



## **Comments on the State of Texas Hurricane Harvey Action Plan for CDBG-DR Funds**

February 13, 2018

Via email to [cdr@glo.texas.gov](mailto:cdr@glo.texas.gov)

We appreciate the opportunity to provide comments on the State of Texas Hurricane Harvey Action Plan for Community Development Block Grant fund for Disaster Recovery allocated by Federal Register Notice 6047 on December 27, 2017. The \$57.8 million in CDBG-DR funds allocated to Texas were originally appropriated by Congress in the Continuing Appropriation Act, 2017 (Pub. L. 114-22, September 29, 2016) for disaster relief and recovery “resulting from a major disaster declared in 2016 and occurring prior to enactment of the Appropriations Act”. (81 F.R. 224; 83254, November 21, 2016). On September 8, 2017, the Supplemental Appropriation for Disaster Relief Requirements, 2017 (Pub. L. 115-56) was approved, appropriating an additional \$7.39 billion in CDBG-DR funds for major disasters declared in 2016. The Federal Register Notice for those funds was issued on February 9, 2018.

Texas Appleseed is a public interest justice center that works to change unjust laws and policies that prevent Texans from realizing their full potential. Since Hurricanes Katrina and Rita in 2005, Texas Appleseed has worked with a network of organizations in Texas, including housing advocates, policy experts, and grassroots community groups, to ensure that all Texas families are able to recover in the wake of a natural disaster, that communities are rebuilt to be more resilient, and that all families have the opportunity to live in safe, decent neighborhoods with equal access to educational and economic opportunity.

We understand that this Action Plan covers only the \$57.8 million in CDBG-DR allocated from funds for 2016 disasters, but our comments include recommendations for future Action Plans for CDBG-DR funds allocated to Texas for Hurricane Harvey, particularly in light of HUD’s publication of the Federal Register Notice for the second appropriation of CDBG-DR funding on February 9, 2018.

### **I. Introduction**

Hurricane Harvey may be the costliest natural disaster in U.S. history, with an estimated \$160 billion in damages and one million homes damaged in Texas alone. Regardless of future appropriations, there most likely will not be enough resources to fully address the \$160 billion in estimated damages in Texas. This is particularly true of CDBG-DR funds; in addition to the \$57.8 million covered by this Action Plan, Texas has been allocated \$5 billion from the \$7.39 billion from the Supplemental Appropriation for Disaster Relief Requirements, 2017 (Pub. L. 115-56). The

funding bill passed February 9, 2018 includes a total of \$90 billion in disaster aid; a further \$28 billion in CDBG-DR.

Unfortunately, the further in time we are from the Hurricane, the less likely it is that legislators outside of disaster-affected states will feel the same kind of urgency or need to appropriate additional funds.

In light of limited funding and the potential limited nature of future federal appropriations, the State and federal governments will need to prioritize how these funds are spent. In addition to targeting areas of the greatest unmet need, the State is correct to prioritize both housing, and the needs of low and moderate income families who will have the most difficult time recovering from Hurricane Harvey.<sup>1</sup>

This prioritization is particularly important for CDBG-DR funds. Unlike non-housing needs, which can be funded with FEMA Public Assistance, U.S. Army Corps of Engineers, Department of Agriculture, and Department of Transportation disaster funding, CDBG-DR is the only source of funding for long-term permanent housing repair and reconstruction. We are not suggesting that CDBG-DR funding should not be used for infrastructure or economic development activities (workforce housing is itself critical to economic recovery, and infrastructure improvements must be coordinated with rebuild housing), but we strongly support the state's assessment that housing is the most urgent and critical need, is integral to successful and resilient recovery, and that prioritizing safe, resilient, and affordable housing for disaster survivors should be prioritized. Too many families remain displaced, homeless, or are living in unsafe and unhealthy conditions.

## **II. Citizen Participation**

The Action Plan correctly states that the State must ensure that all citizens have equal access to information about the program, "including persons with disabilities (vision and hearing impaired) and Limited English Proficiency (LEP)" and cites the correct guidance on access for LEP populations in order to avoid potential discrimination against people based on their national origin under Title VI of the Civil Rights Act of 1964.<sup>2</sup> The State provided a Spanish version of the Action Plan, and extended the Action Plan comment period when the Spanish translation was not immediately available.

However, the State has not yet provided a Vietnamese translation of the action plan, nor did it explain its decision not to do so. Under the 2007 Federal Guidance, a "safe harbor" for written

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<sup>1</sup> See, e.g., Thomas Gabe, Gene Falk, Maggie McCarty, and Virginia Mason, Hurricane Katrina: Social-Demographic Characteristics of Impacted Areas, Congressional Research Service Report to Congress (November 5, 2005); Alice Fothergill and Lori Peek, Poverty and Disasters in the United States: A Review of Recent Sociological Findings, *Natural Hazards* 32: 89–110, 2004; and, Shannon Van Zandt, Walter Gillis Peacock, Wesley E. Highland, and Samuel D. Brody, "Mapping social vulnerability to enhance housing and neighborhood resilience", *Housing Policy Debate* 22(1):29-55 (January 2012).

<sup>2</sup> Action Plan at 53.

translation of vital documents is providing written translation “for each eligible LEP language group that constitutes 5 percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered.”<sup>3</sup> According to the 2015 American Community Survey (ACS) 5-year estimates, there are an estimate 45,290 people in Harris County who speak English less than “very well” and whose first language is Vietnamese. The State did translate Action Plans and Amendments for Hurricanes Dolly and Ike into Vietnamese.

The “safe harbor” is not a bright line rule. Instead, the Guidance lays out a four-factor balancing test that recipients of federal funds should use to determine the extent of their obligation to provide LEP services. The State has not included its analysis of those factors in the Action Plan, or laid out what language services other than translation of documents it may make available for LEP populations.<sup>4</sup>

Including this analysis and a plan for providing language access in the Action Plan (or as an appendix) is important to fulfilling the requirements of the December 2017 Federal Register Notice. Lack of sufficient language access for LEP populations in disaster recovery programs was the basis of a Title VI complaint against the State of New Jersey after Superstorm Sandy and the resulting Voluntary Compliance Agreement, and Conciliation Agreement.<sup>5</sup> We appreciate the GLO’s commitment to distributing disaster recovery funds as quickly as possible. Making its language access plan clear now not only ensures equal access for all affected households, it also avoids future delays that might result from having to resolve a Title VI complaint.

We also encourage the State to lengthen the public comment period for the Action Plan. The December 2017 FR Notice requires that the Action Plan be posted on the grantee’s website for “no less than 14 days”, giving the State discretion to provide a longer public comment period.<sup>6</sup> We recommend that the State provide a public comment period of 30 days.

We appreciate the State’s commitment to issuing an Action Plan and submitting it to HUD as quickly as possible in order to start providing help to affected Texans. However, particularly for future Action Plans that will describe the uses of far more funding, a greater variety of programs, and affect a larger number of Texans, 14 days is an insufficient amount of time to allow meaningful review and public comment, particularly from the citizens who will be most directly affected by the use of these funds. Providing at least a 30-day comment period affords citizens, local governments, and other interested parties a reasonable opportunity to read the Action Plan and provide important feedback.

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<sup>3</sup> 72 F.R. 2732; 2745 (January 22, 2007)

<sup>4</sup> See, e.g., *Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964* (DOJ, DHS, HUD, DHHS, DOT, August 2016); and, 72 F.R. 2732 (January 22, 2007)

<sup>5</sup> See Voluntary Compliance Agreement and Conciliation Agreement, Title VI Case No. 02-13-0048-6 (May 30, 2014) available at <http://portal.hud.gov/hudportal/documents/huddoc?id-NewJerseyAgreementsigned.pdf>

<sup>6</sup> 84 F.R. 247; 61322 (December 27, 2017) at I.A.C.

Meaningful and ongoing citizen participation also requires that information and data posted on the required public website go beyond the documents specified in the FR Notice.<sup>7</sup> The majority of public interest in CDBG-DR programs will not be in procurement processes, but in the progress of programs and projects, and in the beneficiaries of those programs. GLO must publish information that enables the public to monitor the progress of programs, and data necessary to evaluate the civil rights compliance of grantees.

### III. Needs Assessment

Under I.C of the December 27, 2017 FR Notice, “[i]n developing the resulting Action Plan for Hurricane Harvey (Public Law 115-31) Texas must meet the grant process requirements from the November 21, 2016 notice, which include. . . [c]onsult[ing] with affected citizen, stakeholders, local governments, and public housing authorities to assess needs.” While the State consulted extensively with local and regional governments, including a list of 13 additional stakeholders in the Action Plan, one of which is a public housing development, there is no indication anywhere that the state consulted with “affected citizens.”

The individuals and families that will be directly affected by the State’s Action Plan and other program and allocation decisions are the most critical constituents for the Action Plan. While the requirement for a public hearing after publication of the Action Plan may have been waived by the November 21, 2016 FR Notice, the consultation requirement was not.

In addition, input from affected citizen and community groups is an integral part of the needs assessment process required by the applicable FR Notice.<sup>8</sup> In the notice, HUD recommends its Disaster Impact and Unmet Needs Assessment Kit to guide grantees through the mandatory impact and unmet needs assessment. The Disaster Impact and Unmet Needs Assessment Kit’s description of data analysis includes a question specifically about , “engagement of the citizenry”.

*Grantees need to determine if the broader public has been engaged in planning and recovery efforts to date. **Are needs being communicated by the public that have not been heard or captured by the entities gathering impact data?** A grantee with a deep and comprehensive understanding of the public’s perspective and level of engagement will be better able to define and prioritize unmet needs. (emphasis added)<sup>9</sup>*

The joint *Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964* (Disaster Title VI Guidance) also emphasizes the importance of

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<sup>7</sup> See; 81 F.R. 83254; 83262 VI.C.4.e.; and, VI.A.1.b(2).

<sup>8</sup> 82 F.R. 61320; 61332 (December 27, 2017) incorporates the requirements of the November 2016 notice: “In developing the resulting Action Plan for Hurricane Harvey (Pub. L. 115-31), Texas must meet the grant process requirements from the November 21, 2016 notice.”

<sup>9</sup> *Disaster Impact and Unmet Needs Assessment Kit* at 6 (HUD, March 2013) available at [https://www.hudexchange.info/resources/documents/Disaster\\_Recovery\\_Disaster\\_Impact\\_Needs\\_Assessment\\_Kit.pdf](https://www.hudexchange.info/resources/documents/Disaster_Recovery_Disaster_Impact_Needs_Assessment_Kit.pdf)

engagement with diverse racial, ethnic, and LEP populations from emergency planning through the recovery stages.[10]<sup>10</sup>

*Direct engagement with diverse racial, ethnic, and LEP populations is necessary during the recovery stage to ensure that recovery programs . . . are developed in a manner that takes into account the needs of all members of the community, regardless of race, color, or national origin, and do not result in the creation or perpetuation of racial or ethnic disparities.*

Direct community engagement is important given the well known deficiencies in the most widely available data, particularly FEMA data, which incorrectly estimates unmet needs of renters and low and moderate income homeowners. FEMA data undercounts damage in the following ways:

1. FEMA does not inspect rental units for damage; it instead uses personal property damage as a proxy for unit damage. Rental units are only “most impacted” if there is a FEMA personal property assessment of \$2000 or more or over one foot of flooding. Low-income families may have lost everything, but if a FEMA inspector does not think their personal property was worth \$2000 or there was less than one foot of water in the unit, that unit will not be included in damage estimates. We also note that the majority of the damage from Harvey’s initial landfall was not flooding damage. Calculating a damage amount based on personal property loss rather than unit loss would result in an entirely inaccurate amount of unmet need for rental housing.

This is compounded by the fact that, under the allocation methodology laid out in Appendix A to the November 2016 FR Notice, for purposes of calculating unmet affordable rental housing need, “landlords are presumed to have adequate insurance coverage unless the unit is occupied by a renter with income of \$20,000 or less.” Using the 2017 Area Median Limits calculated by HUD for the Houston Metro Area, the only units that would be counted would be units affordable to families of three or less making 30% or less of AMI, again massively undercounting the need for affordable rental housing in a state with high demand for housing and a growing affordability crisis. As the Action Plan states, “[i]n an already tight market, the loss of housing associated with Hurricane Harvey only compounds affordability issues in the state.”

2. FEMA’s temporary housing programs disadvantage renters and lower-income homeowners. Both FEMA’s rental assistance and Direct Leasing and Multi-Family Lease and Repair rely on the willingness of local landlords to participate in the programs and on the availability of units in the first place. Following Hurricane Katrina, FEMA’s housing referral site included openly discriminatory ads, and testing showed that people of color and people with

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<sup>10</sup> *Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964* (DOJ, DHS, HUD, DHHS, DOT, August 2016) at 7

disabilities were subject to discrimination in the housing market.<sup>11</sup> In Texas, landlords have been reluctant to participate in temporary housing programs post-Harvey, leaving many families without stable housing or homeless. (Yet another reason GLO's prioritization of rebuilding affordable rental housing is so important.) The Direct Assistance for Limited Home Repair (DALHR) may also exclude many lower income homeowners. FEMA's program rule is that "repairs cannot exceed the lesser of 50% of the home's fair market value or \$60,000." Homes with lower fair market values, therefore, will be denied assistance, even if they need the exact same amount of repair assistance as a home with a higher market value. Data on the progress of these programs should also be included in the Needs Assessment.

3. FEMA data undercounts damages to low and moderate income homeowners. Following Hurricane Dolly in 2008, FEMA denied approximately half of all housing repair applications in the Rio Grande Valley for "insufficient damage," not because those homes were not damaged by the hurricane, but because FEMA was applying an unpublished standard of "deferred maintenance," which essentially denied low income homeowners assistance based on the inspector's opinion of what the pre-storm condition of the home might have been. As a result, FEMA underestimated housing damage in the Rio Grande Valley by as much as 50%. FEMA is no longer permitted to use the "deferred maintenance" evaluation, due to the federal lawsuit that resulted from this practice, *LUPE v. FEMA*. However, in the wake of Hurricane Harvey, low-income homeowners have testified before the Texas Legislature that they are being denied FEMA assistance based on the alleged pre-storm condition of their homes.<sup>12</sup> FEMA's policy and/or practices systemically undercount housing damage in low-income communities and communities of color, in violation of the Stafford Act's prohibition on discrimination "on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status", and other federal civil rights laws.<sup>13</sup>
4. Heir property issues, which are much more prevalent in African-American families and rural communities, affect eligibility for SBA loans, which in turn contributes to the disproportionate undercounting of damage to households and neighborhoods of color. Homeowners without clear title are not eligible for SBA loans, and although FEMA guidance allows for alternative proof of ownership, it is unclear that this guidance is being explained to applicants.<sup>14</sup>

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<sup>11</sup> National Fair Housing Alliance, *No Home for the Holidays: Report on Housing Discrimination Against Hurricane Katrina Survivors* (December 20, 2015) Available at: <http://nationalfairhousing.org/wp-content/uploads/2017/04/No-Home-for-the-Holidays-NFHA-Katrina-Discrimination-Report-12-20-05-3.pdf>

<sup>12</sup> January 18, 2018 Texas House Urban Affairs Committee Hearing. Summary and video found at <https://texashousers.net/2018/01/18/Harvey-survivors-tell-texas-house-urban-affairs-committee-that-safe-housing-is-long-overdue/>

<sup>13</sup> 42 U.S.C. 5151

<sup>14</sup> "FEMA defines an owner-occupied residence as one where the applicant:

- Is the legal owner; or
- Does not hold a formal title to the residence and pays no rent, but is responsible for the payment of taxes or maintenance of the residence; or

5. FEMA has repeatedly refused to make some damage data and data about application approvals and denials public, especially data disaggregated by protected class. Our understanding is that FEMA has also failed to make some of this data available to the State, making it impossible for the State to incorporate the disparate impact on protected classes or geographic areas into its needs assessment and Action Plan. The available data addressing this issue includes a survey conducted by the Episcopal Health Foundation published in December 2017, which found that half of affected residents reported that they were not getting the help they needed, that households whose FEMA applications were rejected were not given a reason for the denial or information on how to appeal, and that Black and Hispanic residents and households with lower incomes were more likely to be affected by property damage or income loss than other affected Texans.<sup>15</sup>

These issues are compounded by administrative and process problems that emerged after Hurricane Katrina, Rita, Dolly, and Ike, and that are continuing in the wake of Hurricane Harvey.; Applicants receive contradictory or inaccurate information from FEMA personnel, notices to applicants are confusing and inadequate, and the appeals process is both unduly time consuming and difficult to navigate

At minimum, if the State is using FEMA data to determine need, the State should look at FEMA application data, not just eligibility and damage data. Eligibility is a flawed measure, given the high level of FEMA denials generally (which calls into question its reliability). The State has not made FEMA eligibility a prerequisite for CDBG-DR eligibility in the past. Even FEMA application may be a poor measure of need, due to the fact that displacement, disability or age, the impact of the hurricane on health, and other issues may have prevented some individuals and families from even completing an application.

As the Action Plan points out, “some housing and income demographics are slightly different in the eligible counties versus the statewide averages. The 49 eligible counties have an estimated median owner-occupied housing unit value and median household income lower than the state as a whole.” The affected counties also have higher African-American and minority populations as a whole than the statewide total.<sup>16</sup> Given this, we are concerned that the data used to determine unmet need for both owners and renters may underestimate the level of unmet need in the LMI category. We understand that the data available to the GLO at the time the Action Plan was written was not

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- Has lifetime occupancy rights with formal title vested in another (see Figure 6 for required documentation).

FEMA, *Individuals and Households Program Unified Guidance (IHPUG)*, FP 104-009-3 / September 30, 2016, at 17-18.

<sup>15</sup> Liz Hamel, Bryan Wu, Mollyann Brodie, Shao-Chee Sim, and Elena Marks, *An Early Assessment of Hurricane Harvey's Impact on Vulnerable Texans in the Gulf Coast Region: Their Voices and Priorities to Inform Rebuilding Efforts* (Kaiser Family Foundation and Episcopal Health Foundation, December 5, 2017) Available at: <https://www.kff.org/other/report/an-early-assessment-of-hurricane-harveys-impact-on-vulnerable-texans-in-the-gulf-coast-region-their-voices-and-priorities-to-inform-rebuilding-efforts/?platform=hootsuite>

<sup>16</sup> Action Plan at 13.

complete and that these numbers will change in subsequent Action Plans and Amendments which must use the most recent data available.<sup>17</sup>

We support the use of a data-based formula to allocate funds within the State of Texas. But that formula must be adjusted to account for deficiencies in FEMA and other data and ensure that the needs of all Texans affected by Hurricane Harvey are taken into account.<sup>18</sup>

There are similar issues with identifying and prioritizing infrastructure needs. We agree with the GLO that FEMA public assistance data is both preliminary and not the ideal data set with which to determine infrastructure needs. However, we are concerned that an alternative evaluation of infrastructure needs based on priorities identified by impacted communities, the October 31, 2017 Request for Federal Assistance: Critical Infrastructure Projects, compiled by the Governor's Commission to Rebuild Texas, is not an accurate picture of infrastructure needs either.

We understand that this report was compiled almost immediately after the hurricane and that the proposed funding for many of these projects is not CDBG-DR. We also commend the Commission for including "Equity and Fairness" and "Environmentally Sound" as criteria for evaluating projects. However, it is unclear how these criteria were applied and the final list of projects selected by the Commission raises a number of concerns:

1. Heavily damaged jurisdictions that we would expect to see represented in these projects, particularly Port Arthur, do not have proposed projects on the list. We understand that Port Arthur did not submit a project to the Commission, which may indicate a lack of capacity - in an area with such a high level of damage - to engage in this process. Low-income communities and communities of color are more likely to be left out of a process that relies on the communities to identify and prioritize their infrastructure needs. This is particularly true for smaller, poorer, or more rural communities that have capacity barriers intensified by the aftermath of a disaster. Port Arthur, for example, has a 29.3% poverty rate and is 40.7% African-American and 29.6% Hispanic/Latino.<sup>19</sup>

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<sup>17</sup> 81 F.R. 83254; 83258 (November 21, 2016)

<sup>18</sup> For the second allocation round following Hurricanes Dolly and Ike in 2008, HUD created a new formula for allocating CDBG disaster recovery funds between states. The formula took into account: "(i) The sum of estimated unmet housing, infrastructure, and business needs, adjusted by (ii) a HUD-calculated risk level for recovery challenge," which compensated for some of the problems with FEMA data - particularly the underrepresentation of unmet needs in low-income minority families and communities", including a "challenge to recover" factor reflecting data from Hurricanes Katrina, Rita, and Wilma that was used to calculate the risk a home would not recover, adjusting grant allocations so that states with higher per-damaged home risk scores received more funds. Department of Housing and Urban Development Additional Allocations and Waivers Granted to and Alternative Requirements for 2008 Community Development Block Grant (CDBG) Disaster Recovery Grantees (August 14, 2009) Federal Register/Vol. 74, No. 156 [Docket No. FR-5337-N-01] available at <http://edocket.access.gpo.gov/2009/pdf/E9-19488.pdf> and 46 Fed. Reg. Vol. 74, No. 156. Friday, August 14, 2009, p. 41155

<sup>19</sup> 2010 Census Data

2. There are several projects in the report that are economic development projects with no clear, or even claimed, tie to unmet disaster needs. One of these projects alone is estimated to cost \$1.3 billion and primarily benefits a county for which no disaster was declared.<sup>20</sup> In 2008, the Mississippi State Conference NAACP, the Gulf Coast Fair Housing Center and several individuals filed a lawsuit against HUD (*Mississippi State Conference NAACP v. U.S. Department of Housing and Urban Development*, CV-08-2140) alleging that HUD violated 42 U.S.C. § 5301 of the Housing and Community Development Act of 1974 by approving Mississippi's Hurricane Katrina Action Plan diverting \$570 million in CDBG-DR funds from programs addressing the housing needs of low- and moderate-income survivors to funding of a major expansion of the commercial Port of Gulfport.<sup>21</sup>
3. While CDBG-DR is not the primary proposed funding source for many of these projects, it is often proposed as a backup source of funding for FEMA or ACOE dollars. In addition, it is critical that recovery from Hurricane Harvey is coordinated in order to leverage all available funds and ensure that communities are rebuilt in a way that protects them from future events.
4. Many jurisdictions have not assessed their infrastructure on the basis of greatest need.<sup>22</sup> For example, the City of Houston did not conduct a study of open ditch drainage in the City until after Hurricane Ike, despite repeat flooding in certain neighborhoods. The study confirmed that 88% of open ditch drainage was in minority neighborhoods, a legacy of segregation and historical disinvestment. The city's failure to evaluate these needs for decades meant that drainage projects in minority neighborhoods were never prioritized for infrastructure investment.

As the State reminds subrecipients in the Action Plan, they are obligated to use federal funding in a manner that affirmatively furthers fair housing and complies with civil rights requirements, including spending on infrastructure and mitigation, and the GLO will review projects for civil rights compliance.[21] The State's inclusion of "pre-disaster needs" in its assessment is important and appropriate.<sup>23</sup>

#### **IV. Use of Funds**

The State's prioritization of housing needs, the needs of low and moderate income families, and rebuilding affordable rental housing are not only the correct priorities from an equity standpoint, but also from a comprehensive disaster recovery standpoint. Low-income families and

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<sup>20</sup> See, e.g., The Governor's Commission to Rebuild Texas, *Request for Federal Assistance: Critical Infrastructure Projects* (October 31, 2017) at 44.

<sup>21</sup> The case was settled in 2010, resulting in the submission of a new Action Plan with additional funding for LMI households.

<sup>22</sup> For this reason, among others, including those cited by the Comments of the Coalition for Environment, Equity, and Resilience (CEER), the Texas Coastal Resiliency Study may be a valuable source of potential projects for jurisdictions.

<sup>23</sup> Action Plan at 6. Texas Appleseed also appreciates GLO's use of the Oxford Comma.

communities are disproportionately affected by natural disasters, and then are disadvantaged again when the recovery process does not take their unique needs into account. Prioritizing rebuilding affordable and rental housing across the region will prevent permanent displacement, preserve the jobs and populations of many communities, and increase the quality of Texas housing stock. This priority also reflects HUD's requirement, in the February 9, 2018 FR Notice, that "each grantee primarily consider and address its unmet housing recovery needs."<sup>24</sup>

#### 1. Harris County Residential Buyout Program

It is critically important that program guidelines for this buyout program be developed in a transparent process with extensive community input. Regardless of whether these planned buyouts are voluntary or mandatory, relocating away from an existing community or a home that has been in a family for generations can be difficult and even traumatic.<sup>25</sup> Without planning and community buy-in, a voluntary individual buyout program can result in a patchwork of empty and occupied homes, creating a blighted neighborhood. One of the critical issues in ensuring a successful buyout program is equity and ensuring that program rules and processes do not have a disparate impact on particular groups of homeowners.

The program guideline requirements listed in the Action Plan are a promising start, particularly the requirement that the program serve LMI households, who have the least resources with which to relocate on their own or to maintain temporary housing elsewhere for a long period of time, leaving them to live in homes that may be structurally compromised or present health risks because of mold. It is particularly critical that, as required by the Action Plan, this buyout program includes not only acquisition and demolition, but relocation payment and assistance as well.

The December 27, 2017 FR Notice recognizes the importance of this use of funds, as did previous applicable FR Notices, by clarifying the previously published alternative requirement qualifying this use of funds to meet the LMI national objective criteria for buyouts and housing incentives. To meet the Low/Mod Buyout (LMB) and Low/Mod Housing Incentive (LMHI) national objectives, grantees must demonstrate that the buyout award is greater than the post-disaster fair market value of the property, or that housing incentives are tied to voluntary buyout programs in order to help LMI households move outside of the affected floodplain or to a lower-risk area.<sup>26</sup>

Low and moderate income households must be provided with enough funds that the choice to move is a realistic one (or to ensure that they can actually move to a safer area in the case of mandatory buyouts).

In 2007, the State of New Jersey set up a permanent voluntary buyout program called Blue Acres, which was used for buyouts following Hurricane Sandy using FEMA, CDBG-DR, and state and

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<sup>24</sup> 83 F.R. 5844 (February 9, 2018)

<sup>25</sup> Over 50% of applicants who opted out of the State's Hurricane Ike and Dolly homeowner mobility program cited attachment to their neighborhood or the fact that the property had been in their family for a long time as their reason for choosing not to move. (February 28, 2017 data obtained from GLO)

<sup>26</sup> 82 F.R. 61320; 61323 (December 27, 2017).

municipal funding. The program purchased homes at the fair market value of the home before Hurricane Sandy flooding.<sup>27</sup> However, this policy denies LMI homeowners a realistic choice to move. For example, take an elderly homeowner in Harris County who has paid off their mortgage and is now on a fixed income. If their home was worth \$45,000, or even \$60,000 or \$80,000 before the hurricane (perhaps because of repeated flooding or its location in a distressed neighborhood), that amount of money will not be enough to purchase a new home in a safer area, nor will it provide rent for the rest of that person's life. The homeowner is stuck between staying in an unsafe home or losing housing stability and perhaps their only asset. This is not a real choice, and results in the most vulnerable homeowners staying in high risk areas.<sup>28</sup>

Using the pre-storm value of a home to determine disaster recovery program benefits often has a discriminatory impact on the basis of race or ethnicity as well. Following Hurricane Katrina, a lawsuit was filed against the State of Louisiana and the U.S. Department of Housing and Urban Development (HUD) alleging racial discrimination in the State's CDBG-DR funded Road Home Program, which provided grants to homeowners to repair or rebuild their homes. The original grant formula was based on the pre-storm value of a home, which resulted in African-American homeowners receiving less repair money than White homeowners, because their homes were located in neighborhoods with lower home values due to market discrimination and the legacy of segregation.<sup>29</sup> Many African-American families were left unable to complete repairs or return home or were left living in uninhabitable houses. As Louisiana Congressman Cedric Richmond said when the case was settled in 2011,

*[e]veryone knew that the Road Home formula for calculating grant awards was deeply flawed and punished folks in neighborhoods where home values were lower. . . After all, if two families are both rebuilding a three bedroom home then their construction costs will be the same—regardless of the neighborhood. In that case, each family deserves the same assistance from their government. Unfortunately, the flawed formula was effectively discriminatory, locking many families out of equitable assistance.<sup>30</sup>*

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<sup>27</sup> FEMA, "For Communities Plagued by Repeated Flooding, Property Acquisition May be the Answer" (Release No: SRFO-NJ NR-023, May 28, 2014) Available at <https://www.fema.gov/news-release/2014/05/28/communities-plagued-repeated-flooding-property-acquisition-may-be-answer>

<sup>28</sup> These areas are not only high risk because of flooding, some communities, particularly low-income communities of color, were impacted not only by flooding but by hazards related to chemicals, oils, sewage, waste or air pollution during the event,

<sup>29</sup> For example, redlining by the Federal Housing Administration in the 1930s, GI Bill loan guarantee requirements that forced developers to build all-white neighborhoods, discriminatory zoning that placed environmental hazards and industrial uses in communities of color, failure to provide adequate infrastructure or public services in communities of color, etc.

<sup>30</sup> Congressman Cedric Richmond, quoted in "Settlement Reached in Road Home Discrimination Challenge," Kelly Parker, *The Louisiana Weekly*, July 11, 2011. Available at <http://www.louisianaweekly.com/settlement-reached-in-road-home-discrimination-challenge/>

The lawsuit (which resulted in a change to the Road Home formula) and settlement resulted in an additional \$535 million in repair and rebuilding funds for LMI homeowners in the four most impacted parishes in Louisiana.<sup>31</sup>

Another barrier to relocation for LMI homeowners, particularly African-Americans, may be inability to show clear title because of heirs' property ownership.<sup>32</sup> The State of Texas has successfully addressed this issue in disaster recovery programs in two ways. First, in 2009, the Texas Legislature passed HB 2450, which allowed the agency administering CDBG-DR to accept alternative proof of ownership, including an Affidavit of Heirship, for purposes of disaster recovery programs that repaired or rebuilt homes in place. Second, following Hurricanes Ike and Dolly, the State funded the Texas Title Project, which helped LMI households clear title and access, in particular, the State's homeowner mobility program, allowing them to choose to move to a safer area rather than rebuild in place. The Homeowner Opportunity Program (HOP) provides other lessons learned and best practices for relocation programs of any type, including the critical importance of mobility counseling and real estate agents to ensure that families have the knowledge they need to make an informed decision about what is best for them and to make successful moves to safer areas. The worst case scenario is that families who accept buyout are unable to find housing in safer areas and move back into their original or less safe neighborhoods.

## 2. Affordable Rental Recovery Program

The Action Plan allocates \$10.86 million for "rehabilitation and reconstruction of affordable multifamily housing projects" in Aransas, Nueces, and Refugio Counties (Counties). While it is not clear from the Action Plan what methodology the State used to allocate 20% of funds to these counties, the Plan states that "because of the unique economy and workforce needs of the region, Aransas, Nueces, and Refugio Counties have been identified as 'most impacted and distressed' for purposes of this allocation."<sup>33</sup> Given that their need for workforce housing to sustain their economies is the justification for allocating these funds to the Counties, instead of allocating the funding to other areas of the state with urgent housing needs, we would expect this funding to be spent on the most immediately available projects.

We also expect that this housing will be affordable to the workforce it is intended to serve; not merely meet the CDBG-DR requirement that a minimum of 51% of units are affordable to

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<sup>31</sup> *Greater New Orleans Fair Housing Action Center, et al., v. United States Department of Housing & Urban Development and Robin Keegan, in her official capacity as Executive Director of the Louisiana Recovery Authority*, (U.S. District Court, District of Columbia: 1:08-cv-01938-HHK, 2008). We note that ensuring buyout programs provide homeowners with awards that will enable them to move to safer areas will benefit homeowners of all races and ethnicities.

<sup>32</sup> Heirs' property is created when a landowner dies without a probated will, creating divided ownership of property between multiple heirs, creating a situation in which all the heirs must agree, for example, in order to sell the land, obtain a mortgage, or access programs like CDBG-DR home repair and rebuilding programs. Heir's property ownership is particularly prevalent in African-American communities. *See, e.g.*: Kuris, Gabriel, "'A Huge Problem in Plain Sight': Untangling Heirs' Property Rights in the American South, 2000-2017," 2018, *Innovations for Successful Societies*, Princeton University, <http://successfulsocieties.princeton.edu/>

<sup>33</sup> Action Plan at 49.

individuals earning 80% or less of Area Median Family Income (AMFI) or comply with High HOME Investment Partnership rents. The Counties must evaluate the damage to and need for affordable rental housing at multiple income levels: rents must be affordable to families at 30% of AMFI, 50% of AMFI, and 80% of AMFI in proportion to the unmet housing need in these income categories. Neither the State nor subrecipients should be replacing damaged or destroyed affordable housing with housing that is less affordable to low-income households. Like the Low-Income Housing Tax Credit (LIHTC) program, developments funded with public CDBG-DR dollars should be prohibited from source of income discrimination, particularly against housing voucher recipients.

## **V. Allocation of CDBG-DR Funds and Future Action Plans/Action Plan Amendments**

### **A. Housing**

The State's decision to prioritize unmet housing need and the unmet needs of LMI households is the right one, and these unmet needs should be the priority for additional CDBG-DR funds allocated by amendment to this Action Plan.

However, the housing repaired and rebuilt must actually be affordable to displaced residents. The current Action Plan states that projects are eligible if "a minimum of 51% of units are affordable to individuals earning 80% or less of Area Median Family Income (AMFI) or comply with High HOME Investment Partnership rents." This does not represent true affordability or meet the needs of disaster survivors.

The State's needs assessment found that 37% of unmet renter need in the affected counties was in the 0-30% income category; 14% in the 31-50% category; 17% in the 51-80% income category, and 25% non-LMI.<sup>34</sup> Requests for rental and utility assistance were also the top two categories of calls that the Texas Health and Human Services Commission (THHSC) 2-1-1 information centers received following the first month after Harvey. Following the CDBG and HOME affordability guidelines would not produce housing affordable to 51% of the unmet renter need, and would produce double the non-LMI renter need. Public money would be used to replace affordable housing with less affordable housing.

We strongly support prioritizing rebuilding affordable rental housing, but in order for that housing to be truly affordable, rents must be affordable to families at 30% of AMFI, 50% of AMFI, and 80% of AMFI in proportion to the unmet housing need in these income categories. This is also true for homeowner repair and rebuilding programs; they should serve unmet need at various income levels proportionally. The State of Texas in fact administered its Hurricane Ike and Dolly Round II CDBG-DR funding to serve both renters and homeowners proportionally at various income levels. Both the State and subrecipients are familiar with administering housing programs to serve all income levels, and their most recent (and in some cases ongoing) experience with housing program administration included a proportionality requirement. These programs success fully served more

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<sup>34</sup> Action Plan at 34.

low-income homeowners and produced more units affordable to the lower-income families most in need of housing.

In addition, the State should set aside funds from the \$5 billion allocation to rebuild public housing, assisted and affordable housing, housing for persons with special needs, and other types of affordable housing listed in Section III.A. of the Action Plan. The failure to rebuild public housing, often because of race-based community opposition, has been an ongoing issue in Texas. Rebuilding housing for the most vulnerable Texas families should be a priority, and GLO should ensure that jurisdictions are aware of the relationship between public housing rebuilding and their eligibility for other CDBG-DR funds, and that its contracts with subrecipients contain sufficient enforcement provisions.

Like the Low-Income Housing Tax Credit (LIHTC) program, developments funded with public CDBG-DR dollars should be prohibited from source of income discrimination, particularly against housing voucher recipients.

The other set aside that should be incorporated into the forthcoming Action Plan Amendment is a set aside of funds to offset and prevent homelessness. Texas Appleseed and its project partner, Texas Network of Youth Services (TNOYS), recently published a comprehensive report on youth homelessness. In addition to documenting the seriousness of the problem, it also found that while non-profit service providers are finding innovative ways to provide services to this population, services are woefully underfunded. The state does not provide any direct funding for youth experiencing homelessness in Texas. Homelessness increases in the wake of natural disasters.<sup>35</sup> Hurricane Harvey is no different - with some providers of services to homeless youth reporting an uptick in intakes. In response to an inquiry from TNOYS, Covenant House Texas estimated that 18-20 percent of their intakes over the last few months were Harvey-related.

GLO states in the Action Plan that it has or will have housing guidelines for CDBG-DR housing programs. This would be a continuation of another best practice from Hurricane Ike and Dolly recovery: standard housing guidelines that local jurisdictions could adjust to reflect costs in their areas. A standardized housing program that both the GLO and subrecipients have experience running will substantially reduce the amount of time it will take to stand up programs and start delivering housing, as well as ensure that Texans across the impacted areas are treated equitably. In disaster recovery programs pre-Ike Round II, homeowners were subjected to different eligibility rules and different amounts of help to rebuild based solely on where they lived.

The State should include the Homeowner Opportunity Program (HOP), which allows eligible homeowners to choose to move to lower-risk higher opportunity area rather than rebuild in place,

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<sup>35</sup> See, e.g.: Laura Garcia, "Harvey triggered increase in area's homeless, advocates say" *Victoria Advocate*, January 29, 2018, Available at: <https://www.victoriaadvocate.com/news/2018/jan/29/harvey-triggered-increase-in-areas-homeless-advoca/>, Carlos Ballasteros, "Hurricane Harvey Victims: More than 20,000 Children in Houston Are Homeless, Report Shows" *Newsweek*, November 27, 2017. Available at: <http://www.newsweek.com/hurricane-harvey-victims-homeless-fema-722640>, Thompson Reuters, "Natural Disasters Make 14 Million People Homeless Each Year, Reports Show" *Global Citizen*, October 13, 2017. Available at: <https://www.globalcitizen.org/en/content/disasters-climate-change-14-million-homeless/>

in its Hurricane Harvey housing programs. The program, created after Hurricanes Dolly and Ike, was the first of its kind nationally. As of February 17, 2017, 282 households, or 9% of total applicants for homeowner assistance had been successfully relocated to safer, higher opportunity areas.<sup>36</sup> The HOP program not only provided homeowners with a choice of whether to move or rebuild in place, it included services like mobility counseling and real estate assistance to help ensure that the choice was an informed one, and used a formula-determined benefit amount that made the choice to relocate a real one for LMI families. The State and regional Councils of Government now have experience running a homeowner mobility program that is both a source of valuable lessons learned in how to improve the program, a resource for other voluntary and mandatory buyout programs, and will allow this program to be stood up quickly when the State receives the next allocation of CDBG-DR dollars.

## B. Infrastructure and Economic Development

As laid out in our comments on the Needs Assessment (above), we have concerns about the data and methodology used to identify infrastructure needs, whether that analysis incorporated pre-disaster conditions, the lack of information about the proposed beneficiaries of these projects, and the shocking lack of projects proposed for some of the hardest hit areas. We understand that these are preliminary data, and that better sources will be available and incorporated into future needs assessments, but we urge GLO to conduct continuing needs assessments and evaluations of proposed projects with these issues in mind, for all of the reasons laid out in our comments above.

We are pleased to see both the emphasis on integrating mitigation measures into rebuilding, and the State's commitment to "ensur[ing] that infrastructure activities will avoid disproportionate impact on vulnerable communities and will create, to the extent practicable, opportunities to address economic inequities facing local communities".<sup>37</sup> This is critical to ensuring that mitigation protects all Texans, and to producing sustainable resiliency.

Resilience is the ability to withstand and recover from disasters quickly, in a way that mitigates future damage and vulnerability, and in a way that goes beyond physical infrastructure. Low-income communities and communities of color are disproportionately affected by and have a harder time recovering from a disaster because of both geographic and social vulnerability forced on them by segregation, discrimination, and the cumulative effects of previous disasters on wealth and access to opportunity. For its Natural Disaster Resilience Competition (NDRC) HUD defined a resilient community as one which "is able to resist and rapidly recover from disasters or other shocks with minimal outside assistance," and that plan and implement disaster recovery that mitigates future threats "while also improving quality of life for existing residents and making communities more resilient to economic stresses or other shocks." Improving the quality of life for existing residents and making them more resilient to other shocks, including economic stress that can push middle and working class families into poverty following a disaster, is at the core of our concern for equity in disaster recovery.

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<sup>36</sup> Data obtained from GLO, February 28, 2017.

<sup>37</sup> Action Plan at 44.

Equity and civil rights concerns are integral to a successful and sustainable disaster recovery. Reducing segregation, is not only a legal and moral obligation, it is good for economic development. Metropolitan areas with high poverty rates and high levels of segregation have worse economic performance than less segregated areas. Rates of both income growth and property value growth are slower for segregated regions, for all areas, races, and income levels.<sup>38</sup> More inclusive regions also generate more long-term growth.<sup>39</sup> A study of the cost of segregation in the Chicago region found that reducing the level of segregation to the median level of segregation in the country's 100 largest metro areas would result in an additional \$4.4 billion in income, 83,000 more people with bachelor's degrees, and a 30% drop in the homicide rate.<sup>40</sup>

Also key to economic recovery and future resilience is ensuring that the jobs generated by recovery projects and programs are filled by local workers and those who lost jobs because of Harvey to create real jobs and job training for community residents, and create additional opportunities for community businesses.

Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u; 24 C.F.R 135) requires recipients of certain HUD financial assistance, including CDBG-DR, provide job training, employment, and contracting opportunities for low or very low income residents in connections with projects or activities in their neighborhoods to the greatest extent possible. Historically, Section 3 has not been vigorously enforced, and jurisdictions have completely failed to comply with its provisions. We urge the State to fully implement and enforce Section 3, including monitoring (including of whether contractors are genuinely Section 3 eligible), helping to set up a training and jobs pipeline, measuring success in terms of the number of hours worked by Section-3 eligible workers, clearly defining the geographic area from which residents should get preference as locally as possible, and imposing monetary penalties on contractors who do not meet their Section 3 goals. In addition to Section 3, jurisdictions routinely impose requirements like local hiring and job production in exchange for government financial assistance or other benefits.

Other options for increasing the number of jobs going to affected individuals and communities are ensuring that contractor qualifications include a commitment to local hiring and best value bidding processes that give more points to bidders who can comply with job quality and targeted hiring

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<sup>38</sup> Emily Badger, "Why Segregation is Bad for Everyone", *City Lab* (May 3, 2013) Available at: <https://www.citylab.com/life/2013/05/why-segregation-bad-everyone/5476/>

<sup>39</sup> Li, Huiping, Harrison Campbell, and Steven Fernandez. "Residential segregation, spatial mismatch, and economic growth across US metropolitan areas." *Urban Studies* 50.13 (2013): 2642–2660; Benner Chris, and Manuel Pastor. "Brother, can you spare some time? Sustaining prosperity and social inclusion in America's metropolitan regions." *Urban Studies* 52.7 (2015): 1339–1356.

<sup>40</sup> Metropolitan Planning Council and Urban Institute, *The Cost of Segregation: Lost Income. Lost Lives. Lost Potential*, (March 2017) Available at: [http://www.metroplanning.org/costofsegregation/default.aspx?utm\\_source=%2fcostofsegregation&utm\\_medium=web&utm\\_campaign=redirect](http://www.metroplanning.org/costofsegregation/default.aspx?utm_source=%2fcostofsegregation&utm_medium=web&utm_campaign=redirect) See, also: [http://www.metroplanning.org/costofsegregation/default.aspx?utm\\_source=%2fcostofsegregation&utm\\_medium=web&utm\\_campaign=redirect](http://www.metroplanning.org/costofsegregation/default.aspx?utm_source=%2fcostofsegregation&utm_medium=web&utm_campaign=redirect)

standards. CDBG-DR presents an opportunity to leverage housing and infrastructure funds into economic development funds as well.

## **VI. Conclusion**

This Action Plan reflects a number of lessons learned from past disasters, and Texas' length and depth of experience, and more recent continuity of administration of federal disaster recovery funds. Among the best practices borne of experience in this Action Plan that should be continued in subsequent Action Plans and Action Plan Amendments are:

1. Prioritizing the needs of LMI households and communities;
2. Prioritizing rebuilding affordable rental housing;
3. Ensuring that buyout programs include funding to ensure that LMI families have a real opportunity to relocate and make the program effective, and do not violate civil rights and fair housing laws;
4. Understanding that housing recovery is central to economic recovery;
5. Incorporating equity into planning, and evaluation of programs and projects from the beginning, and making clear that equity is not just a legal requirement and best practice for housing programs but for infrastructure and all recovery programs and projects;
6. Emphasizing mitigation and resilience;
7. Providing training on civil rights requirements for local grantees, a form of technical assistance that local jurisdictions have indicated they want; and,
8. Reaffirming the State's commitment to ensuring that all Texans affected by Hurricane Harvey benefit equitably from public disaster recovery funds.

The impact of segregation and historical disinvestment in communities of color is a disaster recovery issue. Low-income communities and communities of color have often been forced into the most geographically vulnerable areas, and a history of discriminatory zoning has often placed heavy industrial and environmentally hazardous land uses in those communities, not only increasing their vulnerability to natural and man-made disasters, but depressing their property values, making it difficult for these families to move to safer areas. The impact of repeated disasters, for example, repetitive flooding, forces low and moderate income families into poverty, decreasing the resilience of these families and communities and making it harder for them to recover from subsequent disasters. There is also a national history of locating assisted and affordable housing into more segregated and economically distressed areas, depriving low and moderate income families of choices about where they live. Ensuring that we are not repeating patterns of racial, ethnic, and economic segregation, that we are addressing the needs of people with disabilities and the elderly, that we are locating rebuilt rental housing in safer areas and giving homeowners meaningful choices about relocating to these areas, and addressing the historically neglected infrastructure in these communities to mitigate future disasters is the only way that recovery will be successful and increase resiliency for future disasters.

As the Action Plan acknowledges, disaster recovery can present an opportunity to affected communities to examine a wide range of issues and recover in a way that creates more sustainable, resilient, and inclusive communities. The GLO's commitment to developing recovery projects "in a manner that considers an integrated approach to address long term recovery and restoration of infrastructure, housing, and economic revitalization in the most impacted and distressed areas," as well as mitigation, resiliency, and sustainability, will help ensure that Harvey recovery is a meaningful recovery that benefits all affected Texans.

We appreciate GLO's work on the Action Plan and disaster recovery, and your consideration of these comments. Please let us know if we can provide further information or be helpful in any way.

Sincerely,

Madison Sloan  
Director, Disaster Recovery and Fair Housing Project  
Texas Appleseed  
1609 Shoal Creek Blvd., Suite 201  
Austin, Texas 78701  
(512) 473-2800 ext. 108  
msloan@texasappleseed.net