

Marion M. McFadden
Principal Deputy Assistant Secretary for Community Planning and Development
U.S. Department of Housing and Urban Development
451 7th St SW
Washington, D.C. 20410

February 21, 2023

Re: Request for Information for HUD's Community Development Block Grant Disaster Recovery (CDBG-DR) Rules, Waivers, and Alternative Requirements, Docket No. FR-6336-N-01 (87 Fed. Reg. 77864)

Dear Ms. McFadden:

On behalf of the environmental, climate, and housing justice and civil rights organizations and advocates listed below, we write to share our recommendations in support of stronger civil rights and racial equity requirements and oversight in HUD's CDBG-DR program. Reforms to ensure that CDBG-DR operates more equitably are much needed, especially in light of the program's past performance. Disaster recovery funding is critical to helping vulnerable communities regain access to basic needs in housing and infrastructure, as well as to putting them on the path to longer-term security and opportunity, following the devastating physical and economic impacts that natural disasters too often bring. We thank HUD for embarking on this process to review and revise its CDBG-DR policies and for soliciting input on considerations of equity and civil rights – considerations that should be central in improving CDBG-DR administration.

Instances abound of low-income communities of color being disadvantaged in the allocation of CDBG-DR resources, even though these are the very communities most in need of funds. Racial disparities in state-level political power, intergenerational wealth on a household and neighborhood level, and the geographic concentration of public and private resources operate in an interconnected way to render these communities particularly vulnerable to the devastation of natural disasters (often on top of ongoing housing cost pressures, habitability issues, and myriad forms of economic and environmental discrimination). Households in these communities are more likely to lack a cushion for recovery or to be situated to meet even basic human rights needs following a disaster, while on a collective scale, community infrastructure and economic growth and participation are especially susceptible to lasting damage. Disaster response preparedness and recovery has also failed to account for the vulnerability and needs of people with disabilities, immigrants and other people with limited English proficiency, and LGBTQ (lesbian, gay, bisexual, transgender, and queer) people, and other marginalized people and communities, exacerbating risk and creating systemic barriers to recovery. The disproportionate exclusion of these individuals and communities from the recovery process, due

to the skewed designation of funds by geography or by income, displacement pressures, and the failure to prioritize or target the most critical and pressing needs, has presented a grave civil and human rights issue in many places.¹

Below, we provide our recommendations and responses to a number of the questions presented in HUD’s RFI. We call upon HUD to implement specific and consequential requirements that ensure both clarity and accountability for civil rights performance in CDBG-DR administration. This includes strong measures at multiple stages to promote compliance with Title VI of the Civil Rights Act of 1964, prohibiting discrimination in federally-funded programs and activities, as well as with Title VIII of the Civil Rights Act of 1968, the Fair Housing Act, which broadly prohibits discrimination in housing and related services and which requires HUD and its grantees to affirmatively further the purposes of the act (“AFFH”).²

Program regulations (as well as accompanying guidance and technical assistance) should make explicit for grantees receiving CDBG-DR funds that they are bound to carefully assess and tailor their allocation decisions around civil rights impacts – and, as described further below, HUD should set forth more a more detailed framework to guide this assessment and to provide structure that will channel funds appropriately. (For example, requiring adequate attention to the needs of low-income renters and in particular subsidized households.) These kinds of specific and robust *ex ante* oversight measures are necessary in order to provide clarity at the outset to grantees as to what a heightened, comprehensive standard for civil rights compliance means for them on the ground and throughout their funding plans and ongoing administration. Such measures will also enable stakeholders to better understand their rights and engage in planning and oversight; and a strong *ex ante* framework will assist HUD in making early interventions and in targeting enforcement resources toward recalcitrant grantees that fail to meet these new, clearer expectations.

In addition, strong and consequential review and complaint processes are fundamental to making rights that exist on paper real to people and communities. Civil rights requirements *need to actually be enforced* in order to have meaning -- to improve lives and move us toward a more equitable society, as the laws are intended. HUD should make clear that it is putting teeth into its administration of this program, alongside (and even in advance of) the new regulatory clarity it should provide. This entails the delaying or withholding of federal funds, when needed to achieve compliance by funding recipients. It includes HUD-initiated action, such as multi-stage

¹ See, e.g., Fixing America’s Broken Disaster Recovery System, NLIHC, available at https://nlihc.org/sites/default/files/Fixing-Americas-Broken-Disaster-Housing-Recovery-System_P1.pdf; Lessons from Texas, Texas Appleseed, available at https://www.texasappleseed.org/sites/default/files/TexasAppleseedHurricane_WhitePaper_02c_Final.pdf.

² Such measures are also responsive to Executive Orders 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations)(1994); 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government)(2021); and Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government)(2023).

civil rights reviews (for both substantive outcomes and process) and corrections to recipients' plans and activities. It also includes supporting engagement of residents representing the communities most impacted by disasters, including through more public transparency, technical assistance, outreach, and responsiveness when community concerns are raised or complaints filed.

Our specific responses to the RFI are as follows. We focus on questions regarding ways to better advance equity, as well to pertaining to compliance with civil rights requirements under Title VI and the Fair Housing Act (including its nondiscrimination and AFFH requirements). A number of our recommendations cut across questions, so we combine prompts accordingly.

Responses to Selected Questions:

1. Reducing Administrative Burden and Accelerating Recovery

Are there CDBG–DR rules, waivers, or alternative requirements that should be revised to better align with federal disaster relief programs implemented by the Federal Emergency Management Agency (FEMA), the U.S. Small Business Administration, the U.S. Army Corps of Engineers, or other Federal agencies? Are there CDBG–DR rules, waivers, or alternative requirements that should be adopted by other Federal disaster recovery agencies?

We recommend that HUD and other agencies involved in disaster recovery adopt FEMA's improved procedures for establishing homeownership, by offering options outside of traditional title records. Reliance on traditional title systems disproportionately excludes low income homeowners of color,³ and alternative methods of establishing homeownership better enable vulnerable homeowners to secure the assistance they are due. Such policies should be adopted and implemented consistently and equitable across the fifty states and territories.

2. Establishing Priorities

(a) Should CDBG–DR rules, waivers, or alternative requirements be written to 1) encourage or require grantees to first address disaster recovery housing needs prior to other recovery needs (e.g., infrastructure), or 2) encourage or require grantees to invest in whole community recovery in proportion to its unmet recovery need (e.g., housing, infrastructure, economic revitalization, and mitigation)?

Due to the exceptionally severe risks of homelessness, displacement, and health and habitability concerns, housing should be a priority use of CDBG-DR funds. Housing security and affordability plays a central role in well-being, including physical and mental health and continuity in access to schools and employment. It is imperative, however, that an emphasis on

³ See, e.g., Bipartisan Policy Center Explainer at <https://bipartisanpolicy.org/explainer/addressing-burdensome-ownership-and-occupancy-requirements-to-improve-disaster-assistance/>.

housing be combined with an overarching focus on the needs of low-income households and communities and attention to civil rights impacts on marginalized communities such as households of color, people with disabilities, people with limited English proficiency, and LGBTQ people. That is, housing needs for vulnerable populations should be a highest priority use of funds. Ascertaining the extent of “unmet need” for these households must accurately account for renters and should, further, incorporate factors such as the availability of affordable and accessible housing relative to community need, cost burdens and homeless risk, overcrowding and habitability, in evaluating what needs remain to be met – outstanding housing needs must not be determined based on property value.

Under statute, seventy percent of CDBG-DR funds are to benefit LMI households (a requirement that needs more clarity in its implementation, as noted below), but “whole community” improvements are unlikely to flow to low-income households if those households lack stable housing and are vulnerable to homelessness and displacement. Additional (non-housing) community investment efforts that specifically target LMI needs and are paired with significant long term affordable and accessible housing (in particular, public and other subsidized housing) should be prioritized ahead of housing for higher-income households, or where needed to provide for basic needs and services, due to the depth of infrastructure, community development, and mitigation needs often facing low-income residents. However, the reconstruction of broader infrastructure or place-based mitigations, without significant and intentional affordable and accessible housing reconstruction and preservation, will mean LMI households do not benefit from this restoration and improvements as new community resources lead to more acute housing demand.

As documented by the National Low Income Housing Coalition (NLIHC), housing is an especially pressing need following disasters for numerous reasons. There is already a severe widespread shortage of affordable housing for low income households, which can be exacerbated by disasters to devastating effect. After a major disaster, rents may spike dramatically, due to a combination of a physical loss of stock and the pressure of temporary new renters while homes are repaired or replaced. As NLIHC further points out, affordable homes are often the most vulnerable to disasters, but they are less likely to be rebuilt after a disaster strikes, and when naturally occurring rental housing stock is damaged, the cost to repair and rehabilitate the property leads to higher rents. In addition, housing cost burdens overall are disproportionately severe among people of color, such that rising affordability pressures, homelessness, and displacement risk pose significant racial equity concerns. Affordable housing need should therefore be a paramount consideration in disaster recovery, so as to ensure that LMI households and households of color have basic needs met and that they retain access to any other community improvements. Moreover, there is a clear need to prioritize affordable housing that is also accessible given the persistent re-institutionalization of people with disabilities in segregated settings before and after disasters.

(c) What CDBG–DR rules, waivers, or alternative requirements, if any, should be modified or eliminated so that grantees are prioritizing assistance to low- and moderate-income persons and areas, vulnerable populations, and underserved communities?; (d) How can CDBG–DR rules, waivers, or alternative requirements be modified or eliminated to encourage greater levels of investment in infrastructure projects that provide the greatest benefit to impacted low- and moderate-income areas? and (e) What CDBG–DR rules, waivers, or alternative requirements, if any, should be modified or eliminated so that grantees carry out activities to support economic revitalization for underserved and economically distressed communities?

Currently, CDBG-DR Action Plans include overall demographic profiles and references to fair housing (including AFFH) and equitable allocation, but HUD does not provide specific direction as to what this should look like.⁴ HUD should more specifically indicate ways in which the recipient is expected to prioritize uses and allocate funds based on local data and strategies the recipient should undertake to further fair housing and to prevent discriminatory impacts. Blanket certifications, detached from a documented commitment to specific policies, activities, and funding decisions, are insufficient to ensure compliance. HUD should also identify scenarios that raise a presumption that aspects of the recipient’s plan are inconsistent with its AFFH duty, result in a discriminatory impact, or fail to advance equity in keeping with (forthcoming) regulatory requirements.

Recommended directives include:

- Infrastructure and mitigation investments should most highly prioritize the basic needs disproportionately faced by disinvested communities (such as adequate plumbing and sewer and flood mitigation); and needs calculations should be responsive to the cumulative needs and harms faced by those communities due to ongoing structural discrimination.
- For infrastructure, prioritize needs and improvements that specifically target LMI/underserved neighborhoods (including those with ongoing impacts from a history of discrimination/segregation) or that serve LMI individuals. Regional or community-wide infrastructure often only partially benefits LMI individuals/neighborhoods and commonly excludes them from equal services.
- Infrastructure restoration must adhere to strong and detailed Title VI, environmental justice, and Fair Housing Act standards, avoiding perpetuation or replication of the

⁴ Current requirements include HUD’s Action Plan Checklist, available at <https://www.hud.gov/sites/dfiles/CPD/documents/CDBG-DR/CDBG-DR%20Public%20Action%20Plan%20HUD%20Review%20Checklist%20for%20Grants%20Under%20Public%20Law%20117-43.pdf> and guidance on civil rights data for Action Plans, available at <https://sites.hudexchange.info/cdbg-dr-consolidated-notice/action-plan-and-implementation-fair-housing-civil-rights-data/>.

previous patterns of inequitable burdens (such as pollution) and exclusion from benefits imposed on disadvantaged communities and specifically communities of color.

- As stated above, grantees should be required to document how long-term affordable housing is paired with any significant infrastructure, mitigation, or other community investments that would otherwise hazard displacement or that are sited in higher-resourced communities. While such investments (other than affordable housing) in higher resourced, higher income areas should not be prioritized over such investments in areas of higher need and should not count toward the seventy-percent LMI requirement, affordable housing development should still be attached as a condition of any such investments.

Additionally, we support the priorities set forth by NLIHC’s Disaster Recovery Coalition:

- Preserve the 70% LMI requirement and make it more difficult to waive.
- Prioritize renters, homeowners, and people experiencing homelessness proportionally (prioritizing low income people and ensuring that renters are not undercounted or underfunded).
- Ensure active public engagement at all levels and at all times of plan creation and implementation.
- Robust review and oversight over civil rights requirements.

(g) How can CDBG–DR rules, waivers, or alternative requirements be modified or eliminated to better address the unmet recovery and mitigation needs of affordable rental housing, public housing, and housing for vulnerable populations?

As NLIHC states in making their recommendations:

“Due to a combination of segregation, exclusionary zoning, and disinvestment in infrastructure for economically depressed communities and communities of color, 450,000 of the nation’s affordable homes are located in flood-prone areas. In general, federally assisted affordable housing continues to be located in such at-risk areas, forcing the lowest-income households into areas with the highest risk of disasters. Not only does this pattern needlessly place people in harm’s way, but it ensures that more federal dollars are needed to repair and reconstruct homes and fund emergency services. Federally assisted affordable housing is also more likely than market-rate housing to be located in areas with high natural hazard risks. A recent report by NLIHC and the Public and Affordable Housing Research Corporation (PAHRC) found that nearly one-third of federally assisted housing stock is located in areas with very high or relatively high risk of negative impacts from 6 natural hazards compared to one-quarter of all renter-occupied homes and 14% of owner occupied

homes. The households residing in these higher-risk units are made up predominantly of people of color, with the Public Housing program having the largest share of units (40%) in areas of very high or relatively high risk of natural hazards.”

Given those facts, it is critical to an improved, more equitable CDBG-DR program that HUD provide for and enforce the following priorities and requirements:

- To the greatest extent possible, long-term recovery should prioritize the rehabilitation and construction of homes affordable to people with the lowest incomes, including residents of federally subsidized housing.
- Long-term recovery should prioritize 1:1 replacement of any lost federal- or state-assisted housing and increase the total affordable units available in the jurisdiction.
- Siting policies and practices must further fair housing: siting must provide for non-displacement and for access to well-resourced areas (outcomes must not perpetuate segregation and exclusion); residents must be empowered with the choice as to whether to remain or relocate. Counseling must be provided.
- Rental homes developed with federal funds must require affordability of at least 30 years, and rental housing funds providing to landlords must include, in addition to affordability restrictions, fair housing requirements such as nondiscrimination in tenant selection (e.g., criminal records), source of income (e.g., housing vouchers), and tenant protections such as just cause eviction requirements.

Discrimination in the distribution of funds (for example, where allocation is based on property values) has too often featured in CDBG-DR administration. HUD can take steps to prevent such recurring discrimination by setting forth more specific priorities and requirements that structure fund administration in ways that comply with civil rights requirements, such as the requirements noted here. In addition to preventing discrimination, however, HUD must provide a clear framework (that is, an institutionalized method, see, e.g., *Shannon v. HUD*) for affirmatively furthering fair housing in its disaster recovery administration. Lessons from past funding and program administration make clear: in order to protect fair housing rights and further fair housing, HUD needs to do more than require civil rights certifications of recipients. It must also provide clearer directives around specific policies and activities with fair housing impacts.

(h) How can CDBG-DR rules, waivers, or alternative requirements be modified or eliminated to allow grantees to leverage private capital (e.g., bridge loans) to start the long-term recovery process immediately after a disaster?

HUD’s fellow federal agencies with authority to regulate sources of private capital can align incentives with and contribute to CDBG-DR-funded disaster recovery initiatives. HUD should consider ways that it can initiate and systemize coordination with such regulators. Strong

standards for civil rights compliance and for accountability to community needs must remain in place and extend throughout any public-private partnerships.

One area of potential coordination is around the forthcoming Community Reinvestment Act regulations, for which the bank regulators have proposed new, expanded opportunities for banks to receive CRA credit for climate response activities. Another is the Federal Housing Finance Agency's Federal Home Loan Bank (FHLB) system, for which FHFA has embarked on a process to modernize and revitalize the FHLB's mission and oversight. FHLB advances may support community development purposes as well as affordable housing, and FHFA could encourage support for disaster recovery and mitigation funding and FHLB financing of affordable housing in disaster areas.

4. Developing the Action Plan

(a) What CDBG–DR rules, waivers, or alternative requirements relating to the action plan, if any, should be modified or eliminated to capture unmet disaster recovery needs or mitigation needs more accurately?

We underscore the need for HUD to provide a more detailed and comprehensive planning rubric for fund allocation and related activities, so as to promote equity and civil rights compliance, and for Plans to incorporate the equity-related priorities and requirements recommended here and developed further by HUD. Please also refer to our recommendations in the responses to Question sets (2), (3), (5), and (6).

5. Advancing Equity

(a) What CDBG–DR rules, waivers, or alternative requirements, if any, should be modified or eliminated to ensure grantees equitably allocate resources and adequately address disaster-related needs of the most impacted, vulnerable, and underserved communities?; (b) What CDBG–DR rules, waivers, or alternative requirements, if any, should be modified or eliminated to ensure that grantees advance equity in the timing of who is able to receive assistance and the amount of assistance available and received? For example, by prioritizing programs to assist homeowners over those that assist renters, a grantee may not have enough funding to meet the unmet needs of renters, including those less able to prepare for, respond to, and recover from the impacts of disasters; (c) What CDBG–DR rules, waivers, or alternative requirements, if any, should be modified to further prevent an ‘unjustified discriminatory effect’ (i.e., interests can be served by another practice with a less discriminatory effect) based on race or other protected class in the implementation of CDBG–DR funding to address disaster-related unmet needs (recognizing that HUD has no authority to waive or specify alternative requirements for statutes and regulations related to fair housing, nondiscrimination, labor, or the environment)?; and (e) What additional guidance, data, or support can HUD provide to help grantees comply with fair housing and civil rights requirements and allocate resources equitably across housing types?

As we recommended in our responses to Question Sets (2) and (3), HUD should set forth clear priorities for the use of CDBG-DR funds so as to provide first for the most vulnerable households and communities, to avoid discriminatory impacts, and to acknowledge and respond to cumulative disadvantage. Currently, disaster recovery guidance includes “check the box” references to civil rights requirements on a general scale, and this has too often yielded situations where HUD has accepted plans on the basis of the certification alone, while discrimination or a failure to further fair housing is manifest in grantees’ actual policies and practices. HUD should set forth specific presumptions and requirements for ways that grantees should and should not act.

HUD should set grantees up for success, but also equip community advocates to identify and challenge civil rights failures. We recommend that HUD provide for fair housing and Title VI (as well as other civil rights) technical assistance in Action Plan development, with regard to both policy/funding commitments and to process (for example, ensuring adequate community review and input at multiple stages, including outreach to fair housing organizations). HUD should also provide for standardized, comprehensive data that is publicly available and presented in a way that is easily understood.

Finally and importantly, HUD needs to impose consequences for civil rights failures. A clear planning rubric, setting forth priorities that promote equity and specifying policies and activities that will safeguard civil rights protections and advance fair housing, will better guide recipients and will provide early red flags that can help HUD correct problems at the outset. Where other corrective measures are insufficient, however, HUD must demonstrate that it will actually withdraw funds when there is a finding of discrimination that stands unremedied.

Among the available mechanisms, HUD’s Office of Community Planning and Development must take funding sanctions, including suspension or termination of funding, based on evidence that 1) a letter of findings has been issued against a recipient or subrecipient indicating a violation of Title VI of the Civil Rights Act, of Section 109 of the Housing and Community Development Act of 1987, of Section 504 of the 1973 Rehabilitation Act, or of Title II of the Americans with Disabilities Act or 2) a determination of reasonable cause against a recipient or subrecipient under the Fair Housing Act or 3) the filing of a lawsuit against a recipient or a subrecipient by the United States Department of Justice for a violation of any of these laws or 4) a judicial ruling against a recipient or subrecipient by a federal or state court for a violation of one of these laws. Funding sanctions may be avoided or removed by evidence of a resolution satisfactory to the Office of Fair Housing and Equal Opportunity. Due process is available to recipients and subrecipients through regulatory and judicial proceedings in all of these matters.

In addition, HUD’s Office of Community Planning and Development must take funding sanctions, based on other evidence that a recipient or subrecipient is in violation of one or more

civil rights obligations, including the obligation to affirmatively further fair housing, based on a recommendation by the Office of Fair Housing and Equal Opportunity that a recipients' actual or proposed actions are not or will not be in compliance with these civil rights authorities. These programmatic recommendations should be confirmed by an unequivocal delegation of authority to FHEO to make determinations of non compliance with programmatic obligations of civil rights non compliance.

6. Replacing Disaster-damaged Housing Units, Minimizing Displacement, and Incentivizing Affordable Housing Development

(a) How can CDBG–DR rules, waivers, or alternative requirements be modified or eliminated to ensure that grantees are mitigating natural hazard risks (e.g., sea level rise, high winds, storm surge, flooding, volcanic eruption, and wildfire risk), while also minimizing displacement of members of families, individuals, or entities such as businesses, farms, or nonprofit organizations from their homes and neighborhoods?; and (b) What additional relocation, acquisition, and replacement housing waivers and alternative requirements should HUD consider that would assist and expedite community efforts to reduce future risk while minimizing displacement and ensuring fair treatment and protections to those whose property is acquired or who must move due to a CDBG–DR funded activity?

As stated above in our response to Question Sets (2) and (3), mitigation projects should prioritize low-income communities and should include rehabilitation for and preservation of affordable and accessible housing; infrastructure funding that serves high-income areas should come with the condition of new creation of affordable and accessible in highly-resourced, healthy locations. Infrastructure and community development funding should prioritize basic needs disproportionately faced by low income communities and communities of color, as well as people with disabilities, immigrants and other people with limited English proficiency, and LGBTQ (lesbian, gay, bisexual, transgender, and queer) people, and other marginalized people and communities, including prioritizing those needs and resources that will enable individuals and households to remain in their communities should they choose to do so. Grantees should provide 1:1 replacement and provide residents with the choice to relocate or remain. New siting of replacement housing must adhere to strong fair housing standards, providing for access to highly resourced areas that are not susceptible to flooding or other environmental risks, and avoiding the replication or perpetuation of resource exclusion and segregation. Funds for landlords or development must include long term affordability restrictions, tenant protections, and fair housing protections. Any involuntary buyouts should only be undertaken after direct consultation with affected residents, and only after all alternatives have been fully investigated and found inadequate for the long-term protection of residents.

Where grantees' activities result in the perpetuation of segregation (by reinforcing or replicating exclusion), disparities in access to housing, or disparities in access to community investments and resource distribution, HUD must make clear that this is a substantive civil rights violation, as well as a violation of CDBG-DR process requirements, and that HUD will take action accordingly. HUD should not approve Action Plans that are inconsistent with grantees' AFFH and nondiscrimination obligations or that fail to enact the priorities and resident protection requirements we recommend here.

Thank you for your consideration of our recommendations on these important issues. Please reach out to Megan Haberle at mhaberle@ncrc.org with any questions or for further discussion.

Best regards,

Megan Haberle
Senior Director of Policy
National Community Reinvestment Coalition

Amy Laura Cahn
Legal Director
Taproot Earth

Leslie G. Fields
National Director, Policy Advocacy and Legal
Sierra Club

Vincent Martin
Detroit, Michigan

Marsha Jackson
Co-Chair
Southern Sector Rising

Hannah Perls
Staff Attorney
Harvard Environmental & Energy Law Program (EELP)*

Dwain Tyndal
Executive Director
Alternatives for Community and Environment (ACE)

David Rammler
Consulting Disaster Recovery Attorney
Fair Share Housing Center of New Jersey

Adrienne L. Hollis
Executive Director
Ubuntu Power Project

Debbie Chizewer
Managing Attorney
Earthjustice

Joni Arends
Executive Director
Concerned Citizens for Nuclear Safety

Meleah Geertsma
Director, Environmental Justice Policy
Environment, Equity, and Justice Center

Marc Brennan
iDare LLC*

Philip Tegeler
Executive Director
Poverty & Race Research Action Council

Kate Walz
Deputy Director of Litigation
National Housing Law Project

Sacoby Wilson
Professor and Director, T.H.E. EJ Lab*
Maryland Institute for Applied Environmental Health
University of Maryland-College Park

Arthur Bowman
Policy Director
Center for Environmental Health

Vernice Miller-Travis
Executive Vice President
Metropolitan Group*

Anjana Malhotra
Senior Staff Attorney
National Center for Law and Economic Justice

*organization for affiliation purposes only

Cc: Demetria McCain

Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development