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Part III

**Department of
Housing and Urban
Development**

**Additional Waivers Granted to and
Alternative Requirements for the State of
Mississippi Under Public Law 109-148;
Notice**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

[Docket No. FR-5051-N-07]

**Additional Waivers Granted to and
Alternative Requirements for the State
of Mississippi Under Public Law 109-
148**

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

ACTION: Notice of waivers and alternative requirements.

SUMMARY: As described in the **SUPPLEMENTARY INFORMATION** section of this Notice, HUD is authorized by statute to waive statutory and regulatory requirements and specify alternative requirements for this grant, upon the request of the state grantee. This Notice describes the additional waivers for the disaster recovery grants made to the State of Mississippi under the subject appropriations act.

DATES: *Effective Date:* October 30, 2006.

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

SUPPLEMENTARY INFORMATION:

Authority To Grant Waivers

A Federal fiscal year 2006 supplemental appropriation for the Community Development Block Grant (CDBG) program was in the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Pub. L. 109-148, approved December 30, 2005), that appropriated \$11.5 billion for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of the covered disasters.

The 2006 Act authorizes the Secretary to waive, or specify alternative requirements for, any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or use by the recipient of these funds and guarantees, except for requirements related to fair

housing, nondiscrimination, labor standards, and the environment, upon a request by the state and a finding by the Secretary that such a waiver would not be inconsistent with the overall purpose of the statute. The following additional waivers and alternative requirements for funds provided under the 2006 Act are in response to requests from the State of Mississippi.

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

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

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

Waiver Justification

In general, waivers already granted to the State of Mississippi and alternative requirements already specified for CDBG disaster recovery grant funds provided under Public Law 109-148 apply. The notices in which these prior waivers and alternative requirements applicable to Mississippi appear are 71 FR 7666, published February 13, 2006, and 71 FR 34457, published June 14, 2006.

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

Eligibility—wind pool reinsurance premium. The state requested that HUD grant an eligibility waiver to permit it to pay reinsurance costs for two years for the wind pool for insurance maintained by the Mississippi Windstorm Underwriting Association (MWUA). HUD was initially concerned that allowing this activity would artificially depress the costs of insurance in the wind pool area and result in people making redevelopment decisions that did not take into account the real balance of risks and benefits of living in

the impacted areas. The state responded by pointing out that even with the reinsurance in place insurance rates would still rise substantially, that the state would disclose to ratepayers the risk that rates would increase more if reinsurance rates remained high after grant assistance ended, and that the state was simultaneously working to raise building standards to help ameliorate actual risks and possibly lower eventual insurance costs. HUD considered the request and the state's response and agreed that it is consistent with the overall purposes of the 1974 Act for the state to fund, in accordance with the terms described in the state's Action Plan, the reinsurance coverage for the wind pool maintained by MWUA.

Low- and moderate-income household benefit for multi-unit housing projects. Rehabilitation and reconstruction of housing is an eligible CDBG activity. HUD has already granted the state an eligibility waiver to allow new construction of housing. Now the state has requested a related waiver to allow it to fund multi-unit projects and to measure benefit to low- and moderate-income households in such projects in a manner more supportive of mixed-income housing than the *structure* basis required by 24 CFR 570.483(b)(3). (Under the cited regulation, the general rule is that at least 51 percent of the residents of an assisted *structure* must be income eligible.)

HUD has reviewed other housing assistance programs that measure benefit differently: by the housing *unit*. Under the unit approach, one or more of the units in a structure must house income-eligible families, but the remainder of the units may be market-rate, so long as the proportion of assistance provided compared to the overall project budget is no more than the proportion of units that will be occupied by income-eligible households compared to the number of units in the overall project. In other words, the rule under the structure approach is that a nickel of CDBG assistance to a structure means that 51 percent of the units must meet income requirements. Under the proportional units approach, the number of income-eligible units is proportional to the amount of assistance provided. Based on HUD experience, the second approach is generally more compatible with large-scale development of mixed-income housing.

There is HUD precedent for using the proportional unit basis in two programs familiar to the state: (1) the CDBG program rule has a built-in exception that allows limited use of the unit basis for multi-unit non-elderly new

construction structures with between 20 and 50 percent low- and moderate-income occupancy, and (2) the HOME Investment Partnerships program, HUD's primary housing production program, successfully uses its own variation on the proportional unit approach. After review of the state's Action Plan for Disaster Recovery and learning more about the state's intention to encourage mixed-income housing development, HUD has determined that it is consistent with the overall purposes of the 1974 Act to provide the state the requested additional flexibility in measuring program benefit.

Therefore, the waiver and alternative requirements allow the state a choice. The state may measure benefit within a housing development project (1) according to the existing CDBG requirements, (2) according to the HOME program requirements at 24 CFR 92.205(d) or (3) according to the modified CDBG alternative requirements specified in this notice, which extend the CDBG exception noted above. The state must select and use just one method for each project. For these purposes, the term "project" will have the same meaning as in the HOME program at 24 CFR 92.2.

Unlike the HOME program, the CDBG program does not regulate the maximum amount of assistance per unit, require unit and income reviews in the years following initial occupancy, require a specific form of subsidy layering review, or define affordability. The state is reminded, however, that CDBG does require that costs be necessary and reasonable and that the state must develop procedures and documentation to ensure that its housing investments meet this requirement. The state must also meet all civil rights and fair housing requirements.

Overall Benefit to Low- and Moderate-Income Persons

The State of Mississippi has repeated its request that the Secretary waive the requirement that 50 percent of the CDBG funds received by the state under the grant made under Public Law 109-148 be for activities that benefit persons of low and moderate income (see 71 FR 7666, published February 13, 2006, for the waiver granted under Public Law 109-148 to the original 70 percent requirement). In a June 14, 2006, notice (71 FR 34457) the Secretary granted a waiver of the overall benefit requirement for the Public Law 109-148 grant to the extent that the state could carry out the activity of compensation for housing loss, (the costs of which the state believed at the time would consume the majority of its grant), in an

"income-blind" manner because the disaster affected households without regard to income. Because the current \$1.3 billion estimate of demand for this program under the eligibility criteria specified by the state is substantially less than the approximately \$3.255 billion estimated and approved in the Action Plan, the state now plans to modify the activity and reallocate funds to additional beneficiary groups or to other activities through a substantial amendment to its Action Plan. Note that the June 14 waiver does not cover activities added or modified under such a substantial amendment. To recognize the actual size of the program and because the state subsequently repeated its request for an overall benefit waiver that covers all activities, HUD is replacing the June 14 waiver and alternative requirements with the updated waiver and alternative requirements in this notice. (Substantial amendments to the state's program after the date of this notice may trigger further updates.)

To grant this waiver, the Secretary must find that it is "not inconsistent" with the CDBG program's primary purpose. This purpose is stated at 42 U.S.C. 5301(c):

"The primary objective of this chapter and of the community development program of each grantee under this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income."

Further, Public Law 109-148 stipulates that, to decrease or eliminate the overall benefit requirement below 50 percent, the Secretary of HUD must also make a finding of "compelling need" for the waiver.

The Secretaries of HUD have granted very few overall benefit waivers for past disaster recoveries. The Secretary reset the percentage requirement for Grand Forks, North Dakota, to the actual pre-storm percentage of income-eligible residents in the affected area, and included the proviso that the City serve low- and moderate-income persons first, whenever feasible. HUD also allowed the State of Maine, following severe ice storms, an overall benefit waiver that permitted the state to use its entire grant to assist private utilities with uninsured service restoration costs. Logically, a utility grid or service area cannot be restored for one income group alone, and this type of disaster affects everyone in an area, regardless of income. There was no practical methodology in this example for allocating costs among income groups. In these two cases, the waiver supported some area-wide

activity such as buyouts or infrastructure that arguably resulted in a larger total number of assisted low- and moderate-income households than if more targeted and measurable assistance had been provided.

The case in Mississippi is more complicated than those in Maine and Grand Forks, because of the large number of political sub-jurisdictions, choice of possible activities, the effects of the mix of activities, population movement, and the catastrophic scale of the disaster. As in Maine, whole areas of Mississippi were impacted regardless of income (and far more severely in Mississippi than in Maine), so many of the state's proposed activities are area- or sector-wide. As in Grand Forks, the majority of Mississippians in the most impacted areas were not income-eligible prior to the storm so the state's recovery strategy must necessarily address the needs of a range of income groups.

Mississippi has a much larger CDBG grant than either Maine or Grand Forks. Although the state plans to use the homeowner assistance funds very rapidly, it will take somewhat longer to budget and to use the remainder of the grant, and to determine the final benefit figures for the programs it plans to undertake.

In considering the waiver request, HUD again examined the available post-disaster data on unmet recovery needs and the percentages of low- and moderate-income populations residing in the most impacted areas at the time of the disaster (Hancock County: 43 percent, Harrison County: 41 percent, Jackson County: 37 percent, Pearl River County: 41 percent.). HUD accepts the position of the state that one of the state's compelling needs for assistance in the disaster-affected area is to help re-establish homeowners outside the floodplain who suffered major uninsured flood damage. (The state designated this as its "primary need.")

HUD also considered the other CDBG disaster recovery activities the state is undertaking. After the June 14 waiver, the state made Action Plan amendments including some additional CDBG disaster recovery activities that do not qualify under the low- and moderate-income national objective, such as assistance to private utilities, wind pool re-insurance (mentioned elsewhere in this notice) and regional infrastructure development. In its Action Plan, the state described how these activities would address its disaster recovery needs. However, the state has not yet published Action Plan amendments describing the uses of all grant funds.

HUD considered the data and the state's justification for its request.

Considering that the state has not yet budgeted all of its grant funds in the Action Plan, it has a large amount of unbudgeted funds, it will be reallocating previously budgeted funds, and a substantial number of low- and moderate-income persons were impacted by the disaster, HUD decided that the Department does not have enough information to conclude that the state has compelling need for a waiver of overall benefit for the entire grant at this time.

Based on the compelling need presented for the activities already included in the Action Plan for Disaster Recovery for the grant made under Public Law 109–148, HUD is granting the state a waiver of the requirement that at least 50 percent of the supplemental CDBG grant funds provided under Public Law 109–148 primarily benefit persons of low and moderate income, to the extent necessary to permit Mississippi to carry out the activities contained in its March 31, June 28, and July 12, 2006, Action Plan submissions, provided that the state must give reasonable priority for the balance of its funds to activities that will primarily benefit persons of low and moderate income. HUD expects the grantee to maintain low- and moderate-income benefit documentation for each activity providing such benefit. This waiver of overall benefit does not cover activities that may be added or modified under a substantial amendment to the activities mentioned in the Action Plan submissions listed above.

Previously, the state agreed to examine other housing needs and to pursue other sources of funding to provide assistance for other compelling housing needs, such as for homeless and special needs populations, for low-income renters, and for uninsured low-income homeowners. HUD expects the state to continue these efforts.

HUD is not granting the state's request that all of its activities be carried out under the national objective of "urgent need" because such a waiver would effectively grant an overall benefit waiver for the entire grant. HUD expects the state to principally benefit low- and moderate-income persons in activities where such design is feasible and reasonable, and to design its activities to meet the "slum-blight" or urgent need national objective otherwise. Consistent with the principles discussed above, HUD will be open to considering a further extension of the waiver when the uses of the balance of the available funds are proposed by the state.

HUD also reminds the state that, pursuant to the instruction in Public Law 109–148, all waivers in this notice

must be reconsidered on the two-year anniversary date of this notice.

Applicable Rules, Statutes, Waivers, and Alternative Requirements

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

a. Those governing the funds appropriated under Public Law 109–148 and already published in the **Federal Register**, including those in Notices 71 FR 7666, published February 13, 2006; and 71 FR 34457, published June 14, 2006; and

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

2. *Low- and moderate-income benefit for multi-unit housing projects.* HUD will consider assistance for a multi-unit housing project to benefit low- and moderate-income households in the following circumstances:

(a)(i) The CDBG assistance defrays the development costs of a housing project providing eligible permanent residential units that, upon completion, will be occupied by low- and moderate-income households; and

(ii) If the project is rental, the units occupied by low- and moderate-income households will be leased at affordable rents. The grantee or unit of general local government shall adopt and make public its standards for determining "affordable rents" for this purpose; and

(iii) The proportion of the total cost of developing the project to be borne by CDBG funds is no greater than the proportion of units in the project that will be occupied by low- and moderate-income households; or

(b) When CDBG funds defray the development costs of eligible permanent residential units, such funds shall be considered to benefit low and moderate income persons if the grantee follows the provisions of 24 CFR 92.205(d); or

(c) The requirements of 24 CFR 570.483(b)(3) are met.

(d) The state must select and use just one method for each project.

(e) The term "project" will have the same meaning as in the HOME program at 24 CFR 92.2.

(f) If the state applies option (a) or (b) above to a housing project, 24 CFR 570.483(b)(3) is waived for that project.

3. *Eligibility—wind pool reinsurance premium.* 42 U.S.C. 5305(a) is waived to the extent necessary to make eligible payment of wind pool reinsurance premiums in accordance with the state's approved Action Plan and published program design.

4. *Overall benefit.* 42 U.S.C. 5301(c) and 5304(b)(3), and 24 CFR 570.484 and 24 CFR 91.325(b)(4)(ii) with respect to the overall benefit requirement are waived to the extent necessary to permit Mississippi to carry out the activities contained in its March 31, June 28, and July 12, 2006, Action Plan submissions, provided that:

a. The state must give reasonable priority for the balance of its funds to activities which will primarily benefit persons of low and moderate income; and

b. The State will maintain documentation of the low- and moderate-income benefit attributable to each assisted activity, if feasible, and report on such benefit to HUD as part of the regular quarterly reports.

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

Catalog of Federal Domestic Assistance

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

Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4321(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 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the finding by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number).

Dated: October 19, 2006.

Roy A. Bernardi,
Deputy Secretary.

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