of HUD decisions with regard to the Road Home program that *has* resulted in the concrete effect of disproportionately burdening African American families in their efforts to repair and return to their homes. *See* Compl. ¶¶ 52-60.

Several courts have held, subsequent to the Supreme Court's decision in *SUWA*, that § 3608(e)(5) imposes enforceable obligations on HUD that may be reviewed under the APA. In *Darst-Webbe Tenant Association Board v. St. Louis Housing Authority*, 417 F.3d 898, 907 (8th Cir. 2005), for example, the Eighth Circuit held that *SUWA* permits review of whether "HUD exercised its broad authority in a manner that demonstrates consideration of, and an effort to achieve, . . . results" by furthering opportunities for fair housing.[25] *See also Thompson*, 2006 WL 581260, at *4-5 ("As held in *Darst-Webbe*, *SUWA* does not prevent the Court from reviewing whether HUD has met its statutory duty to affirmatively further fair housing.").

This Court should accordingly hold that review of HUD's compliance with its obligation to affirmatively further fair housing is proper under the APA.

C. Plaintiffs' Complaint alleges sufficient facts to state a claim against both HUD and Rainwater for violations of Title VIII and the HCDA.

HUD and Rainwater raise various arguments regarding the sufficiency of the facts alleged in Plaintiffs' Complaint. *See* HUD Br. 40-45; Rainwater Br. 18-33. In considering the sufficiency of a plaintiff's factual allegations, this Court accepts a plaintiff's allegations as true

[25] While the Eighth Circuit without analysis equated § 3608(e)(5) with the general land-management statute at issue in *SUWA*, a comparison with which Plaintiffs disagree, the court nonetheless went on to identify a specific legal obligation that is enforceable against HUD—namely, the obligation to "demonstrate[] consideration of, and an effort to achieve, . . . results" in the form of furthering fair housing opportunities. *Darst-Webbe*, 417 F.3d at 907.

and draws all reasonable inferences in the plaintiff's favor. *Aktieselskabet AF 21 Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008). The plaintiff's allegations must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

1. HUD's motion to dismiss must be denied because Plaintiffs allege sufficient facts to establish violations of Title VIII and the HCDA.

HUD asserts that Plaintiffs' Complaint fails to satisfy the pleading standard in Rule 8(a) for its causes of action against HUD under Title VIII and the HCDA. HUD Br. 40-45. But Plaintiffs' Complaint clearly satisfies Rule 8(a) by providing ample notice to HUD of the factual basis for the claims of disparate impact discrimination under § 3604(a) and § 3605, and for the claims that HUD failed to affirmatively further fair housing under § 3608(e)(5) and § 5304(b)(2).

HUD first argues that Plaintiffs have failed to state a claim for disparate impact discrimination under § 3604(a) and § 3605(a). HUD rests this argument on the uniformly rejected theory that Plaintiffs must plead a prima facie case in their Complaint and, consequently, that Plaintiffs must allege statistically significant statistics about racial disparities caused by HUD's policies. *See* HUD Br. 41-43. It is well-accepted that statistics showing a policy had a disparate impact on a protected class satisfy a plaintiff's prima facie case in a Title VIII disparate impact action. *See 2922 Sherman Ave. Tenants' Ass'n v. Dist. of Columbia*, 444 F.3d 673, 679-81 (D.C. Cir. 2006). But uniform authority makes it clear that plaintiffs need not establish a prima facie case at the pleading stage, because "[t]he prima facie case . . . is an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510, 515 (2002); *see also Twombly*, 550 U.S. at 569-70 (reaffirming *Swierkiewicz* and reiterating that a heightened pleading requirement does not apply to discrimination claims). Thus, while Plaintiffs may need to produce statistics on racial disparities to prove their case at *trial*, or to defeat a

summary judgment motion by HUD, they cannot be required to plead such statistics to survive a motion to dismiss. *See, e.g., NCRC*, 573 F. Supp. 2d at 79.

In *NCRC*, this Court rejected a defendant's identical argument that to survive a motion to dismiss under Rule 12(b)(6), plaintiffs in a Title VIII disparate impact action were required to plead facts *showing* that the defendant's mortgage underwriting policies caused a disproportionate impact on African American homeowners, including statistics comparing how African American and white homeowners fared when the policy was applied to them. *Id.* (following *Swierkiewicz* and reiterating that "'the requirements for establishing a prima facie case'" do not "'apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.'") (quoting *Swierkiewicz*, 534 U.S. at 511); *NCRC* Dkt., No. 07-1357.

Tellingly, HUD relies exclusively and inappropriately on cases involving summary judgment motions or trials (where showing the prima facie case is necessary), and cites not a single case involving a Rule 12(b)(6) motion (where showing the prima facie case is unnecessary).[26] This Court should disregard these wholly inapposite cases and, as in *NCRC*, reaffirm that at this stage "the ordinary rules for assessing the sufficiency of a complaint apply," and not a heightened pleading standard. *Id.* (quoting *Swierkiewicz*, 534 U.S. at 511).

Plaintiffs' Complaint easily satisfies the proper pleading standard. "Rule 8 requires not a specific quantity of facts, but simply 'a short and plain statement of the claim showing that the

[26] *See* HUD Br. 41 (citing *Graoch Assocs. v. Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 369 (6th Cir. 2007) (affirming an appeal from the grant of summary judgment in favor of an apartment owner); *2922 Sherman Ave.*, 444 F.3d at 676 (reversing a judgment after a jury trial on a disparate impact claim and ordering a new trial on plaintiffs intentional discrimination claim); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir. 1988) (reversing an appeal from a judgment following a bench trial); *United States v. City of Black Jack*, 508 F.2d 1179, 1187-88 (8th Cir. 1974) (reversing a district court's refusal to grant a permanent injunction and remanding for the district court to enter an order enjoining the enforcement of a discriminatory ordinance)).

pleader is entitled to relief.'" *Aktieselskabet*, 525 F.3d at 16 (quoting Fed. R. Civ. P. 8(a)(2)). As the Supreme Court recently explained, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). This "plausibility" standard is not a "probability requirement," and instead merely requires a plaintiff to allege facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged" or, in other words, that there is "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556-57).

Plaintiffs' Complaint alleges more than enough facts to create a reasonable inference that HUD's approval of the Road Home grant formula (and other actions) have caused a disparate impact on African American homeowners in New Orleans in violation of §§ 3604(a) and 3605(a). The Complaint offers an explicit, clear, and logical explanation of how the Road Home formula has caused a disproportionate impact on African Americans in receiving grants to rebuild, repair and return to their homes. In particular, plaintiffs allege that:

- U.S. Census data show that African Americans are more likely than whites to own homes with lower property values, including comparable homes, and are more likely to receive grants under the Road Home program based on the pre-storm value of their homes. *See* Compl. ¶¶ 3-4, 53-55;

- Nearly 80% of homes owned by African Americans in New Orleans were valued at less than $100,000, compared to only about 33% homes owned by whites. Compl. ¶ 54.

- The Road Home formula disadvantages African American homeowners whose home property values are lower (when the cost of repair exceeds the pre-storm value), because the formula awards grants based on the *lower* of the pre-storm value of the home or the cost of damage to the home. Compl. ¶¶ 3-4, 45-53, 55.

- Because of the formula, African American homeowners are more likely than white homeowners to have a gap between the cost of rebuilding and their rebuilding resources (including grants), and the average gap for African American applicants is far larger than the average gap for white applicants. Compl. ¶¶ 56-57.

These factual allegations, which the "court must accept as true," create far more than a "reasonable inference" or a "sheer possibility" that HUD's formula has disproportionately impacted African Americans. *Iqbal*, 129 S. Ct. at 1949.[27] Accepting as true Plaintiffs' factual allegations that African Americans own homes with lower property values than whites (including when their homes are comparable); that the Road Home formula provides smaller awards to homeowners whose property values are lower (when the cost of repair is higher than the pre-storm value); and that this formula causes African Americans to have more frequent and larger shortfalls in funding needed to rebuild their homes than whites, the most logical conclusion—not only a reasonable conclusion—is that the formula has caused a disparate impact on African Americans, as Plaintiffs explicitly allege. *See* Compl. ¶¶ 3-4, 52-59. Thus, Plaintiffs have alleged facts that far surpass those necessary to satisfy Rule 8(a)'s pleading requirements. Moreover, contrary to HUD's contention that Plaintiffs "fail to allege that African American homeowners experience a disparate impact in the amount they allegedly received under the Road Home grant award as compared to white homeowners," HUD Br. 42, these facts clearly allege that the formula caused African American homeowners to receive smaller grant awards than white homeowners under the Road Home program, causing more frequent and larger gaps in the cost to rebuild. *See* Compl. ¶¶ 3-4, 52-58.[28]

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[27] The Court's discussion in *Iqbal* about what factual allegations a plaintiff must make in order to sufficiently plead a *Bivens* claim of *intentional* discrimination under the Fifth Amendment, *Iqbal*, 129 S. Ct. at 1948-49, 1951-52, is obviously inapplicable to Plaintiffs' *disparate impact* claim under Title VIII. Plaintiffs need not allege or ultimately prove at trial that HUD acted with discriminatory intent or purpose. *See 2922 Sherman Ave.*, 444 F.3d at 681.

[28] Contrary to HUD's unsupported assertion, Plaintiffs need not allege discrimination in the method of home appraisals or the Road Home policy that allows grantees to use their own appraisers. *See* HUD Br. 42-43. Plaintiffs can adequately plead their claim without making these two allegations, as detailed above. In any event, it is common knowledge that racial disparities in home values can occur without a biased appraiser or method of appraisal, because an appraisal compares a particular home to similar homes in the same area that have been sold at

In addition, HUD contends that Plaintiffs have failed to state a claim for a violation of § 3605(a) of Title VIII because "Plaintiffs do not allege, nor could they allege, that HUD engaged in residential real estate transactions with anyone." HUD Br. 43. HUD's argument is misguided. The statute defines the term "residential real estate-related transaction" to include "[t]he making or purchasing of loans or providing other financial assistance . . . for purchasing, constructing, improving, repairing, or maintaining a dwelling." 42 U.S.C. § 3605(b)(1)(A). Not surprisingly, HUD provides no authority for its apparent claim that HUD's approval of the disbursement of federal funds to homeowners who seek to repair damage caused by Hurricanes Katrina and Rita does not constitute "providing . . . financial assistance" for "constructing, improving, repairing, or maintaining a dwelling." *Id.* In fact, the case law requires a far less direct connection between the defendant's financial assistance and the homeowner than HUD wishes to impose. *See Nat'l Fair Hous. Alliance*, 208 F. Supp. 2d at 58 (holding that property insurance is covered by § 3605 because "insurance provides the financial assistance necessary to maintain a dwelling"); *United States v. Mass. Indus. Fin. Agency*, 910 F. Supp. 21, 29 (D. Mass. 1996) ("Defendant's argument that it does not provide 'financial assistance' because it does not provide funds *directly* to applicants is unconvincing.").

Finally, HUD argues that Plaintiffs have failed to state a claim that HUD violated its affirmative obligations under § 3608(e)(5) of Title VIII and § 5304(b)(2) of the HCDA. *See* HUD Br. 44-45. This argument rests on the contention that § 3608(e)(5) and § 5304(b)(2) require only that HUD *consider* the effect of its decisions on fair housing. HUD Br. 44. But

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a market rate, and market rates are influenced by racial discrimination in our broader society. Similarly meritless is HUD's assertion that Plaintiffs must allege the Additional Compensation Grants create statistical disparities in the award of grants. HUD Br. 43. Plaintiffs allege that the Additional Compensation Grant "does not eliminate the discriminatory disparities in grant amounts" that are caused by the general grant formula. Compl. ¶ 59. No more is required.

HUD's affirmative obligation goes beyond mere consideration of the effect of its decisions on fair housing, and is instead an "affirmative duty to consider the impact of publicly assisted housing programs on racial concentration *and to act affirmatively* to promote the policy of fair, integrated housing." *Otero*, 484 F.2d at 1134 (emphasis added); *see also Darst-Webbe*, 417 F.3d at 907; *NAACP*, 817 F.2d at 155 ("HUD [must] use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."); *Lee*, 698 F. Supp. at 342. Plaintiffs' Complaint adequately alleges that HUD participated in the development and administration of a grant formula that disproportionately prevents African American families from being able to rebuild their homes and remain in their communities. Compl. ¶¶ 3-4, 45-56. These facts are sufficient to state a claim that HUD failed to act affirmatively to promote open housing in New Orleans.

2. Rainwater's motion to dismiss must be denied because Plaintiffs have alleged sufficient facts to state a Title VIII disparate impact claim.

Rainwater also contends that Plaintiffs' Title VIII claims must be dismissed under Rule 12(b)(6) for failure to state a claim. Rainwater first argues that Plaintiffs have not alleged a violation of § 3605(a) because Rainwater has not engaged in any residential real estate-related transactions. Rainwater Br. 31. This argument must be rejected for the same reasons discussed *supra* Part II.C.1. The statute specifically defines real estate-related transactions to include financial assistance "for improving, repairing, or maintaining a dwelling." 42 U.S.C. § 3605(b)(1)(A). The Complaint plainly alleges that the Road Home program provides financial assistance for home improvement and repair, and that Rainwater's design and implementation of that program has a disparate impact on African Americans. Compl. ¶¶ 43-60.

Rainwater also argues that Plaintiffs' Title VIII claims must be dismissed because Plaintiffs "have not and cannot allege that African American and white homeowners with

substantially similar home values were treated differently" due to the application of the Road Home formula.[29] Rainwater Br. 32-33. This argument fundamentally misunderstands the appropriate legal standard.

In order to allege a disparate impact violation under Title VIII, a plaintiff need only allege facts sufficient to demonstrate that a facially-neutral policy has a significant adverse impact on members of a protected group. *See NCRC*, 573 F. Supp. 2d at 79. Plaintiffs therefore need only allege facts to show that application of the Road Home formula has had a discriminatory effect on African American homeowners—Plaintiffs do *not* need to allege that a similarly-situated group was treated differently under the Road Home program. *See id.* (expressly rejecting the defendant's argument in a Title VIII disparate impact claim that the plaintiff failed to allege the existence of a similarly-situated class); *see also Charleston Hous. Auth. v. USDA*, 419 F.3d 729, 741 (8th Cir. 2005) (rejecting housing authority's argument that the plaintiffs' disparate impact claims fail because they did not demonstrate that similarly-situated individuals were treated differently, and noting that plaintiffs "need prove no more than that the conduct of the defendant actually or predictably results in discrimination").

Rainwater asserts that *2922 Sherman Avenue* is to the contrary, *see* Rainwater Br. 32, but that case *specifically declined* to consider the defendant's argument that plaintiffs needed to provide evidence of a relevant comparison group. *See 2922 Sherman Ave.*, 444 F.3d at 681.[30] But Rainwater makes an even more fundamental error. According to Rainwater, Plaintiffs must

[29] While HUD appears to make a version of this argument in its Preliminary Statement, *see* HUD Br. 3, HUD never makes this point in its Argument. *See* HUD Br. 42. In any event, as discussed in this section, this argument is meritless.

[30] The court in *2922 Sherman Avenue* did vacate a jury verdict in favor of the plaintiffs on their disparate impact claim, but that reversal was based on the plaintiffs' failure, at trial, to prove statistically significant disparities that adversely affected Hispanics. *2922 Sherman Ave.*, 444 F.3d at 681. Of course, as discussed above, this case is not yet at the stage of determining the sufficiency of evidence presented at trial. *See supra* Part II.C.1.

find white and African American homeowners with "substantially the same property value" and demonstrate that the white homeowners were treated more favorably. Rainwater Br. 33. But the use of property value in the Road Home formula is the very practice alleged to be discriminatory, so it would be nonsensical to compare homeowners on whom the practice has no differentiating effect. As the D.C. Circuit put it in the very case Rainwater cites, "[i]f we were to require that the very factor that causes disparate impact be included in the comparison . . . , we would effectively define disparate impact analysis out of existence." *Anderson v. Zubieta*, 180 F.3d 329, 342 (D.C. Cir. 1999), *cited in* Rainwater Br. 32.

Because, as noted *supra* Part II.C.1, Plaintiffs have adequately alleged that the Road Home program has a disproportionate adverse effect on African American homeowners, Rainwater's argument must be rejected. Compl. ¶¶ 3-4, 45-60, 74-76; *see NCRC*, 573 F. Supp. 2d at 79.

D. The individual Plaintiffs did not waive their right to sue.

Rainwater finally contends in a footnote that by signing a Grant Agreement and accepting grant awards, the individual Plaintiffs are required to raise any disputes through a state-level administrative appeals process. *See* Rainwater Br. 24 n.6. But that administrative review process is expressly limited to reviewing homeowner challenges to grant awards and eligibility. *See* The Road Home, *Appeals and Second Disbursements* 1 (Ex. H) ("You have the right to appeal . . . [the] award decision. You can appeal: Eligibility decisions; amount of benefit compensation . . .; [d]enial of Additional Compensation Grant."); The Road Home, *Filing an Appeal* 1 (Ex. I) ("If you believe the program's determination of your funding award calculation or your eligibility status is incorrect . . . you can file a formal appeal . . . ."). Plaintiffs do not argue that their grant was incorrectly calculated or that they were improperly found to be ineligible. Plaintiffs argue instead that the program, as designed and operated, had the illegal

effect of discriminating against them because they are African American. Compl. ¶¶ 3-4, 45-60. This is a challenge that the appeals process *expressly disclaims* any authority to resolve: "The Appeals Office will not change policies or laws set forth by the State of Louisiana or the federal government." The Road Home, *Filing an Appeal* 1 (Ex. I). Rainwater cannot plausibly contend that Plaintiffs' only remedy for racial discrimination is through an administrative review process that claims no ability to redress or even consider those claims.

Even if the Grant Agreement were read to waive the individual Plaintiffs' right to sue, that waiver would be invalid under the appropriations statutes that created the CDBG Disaster Recovery Grant program (and that funded the Road Home program). Those Acts provide that the use of disaster recovery funds is subject to the requirements that govern the regular CDBG program, and that HUD can waive "any provision of any statute or regulation that the Secretary administers . . . *except* for requirements related to fair housing, nondiscrimination, labor standards, and the environment." 2005 Act, 119 Stat. at 2780 (emphasis added); *see also* 2006 Act, 120 Stat. at 472-73 (same). A requirement that purported to force Plaintiffs to raise fair housing and nondiscrimination claims exclusively in a state administrative proceeding so ill-suited for that purpose would violate this term of the federal appropriations acts and, thus, would be unenforceable.

Each of the individual Plaintiffs is therefore properly before this Court, because the Grant Agreement does not waive the right to sue for Rainwater's violation of Title VIII and the HCDA, and because reading the Grant Agreement to constitute such a waiver would violate the federal statutes establishing the CDBG Disaster Recovery Grant program.

*** * ***

Plaintiffs' claims that HUD and Rainwater violated Title VIII and the HCDA are enforceable against both Defendants and reviewable by this Court, and Plaintiffs have alleged sufficient facts to state a claim. The motions to dismiss for failure to state a claim under Rule 12(b)(6) should be denied.

III. Rainwater's motion to transfer should be denied because Rainwater has failed to carry his heavy burden of establishing that this Court should disturb Plaintiffs' choice of forum.

Pursuant to 28 U.S.C. § 1404(a), this Court may transfer this action out of the District of Columbia only if Rainwater establishes that plaintiffs initially could have brought this action in the Middle District of Louisiana, and considerations of convenience and the interests of justice weigh in favor of transfer to that district. *See Shenandoah Assocs. Ltd. P'ship v. Tirana*, 182 F. Supp. 2d 14, 25 (D.D.C. 2001). A court should not transfer a case from a plaintiff's chosen forum "simply because another forum, in the court's view, may be superior to that chosen by the plaintiff." *Pain v. United Tech. Corp.*, 637 F.2d 775, 783 (D.C. Cir. 1980). Instead, courts should weigh a number of case-specific factors, including the private interests of the parties and witnesses, and public interests such as efficiency and fairness. *Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 12 (D.D.C. 2000).

Although Plaintiffs agree that this action *could* have been filed in the Middle District of Louisiana or the Eastern District of Louisiana, *see* 28 U.S.C. § 1391(e), Rainwater has failed to meet his heavy burden of demonstrating that the balance of interests favors transfer. *Pain*, 637 F.2d at 784. Accordingly, Plaintiffs' choice of forum should not be disturbed.

A. Rainwater has not demonstrated that the private interests of the parties and witnesses weigh in favor of transferring this case.

District courts weigh a number of private-interest factors in determining whether transfer is warranted, including the plaintiffs' choice of forum, the defendants' choice of forum, the

forum in which the claim arose, the convenience of the parties and witnesses, and the ease of access to sources of proof. *See Wilderness Soc'y*, 104 F. Supp. 2d at 12; *Trout Unlimited v. USDA*, 944 F. Supp. 13, 16 (D.D.C. 1996)).

The first of these factors—the plaintiffs' choice of forum—is often dispositive. It is well established that a plaintiff's choice of forum "should be afforded substantial deference unless that forum has no substantial connection with the parties or subject matter at issue." *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 154 F. Supp. 2d 10, 14 (D.D.C. 2001); *see also Wilderness Soc'y*, 104 F. Supp. 2d at 12-13 (collecting cases). Rainwater argues that Plaintiffs' choice of forum "deserves little deference" because "none of the named Plaintiffs reside in the District of Columbia." Rainwater Br. 42. This assertion is false. Plaintiff National Fair Housing Alliance ("NFHA") has its principal place of business in the District of Columbia, and is thus a resident of the District of Columbia. Compl. ¶ 12. This Court has held that even when only one plaintiff is a resident of the chosen forum, the court should afford substantial deference to the plaintiffs' choice of forum. *See Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 11 (D.D.C. 2007).

Rainwater further contends that Plaintiffs' choice of forum should be given little deference, because "most, if not all, of the relevant events concerning Plaintiffs' Road Home grant applications" took place in Louisiana. Rainwater Br. 42. This argument is also incorrect. Plaintiffs' Complaint alleges relevant events that occurred in the District of Columbia, including HUD's assisting LRA in designing the Road Home grant formula and HUD's review, approval, and continuing oversight. Compl. ¶¶ 49-51; *see also* Kome Decl. ¶¶ 1, 13-24.

This Court's decision in *Greater Yellowstone Coalition v. Bosworth*, 180 F. Supp. 2d 124 (D.D.C. 2001) is instructive. In *Bosworth*, several environmental groups alleged that the United States Forest Service failed to comply with certain federal statutes when it renewed a cattle-

grazing permit for forest land in Montana without assessing the environmental impact of the renewal. *Id*. at 126. The defendants moved to transfer the action to the District of Montana on the ground that the decision to issue the permit and the effects of such a decision are inherently related to Montana, not the District of Columbia. *Id*. at 128. This Court denied the defendants' motion, concluding that because federal government officials in the District of Columbia were involved in the decision to reissue the permit and two of the five plaintiffs had offices in the District of Columbia, the action had a sufficient nexus to this forum. *Id*. at 128-29. The Court distinguished other cases involving federal agencies that had been transferred out of the District of Columbia, noting that in those cases, "none of the plaintiffs resided in the District of Columbia and none of the decisionmaking occurred in the District of Columbia." *Id*. at 129 (discussing *Trout Unlimited* and *Hawksbill Sea Turtle v. FEMA*, 939 F. Supp. 1 (D.D.C. 1996)).

Rainwater's reliance on *Al-Ahmed v. Chertoff*, 564 F. Supp. 2d 16 (D.D.C. 2008), is misplaced. *See* Rainwater Br. 39. *Al-Ahmed* granted the defendants' motion to transfer because the plaintiff was a Virginia resident, *all* of the administrative decisions at issue were made in Virginia, and the "only real connection [the] lawsuit has to the District of Columbia is that a federal agency headquartered here is charged with generally regulating and overseeing the [administrative] process . . . ." *Al-Ahmed*, 564 F. Supp. 2d at 19 (citations omitted). Plaintiffs here have alleged not that HUD is generally charged with regulating the administrative process, but rather that HUD officials in the District of Columbia made specific decisions in the design and approval of the Road Home program that have resulted in a discriminatory disparate impact.

Despite Rainwater's contention to the contrary, the fact that this litigation also has a connection to Louisiana does not compel a transfer to the Middle District of Louisiana. *Cf. Ingram v. Eli Lilly & Co.*, 251 F. Supp. 2d 1, 7 (D.D.C. 2003) (holding that although litigation

"admittedly has a greater connection to Washington [state]," plaintiff's choice of the District of Columbia as its forum should not be disturbed).

None of the other private interest factors weighs in favor of transferring this case to the Middle District of Louisiana. Although Rainwater asserts that such a transfer will be "more convenient" for the parties, Rainwater Br. 42, Plaintiff NFHA and Defendant HUD are in the District of Columbia, and many of the relevant documents and witnesses are therefore located in this forum. While some of the plaintiffs do reside in Louisiana, this Court should defer to their judgment regarding where to file their lawsuit. *See Wilderness Soc'y*, 104 F. Supp. 2d at 15 (noting that although some of the plaintiffs were located in Alaska, they "presumably do not consider the District of Columbia to be an inconvenient forum or else they would not have sued here"). And although Rainwater is located in Baton Rouge, he has failed to proffer any evidence to demonstrate that it would be an undue hardship for him to litigate this case in the District of Columbia. *See Robinson v. Eli Lilly & Co.*, 535 F. Supp. 2d 49, 52 (D.D.C. 2008) (denying transfer motion where the defendant "neither articulated nor demonstrated hardship for it as a corporate party to have to travel to this district for these proceedings"). Nor has Rainwater shown that "any lay or expert witnesses will refuse to appear in this district for trial or cannot have their testimony preserved by videotaped deposition." *Id*. Moreover, although Rainwater vaguely asserts that "documents and materials concerning Plaintiffs' Road Home grant applications are located in Baton Rouge," it is uncontested that—in light of Plaintiffs' claims against HUD—other documents relevant to this litigation are located in the District of Columbia.

B. Rainwater has not demonstrated that public interests weigh in favor of transferring this case.

Transfer is also unwarranted in light of the public interests at issue in this action. District courts review a number of public-interest factors in considering a motion to transfer, including

the transferee court's familiarity with the governing laws, the relative congestion of the transferor and transferee courts' calendars, and any local interests in deciding local controversies. *Trout Unlimited*, 944 F. Supp. at 16. Rainwater has failed to demonstrate that any of these interests weigh in favor of transferring this action to the Middle District of Louisiana.

First, Rainwater's contention that the Middle District of Louisiana is "equally familiar with the federal laws governing Plaintiffs' claims" is of no moment. Rainwater Br. 43. The applicable standard is not whether the transferee court is "equally familiar" with the governing laws, but whether the transferee court has some sort of expertise that the transferor court does not, such that there is an advantage to having the transferee court resolve the dispute. *See Wilderness Soc'y*, 104 F. Supp. 2d at 16; *Trout Unlimited*, 944 F. Supp. at 19. Here, none of Plaintiffs' claims involves an issue of Louisiana state law, and there is thus "no advantage to having a federal court 'thoroughly familiar and experienced' in the state law of [Louisiana] adjudicate this suit." *Wilderness Soc'y*, 104 F. Supp. 2d at 16 (quoting *Trout Unlimited*, 944 F. Supp. at 19). It is axiomatic that the Middle District of Louisiana is no better suited than this Court to resolve Plaintiffs' federal statutory claims. *See Miller v. Insulation Contractors*, No. 08-1556, 2009 WL 1066263, at *3 (D.D.C. Apr. 21, 2009) ("[A]ll federal courts are presumed to be equally familiar with the law governing federal statutory claims.").

Second, Rainwater's assertion that there is "no evidence that Plaintiffs' case would proceed more quickly in the District of Columbia," Rainwater Br. 43, improperly shifts the burden of proof to Plaintiffs to demonstrate that the District of Columbia is the most appropriate forum. This simply is not the law. It is Rainwater's burden to demonstrate that public interests, such as the relative congestion of the courts, favor transferring the case. *See SEC v. Savoy*

Indus., Inc., 587 F.2d 1149, 1154 (D.C. Cir. 1978). Rainwater has not established that this Court's docket is significantly heavier than the docket in the Middle District of Louisiana.

Finally, Rainwater contends that the Middle District of Louisiana has a stronger local interest in resolving this case because the litigation involves "Louisiana properties" and "Louisiana residents." Rainwater Br. 43-44. But, as noted, this litigation also has significant ties to the District of Columbia. In addition, all of Plaintiffs' claims are based on violations of federal law, and this Court has held that where one issue in the suit is "whether federal agencies complied with federal law," the case cannot have a "purely local impact" in another forum. *Sierra Club*, 523 F. Supp. 2d at 13. This is especially true because both Title VIII and the HCDA reflect *national* policies. *See id.*; *see also* 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."); 42 U.S.C. § 5301(b) ("The Congress . . . finds and declares that the future welfare of the Nation and the well-being of its citizens depend on the establishment and maintenance of viable urban communities as social, economic, and political entities . . . .").

Because Rainwater has failed to demonstrate that the balance of private and public interests favors a transfer of this action to the Middle District of Louisiana, the motion to transfer should be denied.

CONCLUSION

For the reasons stated herein, the Court should deny HUD's motion to dismiss (Dkt. 22), Rainwater's motion to dismiss (Dkt. 28), and Rainwater's motion to transfer (Dkt. 28).

Dated: June 5, 2009.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al., Defendants.	Civil Action No. 1:08-cv-01938 (HHK)

PROPOSED ORDER

Upon consideration of Defendant U.S. Department of Housing and Urban Development's Motion to Dismiss, Docket No. 22, Defendant Paul Rainwater's Motion to Dismiss and Motion to Transfer, Docket No. 28, Plaintiffs' Memorandum in Opposition, the Defendants' replies, and the entire record herein, it is, this ____ day of _____, hereby ORDERED that Defendants' Motions Are DENIED.

_____
Henry H. Kennedy
United States District Judge

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND MOTION TO TRANSFER

LIST OF EXHIBITS

Exhibit A. Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (Dec. 30, 2005) ("2005 Act").

Exhibit B. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006, Pub. L. No. 109-234, 120 Stat. 418 (June 15, 2006) ("2006 Act").

Exhibit C. Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, 121 Stat. 1295 (Nov. 13, 2007) ("2007 Act").

Exhibit D. Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Department of Defense Appropriations Act, 2006, 71 Fed. Reg. 7666 (Feb. 13, 2006).

Exhibit E. Allocations and Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under Chapter 9 of Title II of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006, 71 Fed. Reg. 63,337 (Oct. 30, 2006).

Exhibit F. Allocations and Requirements for the Supplemental Grant to the State of Louisiana Under Division B of the Department of Defense Appropriations Act, 2008, 72 Fed. Reg. 70,472 (Dec. 11, 2007).

Exhibit G. Reconsideration of Waivers Granted to and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees Under Public Laws 109–148 and 109–234,73 Fed. Reg. 46,312 (Aug. 8, 2008).

Exhibit H. The Road Home, *Appeals and Second Disbursements*.

Exhibit I. The Road Home, *Filing an Appeal*.

Exhibit A

The 2005 Act

Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (Dec. 30, 2005).

DEPARTMENT OF DEFENSE, EMERGENCY SUPPLEMENTAL APPROPRIATIONS TO ADDRESS HURRICANES IN THE GULF OF MEXICO, AND PANDEMIC INFLUENZA ACT, 2006

Public Law 109–148
109th Congress

An Act

Dec. 30, 2005
[H.R. 2863]

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2006, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.
Department of Defense Appropriations Act, 2006.

DIVISION A

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2006

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2006, for military functions administered by the Department of Defense and for other purposes, namely:

TITLE I

MILITARY PERSONNEL

MILITARY PERSONNEL, ARMY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty, (except members of reserve components provided for elsewhere), cadets, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $28,191,287,000.

MILITARY PERSONNEL, NAVY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve provided for elsewhere), midshipmen, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $22,788,101,000.

MARITIME ADMINISTRATION

OPERATIONS AND TRAINING

For an additional amount for "Operations and training", $7,500,000, to remain available until September 30, 2007, for necessary expenses related to the consequences of hurricanes in the Gulf of Mexico during calendar year 2005: *Provided,* That the amount provided under this heading is designated as an emergency requirement pursuant to section 402 of H. Con. Res. 95 (109th Congress), the concurrent resolution on the budget for fiscal year 2006.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

PUBLIC AND INDIAN HOUSING

TENANT-BASED RENTAL ASSISTANCE

Vouchers.

For an additional amount for housing vouchers for households within the area declared a major disaster under the Robert T. Stafford Disaster Relief and Emergency Act (42 U.S.C. 5121 et seq.) resulting from hurricanes in the Gulf of Mexico during calendar year 2005, $390,299,500, to remain available until September 30, 2007: *Provided,* That such households shall be limited to those which, prior to Hurricanes Katrina or Rita, received assistance under section 8 or 9 of the United States Housing Act of 1937 (Public Law 93–383), section 801 or 811 of the Cranston-Gonzalez National Affordable Housing Act (Public Law 101–625), the AIDS Housing Opportunity Act (Public Law 101–625), or the Stewart B. McKinney Homeless Assistance Act (Public Law 100–77); or those which were homeless or in emergency shelters in the declared disaster area prior to Hurricanes Katrina or Rita: *Provided further,* That these funds are available for assistance, under section 8(o) of the United States Housing Act of 1937: *Provided further,* That in administering assistance under this heading the Secretary of Housing and Urban Development may waive requirements for income eligibility and tenant contribution under section 8 of such Act for up to 18 months: *Provided further,* That all households receiving housing vouchers under this heading shall be eligible to reoccupy their previous assisted housing, if and when it becomes available: *Provided further,* That the amount provided under this heading is designated as an emergency requirement pursuant to section 402 of H. Con. Res. 95 (109th Congress), the concurrent resolution on the budget for fiscal year 2006.

COMMUNITY PLANNING AND DEVELOPMENT

COMMUNITY DEVELOPMENT FUND

For an additional amount for the "Community development fund", for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of hurricanes in the Gulf of Mexico in 2005 in States for which the President declared a major disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) in conjunction with Hurricane Katrina, Rita, or Wilma, $11,500,000,000, to remain available until expended, for activities

authorized under title I of the Housing and Community Development Act of 1974 (Public Law 93–383): *Provided*, That no State shall receive more than 54 percent of the amount provided under this heading: *Provided further*, That funds provided under this heading shall be administered through an entity or entities designated by the Governor of each State: *Provided further,* That such funds may not be used for activities reimbursable by or for which funds are made available by the Federal Emergency Management Agency or the Army Corps of Engineers: *Provided further*, That funds allocated under this heading shall not adversely affect the amount of any formula assistance received by a State under this heading: *Provided further*, That each State may use up to five percent of its allocation for administrative costs: *Provided further,* That Louisiana and Mississippi may each use up to $20,000,000 (with up to $400,000 each for technical assistance) from funds made available under this heading for LISC and the Enterprise Foundation for activities authorized by section 4 of the HUD Demonstration Act of 1993 (42 U.S.C. 9816 note), as in effect immediately before June 12, 1997, and for activities authorized under section 11 of the Housing Opportunity Program Extension Act of 1996, including demolition, site clearance and remediation, and program administration: *Provided further,* That in administering the funds under this heading, the Secretary of Housing and Urban Development shall 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 (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment), upon a request by the State that such waiver is required to facilitate the use of such funds or guarantees, and a finding by the Secretary that such waiver would not be inconsistent with the overall purpose of the statute, as modified: *Provided further,* That the Secretary may waive the requirement that activities benefit persons of low and moderate income, except that at least 50 percent of the funds made available under this heading must benefit primarily persons of low and moderate income unless the Secretary otherwise makes a finding of compelling need: *Provided further,* That the Secretary shall publish in the Federal Register any waiver of any statute or regulation that the Secretary administers pursuant to title I of the Housing and Community Development Act of 1974 no later than 5 days before the effective date of such waiver: *Provided further,* That every waiver made by the Secretary must be reconsidered according to the three previous provisos on the two-year anniversary of the day the Secretary published the waiver in the Federal Register: *Provided further*, That prior to the obligation of funds each State shall submit a plan to the Secretary detailing the proposed use of all funds, including criteria for eligibility and how the use of these funds will address long-term recovery and restoration of infrastructure: *Provided further*, That each State will report quarterly to the Committees on Appropriations on all awards and uses of funds made available under this heading, including specifically identifying all awards of sole-source contracts and the rationale for making the award on a sole-source basis: *Provided further,* That the Secretary shall notify the Committees on Appropriations on any proposed allocation of any funds and any related waivers made pursuant to these provisions under this

Federal Register, publication. Deadline.

Reports.

Notification.

heading no later than 5 days before such waiver is made: *Provided further,* That the Secretary shall establish procedures to prevent recipients from receiving any duplication of benefits and report quarterly to the Committees on Appropriations with regard to all steps taken to prevent fraud and abuse of funds made available under this heading including duplication of benefits: *Provided further,* That the amounts provided under this heading are designated as an emergency requirement pursuant to section 402 of H. Con. Res. 95 (109th Congress), the concurrent resolution on the budget for fiscal year 2006. Reports.

ADMINISTRATIVE PROVISIONS

SEC. 901. Notwithstanding provisions of the United States Housing Act of 1937 (Public Law 93–383), in order to assist public housing agencies located within the most heavily impacted areas of Louisiana and Mississippi that are subject to a declaration by the President of a major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) in connection with Hurricane Katrina or Rita, the Secretary for calendar year 2006 may authorize a public housing agency to combine assistance provided under sections 9(d) and (e) of the United States Housing Act of 1937 and assistance provided under section 8(o) of such Act, for the purpose of facilitating the prompt, flexible and efficient use of funds provided under these sections of the Act to assist families who were receiving housing assistance under the Act immediately prior to Hurricane Katrina or Rita and were displaced from their housing by the hurricanes.

SEC. 902. To the extent feasible the Secretary of Housing and Urban Development shall preserve all housing within the area declared a major disaster under the Robert T. Stafford Disaster Relief and Emergency Act (42 U.S.C. 5121 et seq.) resulting from Hurricane Katrina or Rita that received project-based assistance under section 8 or 9 of the United States Housing Act of 1937, section 801 or 811 of the Cranston-Gonzalez National Affordable Housing Act, the AIDS Housing Opportunity Act, or the Stewart B. McKinney Homeless Assistance Act: *Provided*, That the Secretary shall report to the Committees on Appropriations on the status of all such housing, including costs associated with any repair or rehabilitation, within 120 days of enactment of this Act. Reports. Deadline.

THE JUDICIARY

COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES

SALARIES AND EXPENSES

For an additional amount for "Salaries and expenses, Courts of Appeals, District Courts, and Other Judicial Services", $18,000,000, to remain available until expended, for necessary expenses related to the consequences of hurricanes in the Gulf of Mexico during calendar year 2005: *Provided*, That notwithstanding any other provision of law such sums shall be available for transfer to accounts within the Judiciary subject to approval of the Judiciary operating plan: *Provided further*, That the amount

Exhibit B

The 2006 Act

Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006, Pub. L. No. 109-234, 120 Stat. 418 (June 15, 2006).

EMERGENCY SUPPLEMENTAL APPROPRIATIONS ACT FOR DEFENSE, THE GLOBAL WAR ON TERROR, AND HURRICANE RECOVERY, 2006

Public Law 109–234
109th Congress

An Act

June 15, 2006
[H.R. 4939]

Making emergency supplemental appropriations for the fiscal year ending September 30, 2006, and for other purposes.

Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2006, and for other purposes, namely:

TITLE I

GLOBAL WAR ON TERROR SUPPLEMENTAL APPROPRIATIONS

CHAPTER 1

DEPARTMENT OF AGRICULTURE

FOREIGN AGRICULTURAL SERVICE

PUBLIC LAW 480 TITLE II GRANTS

For an additional amount for "Public Law 480 Title II Grants", during the current fiscal year, not otherwise recoverable, and unrecovered prior years' costs, including interest thereon, under the Agricultural Trade Development and Assistance Act of 1954, for commodities supplied in connection with dispositions abroad under title II of said Act, $350,000,000, to remain available until expended: *Provided,* That from this amount, to the maximum extent possible, funding shall be used to support the previously approved fiscal year 2006 programs under section 204(a)(2) of the Agricultural Trade Development and Assistance Act of 1954: *Provided further,* That the amount provided under this heading is designated as an emergency requirement pursuant to section 402 of H. Con. Res. 95 (109th Congress), the concurrent resolution on the budget for fiscal year 2006.

and the 2004–2005 winter storms in the State of California: *Provided further*, That any amounts in excess of those necessary for emergency expenses relating to the eligible projects cited in the first sentence of this paragraph may be used for other projects authorized under 23 U.S.C. 125: *Provided further*, That the amounts provided under this heading are designated as an emergency requirement pursuant to section 402 of H. Con. Res. 95 (109th Congress), the concurrent resolution on the budget for fiscal year 2006.

(HIGHWAY TRUST FUND)

(RESCISSION)

Of the unobligated balances of funds apportioned to each State under chapter 1 of title 23, United States Code, $702,362,500 are rescinded: *Provided*, That such rescission shall not apply to the funds distributed in accordance with 23 U.S.C. 130(f), 23 U.S.C. 133(d)(1) as in effect prior to the date of enactment of Public Law 109–59, the first sentence of 23 U.S.C. 133(d)(3)(A), 23 U.S.C. 104(b)(5), or 23 U.S.C. 163 as in effect prior to the enactment of Public Law 109–59.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

COMMUNITY PLANNING AND DEVELOPMENT

COMMUNITY DEVELOPMENT FUND

(INCLUDING TRANSFER OF FUNDS)

For an additional amount for the "Community development fund", for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of Hurricanes Katrina, Rita, or Wilma in States for which the President declared a major disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), $5,200,000,000, to remain available until expended, for activities authorized under title I of the Housing and Community Development Act of 1974 (Public Law 93–383): *Provided,* That funds provided under this heading shall be administered through an entity or entities designated by the Governor of each State: *Provided further,* That such funds may not be used for activities reimbursable by or for which funds are made available by the Federal Emergency Management Agency or the Army Corps of Engineers: *Provided further,* That funds allocated under this heading shall not adversely affect the amount of any formula assistance received by a State under this heading: *Provided further,* That each State may use up to five percent of its allocation for administrative costs: *Provided further,* That not less than $1,000,000,000 from funds made available on a pro-rata basis according to the allocation made to each State under this heading shall be used for repair, rehabilitation, and reconstruction (including demolition, site clearance and remediation) of the affordable rental housing stock (including public and other HUD-assisted housing) in the impacted areas: *Provided further*, That no State shall receive more than $4,200,000,000: *Provided further,* That in administering the funds under this heading, the Secretary of Housing and Urban Development may 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 (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment), upon a request by the State that such waiver is required to facilitate the use of such funds or guarantees, and a finding by the Secretary that such waiver would not be inconsistent with the overall purpose of the statute: *Provided further,* That the Secretary may waive the requirement that activities benefit persons of low and moderate income, except that at least 50 percent of the funds made available under this heading must benefit primarily persons of low and moderate income unless the Secretary otherwise makes a finding of compelling need: *Provided further,* That the Secretary shall publish in the Federal Register any waiver of any statute or regulation that the Secretary administers pursuant to title I of the Housing and Community Development Act of 1974 no later than 5 days before the effective date of such waiver: *Provided further,* That every waiver made by the Secretary must be reconsidered according to the three previous provisos on the two-year anniversary of the day the Secretary published the waiver in the Federal Register: *Provided further,* That prior to the obligation of funds each State shall submit a plan to the Secretary detailing the proposed use of all funds, including criteria for eligibility and how the use of these funds will address long-term recovery and restoration of infrastructure: *Provided further,* That prior to the obligation of funds to each State, the Secretary shall ensure that such plan gives priority to infrastructure development and rehabilitation and the rehabilitation and reconstruction of the affordable rental housing stock including public and other HUD-assisted housing: *Provided further,* That each State will report quarterly to the Committees on Appropriations on all awards and uses of funds made available under this heading, including specifically identifying all awards of sole-source contracts and the rationale for making the award on a sole-source basis: *Provided further,* That the Secretary shall notify the Committees on Appropriations on any proposed allocation of any funds and any related waivers made pursuant to these provisions under this heading no later than 5 days before such waiver is made: *Provided further,* That the Secretary shall establish procedures to prevent recipients from receiving any duplication of benefits and report quarterly to the Committees on Appropriations with regard to all steps taken to prevent fraud and abuse of funds made available under this heading including duplication of benefits: *Provided further*, That of the amounts made available under this heading, $12,000,000 shall be transferred to "Management and Administration, Salaries and Expenses", of which $7,000,000 is for the administrative costs, including IT costs, of the KDHAP/DVP voucher program; $9,000,000 shall be transferred to the Office of Inspector General; and $6,000,000 shall be transferred to HUD's Working Capital Fund: *Provided further*, That none of the funds provided under this heading may be used by a State or locality as a matching requirement, share, or contribution for any other Federal program: *Provided further*, That the amounts provided under this heading are designated as an emergency requirement pursuant to section 402 of H. Con. Res. 95 (109th Congress), the concurrent resolution on the budget for fiscal year 2006.

Federal Register, publication. Deadline.

Reports. Contracts.

Notification. Deadline.

Procedures. Reports. Fraud.

Exhibit C

The 2007 Act

Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, 121 Stat. 1295 (Nov. 13, 2007).

Public Law 110–116
110th Congress

An Act

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2008, and for other purposes.

Nov. 13, 2007
[H.R. 3222]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

SEC. 2. REFERENCES.

1 USC 1 note.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referencing only to the provisions of that division.

DIVISION A—DEPARTMENT OF DEFENSE

Department of Defense Appropriations Act, 2008.

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2008, for military functions administered by the Department of Defense and for other purposes, namely:

TITLE I

MILITARY PERSONNEL

MILITARY PERSONNEL, ARMY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty, (except members of reserve components provided for elsewhere), cadets, and aviation cadets; for members of the Reserve Officers' Training Corps; and

is available for work on State and private lands using all the authorities available to the Forest Service;

"(4) $25,000,000 shall be available for rehabilitation and restoration of Federal lands; and

"(5) $14,000,000 shall be available for reconstruction and construction of Federal facilities and may be transferred to and merged with 'Forest Service—Capital Improvement and Maintenance'.

"(b) Notwithstanding any other provision of this joint resolution, and in addition to amounts otherwise available by this joint resolution, there is appropriated $171,000,000 for 'Department of the Interior—Bureau of Land Management—Wildland Fire Management', to remain available until expended. Of such funds—

"(1) $40,000,000 shall be available for emergency wildfire suppression;

"(2) $115,000,000 shall be used within 30 days of enactment of this section for repayment to other accounts from which such funds were transferred in fiscal year 2007 for wildfire suppression so that all such transfers for fiscal year 2007 are fully repaid; Deadline.

"(3) $10,000,000 shall be available for hazardous fuels reduction activities; and

"(4) $6,000,000 shall be available for rehabilitation and restoration of Federal lands.

"(c) Each amount provided by this section is designated as an emergency requirement and necessary to meet emergency needs pursuant to subsections (a) and (b) of section 204 of S. Con. Res. 21 (110th Congress), the concurrent resolution on the budget for fiscal year 2008.

"SEC. 158. (a) Notwithstanding any other provision of this joint resolution, and in addition to amounts otherwise made available by this joint resolution, there is appropriated $2,900,000,000 for 'Department of Homeland Security—Federal Emergency Management Agency—Disaster Relief', to remain available until expended.

"(b) The amount provided by this section is designated as an emergency requirement and necessary to meet emergency needs pursuant to subsections (a) and (b) of section 204 of S. Con. Res. 21 (110th Congress), the concurrent resolution on the budget for fiscal year 2008.

"SEC. 159. (a) Notwithstanding any other provision of this joint resolution, and in addition to amounts otherwise made available by this joint resolution, there is appropriated $3,000,000,000 for 'Department of Housing and Urban Development—Community Planning and Development—Community Development Fund', to remain available until expended, to enable the Secretary of Housing and Urban Development to make a grant or grants to the State of Louisiana solely for the purpose of covering costs associated with otherwise uncompensated but eligible claims that were filed on or before July 31, 2007, under the Road Home program administered by the State in accordance with plans approved by the Secretary. Grants. Louisiana.

"(b) In allocating funds under this section, the Secretary of Housing and Urban Development shall ensure that such funds serve only to supplement and not supplant any other State or Federal resources committed to the Road Home program. No funds shall be drawn from the Treasury under this section beyond those necessary to fulfill the exclusive purpose of this section.

"(c) The amount provided by this section is designated as an emergency requirement and necessary to meet emergency needs pursuant to subsections (a) and (b) of section 204 of S. Con. Res. 21 (110th Congress), the concurrent resolution on the budget for fiscal year 2008.".

Approved November 13, 2007.

LEGISLATIVE HISTORY—H.R. 3222:

HOUSE REPORTS: Nos. 110–279 (Comm. on Appropriations) and 110–434 (Comm. of Conference).
SENATE REPORTS: No. 110–155 (Comm. on Appropriations).
CONGRESSIONAL RECORD, Vol. 153 (2007):
Aug. 4, considered and passed House.
Oct. 2, 3, considered and passed Senate, amended.
Nov. 8, House and Senate agreed to conference report.

○

Exhibit D

February 13, 2006 HUD Notice of Allocations and Waivers

Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Department of Defense Appropriations Act, 2006, 71 Fed. Reg. 7666 (Feb. 13, 2006).

Federal Register

Monday,
February 13, 2006

Part IV

Department of Housing and Urban Development

Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Department of Defense Appropriations Act, 2006; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5051–N–01]

Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Department of Defense Appropriations Act, 2006

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of allocations, waivers, and alternative requirements.

SUMMARY: This Notice advises the public of the allocations for grant funds for Community Development Block Grant (CDBG) disaster recovery grants for the purpose of assisting in the recovery in the most impacted and distressed areas related to the consequences of Hurricanes Katrina, Rita, and Wilma in the Gulf of Mexico in 2005. As described in the **SUPPLEMENTARY INFORMATION** section of this Notice, HUD is authorized by statute to waive statutory and regulatory requirements and specify alternative requirements for this purpose, upon the request of the state grantees. This Notice also describes the common application and reporting waivers and the common alternative requirements for the grants. Each State receiving an allocation may request additional waivers from the Department as needed to address the specific needs related to that State's recovery activities.

DATES: *Effective Date:* February 13, 2006.

FOR FURTHER INFORMATION CONTACT: Jan C. Opper, Director, Disaster Recovery and Special Issues Division, Office of Block Grant Assistance, Department of Housing and Urban Development, Room 7286, 451 Seventh Street, SW., Washington, DC 20410, telephone number (202) 708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339. FAX inquiries may be sent to Mr. Opper at (202) 401–2044. (Except for the ''800'' number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

Authority To Grant Waivers

The Department of Defense Appropriations Act, 2006 (Public Law 109–148, approved December 30, 2005) (Appropriations Act) appropriates $11.5 billion in Community Development Block Grant funds for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure directly related to the consequences of the covered disasters. The Appropriations Act authorizes the Secretary 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 use by the recipient of these funds and guarantees, except for requirements related to fair housing, nondiscrimination, labor standards, and the environment, upon a request by the State and a finding by the Secretary that such a waiver would not be inconsistent with the overall purpose of the statute. The following application and reporting waivers and alternative requirements are in response to requests from each of the States receiving an allocation under this Notice.

The Secretary finds that the following waivers and alternative requirements, as described below, are not inconsistent with the overall purpose of Title I of the Housing and Community Development Act of 1974, as amended, or the Cranston-Gonzalez National Affordable Housing Act, as amended.

Under the requirements of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act), regulatory waivers must be justified and published in the **Federal Register**.

Except as described in this Notice, statutory and regulatory provisions governing the Community Development Block Grant program for states, including those at 24 CFR part 570, shall apply to the use of these funds. In accordance with the appropriations act, HUD will reconsider every waiver in this Notice on the two-year anniversary of the day this Notice is published.

Additional Waivers

The Department will respond separately to each State's requests for waivers of provisions not covered in this Notice, after working with the State to tailor the program to best meet the unique disaster recovery needs in its impacted areas.

Allocations

Public Law 109–148 (effective December 30, 2005) provides $11.5 billion of supplemental appropriation for the CDBG program for:

> Necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of hurricanes in the Gulf of Mexico in 2005.

The conference report (H.R. Rep. No. 109–359) echoes and expands on this direction, stating:

> The conference agreement includes $11,500,000,000 for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and mitigation in communities in any declared disaster area in Louisiana, Mississippi, Alabama, Florida, and Texas related to Hurricanes Katrina, Rita or Wilma. * * *
> The conference agreement emphasizes the requirement that the States with the most impacted and distressed areas in connection with the Gulf of Mexico hurricanes receive priority consideration in the allocation of funds by HUD.

The law further notes:

> That funds provided under this heading shall be administered through an entity or entities designated by the Governor of each State. And that: No state shall receive more than 54 percent of the amount provided under this heading.

Funds allocated are intended by HUD to be used toward meeting unmet housing needs in areas of concentrated distress. ''Unmet housing needs'' is defined to include, but not be limited to, those of uninsured homeowners whose homes had major or severe damage. ''Concentrated distress'' is defined as the total number of housing units with major or severe housing damage in counties where 50 percent or more of units had major or severe damage. As provided for in Public Law 109–148, the funds may not be used for activities reimbursable by or for which funds are made available by the Federal Emergency Management Agency or the Army Corps of Engineers.

The allocations are as follows:

State	Disaster	Amount
Alabama	Hurricane Katrina (FEMA–1605–DR)	$74,388,000
Florida	Hurricane Katrina (FEMA–1602–DR), Hurricane Wilma (FEMA–1609–DR)	82,904,000
Louisiana	Hurricane Katrina (FEMA–1603–DR), Hurricane Rita (FEMA–1607–DR)	6,210,000,000
Mississippi	Hurricane Katrina (FEMA–1604–DR)	5,058,185,000
Texas	Hurricane Rita (FEMA–1606–DR)	74,523,000

HUD will invite each grantee named above to submit an Action Plan for Disaster Recovery in accordance with this Notice.

The appropriations statute requires funds be used only for disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of hurricanes in the Gulf of Mexico in 2005. The statute directs that each grantee will describe in its Action Plan for Disaster Recovery how the use of the grant funds will address long-term recovery and infrastructure restoration. HUD will monitor compliance with this direction and may be compelled to disallow expenditures if it finds uses of funds are not disaster-related, or funds allocated duplicate other benefits. HUD encourages grantees to contact their assigned HUD offices for guidance in complying with these requirements during development of their Action Plans for Disaster Recovery or if they have any questions regarding meeting these requirements.

Prevention of Fraud, Abuse, and Duplication of Benefits

The statute also directs the Secretary to:

> Establish procedures to prevent recipients from receiving any duplication of benefits and report quarterly to the Committees on Appropriations with regard to all steps taken to prevent fraud and abuse of funds made available under this heading including duplication of benefits.

To meet this directive, HUD is pursuing four courses of action. First, this Notice includes specific reporting, written procedures, monitoring, and internal audit requirements for grantees. Second, to the extent its resources allow, HUD will institute risk analysis and on-site monitoring of grantee management of the grants and of the specific uses of funds. Third, HUD will be extremely cautious in considering any waiver related to basic financial management requirements. The standard, time-tested CDBG financial requirements will continue to apply. Fourth, HUD is collaborating with the HUD Office of Inspector General to plan and implement oversight of these funds.

Waiver Justification

This section of the Notice briefly describes the basis for each waiver and related alternative requirements, if any.

The waivers, alternative requirements, and statutory changes described in this Notice apply only to the CDBG supplemental disaster recovery funds appropriated in Public Law 109–148, not to funds provided under the regular CDBG program. These actions provide additional flexibility in program design and implementation and implement statutory requirements unique to this appropriation.

Application for Allocation

These waivers and alternative requirements streamline the pre-grant process and set the guidelines for the State's application for its allocation. HUD encourages each of the five eligible grantees to submit an Action Plan for Disaster Recovery to HUD within 60 days of the publication date of this Notice.

Overall benefit to low- and moderate-income persons. Pursuant to explicit authority in the appropriations act, HUD is granting an overall benefit waiver that allows for up to 50 percent of the grant to assist activities under the urgent need or prevention or elimination of slums and blight national objectives, rather than the 30 percent allowed in the annual State CDBG program. The primary objective of Title I of the Housing and Community Development Act and of the funding program of each grantee is ''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.'' The statute goes on to set the standard of performance for this primary objective at 70 percent of the aggregate of the funds used for support of activities producing benefit to low- and moderate-income persons. Since extensive damage to community development and housing affected those with varying incomes, and income-producing jobs are often lost for a period of time following a disaster, HUD is waiving the 70 percent overall benefit requirement, leaving the 50 percent requirement, to give grantees even greater flexibility to carry out recovery activities within the confines of the CDBG program national objectives. HUD may only provide additional waivers of this requirement if it makes a finding of compelling need. The requirement that each activity meet one of the three national objectives is not waived.

Expanded distribution and direct action. The waivers and alternative requirements allowing distribution of funds by a state to entitlement communities and Indian tribes, and to allow a state to carry out activities directly rather than distribute all funds to units of local government are consistent with waivers granted for previous similar disaster recovery cases. HUD believes that, in recommending the Lower Manhattan Development Corporation (LMDC) as a model and in increasing the administrative cap, Congress is signaling its intent that the States under this appropriation also be able to carry out activities directly. Therefore, HUD is waiving program requirements to support this. HUD is also including in this Notice the necessary complementary waivers and alternative requirements related to subrecipients to ensure proper management and disposition of funds during the grant execution and at closeout.

Consistency with the consolidated plan. HUD is waiving the requirement for consistency with the consolidated plan because the effects of a major disaster usually alter a grantee's priorities for meeting housing, employment, and infrastructure needs. To emphasize that uses of grant funds must be consistent with the overall purposes of the Housing and Community Development Act of 1974, HUD is limiting the scope of the waiver for consistency with the consolidated plan; it applies only until the grantee first updates its consolidated plan priorities following the disaster.

Action Plan for Disaster Recovery. HUD is waiving the CDBG action plan requirements and substituting an Action Plan for Disaster Recovery. This will allow rapid implementation of disaster recovery grant programs and ensure conformance with provisions of the Appropriations Act. Where possible, the Action Plan for Disaster Recovery, including certifications, does not repeat common action plan elements the grantee has already committed to carry out as part of its annual CDBG submission. Although a State as the grantee may designate an entity or entities to administer the funds, the State is responsible for compliance with Federal requirements. During the course of the grant, HUD will monitor the State's use of funds *and* its actions for consistency with the Action Plan. 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. The State may also amend activities in its Action Plan.

Citizen participation. The citizen participation waiver and alternative requirements will 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. The waiver removes the requirement at both the grantee and state grant recipient levels for public hearings or meetings as the method for disseminating information or collecting

citizen comments. Instead, grantees are encouraged to employ innovative methods to communicate with citizens and solicit their views on proposed uses of disaster recovery funds, and to indicate in the Action Plan how it has addressed these views.

Administration limitation. State program administration requirements must be modified to be consistent with the appropriations act, which allows up to five percent of the grant to be used for the State's administrative costs. The provisions at 42 U.S.C. 5306(d) and 24 CFR 570.489(a)(1)(i) and (iii) will not apply to the extent that they cap State administration expenditures and require a dollar for dollar match of State funds for administrative costs exceeding $100,000. HUD does not waive 24 CFR 570.489(a)(3) to allow the State to exceed the overall planning, management and administrative cap of 20 percent.

Use of Subrecipients

The State CDBG program rule does not make specific provision for the treatment of the entities called ''subrecipients'' in the CDBG entitlement program. The waiver allowing the state to carry out activities directly creates a situation in which the state may use subrecipients to carry out activities in a manner similar to entitlement communities. HUD and its Office of Inspector General have long identified the use of subrecipients as a practice that increases the risk of abuse of funds. HUD's experience is that this risk can be successfully managed by following the CDBG entitlement requirements and related guidance. Therefore, HUD is requiring that a state taking advantage of the waiver allowing it to carry out activities directly must follow the alternative requirements drawn from the CDBG entitlement rule and specified in this Notice when using subrecipients.

Reporting

HUD is waiving the annual reporting requirement because the Congress requires quarterly reports from the grantees and from HUD on various aspects of the uses of funds and of the activities funded with these grants. Many of the data elements the grantees will report to Congress quarterly are the same as those that HUD will use to exercise oversight for compliance with the requirements of this Notice and for prevention of fraud, abuse of funds, and duplication of benefits. To collect these data elements and to meet its reporting requirements, HUD is requiring each grantee to report to HUD quarterly using the online Disaster Recovery Grant Reporting system, which has just converted to a streamlined, re-engineered, Internet-based format. HUD will use grantee reports to monitor for anomalies or performance problems that suggest fraud, abuse of funds, and duplication of benefits; to reconcile budgets, obligations, fund draws, and expenditures; and to calculate applicable administrative and public service limitations and the overall percent of benefit to low- and moderate-income persons, and as a basis for risk analysis in determining a monitoring plan.

After HUD reviews each report and accepts a report, the grantee must post the report on a Web site for its citizens. If a grantee chooses, it may use this report, together with a statement regarding any sole source procurements, as its required quarterly submission to the Committees on Appropriations. Each quarter, HUD will submit to the Committees a summary description of its report reviews, other HUD monitoring and technical assistance activities undertaken during the quarter, and any significant conclusions related to fraud or abuse of funds or duplication of benefits.

Certifications

HUD is waiving the standard certifications and substituting alternative certifications. The alternative certifications are tailored to CDBG disaster recovery grants and remove certifications and references that are redundant or appropriate to the annual CDBG formula program.

Applicable Rules, Statutes, Waivers, and Alternative Requirements

Pre-Grant Process

1. *General note.* 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 Community Development Block Grant 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.

2. *Overall benefit waiver and alternative requirement.* The requirements at 42 U.S.C. 5301(c), 42 U.S.C. 5304(b)(3)(A), and 24 CFR 570.484 that 70 percent of funds are for activities that benefit low- and moderate-income persons are waived to stipulate that at least 50 percent of disaster recovery grant funds are for activities that principally benefit low- and moderate-income persons.

3. *Direct grant administration by States and means of carrying out eligible activities.* Requirements at 42 U.S.C. 5306 are waived to the extent necessary to allow the State to use its disaster recovery grant allocation directly to carry out state-administered activities eligible under this Notice. Activities eligible under this Notice may be undertaken, subject to State law, by the recipient through its employees, or through procurement contracts, or through loans or grants under agreements with subrecipients, or by one or more entities that are designated by the chief executive officer of the State. Activities made eligible under section 105(a)(15) of the Housing and Community Development Act of 1974, as amended, may only be undertaken by entities specified in that section, whether the assistance is provided to such an entity from the State or from a unit of general local government.

4. *Consolidated Plan waiver.* Requirements at 42 U.S.C. 12706 and 24 CFR 91.325(a)(6), that housing activities undertaken with CDBG funds be consistent with the strategic plan, are waived. Further, 42 U.S.C. 5304(e), to the extent that it would require HUD to annually review grantee performance under the consistency criteria, is also waived. These waivers apply only until the time that the grantee first updates the consolidated plan priorities following the disaster.

5. *Citizen participation waiver and alternative requirement.* Provisions of 42 U.S.C. 5304(a)(2) and (3), 42 U.S.C. 12707, 24 CFR 570.486, and 24 CFR 91.115(b) with respect to citizen participation requirements are waived and replaced by the requirements below. The streamlined requirements do not mandate public hearings at either the state or local government level, but do require providing a reasonable opportunity for citizen comment and ongoing citizen access to information about the use of grant funds. The streamlined citizen participation requirements for this grant are:

a. Before the grantee adopts the action plan for this grant or any substantial amendment to this grant, the grantee will publish the proposed plan or amendment (including the information required in this Notice for an Action Plan for Disaster Recovery). The manner of publication (including prominent posting on the state, local, or other relevant website) must afford citizens, affected local governments and other interested parties a reasonable opportunity to examine the plan or

amendment's contents. Subsequent to publication, the grantee must provide a reasonable time period and method(s) (including electronic submission) for receiving comments on the plan or substantial amendment. 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.

b. In the action plan, each grantee will specify its criteria for determining what changes in the grantee's activities constitute a substantial amendment to the plan. At a minimum, adding or deleting an activity or changing the planned beneficiaries of an activity will constitute a substantial change. The grantee may modify or substantially amend the action plan if it follows the same procedures required in this Notice for the preparation and submission of an Action Plan for Disaster Recovery. The grantee must notify HUD, but is not required to notify the public, when it makes any plan amendment that is not substantial.

c. The grantee must consider all comments received on the action plan or any substantial amendment and submit to HUD a summary of those comments and the grantee's response with the action plan or substantial amendment.

d. The grantee must make the action plan, any substantial amendments, and all performance reports available to the public. HUD recommends posting them on the Internet. In addition, the grantee must make these documents available in a form accessible to persons with disabilities and non-English-speaking persons. During the term of this grant, the grantee will provide citizens, affected local governments, and other interested parties reasonable and timely access to information and records relating to the action plan and the grantee's use of this grant.

e. 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.

6. *Modify requirement for consultation with local governments.* Currently, the statute and regulations require consultation with affected units of local government in the non-entitlement area of the State regarding the State's proposed method of distribution. HUD is waiving 42 U.S.C. 5306(d)(2)(C)(iv), 24 CFR 91.325(b), and 24 CFR 91.110, with the alternative requirement that the State consult with all disaster-affected units of general local government, including any CDBG entitlement communities, in determining the use of funds.

7. *Action Plan waiver and alternative requirement.* The requirements at 42 U.S.C. 12705(a)(2), 42 U.S.C. 5304(a)(1), 42 U.S.C. 5304(m), 42 U.S.C. 5306(d)(2)(C)(iii), 24 CFR 1003.604, and 24 CFR 91.320 are waived for these disaster recovery grants. Each State must submit to HUD an Action Plan for Disaster Recovery that describes:

a. The effects of the covered disaster, especially in the most impacted areas and populations, and the greatest recovery needs resulting from the covered disaster that have not been addressed by insurance proceeds, other federal assistance or any other funding source;

b. The grantee's overall plan for disaster recovery including:

(i) How the State will promote sound short and long-term recovery planning at the state and local levels, especially land use decisions that reflect responsible flood plain management, removal of regulatory barriers to reconstruction, and prior coordination with planning requirements of other State and Federal programs and entities;

(ii) How the State will encourage construction methods that emphasize high quality, durability, energy efficiency, and mold resistance including how the State will promote enactment and enforcement of modern building codes and mitigation of flood risk where appropriate;

(iii) How the State will provide or encourage provision of adequate, flood-resistant housing for all income groups that lived in the disaster impacted areas prior to the incident date(s) of the applicable disaster(s), including a description of the activities it plans to undertake to address emergency shelter and transitional housing needs of homeless individuals and families (including subpopulations), to prevent low-income individuals and families with children (especially those with incomes below 30 percent of median) from becoming homeless, to help homeless persons make the transition to permanent housing and independent living, and to address the special needs of persons who are not homeless identified in accordance with 24 CFR 91.315(d);

c. Monitoring standards and procedures that are sufficient to ensure program requirements, including non-duplication of benefits, are met and that provide for continual quality assurance, investigation, and internal audit functions, with responsible staff reporting independently to the Governor of the State or, at a minimum, to the chief officer of the governing body of any designated administering entity;

d. A description of the steps the State will take to avoid or mitigate occurrences of fraud, abuse, and mismanagement, especially with respect to accounting, procurement, and accountability, with a description of how the State will provide for increasing the capacity for implementation and compliance of local governments, subrecipients, subgrantees, contractors, and any other entity responsible for administering activities under this grant; and

e. The state's method of distribution. The method of distribution shall include descriptions of the method of allocating funds to units of local government and of specific projects the state will carry out directly, as applicable. The descriptions will include:

(i) When funds are to be allocated to units of local government, all criteria used to select applications from local governments for funding, including the relative importance of each criterion, and including a description of how the disaster recovery grant resources will be allocated among all funding categories and the threshold factors and grant size limits that are to be applied; and

(ii) When the State will carry out activities directly, the projected uses for the CDBG disaster recovery funds by responsible entity, activity, and geographic area;

(iii) How the method of distribution or use of funds described in accordance with the above subparagraphs will result in eligible uses of grant funds related to long-term recovery from specific effects of the disaster(s) or restoration of infrastructure; and

(iv) Sufficient information so that citizens, units of general local government and other eligible subgrantees or subrecipients will be able to understand and comment on the action plan and, if applicable, be able to prepare responsive applications to the State.

f. Required certifications (see the applicable Certifications section of this Notice); and

g. A completed and executed Federal form SF–424.

8. *Allow reimbursement for pre-agreement costs.* The provisions of 24 CFR 570.489(b) are applied to permit a grantee to reimburse itself for otherwise allowable costs incurred on or after the incident date of the covered disaster.

9. *Clarifying note on the process for environmental release of funds when a State carries out activities directly.* Usually, a State distributes CDBG funds to units of local government and takes on HUD's role in receiving environmental certifications from the

grant recipients and approving releases of funds. For this grant, HUD will allow a State grantee to also carry out activities directly instead of distributing them to other governments. According to the environmental regulations at 24 CFR 58.4, when a State carries out activities directly, the State must submit the certification and request for release of funds to HUD for approval.

10. *Duplication of benefits.* In general, 42 U.S.C. 5155 (section 312 of the Robert T. Stafford Disaster Assistance and Emergency Relief Act, as amended) prohibits any person, business concern, or other entity from receiving financial assistance with respect to any part of a loss resulting from a major disaster as to which he has received financial assistance under any other program or from insurance or any other source. The Appropriations Act stipulates that funds may not be used for activities reimbursable by or for which funds have been made available by the Federal Emergency Management Agency or by the Army Corps of Engineers.

11. *Waiver and alternative requirement for distribution to CDBG metropolitan cities and urban counties.*

a. Section 5302(a)(7) of title 42, U.S.C. (definition of ''nonentitlement area'') and provisions of 24 CFR part 570 that would prohibit a state from distributing CDBG funds to units of general local government in entitlement communities and to Indian tribes, are waived, including 24 CFR 570.480(a), to the extent that such provisions limit the distribution of funds to units of general local government located in entitlement areas and to State or Federally recognized Indian tribes. The state is required instead to distribute funds to the most affected and impacted areas related to the consequences of the covered disaster(s) without regard to a local government or Indian tribe status under any other CDBG program.

b. Additionally, because a State grantee under this appropriation may carry out activities directly, HUD 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. Also, 24 CFR 570.494 regarding timely distribution of funds is waived. However, HUD expects each State grantee to expeditiously obligate and expend all funds, including any recaptured funds or program income, and to carry out activities in a timely manner.

12. *Note that use of grant funds must relate to the covered disaster(s).* In addition to being eligible under 42 U.S.C. 5305(a) or this Notice and meeting a CDBG national objective, the Appropriations Act requires that activities funded under this Notice must also be for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of the hurricanes in communities included in Presidential disaster declarations.

13. *Note on change to administration limitation.* Up to five percent of the grant amount may be used for the State's administrative costs. The provisions of 42 U.S.C. 5306(d) and 24 CFR 570.489(a)(1)(i) and (iii) will not apply to the extent that they cap State administration expenditures and require a dollar for dollar match of State funds for administrative costs exceeding $100,000. HUD does not waive 24 CFR 570.489(a)(3) to allow the State to exceed the overall planning, management and administrative cap of 20 percent.

Reporting

14. *Waiver of performance report and alternative requirement.* The requirements for submission of a Performance Evaluation Report (PER) pursuant to 42 U.S.C.12708 and 24 CFR 91.520 are waived. The alternative requirement is that—

a. Each grantee must submit its Action Plan for Disaster Recovery, including performance measures, into HUD's Web-based Disaster Recovery Grant Reporting (DRGR) system. (The signed certfications and the SF–424 must be submitted in hard copy.) As additional detail about uses of funds becomes available to the grantee, the grantee must enter this detail into DRGR, in sufficient detail to serve as the basis for acceptable performance reports.

b. Each grantee must submit a quarterly performance report, as HUD prescribes, no later than 30 days following each calendar quarter, beginning after the first full calendar quarter after grant award and continuing until all funds have been expended and all expenditures reported. Each quarterly report will include information about the uses of funds during the applicable quarter including (but not limited to) the project name, activity, location, and national objective, funds budgeted, obligated, drawn down, and expended; the funding source and total amount of any non-CDBG disaster funds; beginning and ending dates of activities; and performance measures such as numbers of low- and moderate-income persons or households benefiting. Quarterly reports to HUD must be submitted using HUD's Web-based DRGR system.

15. *Use of subrecipients.* The following alternative requirement applies for any activity that a state carries out directly by funding a subrecipient:

a. 24 CFR 570.503, except that specific references to 24 CFR parts 84 and 85 need not be included in subrecipient agreements.

b. 570.502(b).

16. *Recordkeeping.* Recognizing that the State may carry out activities directly, 24 CFR 570.490(b) is waived in such a case and the following alternative provision shall apply: State records. The State shall establish and maintain such records as may be necessary to facilitate review and audit by HUD of the State's administration of CDBG disaster recovery funds under 24 CFR 570.493. Consistent with applicable statutes, regulations, waivers and alternative requirements, and other Federal requirements, the content of records maintained by the State shall be sufficient to: enable HUD to make the applicable determinations described at 24 CFR 570.493; make compliance determinations for activities carried out directly by the state; and show how activities funded are consistent with the descriptions of activities proposed for funding in the action plan. For fair housing and equal opportunity purposes, and as applicable, such records shall include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the program.

17. *Change of use of real property.* This waiver conforms the change of use of real property rule to the waiver allowing a State to carry out activities directly. For purposes of this program, in 24 CFR 570.489(j), (j)(1), and the last sentence of (j)(2), ''unit of general local government'' shall be read as ''unit of general local government or State.''

18. *Responsibility for State review and handling of noncompliance.* This change conforms the rule with the waiver allowing the State to carry out activities directly. 24 CFR 570.492 is waived and the following alternative requirement applies: The State shall make reviews and audits including on-site reviews of any subrecipients, designated public agencies, and units of general local government as may be necessary or appropriate to meet the requirements of section 104(e)(2) of the Housing and Community Development Act of 1974, as amended, as modified by this Notice. In the case of noncompliance with these requirements, the State shall take such

actions as may be appropriate to prevent a continuance of the deficiency, mitigate any adverse effects or consequences and prevent a recurrence. The State shall establish remedies for noncompliance by any designated public agencies or units of general local governments and for its subrecipients.

19. *Information collection approval note.* HUD has approval for information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) under OMB control number 2506–0165, which expires August 31, 2007. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, nor is a person required to respond to, a collection of information unless the collection displays a valid control number.

Certifications

20. *Certifications for state governments, waiver and alternative requirement.* Section 91.325 of title 24 Code of Federal Regulations is waived. Each state must make the following certifications prior to receiving a CDBG disaster recovery grant:

a. The state certifies that it will affirmatively further fair housing, which means that it 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)(ii).)

b. The state certifies that it has in effect and is following a residential anti-displacement and relocation assistance plan in connection with any activity assisted with funding under the CDBG program.

c. The state certifies its compliance with restrictions on lobbying required by 24 CFR part 87, together with disclosure forms, if required by that part.

d. The state certifies that the Action Plan for Disaster Recovery is authorized under state law and that the state, and any entity or entities designated by the State, possesses the legal authority to carry out the program for which it is seeking funding, in accordance with applicable HUD regulations and this Notice.

e. The state certifies that it will comply with the acquisition and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and implementing regulations at 49 CFR part 24, except where waivers or alternative requirements are provided for this grant.

f. The state certifies that it will comply with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u), and implementing regulations at 24 CFR part 135.

g. The state certifies that it is following a detailed citizen participation plan that satisfies the requirements of 24 CFR 91.115 (except as provided for in notices providing waivers and alternative requirements for this grant), and that each unit of general local government that is receiving assistance from the state is following a detailed citizen participation plan that satisfies the requirements of 24 CFR 570.486 (except as provided for in notices providing waivers and alternative requirements for this grant).

h. The state certifies that it has consulted with affected units of local government in counties designated in covered major disaster declarations in the nonentitlement, entitlement and tribal areas of the state in determining the method of distribution of funding;

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 the most impacted and distressed areas related to the consequences of the Gulf Coast hurricanes of 2005 in communities included in Presidential disaster declarations.

(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.

(4) The state will not attempt to recover any capital costs of public improvements assisted with CDBG disaster recovery grant funds, by assessing any amount against properties owned and occupied by persons of low- and moderate-income, including any fee charged or assessment made as a condition of obtaining access to such public improvements, unless (A) disaster recovery grant funds are used to pay the proportion of such fee or assessment that relates to the capital costs of such public improvements that are financed from revenue sources other than under this title; or (B) for purposes of assessing any amount against properties owned and occupied by persons of moderate income, the grantee certifies to the Secretary that it lacks sufficient CDBG funds (in any form) to comply with the requirements of clause (A).

j. The state certifies that the grant will be conducted and administered in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and the Fair Housing Act (42 U.S.C. 3601–3619) and implementing regulations.

k. The state certifies that it has and that it will require units of general local government that receive grant funds to certify that they have adopted and are enforcing:

(1) A policy prohibiting the use of excessive force by law enforcement agencies within its jurisdiction against any individuals engaged in non-violent civil rights demonstrations; and

(2) A policy of enforcing applicable state and local laws against physically barring entrance to or exit from a facility or location that is the subject of such non-violent civil rights demonstrations within its jurisdiction.

l. The state certifies that each state grant recipient or administering entity has the capacity to carry out disaster recovery activities in a timely manner, or the state has a plan to increase the capacity of any state grant recipient or administering entity who lacks such capacity.

m. The state certifies that it will not use CDBG disaster recovery funds for any activity in an area delineated as a special flood hazard area in FEMA's most current flood advisory maps unless it also ensures that the action is designed or modified to minimize harm to or within the floodplain in accordance with Executive Order 11988 and 24 CFR part 55.

n. The state certifies that it will comply with applicable laws.

Duration of Funding

Availability of funds provisions in 31 U.S.C. 1551–1557, added by section 1405 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510), limit the availability of certain appropriations for expenditure. This limitation may not be waived. However, the Appropriations Act for these grants directs that these funds be available until expended unless, in accordance with 31 U.S.C. 1555, the Department determines that the purposes for which the appropriation has been made have been carried out and no disbursement has been made against the appropriation for two consecutive fiscal years. In such

case, the Department shall close out the grant prior to expenditure of all funds.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for the disaster recovery grants under this Notice are as follows: 14.219; 14.228.

Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The FONSI is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street, SW., Washington, DC 20410–0500.

Dated: February 3, 2006.

Pamela H. Patenaude,

Assistant Secretary for Community Planning and Development.

[FR Doc. 06–1357 Filed 2–9–06; 2:51 pm]

BILLING CODE 4210–67–P

Exhibit E

October 30, 2006 HUD Notice of Allocations and Waivers

Allocations and Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under Chapter 9 of Title II of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006, 71 Fed. Reg. 63,337 (Oct. 30, 2006).

Capital Advance: $1,499,500
Five-year rental subsidy: $188,500
Number of units 15

Texas

Dallas, TX
Non-Profit Sponsor: CC Young Memorial Home Inc
Capital Advance: $4,216,500
Five-year rental subsidy: $806,000
Number of units 54

Houston, TX
Five-year rental subsidy: $1,012,000
Number of units 67

San Antonio, TX
Non-Profit Sponsor: Retirement Housing Foundation
Capital Advance: $4,065,300
Five-year rental subsidy: $753,500
Number of units 55

Waco, TX
Non-Profit Sponsor: Mercy Housing Inc
Co-Sponsor: Mercy Housing Colorado
Capital Advance: $4,208,400
Five-year rental subsidy: $821,500
Number of units 55

Utah

Price, UT
Non-Profit Sponsor: Comm Hsg Ser Inc
Capital Advance: $3,516,000
Five-year rental subsidy: $466,000
Number of units 33
Project Description:
The funds will be used for the new construction of two buildings for the very low-income elderly consisting of a total of 33 units. Some of the supportive services that will be provided are meals-on-wheels, housekeeping assistance, social activities and transportation.

Virginia

Kilmarnock, VA
Non-Profit Sponsor: Bay Aging
Capital Advance: $1,515,900
Five-year rental subsidy: $299,500
Number of units 19

Vinton, VA
Non-Profit Sponsor: Metropolitan Housing and CDC, Inc.
Capital Advance: $5,824,400
Five-year rental subsidy: $1,150,500
Number of units 73

Washington

Buckley, WA
Non-Profit Sponsor: Enumclaw Community Hospital
Capital Advance: $2,042,700
Five-year rental subsidy: $318,500
Number of units 20

Kennewick, WA
Non-Profit Sponsor: Shalom Ecumenical Center
Capital Advance: $4,008,900
Five-year rental subsidy: $722,000
Number of units 45

Spokane, WA
Non-Profit Sponsor: East Central Community Organization
Capital Advance: $2,157,200
Five-year rental subsidy: $394,000
Number of units 25

Vancouver, WA
Non-Profit Sponsor: Columbia Non-Profit Housing
Capital Advance: $5,479,700
Five-year rental subsidy: $866,500
Number of units 56

Yakima, WA
Non-Profit Sponsor: Diocese of Yakima Housing Services
Capital Advance: $3,544,700
Five-year rental subsidy: $640,000
Number of units 40

Wisconsin

Milwaukee, WI
Non-Profit Sponsor: Eternal Life Church of God in Christ
Capital Advance: $2,799,900
Five-year rental subsidy: $380,000
Number of units 24

Town of Russell, WI
Non-Profit Sponsor: Impact Seven INC
Capital Advance: $1,255,300
Five-year rental subsidy: $198,500
Number of units 12

[FR Doc. E6–18071 Filed 10–27–06; 8:45 am]
BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5089–N–01]

Allocations and Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under Chapter 9 of Title II of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of allocation, waivers, and alternative requirements.

SUMMARY: This Notice advises the public of the allocations for grant funds for Community Development Block Grant (CDBG) disaster recovery grants for the purpose of assisting in the recovery in the most impacted and distressed areas related to the consequences of Hurricanes Katrina, Rita, and Wilma in the Gulf of Mexico in 2005. As described in the Supplementary Information section of this notice, HUD is authorized by statute to waive statutory and regulatory requirements and specify alternative requirements for this purpose, upon the request of the State grantees. This notice also describes the application and reporting waivers and the common alternative requirements for the grants made under the subject appropriations act.

DATES: *Effective Date:* November 6, 2006.

FOR FURTHER INFORMATION CONTACT: Jan C. Opper, Director, Disaster Recovery and Special Issues Division, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7286, Washington, DC 20410, telephone number (202) 708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339. FAX inquiries may be sent to Mr. Opper at (202) 401–2044. (Except for the ''800'' number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

Authority To Grant Waivers

Chapter 9 of Title II of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 (Pub. L. 109–234, approved June 15, 2006) (Public Law 109–234) appropriates $5.2 billion in Community Development Block Grant funds for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure directly related to the consequences of the covered disasters. Public Law 109–234 authorizes the Secretary 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 use by the recipient of these funds and guarantees, except for requirements related to fair housing, nondiscrimination, labor standards, and the environment, upon a request by the State and a finding by the Secretary that such a waiver would not be inconsistent with the overall purpose of the statute. The following application and reporting waivers and alternative requirements are in response to requests from the States receiving an allocation under this notice.

The Secretary finds that the following waivers and alternative requirements, as described below, are not inconsistent with the overall purpose of Title I of the Housing and Community Development Act of 1974, as amended, or the Cranston-Gonzalez National Affordable Housing Act, as amended.

Under the requirements of the Department of Housing and Urban Development Act, as amended (42 U.S.C. 3535(q)), regulatory waivers must be published in the **Federal Register**.

Except as described in this and other notices applicable to this grant, statutory and regulatory provisions governing the Community Development Block Grant program for States, including those at 24 CFR part 570, shall apply to the use of these funds. In accordance with Public Law 109–234, HUD will reconsider every waiver in this notice on the two-year anniversary of the day this notice is published.

Allocations

Public Law 109–234 (effective June 15, 2006) provides $5.2 billion of supplemental appropriation for the CDBG program for:

necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of Hurricanes Katrina, Rita, or Wilma.

The law further notes:

That funds provided under this heading shall be administered through an entity or entities designated by the Governor of each State. And that: *No State shall receive more than $4.2 billion of the amount provided under this heading.*

As provided for in Public Law 109–234, the funds may not be used for activities reimbursable by or for which funds are made available by the Federal Emergency Management Agency or the Army Corps of Engineers. Further, none of the funds made available under this heading may be used by a State or locality as a matching requirement, share, or contribution for any other Federal program.

Also as required by the law, not less than $1.0 billion of the $5.2 billion appropriation less $27.0 million in administrative set-asides (which computes to 19.3311 percent of any State's allocation) shall be used for repair, rehabilitation, and reconstruction (including demolition, site clearance and remediation) of the affordable rental housing stock (including public and other HUD-assisted housing) in the impacted areas. Therefore, HUD is requiring that not less than 19.3311 percent of each State's grant be used for these activities.

From this supplemental appropriation, the Secretary is allocating funds as follows.

State	Disaster	Allocation amount ($)
Alabama	Hurricane Katrina (FEMA–1605–DR)	$21,225,574
Florida	Hurricane Katrina (FEMA–1602–DR), Hurricane Wilma (FEMA–1609–DR)	100,066,518
Louisiana	Hurricane Katrina (FEMA–1603–DR), Hurricane Rita (FEMA–1607–DR)	4,200,000,000
Mississippi	Hurricane Katrina (FEMA–1604–DR)	423,036,059
Texas	Hurricane Rita (FEMA–1606–DR)	428,671,849

State	Minimum amount for affordable rental housing ($)
Alabama	$4,103,146
Florida	19,344,001
Louisiana	811,907,984
Mississippi	81,777,703
Texas	82,867,166

The amounts in the table directly above are the minimum required for each State to use of its allocation from Public Law 109–234 for repair, rehabilitation, and reconstruction (including demolition, site clearance and remediation) of the affordable rental housing stock (including public and other HUD-assisted housing) in the impacted areas.

In Louisiana, the Department has reviewed data chronicling the massive impact of the disasters on affordable rental housing, including public housing, in the areas of the State most affected by disasters. In light of the unprecedented housing needs resulting from the disasters, the Secretary is carrying out his statutory duty to ensure that priority has been given to identified affordable rental housing by providing an alternative requirement. HUD is requiring that, before the State of Louisiana expends any funds to meet the minimum requirement for affordable rental housing under this notice (*see* table above), the Governor of Louisiana shall demonstrate to the Secretary's satisfaction that the State will provide funds or has identified dedicated resources sufficient to meet the key disaster recovery needs for repair, rehabilitation, and reconstruction of affordable rental housing stock, including public housing, in the most impacted areas of the State.

HUD invites each State receiving an allocation to submit an Action Plan for Disaster Recovery in accordance with this notice.

The appropriations statute requires funds be used only for disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of hurricanes in the Gulf of Mexico in 2005. The statute directs that each grantee will describe in its Action Plan for Disaster Recovery how the use of the grant funds gives priority to infrastructure development and rehabilitation and the rehabilitation and reconstruction of the affordable rental housing stock including public and other HUD-assisted housing. HUD will monitor compliance with this direction and may be compelled to disallow expenditures if it finds uses of funds are not disaster-related, or funds allocated duplicate other benefits.

For the State of Louisiana, which suffered major impacts from two different hurricanes, HUD estimates that over 85 percent of the major and severe damage due to those storms is in the New Orleans-Metairie-Bogalusa Metropolitan Area (Jefferson, Orleans, Plaquemines, St. Bernard, St. Charles, St. John the Baptist, and St. Tammany Parishes). HUD therefore expects that the State will target a substantial majority of its disaster recovery funds under Pub. L. 109–234 toward the disaster recovery needs in the New Orleans-Metairie-Bogalusa Metropolitan Area, and has included an alternative requirement to that effect.

Prevention of Fraud, Abuse, and Duplication of Benefits

The statute also directs the Secretary to:

Establish procedures to prevent recipients from receiving any duplication of benefits and report quarterly to the Committees on Appropriations with regard to all steps taken to prevent fraud and abuse of funds made available under this heading including duplication of benefits.

To meet this directive, HUD is pursuing five courses of action. First, this notice makes applicable specific reporting, written procedures, monitoring, and internal audit requirements for grantees. Second, to the extent its resources allow, HUD will institute risk analysis and on-site monitoring of grantee management of the grants and of the specific uses of funds. Third, HUD will be extremely cautious in considering any waiver related to basic financial management requirements. The standard, time-tested CDBG financial requirements will continue to apply. Fourth, HUD is collaborating with the HUD Office of Inspector General to plan and implement oversight of these funds. Fifth, HUD will follow the direction of the conference report, 109–494, and apply $6 million of funds appropriated for the Working Capital Fund for ''immediate enhancement of the capabilities of the Disaster Recovery Grant Reporting system by building

additional electronic controls that will increase accountability while further decreasing the risk of fraud, waste, or abuse.''

Waiver Justification

In general, waivers already granted to the States and alternative requirements already specified for CDBG disaster recovery grant funds provided under the Department of Defense Appropriations Act, 2006 (Pub. L. 109–148, approved December 30, 2005) (Appropriations Act) will also apply to grant funds provided under Public Law 109–234. This eliminates unnecessary inconsistencies in administration of the two grants and thus reduces the opportunities for technical errors. The notices in which these prior waivers and alternative requirements appear are 71 FR 7666, published February 13, 2006 (all five States); 71 FR 34448 (for Alabama), 71 FR 34451 (for Mississippi), and 71 FR 34457 (for Louisiana), all published June 14, 2006; 71 FR 43622, published August 1, 2006 (for Texas); 71 FR 51678 (for Florida), published August 30, 2006; and 71 FR 62372 (for Mississippi), published October 24, 2006, except that the provisions of paragraph four of the latter notice do not apply to the funds allocated under Pub. L. 109–234.

In addition to making applicable the requirements cited above, this notice specifies and provides for differences in program rules, waivers, or alternative requirements that are necessary due to the provisions of Public Law 109–234.

The provisions of this notice do not apply to funds provided under the regular CDBG program. The provisions provide additional flexibility in program design and implementation and implement statutory requirements unique to this appropriation.

Application for Allocation

The waivers and alternative requirements related to a State's application for its allocation are those delineated in a notice entitled, ''Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Department of Defense Appropriations Act, 2006,'' published February 13, 2006 71 (FR 7666), with the changes noted below. HUD encourages each State receiving an allocation to submit an Action Plan for Disaster Recovery to HUD within 60 days of the publication date of this notice.

New elements added to the State's Action Plan for Disaster Recovery include a description of how the State will give priority to infrastructure development and rehabilitation and how the State will give priority to the rehabilitation and reconstruction of the affordable rental housing stock including public and other HUD-assisted housing. The State must also explain how its choices for fund use will result in the State meeting the requirement to use not less than 19.3311 percent of its allocation for repair, rehabilitation, and reconstruction (including demolition, site clearance and remediation) of the affordable rental housing stock (including public and other HUD-assisted housing) in the impacted areas. The explanation should include how the State has considered the unique challenges that individuals with disabilities face in finding accessible and affordable housing.

Applicable Rules, Statutes, Waivers, and Alternative Requirements

1. *General note.* Except as described in this notice, the statutory, regulatory, and notice provisions that shall apply to the use of these funds are:

a. Those governing the funds appropriated under the Appropriations Act and already published in the **Federal Register**, including those in notices 71 FR 7666, published February 13, 2006 (for all five States); 71 FR 34448 (for Alabama), 71 FR 34451 (for Mississippi), and 71 FR 34457 (for Louisiana), all published June 14, 2006; 71 FR 43622 for Texas, published August 1, 2006; 71 FR 51678 (for Florida), published on August 30, 2006; and 71 FR 62372 (for Mississippi), published October 24, 2006, except that the provisions of paragraph four of the latter notice do not apply to the funds allocated under Public Law 109–234; and

b. Those governing the Community Development Block Grant program for States, including those at 42 U.S.C. 5301 *et seq.* and 24 CFR part 570.

2. *Action Plan additional elements.* a. In addition to the waivers and alternative requirements published in the ''Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Department of Defense Appropriations Act, 2006'' notice published February 13, 2006, the disaster recovery grantees receiving funding under Public Law 109–234 must add the items in paragraph b below to those described in paragraph number 7 on page 7669 of that notice regarding the information required in the State's overall plan for disaster recovery for use of funds under Public Law 109–234.

b. The grantee's overall plan for disaster recovery will also include:

(i) An explanation of how the State will give priority to the rehabilitation and reconstruction of the affordable rental housing stock including public and other HUD-assisted housing, a description of the activities the State plans to undertake with grant funds under this priority, and a description of the unique challenges that individuals with disabilities face in finding accessible and affordable housing;

(ii) An explanation of how the State will give priority to infrastructure development and rehabilitation, and a description of the infrastructure activities it plans to undertake with grant funds; and

(iii) An explanation of how the method of distribution or use of funds described in accordance with the applicable notices will result in the State meeting the requirement that at least 19.3311 percent of its allocation under this notice shall be used for repair, rehabilitation, and reconstruction (including demolition, site clearance and remediation) of the affordable rental housing stock (including public and other HUD-assisted housing) in the impacted areas.

3. *Note that use of grant funds must relate to the covered disaster(s).* In addition to being eligible under 42 U.S.C. 5305(a) of this notice and meeting a CDBG national objective under the penultimate paragraph of 42 U.S.C. 5304(b)(3), Public Law 109–234 requires that activities funded under this notice must also be for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of Hurricanes Katrina, Rita, and Wilma in communities included in Presidential disaster declarations.

4. *Alternative Requirements Regarding Targeting in Louisiana.* a. The State of Louisiana will target 70 percent of its disaster recovery funds under Pub. L. 109–234 towards the disaster recovery needs in the New Orleans-Metairie-Bogalusa Metropolitan Area; and

b. Before the State of Louisiana expends any funds to meet the minimum requirement for affordable rental housing under this notice, the Governor of Louisiana shall demonstrate to the Secretary's satisfaction that the State will provide funds or has identified dedicated resources sufficient to meet the key disaster recovery needs for repair, rehabilitation, and reconstruction of affordable rental housing stock, including public housing

disaster recovery in the most impacted areas of the State.

5. *Information collection approval note.* HUD has approval for information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) under OMB control number 2506–0165, which expires August 31, 2007. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, nor is a person required to respond to, a collection of information unless the collection displays a valid control number.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for the disaster recovery grants under this notice are as follows: 14.219; 14.228.

Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The FONSI is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the finding by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number).

Dated: October 25, 2006.

Roy A. Bernardi,

Deputy Secretary.

[FR Doc. 06–8978 Filed 10–26–06; 1:56 pm]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5067–N–02]

Extension of Period of Submission for Notices of Intent and Fungibility Plans in Accordance With HUD's Implementation Guidance for Section 901 of the Emergency Supplemental Appropriations To Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: On July 28, 2006, HUD published a notice entitled, ''Implementation Guidance for Section 901 of the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.'' This notice extends the period for eligible public housing agencies (PHAs) located within the most heavily impacted areas of Louisiana and Mississippi that are subject to a declaration by the President of a major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in connection with Hurricanes Katrina or Rita to submit Notices of Intent and Fungibility Plans in accordance with the July 28, 2006, notice. Section 901 of the supplemental appropriations act authorizes PHAs to combine assistance provided under sections 9(d) and (e) of the United States Housing Act of 1937 (Act) and assistance provided under section 8(o) of the Act, for the purpose of facilitating the prompt, flexible, and efficient use of funds provided under these sections of the Act to assist families who were receiving housing assistance under the Act immediately prior to Hurricane Katrina or Rita and were displaced from their housing by the hurricanes. In addition to extending the PHA submission deadline, this notice removes the restriction that the combined funding may not be spent for uses under the housing choice voucher (HCV) program. If approved by HUD, the combined funding may now be used for eligible purposes under the HCV program. Any use of combined funds under the HCV program must also be in accordance with the requirement to assist those families who were receiving housing assistance under the public housing or HCV program immediately prior to Hurricane Katrina or Rita and were displaced from their housing by the hurricane. A PHA that already has an approved Fungibility Plan may request HUD approval to change the Plan in order to use the combined funds for HCV program eligible purposes. As provided in the July 28, 2006 **Federal Register** notice, PHAs must submit to HUD requests for approval of any substantial deviations from the approved Fungibility Plan, and HUD will respond to such requests within 10 calendar days.

DATES: Eligible PHAs must submit their Notices of Intent and Fungibility Plans no later than November 21, 2006.

FOR FURTHER INFORMATION CONTACT: For technical assistance and other questions concerning the Notice of Intent and Section 901 Fungibility Plan, PHAs should contact their local HUD Public Housing Hub in New Orleans, Louisiana, or Jackson, Mississippi; or Bessy Kong, Deputy Assistant Secretary for Policy, Program, and Legislative Initiatives, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4216, Washington, DC 20410–5000, telephone (202) 708–0614 or 708–0713, extension 2548 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On July 28, 2006 (71 FR 42996), HUD published a notice entitled, ''Implementation Guidance for Section 901 of the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.'' Section V.A. of the July 28, 2006, notice, entitled, ''General Procedures for Combining Public Housing and Voucher Funds Under Section 901,'' instructs that PHAs interested in implementing the flexibility authorized in Section 901 should submit, in writing for HUD review and approval, no later than 45 days from the date of the notice or September 11, 2006: (1) A Notice of Intent to invoke Section 901 flexibility and (2) a detailed Section 901 Fungibility Plan describing the total amount under Section 901, and the source of those funds by account (HCV, Operating Fund, Capital Fund).

Some eligible PHAs are facing circumstances that precluded submission of their Notices of Intent and Fungibility plans by September 11, 2006, and require additional time to determine whether program funds are available to combine for other program uses. Therefore, HUD has extended the period during which eligible PHAs may submit their Notices of Intent and Fungibility Plans to no later than November 21, 2006, in order to allow sufficient time for HUD to review and approve the plans. HUD strongly recommends earlier submission, if possible, in the event resubmission of plans is required because of HUD's review determinations. HUD must approve all plans, including those that must be resubmitted, no later than December 31, 2006.

In addition to extending the PHA submission deadline, this notice removes the restriction that the combined funding may not be spent for uses under the housing choice voucher (HCV) program. If approved by HUD, the combined funding may now be used

Exhibit F

December 11, 2007 HUD Notice of Allocations and Requirements

Allocations and Requirements for the Supplemental Grant to the State of Louisiana Under Division B of the Department of Defense Appropriations Act, 2008, 72 Fed. Reg. 70,472 (Dec. 11, 2007).

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5183–N–01]

Allocations and Requirements for the Supplemental Grant to the State of Louisiana Under Division B of the Department of Defense Appropriations Act, 2008

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of allocation and requirements.

SUMMARY: This Notice advises the public of the allocation of a $3 billion Community Development Block Grant (CDBG) disaster recovery grant to the State of Louisiana solely for the purpose of covering costs associated with otherwise uncompensated but eligible claims that were filed on or before July 31, 2007, under the Road Home homeowner compensation program administered by the State in accordance with plans approved by the Secretary. As described in the Supplementary Information section of this notice, HUD has determined that the State shall follow the requirements applicable to the other CDBG disaster recovery grants funding the Road Home homeowner compensation program, unless those requirements conflict with the requirements of section 159 of Public Law 110–116, in which case the requirements of that law apply.

DATES: *Effective Date*: December 11, 2007.

FOR FURTHER INFORMATION CONTACT: Jessie Handforth Kome, Director, Disaster Recovery and Special Issues Division, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7286, Washington, DC 20410, telephone number (202) 708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339. Fax inquiries may be sent to Ms. Kome at (202) 401–2044. (Except for the ''800'' number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

Program Requirements

Except as described in Public Law 110–116 and in this and other notices applicable to this grant, statutory and regulatory provisions governing the Community Development Block Grant program for states, including those at 24 CFR part 570, shall apply to the use of these funds.

The stated purpose of the supplemental appropriation is:

> * * * solely for the purpose of covering costs associated with otherwise uncompensated but eligible claims that were filed on or before July 31, 2007, under the Road Home program administered by the State in accordance with plans approved by the Secretary.

The conference report clarifies that these funds are for costs associated with the Road Home homeowner compensation program and not for any other Road Home program. Public Law 110–116 further stipulates that the funds must ''serve only to supplement and not supplant any other State or Federal resources committed to the Road Home program.''

On review of Public Law 110–116, HUD has determined these funds must be used in accordance with the same CDBG disaster recovery program requirements that apply to the Road Home homeowner compensation program under law, regulation, and Notice unless those requirements conflict with the requirements of Public Law 110–116, in which case the stipulations of that supplemental law shall apply. This means, for example, that:

- The State must only use the funds for costs eligible under the Road Home homeowner compensation program under the Action Plans for Disaster Recovery (Action Plans) for the grants made under Public Laws 109–148 and 109–234, as those plans have been amended and accepted by HUD and in accordance with Public Law 110–116;
- The State may assume the responsibility for environmental review related to this grant in accordance with 24 CFR part 58;
- Because this grant is additional funding for activities included in approved Action Plans, this Notice requires that the amount of CDBG disaster recovery and State funds must remain at or above the allocations for the homeowner compensation program as of the date the law is effective until funds for the costs associated with the last eligible homeowner compensation claim are assigned by the State;
- On a quarterly basis, the State must report to HUD on the grant in the disaster recovery grant reporting system;
- The same CDBG disaster recovery financial standards and requirements apply to this grant as applied to the two preceding CDBG disaster recovery grants to the State;
- The same CDBG property disposition requirements apply to properties assisted or acquired with this grant; and
- HUD will apply the same actions to prevent fraud, waste, and abuse of funds related to this grant as it is applying to the previous CDBG disaster recovery grants.

As noted, in general, CDBG waivers already granted to the State and alternative requirements already specified for CDBG disaster recovery grant funds provided under Public Law 109–148 and under Public Law 109–234 also apply to grant funds provided under Public Law 110–116. This eliminates unnecessary inconsistencies in administration of the three grants and, thus, reduces the opportunities for technical errors. The notices in which these prior waivers and alternative requirements appear are 71 FR 7666, published February 13, 2006 (all five states); 71 FR 34451 (for Louisiana), published June 14, 2006; 71 FR 63337, published October 30, 2006 (all five states); 72 FR 10014, published March 6, 2007 (for Louisiana); and 72 FR 48804, published August 24, 2007 (all five states). In addition to the requirements imposed by HUD, all other requirements of the Road Home homeowner compensation program shall apply to the use of these funds. Specifically, it is HUD's understanding that the State set a deadline of December 1, 2007, for those homeowners who applied by July 31, 2007, to schedule an appointment with the Road Home program to complete the application and begin the verification process. HUD expects the State to adhere to this deadline. The State may not extend this deadline without prior HUD approval.

The Road Home homeowner compensation program includes an elevation component, which is eligible under CDBG, but was intended by the program designers to be funded primarily through a Federal Emergency Management Agency (FEMA) program. Therefore, HUD expects the State of Louisiana to continue to work constructively with FEMA to access the available Hazard Mitigation Grant Program funding for elevation activities.

The provisions of this notice do not apply to funds provided to the states under the regular CDBG program.

Allocations

Public Law 110–116 (effective November 13, 2007) provides $3 billion of supplemental appropriation for the State of Louisiana CDBG program solely for:

> the purpose of covering costs associated with otherwise uncompensated but eligible claims that were filed on or before July 31, 2007, under the Road Home program administered by the State in accordance with plans approved by the Secretary.

As further provided for in Public Law 110–116, the funds may only be used to supplement and not supplant any other

State or federal resources committed to the Road Home homeowner compensation program. No funds shall be drawn from the U.S. Treasury beyond those necessary to fulfill this exclusive purpose. To ensure compliance with this limitation, the Department will make the grant under this Notice, but will restrict the use of the grant funds in the State's line of credit until the State has certified to HUD that all CDBG funds approved for the same purposes in the Action Plans for Disaster Recovery under each preceding CDBG disaster recovery grant (as of November 13, 2007, amounts budgeted from the grant under Public Law 109–148 equal $4,035,090,868 and those under the Public Law 109–234 grant equal $2,955,361,750), along with the $372.5 million of additional state-appropriated funds pledged to the Road Home homeowner compensation program, have already been assigned by the State for eligible costs under that program. The State will demonstrate this assignment by documenting payment requests from its contractor for costs associated with Option 1 claims that have already closed or for costs associated with Option 2 or 3 claims that are scheduled for closing. The payment requests must document costs associated with homeowner compensation claims that are sufficient to exhaust funds budgeted for homeowner compensation in the Public Law 109–148 and Public Law 109–234 grants and the $372.5 million in cash budgeted by the State. On receiving the signed certification from the State, HUD will permit drawdowns under this grant to commence. This assignment and certification process will allow HUD and the State to comply with the law without slowing the flow of funds to homeowners and without undue burden to the State program administrators. HUD will monitor compliance with this direction and may be compelled to disallow expenditures if it finds uses of funds are not in compliance with this provision.

Prevention of Fraud, Abuse, and Duplication of Benefits

The previous supplemental appropriations statutes (Public Laws 109–148 and 109–234) also directed the Secretary to:

> Establish procedures to prevent recipients from receiving any duplication of benefits and report quarterly to the Committees on Appropriations with regard to all steps taken to prevent fraud and abuse of funds made available under this heading including duplication of benefits.

The grant under this Notice will be subject to the courses of action HUD is already undertaking for the two previous grants to the State. To meet this directive, HUD is pursuing five courses of action. First, this Notice makes applicable specific reporting, written procedures, monitoring, and internal audit requirements for grantees. Second, to the extent its resources allow, HUD will institute risk analysis and on-site monitoring of grantee management of the grants and of the specific uses of funds. Third, HUD will be extremely cautious in considering any waiver related to basic financial management requirements. HUD's standard, time-tested CDBG financial requirements will continue to apply. Fourth, HUD is collaborating with the HUD Office of Inspector General to plan and implement oversight of these funds. Fifth, HUD is applying $6 million for immediate enhancement of the capabilities of the Disaster Recovery Grant Reporting system by building additional electronic controls to increase accountability while further decreasing the risk of fraud, waste, or abuse of funds.

Application for Allocation

The general requirements related to a state's application for its allocation are those delineated in a notice entitled, ''Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Department of Defense Appropriations Act, 2006,'' published February 13, 2006, at 71 FR 7666. HUD invites the State of Louisiana to submit an application, including a Standard Form 424 and the appropriate CDBG disaster recovery certifications as listed in that Notice. Public Law 110–116 stipulates that this grant is governed by the State's Action Plans for the Road Home homeowner compensation program. Adding the additional program funding constitutes an amendment to the program covered by these plans, but because of the specificity of the law regarding the uses of funds, HUD has determined that the Action Plans taken together are drafted so that this funding increase, large as it is, does not meet the substantial amendment definition in the Notice cited above.

Applicable Rules, Statutes, Waivers, and Alternative Requirements

1. *General requirements.* Except as described in this Notice, the statutory, regulatory, and notice provisions that shall apply to the use of these funds are:

a. Those governing the funds appropriated under the Appropriations Act and already published in the **Federal Register**, including those in notices 71 FR 7666, published February 13, 2006 (for all five states); 71 FR 34451 (for Louisiana), published June 14, 2006; 71 FR 63337, published October 30, 2006 (all five states); 72 FR 10014, published March 6, 2007 (for Louisiana); and 72 FR 48804, published August 24, 2007 (all five states); and

b. Those governing the CDBG program for states, including those at 42 U.S.C. 5301 *et seq.* and 24 CFR part 570.

c. In addition to the requirements imposed by HUD, all other requirements of the Road Home homeowner compensation program shall apply to the use of these funds. Specifically, it is HUD's understanding that the State set a deadline of December 1, 2007, for those homeowners who applied by July 31, 2007, to schedule an appointment with the Road Home program to complete the application and begin the verification process. HUD expects the State to adhere to this deadline. The State may not extend this deadline without prior HUD approval.

2. *Use of grant funds.*

a. Public Law 110–116 requires that activities funded under this Notice be used solely for the purpose of covering costs associated with otherwise uncompensated but eligible claims that were filed on or before July 31, 2007 under the Road Home homeowner compensation program administered by the State in accordance with its CDBG Action Plans. To the extent that the requirements of Public Law 110–116 conflict with the requirements listed in paragraph 1 of this Notice, the requirements of Public Law 110–116 will apply.

b. Further, grant funds must serve only to supplement and not supplant any other state or federal resources committed to the Road Home program. Before the Department will permit the State to draw down grant funds, the State must certify to HUD, in writing, that all CDBG funds approved for the same purposes in the Action Plans under the grants made under Public Laws 109–148 and 109–234 and the $372.5 million in additional state funds pledged to the Road Home homeowner compensation program already have been assigned or expended by the State for costs associated with the homeowner compensation program. The State will demonstrate the assignment of funds by documenting payment requests from the contractor for costs associated with Option 1 claims that have already closed or for costs associated with Option 2 or 3 claims that are scheduled for closing. The payment requests must document total costs associated with homeowner compensation claims that are sufficient to exhaust funds budgeted

for homeowner compensation in the Public Law 109–148 and Public Law 109–234 grants and the $372.5 million in cash budgeted by the State. On receiving the signed certification from the State, HUD will permit the State to begin making draw downs under this grant.

c. The amount of CDBG disaster recovery funds budgeted for the homeowner compensation program must remain at or above the current Actions Plan allocations for the homeowner compensation program as of the date the law is effective until the costs associated with the last eligible homeowner compensation claim are assigned.

3. *De-obligation of unused grant funds.* If grant funds under Public Law 110–116 remain after all costs associated with Road Home homeowner compensation claims that were filed on or before July 31, 2007, have been paid, those remaining funds shall be de-obligated by HUD.

4. *Information collection approval note.* HUD has approval for information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) under Office of Management and Budget (OMB) control number 2506–0165 . In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, nor is a person required to respond to, a collection of information unless the collection displays a valid control number.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for the disaster recovery grants under this Notice are as follows: 14.219; 14.228.

Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The FONSI is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the finding by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number).

Dated: December 5, 2007.

Roy A. Bernardi,

Deputy Secretary.

[FR Doc. E7–24002 Filed 12–10–07; 8:45 am]

BILLING CODE 4210–67–P

Exhibit G

August 8, 2008 HUD Notice of Reconsideration of Waivers

Reconsideration of Waivers Granted to and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees Under Public Laws 109–148 and 109–234,73 Fed. Reg. 46,312 (Aug. 8, 2008).

Naval Base
Point Loma CA
Landholding Agency: Navy
Property Number: 77200830012
Status: Unutilized
Reasons: Secured Area

New York

Bldg. 913T
Brookhaven Natl Laboratory
Upton NY 11973
Landholding Agency: Energy
Property Number: 41200830001
Status: Unutilized
Reasons: Extensive deterioration; Secured Area; Within 2000 ft. of flammable or explosive material

Ohio

National Guard Facility
1512 Oak Harbor Rd.
Fremont OH 43420
Landholding Agency: GSA
Property Number: 54200830006
Status: Excess
GSA Number: 1–D–OH–834
Reasons: Within 2000 ft. of flammable or explosive material

Unsuitable Properties

Building

Utah

Bldg. 00143
Tooele Army Depot
Tooele UT 84074
Landholding Agency: Army
Property Number: 21200830002
Status: Unutilized
Reasons: Extensive deterioration

Virginia

Bldgs. NH–18, NH–21
Naval Support Activity
Norfolk VA 23551
Landholding Agency: Navy
Property Number: 77200830014
Status: Excess
Reasons: Extensive deterioration; Secured Area

Bldg. 100
Naval Support Activity
Lafayette River Annex
Norfolk VA 23551
Landholding Agency: Navy
Property Number: 77200830015
Status: Excess
Reasons: Extensive deterioration; Secured Area

Unsuitable Properties

Land

North Carolina

0.23 acres
Marine Corps Base
Camp Lejeune NC
Landholding Agency: Navy
Property Number: 77200830013
Status: Unutilized
Reasons: Secured Area

[FR Doc. E8–18181 Filed 8–7–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5224–N–01]

Reconsideration of Waivers Granted to and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees Under Public Laws 109–148 and 109–234

AGENCY: Office of the Secretary, HUD.

ACTION: Notice.

SUMMARY: This Notice reconsiders and generally affirms the waivers made under the three ''common'' Notices governing grant funds for Community Development Block Grant (CDBG) disaster recovery grants for the purpose of assisting in the recovery in the most impacted and distressed areas related to the consequences of Hurricanes Katrina, Rita, and Wilma in the Gulf of Mexico in 2005. These prior notices were published in the **Federal Register** on February 13, 2006, October 30, 2006, and August 24, 2007. The Notice published today addresses the purpose and use of these funds, while highlighting unique components of the three notices and noting any changes made by HUD as the result of the required reconsideration of the waivers. For the most part, HUD is repeating or restating the original explanatory text so that grantees and program administrators may continue to have the explanation of a changed requirement and the requirement itself in a single document.

DATES: *Effective Date:* August 8, 2008.

FOR FURTHER INFORMATION CONTACT: Jessie Handforth Kome, Director, Disaster Recovery and Special Issues Division, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7286, Washington, DC 20410, telephone number 202–708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. Fax inquiries may be sent to Ms. Kome at 202–401–2044. (Except for the 800 number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

Authority To Grant Waivers

The Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Pub. L. 109–148, approved December 30, 2005) (Appropriations Act) appropriated $11.5 billion, and Chapter 9 of Title II of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 (Pub. L. 109–234, approved June 15, 2006), appropriated $5.2 billion for a combined total of $16.7 billion in CDBG funds for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure directly related to the consequences of the covered disasters. These 2006 Acts (collectively ''the supplemental Acts'') authorize the Secretary 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 by the five eligible states' use of these funds, except for requirements related to fair housing, nondiscrimination, labor standards, and the environment, upon a request by one of the five states and a finding by the Secretary that such a waiver would not be inconsistent with the overall purpose of the statute. The difference between the waiver authorizations in the supplemental Acts is that Public Law 109–148 directs that the Secretary ''shall'' make the waivers in response to a state's request and a consistency finding, while Public Law 109–234 states that the Secretary ''may'' make such waivers.

This Notice reconsiders and generally affirms the waivers made under the three ''common'' Notices governing grant funds for CDBG disaster recovery grants for the purpose of assisting in the recovery in the most impacted and distressed areas related to the consequences of Hurricanes Katrina, Rita, and Wilma in the Gulf of Mexico in 2005. These prior notices were published in the **Federal Register** on February 13, 2006 (71 FR 7666), October 30, 2006 (71 FR 63337), and August 24, 2007 (72 FR 48804). The reconsideration of the February 13, 2006, Notice is required at this time. HUD is reconsidering the October 30, 2006, and August 24, 2007, Notices earlier than required by statute because publication of all common waivers and alternative requirements in a single Notice will produce a more sensible administrative and regulatory result.

The following waivers and alternative requirements for funds provided under either 2006 Act are in response to requests from all five states receiving CDBG disaster recovery grants under those Acts. In accordance with the states' earlier requests for administrative consistency to the extent feasible (noted in 71 FR 63337, published October 30, 2006), each waiver or alternative requirement will apply to assistance

provided under either Act wherever appropriate and possible.

After reconsideration, the Secretary affirms that the following waivers and alternative requirements, as described below, are not inconsistent with the overall purpose of Title I of the Housing and Community Development Act of 1974, as amended, or the Cranston-Gonzalez National Affordable Housing Act, as amended.

Under the requirements of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act), as amended 42 U.S.C. 3535(q), regulatory waivers must be justified and published in the **Federal Register**.

Further, the supplemental Acts direct the Secretary to publish in the **Federal Register** any waiver (or reconsideration thereof) of any statute or regulation that the Secretary administers pursuant to Title I of the Housing and Community Development Act of 1974, no later than 5 days before the effective date of such waiver.

Except as described in this and other notices applicable to these grants, 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. In accordance with the supplemental Acts, HUD is reconsidering every published waiver 2 years from its date of publication.

Allocations

The supplemental Acts provide a combined total of $16.7 billion for the CDBG program for:

> Necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of Hurricanes Katrina, Rita, or Wilma in the Gulf of Mexico in 2005.

The $11.5 billion allocation appropriated under Public Law 109–148 is also discussed and expanded upon in the conference report (H.R. Rep. No. 109–359). The conference agreement included $11.5 billion for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure, and mitigation in communities in any declared disaster area in Louisiana, Mississippi, Alabama, Florida, and Texas related to Hurricanes Katrina, Rita, or Wilma. The conference agreement emphasizes the requirement that the states with the most impacted and distressed areas in connection with the Gulf of Mexico hurricanes receive priority consideration in the allocation of funds by HUD.

Public Law 109–148 further states:

> That funds provided under this heading shall be administered through an entity or entities designated by the Governor of each state. And that no state shall receive more than 54 percent of the amount provided under this heading.

Public Law 109–234 also states:

> That funds provided under this heading shall be administered through an entity or entities designated by the Governor of each state. And that no state shall receive more than $4.2 billion of the amount provided under this heading.

As provided for in Public Law 109–148 and Public Law 109–234, the funds may not be used for activities reimbursable by or for which funds are made available by the Federal Emergency Management Agency (FEMA) or the Army Corps of Engineers. Further, none of the funds made available under Public Law 109–234 may be used by a state or locality as a matching requirement, share, or contribution for any other federal program.

Also as required by Public Law 109–234, not less than $1.0 billion of the $5.2 billion appropriation (which computes to 19.3311 percent of any state's allocation, excluding $27.0 million in administrative set-asides) shall be used for repair, rehabilitation, and reconstruction (including demolition, site clearance, and remediation) of the affordable rental housing stock (including public and other HUD-assisted housing) in the impacted areas. Therefore, HUD requires that not less than 19.3311 percent of each state's grant under Public Law 109–234 be used for these activities.

The allocations from Public Law 109–148 are as follows:

TABLE 1—FEBRUARY 13, 2006, DISASTER RECOVERY ALLOCATION

State	Disaster	Allocation amount ($)
Alabama	Hurricane Katrina (FEMA–1605–DR)	74,388,000
Florida	Hurricane Katrina (FEMA–1602–DR), Hurricane Wilma (FEMA–1609–DR)	82,904,000
Louisiana	Hurricane Katrina (FEMA–1603–DR), Hurricane Rita (FEMA–1607–DR)	6,210,000,000
Mississippi	Hurricane Katrina (FEMA–1604–DR)	5,058,185,000
Texas	Hurricane Rita (FEMA–1606–DR)	74,523,000

The allocations from the supplemental appropriation, as provided for in Public Law 109–234, are as follows:

TABLE 2—OCTOBER 30, 2006, DISASTER RECOVERY SUPPLEMENTAL ALLOCATION

State	Disaster	Allocation amount ($)	Minimum amount for affordable rental housing ($)
Alabama	Hurricane Katrina (FEMA–1605–DR)	21,225,574	4,103,146
Florida	Hurricane Katrina (FEMA–1602–DR), Hurricane Wilma (FEMA–1609–DR)	100,066,518	19,344,001
Louisiana	Hurricane Katrina (FEMA–1603–DR), Hurricane Rita (FEMA–1607–DR)	4,200,000,000	811,907,984
Mississippi	Hurricane Katrina (FEMA–1604–DR)	423,036,059	81,777,703
Texas	Hurricane Rita (FEMA–1606–DR)	428,671,849	82,867,166

The amounts in Table 2 include the minimum amount of the allocations each state is required to use, pursuant to Public Law 109–234, for repair, rehabilitation, and reconstruction (including demolition, site clearance, and remediation) of the affordable rental housing stock (including public and other HUD-assisted housing) in the impacted areas.

In the case of Louisiana, the Department reviewed data chronicling the massive impact of the disasters on affordable rental housing, including public housing, in the areas of the state most affected by the disasters. In light of the state's unprecedented housing needs resulting from the disasters, the Secretary gave priority to affordable rental housing through an alternative requirement on the grant under Public Law 109–234. Under a prior Notice, HUD required that before the state of Louisiana expended any funds to meet the minimum requirement for affordable rental housing (see table above), the Governor of Louisiana had to demonstrate to the Secretary's satisfaction that the state will provide funds or has identified dedicated resources sufficient to meet the key disaster recovery needs for repair, rehabilitation, and reconstruction of affordable rental housing stock, including public housing, in the most impacted areas of the state. This notice continues the requirement to ensure that any fund reprogramming continues to prioritize such housing.

Pursuant to this Notice, HUD continues to invite each of the five states to submit an Action Plan for Disaster Recovery in accordance with prior Notices.

The supplemental Acts require that funds be used only for disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of hurricanes in the Gulf of Mexico in 2005. The supplemental Acts direct that each grantee describe in its Action Plan for Disaster Recovery how the use of the grant funds gives priority to infrastructure development and the rehabilitation and reconstruction of the affordable rental housing stock, including public and other HUD-assisted housing. HUD monitors compliance with this direction and may be compelled to disallow expenditures if it finds that uses of funds are not disaster-related, or that funds allocated duplicate other benefits. HUD encourages grantees to contact their assigned HUD offices for guidance in complying with these requirements during development of their Action Plans for Disaster Recovery and any amendments or if they have any questions regarding meeting these requirements.

For the state of Louisiana, which suffered major impacts from two of the hurricanes, HUD estimated that more than 85 percent of the major and severe damage due to those storms was in the New Orleans-Metairie-Bogalusa Metropolitan Area (Jefferson, Orleans, Plaquemines, St. Bernard, St. Charles, St. John the Baptist, and St. Tammany parishes). HUD, therefore, expects the state to target a substantial majority of its disaster recovery funds under Public Law 109–234 toward the disaster recovery needs in the New Orleans-Metairie-Bogalusa Metropolitan Area, and included an alternative requirement to that effect.

Prevention of Fraud, Abuse, and Duplication of Benefits

The supplemental Acts also directed the Secretary to: Establish procedures to prevent recipients from receiving any duplication of benefits and report quarterly to the Committees on Appropriations with regard to all steps taken to prevent fraud and abuse of funds made available under this heading, including duplication of benefits.

To meet this directive, HUD has taken five courses of action. First, HUD established by Notice specific reporting, written procedures, monitoring, and internal audit requirements for grantees. Second, to the extent that its resources allowed, HUD instituted risk analysis and on-site monitoring of grantee management of the grants and of the specific uses of funds. Third, HUD has been extremely cautious in considering any waiver related to basic financial management requirements. The standard, time-tested CDBG financial requirements will continue to apply to future waiver requests. Fourth, HUD collaborated with the HUD Office of Inspector General to plan and implement oversight of these funds. Fifth, HUD followed the direction of the conference report for Public Law 109–494 and applied $6 million of funds appropriated for the Working Capital Fund for ''immediate enhancement of the capabilities of the Disaster Recovery Grant Reporting system by building additional electronic controls that are intended to increase accountability while further decreasing the risk of fraud, waste, or abuse.''

Waiver Justification

In general, waivers already granted to the states of Alabama, Florida, Louisiana, Mississippi, and Texas and alternative requirements already specified for CDBG disaster recovery grant funds provided under the supplemental Acts apply unless determined to be excepted or limited under this Notice. The notices in which these prior waivers and alternative requirements appear are shown in the table below.

Notice	Date	Applicability
71 FR 7666, FR–5051–N–01	02/13/2006	Common Allocation/Application for $11.5 billion.
71 FR 34448, FR–5051–N–02	06/14/2006	State of Alabama.
71 FR 34451, FR–5051–N–04	06/14/2006	State of Louisiana.
71 FR 34457, FR–5051–N–03	06/14/2006	State of Mississippi.
71 FR 43622, FR–5051–N–05	08/01/2006	State of Texas.
71 FR 51678, FR–5051–N–06	08/30/2006	State of Florida.
71 FR 62372, FR 5051–N–07	10/24/2006	State of Mississippi.
71 FR 63337, FR–5089–N–01	10/30/2006	Common Allocation/Application, and Applicability of Prior Waivers for $5.2 billion.
72 FR 10014, FR–5089–N–03	03/06/2007	State of Louisiana.
72 FR 10020, FR–5089–N–04	03/06/2007	State of Mississippi.
72 FR 48804, FR–5089–N–05	08/24/2007	Common waiver of Section 414 of the Stafford Act and alternative requirements.
72 FR 48808, FR–5051–N–08	08/24/2007	State of Mississippi.
72 FR 61788, FR–5051–N–09	10/31/2007	State of Mississippi.
72 FR 70472, FR–5183–N–01	12/11/2007	State of Louisiana for $3 billion.

The provisions of this Notice do not apply to funds provided under the regular CDBG program or other HUD or federally funded programs. The provisions provide additional flexibility in program design and implementation

and implement statutory requirements unique to these appropriations.

Section 414 of the Stafford Act

The states requested and were granted a waiver of Section 414 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, for all their disaster recovery programs. Section 414 requires special measures that are designed to assist the efforts of the five states in expediting the rendering of aid and emergency services and in the reconstruction and rehabilitation of devastated areas, as necessary. In addition, the Secretary provided alternative requirements more consistent with the purpose of the supplemental Acts, which have assisted and supported disaster recovery in the areas most impacted by the effects of the three 2005 Gulf hurricanes. Hurricanes Katrina, Rita, and Wilma resulted in unprecedented destruction in the Gulf states, which will continue to require reconstruction for many years (and possibly decades) to come. The Department surveyed other federal agencies' administration of Section 414 and found varying interpretations for long-term, post-disaster projects involving the acquisition, rehabilitation, or demolition of disaster-damaged housing. The five states have also launched programs, such as rental rehabilitation, that could be affected by this statute if a clear direction to restore affordable rental housing to the devastated areas is not realized. Therefore, to avoid possible risk to the recovery effort by further delay in providing the states with a definitive answer, the Department issued a partial statutory waiver and specified alternative requirements. HUD is continuing this statutory waiver by this Notice because affordable housing programs are under way in all five of the states that rely on this waiver and alternative requirements. For programs or projects covered by this waiver (''covered programs or projects'') that are initiated within 3 years after the applicable disaster, an affected state must select one of the two alternative requirements specified in 72 FR 48804 and restated in this Notice.

Alternative One

The state may provide relocation assistance to a former residential occupant whose former dwelling is acquired, rehabilitated, or demolished for a covered program or project initiated within 3 years after the disaster, even though the actual displacements were caused by the effects of the disaster. To the extent practicable, such relocation assistance must be offered in a manner consistent with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (URA) and its implementing regulations, except as modified by applicable waivers and alternative requirements.

Alternative Two

If the state determines that the first alternative would substantially conflict with meeting the disaster recovery purposes of the supplemental Acts, the state may establish a re-housing plan for a covered program or project initiated within 3 years after the disaster. Such determinations must be made on a program or project basis (not person or household). The re-housing plan must include, at minimum, the following:

1. A description of the class(es) of persons eligible for assistance, including all persons displaced from their residences by particular enumerated, or all, effects of the disaster, and including all persons still receiving temporary housing assistance from FEMA for the covered disaster(s);

2. A description of the types and amount of financial assistance to be offered, if any;

3. A description of other services to be made available, including, at minimum, outreach efforts to eligible persons and housing counseling providing information about available housing resources. Outreach efforts and housing counseling information should be provided in languages other than English to persons with limited English proficiency; and

4. Contact information and a description of any applicable application process, including any deadlines.

5. If the program or project involves rental housing, the re-housing plan must also include the following:

(i) Placement services for former and prospective tenants;

(ii) A public registry of available rental units assisted with CDBG disaster recovery and/or other funds; and

(iii) A description of application materials, award letters, and operating procedures requiring property owners to make reasonable attempts to contact their former residential tenants and offer them a unit upon completion if they meet the program's eligibility requirements.

Justification for Waiver

This section of the Notice describes the basis for granting the section 414 waivers represented by the states in their requests. The principal reasons are highlighted here:

- Hurricanes Katrina, Rita, and Wilma caused unprecedented destruction in the Gulf Coast region. The magnitude of destruction resulted in massive displacements and decimated the region's affordable housing stock. Continued ambiguity on Section 414's applicability may cause substantial delays in long-term recovery along the Gulf Coast, particularly in Louisiana, Mississippi, and Texas;
- URA assistance may duplicate insurance proceeds and federal, state, or local housing assistance that has already been disbursed; and
- The opportunity to simplify the administration of disaster recovery projects or programs initiated years following the disaster.

Persons in physical occupancy who are displaced by a HUD-assisted disaster recovery project will continue to be eligible for URA assistance. Persons displaced by the effects of the disaster may continue to apply for assistance under the states' approved disaster recovery programs, which are designed to bring affordable housing to the affected areas. This waiver does not address programs or projects receiving other HUD funding, or funding from other federal sources.

A state may already be performing some elements of a re-housing plan, such as providing a public rental registry or undertaking outreach and placement services to those former residents still receiving FEMA housing assistance. Description in the re-housing plan of how those existing efforts will be available for covered programs or projects may be used in satisfying the requirements of this Notice. These waivers and alternative requirements streamline the pre-grant process and set the guidelines for a state's application for allocations.

Application for Allocations Under Public Laws 109–148 and 109–234

Overall benefit to low- and moderate-income persons. Pursuant to explicit authority in the supplemental Acts, HUD granted an overall benefit waiver that allows for up to 50 percent of the grants to assist activities under the urgent need or under the prevention or elimination of slums and blight national objectives, rather than the 30 percent allowed in the annual state CDBG program. The primary objective of Title I of the Housing and Community Development Act of 1974 and of the funding program of each grantee is ''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.'' The statute goes on to set the standard of performance for this primary objective for the annual CDBG program at 70 percent of the aggregate of the funds used for support of activities producing benefit to low- and moderate-income persons. Because extensive damage to community development and housing affected those with varying incomes, and the hardest-hit grantees have designed their programs to take advantage of this waiver, HUD is retaining the waiver of the 70 percent overall benefit requirement and leaving the 50 percent requirement, in order to give grantees continued flexibility to carry out recovery activities within the confines of the CDBG program national objectives. HUD may provide additional waivers of this requirement only if it makes a finding of compelling need. The requirement that each activity meet one of the three national objectives is not waived. HUD did reconsider, but is not altering this waiver. The states have already budgeted the vast majority of the funds under the terms of the initial waiver. Changing the waiver and alternative requirement now might be counter-productive to the recovery efforts across the Gulf Coast and, most particularly, in Louisiana. The state of Mississippi has been granted additional overall benefit waivers and alternative requirements as published in Notices other than the three under reconsideration in the current Notice. The first of Mississippi's other Notices is scheduled for reconsideration in June 2008.

Expanded distribution and direct action. The waivers and alternative requirements allowing distribution of funds by a state to entitlement communities and Indian tribes, and to allow a state to carry out activities directly rather than distribute all funds to units of local government, are consistent with waivers granted for previous similar disaster recovery cases. HUD believes that, in recommending the Lower Manhattan Development Corporation (LMDC) as a model and in increasing the administrative cap, Congress is signaling its intent that the states under this appropriation also be able to carry out activities directly. Therefore, HUD waived and continues its waiver of certain program requirements to support direct implementation of activities by the states. HUD stated in prior Notices and restates in this Notice the necessary complementary waivers and alternative requirements related to subrecipients to ensure proper management and disposition of funds during the grant execution and at closeout.

Consistency with the consolidated plan. HUD waived the requirement for consistency with the consolidated plan priorities because the effects of a major disaster usually alter a grantee's priorities for meeting housing, employment, and infrastructure needs. To emphasize that uses of grant funds must be consistent with the overall purposes of the Housing and Community Development Act of 1974, HUD requires the scope of the waiver to be consistent with the consolidated plan; the waiver applies only until the grantee first updates its consolidated plan priorities following the disaster. Because of limited data availability or staff resources, not all grantees have completely updated their consolidated plans. Therefore, HUD is continuing this waiver.

Action Plan for Disaster Recovery. HUD waived the CDBG action plan requirements and substituted an Action Plan for Disaster Recovery. HUD is continuing this waiver and restates the Action Plan for Disaster Recovery requirements under this Notice. This waiver allowed for rapid implementation of disaster recovery grant programs and ensured conformance with provisions of the supplemental Acts. Where possible, the Action Plan for Disaster Recovery, including certifications, does not repeat common action plan elements that the grantee already committed to carry out as part of its annual CDBG submission. Although a state as the grantee may designate an entity or entities to administer the funds, the state is responsible for compliance with federal requirements. During the course of these grants, HUD is monitoring the states' uses of funds and their actions for consistency with the Action Plan. A state may submit an initial, partial Action Plan and amend it one or more times subsequently until the Action Plan describes uses for the combined total grant amount. A state may also amend activities in its Action Plan.

The following new elements to a state's Action Plan for Disaster Recovery apply only to the supplemental funds allocated under Public Law 109–234:

These elements include a description of how the state gives priority to infrastructure development and rehabilitation and how the state gives priority to the rehabilitation and reconstruction of the affordable rental housing stock, including public and other HUD-assisted housing. The state must explain how its choices for the use of funds will result in the state meeting the requirement to use not less than 19.3311 percent of its allocation under Public Law 109–234 for repair, rehabilitation, and reconstruction (including demolition, site clearance, and remediation) of the affordable rental housing stock (including public and other HUD-assisted housing) in the impacted areas. The explanation should include how the state has considered the unique challenges that individuals with disabilities face in finding accessible and affordable housing.

Citizen participation. The citizen participation waiver and alternative requirements permit a more streamlined public process, but one that still provides for reasonable public notice, appraisal, examination, and comment on the CDBG disaster recovery grant fund activities. The waiver removes the requirement at both the grantee and state grant recipient levels for public hearings or meetings as the method for disseminating information or collecting citizen comments. Instead, grantees are encouraged to employ innovative methods to communicate with citizens and solicit their views on proposed uses of disaster recovery funds, and to indicate in the Action Plan how the grantee has addressed these views. After reconsidering this waiver, HUD decided to leave it in place because the need for speedy decision-making is still necessary in some of the states. However, HUD is providing guidance that, as time since the hurricanes elapses, HUD expects grantees to provide for increased time for public comments and for provision of public hearings related to amendments to the Action Plan whenever hearings are administratively feasible. HUD notes that most grantees are making good use of the Internet to provide disaster recovery information on plan amendments and resources for their citizens, and HUD expects this practice will continue.

Administration limitation. State program administration requirements must be modified to be consistent with the Appropriations Act, which allows up to 5 percent of the grant to be used for the state's administrative costs. The provisions at 42 U.S.C. 5306(d) and 24 CFR 570.489(a)(1)(i) and (iii) will not apply to the extent that they cap state administration expenditures and require a dollar-for-dollar match of state funds for administrative costs exceeding $100,000. HUD does not waive 24 CFR 570.489(a)(3) to allow the state to exceed the overall planning, management, and administrative cap of 20 percent.

Use of Subrecipients

The state CDBG program rule does not make specific provision for the treatment of the entities called ''subrecipients'' in the CDBG entitlement program. The waiver allowing a state to carry out activities directly creates a situation in which the state may use subrecipients to carry out activities in a manner similar to entitlement communities. HUD and its Office of Inspector General have long identified the use of subrecipients as a practice that increases the risk of abuse of funds. HUD's experience is that this risk can be successfully managed by adhering to the CDBG entitlement requirements and related guidance. Therefore, HUD requires that a state taking advantage of the waiver allowing it to carry out activities directly must follow the alternative requirements that are drawn from the CDBG entitlement rule and specified in this Notice, when using subrecipients.

Reporting

HUD waives the annual reporting requirement because Congress requires quarterly reports from the grantees and from HUD on various aspects of the uses of funds and of the activities funded with these grants. Many of the data elements the grantees will report to Congress quarterly are the same as those that HUD uses to exercise oversight for compliance with the requirements of this Notice and for prevention of fraud, abuse of funds, and duplication of benefits. To collect these data elements and to meet its reporting requirements, HUD requires each grantee to report to HUD quarterly using the online Disaster Recovery Grant Reporting system. HUD uses grantee reports to monitor for anomalies or performance problems that suggest fraud, abuse of funds, and duplication of benefits; to reconcile budgets, obligations, fund draws, and expenditures; to calculate applicable administrative and public service limitations and the overall percent of benefit to low- and moderate-income persons; and to establish a basis for risk analysis in determining a monitoring plan.

Originally, HUD's guidance was that after HUD reviews each report and accepts a report, the grantee must post the report on an Internet site with public access for its citizens. On reconsideration, HUD is requiring grantees to post each report as it is submitted. After HUD reviews the report, the grantee may also post the reviewed version, if HUD makes any changes. If a grantee chooses, it may use its report, together with a statement regarding any sole source procurements, as its required quarterly submission to the Committees on Appropriations. Each quarter, HUD will submit to the Committees a summary description of its report reviews, of other HUD monitoring and technical assistance activities undertaken during the quarter, and of any significant conclusions related to fraud, abuse of funds, or duplication of benefits.

Certifications

HUD waived the standard certifications and substituted alternative certifications. The alternative certifications are tailored to CDBG disaster recovery grants and remove certifications and references that are redundant or appropriate to the annual CDBG formula program.

Applicable Rules, Statutes, Waivers, and Alternative Requirements

The following discussion is comprised of two parts: a common section that applies to **Federal Register** notices 71 FR 7666, 71 FR 63337, and 72 FR 48804, and a unique section that highlights components of these three notices that are different.

Common Section

1. *General note.* 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, the statutory, regulatory, and notice provisions that shall apply to the use of these funds are:

a. The state-specific Notices governing the funds appropriated under Public Law 109–148 and Public Law 109–234 (the supplemental Acts) and already published in the **Federal Register**;

b. Those governing the CDBG program for states, including those at 42 U.S.C. 5301 *et seq.* and 24 CFR part 570.

2. *Overall benefit waiver and alternative requirement.* The requirements at 42 U.S.C. 5301(c), 42 U.S.C. 5304(b)(3)(A), and 24 CFR 570.484 that at least 70 percent of funds are for activities that benefit low- and moderate-income persons are waived to stipulate that at least 50 percent of disaster recovery grant funds from each grant must assist activities that principally benefit low- and moderate-income persons.

3. *Section 414 of the Stafford Act waiver and alternative requirements.*

a. Section 414 of the Stafford Act, 42 U.S.C. 5181 (including its implementing regulation at 49 CFR 24.403(d)), is waived to the extent that it would apply to CDBG disaster recovery-funded programs or projects initiated at least one year after the incident-date of Hurricane Katrina, Rita, or Wilma (as applicable) by the states of Alabama, Florida, Louisiana, Mississippi, and Texas under an approved Action Plan for Disaster Recovery for its grants under Public Law 109–148 or Public Law 109–234; provided that such program or project was not planned, approved, or otherwise under way prior to the disaster.

b. For all programs or projects covered by this waiver (''covered programs or projects'') that are initiated at least one year after but within no more than 3 years after the applicable disaster, the states of Alabama, Florida, Louisiana, Mississippi, and Texas must comply with one of the following two alternative requirements (for programs or projects initiated after the 3-year period, the alternative requirements would not apply; only the waiver would be applicable):

1. Relocation Assistance. The state may provide relocation assistance to a former residential occupant whose former dwelling is acquired, rehabilitated, or demolished for a covered program or project initiated within 3 years after the disaster, even though the actual displacements were caused by the effects of the disaster. To the extent practicable, such relocation assistance must be offered in a manner consistent with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and its implementing regulations, except as modified by prior waivers and alternative requirements granted to the states.

2. Re-housing Plan. If the state determines that the first alternative would substantially conflict with meeting the disaster recovery purposes of the supplemental Acts, the grantee may establish a re-housing plan for a covered program or project initiated at least one year after, but within no more than 3 years after, the disaster. Such a determination must be made on a program or project basis (not person or household). The re-housing plan must include, at minimum, the following:

i. A description of the class(es) of persons eligible for assistance, including all residents displaced from their residences by either certain enumerated or all effects of the covered disaster, and including all disaster-displaced residents still receiving temporary housing assistance from FEMA for the covered disasters;

ii. A description of the types and amount of financial assistance to be provided, if any;

iii. A description of other services to be made available, including, at a minimum, outreach efforts to eligible persons and housing counseling that provide information about available housing resources;

iv. Contact information for additional program information;

v. A description of any applicable application process, including any deadlines; and

vi. If the program or project covered by this waiver involves rental housing, the grantee shall establish procedures for the following:

A. Application materials, award letters, and operating procedures that require property owners to make reasonable attempts to contact their former tenants and to offer a unit, upon completion, to those tenants meeting the program's eligibility requirements;

B. Placement services for former and prospective tenants; and

C. A public registry of available rental units assisted with CDBG disaster recovery and/or other funds.

c. Eligible Project Costs. The cost of relocation assistance and the reoccupancy plan are eligible project costs in the same manner and to the same extent as other project costs authorized under the supplemental Acts. For covered programs or projects involving affordable rental housing, the relocation and planning costs required by this Notice may be paid from funds reserved for the affordable rental housing stock in the impacted areas under Public Law 109–234.

4. *Direct grant administration by states and means of carrying out eligible activities.* Requirements at 42 U.S.C. 5306 are waived to the extent necessary to allow the state to use its disaster recovery grant allocation directly to carry out state-administered activities eligible under this Notice. Activities eligible under this Notice may be undertaken, subject to state law, by the recipient through its employees or through procurement contracts, through loans or grants under agreements with subrecipients, or by one or more entities that are designated by the chief executive officer of the state. Activities made eligible under section 105(a)(15) of the Housing and Community Development Act of 1974, as amended, may be undertaken only by entities specified in that section, regardless of whether the assistance is provided to such an entity from the state or from a unit of general local government.

5. *Consolidated Plan waiver.* Requirements at 42 U.S.C. 12706 and 24 CFR 91.325(a)(6), that housing activities undertaken with CDBG funds be consistent with the strategic plan, are waived. Further, the requirement at 42 U.S.C. 5304(e), to the extent that it would require HUD to annually review grantee performance under the consistency criteria, is also waived. These waivers apply only until the time that the grantee first updates its consolidated plan priorities following the hurricane.

6. *Citizen participation waiver and alternative requirement.* Provisions of 42 U.S.C. 5304(a)(2) and (3), 42 U.S.C. 12707, 24 CFR 570.486, and 24 CFR 91.115(b), with respect to citizen participation requirements, are waived and replaced by the requirements below. The streamlined requirements do not mandate public hearings at either the state or local government level, but do require providing a reasonable opportunity for citizen comment and ongoing citizen access to information about the use of grant funds. The streamlined citizen participation requirements for this grant are:

a. Before the grantee adopts the action plan for this grant or any substantial amendment to this grant, the grantee will publish the proposed plan or amendment (including the information required in this Notice for an Action Plan for Disaster Recovery). The manner of publication (including prominent posting on the state, local, or other relevant Web site) must afford citizens, affected local governments, and other interested parties a reasonable opportunity to examine the plan or amendment's contents. Subsequent to publication, the grantee must provide a reasonable time period and method(s) (including electronic submission) for receiving comments on the plan or on any substantial amendment to it. 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. HUD expects the grantee to hold a public hearing on a proposed plan amendment unless doing so would hinder the provision of expedient disaster recovery.

b. In the action plan, each grantee will specify its criteria for determining what changes in the grantee's activities constitute a substantial amendment to the plan. At a minimum, adding or deleting an activity or changing the planned beneficiaries of an activity will constitute a substantial change. The grantee may modify or substantially amend the action plan if it follows the same procedures required in this Notice for the preparation and submission of an Action Plan for Disaster Recovery. The grantee must notify HUD, but is not required to notify the public, when it makes any plan amendment that is not substantial.

c. The grantee must consider all comments received on the action plan or any substantial amendment and submit to HUD a summary of those comments and the grantee's response with the action plan or substantial amendment.

d. The grantee must make the action plan, any substantial amendments, and all performance reports available to the public. HUD recommends posting them on the Internet. In addition, the grantee must make these documents available in a form accessible to persons with disabilities and non-English-speaking persons. During the term of this grant, the grantee will provide citizens, affected local governments, and other interested parties with reasonable and timely access to information and records relating to the action plan and to the grantee's use of this grant.

e. 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.

7. *Modify requirement for consultation with local governments.* Currently, the statute and regulations require consultation with affected units of local government in the non-entitlement area of the state regarding the state's proposed method of distribution. HUD is waiving 42 U.S.C. 5306(d)(2)(C)(iv), 24 CFR 91.325(b), and 24 CFR 91.110, with the alternative requirement that the state consult with all disaster-affected units of general local government, including any CDBG entitlement communities, in determining the use of funds.

8. *Action Plan waiver and alternative requirement.* The requirements at 42 U.S.C. 12705(a)(2), 42 U.S.C. 5304(a)(1), 42 U.S.C. 5304(m), 42 U.S.C. 5306(d)(2)(C)(iii), 24 CFR 1003.604, and 24 CFR 91.320 are waived for these disaster recovery grants. Each state must submit to HUD an Action Plan for Disaster Recovery that describes:

a. The effects of the covered disaster, especially in the most impacted areas and populations, and the greatest recovery needs resulting from the covered disaster that have not been addressed by insurance proceeds, other federal assistance, or any other funding source;

b. The grantee's overall plan for disaster recovery, including:

1. How the state will promote sound short- and long-term recovery planning at the state and local levels, especially land use decisions that reflect

responsible flood plain management, removal of regulatory barriers to reconstruction, and prior coordination with planning requirements of other state and federal programs and entities;

2. How the state will encourage construction methods that emphasize high quality, durability, energy efficiency, and mold resistance, including how the state will promote enactment and enforcement of modern building codes and mitigation of flood risk, where appropriate;

3. How the state will provide or encourage provision of adequate, flood-resistant housing for all income groups that lived in the disaster-impacted areas prior to the incident date(s) of the applicable disaster(s), including a description of the activities it plans to undertake to address emergency shelter and transitional housing needs of homeless individuals and families (including subpopulations), to prevent low-income individuals and families with children (especially those with incomes below 30 percent of median) from becoming homeless, to help homeless persons make the transition to permanent housing and independent living, and to address the special needs of persons who are not homeless-identified, in accordance with 24 CFR 91.315(d);

c. Monitoring standards and procedures that are sufficient to ensure that program requirements, including non-duplication of benefits, are met and that provide for continual quality assurance, investigation, and internal audit functions, with responsible staff reporting independently to the Governor of the state or, at a minimum, to the chief officer of the governing body of any designated administering entity;

d. A description of the steps the state will take to avoid or mitigate occurrences of fraud, abuse, and mismanagement, especially with respect to accounting, procurement, and accountability, with a description of how the state will provide for increasing the capacity for implementation and compliance of local governments, subrecipients, subgrantees, contractors, and any other entity responsible for administering activities under this grant; and

e. The state's method of distribution. The method of distribution shall include descriptions of the method of allocating funds to units of local government and of specific projects the state will carry out directly, as applicable. The descriptions will include:

1. When funds are to be allocated to units of local government; and all criteria used to select applications from local governments for funding, including the relative importance of each criterion, and including a description of how the disaster recovery grant resources will be allocated among all funding categories, plus the threshold factors and grant size limits that are to be applied; and

2. In cases where the state will carry out activities directly, the projected uses for the CDBG disaster recovery funds broken down by responsible entity, activity, and geographic area;

3. How the method of distribution or use of funds described in accordance with the above subparagraphs will result in eligible uses of grant funds related to long-term recovery from specific effects of the disaster(s) or restoration of infrastructure; and

4. Sufficient information so that citizens, units of general local government, and other eligible subgrantees or subrecipients will be able to understand and comment on the action plan and, if applicable, be able to prepare responsive applications to the state.

f. Required certifications (see the applicable Certifications section of this Notice); and

g. A completed and executed federal form SF–424.

9. *Allow reimbursement for pre-agreement costs.* The provisions of 24 CFR 570.489(b) are applied to permit a grantee to reimburse itself for otherwise allowable costs incurred on or after the incident date of the covered disaster.

10. *Clarifying note on the process for environmental release of funds when a state carries out activities directly.* Usually, a state distributes CDBG funds to units of local government and takes on HUD's role in receiving environmental certifications from the grant recipients and approving releases of funds. For this grant, HUD will allow a state grantee to also carry out activities directly instead of distributing all funds to other governments. According to the environmental regulations at 24 CFR 58.4, when a state carries out activities directly, the state must submit the certification and request for release of funds to HUD for approval.

11. *Duplication of benefits.* In general, 42 U.S.C. 5155 (section 312 of the Robert T. Stafford Disaster Assistance and Emergency Relief Act, as amended) prohibits any person, business concern, or other entity from receiving financial assistance with respect to any part of a loss resulting from a major disaster as to which such person/business/entity has received financial assistance under any other program or from insurance or any other source. The appropriations acts stipulate that funds may not be used for activities reimbursable by, or for which funds have been made available by, the Federal Emergency Management Agency or by the Army Corps of Engineers.

12. *Waiver and alternative requirement for distribution to CDBG metropolitan cities and urban counties.*

a. Section 5302(a)(7) of title 42, U.S.C. (definition of ''non-entitlement area''), and provisions of 24 CFR part 570 that would prohibit a state from distributing CDBG funds to units of general local government in entitlement communities and to Indian tribes, are waived, including 24 CFR 570.480(a), to the extent that such provisions limit the distribution of funds to units of general local government located in entitlement areas and to state or federally recognized Indian tribes. The state is required instead to distribute funds to the most adversely affected and impacted areas related to the consequences of the covered disaster(s) without regard to a local government or Indian tribe status under any other CDBG program.

b. Additionally, because a state grantee under this appropriation may carry out activities directly, HUD is applying the regulations at 24 CFR 570.480(c) with respect to the basis under which HUD determines whether the state has failed to carry out its certifications; the basis shall be that the state has failed to carry out its certifications in compliance with applicable program requirements. Also, HUD is waiving 24 CFR 570.494, regarding timely distribution of funds. However, HUD expects each state grantee to expeditiously obligate and expend all funds, including any recaptured funds or program income, and to carry out activities in a timely manner.

13. *Note that use of grant funds must relate to the covered disaster(s).* The supplemental Acts impose fundability criteria in addition to the annual CDBG requirement that each activity must be eligible under 42 U.S.C. 5305(a) or this Notice and meet a CDBG national objective under the penultimate paragraph of 42 U.S.C. 5304(b)(3). Public Laws 109–148 and 109–234 require that each activity assisted must be related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of Hurricanes Katrina, Rita, and Wilma in communities included in Presidential disaster declarations.

14. *Note on the change to the administration limitation.* Up to 5 percent of the grant amount may be used for the state's administrative costs.

The provisions of 42 U.S.C. 5306(d) and 24 CFR 570.489(a)(1)(i) and (iii) will not apply to the extent that they cap state administration expenditures and require a dollar-for-dollar match of state funds for administrative costs exceeding $100,000. HUD does not waive 24 CFR 570.489(a)(3) to allow a state to exceed the overall planning, management, and administrative cap of 20 percent.

Reporting

15. *Waiver of performance report and alternative requirement.* The requirements for submission of a Performance Evaluation Report (PER) pursuant to 42 U.S.C. 12708 and 24 CFR 91.520 are waived. The alternative requirement is that:

a. Each grantee must submit its Action Plan for Disaster Recovery, including performance measures, into HUD's Web-based Disaster Recovery Grant Reporting (DRGR) system. (The signed certifications and the form SF–424 must be submitted in hard copy.) As additional detail about uses of funds becomes available to the grantee, the grantee must enter this detail into DRGR, in sufficient detail to serve as the basis for acceptable performance reports.

b. Each grantee must submit a quarterly performance report, as HUD prescribes, no later than 30 days following each calendar quarter, beginning after the first full calendar quarter, after grant award and continuing until all funds have been expended and all expenditures reported. Each quarterly report will include information about the uses of funds during the applicable quarter, including (but not limited to) the project name, activity, location, and national objective, funds budgeted, obligated, drawn down, and expended; the funding source and total amount of any non-CDBG disaster funds; beginning and ending dates of activities; and performance measures such as numbers of low- and moderate-income persons or households benefiting. Quarterly reports to HUD must be submitted using HUD's Web-based DRGR system.

16. *Use of subrecipients.* The following alternative requirement applies for any activity that a state carries out directly by funding a subrecipient:

a. 24 CFR 570.503, except that specific references to 24 CFR parts 84 and 85 need not be included in subrecipient agreements.

b. 570.502(b), except to the extent that it mandates compliance with Office of Management and Budget (OMB) Circular A–110 (implemented at 24 CFR part 84, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations''). HUD recommends application of 24 CFR part 84, but does not require it.

17. *Recordkeeping.* Recognizing that the state may carry out activities directly, 24 CFR 570.490(b) is waived in such a case and the following alternative provision shall then apply: state records. The state shall establish and maintain such records as may be necessary to facilitate review and audit by HUD of the state's administration of CDBG disaster recovery funds under 24 CFR 570.493. Consistent with applicable statutes, regulations, waivers and alternative requirements, and other federal requirements, the content of records maintained by the state shall be sufficient to: enable HUD to make the applicable determinations described at 24 CFR 570.493; make compliance determinations for activities carried out directly by the state; and show how activities funded are consistent with the descriptions of activities proposed for funding in the action plan. For fair housing and equal opportunity purposes and, as applicable, such records shall include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the program.

18. *Change of use of real property.* This waiver conforms the change of use of real property rule to the waiver allowing a state to carry out activities directly. For purposes of this program, in 24 CFR 570.489(j), (j)(1), and the last sentence of (j)(2), ''unit of general local government'' shall be read as ''unit of general local government or state.''

19. *Responsibility for state review and handling of noncompliance.* This change conforms the rule with the waiver allowing the state to carry out activities directly. 24 CFR 570.492 is waived and the following alternative requirement applies: The state shall make reviews and audits, including on-site reviews of any subrecipients, designated public agencies, and units of general local government as may be necessary or appropriate to meet the requirements of section 104(e)(2) of the Housing and Community Development Act of 1974, as amended, and modified by this Notice. In the case of noncompliance with these requirements, the state shall take such actions as may be appropriate to prevent a continuance of the deficiency, to mitigate any adverse effects or consequences, and to prevent a recurrence. The state shall establish remedies for noncompliance by any designated public agencies or units of general local governments and for its subrecipients.

20. *Information collection approval note.* HUD has approval for information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) under OMB control number 2506–0165. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, nor is a person required to respond to, a collection of information, unless the collection displays a valid control number.

Certifications

21. *Certifications for state governments, waiver, and alternative requirement.* Section 91.325 of title 24 of the Code of Federal Regulations is waived. Each state must make the following certifications prior to receiving a CDBG disaster recovery grant:

a. The state certifies that it will affirmatively further fair housing, which means that it 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).)

b. The state certifies that it has in effect and is following a residential anti-displacement and relocation assistance plan in connection with any activity assisted with funding under the CDBG program.

c. The state certifies its compliance with restrictions on lobbying required by 24 CFR part 87, together with disclosure forms, if required by that part.

d. The state certifies that the Action Plan for Disaster Recovery is authorized under state law and that the state, and any entity or entities designated by the state, possesses the legal authority to carry out the program for which it is seeking funding, in accordance with applicable HUD regulations and this Notice.

e. The state certifies that it will comply with the acquisition and relocation requirements of the URA, as amended, and implementing regulations at 49 CFR part 24, except where waivers or alternative requirements are provided for this grant.

f. The state certifies that it will comply with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u), and implementing regulations at 24 CFR part 135.

g. The state certifies that it is following a detailed citizen participation plan that satisfies the

requirements of 24 CFR 91.115 (except as provided for in notices providing waivers and alternative requirements for this grant), and that each unit of general local government that is receiving assistance from the state is following a detailed citizen participation plan that satisfies the requirements of 24 CFR 570.486 (except as provided for in notices providing waivers and alternative requirements for this grant).

h. The state certifies that it has consulted with affected units of local government in counties designated in covered major disaster declarations in the non-entitlement, entitlement, and tribal areas of the state in determining the method of distribution of funding;

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 the most impacted and distressed areas related to the consequences of the Gulf Coast hurricanes of 2005 in communities included in Presidential disaster declarations.

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.

4. The state will not attempt to recover any capital costs of public improvements assisted with CDBG disaster recovery grant funds, by assessing any amount against properties owned and occupied by persons of low- and moderate-income, including any fee charged or assessment made as a condition of obtaining access to such public improvements, unless: (A) disaster recovery grant funds are used to pay the proportion of such fee or assessment that relates to the capital costs of such public improvements that are financed from revenue sources other than under this title; or (B) for purposes of assessing any amount against properties owned and occupied by persons of moderate income, the grantee certifies to the Secretary that it lacks sufficient CDBG funds (in any form) to comply with the requirements of clause (A).

j. The state certifies that the grant will be conducted and administered in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and the Fair Housing Act (42 U.S.C. 3601–3619) and implementing regulations.

k. The state certifies that it has and that it will require units of general local government that receive grant funds to certify that they have adopted and are enforcing:

1. A policy prohibiting the use of excessive force by law enforcement agencies within its jurisdiction against any individuals engaged in non-violent civil rights demonstrations; and

2. A policy of enforcing applicable state and local laws against physically barring entrance to or exit from a facility or location that is the subject of such non-violent civil rights demonstrations within its jurisdiction.

l. The state certifies that each state grant recipient or administering entity has the capacity to carry out disaster recovery activities in a timely manner, or that the state has a plan to increase the capacity of any state grant recipient or administering entity that lacks such capacity.

m. The state certifies that it will not use CDBG disaster recovery funds for any activity in an area delineated as a special flood hazard area in FEMA's most current flood advisory maps, unless it also ensures that the action is designed or modified to minimize harm to or within the floodplain in accordance with Executive Order 11988 and 24 CFR part 55.

n. The state certifies that it will comply with applicable laws.

22. *Duration of funding.* Availability of funds provisions in 31 U.S.C. 1551–1557, added by section 1405 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510), limit the availability of certain appropriations for expenditure. This limitation may not be waived. However, the appropriations acts for these grants direct that these funds be available until expended unless, in accordance with 31 U.S.C. 1555, the Department determines that the purposes for which the appropriation has been made have been carried out and that no disbursement has been made against the appropriation for 2 consecutive fiscal years. In such a case, the Department shall close out the grant prior to expenditure of all funds.

Provisions Unique to Grants Under Public Law 109–234

23. *Action Plan additional elements.* The disaster recovery grantees receiving funding under Public Law 109–234 must provide the following elements as part of the overall plan for disaster recovery:

a. An explanation of how the state will give priority to the rehabilitation and reconstruction of the affordable rental housing stock, including public and other HUD-assisted housing, a description of the activities the state plans to undertake with grant funds under this priority, and a description of the unique challenges that individuals with disabilities face in finding accessible and affordable housing;

b. An explanation of how the state will give priority to infrastructure development and rehabilitation, and a description of the infrastructure activities it plans to undertake with grant funds; and

c. An explanation of how the method of distribution or use of funds described in accordance with the applicable notices will result in the state meeting the requirement that at least 19.3311 percent of its allocation under this notice shall be used for repair, rehabilitation, and reconstruction (including demolition, site clearance, and remediation) of the affordable rental housing stock (including public and other HUD-assisted housing) in the impacted areas.

24. *Alternative requirements regarding targeting in Louisiana.*

a. The State of Louisiana will target 70 percent of its disaster recovery funds under Public Law 109–234 toward the disaster recovery needs in the New Orleans-Metairie-Bogalusa Metropolitan Area; and

b. Before Louisiana expends any funds to meet the minimum requirement for affordable rental housing under this notice, the Governor of Louisiana shall demonstrate to the Secretary's satisfaction that the state will provide funds or has identified dedicated resources sufficient to meet the key disaster recovery needs for repair, rehabilitation, and reconstruction of affordable rental housing stock, including public housing disaster recovery in the most impacted areas of the state.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for the disaster recovery grants under this Notice are as follows: 14.219; 14.228.

Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available for public inspection between 8 a.m. and 5

p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the finding by calling the Regulations Division at 202–402–3055 (this is not a toll-free number).

Dated: July 28, 2008.

Roy A. Bernardi,

Deputy Secretary.

[FR Doc. E8–18281 Filed 8–7–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Exxon Valdez Oil Spill Trustee Council; Notice of Meeting

AGENCY: Office of the Secretary, Department of the Interior.

ACTION: Notice of meeting.

SUMMARY: The Department of the Interior, Office of the Secretary is announcing a public meeting of the *Exxon Valdez* Oil Spill Public Advisory Committee.

DATES: September 3, 2008, at 9 a.m.

ADDRESSES: Exxon Valdez Oil Spill Trustee Council Office, 441 West 5th Avenue, Suite 500, Anchorage, Alaska.

FOR FURTHER INFORMATION CONTACT: Douglas Mutter, Department of the Interior, Office of Environmental Policy and Compliance, 1689 ''C'' Street, Suite 119, Anchorage, Alaska, 99501, (907) 271–5011.

SUPPLEMENTARY INFORMATION: The Public Advisory Committee was created by Paragraph V.A.4 of the Memorandum of Agreement and Consent Decree entered into by the United States of America and the State of Alaska on August 27, 1991, and approved by the United States District Court for the District of Alaska in settlement of *United States of America* v. *State of Alaska*, Civil Action No. A91–081 CV. The meeting agenda will include review of the draft fiscal year 2009 program development and implementation budget, and invitation; 2008 update to the Injured Resources and Services List; Integrated Herring Restoration Program; fiscal year 2008 projects requesting extensions; and personnel changes.

Willie R. Taylor,

Director, Office of Environmental Policy and Compliance.

[FR Doc. E8–18341 Filed 8–7–08; 8:45 am]

BILLING CODE 4310–RG–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R7-R-2008-NO182] [70138-1263-0000-4A]

Information Collection Sent to the Office of Management and Budget (OMB) for Approval; Alaska Guide Service Evaluation

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. The ICR, which is summarized below, describes the nature of the collection and the estimated burden and cost. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: You must submit comments on or before September 8, 2008.

ADDRESSES: Send your comments and suggestions on this ICR to the Desk Officer for the Department of the Interior at OMB-OIRA at (202) 395-6566 (fax) or OIRA_DOCKET@OMB.eop.gov (e-mail). Please provide a copy of your comments to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222-ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); (703) 358-2269 (fax); or hope_grey@fws.gov (e-mail).

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Hope Grey by mail, fax, or e-mail (see ADDRESSES) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

OMB Control Number: None. This is a new collection.

Title: Alaska Guide Service Evaluation.

Service Form Number(s): 3-2349.

Type of Request: New collection.

Affected Public: Clients of permitted commercial guide service providers.

Respondent's Obligation: Voluntary.

Frequency of Collection: One time following use of commercial guide services.

Estimated Annual Number of Respondents: 396.

Estimated Total Annual Responses: 396.

Estimated Time Per Response: 15 minutes.

Estimated Total Annual Burden Hours: 99.

Abstract: We are proposing to collect information to help us evaluate commercial guide services on our national wildlife refuges in the State of Alaska (State). The National Wildlife Refuge Administration Act of 1966, as amended (16 U.S.C. 668dd-ee), authorizes us to permit uses, including commercial visitor services, on national wildlife refuges when we find the activity to be compatible with the purposes for which the refuge was established. With the objective of making available a variety of quality visitor services for wildlife-dependent recreation on National Wildlife Refuge System lands, we issue permits for commercial guide services, including big game hunting, sport fishing, wildlife viewing, river trips, and other guided activities. We plan to use FWS Form 3-2349 (Alaska Guide Service Evaluation) as a method to:

(1) Monitor the quality of services provided by commercial guides.

(2) Gauge client satisfaction with the services.

(3) Assess the impacts of the activity on refuge resources.

The client is the best source of information on the quality of commercial guiding services. We plan to collect:

(1) Client name.

(2) Guide name(s).

(3) Type of guided activity.

(4) Dates and location of guided activity.

(5) Information on the services received such as the client's expectations, safety, environmental impacts, and client's overall satisfaction.

We will encourage respondents to provide any additional comments that they wish regarding the guide service or refuge experience, and ask whether or not they wish to be contacted for additional information.

The above information, in combination with State-required guide activity reports and contacts with guides and clients in the field, will provide a comprehensive method for monitoring permitted commercial guide activities. A regular program of client evaluation will help refuge managers detect potential problems with guide services so that we can take corrective actions promptly. In addition, we will use this information during the competitive selection process for big game and sport fishing guides to evaluate an applicant's

Exhibit H

The Road Home, *Appeals and Second Disbursements*

Appeals and Second Disbursements *April 10, 2007*

Overview

You have the right to appeal *The Road Home* Homeowner Assistance program's award decision. You can appeal:

- Eligibility decisions
- Amount of benefit compensation including, but not limited to:
  - Pre-storm value of home
  - Estimated cost of damage
  - Amount of FEMA assistance
  - Amount of Insurance payments
- Denial of Additional Compensation Grant (formerly called Affordable Compensation Loan)

All appeals must be submitted in writing to *The Road Home* Appeals Office. **Before submitting an appeal to *The Road Home* Appeals Office, you must first attempt to resolve issues by working with *The Road Home* Resolution Team.**

Conditions for Filing a *Road Home* Appeal

If you are not satisfied with the Resolution Team's decision, you can file a formal appeal in writing to *The Road Home* Appeals Office. No one from *The Road Home* staff can do this for you. One of the following situations must have taken place before your appeal will be accepted by *The Road Home* Appeals Office:

- You received written notification of the Resolution Team's decision, you do not agree with the award amount(s) and you would like to submit a *Road Home* appeal.

- You received written notification of the Resolution Team's decision, you have gone to **one** closing and you would like to submit a *Road Home* appeal after one closing.

The Appeals Office will research all information related to an application only as it relates to current policies governing *The Road Home* award decisions. *The Road Home* Appeals Office will not change policies or laws set forth by the State of Louisiana or the federal government. If you disagree with the decision of *The Road Home* Appeals Office, you have the right to submit a State Appeal to the State of Louisiana's Office of Community Development (OCD).

Even though you may be seeking a resolution or appeal of an award, you are allowed to receive the amount of the grant award through a first closing. If you are awarded an additional amount as a result of the resolution or appeal process you will receive the

funds at a second closing or, if additional documents do not need to be recorded, through a second disbursement mailed directly to you.

If *The Road Home* determines through the resolution or appeal process that you were overpaid for any reason at your first closing, you will be required to refund the overpayment to the State of Louisiana Office of Community Development (OCD).

NOTE: If you have chosen **Option 2** or **Option 3** but wish to seek additional amounts through the resolution or appeal process after the first closing, please be aware that you are selling your property to *The Road Home* Corporation at the FIRST closing for the amount of the initial award and the sale of your property to *The Road Home* Corporation is **FINAL. After the sale at the first closing, you cannot get your property back even if you do not receive any additional award through the resolution or appeal process.** If you do not want to sell your property for the amount of the initial award, you should not close on your grant until the resolution or appeal process is finished.

Second Closing

If you have completed one closing with First American Title Insurance Company you have up to 90 days from the date of the first closing to request Resolution or, if you have already received written notification of the Resolution Team's decision, file a *Road Home* Appeal if you disagree with the award you received.

If *The Road Home* Appeals Office determines that you should receive an additional award after the first closing, you will be contacted to either:

1. Schedule a second closing with First American Title Insurance Company if additional closing documents need to be recorded or
2. Schedule a second award disbursement *mailed directly to you* if additional closing documents do not need to be recorded.

You cannot file an appeal with *The Road Home* program after you go to a second closing or receive a second disbursement. At a second closing you will be asked to sign a form stating that you understand no appeal will be accepted by *The Road Home* or the State of Louisiana Office of Community Development (OCD) after the second closing is complete.

Instructions for Filing a *Road Home* Appeal

If you choose to formally appeal a *Road Home* Resolution Team decision, you must submit your appeal in writing to the Appeals Office **within 90 days** from the date postmarked on your Resolution letter or the date of your first closing. The Appeals Office will only accept communication that is mailed to *The Road Home* Appeals Office. Faxes, emails, telephone calls, or other methods of communication will not be accepted as an appeal but can be followed up with a mailed letter/document.

When submitting a *Road Home* appeal, your letter or document must include the following information:

- Full name of all Homeowners/Applicants

- Complete address
- Application ID number (beginning with 06HH)
- Signature of Applicant or Co-Applicant
- Telephone number(s)
- Specific reason for appealing *The Road Home* decision.

Additional information can be submitted to support your appeal claim, including:

- Supporting documentation for your appeal
- Additional justification for appealing *The Road Home* program decision
- Request for a copy of your appeal file with your Appeal Determination Report.

All information related to your formal appeal must be mailed to:

The Road Home Appeals Office
P.O. Box 4669
Baton Rouge, Louisiana 70821

The Appeals Office staff will research your issue thoroughly and objectively, providing a decision within 60 days upon accepting all appeal documents. All official communication from the Appeals Office will be provided in writing through first-class mail. All decisions will be made by Appeals Office staff based on the information included in your application, award calculations made by *The Road Home,* program policies, and documents mailed with your appeal. All Appeal Office decisions including policies reviewed will be recorded in an Appeal Determination Report and mailed to you. The Appeals Office will also forward your Appeal decision to the Louisiana Office of Community Development (OCD).

Filing a State Appeal to the Office of Community Development (OCD)

If you disagree with the final decision made by *The Road Home* Appeals Office, you can submit a State appeal to the Louisiana Office of Community Development (OCD). State appeals must be submitted in writing within 30 days of the final decision made by *The Road Home* Appeals Office. State appeals must be mailed to:

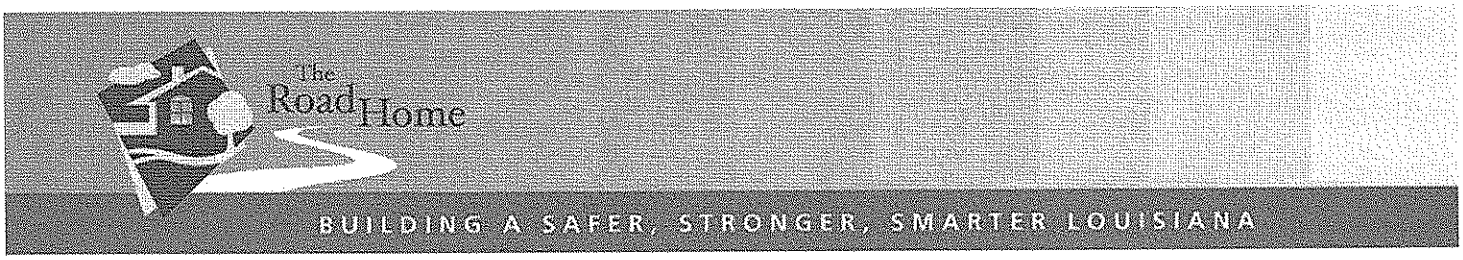
The Road Home Appeals Office
ATTN: STATE APPEAL
P.O. Box 4669
Baton Rouge, Louisiana 70821

The appeal must be postmarked on or before the 30th day of the final decision of *The Road Home* Appeals Office, as shown on the Appeal Determination Report. Faxes, emails, telephone calls, or other methods of communication will not be accepted as an appeal.

The Road Home will notify OCD of your appeal. OCD will respond directly to you after receiving a State appeal and base its decision solely on the merits of the case and application information.

Exhibit I

The Road Home, *Filing an Appeal*



Filing an Appeal

If you believe the program's determination of your funding award calculation or your eligibility status is incorrect, you have the option to work with your PAL to resolve these issues with your award or you can file a formal appeal in writing to the State Appeals Office.

If you have already closed on your award, you must appeal any issues with your award within 90 days of closing. After 90 days, the award is considered final and may not be appealed.

The Appeals Office will research all information related to an application only as it relates to current policies governing *The Road Home* award outcomes. The Appeals Office will not change policies or laws set forth by the State of Louisiana or the federal government. If you disagree with the outcome of the Appeals Office, you have the right to request a review by the State Review Panel.

Even though you may be seeking an appeal of an award, you are allowed to receive the amount of the grant award through a first closing. If you are awarded an additional amount as a result of the PAL or appeal process, you will receive the funds through a second disbursement. If additional documents do not need to be recorded, a second disbursement will be disbursed to you, per your instructions.

NOTE: If you have chosen **Option 2** or **Option 3** but wish to seek additional amounts through the appeal process after your first closing, please be aware that you are selling your property to *The Road Home* Corporation, dba, Louisiana Land Trust at the FIRST closing for the amount of the initial award. **The sale of your property to *The* Louisiana Land Trust is FINAL. After the sale at the first closing, you cannot get your property back even if you do not receive any additional award through the appeal process.**

If you do not want to sell your property for the amount of the initial award, you should not close on your grant until the PAL process or the appeal process is finished.

Second Disbursements

If you have completed one closing, you have up to 90 days from the date of the first closing to file an appeal. If you have already received written notification from your PAL's, and disagree with the outcome,, you may file a State Appeal if you disagree with the award you received.

If the Appeals Office determines that you should receive an additional award after the first closing, you will be contacted to either:

1. Schedule a second closing if additional closing documents need to be recorded or
2. Schedule a second award disbursement to be mailed or electronically transferred to you if additional closing documents do not need to be recorded.

You cannot file an appeal after you receive a second disbursement. When you receive your second disbursement, you will be asked to sign a form stating that you understand that **no** appeal will be accepted after the second closing is complete.

Instructions for Filing a *Road Home* Appeal

If you choose to formally appeal your award after completing your first closing, you must submit your appeal in writing to the Appeals Office **within 90 days** from the date of your first closing. A formal appeal of calculations related to your *Road Home* application or award can include more than one request for consideration or review but must be submitted as one appeal.

Only communication that is mailed to the Appeals Office will be accepted.

When submitting an appeal, your letter or document must include the following information:

- Full name of all Homeowners/Applicants
- Current mailing address
- Application ID number (beginning with 06HH)
- Original Signature of Applicant or Co-Applicant
- Telephone number(s)
- Specific reason(s) for your appeal.

Additional information can be submitted to support your appeal claim, including:

- Supporting documentation for your appeal
- Additional justification for filing an appeal

All information related to your formal appeal must be mailed to:

Appeals Office
P.O. Box 4669
Baton Rouge, Louisiana 70821

Your appeal will be assigned to an Appeals Advisor who will work with you to collect any necessary information and determine an outcome. They will mail you a packet containing information from your file that was used to determine your compensation. The appeals advisor will thoroughly research your appeal, seeking information from you and third parties – insurance companies, appraisers, damage estimators – depending

on the issue raised. Your advisor will contact you, by phone, at least every 15 days to update you on the status of your appeal and clarify any issues.
Once your advisor makes a determination on your case, they will prepare the "Appeals Determination Letter" which will be mailed to you, giving you the option to accept the determination or request a review of the determination by the State Review Panel. All official communication from the Appeals Office will be provided in writing through first-class mail. All determinations will be made by Appeals Office staff based on the information included in your application, award calculations made by *The Road Home,* program policies, and documents mailed with your appeal. All Appeal Office decisions including policies reviewed will be recorded in an Appeal Summary and an Appeal Determination Letter will be mailed to the applicant..

Once your Appeal Determination Letter is mailed to you, no additional or separate appeal can be filed unless your calculations change after the letter is issued.

Once you receive the Appeals Determination Letter, you have two options: 1) Accept the determination within 30 days of receiving the Appeals Selection Form or 2) Request a review of the determination by the State Review Panel. If you select Option 2, your Appeals Advisor will call you within 5 days of the request to clarify any outstanding issues. Your Appeals Advisor will place your appeal on the review panel docket within 10 days of receipt of your request for consideration by the State Review Panel. If you would like for your appeal to be reviewed by the State Review Panel, you must make this request to your Appeals Advisor on or before the 30th day of the final decision of the Appeals Office, as shown on the Appeal Determination Letter.