

Community	Community map repository address
Unincorporated Areas of Charleston County .....	Charleston County Lonnie Hamilton, III Public Services Building, Building Inspection Services Department, 4045 Bridge View Drive, Suite 311, North Charleston, SC 29405.

**Fort Bend County, Texas and Incorporated Areas**  
**Docket Nos.: FEMA-B-1753; FEMA B-1944**

City of Fulshear .....	City Hall, 30603 FM 1093, Fulshear, TX 77441.
City of Houston .....	Public Works and Engineering Department—Floodplain Management Office, 1002 Washington Avenue, 3rd Floor, Houston, TX 77002.
City of Simonton .....	City Hall, 35011 FM 1093, Simonton, TX 77476.
City of Weston Lakes .....	Weston Lakes City Hall, 8045 FM 359, Suite 200, Fulshear, TX 77441.
Unincorporated Areas of Fort Bend County .....	Fort Bend County Drainage District, 1124 Blume Road, Rosenberg, TX 77471.
Village of Fairchilds .....	Fairchilds Village Map Repository, Fairchild Volunteer Fire Department, 8715 Fairchild Road, Richmond, TX 77469.
Village of Pleak .....	Pleak Village Hall, 6621 FM 2218 South, Richmond, TX 77469.

**Llano County, Texas and Incorporated Areas**  
**Docket Nos.: FEMA B-1523, FEMA B-1923**

City of Llano .....	Code Enforcement Department, 301 West Main Street, 2nd Floor, Llano, TX 78643
Unincorporated Areas of Llano County .....	Llano County Permitting and Emergency Management, 100 West Sandstone Street, Suite 200A, Llano, TX 78643.

**Frederick County, Virginia and Incorporated Areas**  
**Docket No.: FEMA-B-1817 and B-1955**

Town of Middletown .....	Town Office, 7875 Church Street, Middletown, VA 22645.
Town of Stephens City .....	Town Office, 1033 Locust Street, Stephens City, VA 22655.
Unincorporated Areas of Frederick County .....	Frederick County Administration Building, 107 North Kent Street, Suite 202, Winchester, VA 22601.

**Independent City of Winchester, Virginia**  
**Docket No.: FEMA-B-1817 and B-1955**

City of Winchester .....	Rouss City Hall, 15 North Cameron Street, Winchester, VA 22601.
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**BILLING CODE 9110-12-P**

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

[Docket No. FR-6219-N-01]

**Waivers and Alternative Requirements  
for Community Development Block  
Grant Disaster Recovery Grantees**

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This notice governs Community Development Block Grant disaster recovery (CDBG-DR) funds awarded under several appropriations. Specifically, this notice provides waivers and establishes alternative requirements for certain grantees that have submitted waiver requests for grants provided pursuant to Public Laws. This notice also provides further clarification on the waiver and alternative requirement for use of a FEMA-approved alternative to the

CDBG-DR elevation requirement for nonresidential structures. Additionally, this notice revises action plan substantial amendment requirements for CDBG-Mitigation (CDBG-MIT) grants.  
**DATES:** Applicability Date: October 5, 2020.

**FOR FURTHER INFORMATION CONTACT:**

Jessie Handforth Kome, Director, Office of Block Grant Assistance, U.S. Department of Housing and Urban Development, 451 7th Street SW, Room 7282, Washington, DC 20410, telephone number 202-708-3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339. Facsimile inquiries may be sent to Ms. Kome at 202-708-0033. (Except for the "800" number, these telephone numbers are not toll-free.) Email inquiries may be sent to [disaster\\_recovery@hud.gov](mailto:disaster_recovery@hud.gov).

**SUPPLEMENTARY INFORMATION:**

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**I. Public Law 113-2 Waivers and Alternative Requirements**

*Authorizing Specific Housing Activities for the "Reshaping the Urban Delta" Initiative (City of New Orleans Only)*

The Department awarded \$141,260,569 in Community Development Block Grant National Disaster Resilience (CDBG-NDR) funds made available under Public Law 113-2 to the City of New Orleans to implement activities described in the city's application, which the city collectively refers to as the "Reshaping the Urban Delta" initiative. This section of the notice specifies waivers and

alternative requirements and modifies requirements for CDBG–NDR funds awarded to the City of New Orleans under Public Law 113–2, for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization.

Public Law 113–2 authorizes the Secretary to waive or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with HUD's obligation or use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment). Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5. The waiver and alternative requirement provided in this section is in response to a request by the City of New Orleans explaining why there is good cause for the waiver and is based upon a determination by the Secretary that good cause exists and that the waiver or alternative requirement is not inconsistent with the overall purposes of title I of the Housing and Community Development Act of 1974 (HCDA).

The City of New Orleans will use its CDBG–NDR funds to create the city's first Resilience District in the Gentilly neighborhood, a low- and moderate-income community with a particularly high risk of flooding. The city is requesting a waiver to establish an alternative requirement to create a CDBG-eligible activity that comprises all of the activities proposed in the community adaptation component of the Resilience District initiative.

The city's initiative is comprised of four components: (1) Urban water: consisting of public improvements to improve storm water management; (2) reliable energy and smart systems: to enhance the reliability of the electrical grid and energy asset monitoring; (3) coastal restoration: A series of coastal protection and restoration projects to mitigate flooding impacts; and (4) community adaptation: to support improvements to private residential properties in the neighborhood as a means of improving storm water management.

Certain activities under the community adaptation component, as proposed by the City, are not CDBG-eligible as housing rehabilitation activities as they do not involve the rehabilitation of the housing structure itself. Accordingly, the Department is granting a waiver and establishing an alternative requirement to create a CDBG-eligible activity that comprises all of the activities proposed for

improvements to residential properties under the community adaptation component of the initiative. In its approved CDBG–NDR action plan, the city describes activities that will be eligible for funding and that entail improvements to private residential properties. These improvements may include the installation of permeable driveways, rain cisterns, bioswales and other site and exterior adaptations and resilience retrofits which are on the property of homeowners, but generally do not involve physical improvements to the housing unit.

To clarify the eligibility of these activities as outlined in the city's approved CDBG–NDR application and action plan, the Department is approving a waiver and alternative requirement to expand section 105(a)(4) of the HCDA only to the extent necessary to create a new eligible activity for the city's CDBG–NDR grant. This new eligible activity shall be comprised of activities described in its CDBG–NDR application and approved action plan for residential improvements under the community adaptation portion of the initiative, through installation of improvements and implementation of stormwater management practices on residential properties for the purpose of enhancing the resilience of the residential building and preventing neighborhood flooding.

## **II. Public Law 114–113, 114–223, 114–254, 115–31, 115–56, 115–123, 115–254, and 116–20 Waivers and Alternative Requirements**

This section of the notice specifies waivers and alternative requirements and modifies requirements for CDBG–DR funds awarded to grantees that received an allocation for a 2015, 2016, 2017, 2018, or 2019 major disaster under Public Laws 114–113, 114–223, 114–254, 115–31, 115–56, 115–123, 115–254, and 116–20 for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing, economic revitalization, and mitigation. Public Laws 114–113, 114–223, 114–254, 115–31, 115–56, 115–123, 115–254, and 116–20 authorize the Secretary to waive or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with HUD's obligation or use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment). Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5. As required by Public Laws 114–113, 114–223, 114–254, 115–31, 115–56,

115–123, 115–254, and 116–20 the waivers and alternative requirements provided in this paragraph are based upon a determination by the Secretary that good cause exists and that the waivers or alternative requirements are not inconsistent with the overall purposes of title I of the HCDA.

### *II.A. Waiver and Alternative Requirement for Use of FEMA-Approved Elevation Standards for Nonresidential Structures*

Grantees that received an allocation for a 2015, 2016, 2017, 2018, or 2019 major disaster under Public Laws 114–113, 114–223, 114–254, 115–31, 115–56, 115–123, 115–254, and 116–20 are subject to different federal requirements established by the Federal Emergency Management Agency (FEMA) and HUD, with respect to the elevation of nonresidential structures in a floodplain. Grantees that have received an allocation of CDBG–MIT funds pursuant to Public Law 115–123 are also subject to these different federal requirements.

Specifically, CDBG–DR and CDBG–MIT grantees under these appropriations and corresponding **Federal Register** notices are required to elevate, or floodproof in accordance with FEMA floodproofing standards at 44 CFR 60.3(c)(3)(ii) or a successor standard, nonresidential structures up to at least two feet above the 100-year (or 1 percent annual chance floodplain), *i.e.* two feet above the base flood elevation. Critical Actions, as defined at 24 CFR 55.2(b)(3), within the 0.2 percent annual chance floodplain (*i.e.*, 500-year floodplain), must be elevated or floodproofed (in accordance with FEMA standards) to the higher of 0.2 percent annual floodplain flood elevation or three feet above the 1 percent annual chance floodplain (*i.e.*, 100-year floodplain). Under current CDBG–DR and CDBG–MIT requirements for these grantees, if the 500-year floodplain or elevation standard is unavailable, and the Critical Action is in the 100-year floodplain, then the structure must be elevated or floodproofed to at least three feet above the 100-year floodplain elevation.

CDBG–DR funds may be used to meet the non-federal match requirements for programs funded by FEMA. CDBG–DR grantees using FEMA and CDBG–DR funds to fund the same activity, however, have encountered challenges in certain circumstances in reconciling CDBG–DR elevation requirements with those established by FEMA. CDBG–MIT grantees will encounter similar challenges in the implementation of projects when using FEMA funds

together with CDBG–MIT funds. FEMA regulations at 44 CFR 9.11(d)(3)(i) and (ii) prohibit new construction or substantial improvements to a structure unless the lowest floor of the structure is at or above the level of the base flood and for critical actions, at or above the level of the 500-year flood, while 44 CFR 9.11(d)(3)(iii) allows for an alternative to elevation to the 100- or 500-year flood level, subject to FEMA approval, which would provide for improvements that would ensure the substantial impermeability of the structure below flood level.

As programs funded by FEMA are pursuant to an annual appropriation, FEMA funded projects generally commence soon after a disaster and well in advance of the availability of CDBG–DR funds. When CDBG–DR funds are used as match for a FEMA project that is underway, the alignment of HUD’s elevation standards with any alternative standard allowed by FEMA may not be feasible and may not be cost reasonable.

Accordingly, the Department is waiving the elevation requirements applicable under the **Federal Register** notices for the referenced appropriations, and establishing an alternative requirement for the use of an alternative, FEMA-approved flood standard when each of the following conditions is in place: (i) CDBG–DR or CDBG–MIT funds are used as the non-federal match for FEMA assistance; (ii) the FEMA-assisted activity, for which CDBG–DR or CDBG–MIT funds will be used as match, commenced prior to HUD’s obligation of CDBG–MIT or CDBG–DR funds to the grantee; and (iii) the grantee has determined and demonstrated with records in the activity file that implementation costs of the required CDBG–DR elevation or flood proofing up to two feet is not reasonable as that term is defined in the applicable cost principles at 2 CFR 200.404. HUD and FEMA will issue joint guidance to assist grantees in the compliant implementation of this provision and with other requirements that apply when CDBG–DR or CDBG–MIT funds are used to meet the non-federal match requirements of certain FEMA programs.

#### *II.B. Changes to the DOB Implementation Notice for Grantees That Received a CDBG–DR Allocation for a 2015, 2016, or 2017 Disaster Event*

On June 20, 2019, the Department published a **Federal Register** notice, “Updates to Duplication of Benefits Requirements Under the Stafford Act for Community Development Block Grant (CDBG) Disaster Recovery Grantees,” (84 FR 28836) (“2019 DOB Notice”).

This notice reflects the requirements of recent CDBG–DR supplemental appropriations acts and amendments to the Robert T. Stafford Disaster Relief and Emergency Assistance Act. HUD’s corresponding DOB implementation notice, “Applicability of Updates to Duplication of Benefits Requirements Under the Stafford Act for Community Development Block Grant (CDBG) Disaster Recovery Grantees,” (84 FR 28848) (“DOB Implementation Notice”) makes conforming amendments to other notices governing CDBG–DR grants received in response to a disaster declared between January 1, 2015 and December 31, 2017. The DOB Implementation Notice advises these grantees of the applicability of the 2019 DOB Notice to their existing CDBG–DR activities. In the DOB Implementation Notice, the Department imposed the requirements of the 2019 DOB Notice for: (a) New programs and activities added to the action plan after the date of the implementation notice; and (b) existing programs and activities, to the extent that the grantee amends its action plan to change its treatment of loans in accordance with the 2019 DOB Notice.

The Department recognizes that not all grantees include this level of specificity in their action plan and is broadening the applicability of the 2019 DOB Notice to include existing programs and activities, to the extent that the grantee amends its action plan or its policies and procedures to change the treatment of loans in accordance with the 2019 DOB Notice. Therefore, this notice deletes and replaces the first bullet of the third paragraph of section III of the DOB Implementation Notice, which follows the sentence: “This notice makes the following changes to the Prior Notices.” The first bullet in the third paragraph of section III is revised to read:

- “The 2019 DOB Notice shall supersede the 2011 DOB notice for any new activities submitted to HUD in an action plan or action plan amendment on or after the effective date of this notice, and for existing programs and activities, to the extent that the grantee amends its action plan or its policies and procedures to change the treatment of loans in accordance with the 2019 DOB Notice. If a grantee opts to revise its policies and procedures for one or more existing programs that were included in an action plan for disaster recovery before the effective date of this notice, the grantee must amend its action plan to reflect any resulting changes in benefits to program participants or to correct any resulting inconsistencies with duplication of

benefits policies described in the action plan.”

#### *II.C. Use of the “Upper Quartile” or “Exception Criteria” for Low- and Moderate-Income Area Benefit Activities (State of Texas only)*

The State of Texas was awarded a total of \$74,568,000 from Public Laws 114–113 and 115–31 for recovery from 2015 disasters; a total of \$238,895,000 from Public Laws 114–223, 114–254, and 115–31 for recovery from 2016 disasters; a total of \$5,734,190,000 from Public Laws 115–56, 115–123, and 115–31 for recovery from Hurricane Harvey disaster; a total of \$72,913,000 from Public Laws 115–254 and 116–20 for recovery from 2018 disasters; and a total of \$212,741,000 from Public Law 116–20 for recovery from 2019 disasters. HUD has also awarded \$4,297,189,000 of CDBG–MIT funds to the State under Public Law 115–123 for mitigation activities. This section of the notice specifies waivers and alternative requirements and modifies requirements for CDBG–DR and CDBG–MIT funds awarded to the State of Texas under Public Laws 114–113, 114–223, 114–254, 115–31, 115–56, 115–123, 115–254, and 116–20 for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing, economic revitalization, and mitigation.

The State is seeking a waiver and alternative requirement to apply exception criteria in determining that an activity qualifies as meeting the low- and moderate-income (LMI) area benefit national objective when the area contains fewer than 51 percent of LMI persons. This waiver and alternative requirement will allow the State to use the “upper quartile” or “exception criteria” for LMI area benefit activities for non-entitlement counties impacted by the 2015 and 2016 floods, as well as areas impacted by Hurricane Harvey.

Section 105(c)(2)(A) of the HCDA generally provides that assisted activities designed to serve an area generally and clearly designed to meet identified needs of LMI persons in the area, shall be considered to principally benefit persons of low- and moderate-income if the area served in a metropolitan city or urban county is within the highest quartile of all areas within the jurisdiction of such city or county in terms of the degree of concentration of persons of low- and moderate-income. In some cases, HUD permits an exception to the requirement that at least 51 percent of the residents of the area qualify as LMI, when certain requirements are met.

The exception provided by HUD under this waiver and alternative requirement is typically applied to those entitlement communities that have few, if any, areas within their jurisdiction that have 51 percent or more of LMI residents. Under the exception, communities are allowed to use a percentage that is less than 51 percent to qualify activities under the LMI area benefit national objective criteria. In these communities, activities must serve an area that contains a percentage of LMI residents that is within the upper quartile of all census-block groups within its jurisdiction in terms of the degree of concentration of LMI residents. HUD assesses each grantee's census-block groups to determine whether a grantee qualifies to use this exception and identifies the alternative percentage the grantee may use instead of 51 percent for the purpose of qualifying activities under the LMI area benefit national objective criteria. HUD determines the lowest proportion a grantee may use to qualify an area for this purpose and advises the grantee accordingly. CDBG-DR grantees are required to use the most recent data available in implementing the exception criteria. The "exception criteria" applies to disaster recovery activities funded by a State grantee pursuant to the applicable **Federal Register** notices in jurisdictions covered by such criteria, including jurisdictions that receive CDBG-DR funds from a State.

The State of Texas is requesting this waiver and alternative requirement for only those non-entitlement counties in which fewer than one quarter of the block groups within each jurisdiction have 51 percent or more of LMI residents. When the "upper quartile" or "exception criteria" methodology is applied to block groups within those counties that do not fall within an entitlement community, fewer than one quarter of the populated-block groups in those counties contain 51 percent or more of LMI persons.

To enable the State to undertake the activities it has determined to be most critical for its recovery, and to ensure that LMI persons are sufficiently served and assisted, HUD is waiving section 105(c)(2)(A) of the HCDA and establishing an alternative requirement to authorize the State to use the "upper quartile" or "exception criteria" for LMI area benefit activities for non-entitlement counties for any current or future grants made under Public Laws 114-113, 114-223, 114-254, 115-31, 115-56, 115-123, 115-254, and 116-20.

The non-entitlement counties that qualify under this alternative requirement, and the calculated

"exception percentages" for each, will be posted in tables on the HUD website. These tables will be updated annually by HUD. The "exception percentage" for each of the counties that qualify will represent the new threshold for qualifying block groups in those counties under the LMI area benefit national objective criteria. In granting this flexibility to the State of Texas, the Department will not consider any request to lower the State's requirements in regard to the overall percentage of funds that must be used for activities that benefit low- and moderate-income persons for its CDBG-DR funds for 2015 to 2019 disasters, or its CDBG-MIT funds.

### **III. Public Law 115-31, 115-56, 115-123, 115-254, and 116-20 Waivers and Alternative Requirements**

#### *Use of Standardized Area Median Income (State of Texas Only)*

The Department has awarded \$5,734,190,000 in CDBG-DR funds to the State of Texas for recovery from Hurricane Harvey from Public Laws 115-56, 115-123, and 115-31. HUD has also awarded \$4,297,189,000 of CDBG-MIT funds to the State under Public Law 115-123 for mitigation activities. Additionally, the State was awarded a total of \$72,913,000 from Public Laws 115-254 and 116-20 for recovery from 2018 disasters, and a total of \$212,741,000 from Public Law 116-20 for recovery from 2019 disasters. This section of the notice specifies waivers and alternative requirements and modifies requirements for CDBG-DR and CDBG-MIT funds awarded to the State of Texas under Public Laws 115-31, 115-56, 115-123, 115-254, and 116-20 for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing, economic revitalization, and mitigation.

Public Laws 115-31, 115-56, 115-123, 115-254, and 116-20 authorize the Secretary to waive or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with HUD's obligation or use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment). Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5. The waiver and alternative requirement provided in this paragraph is in response to a request by the State of Texas explaining why there is good cause for the waiver and based upon a determination by the Secretary that good cause exists and that

the waiver or alternative requirement is not inconsistent with the overall purposes of title I of the HCDA.

The State is asking to modify requirements and coordinate recovery efforts across multiple CDBG-DR and CDBG-MIT allocations under Public Laws 115-31, 115-56, 115-123, 115-254, and 116-20 through use of a standardized area median income for purposes of meeting the low- and moderate-income national objective criteria.

42 U.S.C. 5302(a)(20)(A) defines the terms "persons of low and moderate income" and "low- and moderate-income persons" to mean families and individuals whose incomes do not exceed 80 percent of the median income of the area involved, as determined by the Secretary with adjustments for smaller and larger families.

The State has presented data indicating a large range in area median income (AMI) in the Harvey-impacted areas of the State, ranging from \$40,200 to \$91,100 for a family of four. This statewide variation can have unintended consequences for participation in CDBG-DR funded activities, for example, the State affirms that "while the cost of living varies between communities throughout the state, the cost to rebuild or reconstruct a new home does not vary on the order of magnitude evidenced by the disparity in AMI across Texas counties." As the State seeks to primarily serve LMI individuals and areas in the disaster-impacted counties, the variation between county-level AMI limits the participation of families and individuals in the State's recovery programs in those counties with very low AMI, because these families and individuals have incomes that are at or above the 80 percent of AMI in the respective county even though their incomes are less than 80 percent of the statewide median income.

Based on the above circumstance, the State of Texas has requested a waiver and alternative requirement to allow the State to make LMI determinations across the most impacted and distressed (MID) areas for 2017, 2018, and 2019 disasters based on a determination that the incomes of families and individuals are below 80 percent of statewide median income. In its request, the State emphasizes the importance of providing assistance to the households most in need through a housing rehabilitation and reconstruction program, through buyouts and acquisitions that remove homes from harms' way, and through other flood drainage infrastructure activities.

In the circumstances outlined in the State's request, the broadening of 42 U.S.C. 5302(a)(20)(A) is warranted given the variance in AMIs across the affected counties. Thus, the Department finds that good cause exists and waives 42 U.S.C. 5302(a)(20)(A) to the extent necessary to allow the Secretary to enable the State of Texas to make LMI determinations based on statewide median income instead of otherwise applicable AMI when local AMI is below statewide median income data (as published by HUD annually with adjustments for smaller and larger families). In areas where this waiver and alternative requirement permits the State to use statewide median income for LMI determinations, the State may also use statewide median income data (as published by HUD annually with adjustments for smaller and larger families) to calculate 120 percent of statewide median income, and to use 120 percent of statewide median income as a substitute for 120 percent of AMI. This will allow the State of Texas to standardize the median income for the counties impacted by Hurricane Harvey, and 2018 and 2019 disasters that have an AMI below the statewide median income. This alternative requirement also includes the MID areas identified by the State and HUD for its CDBG-MIT funds. However, if those counties have an AMI above the statewide median income, LMI eligibility will continue to be defined by the county's higher AMI standard.

This waiver and alternative requirement is provided for the purposes of assisting the most at-risk populations who are in need of recovery assistance in each of the MID areas identified by HUD and the State for 2017, 2018, 2019 disasters, and its CDBG-MIT funds. In granting this flexibility to the State of Texas, the Department will not consider any request to lower the State's requirement in regard to the overall percentage of funds that must be used for activities that benefit low- and moderate-income persons for its CDBG-DR funds for 2017, 2018, or 2019 disasters or its CDBG-MIT funds.

#### **IV. Public Law 115–56 and 115–123 Waivers and Alternative Requirements**

*Base Flood Elevation Requirement and Reimbursement in the "Homeowner Reimbursement Program" (State of Texas Only)*

The Department awarded \$5,024,215,000 under Public Law 115–56 and \$652,175,000 under Public Law 115–123 to the State of Texas for recovery from Hurricane Harvey for

necessary expenses related to disaster relief, long term recovery, restoration of infrastructure and housing, economic revitalization, and mitigation due to a qualified disaster. This section of the notice specifies waivers and alternative requirements and modifies requirements for CDBG-DR funds awarded to the State of Texas under Public Laws 115–56 and 115–123.

Public Law 115–56 and 115–123 authorize the Secretary to waive or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with HUD's obligation or use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment). Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5. The State of Texas has submitted a request for the waiver in this section with an explanation of why the waiver is required to facilitate the use of the funds. The waiver and alternative requirement provided in this section is based upon a determination by the Secretary that good cause exists, and that the waiver and alternative requirement is not inconsistent with the overall purposes of title I of the HCDA.

The State is implementing a Homeowner Reimbursement Program designed to assist homeowners in recovering up to \$50,000 in out-of-pocket expenses paid by the homeowner for residential rehabilitation due to Hurricane Harvey. To be eligible for this program, the State's rules require that the home must be the owner's primary residence and the eligible repairs must have been completed prior to the program's application launch date of February 28, 2019. Because the State's Hurricane Harvey response and recovery efforts commenced on the date of the disaster and before CDBG-DR assistance was available, some homeowners participating in the State's Homeowner Reimbursement Program may have repaired their homes to meet program requirements of the Federal Emergency Management Agency (FEMA) and local permitting requirements, rather than the CDBG-DR program requirements.

Some homeowners seeking assistance from the State's program elevated homes to meet the requirements of their municipalities but did not elevate their homes to meet HUD's requirement that residential structures be elevated to at least 2 feet above base flood elevation as required by the **Federal Register** notice governing the use of these funds. Because the homeowners did not anticipate receiving federal assistance,

the State is requesting a waiver to reimburse homeowners that are otherwise eligible for assistance but elevated their homes to comply with the local jurisdiction's freeboard requirements, which may be lower than the HUD-mandated standard to elevate to base flood elevation plus 2 feet.

HUD's February 9, 2018 notice provides that: "All structures, defined at 44 CFR 59.1, designed principally for residential use and located in the 100-year (or 1 percent annual chance) floodplain that receive assistance for new construction, repair of substantial damage, or substantial improvement, as defined at 24 CFR 55.2(b)(10), must be elevated with the lowest floor, including the basement, at least two feet above the base flood elevation (83 FR 5861)."

HUD finds that good cause exists to waive the language in the **Federal Register** notice requiring the 2 feet above base flood elevation for homeowners seeking reimbursement in the State's Homeowner Reimbursement Program and to establish an alternative requirement to permit the State to reimburse those homeowners for costs of rehabilitation completed before the program's application launch date of February 28, 2019, subject to the following requirements:

- The homeowner's reimbursed rehabilitation costs complied with the elevation requirement of the local jurisdiction.

- The activity is eligible under title I of the HCDA or by waiver and is consistent with CPD–15–07: Guidance for Charging Pre-Application Costs of Homeowners, Businesses, and Other Qualifying Entities to CDBG Disaster Recovery Grants.

- The activity meets a CDBG-DR national objective and otherwise complies with CDBG-DR requirements not waived by this section.

- The State uses not less than 70 percent of the aggregate CDBG-DR grant for activities that benefit low- and moderate-income persons.

The State must ensure that all costs charged to this program and to the CDBG-DR grant are necessary and reasonable expenses related to disaster recovery.

#### **V. Public Law 115–123 Waivers and Alternative Requirements**

*Substantial Action Plan Amendment Requirements for CDBG-MIT Grants*

Public Law 115–123 authorizes the Secretary to waive or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with HUD's obligation or use by the recipient of

these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment). Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5. As required by Public Laws 115–123, the waiver and alternative requirement provided in this paragraph is based upon a determination by the Secretary that good cause exists, and that the waiver or alternative requirement is not inconsistent with the overall purposes of title I of the HCDA.

The Department's August 30, 2019 **Federal Register** notice (84 FR 45838) included requirements for CDBG–MIT grantees that must be followed for substantial amendments to a CDBG–MIT action plan. Section V.A.2.g.(1) of the August 30, 2019 notice requires grantees to follow the same procedures for a substantial action plan amendment as are required for the preparation and submission of the initial CDBG–MIT action plan, including multiple public hearings in various geographic locations, except that that a substantial action plan amendment shall require a 30-day public comment period. HUD, however, has generally not established a public hearing requirement for substantial amendments to a grantee's action plan for CDBG–DR grants. This alternative requirement will better align CDBG–MIT substantial amendment requirements with those established for CDBG–DR substantial amendments, with the addition of continued engagement of the public through a 30-day public comment period and through the citizen advisory committees required by the CDBG–MIT notice. For these reasons, HUD is replacing V.A.2.g. subparagraph (1) of the August 30, 2019 notice with the following:

(1) Substantial amendment. The grantee must provide a 30-day public comment period and reasonable method(s) (including electronic submission) for receiving comments on substantial amendments. In its action plan, each grantee must specify criteria for determining what changes in the grantee's plan constitute a substantial amendment to the plan. At a minimum, the following modifications will constitute a substantial amendment: The addition of a CDBG–MIT Covered Project; a change in program benefit or eligibility criteria; the addition or deletion of an activity; or the allocation or reallocation of a monetary threshold specified by the grantee in its action plan. The grantee may substantially amend the action plan if it follows the same procedures required for CDBG–MIT funds for the preparation and submission of an action plan, provided, however, that a substantial action plan amendment shall require a 30-day public comment period and is not subject to the public hearing

requirements in section V.A.3.a. of this notice.

## **VI. Public Law 115–56, 115–123, and 116–20 Waivers and Alternative Requirements**

### *Use of Standardized Area Medium Income (U.S. Virgin Islands Only)*

Public Laws 115–56, 115–123, and 116–20 authorize the Secretary to waive or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with HUD's obligation or use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment).

Waivers and alternative requirements are based upon a determination by the Secretary that good cause exists, and that the waiver or alternative requirement is not inconsistent with the overall purposes of title I of the HCDA. Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5. For the waiver and alternative requirement described in this section of the notice, the Secretary has determined that good cause exists and that the waiver and alternative requirement is not inconsistent with the overall purposes of title I of the HCDA.

Grantees under Public Laws 115–56, 115–123, and 116–20 may request waivers and alternative requirements from the Department as needed to address specific needs related to their recovery activities. Public Laws 115–56, 115–123, and 116–20 also authorize the Department to provide waivers and establish alternative requirements absent a request from a CDBG–DR grantee.

The Department awarded the U.S. Virgin Islands (USVI) \$242,684,000 of CDBG–DR funds under Public Law 115–56, \$779,221,000 of CDBG–DR funds under Public Law 115–123, and \$53,588,884 of CDBG–DR funds under Public Law 116–20. The Department has also awarded the USVI \$774,188,000 of CDBG–MIT funds under Public Law 115–123 for mitigation activities.

The USVI has requested that HUD provide a waiver to establish higher income limits for the purposes of determining low- and moderate-income benefit, due to the USVI's extremely high cost of living. The USVI contends that “the data used to set HUD area medium incomes (AMI) and the associated income limits for the U.S. Virgin Islands is uniquely outdated compared to other grantees due to the lack of recent American Community Survey (ACS) data from the Census Bureau. This results in compounding

inaccuracies as estimates are based on data collected over eight years ago.” The USVI contends that granting this waiver and alternative requirement will allow it to more accurately reflect the number of residents that are financially burdened and who are in greatest need of CDBG–DR assistance.

In order to establish consistent LMI income limits across all three islands of the USVI and recognizing the high cost and other unique characteristics of the USVI identified above, the Department finds that good cause exists and waives 42 U.S.C. 5302(a)(20)(A) to the extent necessary to standardize the AMI across the entire territory of the USVI by allowing the USVI to use the area median income (as published by HUD annually with adjustments for smaller and larger families) of the Island of St. John for all islands in the territory, since those LMI income limits are the highest of the three islands within the Territory. This waiver also permits the use of AMI of the Island of St. John (as published by HUD annually with adjustments for smaller and larger families) for all islands in the territory whenever grant requirements necessitate the application of AMI, including when it may be necessary to calculate 120 percent of AMI. In granting this flexibility, the Department will not consider any request to lower the USVI's requirement in regard to the overall percentage of funds that must be used for activities that benefit low- and moderate-income persons.

## **VII. Public Law 115–254 and 116–20 Waivers and Alternative Requirements**

This section of the notice applies to certain grantees that received an allocation of funds appropriated under Public Laws 115–254 and 116–20 for major disasters and events that occurred in 2017, 2018, and 2019. Public Laws 115–254 and 116–20 authorize the Secretary to waive or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with HUD's obligation or use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment).

Waivers and alternative requirements are based upon a determination by the Secretary that good cause exists, and that the waiver or alternative requirement is not inconsistent with the overall purposes of title I of the HCDA. Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5. For the waivers and alternative requirements described in this section of notice, the Secretary has determined

that good cause exists and that the waivers and alternative requirements are not inconsistent with the overall purposes of title I of the HCDA.

Grantees under Public Laws 115–254 and 116–20 may request waivers and alternative requirements from the Department as needed to address specific needs related to their recovery activities. Public Laws 115–254 and 116–20 also authorize the Department to provide waivers and establish alternative requirements absent a request from a CDBG–DR grantee.

*VIII.A. Authorizing Tourism and Business Marketing Assistance Activities (The Northern Mariana Islands Only)*

The Department has awarded \$188,652,000 of CDBG–DR funds under Public Law 115–254 and \$55,294,000 under Public Law 116–20, for a combined allocation of \$243,946,000 to the Commonwealth of Northern Mariana Islands (CNMI). CNMI has requested that HUD authorize the use of up to \$10,000,000 of CDBG–DR funds for tourism and business marketing as activities necessary for recovery from Super Typhoon Yutu. Tourism is the primary economic contributor to CNMI's economy. The Marianas Visitors Authority (MVA), the CNMI's tourism office, is mandated to promote Saipan, Tinian, Rota, and the Northern Islands as an ideal destination to travelers from countries in Asia, Oceania and throughout the world. CNMI's current main tourism markets are Korea, China, and Japan.

The total value of tourism within the CNMI economy amounts to \$1.1 billion (or 72 percent) of overall Gross Domestic Product (GDP) and the accommodations and amusement sector provides for an average of 21.5 percent of total employee compensation within the Commonwealth. Due to the influence of the tourism industry in the CNMI and the scale of Super Typhoon Yutu, the impacts of the disaster on the economy were wide-ranging and pronounced. In total, arrivals for November (after the typhoon in October) fell by 88.35 percent or 42,444, marking the sharpest year-over-year downturn in recent history. The closure of the Saipan International Airport also led to a decrease in arrivals by 30 percent (over 400,000 visitors).

Tourism and business advertising campaigns are in general ineligible for CDBG–DR assistance. HUD, however, recognizes that such support can be an important means of economic recovery in a damaged regional economy that depends on tourism and seeks to attract

new business investments to generate jobs and create tax revenues.

HUD has previously granted similar waivers for other CDBG–DR grantees with tourism-dependent economies. As CNMI is proposing advertising and marketing activities rather than direct assistance to tourism-dependent and other businesses, and because the measures of long-term benefit from the proposed activities must be derived using indirect means, 42 U.S.C. 5305(a) is waived only to the extent necessary to make eligible use of no more than \$10,000,000 for assistance for tourism and business marketing activities to promote travel and to attract new businesses to disaster-impacted areas. No elected officials shall appear in tourism or business marketing materials financed with CDBG–DR funds. Given the importance of tourism to the overall economy, HUD is authorizing this use of these funds without regard to unmet housing need. This waiver will expire two years after the Commonwealth first draws CDBG–DR funds under the allocation provided in the January 27, 2020 **Federal Register** notice (85 FR 4681).

In providing similar waivers for other CDBG–DR grantees, the Department has often identified issues in the procurement of tourism and business marketing services, with grantees adding CDBG–DR funds to existing tourism and business marketing contracts procured with other sources of funds. In providing this waiver, HUD advises the Commonwealth to ensure that contracts funded pursuant to this waiver with CDBG–DR funds comply with applicable procurement requirements. The grantee must also develop metrics to demonstrate the impact of CDBG–DR expenditures on the tourism and other sectors of the economy and shall identify those metrics in its action plan.

*VIII.B. Financial Certification Requirements Under Public Laws 115–254 and 116–20*

The Department's January 27, 2020 **Federal Register** notice (84 FR 4681) included requirements for the certification of financial controls and procurement processes and adequate procedures for grant management for Public Law 115–254 and 116–20 grantees, allowing them to use their prior 2016 or 2017 certifications for the purposes of the allocations provided by that notice. The notice, however, did not include or reference the financial certifications provided for a grantee's CDBG–MIT funds as also being a valid form of certification for the allocation. Since the Department's August 30, 2019

CDBG–MIT **Federal Register** notice (84 FR 45838) requires grantees to provide evidence of proficient financial controls and procurement processes as well as the establishment of adequate procedures to prevent any duplication of benefits as defined by section 312 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5155, the Department is adding the CDBG–MIT certification as an acceptable certification that may be used for grants allocated by Public Laws 115–254 and 116–20 for 2018 and 2019 disasters. HUD is deleting and replacing the second paragraph of section IV.B.1. of the January 27, 2020 notice with the following:

A grantee that received a certification of its financial controls and procurement processes pursuant to a 2016 or 2017 disaster or for its CDBG–MIT allocation may request that HUD rely on its previous certification for purposes of this grant, provided, however, that grantees shall be required to provide updates to reflect any material changes in the submissions. This information must be submitted within 60 days of the applicability date of this notice. The grant agreement will not be executed until HUD has approved the grantee's certifications. The grantee must implement the CDBG–DR grant consistent with the controls, processes, and procedures as certified by HUD. HUD is requiring each grantee to submit (or update and resubmit, as applicable) all policies and procedures pertaining to its duplication of benefits procedures as outlined below:

HUD is also deleting and replacing the first bullet in section III of the January 27, 2020 notice with the following:

- Within 60 days of the applicability date of this notice (or when the grantee submits its action plan, whichever is earlier), submit documentation for the certification of financial controls and procurement processes and adequate procedures for grant management, as amended in section IV.B.1 of this notice. A grantee that received a certification of its financial controls and procurement processes pursuant to a 2016 or 2017 disaster or for its CDBG–MIT allocation, may request that HUD rely on its previous certification for purposes of this allocation, provided, however, that grantees shall be required to provide updates to reflect any material changes in the submissions.

**VIII. 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 Regulations Division, Office of General Counsel,



Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number).

Hearing- or speech-impaired individuals may access this number through TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number).

Dated: September 23, 2020.

**John Gibbs,**

*Acting Assistant Secretary for Community Planning and Development.*

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**BILLING CODE 4210-67-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

[201A2100DD/AAKC001030/  
A0A501010.999900]

### HEARTH Act Approval of Wilton Rancheria, California Business Site Leasing Act

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** The Bureau of Indian Affairs (BIA) approved the Wilton Rancheria, California (Tribe) leasing regulations under the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012 (HEARTH Act). With this approval, the Tribe is authorized to enter into business leases without further BIA approval.

**DATES:** These regulations were approved on September 23, 2020.

**FOR FURTHER INFORMATION CONTACT:** Ms. Sharlene Round Face, Bureau of Indian Affairs, Division of Real Estate Services, [sharelene.roundface@bia.gov](mailto:sharelene.roundface@bia.gov), (505) 563-3132.

#### SUPPLEMENTARY INFORMATION:

##### I. Summary of the HEARTH Act

The HEARTH Act makes a voluntary, alternative land leasing process available to Tribes, by amending the Indian Long-Term Leasing Act of 1955, 25 U.S.C. 415. The HEARTH Act authorizes Tribes to negotiate and enter into agricultural and business leases of Tribal trust lands with a primary term of 25 years, and up to two renewal terms of 25 years each, without the approval of the Secretary of the Interior (Secretary). The HEARTH Act also authorizes Tribes to enter into leases for

residential, recreational, religious or educational purposes for a primary term of up to 75 years without the approval of the Secretary. Participating Tribes develop Tribal leasing regulations, including an environmental review process, and then must obtain the Secretary's approval of those regulations prior to entering into leases. The HEARTH Act requires the Secretary to approve Tribal regulations if the Tribal regulations are consistent with the Department of the Interior's (Department) leasing regulations at 25 CFR part 162 and provide for an environmental review process that meets requirements set forth in the HEARTH Act. This notice announces that the Secretary, through the Assistant Secretary—Indian Affairs, has approved the Tribal regulations for the Wilton Rancheria, California.

##### II. Federal Preemption of State and Local Taxes

The Department's regulations governing the surface leasing of trust and restricted Indian lands specify that, subject to applicable Federal law, permanent improvements on leased land, leasehold or possessory interests, and activities under the lease are not subject to State and local taxation and may be subject to taxation by the Indian Tribe with jurisdiction. See 25 CFR 162.017. As explained further in the preamble to the final regulations, the Federal government has a strong interest in promoting economic development, self-determination, and Tribal sovereignty. 77 FR 72440, 72447-48 (December 5, 2012). The principles supporting the Federal preemption of State law in the field of Indian leasing and the taxation of lease-related interests and activities applies with equal force to leases entered into under Tribal leasing regulations approved by the Federal government pursuant to the HEARTH Act.

Section 5 of the Indian Reorganization Act, 25 U.S.C. 5108, preempts State and local taxation of permanent improvements on trust land. *Confederated Tribes of the Chehalis Reservation v. Thurston County*, 724 F.3d 1153, 1157 (9th Cir. 2013) (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)). Similarly, section 5108 preempts State taxation of rent payments by a lessee for leased trust lands, because "tax on the payment of rent is indistinguishable from an impermissible tax on the land." See *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1331, n.8 (11th Cir. 2015). In addition, as explained in the preamble to the revised leasing regulations at 25 CFR part 162, Federal

courts have applied a balancing test to determine whether State and local taxation of non-Indians on the reservation is preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The *Bracker* balancing test, which is conducted against a backdrop of "traditional notions of Indian self-government," requires a particularized examination of the relevant State, Federal, and Tribal interests. We hereby adopt the *Bracker* analysis from the preamble to the surface leasing regulations, 77 FR at 72447-48, as supplemented by the analysis below.

The strong Federal and Tribal interests against State and local taxation of improvements, leaseholds, and activities on land leased under the Department's leasing regulations apply equally to improvements, leaseholds, and activities on land leased pursuant to Tribal leasing regulations approved under the HEARTH Act. Congress's overarching intent was to "allow Tribes to exercise greater control over their own land, support self-determination, and eliminate bureaucratic delays that stand in the way of homeownership and economic development in Tribal communities." 158 Cong. Rec. H. 2682 (May 15, 2012). The HEARTH Act was intended to afford Tribes "flexibility to adapt lease terms to suit [their] business and cultural needs" and to "enable [Tribes] to approve leases quickly and efficiently." H. Rep. 112-427 at 6 (2012).

Assessment of State and local taxes would obstruct these express Federal policies supporting Tribal economic development and self-determination, and also threaten substantial Tribal interests in effective Tribal government, economic self-sufficiency, and territorial autonomy. See *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (determining that "[a] key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on Federal funding"). The additional costs of State and local taxation have a chilling effect on potential lessees, as well as on a tribe that, as a result, might refrain from exercising its own sovereign right to impose a Tribal tax to support its infrastructure needs. See *id.* at 810-11 (finding that State and local taxes greatly discourage Tribes from raising tax revenue from the same sources because the imposition of double taxation would impede Tribal economic growth).

Similar to BIA's surface leasing regulations, Tribal regulations under the