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**Billing Code 4210-67
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

[Docket No. FR-5696-N-16]

**Additional Clarifying Guidance, Waivers, and Alternative Requirements for Grantees
in Receipt of Community Development Block Grant Disaster Recovery Funds
under the Disaster Relief Appropriations Act, 2013**

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

ACTION: Notice.

SUMMARY: This notice provides clarifying guidance, waivers, and alternative requirements for Community Development Block Grant Disaster Recovery grantees in receipt of funds under the Disaster Relief Appropriations Act, 2013 (the Appropriations Act). This notice modifies requirements for infrastructure projects funded by grantees receiving an allocation for Hurricane Sandy. This notice also provides waivers and alternative requirements for the State of New Jersey's Energy Resilience Bank and LMI Homeowner Rebuilding Program, and for New York City's infrastructure projects and the Breezy Point Flood Mitigation System.

DATES: Effective Date: **[Insert date 5 days from date of publication in the FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Stanley Gimont, Director, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street, SW, Room 7286, Washington, DC 20410, telephone number 202-708-3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339. Facsimile inquiries may be sent to Mr. Gimont at 202-401-2044. (Except for the

"800" number, these telephone numbers are not toll-free.) Email inquiries may be sent to disaster_recovery@hud.gov.

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I. Background

The Appropriations Act (Pub. L. 113–2, approved January 29, 2013) made available \$16 billion in Community Development Block Grant disaster recovery (CDBG-DR) funds for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the most impacted and distressed areas, resulting from a major disaster declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 et. seq.) (Stafford Act), due to Hurricane Sandy and other eligible events in calendar years 2011, 2012, and 2013. On March 1, 2013, the President issued a sequestration order pursuant to Section 251A of the Balanced Budget and Emergency Deficit Control Act, as amended (2 U.S.C. 901a), and reduced the amount of funding for CDBG–DR grants under the Appropriations Act to \$15.18 billion. To date, a total of \$15.18 billion has been allocated or set aside: \$13 billion in response to Hurricane Sandy, \$514 million in response to disasters occurring in 2011 or 2012, \$655 million in response to 2013 disasters, and \$1 billion set aside for the National Disaster Resilience Competition.

This notice specifies a waiver and alternative requirements and modifies requirements for Hurricane Sandy grantees in receipt of allocations under the Appropriations Act, which are described within the Federal Register notices published by the Department on March 5, 2013 (78 FR 14329), April 19, 2013 (78 FR 23578), August 2, 2013 (78 FR 46999), November 18, 2013 (78 FR 69104), March 27, 2014 (79 FR 17173), July 11, 2014 (79 FR 40133), October 16, 2014 (79 FR 62182), April 2, 2015 (80 FR 17772), and May 11, 2015 (80 FR 26942), referred to collectively in this notice as the “prior notices.” The requirements of the prior notices continue to apply, except as modified by this notice.¹

II. Applicable Rules, Statutes, Waivers, and Alternative Requirements

The Appropriations Act authorizes the Secretary to waive, or specify alternative requirements for, any provision of any statute or regulation that the Secretary administers in connection with 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 Housing and Community Development Act of 1974 (42 U.S.C. 5301 et seq.) (HCD Act). 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 notice, the Secretary has determined that good cause exists and that the waivers and alternative requirements are not inconsistent with the overall purpose of the HCD Act. Grantees may request waivers and alternative requirements from the Department as needed to address specific needs related to their

¹ Links to the prior notices, the text of the Appropriations Act, and additional guidance prepared by the Department for CDBG–DR grants, are available on the HUD Exchange Web site:

<https://www.hudexchange.info/cdbg-dr/cdbg-dr-laws-regulations-and-federal-register-notices/>.

recovery activities. Under the requirements of the Appropriations Act, waivers must be published in the Federal Register no later than 5 days before the effective date of such waiver.

1. *Exemptions from Infrastructure Program and Project Requirements - Obligated Assistance from Federal Grant Program Projects and Completed Projects - (Hurricane Sandy Grantees only)*. The March 27, 2014, Federal Register notice, at paragraph II.1.b., Obligated Public Assistance Grant Program Projects (78 FR 17174), provides an exemption from certain infrastructure requirements described in paragraph 2 of the Federal Register notice published November 18, 2013, at 78 Fed. Reg. 69107, for those projects to which the Federal Emergency Management Agency (FEMA) had obligated Public Assistance (PA) funds on or before November 25, 2013. After consideration of the factors discussed below, HUD is now modifying this exemption. As of the effective date of this notice, the infrastructure requirements described in paragraph 2 at 78 FR 69107 will not apply to an infrastructure project carried out by a Hurricane Sandy CDBG-DR grantee if FEMA or any other Federal agency has obligated funds to that infrastructure project on or before January 15, 2014, or if the infrastructure project was completed on or before January 15, 2014.

Oftentimes CDBG-DR grantees are awarded Federal recovery funds for which CDBG-DR can be used as the source for the required non-Federal local match of funds. These Federal sources may include, but are not limited to, the Environmental Protection Agency, the Federal Highway Administration, the Federal Transportation Administration, the Army Corps of Engineers, and the FEMA Public Assistance and Hazard Mitigation grant programs. Such grant assistance can be used for a variety of activities and often requires grantees to contribute a non-Federal share of funds to a project. If the project is an eligible CDBG-DR activity, CDBG-DR funds may be used for the payment of the non-Federal share required in connection with a Federal

grant-in-aid program if permitted by the Federal awarding agency that required the match (see 24 CFR 570.201(g) and 42 U.S.C. 5305(a)(9)) .

Prior to HUD's November 18, 2013, notice, many grantees had coordinated with Federal agencies to secure funding for critical infrastructure projects, but only upon establishment of the Sandy Recovery Office and the launch of the Regional Coordination Working Group (now known as the Sandy Regional Infrastructure Resilience Coordination Group or SRIRC Group), in January 2014, would grantees have been able to comply with Federal coordination requirements outlined in the November 18, 2013 notice. In addition, grantees may have completed infrastructure projects before the establishment of the requirements described in that notice at paragraph 2 at 78 FR 69107.

Accordingly, the clarification described in the March 27, 2014, notice at paragraph II.1.b. is amended to read, "Infrastructure requirements described in paragraph 2 at 78 FR 69107 do not apply to any infrastructure project where funds have been obligated by a Federal agency under any federal grant-in-aid program on or before January 15, 2014, or where a project funded through any means was completed on or before January 15, 2014."

*2. Waiver of requirement for assistance to businesses, including privately owned utilities for Energy Resilience Bank activities (State of New Jersey only) – The Federal Register notice published on March 5, 2013, instituted an alternative requirement to various provisions at 42 U.S.C. 5305(a) and restricts the assistance provided to for-profit businesses to only those businesses that meet the definition of a small business as described by the Small Business Administration (SBA) at 13 CFR part 121. That notice also prohibited CDBG-DR grantees in receipt of funds under the Appropriations Act from providing funds to privately owned utilities (paragraph VI.D.41., *Alternative requirement for assistance to businesses, including privately-**

owned utilities, at 78 FR 14347). The State of New Jersey has requested a waiver of the prohibition on assistance to businesses that do not meet the SBA definition of a small business and the prohibition on assistance to privately owned utilities for its planned \$200 million CDBG-DR investment in the New Jersey Energy Resilience Bank (ERB).

The Department approved the ERB in the State's disaster recovery Action Plan for the second allocation of CDBG-DR funds under the Appropriations Act on May 30, 2014.² The State has committed to using the ERB to harden critical facilities to ensure they remain operational during storm events through the use of distributed energy generation, such as combined heat and power, fuel cells, and off-grid solar inverters with battery storage. Eligible technologies must be constructed to operate independently from the electric utility grid and be able to start up without a direct connection to the electric grid when the grid is down due to extreme weather events. The ERB will focus on funding critical facilities in sectors that were impacted by Hurricane Sandy, including water and wastewater treatment plants, hospitals and long-term care facilities, colleges and universities, state and county correctional facilities, HUD-assisted multifamily housing units, community shelters, and transportation and transit infrastructure.

The ERB aligns with the Hurricane Sandy Rebuilding Strategy's (the Strategy) goal of "Ensuring a Regionally Coordinated, Resilient Approach to Infrastructure Investment," and the Strategy specifically references the ERB as a program developed by the State with assistance from the Hurricane Sandy Rebuilding Task Force. The Strategy notes "most energy infrastructure is privately-owned and operated, which means that resilience investment will come about only through close cooperation between the Federal and State governments and the private sector."

² <http://www.renewjerseystronger.org/plans-policies-reports/#cdbg>

Many of the facilities expected to receive funding through the State's ERB provide critical public services but are owned by a mix of public and for-profit entities, or are solely privately owned, and cannot be assisted under the current prohibitions imposed by the March 5, 2013, notice. At least 20 of the 108 potentially eligible hospital facilities are operated as for-profit entities and do not meet the small business criteria. Moreover, 438 of the State's 617 long-term care facilities and 95 of 170 institutions of higher learning are operated as for-profit entities and do not meet the small business criteria. The State also anticipates funding private utilities, such as private water districts, which serve the needs of their regional populations in the same manner as public utilities.

These facilities often serve communities most impacted by Hurricane Sandy, having high concentrations of low- and moderate-income (LMI) persons, and they provide essential services to vulnerable populations that are comparable to their public and non-profit counterparts. Without a waiver of the restrictions on assistance to certain types of businesses, many of these critical facilities would be ineligible for funding, leaving large gaps in the State's regional distributed energy networks and excluding significant populations (including LMI persons) from benefiting from the State's resiliency measures.

While not every critical facility will serve predominantly LMI populations, vulnerable residents typically rely more on community-based facilities and services, especially in disaster scenarios. To the extent that the ERB will be funding such facilities and services, LMI populations would benefit especially from the increased resiliency of critical infrastructure during the next storm event. Accordingly, as a condition of providing this waiver, HUD is requiring the State to develop a scoring methodology for the selection of ERB projects that provides preferential treatment to LMI areas and populations. The LMI benefit scoring methodology is to

be designed to ensure continued progress by the State in meeting its overall CDBG-DR grant LMI benefit requirement and to ensure that, in financing ERB projects, the State places a significant priority on serving LMI areas and populations.

In its request to the Department, the State acknowledged that the ERB is not a substitute for private investment, but is instead designed to leverage additional private investment in resilient energy systems. The State has developed ERB financial products using substantial market research and analysis to ensure that products are attractive to consumers in the market, while also generating proceeds for the ERB. The State is also developing assistance packages that consist of variable contributions of loans, forgivable loans, and grants, with each product requiring varying levels of equity investments. Market research and analysis specific to each business sector and uniform underwriting standards will drive the precise financing terms and equity contributions of participating businesses to ensure that assistance is based on actual identified need. For example, the water/wastewater product that the ERB will offer requires for-profit applicants to provide an equity contribution of 10 percent of total project cost, while there is no equity contribution for public or non-profit facilities. Accordingly, HUD is requiring the State to establish policies and procedures to ensure that the CDBG-DR funds invested in ERB projects reflect the actual identified financing needs of the assisted businesses, while also ensuring a robust return to the ERB to finance future investments.

Based on the critical role that the ERB will fulfill in ensuring long-term resiliency within Sandy-impacted New Jersey communities and for only those activities funded by the ERB as described in the State's approved disaster recovery Action Plan Amendment, the Department is waiving the alternative requirement in the March 5, 2013, notice and subsequent notices that prohibit funding businesses that do not meet the SBA definition of small business and funding of

private utilities, subject to the following alternative requirements. As a condition of this waiver the State must:

- Provide preferential treatment to LMI areas and populations in its ERB scoring methodology;
- Require an equity contribution for for-profit critical facilities, the amount of which is to be based on uniform underwriting standards developed by the State and uniformly applied to all such facilities, to ensure that the level of assistance provided to these facilities addresses only the actual identified needs of the project; and
- Establish a mix of financing terms (loan, forgivable loan, and/or grant) for each assisted for-profit facility, based on the business's financial capacity, in order to ensure that assistance is based on actual identified need, in order to achieve a targeted use of funds and to safeguard against the potential over-subsidization of for-profit facilities.

This waiver allows the State to add new potential beneficiaries to the activity described within its amended Action Plan for disaster recovery. This change will constitute a substantial amendment as described in the March 5, 2013, notice (78 FR 14329) at paragraph VI.A.3.a. Accordingly, the State must submit a Substantial Action Plan Amendment revising its description of the ERB to include affected entities, and this amendment will be subject to the citizen participation requirements of the March 5, 2013, notice at VI.A.3, which requires no less than 7 calendar days to solicit public comment.

3. Extension of Urgent Need Certification Waiver for ERB activities (State of New Jersey only) – The March 5, 2013, Federal Register notice waives the certification requirements for classifying activities as meeting the CDBG urgent need national objective until “two years after the date HUD obligates funds to a grantee for the activity” (paragraph VI.A.1.f, *Use of the urgent*

need national objective, at 78 FR 14336) and establishes an alternative requirement for grantees. That requirement provides that during the 2-year period, grantees must document how all programs and/or activities funded under the urgent need national objective category respond to a disaster-related impact. In its implementation of the Appropriations Act, HUD established the 2-year limit on the use of this alternative certification requirement in response to grantees' historical use of this urgent need alternative certification requirement in previous disasters. The State of New Jersey has requested an extension of the urgent need national objective alternative certification requirement for the program income generated from its CDBG-DR grant and used to fund activities through its ERB program.

HUD must obligate all funds under the Appropriations Act by September 30, 2017. Because grantees are required to expend program funds within 2-years following HUD's obligation of the funds, CDBG-DR funds used to finance ERB projects will automatically qualify under the 2-year alternative urgent need certification requirement. The State, however, intends to apply program income generated through ERB projects to additional ERB projects and may also apply program income from its other CDBG-DR programs to the ERB, beyond the 2-year period of the alternative urgent need certification requirement. The State has requested authority to use the alternative urgent need certification requirement; for the life of the CDBG-DR grant, for program income applied to the ERB. Without this extension, funds critical to the performance of the ERB could not be classified as meeting the urgent need national objective and program participants may be unable to raise necessary private capital for critical energy resilience projects. Providing this flexibility for ERB-financed projects will allow the projects to be implemented following the obligation of all CDBG-DR funds to the ERB and until the State has closed out its CDBG-DR Sandy recovery grant.

Therefore, until grant closeout and for only program income used to fund ERB activities, HUD is permitting the State of New Jersey, when the use of the urgent need national objective is warranted, to document the use of the urgent need national objective by applying the waiver and alternative requirement regarding urgent need at paragraph VI.A.1.f. of the March 5, 2013, notice (78 FR 14336). The program income requirements described in paragraphs A.2 and A.17 of section VI of the March 5, 2013, notice (78 FR 14336) will continue to apply.

4. Extension of 1-year time limitation on reimbursable pre-award expenses (State of New Jersey only) – Grantees in receipt of funds under the Appropriations Act are subject to the limitations on the reimbursement of pre-award disaster recovery expenses as provided for in CPD Notice 2014-017 (“Guidance for Charging Pre-Award Costs of Homeowners, Businesses, and Other Qualifying Entities to CDBG Disaster Recovery Grants”)(the CPD Notice)³, as may be amended, and the November 18, 2014, notice at section VI, paragraph 5, which requires grantees to comply with the provisions of the CPD Notice. The CPD Notice states that grantees may “charge to CDBG-DR grants the eligible pre-award and pre-application costs of individuals and private entities related to single- and multi-family residential structures and nonresidential structures, only if the person or private entity incurred the expenses within 1-year after the date of the disaster and before the date on which the person or entity applies for CDBG-DR assistance.” The State of New Jersey has requested an extension of this 1-year limitation for applicants to its LMI Homeowners Rebuilding Program in order to provide reimbursement for rehabilitation and reconstruction expenses incurred by LMI homeowners who incurred such expenses after this time limit and before applying to the program for Federal assistance .

³ <https://www.hudexchange.info/resource/4139/notice-cpd14017-guidance-for-charging-preaward-costs--to-cdbg-disaster-recovery-grants>.

The State of New Jersey implemented the LMI Homeowners Rebuilding Program pursuant to a VCA with the Department, which was executed on May 30, 2014. The VCA was established in response to a complaint filed by civil rights and fair housing organizations regarding the State's administration of its CDBG-DR funded recovery programs. The VCA required the State to implement the LMI Homeowners Rebuilding Program more than 1-year after the 1-year, post-disaster time limitation established in the CPD Notice. As a result, any rehabilitation expenses incurred by applicants to the program after the 1-year date would be ineligible for reimbursement. Without an extension of the 1-year limitation, the State would be limited in its ability to comply with the requirements of the VCA and to provide necessary housing assistance to LMI homeowners.

Accordingly, based on the critical role of the LMI Homeowner Rebuilding Program in providing housing recovery assistance to LMI residents and for only those applicants assisted through the State's LMI Homeowners Rebuilding Program, the Department is extending the date by which grantees may reimburse expenses incurred by applicants to the date of application to the LMI Homeowners Rebuilding Program, provided such expenses would otherwise be eligible expenses.

*5. Waiver of Major Infrastructure Project (Covered Project) requirements for projects in multiple counties (New York City only) – The Federal Register notice published November 18, 2013, describes additional infrastructure requirements, including requirements placed on Covered Projects (paragraph VI.2.g., *Additional Requirements for Major Infrastructure Projects*, at 78 FR 69107). HUD approval is required for each major infrastructure project with such projects defined as having a total cost of \$50 million or more (including at least \$10 million of CDBG-DR funds), or projects that benefit multiple counties. The Federal Register notice published on March 27,*

2014, clarified that “benefits multiple counties” means that the project is physically located in more than one county (paragraph II.1.a., *Definition of “Benefits Multiple Counties,”* at 78 FR 17174). New York City has requested exemption from the major infrastructure requirements for projects located in multiple counties and exclusively within the city, where they otherwise would not meet the definition of a major infrastructure project.

New York City is composed of five counties (which are coterminous with its five boroughs) that are subordinate to the municipal government, and the city’s authority precludes the need for due consideration of the counties’ response. Requiring the city to adhere to the Department’s requirements for major infrastructure projects in such cases would impose additional and unnecessary standards for relatively small projects that do not warrant the level of scrutiny triggered by the requirements. Accordingly, for purposes of identifying major infrastructure projects that are held to the requirements of the notice published November 18, 2013, and any subsequent notice that includes provisions for major infrastructure projects, HUD is providing New York City a waiver of the major infrastructure identification criteria to exclude projects located in multiple counties that are located exclusively within the city, only where the project would not otherwise meet the definition of a major infrastructure project by exceeding the total cost thresholds described above.

6. Waiver of requirements for housing rehabilitation activities for Breezy Point Flood Mitigation System (New York City only) – New York City has requested a waiver of 24 CFR 570.202(a)(1) to the extent necessary to permit new construction of a flood mitigation system at Breezy Point, a privately held cooperative in Queens, by classifying the entire system as an improvement for residential purposes.

Under the CDBG Entitlement Program regulations, which are applicable to units of local government, New York City may use CDBG-DR funds to finance the rehabilitation of privately owned buildings and improvements for residential purposes, including grounds improvements that are incidental to and necessary for housing rehabilitation. This housing rehabilitation provision does not permit the city to construct a new flood mitigation system that improves the grounds of a privatelyheld cooperative that benefits an entire community. The community's unique status as a cooperative on a single property lot also precludes the city from funding the activity as an eligible public facility and improvement under the CDBG regulations at 24 CFR 570.201(c).

The flood mitigation system proposed for Breezy Point will provide critical protection to CDBG-DR home rehabilitation investments as well as investments from other Federal partners, and it will improve waterfronts damaged by Hurricane Sandy. The city has determined that the system is necessary to permit long-term disaster recovery from Hurricane Sandy for the Breezy Point community. Thus, the city has requested the ability to construct the project as part of its CDBG-DR housing rehabilitation and reconstruction efforts in the community.

The city is seeking \$58.2 million to construct this system from FEMA's Hazard Mitigation Grant Program (HMGP), which requires a 25-percent, local match or \$14.55 million that may potentially be sourced from the city's CDBG-DR grant. The community provides year-round residency to 4,300 people and consists of 2,400 homes, nearly all of which were damaged during Hurricane Sandy. The city and community, with State and Federal partners, has worked to rehabilitate homes and reconstruct the community. Federal investments in housing rehabilitation total approximately \$450 million, including National Flood Insurance Program policy payments, SBA loans, FEMA Individual Assistance grants, the city's Rapid Repair grants, and CDBG-DR

grants through the city's NYC Build it Back Program. The NYC Build it Back Program alone is projected to provide \$200 million in housing rehabilitation assistance to households in the area, including \$80 million in assistance to approximately 400 low- or moderate-income households. Without a provision to allow this flood mitigation improvement, Federal investments as well as numerous private and public interests would be exposed to flooding during major flood events and if sea levels rise. A Benefit-Cost Analysis conducted by the city identified a reduction in expected annual flood damages to the community of between 50 percent and 98 percent as a result of this project. In addition, according to the city, the protection that this project will provide has the potential to lower flood insurance premiums for structures in the neighborhood in the event of the revision of FEMA's area Flood Insurance Study (FIS) and the effective Base Flood Elevation.

Therefore, for the city's Breezy Point Flood Mitigation System only, the Department is waiving 24 CFR 570.202(a)(1) to the extent necessary to allow for the city's Breezy Point Flood Mitigation System to be classified as an eligible housing rehabilitation and preservation activity. Further, the Department is waiving section 105(a)4 of the HCD Act to the extent necessary to allow for the new construction associated with this activity that would otherwise be prohibited.

III. Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number for the disaster recovery grants under this notice is 4.269.

IV. 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).

Date: August 19, 2015

Laura H. Hogshead
Chief Operating Officer for
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