

C O M M E N T S

# Integrating Climate Change Resilience Into HUD's Disaster Recovery Program

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A changing climate means that storms, floods, wildfires, and even coastlines cannot be expected to adhere to historical patterns.<sup>1</sup> Pursuant to language in existing legislation, new legislation, and recent executive orders, federal agencies responsible for risk management and disaster recovery have begun giving priority to this fact. The U.S. Department of Housing and Urban Development (HUD) is among those agencies, but HUD has just one foot in the boat—the other foot is still on the dock.

That is, HUD currently only integrates climate change resilience considerations into its approval of projects seeking Community Development Block Grant Disaster Recovery (CDBG-DR) funds insofar as it has sometimes voiced clear support for a “build back better” approach.<sup>2</sup> But HUD's statutory authority enables it to more definitively and systematically support projects aimed at improving resilience and adapting to climate change. Such projects would be oriented toward reducing the disaster risks associated with increasingly severe and frequent extreme events brought about by climate change, as much as past disasters.

HUD's somewhat ambivalent current approach unnecessarily and unreasonably limits opportunities to make housing and infrastructure assets resilient in the face of disaster- and climate-related risks. HUD should clarify that approach—indeed, the formation of the HUD Climate Council announced in October 2015 seems designed to do that and more.<sup>3</sup> This Comment argues for carrying this potential reconciliation forward into future disaster recovery contexts and also into other HUD programs that relate in less obvious ways to disaster recovery and resilience to climate change, and proposes several ways the agency might do so.

## I. Relevant Statutes, Regulations, Guidance, and Executive Orders

HUD's role in disaster recovery is prescribed generally by two statutes, the Housing and Community Development Act of 1974, as amended (HCD Act),<sup>4</sup> and the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (Stafford Act).<sup>5</sup> In addition, the U.S. Congress further prescribes HUD's role in a given disaster through disaster-specific appropriations legislation.<sup>6</sup> As described below, HUD's role chiefly involves ensuring access to housing for people eligible for federal housing assistance, and obligating CDBG-DR funds for eligible projects to restore buildings and infrastructure in a declared disaster area.

1. U.S. GLOBAL CLIMATE CHANGE RESEARCH PROGRAM, NATIONAL CLIMATE ASSESSMENT 38-45 (2014). Key terms used in this Comment include “climate change mitigation,” “adaptation,” “resilience,” and “hazard mitigation.” Climate change mitigation refers to efforts to stem or eliminate the anthropogenic greenhouse gas emissions responsible for climate change. Adaptation refers to efforts to modify existing structures, plans, and systems in response to the results of a changing climate—accommodating shifting shorelines is an obvious and important example. Resilience refers to the ability to recover quickly and fully from adverse climate-related events, such as severe storms or floods. Adaptation and resilience overlap but are distinct. Finally, hazard mitigation refers to efforts to anticipate future adverse weather events and to adjust in ways that reduce or mitigate the likely impacts of those events. Its usage predates common usage of the term climate change mitigation.

2. See, e.g., Press Release, Hurricane Sandy Rebuilding Task Force, Statements of Representatives From Non-Profits, Academic Institutions and Community Groups From Around the Region and the Country on the Hurricane Sandy Rebuilding Strategy (Aug. 19, 2013), <http://1.usa.gov/1KZXaPn>; Press Release, HUD, [Secretary] Donovan Joins State and Local Leaders to Formally Open Marrero Commons on the Site of the Former B.W. Cooper (May 4, 2012), <http://1.usa.gov/1XTnyDF> (“Today we make good on a promise the Obama Administration made to the residents of this great city [New Orleans]: to build back better and stronger.”).

3. Julián Castro, HUD Secretary, “HUD's Climate Council Is Answering @ POTUS' call to #ActOnClimate, leading on resiliency and green energy solutions,” TWITTER (Oct. 27, 2015).

4. Pub. L. No. 93-383, 88 Stat. 633 (1974).

5. Pub. L. No. 100-707, 102 Stat. 4689 (1988).

6. See, e.g., Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2, 127 Stat. 4 (Jan. 29, 2013); U.S. Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, Pub. L. No. 109-148, 119 Stat. 2680 (Dec. 30, 2005).

## A. The HCD Act

Title I of HUD's organic statute, the HCD Act of 1974,<sup>7</sup> as amended, assigns HUD responsibility for the Community Planning and Development program.<sup>8</sup> That program directs the Community Development Fund to recipients of the block grants that Congress has authorized HUD to obligate for eligible activities.<sup>9</sup> Eligibility criteria for those block grants—both the grants available to states and Entitlement Communities<sup>10</sup>—are extensive and complex.<sup>11</sup>

HUD's roles in disaster recovery are incidental to its primary roles as prescribed by the HCD Act. These incidental roles include supplying mortgage assistance and sometimes forbearance to those affected by a declared disaster<sup>12</sup>; facilitating disaster planning on the part of multifamily housing unit managers<sup>13</sup>; and—the focus of this Comment—obligating CDBG-DR grants to applicants who seek assistance in rebuilding damaged structures and infrastructure. HUD itself has described CDBG-DR grants as “supplement[ing] disaster programs of [FEMA], the Small Business Administration, and the U.S. Army Corps of Engineers,”<sup>14</sup> or “fund[ing] the unmet need,”<sup>15</sup> and “a funding source of ‘last resort.’”<sup>16</sup> The U.S. Government Accountability Office (GAO) has put it this way: CDBG-DR is “designed to address needs not met by other disaster recovery programs, which can include resilience-building projects.”<sup>17</sup>

7. HUD's history traces farther back, and effectively begins with the Federal Housing Act of 1934, and the creation of the Federal Housing Administration in the same year and of the Public Housing Administration in 1937. The National Housing Agency, established in 1942, became the Housing and Finance Agency in 1947. HUD was established, and took over the roles of those entities, in 1965. HUD, *HUD History*, <http://1.usa.gov/1AviqrG> (last visited Nov. 5, 2015).

8. 42 U.S.C. §§5301-5321.

9. See 24 C.F.R. pt. 570 (prescribing parameters of CDBG spending).

10. Entitlement communities are cities or urban counties eligible to seek CDBG program funding. See HUD Exchange, CDBG Entitlement Program Eligibility Requirements, [bit.ly/1ODRtff](http://bit.ly/1ODRtff) (last visited Jan. 19, 2016).

11. See HUD OFFICE OF COMMUNITY PLANNING AND DEVELOPMENT, STATE COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM: GUIDE TO NATIONAL OBJECTIVES & ELIGIBLE ACTIVITIES FOR STATE CDBG PROGRAM (2002), <http://1.usa.gov/1FfG58f>; HUD OFFICE OF COMMUNITY PLANNING AND DEVELOPMENT, GUIDE TO NATIONAL OBJECTIVES & ELIGIBLE ACTIVITIES FOR ENTITLEMENT COMMUNITIES (2001), <http://bit.ly/1LObr9a>.

12. See HUD, *Disaster Relief Options for FHA Homeowners*, <http://1.usa.gov/1HuYPMB> (last visited Nov. 5, 2015).

13. See HUD, HUD HANDBOOK 4350.1: MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING, ch. 38 (Dec. 2009), <http://1.usa.gov/1iGttMA>.

14. HUD, *Programs of HUD: Community Development Block Grants (Disaster Recovery Assistance)*, <http://1.usa.gov/1L6ElRa>; see also Supplemental Appropriations Act of 2010, Pub. L. No. 111-212 (July 29, 2010) (“That such funds may not be used for activities reimbursable by, or for which funds are made available by, the Federal Emergency Management Agency or the Army Corps of Engineers”).

15. HUD, DISASTER IMPACT AND UNMET NEEDS ASSESSMENT KIT 2 (Mar. 2013), <http://bit.ly/1Md6qAX>.

16. *Id.* at 6.

17. GAO, GAO-14-603T, DISASTER RESILIENCE: ACTIONS ARE UNDERWAY, BUT FEDERAL FISCAL EXPOSURE HIGHLIGHTS THE NEED FOR CONTINUED ATTENTION TO LONGSTANDING CHALLENGES 11 tbl.1 (2014), <http://bit.ly/1OjMuCo>.

The key statutory provision governing HUD's obligation of CDBG-DR grants is §106(c) of the HCD Act, which provides in pertinent part that

in the event of a major disaster . . . [t]he Secretary may provide assistance to any metropolitan city or urban county under this paragraph only to the extent necessary to meet emergency community development needs . . . of the city or county resulting from the disaster that are not met with amounts otherwise provided.<sup>18</sup>

In providing such assistance, “the Secretary shall evaluate the natural hazards to which any permanent replacement housing is exposed and shall take appropriate action to mitigate such hazards.”<sup>19</sup> These two provisions establish basic parameters for CDBG-DR funds. Whereas the former provision limits eligibility for those funds to “emergency community needs”—that is, needs arising from the acute circumstances of the instant disaster—the latter instructs HUD to address those needs with an eye not only to past declared disasters, but to the risks of leaving the community susceptible to a similar future disaster.

The only other HCD Act provision that addresses CDBG-DR grants directly authorizes the HUD Secretary to waive, modify, and/or supplement some CDBG requirements as appropriate when obligating grants for disaster relief.<sup>20</sup> Very little litigation has addressed the obligation of CDBG-DR grants, directly or otherwise.<sup>21</sup>

## B. The Stafford Act, as Amended by the Sandy Recovery Improvement Act

“Hazard mitigation” also appears in the Congressional Findings and Purpose section of the Stafford Act of 1988: “It is the intent of the Congress, by this chapter, . . . to alleviate the suffering and damage which result from such disasters by— \* \* \* (5) encouraging hazard mitigation measures to reduce losses from disasters, including development of land use and construction regulations.”<sup>22</sup> The Act also includes specific provisions that elaborate on this premise.<sup>23</sup>

However, the Stafford Act says very little about HUD and focuses instead on the Federal Emergency Management Agency (FEMA). The Act's sole instruction to the Secretary of HUD is also directed to the Secretary of

18. 42 U.S.C. §5306(c).

19. *Id.*

20. 42 U.S.C. §5302.

21. See, e.g., *Blanchard v. Newton*, 865 F. Supp. 2d 709 (M.D. La. 2012) (rejecting Eleventh Amendment arguments offered by resident seeking to appeal denial of application to state agency for disaster recovery funds).

22. 42 U.S.C. §5121(b).

23. See, e.g., *id.* §§5133 (pre-hazard mitigation), 5165 (mitigation planning), 5170c (hazard mitigation), 5172 (repair, replacement of damaged facilities).

Commerce; it says they should give priority to grantees in disaster-stricken areas when obligating public housing assistance discretionary funds or funds not yet allocated.<sup>24</sup> The Act's legislative history does not discuss that section in a substantial or meaningful way, nor does it include any meaningful deletions or rejected measures.<sup>25</sup> The Sandy Recovery Improvement Act, which amends several Stafford Act provisions that pertain to FEMA, says nothing about HUD, but calls on FEMA to make recommendations for a national strategy for future disaster preparedness.<sup>26</sup> FEMA's recommendations are discussed in the next subsection of this Comment.

The Stafford Act divides the labor of disaster recovery among agencies in two important ways. First, the Stafford Act assigns FEMA alone a forward-looking role, which it dubs "hazard mitigation."<sup>27</sup> As GAO explained in 2014 testimony regarding federal fiscal exposure and resilience to disasters, FEMA's Hazard Mitigation Grant Program is "the only federal program designed to promote resilience to future disasters during recovery."<sup>28</sup> Notably, however, GAO found that in the wake of Hurricane Sandy, FEMA officials—notwithstanding directives from Congress and executive orders to prioritize resilience in recovery projects—sometimes impeded grant applicants' efforts to incorporate resiliency features into project proposals.<sup>29</sup> Second, the Stafford Act prohibits duplicative payments "to the extent such assistance duplicates benefits available to the person for the same purpose from another source."<sup>30</sup>

### C. Specific Disaster Recovery Appropriations

Disaster-specific appropriations are the only other source of statutory authority for HUD's obligation of CDBG-DR funds apart from the HCD Act and Stafford Act.<sup>31</sup> Since 2004, and certainly since 2006, when HUD established its Disaster Recovery and Special Issues Division to administer CDBG-DR funds,<sup>32</sup> appropriations legislation that did not focus on a specific instrument or program<sup>33</sup> has consistently defined the intended scope of CDBG-DR spending using boilerplate language:

2004 appropriations bill: "[F]or use only for disaster relief, long-term recovery, and mitigation in communities affected by disasters designated by the President between August 31, 2003 and October 1, 2004."<sup>34</sup>

2005 appropriations bill: "[F]or 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 hurricanes in the Gulf of Mexico in 2005 in States for which the President declared a major disaster. . . ."<sup>35</sup>

2006 appropriations bill: "[F]or 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 Hurricanes Katrina, Rita, or Wilma in States for which the President declared a major disaster . . . ."<sup>36</sup>

2008 appropriations bill: "[F]or necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in areas covered by a declaration of major disaster . . . as a result of recent natural disasters. . . ."<sup>37</sup>

2013 appropriations bill: "[F]or necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization. . . ."<sup>38</sup>

The *Congressional Record* does not specifically illuminate what was meant by "mitigation" in 2004, nor why that term does not appear in subsequent appropriations. However, even for disaster relief appropriations after 2004, congressional reports make occasional reference to "mitigation" as an element of CDBG-DR funding.<sup>39</sup> These mentions suggest that lawmakers had not deliberately isolated disaster or hazard mitigation as a distinct piece of HUD's disaster response role, nor had they pointedly rejected it. Indeed, in the legislative history for this series of disaster relief appropriations, our research has revealed no indication that any clear intent informed Congress' inclusion or exclusion of "mitigation" language in post-2004 CDBG-DR funding provisions.<sup>40</sup>

24. *Id.* §5153(b).

25. See H.R. REP. NO. 100-517 (1988), reprinted in 1988 U.S.C.C.A.N. 6085.

26. Pub. L. No. 113-2, §1111.

27. See 42 U.S.C. §5170c; 44 C.F.R. pt. 206, subpt. N (elaborating on FEMA's hazard mitigation program).

28. GAO-14-603T, *supra* note 17, at 11 tbl.1.

29. GAO, GAO-15-515, HURRICANE SANDY—AN INVESTMENT STRATEGY COULD HELP THE FEDERAL GOVERNMENT ENHANCE NATIONAL RESILIENCE FOR FUTURE DISASTERS 24 (2015).

30. 42 U.S.C. §5155(a) & (c).

31. Congress first appropriated CDBG-DR funds for long-term disaster recovery in 1992. See Dire Emergency Supplemental Appropriations Act, Pub. L. No. 102-368, 106 Stat. 1118 (Sept. 23, 1992); MAGGIE McCARTY ET AL., CONG. RESEARCH SERV., THE ROLE OF HUD HOUSING PROGRAMS IN RESPONSE TO PAST DISASTERS (2006).

32. See HUD, Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Department of Defense Appropriations Act, 2006, 71 Fed. Reg. 7666 (Feb. 13, 2006).

33. See, e.g., Pub. L. No. 110-116 (Nov. 13, 2007) (authorizing funds for Louisiana's Road Home Program).

34. Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act of 2005, Pub. L. No. 108-324 (Oct. 13, 2004).

35. U.S. Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Pub. L. No. 109-148 (Dec. 30, 2005).

36. Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery of 2006, Pub. L. No. 109-234 (June 15, 2006).

37. Military Construction, Veterans' Affairs, and Related Agencies Appropriations Bill of 2008, Pub. L. No. 110-252 (June 30, 2008).

38. Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2 (Jan. 29, 2013).

39. See, e.g., H.R. REP. NO. 109-359, at 518 (2005) (Conf. Rep.), reprinted in 2005 U.S.C.C.A.N. 1457, 1517 ("The conference agreement includes \$11,500,000,000 for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and mitigation in communities in [specified disaster areas]."); H.R. REP. NO. 109-388, at 67 (2006) ("The Committee recommends \$4,200,000,000 for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure, and mitigation in communities in [specified disaster areas].").

40. See, e.g., H.R. REP. NO. 110-720 (2008); H.R. REP. NO. 113-1 (2013).

The term “resiliency” first appeared with clear intention in the 2013 post-Sandy appropriation. As with the Stafford Act, which assigns FEMA a forward-looking role and also addresses HUD (thereby arguably implying that HUD is not to assume a forward-looking role), the post-Sandy appropriation included an instruction to the National Park Service to, *inter alia*, spend \$360 million to “increase the resiliency and capacity of coastal habitat and infrastructure to withstand storms and reduce the amount of damage caused by such storms.”<sup>41</sup> None of the directives given to HUD include such language. However, interpreting this language using the canon of statutory construction referred to as *expressio unius*, which infers that omission signifies deliberate exclusion,<sup>42</sup> seems to be at odds with the congressional record.

Members of Congress who discussed the 2013 appropriation *package* made frequent mention of resiliency and preparedness for future disasters, without any clear indication that such terms pertained only to one agency and not another. For example, Rep. Steven Palazzo (R-Miss.) stated that disaster relief provisions would “provide immediate relief for Sandy victims while allowing them to build forward, not just back, and [would] strengthen these communities in the face of future storms.”<sup>43</sup> Similarly, Sen. Kirstin Gillibrand (D-NY) said that “[i]t is also important that as we rebuild, agencies of the Federal Government . . . should be working together to develop the best models for rebuilding our battered coasts as well as planning for the long-term sustainability and resilience of these vulnerable areas.”<sup>44</sup>

“Long-term recovery” appears in each appropriation. No legislative history elaborates on what is meant by “long term,” but it clearly contemplates the future of the community HUD is meant to help to recovery. As our developing knowledge of climate change effectively changes our understanding of the future—in many places, former “500-year” floods and storms are now “100-year” floods and storms<sup>45</sup>—“long-term recovery” necessarily takes on greater urgency and direct relevance to HUD’s funding criteria.

41. Pub. L. No. 113-2, 127 Stat. 30.

42. The full Latin phrase is “*expressio unius est exclusio alterius*.”

43. 159 CONG. REC. H109-01 (daily ed. Jan. 15, 2013).

44. 159 CONG. REC. S311-01 (daily ed. Jan. 28, 2013) (statement of Sen. Kirsten Gillibrand). *See also id.* (statement of Rep. Joseph Crowley (D-NY)) (“[This bill] will help restore and replace damaged or destroyed infrastructure, and it’ll put in place cost-saving measures to prevent further damage when—when, and not if—future storms occur.”); *see also* 159 CONG. REC. H109-01 (statement of Rep. Sheila Jackson Lee (D-Tex.)) (“This funding through HUD’s Community Development Fund will support critical and immediate community needs.”); 159 CONG. REC. S311-01 (statement of Sen. Barbara Mikulski (D-Md.)) (“There is \$16 billion in there for community development block grant funding to restore infrastructure and housing to help people rebuild their lives.”).

45. *See* Andra J. Reed et al., *Increased Threat of Tropical Cyclones and Coastal Flooding to New York City During the Anthropogenic Era*, 112 PROC. NAT’L ACADS. SCI. 12610 (2015), <http://bit.ly/1O5MHGN>; Ning Lin & Kerry Emanuel, *Grey Swan Tropical Cyclones*, NATURE CLIMATE CHANGE, Aug. 2015, <http://bit.ly/1PHWz99> (“We define ‘grey swan’ tropical cyclones as high-impact storms that would not be predicted based on history but may be foreseeable using physical knowledge together with historical data.”).

## D. Regulations and Guidance

Resilience has been integrated to an increasing degree into federal agency operations generally, and into HUD’s CDBG-DR program in particular. This subsection discusses in chronological order statements from HUD itself and from the executive branch more generally since 2004 about how HUD should integrate resilience considerations into its implementation of Congress’ statutory directives. In addition to federal regulations and strategic plans, this subsection also discusses the “allocation notices” HUD promulgates in the Federal Register subsequent to each disaster relief appropriation discussed above. These recite the CDBG-DR grant award process and specify criteria for project approval. They also specify whatever waivers or modifications the HUD Secretary will apply to the rules that generally govern CDBG funds for the purpose of allocating CDBG-DR grants for the declared disaster.

### 1. 2004 Allocation Notice

In its rules for CDBG-DR funding under this appropriation, HUD explains that “use of grant funds must relate to the covered disaster” and, mirroring the statutory language, that “activities funded under this notice must also be related to disaster relief, long-term recovery, and mitigation.”<sup>46</sup>

### 2. 2005 Allocation Notice

The notice cites the statutory language that CDBG-DR funds would go to “[n]ecessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure,” but also cites the broader language of the conference report,<sup>47</sup> regarding allocating funds toward “necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure *and mitigation*.”<sup>48</sup> This suggests that HUD understood that hazard mitigation was a distinct priority—and quite possibly that HUD understood that prioritization to be consistent with congressional intent. Later in the notice, HUD contemplates specific mitigation activity in requiring state action plans to include “how the State will promote enactment and enforcement of modern building codes and mitigation of flood risk where appropriate,” and “[h]ow the State will provide or encourage provision of adequate, flood-resistant housing for all income groups.”<sup>49</sup>

### 3. 2006 Allocation Notice

This notice contains no references to hazard mitigation.<sup>50</sup>

46. Public Notice, 69 Fed. Reg. 72100, 72103 (Dec. 10, 2004).

47. *See* H.R. REP. NO. 109-359.

48. Public Notice, 71 Fed. Reg. 7666, 7666 (Feb. 13, 2006) (emphasis added).

49. *Id.* at 7669.

50. *See* Public Notice, 71 Fed. Reg. 63337 (Oct. 30, 2006).

#### 4. 2008 Initial Allocation Notice

For this appropriation, as with that of 2005, the HUD notice requires a grantee's disaster recovery plan to include "how the state will promote enactment and enforcement of modern building codes and mitigation of flood risk where appropriate" and "[h]ow the state will provide or encourage provision of adequate, flood-resistant housing for all income groups."<sup>51</sup>

#### 5. HUD's 2010-2015 Strategic Plan

Subgoal 4D of HUD's Strategic Plan addresses "disaster preparedness, recovery, and resiliency," and commits HUD, "[t]hrough coordination with federal agencies and state and local governments, [to] help communities focus on climate adaptation and hazard resilience. . . . This effort includes planning for and implementing adaptation and predisaster mitigation strategies and providing assistance following a disaster."<sup>52</sup> It then lists among other strategies for achieving that subgoal, "[r]educe losses to businesses, community organizations, and public infrastructure from reoccurring disasters in high-risk areas."<sup>53</sup> HUD's emphasis on resilience in 2010 was consistent with its general prioritization by the Barack Obama Administration at that time.<sup>54</sup>

#### 6. Prohibition on Duplication of Benefits, Clarified in November 2011

Although it does not discuss resilience, a pair of regulations implementing the Stafford Act's prohibition on duplication of benefits further illuminates the regulatory context in which HUD operates when it supports the federal government's disaster recovery mission.<sup>55</sup> Importantly, the prohibition on duplication of benefits is in no way intended to prevent HUD from supporting resilience efforts, but relates instead to the status of other agencies' funding decisions, which generally precede CDBG-DR engagement. As HUD explains, "[s]ince CDBG[-]DR provides long-term

recovery assistance via supplemental congressional appropriations, and falls lower in the hierarchy of delivery than FEMA or SBA [Small Business Administration] assistance, it is intended to supplement rather than supplant these sources of assistance."

#### 7. HUD's Environmental Justice Strategy and 2012 Adaptation Plan

Since at least 2012, HUD has recognized publicly that the goals of resilience and environmental justice (EJ) are inextricable: "For HUD, EJ means equal access to safe and healthy housing for all; mitigating risks to communities in disaster-prone areas; providing access to affordable, accessible, quality housing free of hazards to residents' health; and working to achieve inclusive, sustainable communities free from discrimination."<sup>56</sup> As with the prohibition on duplication of benefits, this is best understood as a background principle, but one with potentially significant implications for decisions to obligate—or to refuse to obligate—CDBG-DR funds for resilience-oriented projects.

#### 8. 2013 Initial Allocation Notice

In this notice, HUD requires action plans to include a "description of how the grantee will promote . . . sound, sustainable long-term recovery planning informed by a post-disaster evaluation of hazard risk, especially land-use decisions that reflect responsible flood plain management and take into account possible sea level rise," as well as "[a] description of how the grantee's programs or activities . . . will support adoption and enforcement of modern building codes and mitigation of hazard risk, including possible sea level rise, storm surge, and flooding, where appropriate."<sup>57</sup>

51. Public Notice, 73 Fed. Reg. 52870, 52876 (Sept. 11, 2008). *See also* Public Notice, 78 Fed. Reg. 69104 (Nov. 18, 2013) (second allocation of 2013 disaster relief appropriation); Public Notice, 79 Fed. Reg. 62182 (Oct. 16, 2014) (third allocation of 2013 disaster relief appropriation).

52. HUD, FY 2010-2015 STRATEGIC PLAN 36 (2010), <http://1.usa.gov/1LctZJ6>.

53. *Id.* at 36.

54. *See, e.g.*, Presidential Policy Directive 8 (PPD-8) (2011), <http://1.usa.gov/1kqK7jL> ("aimed at strengthening the security and resilience of the United States through systematic preparation for the threats that pose the greatest risk to the security of the Nation, including . . . catastrophic natural disasters"). That directive supplied definitions for "resilience"—"the ability to adapt to changing conditions and withstand and rapidly recover from disruption due to emergencies"—and "mitigation"—"those capabilities necessary to reduce loss of life and property by lessening the impact of disasters . . . includ[ing] . . . efforts to improve the resilience of critical infrastructure . . . and initiatives to reduce future risks after a disaster has occurred." *Id.*

55. *See* 44 C.F.R. §206.191(2) (FEMA-prescribed disaster-recovery benefits delivery sequence); Clarification of Duplication of Benefits Requirements Under the Stafford Act for Community Development Block Grant (CDBG) Disaster Recovery Grantees, 76 Fed. Reg. 71060 (Nov. 16, 2011).

56. Summary of Public Comments, Response to Public Comments, and Final 2012-2015 Environmental Justice Strategy, 77 Fed. Reg. 22599, 22600 (Apr. 16, 2012); *see also* HUD, CLIMATE ADAPTATION PLAN 6 (2012) ("The considerations and actions discussed in this document are also relevant to implementing HUD's Environmental Justice Strategy."). HUD's 2012 and 2014 Adaptation Plans responded to Executive Order No. 13514, *Federal Leadership in Environmental, Energy, and Economic Performance* (Oct. 5, 2009). A notable feature of HUD's 2012 Climate Change Adaptation Plan, published in June of that year, is that it accurately anticipated several of the adverse effects of Hurricane Sandy, which struck New York and New Jersey four months later. *See* HUD ADAPTATION PLAN at 16-18, 24-25 (identifying Atlantic City assets as being highly susceptible to flooding and the adverse effects of sea-level rise).

57. Public Notice, 78 Fed. Reg. 14329, 14333 (Mar. 5, 2013). HUD must approve an action plan, which details how a grantee plans to spend CDBG-DR funds, *see, e.g.*, NYC CDBG-DR Action Plan, [on.nyc.gov/1S92ZCM](http://on.nyc.gov/1S92ZCM), before the grantee may spend obligated funds. HUD issued a floodplain management regulation in November 2013 that, "[w]ith respect to floodplains, with some exceptions, . . . prohibits HUD funding (e.g., Community Development Block Grants, HOME Investment Partnerships Program, Choice Neighborhoods, and others) or Federal Housing Administration (FHA) mortgage insurance for construction in Coastal High Hazard Areas." Floodplain Management and Protection of Wetlands, 78 Fed. Reg. 68719 (Nov. 15, 2013). Though this regulation does not expressly pertain to HUD's role in disaster-recovery efforts, its indirect relation to such efforts is nonetheless apparent, and is consistent with a general prioritization of climate change resilience in the allocation of funds via block grants and other vehicles.

Despite a lack of “hazard mitigation” language in the CDBG-DR section of the appropriation statute, HUD’s 2013 notice addresses climate change impacts and resilience measures in specific terms. The notice also discusses the tie-back requirement, explaining that “[a]ll CDBG-DR activities must clearly address an impact of the disaster for which funding was appropriated,” but that “grantees may also fund new construction or rehabilitate units not damaged by the disaster if the activity clearly addresses a disaster-related impact and is located in a disaster-affected area.”<sup>58</sup> Specifically as to hazard mitigation projects, the notice states that:

HUD strongly encourages grantees to incorporate preparedness and mitigation measures into all rebuilding activities, which helps to ensure that communities recover to be safer, stronger, and more resilient. . . . Mitigation measures that are not incorporated into rebuilding activities must be a necessary expense related to disaster relief, long-term recovery, and restoration of infrastructure, housing, or economic revitalization. Furthermore, the costs associated with these measures may not prevent the grantee from meeting unmet needs.<sup>59</sup>

## 9. Rebuild by Design, July 2013

HUD announced this initiative as “an effort to promote resilience for the Hurricane Sandy-affected region” by “holding a multi-stage design competition” that would generate “design solutions [ ] expected to range in scope and scale—from large-scale green infrastructure to small-scale residential resiliency retrofits.”<sup>60</sup> HUD drew the legal and financial support for this design competition from different statutory sources: Legally, Rebuild by Design was based on the 2010 reauthorization of the America COMPETES Act<sup>61</sup>; and financially, it drew on CDBG-DR funds appropriated by Pub. L. No. 113-2.<sup>62</sup> Although the initiative focused on regional solutions and capacity-building, HUD also intended for it to generate examples of collaborations and projects oriented to resilience that could be reproduced nationwide.<sup>63</sup>

## 10. HUD’s 2014 Climate Adaptation Plan

The 2014 update to HUD’s 2012 Climate Adaptation Plan is notable for the concreteness and wide-ranging scope of its proposed initiatives.<sup>64</sup> In addition to proposing specific updates to policies and changes to binding regulations, it calls for the development of toolkits and training materi-

als for HUD grantees, HUD staff training, and further research on risks related to climate change. It also creates a body—the “Resilience Council”—that is charged with leading these efforts.<sup>65</sup>

Notable examples of particular initiatives include changes to regulations governing the disaster-oriented insurance policies managed by the Government National Mortgage Association (Ginnie Mae), imposing higher flood elevation requirements for at-risk critical infrastructure, identifying and addressing barriers to investments in climate change resilience, incorporating diverse climate-related risks into maps used by the community development program, training HUD staff to better understand the nature and implications of extreme weather events, making projections of disaster risk a factor in field office staffing decisions, and identifying physical assets that are vulnerable to climate risks and characterizing those vulnerabilities.<sup>66</sup>

## 11. The National Disaster Resilience Competition 2014-2016

The National Disaster Resilience Competition (NDR Competition) expressly directs CDBG-DR funds toward resilience-oriented projects. Winners of that competition will receive funds from HUD totaling almost \$1 billion for the implementation of resilience proposals in the counties affected by Hurricane Sandy and other declared disasters listed in the 2013 *Federal Register* notice. The *Federal Register* notice of the Competition cites as statutory authority the boilerplate language from Pub. L. No. 113-2, which provides for “necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization.”<sup>67</sup> Thus, HUD identified no new or additional statutory authority to support its decision to obligate disaster recovery funds to resilience initiatives. Notably, that notice also did not cite to any other supplemental source of statutory authority—say, HCD Act §106(c)(4)(D), which provides that HUD “shall evaluate [ ] natural hazards . . . and take appropriate action to mitigate such hazards” in making CDBG-DR allocations.

In addition to reflecting the consistency of HUD’s existing statutory mandates with a disaster recovery agenda that prioritizes resilience, this grounding in Pub. L. No. 113-2 is also notable for its contrast with the statutory basis of the earlier Rebuild by Design program, which the NDR Competition expressly imitated in other respects.<sup>68</sup> That earlier program, though it used a CDBG-DR vehicle to obligate funds, was predicated legally on the 2010 reauthorization of the America COMPETES Act.<sup>69</sup> The paragraph

58. *Id.* at 14335.

59. *Id.*

60. Rebuild by Design—Competition and Registration, 78 Fed. Reg. 45551, 45551 (July 29, 2013).

61. *Id.* at 45554 (citing Pub. L. No. 111-358, §105, 124 Stat. 3999).

62. Rebuild by Design: Hurricane Sandy Regional Planning and Design Competition Design Brief (2013), [1.usa.gov/Tj3Hlh](http://1.usa.gov/Tj3Hlh).

63. *Id.* at 45552.

64. See HUD, CLIMATE CHANGE ADAPTATION PLAN (2014), <http://bit.ly/1hoyBEi>.

65. *Id.*

66. *Id.* at 14-41.

67. See 80 Fed. Reg. 1039, 1041 (Jan. 8, 2015).

68. See HUD, National Disaster Resilience Competition Phase 2 Fact Sheet 3 (2015), <http://bit.ly/1Z8Anvz> (“The NDRC will build on the successful model of Rebuild by Design”).

69. Rebuild by Design—Competition and Registration, 78 Fed. Reg. 45551, 45554 (July 29, 2013) (citing Pub. L. No. 111-358, §105, 124 Stat. 3999).

of the reauthorization HUD cited, “Prize Competitions,” provided federal agencies with generic authority to allocate prize money for a broad range of purposes.<sup>70</sup>

This is not to say that the NDR Competition departed from the tie-back requirement—it did not. The NDR Competition’s Notice of Funding Availability explains quite clearly how the tie-back requirement pertains to NDR Competition participants:

A tie-back reasonably shows how the effects of the Qualified Disaster resulted in an Unmet Recovery Need that can be addressed by the proposed CDBG-NDR-assisted activities. Or, stated in the reverse, how the proposed project reasonably “ties-back” to addressing demonstrated direct and indirect effects of the Qualified Disaster. Once the necessary tie-back is established for a project, you may design a project that addresses or satisfies an Unmet Recovery Need and also has co-benefits, such as meeting other community development objectives and economic revitalization needs, including greater resilience to negative effects of climate change. HUD has determined that generally, designing a project that improves resilience to the impacts of climate change while meeting an Unmet Recovery Need is a necessary and reasonable cost of recovery.<sup>71</sup>

This part has identified sources of statutory authority for HUD’s CDBG-DR program and has traced the prioritization of resilience through some of those authorities and through the regulations and executive orders that also guide HUD’s approach to disaster recovery efforts. The next part examines more closely HUD’s practical integration of resilience into its support for disaster recovery efforts.

## II. HUD’s Current Interpretation of Limits on Its CDBG-DR Spending

HUD has not issued general regulations that govern the CDBG-DR program, but has instead published a number of informal guidance documents, including *Basically CDBG for Entitlements*,<sup>72</sup> “CDBG Disaster Recovery Overview,”<sup>73</sup> “CDBG Disaster Recovery Framework,”<sup>74</sup> and “CDBG Disaster Recovery Eligible Activities.”<sup>75</sup> Based on those presentations and on what GAO reported hearing from New York and New Jersey state officials, it

70. Pub. L. No. 111-358, §105 (amending the Stevenson-Wydler Technology Innovation Act of 1980 by adding Section 24, “Prize Competitions”).

71. HUD, NATIONAL DISASTER RESILIENCE COMPETITION NOTICE OF FUNDING AVAILABILITY 7 (2014), <http://bit.ly/1Z8C4sV>.

72. HUD, HUD Exchange: Guides and Training Manuals (2014), <http://bit.ly/1OWhXdR>.

73. HUD, HUD Exchange (2011), <http://bit.ly/1VBMMJ4>.

74. HUD Exchange, CDBG Disaster Recovery Framework, <http://bit.ly/1OWBDOP>. The HUD Exchange website does not indicate when this presentation was published, but the presentation file name includes the date February 2, 2013.

75. HUD Exchange, CDBG Disaster Recovery Eligible Activities, <http://bit.ly/1MdFd5D>. This slide presentation is not accessible through a link published on the HUD Exchange, but appears in an Internet search, and is housed on the HUD Exchange’s server.

seems that the greatest hurdle to resilience-oriented project proposals is the requirement that they tie back to the instant disaster.<sup>76</sup>

The Disaster Recovery Framework presentation explains the criteria for approving CDBG-DR project proposals in this way<sup>77</sup>:

### The Appropriation Laws

Funds must be used for: “. . . *necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization . . .*”

### What does this mean?

In the context of CDBG disaster recovery, this means that each activity *must*:

1. Be disaster-related in that it clearly demonstrates a connection to addressing a direct or indirect impact of the disaster in a Presidentially-declared county
2. Be CDBG eligible (according to regs and waivers)
3. Meet a national objective.

### “Recovery” Activities

Disaster-related activities are those that are able to demonstrate a logical connection between the impacts of the covered disaster and the activity’s contribution to community recovery.

### Documenting a Tie to the Disaster

The grantee must document how an activity is addressing a disaster-related impact and how it serves to restore housing, infrastructure, or the economy.

The CDBG Disaster Recovery Eligible Activities presentation largely restates these points, but also includes a pair of slides titled “Preparedness and Mitigation.”<sup>78</sup> Those slides list four further points:

- Preparedness and mitigation measures for rebuilding activities help to ensure that communities recover to be safer, stronger, and more resilient.
- Preparedness and mitigation measures also reduce costs in recovering from future disasters.
- Mitigation measures not incorporated into rebuilding activities must be a necessary expense related to disaster relief, long-term recovery, and restoration of infrastructure, housing, or economic revitalization.
- Costs associated with mitigation measures may not prevent the grantee from meeting unmet needs.

76. See U.S. GAO, GAO-15-515, HURRICANE SANDY: AN INVESTMENT STRATEGY COULD HELP THE FEDERAL GOVERNMENT ENHANCE NATIONAL RESILIENCE FOR FUTURE DISASTERS 16-17, 23-44 (2015).

77. Its explanation is consistent with those provided in the other presentations listed above.

78. HUD, CDBG Disaster Recovery Eligible Activities, *supra* note 75.

Read altogether, these points imply that (1) the tie-back requirement limits CDBG-DR funding eligibility, and (2) “mitigation measures” fit within the compass of projects that satisfy the tie-back requirement. But GAO noted in its 2015 report on recovery from Hurricane Sandy that a number of efforts to mitigate damage from future disasters were refused funding on the grounds that they failed to tie back adequately to the instant disaster.<sup>79</sup> As GAO put it, “program implementation was not always consistent with agency disaster resilience priorities,” and “the broader structure of disaster resilience funding [ ] limited a comprehensive approach to reducing risk overall.”<sup>80</sup>

Somewhat in contrast, HUD’s NDR Competition has signaled clearly that resilience is indispensable for attracting CDBG-DR funds—at least the \$1 billion appropriated by Pub. L. No. 113-2 and made available through the Competition. As the NDR Competition does not dispense with the tie-back requirement,<sup>81</sup> a further subtext (in addition to the NDR Competition’s express statement that resilience is a priority) is that HUD has considered the tension noted above and believes that it is indeed possible not only to marry a tie-back requirement to resilience goals, but to make that marriage a happy one. However, the NDR Competition is unique: HUD has not indicated that its structure or logic will somehow carry forward into future iterations of CDBG-DR grant funding.

In sum, HUD’s recent implementation of its CDBG-DR program has sent mixed messages regarding the relationship between resilience to future disasters and tying proposed projects back to a past disaster. This ambivalence risks confusing officers in state or local government who want to apply CDBG-DR funding to a resilience-oriented project. Such confusion can be expected to inspire those officers to proceed cautiously—and possibly even to shy away from ambitious resilience objectives—in the interest of ensuring that any proposal stays within the CDBG-DR bounds policed by HUD.

### III. HUD Can Promote Resilience Through Some Form of Clarification

To sort out the mixed messages and send a clearer signal to state agencies and local governments, HUD should issue a clarifying statement about the role of resilience in disaster recovery grant review. As mentioned above, HUD convened a Resilience Council in 2014 and then expanded and renamed it the Climate Council in October 2015. Establishing this Council alongside the statements and announcements in HUD’s 2014 Climate Adaptation Report does make clear that HUD means to give greater priority to resilience in a general sense. Yet, while this

strongly implies that the Rebuild by Design program and the NDR Competition are not *sui generis*, it still falls short of what express guidance from HUD could achieve.

How could HUD issue a regulation or guidance for a program that Congress only authorizes and funds on a disaster-by-disaster basis? By drafting and posting the soft guidance noted above, HUD already effectively gives stakeholders general guidance about the CDBG-DR program, notwithstanding the disaster-specific nature of appropriations for that program. Thus, the guidance proposed here, whether it is “soft,” formal, or a legally binding rule, would not be HUD’s first foray into this area, but would instead merely improve on the quality of HUD’s previous forays. Here are several possibilities:

First, HUD could issue a formal rule. The stack of public notices quoted above shows that HUD’s ad hoc disaster-related *Federal Register* notices are in fact (1) highly regular, and (2) not particular to a given disaster. Further, as discussed above, the compass of HUD’s authority under the HCD and Stafford Acts includes disaster recovery that makes resilience to future disasters a priority. It follows that HUD could ground the proposed clarification in three sources of authority: the HCD Act, which directs HUD to mitigate hazards to which permanent housing is exposed; the Stafford Act, which generally encourages Congress and federal agencies to mitigate hazards; and past and future appropriations, which have already directed and will again direct HUD to obligate grant funding for disaster recovery projects using the terms “mitigation,” “resilience,” and/or “long-term recovery.” This last source of statutory footing would prevent anyone from suggesting that HUD was trying to overstep the authority delegated to it by Congress. If, in the next CDBG-DR appropriation, Congress wants to prevent HUD from giving priority to resilience, Congress can take care to exclude these terms.

Second, if HUD is not inclined to issue a notice that could be read as a legally binding rule, it can still issue a policy statement, interpretive rule, or other guidance document that recognizes the existing tension between the forward-looking considerations that inform resilience and the backward-looking considerations that inform whether a proposal is adequately tied back to a past disaster. Such recognition would improve on existing sources of direction, which seem to imply that there is no tension between these priorities and thereby effectively require state and local officials to guess at what approach to reconciliation will prove defensible. It would go farther still if coupled with illustrative examples of better and worse approaches to articulate how a proposed project satisfies both priorities.

### IV. Conclusion

This Comment identifies a tension between the requirement that all projects funded by CDBG-DR tie back to the most recent disaster and the logic of climate change resilience. That logic holds not only that one should always build or rebuild with an eye to the next disaster, but also

79. GAO-15-515, *supra* note 76, at 23.

80. *Id.*

81. See HUD, National Disaster Resilience Competition Phase 2 Fact Sheet 2 (2015), <http://bit.ly/1Z8Anvz> (“Applicants will need to link or ‘tie-back’ their proposals to the disaster from which they are recovering, as well as demonstrate how they are reducing future risks and advancing broader community development goals within their target geographic area(s).”).

that predicting the next disaster requires considering both past events and climate change-driven changes to the pattern of those events. It is, in short, decidedly future-oriented. The Comment also points out that the statutes under which HUD carries out its CDBG-DR program provide ample support for integrating resilience more fully into disaster recovery efforts.

HUD should treat this support as a solid basis on which to build the sorts of initiatives listed in its 2014 Climate

Adaptation Plan. It should also make use of that solid basis for the specific purpose of clarifying internally and externally that reconciling tie back and climate change resilience can and should feature in all disaster recovery efforts, as they have in the Rebuild by Design program and NDR Competition. HUD's newly formed Climate Council is well-positioned to develop and implement the sort of clarification called for here. It should do so, if possible, before the next disaster strikes.