



1 de julio de 2019

RE: Complaint HUD OIG – Description of Fraud, Waste or Abuse

I. Language Accessibility – Civil Rights

The Government of Puerto Rico and the Puerto Rico Department of Housing (“PRDOH”) is not complying with its obligations under Title VI of the Civil Rights Act of 1994 and under the Allocation Notice for people with Limited English Proficiency (LEP).^[i] The Puerto Rico Department of Housing CDBG-DR Program Guidelines (“policies and procedures”) for the Home Repair, Reconstruction or Relocation Program (“R(3)”), are only available in English, under the English version of the CDBG-DR website. Only 22% of the local population is proficient in English.^[ii] Language barriers affect disparately impoverished individuals and elders. 94.5% of households use a language that is not English.^[iii] In regard to LEP, the government certified that they would abide by Title VI of the aforementioned law. The Cross-Cutting Program Guidelines adopted by the PRDOH in February 2019 states that the government would guarantee language accessibility.

"Executive Order No. 13166, signed on August 11, 2000, requires programs, subrecipients, contractors, subcontractors, and/or developers funded in whole or in part with CDBG-DR financial assistance to ensure fair and meaningful access to programs and services for families and individuals with Limited English Proficiency (LEP) and/or deaf/hard of hearing. Fair access is ensured through the implementation of a Language Assistance Plan (LAP), which includes non-English-based outreach, translation services of vital documents, free language assistance services, and staff training. Vital documents are defined as depending on the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner. PRDOH is fully committed to aid those who don't fully understand the English language. Hence, all vital documents, as defined above, will be translated to the Spanish language. Nevertheless, in the event of a discrepancy among any translation, the English version will prevail."^[iv]

Certainly, the implementation guideline for the biggest program under the first allocation of CDBG-DR funds granted to the government of Puerto Rico, a program that will impact hundreds of families and disbursement approximately \$2.2 billions is a "vital document"



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as described before. The lack of translation of this document represents a crass violation of the civil rights of the people of Puerto Rico.

II. Mitigation and displacements

A. Mitigation is not considered

The Action Plan approved by HUD in February 2019 acknowledges that the PRDOH can combine CDBG-DR funds and other allocations to ensure mitigation and resilience.^[v] A feasibility, cost-effectiveness and community support analysis must be carried out. The Allocation Notice permits rebuilding in floodplains with the two-foot elevation standard.^[vi] Other options may be contemplated. Yet, mitigation is not considered within the Action Plan.

This is a cause for great concern. The Action Plan prohibits repairs that involve significant improvements^[vii] and reconstruction in zones deemed as flood prone in the FEMA 100-year flood plain map (FIRM). This includes nearly 250,000 houses that will have their chances to receive disaster recovery assistance limited.^[viii] Mitigation should be an option to promote resilient communities and ensure their right to stay when their safety is guaranteed.

It must be stated that Puerto Rico has been allocated \$2.9 B for mitigation under FEMA's Hazard Mitigation Grants Program. Not contemplating mitigation may lead to arbitrary and capricious use of the funds.

B. Lack of a displacement minimization policy

The Allocation Notice mandates the PRDOH to adopt a clear policy to minimize displacements.^[ix] This obligation is also enshrined on HUD regulations which state that "the grantees (or State or state recipients, as applicable) shall assure that they have taken all reasonable steps to minimize displacements".^[x] In its Action Plan, the PRDOH certified that they have and are currently following a plan for relocation assistance and anti-residential displacements.^[xi]

The Action Plan also certifies compliance with the Uniform Relocation Act (URA), as required by the Allocation Notice.^[xii] Yet, beyond these mere references, there is no description of how these responsibilities will be discharged. The only time that the URA is mentioned outside of the Action Plan is in the Cross-Cutting Guidelines where the PRDOH only mention the sections that will apply and a disclaimer that "Additional Uniform Act requirements can be found in the housing programs guidelines".^[xiii] However, in the policies and procedures for the R (3) Program, they only state the following regarding URA:



"As a HUD-assisted program, and in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA), 42 U.S.C. § 4601 *et seq.*, and the government wide implementing regulations found at 49 C.F.R. part 24, all programs in the PRDOH CBDG-DR portfolio, including the R3 Program, is subject to URA regulations. For more information on how URA regulations apply to the R3 Program, please refer to the URA Guidelines found at www.cdbg-dr.pr.gov." ^[xiv]

It is important to point out that nowhere in the CBDG-DR website are there specific "URA Guidelines" like the ones mentioned in the policies and procedures for the R (3) Program. With government confirmation that the R (3) Program is set to commence in July 2019, the fact that these guidelines are not available is a serious noncompliance with the program requirements.

Relocation is one of the core elements of the R (3) program. The lack of clear guidelines about eligibility criteria, the treatment of owners with informal titles, relocation plans, and the protection of communities' integrity may lead to arbitrary and capricious management of the program, a high rate of denials for assistance and the displacements of individuals who may otherwise lack adequate housing.

III. Discrepancies between Allocation Notice, Puerto Rico Action Plan, and the R (3) Program Policies & Procedures

A. Substantial Improvements

The R(3) Program Guidelines states the homes located in a floodplain "which qualify for rehabilitation that is considered a substantial improvement, as defined in 24 C.F.R. § 55.2, will not be rehabilitated in place," but will receive relocation assistance instead.^[xv] The Allocation Notice mandates that "[a]ll references to "substantial damage" and "substantial" improvement" shall be as defined in 44 CFR 59.1 unless otherwise noted..."^[xvi] The definition of substantial improvement included in the R(3) Program Guidelines, however, does not recognize the exceptions included in 24 C.F.R. § 55.2.

In the guidelines, substantial improvement is defined as: "a) Any repair, reconstruction, modernization or improvement of a structure, the cost of which equals or exceeds 50% of the market value of the structure either: 1) Before the improvement or repair is started; or 2) If the structure has been damaged, and is being restored, before the damage occurred; or b) Any repair, reconstruction, modernization or improvement of a structure that results in an increase of more than 20% in the number of dwelling units in



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a residential project or in the average peak number of customers and employees likely to be on-site at any one time for a commercial or industrial project”.^[xvii]

HUD regulations on floodplain management declare that the aforementioned substantial improvements may not include: “(A) Any project for improvement of a structure to comply with existing state or local health, sanitary or safety code specifications that is solely necessary to assure safe living conditions, or (B) Any alteration of a structure listed on the National Register of Historical Places or on a State Inventory of Historic Places.”^[xviii]

Excluding these exceptions may rule out a significant portion of the affected homes from rehabilitation assistance. In fact, the Action Plan recognizes that as many as 55% of structures in Puerto Rico were built using “self-managed methods of construction” and that type of construction “reduces the structural integrity of homes to withstand natural environmental conditions and renders them ineffective to withstand hurricane conditions.”^[xix] Therefore, as much as half of the homes may need improvements solely to comply with safety standards. These improvements are not significant improvements under HUD Regulation. The R (3) Guidelines must expressly recognize the said distinction.

B. Acquisition of real property; flood and other buyouts

When comparing the Allocation Notice, the Puerto Rico Action Plan and the R (3) Program Guidelines, we have come across mayor discrepancies regarding whether the PRDOH is adopting a real property acquisition or a buyout when it comes to relocation.

The Allocation Notice states that a grantee is able to carry out property acquisitions for a variety of purposes and there are two different ways in which they can execute this acquisition. There is a standard acquisition of real property, and then there are buyouts, which is a more specific type of acquisition of real property. The term ‘buyouts’, refers to the “acquisition of properties located in a floodway or floodplain that is intended to reduce risk from future flooding...”. One of its requirements is that “Any property acquired, accepted, or from which a structure will be removed pursuant to the project will be dedicated and maintained in perpetuity for a use that is compatible with open space, recreational, or floodplain and wetlands management practices”. In all cases, “a deed restriction or covenant running with the property must require that the buyout property be dedicated and maintained for compatible uses in perpetuity”. The distinction between buyouts and other types of acquisitions is important, because “grantees may only redevelop an acquired property if the property is not acquired through a buyout program”. In a standard acquisition of real property, includes the following eligible activities: “The acquisition of real property which is (A) blighted, deteriorated, deteriorating, undeveloped, or inappropriately developed from the standpoint of sound community development and growth; (B) appropriate for rehabilitation or conservation activities; (C) appropriate for the preservation or restoration of historic sites, the beautification of urban land, the conservation of open



spaces, natural resources, and scenic areas, the provision of recreational opportunities, or the guidance of urban development; (D) to be used for the provision of public works, facilities, and improvements eligible for assistance under this chapter; or (E) to be used for other public purposes.”^[xx]

The Puerto Rico Action Plan states the following: “Damaged properties acquired by the PRDOH will be demolished and vacant lots will be maintained as green space.”^[xxi] The wording used by the PRDOH in the Action Plan seems to address this acquisition as a buyout, since it explicitly states that a vacant lot will remain as a green space, which is equivalent to a “open space”.

However, the R (3) Program Guidelines does not use the same wording as the Action Plan. In section 11.3.1, “Demolition and Maintenance of Acquired Property”, the guidelines state that it is PRDOH’s “intent” to keep the properties as vacant lots and refer them to other programs for further consideration of long-term use. “This is to ensure that vacant lots located in hazardous areas are not redeveloped with CDBG-DR Program funds and later considered for buyout activities through other initiatives.”^[xxii]

When comparing the language used in the Action Plan and the R (3) Program Guidelines with the definition provided in the Allocation Notice, the Action Plan addresses the acquisition of the property as a buyout. On the other hand, the R (3) Program Guideline addresses it as a standard acquisition where the property will be held as vacant lot while the communities take into consideration future resilient activities that will ensure cost effective efforts. Nowhere does it mention that a deed restriction will be placed on the property and that it never be redeveloped except for minor structures needed for instance for maintenance of the resulting park or wetland facility.

IV. Best practices regarding disaster response

A. Policies & Procedures

The recent experience with disaster recovery efforts demonstrated that streamlining disaster assistance policies and procedures is instrumental to ensure the equal, just and effective access to assistance. Clear and specific policies and procedures must be adopted in order to hire contractors, choose subrecipients, open programs and disburse any federal funds.



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Puerto Rico's Action Plan contains 27 disaster recovery programs, which most of the time depend on each other. The R (3) program, in particular, invokes in many instances the Title Clearance Program, the Housing Counseling Program, and the Whole Community Resilience Program. However, the only one with published policies and procedures is the R (3) Program. How is the R (3) Program meant to commence if the programs on which it relies on do not have the guidelines that specify their application?

In order to guarantee that the R (3) Program performs in its fullest potential, the government should put on hold the R (3) Program until the policies and procedures for the Title Clearance Program, Housing Counseling Program, and the Whole Community Resilience Program have been established and published.

The policies and procedures of the R (3) Program state that a formal title is a condition for relocations as well as repairs and reconstructions. According to current Puerto Rican legal framework, in order to repair and reconstruct you must obtain a permit from OGPE, the Permit Management Office. The first requirement to be eligible for this permit is proof of title or authorization from the title holder.^[xxiii] Those who do not have a formal title will be referred to the Title Clearance Program.^[xxiv] However, the vast majority of the applicants will depend on this program, since more than half of the population does not have a formal title.^[xxv] Yet, there are no policies and procedures in place for this program. Poor communities, who traditionally lack formality in their dwellings, may be disparately affected by the arbitrary implementation of this program.

It is imperative for the policies and procedures for these programs to be published before commencing the R (3) Program in order to avoid misinformed, wrongful and discriminatory practices throughout its operation.

B. Uniform Process for Owners Without Formal Titles

CDBG-DR funds present an opportunity to ensure secure roofs. However, the lack of clarity in eligibility criteria threatens owners who lack "formal qualifications". The refusal to accept a uniform test-title mechanism with alternate evidence would leave thousands unattended.

The Action Plan mentions that every R (3) applicant must prove their ownership in order to access housing-repair assistance, and those who lack formal titles have the "possibility" of demonstrating ownership through alternative documentation. The policies & procedures for the R (3) Program specify that those applicants who lack formal titles may provide alternative documentation by completing a notarized ownership affidavit that includes the length of time the applicant has lived at the disaster-damaged location, an explanation of circumstances that prevent standard verification.^[xxvi] However, this mechanism can lead to arbitrary judgments that the application is incomplete since it does not provide a uniform document that applicants can fill out.



It is urgent to accept uniform mechanisms to ensure that CDBG-DR funds will reach the people who need them. Therefore, the following best practices must be adopted:

1. The Puerto Rico Department of Housing must adopt a uniform document, such as a statement under penalty of perjury, rather than a notarized ownership affidavit, that would provide applicants a standard form in order to avoid arbitrary judgments.

V. Conclusion

In light of the civil rights violations, as well as the discrepancies mentioned beforehand, we urge the Office of the Inspector General of the Housing and Urban Development Department to address the following issues:

1. Suspend the PRDOH from implementing the Action Plan and the use of CDBG-DR funds until they have established clear and concise program guidelines. These program guidelines must go through the process of public participation and be available in Spanish.
2. Suspend the PRDOH from starting the Repair, Reconstruction or Relocation Program, R (3), until the guidelines for the Title Clearance Program have been published.
3. Demand the PRDOH to use 24 C.F.R. § 55.2 (b) (10) (ii)'s complete definition of "Substantial Improvement".
4. Demand the PRDOH to publish the URA Guidelines.
5. Demand the PRDOH to include in the R (3) Program guidelines the obligation to preserve the properties obtained, due to relocation, as open spaces. Also, the PRDOH must implement a deed restriction that prohibits the redevelopment of those areas with federal, state or private funds.



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ENDNOTES:

- [i]Civil Rights Act of 1964 (42 U.S.C. 2000d)/ Federal Register/Vol. 83, No. 28/Friday, February 9, 2018/Notices 5853
- [ii]Census 2010, 77.5% identified themselves as speaking English less than very well.
- [iii]Community Census 2012–2016
- [iv]PRDOH, Cross-Cutting Program Guidelines, Section 19, p. 25 (Feb. 2019)
- [v]PRDOH, Disaster Recovery Action Plan, p. 179 (Feb. 2019)
- [vi]Federal Register/Vol. 83, No. 28/Friday, February 9, 2018/Notices 5861
- [vii]“Substantial improvement is defined as either: a) Any repair, reconstruction, modernization or improvement of a structure, the cost of which equals or exceeds 50% of the market value of the structure either: 1) Before the improvement or repair is started; or 2) If the structure has been damaged, and is being restored, before the damage occurred; or b) Any repair, reconstruction, modernization or improvement of a structure that results in an increase of more than 20% in the number of dwelling units in a residential project or in the average peak number of customers and employees likely to be on-site at any one time for a commercial or industrial project.” CDBG-DR Program Guidelines for the Home Repair, Reconstruction or Relocation Program pg. 14
- [viii]Gerardo E. Alvarado León, “Sobre 250,000 estructuras están en zonas inundables”, *El Nuevo Día*, 22 de mayo, 2019.
- [ix]5867 Federal Register/Vol. 83, No. 28/Friday, February 9, 2018/Notices
- [x]24 C.F.R. § 570.606
- [xi]PRDOH, Disaster Recovery Action Plan, p. 203 (a) (Feb. 2019)
- [xii]PRDOH, Disaster Recovery Action Plan, p. 203 (d) (Feb. 2019)
- [xiii]PRDOH, Cross-Cutting Program Guidelines, Section 22, pg. 25 (Feb. 2019)
- [xiv] PRDOH, Repair, Reconstruction and Relocation Program Guidelines, Section 20.1, p. 78 (June 2019)
- [xv] PRDOH, Repair, Reconstruction and Relocation Program Guidelines, Section 11.1, p. 37 (June 2019)
- [xvi]83 FR 5844, 5861 (Feb.9, 2018)
- [xvii]PRDOH, Repair, Reconstruction and Relocation Program Guidelines, Section 11.1, p. 37 (June 2019)
- [xviii]24 C.F.R. §55.2 (b) (10) (ii)
- [xix]PRDOH, Disaster Recovery Action, p. 42 (Feb. 2019)
- [xx]5863 Federal Register/Vol. 83, No. 28/Friday, February 9, 2018/Notices
- [xxi]PRDOH, Disaster Recovery Action Plan, p. 127 (Feb. 2019)
- [xxii]PRDOH, Repair, Reconstruction and Relocation Program Guidelines, Section 11.3.1, p. 39 (June 2019)
- [xxiii]Section 2.1.9.5, Regulation No. 9081 of June 7, 2019
- [xxiv]PRDOH, Repair, Reconstruction and Relocation Program Guidelines, p. 16, 46–47 (June 2019)
- [xxv]PRDOH, Disaster Recovery Action Plan, p. 42 (Feb. 2019)
- [xxvi]PRDOH, Repair, Reconstruction and Relocation Program Guidelines, p. 16–17 (June 2019)