September 24, 2007

Attention: Disaster Recovery
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via email actioned@mississippi.org

Secretary Alphonso Jackson
U S Department of Housing and Urban Development
451 7th Street S.W. Room 10000
Washington, DC 20410

Re: Amendment 5 Port of Gulfport Restoration Program

Dear Sirs:

We write to express our deepest opposition to the Mississippi Development Authority's Port of Gulfport Restoration Program made public on September 7, 2007. The proposal describes how the State will divert to the Port of Gulfport $600 million from $2.56 billion allocated for Phase I of the Homeowner Assistance Grant Program.[1] This announcement was the first information that we have been provided about this diversion – and, as far as we know, the first notice to anyone – giving us no opportunity to express our views before it was made public. We submit these comments but urge that the deadline for submission of public comments be extended an additional two weeks because of the complexity and importance of this issue and the inadequate public notice given to this proposal.

We cannot state strongly enough how wrongheaded this proposal is. It makes absolutely no sense at a time when the housing crisis on the Gulf Coast, especially for low and moderate income people, remains dire, to divert $600 million from funds allocated for the mammoth housing recovery job that remains on the Gulf Coast to a proposal which is not for the repair of damage to housing caused by the hurricane, but rather for a vast expansion of the Port of Gulfport to a new location that is two miles off the coast. Further, it is contrary to the use for which Congress intended these funds, which is disaster relief and recovery. Rental housing was disproportionately impacted by the hurricane when compared to other types of housing. Disproportionate numbers of low and moderate income people live in rental housing. Further, people of color, people with disabilities and families with children – all members of protected classes under the federal Fair Housing Act – also rely heavily on rental housing. Under the requirements

[1] While the State proposal states that $215 billion has been allocated to Phase 1, its most recent quarterly report to HUD for the period through June 30, 2007 states that $3.31 billion was allocated to the Homeowners' Assistance Program (both Phase 1 and Phase 2), $750 million of which was to go to Phase 2. We calculate that as leaving $2.56 billion allocated to Phase 1.

of the Community Development Block Grant (CDBG) program, CDBG funds must be used to *affirmatively further* fair housing. Congress has explicitly withheld from HUD the authority to waive this. Yet, only 6% of the $5.4 billion Community Development Block Grant (CDBG) money has been allocated specifically to repair and rebuild rental housing – the $105 million public housing program and the $262.5 million small rental assistance program.[2]

The lack of adequate housing on the Gulf Coast, especially affordable housing, remains critical. Funding a major expansion of the Port of Gulfport will do nothing to address this crisis. Rather, it will exacerbate it by reducing funds previously allocated to housing recovery. There are many other sources of funds that can be used for the Port of Gulfport Project without reducing funding for housing recovery. More basically, the CDBG funds made available by the Department of Defense Appropriations Act passed at the end of 2005 were intended principally to benefit low- and moderate-income persons:

> "The primary objective of this chapter and of the community development program of each grantee under this chapter is the development of viable urban communities, *by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." See* 42 U.S.C. § 5301(c) (emphasis added)

HUD regulations emphasize this important purpose:

> "The aggregate use of CDBG disaster recovery funds shall principally benefit low- and moderate-income families in a manner that ensures that at least 50 percent of the amount is expended for activities that benefit such persons."); 71 Fed. Reg. 7666, 7671 at ¶ 20(i) (2)
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> "Each State must submit to HUD an Action Plan for Disaster Recovery that describes … [t]he grantee's overall plan for disaster recovery including … [h]ow the State will provide or encourage provision of adequate, flood-resistant housing for all income groups that lived in the disaster impacted areas," including how it will "prevent low-income individuals and families with children (especially those with incomes below 30 percent of median) from becoming homeless." HUD Notice, 71 Fed. Reg. 7666, 7669 at ¶ 7 (b) (iii) (Feb. 13, 2006).

Thus far, Mississippi's piecemeal plans developed during the past year and a half fall far short of this requirement. Until now, HUD has approved these piecemeal proposals, including Mississippi's requests for waivers of the requirement that 50 % of funds go to the benefit of low and moderate income persons. These waivers were approved by HUD because of the State's commitments that the needs of this population would be addressed in the future, and its assertion that, when all the CDBG-funded programs have been offered, low- and moderate-income participation will have been significant.. Indeed each HUD waiver includes almost identical language about these commitments. For example,

[2] While the public housing program will specifically assist low income persons, only 50% of the small rental assistance program is targeted to moderate income persons below 80% AMI, and nothing is specifically targeted for low income people. Phase 2 will not assist renters, but is targeted to homeowners with incomes below 120% of AMI and will provide some assistance to some low and moderate income population.

the waiver for an infrastructure program included the following language, which has been included in each of the waivers:

> Previously, the state agreed to examine other housing needs and to pursue other sources of funding to provide assistance for other compelling housing needs, such as for homeless and special needs populations, for low-income renters, and for uninsured low-income homeowners. HUD expects the state to continue these efforts. HUD expects the state to principally benefit low- and moderate-income persons in activities where such design is feasible and reasonable, and to design its activities to otherwise meet the "slum-blight" or urgent-need national objective. See 72 Fed. Reg. 48810

Yet, as each waiver was granted, the further Mississippi strayed from this promise and from the primary purpose of the CDBG grant program. Now after all these proposals have been submitted, 80% of the Mississippi CDBG allocation has been granted waivers from this requirement.[3] In this Port proposal, the State strays even further from the primary purpose of the CDBG appropriation by seeking approval of the *diversion* of funds allocated to housing recovery to a non-housing project that will do nothing to address the housing crisis and little to benefit low and moderate income persons. According to the Port of Gulfport Restoration Program, there are presently 1,286 maritime jobs related to the Port, but only 141 (less than 11%) are held by low or moderate income persons. (p. 3) Moreover, there is virtually no affordable housing available for any new low or moderate income workers who might be hired as a result of new jobs created by this project.

To meet the requirements of the CDBG allocation, the State must reconsider and withdraw this proposal and honor its many past promises to carry out the primary purpose of the CDBG grants.

I. THE IMPACT OF THE STORM

As we have noted in earlier comment letters, the damage caused by Hurricane Katrina in Mississippi was devastating. The Governor's Commission Report issued December 31, 2005 documents the extent of damage wrought by Katrina, and indicates that this damage

[3] See 71 Fed. Reg. 34457 (June 14, 2006) (Phase 1 of Housing Assistance Program -- $3.4 billion, later reduced to $2.65 billion after subtraction of Phase II); 71 Fed. Reg. 62372 (Oct. 24, 2006) (Ratepayer and Wind Pool Mitigation -- $440 million; Regional Infrastructure Program -- $33.075 million); 72 Fed. Reg. 10020 (March 6, 2007) (Economic Development and Community Revitalization -- $500 million); 72 Fed. Reg. 48807 (August 24, 2007) (Infrastructure program -- $588 million). All told, including administration costs, Mississippi has obtained waiver covering $4.368 billion, or 80% of the total CDBG pool of $5.481 Billion. When approving the recent request for a waiver for the Infrastructure Program, HUD noted that the funds generally were for the benefit of all persons in the affected areas and thus included low and moderate income persons. For example, the data provided in the infrastructure request indicated that low income people made up approximately 25-40% of persons in areas slated for water and sewer projects. See 72 Fed. Reg. at 48809-10. But total population in these areas still is significantly below the 50% low and moderate income level (estimates put the figure at 37%) and thus a waiver was needed.

was borne in significant and disproportionate part by low- and moderate-income households:

> "About two-thirds of the housing units in [Harrison, Hancock and Jackson] counties were occupied by households with income below the U.S. median level (approximately $42,000 as of the year 2000). In Hancock and Harrison Counties alone, almost 75 percent of the housing units were occupied by households living below the U.S. median income level." *Id*. at 52.

According to the February 12, 2006 FEMA Report,[4] almost 75% of the rental housing stock (47,013 out of 62,470) damaged by the hurricane was small rental housing units, mostly single family rental units. About 30% of small rental units, (13,798 out of 47,013) suffered major or severe damage.[5] Mississippi's $258 million program intended to restore small rental housing is forecast to provide assistance to 6,000 units, less than half the nearly 13,800 severely damaged or destroyed.[6]

Low income renters were especially hard hit. According to a July, 2006 HUD/FEMA damage report, 52% of rental housing stock (37,105 out of 71,616) damaged by the hurricane was rented to low income persons (those earning less than 50% of area median income).[7] Within this segment, about one-third of the units (11,914 out of 37,105) were severely damaged or destroyed - 10,004 units rented at market rate without subsidy and 1,910 units rented to very low income persons receiving federal voucher assistance The Mississippi Regional Housing Authority reported that 80% of subsidized housing in coastal Mississippi was damaged or completely destroyed.[8] Mississippi forecasts that 5,730 Low Income Housing Tax Credit Units will be built in the coastal area over the next few years, leaving an unmet need of over 4,200 low income rental units outside of the public housing stock.[9] So far there have been several tax-credit funded projects approved by the Mississippi Home Corporation, but many of these have faced bitter

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[4] *Gulf Coast Housing Damage Survey,* published by FEMA, February 12, 2006. This report defines small rental as less than 10 units.

[5] Major damage is valued by FEMA between $5,200 and $30,000. Severe damage is valued by FEMA as $30,000 or more. *Id.* at 5.

[6] Press Release, "Barbour:Low Income Mississippians Benefit from Recovery Housing Programs" Sept. 18, 2007, http://www.governorbarbour.com/news/2007/sep/pr.LowIncomeHousingPrograms.htm.

[7] *FEMA Housing Unit Damage Estimates,* July 12, 2007, p. 6. A copy of this report is attached to these comments as Appendix "A." The report explains that the column "Assisted (Project Based and Voucher) refers to, "Assisted by HUD Public Housing, Project Based Section 8 or Voucher." The column "Very Low Income (LT 50% median) means "Unassisted Renter Households with incomes less than 50% local area median." ***Id.,*** p. 4._ The July 2006 report shows higher totals (71,606 v. 62,470) and higher percentages of major or severe rental damage (39% v. 30%) than the February 2006 Report.

[8] Michael Kunzelman, *Unhabitable Habitats: Tenants Living in Squalor,* Sun-Herald (Biloxi), April 16, 2006, at A19.

[9] Press Release, "Barbour: Low Income Mississippians Benefit from Recovery Housing Programs."

opposition from local residents and local governments, resulting in stopping the projects.[10]

Prior to Hurricane Katrina, lower income residents had serious affordable housing problems. Federal census data from 2000 for the Gulfport-Biloxi-Pascagoula metro area reveals that 50% of households at or below 80% AMI have a housing cost burden and 25.6% of these households have a severe housing cost burden.[11] The loss of so large a percentage of affordable housing, both renter and owner-occupied, has left lower-income residents especially dependent upon federally-funded housing recovery programs. Unfortunately, Mississippi's programs have de-emphasized lower income housing and have left large unmet needs, making it all the more unconscionable for Mississippi to divert funds from housing recovery.

The storm also had a disproportionate impact on minorities. In the hurricane-damaged parts of Mississippi, African-Americans, Latinos and Vietnamese have higher poverty rates and lower rates of homeownership than whites**.** As an Oxfam America briefing paper notes: "African-American households in Mississippi are disproportionately impoverished. According to the 2000 U.S. Census, African-American populations have higher poverty rates and lower homeownership rates than white populations in the hurricane-affected area."[12] Overall, the African-American poverty rate is 27.1% compared to 10.4% for whites. The overall homeownership rate is 49.8% for blacks compared to 74.0% for whites, with some communities having an ever greater disparity.[13] *Id*. Latinos and Vietnamese also have lower average incomes and higher poverty rates.

All minorities – African Americans, Latinos and Vietnamese – are also more likely than whites to be renters. The Oxfam America Report notes, that while "[i]n low-income communities on the coast, fully half of the residents were renters[,] African-Americans in those [Gulf Coast] communities are even more likely to be renters, particularly in Gulfport and Moss Point/Pascagoula where the prevalence of renters is 63 percent and 67 percent respectively."[14] Like African Americans, Latinos and Vietnamese also are more likely than whites to be renters due to lower average incomes.[15] It bears noting that a significant number of Vietnamese and Latino households that reside on the Gulf Coast

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10 Dana Enfinger, "NIMBYism Strikes in Mississippi" Affordable Housing Finance , July, 2007, http://www.housingfinance.com/ahf/articles/2007/jul/NIMBYISM0707.htm

11 Percent Households with Incomes 0-80% of AMI with housing Cost Burden/Severe Housing Cost Burden: Biloxi-Gulfport-Pascagoula Metro region. http://www.dataplace.org/map/?place=x69631.

12 "Recovering States? The Gulf Coast Six Months After the Storm" Oxfam America Briefing Paper, February, 2006.. at 7 (citing 2000 Census data).

13 *Id.* At 8, Table 1 (citing 2000 Census data)

14 *Id*. at 13.

15 Estimate from National Alliance of Vietnamese American Service Agencies.

lost homes, businesses, and community support systems just as others did, and must be included in the recovery effort.[16]

II. THE HOUSING CRISIS CONTINUES UNABATED

It is plain to anyone who has been to the Mississippi Gulf Coast that the housing crisis created by the hurricane is far from over. Particularly indicative of the continuing crisis is that over two years after the storm, approximately 50,000 Mississippians still remain in 17,185 FEMA trailers,[17] most of which have unhealthy levels of formaldehyde.[18] Moreover, many local communities are taking steps to close trailer parks and require removal of trailers from private property.[19] Making things even worse, there is virtually no affordable rental housing available on the Gulf Coast for these residents to move to.

> The lack of affordable housing is the result of virtually no recovery in the rental housing market. Thus far, virtually *none* of the CDBG funds allocated to rental housing – public housing and small rental assistance -- has been spent. According to the July 20, 2007, CDBG Disaster Recovery Expenditure Overview, Mississippi has spent $0 on the Public Housing Program and $870, 486 on administration, and no expenditures are reported on the small rental assistance program.[20] Partial data on building permits in the impacted area suggest that a far higher number of single family residences are being rebuilt than apartment complexes.[21]

III. MISSISSIPPI HAS FAILED TO ADDRESS THE HOUSING CRISIS ESPECIALLY THE DIRE NEED FOR AFFORDABLE RENTAL UNITS

The State's hurricane recovery strategy has played a major role in the rental housing crisis. Only $358 million of the $5.4 billion emergency CDBG grants, **or 6%**, has been allocated to rental housing, i.e. the public housing program and the recently approved small rental assistance program. Such a small percentage of the allocation of CDBG

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[16] According to the National Alliance of Vietnamese American Service Agencies and local community leaders, an estimated 10,000 Vietnamese reside in Mississippi, but are severely undercounted in the census. (According to the 2000 Census, some 5,387 Vietnamese reside in Mississippi.)

[17] "Hurricane Katrina Mississippi Recovery Update", August 2007. FEMA. http://www.fema.gov/news/newsrelease.fema?id=39319

[18] <u>"Blueprint for Gulf Renewal," a Katrina Special Report by the Gulf Coast Reconstruction Watch, August/September 2007</u>. This dangerous situation was not conceded by FEMA until more than a year after the Mississippi Sierra Club did formaldehyde testing showing that about 95% of the trailers tested had unhealthy levels of formaldehyde.
Cite newspaper articles re Pascagoula, Gulfport, Ocean Springs, (others?)

[19] Keith Burton, "Cities Seeking to End FEMA Trailer Parks," Gulf Coast News, April 21, 2007, http://www.gulfcoastnews.com/GCNnewsKatrinaCitiesSeekEndtoFEMAParks.htm

[20] CDBG Disaster Recovery Expenditure Overview, http://www.mississippi.org/UserFiles/File/Home_Owners_Assistance_Program/Disaster%20Recovery.pdf

[21] Data for three Coastal Counties compiled from the Treen Company on file with Mississippi Center for Justice.

funds for rental housing cannot be justified when the impact of the storm fell so disproportionately on rental housing and low and moderate income persons.

Moreover, the State has sought and been granted waivers of the CDBG requirement that 50% of the funds go to the benefit of low and moderate income people for 80% of the CDBG hurricane funding. Even putting the best light on all programs of the State plan for meeting the rental property needs (which includes programs beyond the CDBG money), its strategy will restore at best only 51% of the known rental need.[22] Only 11,730 rental units are forecast to be built by the Small Rental Program and the GO Zone Low Income Housing Tax Credit Program. When one adds 316 destroyed public housing units and a projected 1,275 units under the MS HOME Corp. set-aside the total of rental units projected is 13,321 which only meets 51% of the reported rental housing loss -- the 26,037 damaged units reported in the July, 2006 FEMA/HUD report. As for units severely damaged, the small rental program will restore only 43% of them.

The State is fully aware of this shortfall. Advocates have urged the State to enlarge both the Small Rental Program and to increase funding sources for other rental programs, including making CDBG funds available in combination with GO Zone tax credit funds for affordable housing projects, but these requests have been rejected. For example, the State rejected proposals to enlarge the size the Small Rental Program. See Small Rental Program Final Action Plan, June 26, 2007, p. 9.

The State's recovery plan also leaves out Mississippians who suffered wind damage to their homes. This includes almost 34,000 households who suffered severe to catastrophic wind damage, including 10,300 who had no insurance.[23] Costs to repair for major damage range between $33,000 and $53,000. Costs to repair for catastrophic damage range between $70,000 and $201,000. Insurance settlements did not cover the full cost to repair: The average wind insurance settlement along the 3 coastal counties was $15,869,[24] and did not cover the full cost to repair the full cost of repair.

For wind-damaged households, subtracting out $15,000 in insurance, the unmet need starts at $17,000 for moderate damage and $54,000 for catastrophic damage and goes up. Lower income African American households in many coastal Mississippi communities suffered exclusively wind damage because segregated patterns of settlement placed them on the north side of the railroad tracks which functioned as a levee. Many of these residences were of older construction, with greater deferred maintenance and greater vulnerability to more severe windstorm damage than residences generally.[25] Unlike

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[22] In his September 18, 2007 press release, the Governor points to a different program than the CDBG program – the Low Income Housing Tax Credit Program administered by the Mississippi Home Corporation – as a source of financing for 5,730 affordable housing units. Yet, this program has faced severe local opposition in many areas.

[23] July, 2006 FEMA/HUD Report, p. 6.

[24] *Id.,* Table 1.

[25] Governor's Commission Report, December 31, 2005, pp. 52-53.

Louisiana, these Mississippians are left out of the so-called "comprehensive" recovery plan. The State is aware of this unmet need for it has rejected repeated calls to include wind-damaged households in the home grant programs. See Partial Action Plan, Modification Number 4, Phase II Plan, December 15, 2006, p. 6.

In sum, the continuing housing crisis is to a great extent caused by the failure of the State's plan to address it.[26]

IV. FUNDING A COMPLETELY NEW PORT PROJECT IS NOT THE PURPOSE OF THE CDBG APPROPRIATION

Unlike most recent proposals for use of CDBG money, the State did not consult at all with organizations who have been working tirelessly to address the housing crisis about this Port proposal. Nor has this proposal ever been mentioned in any prior CDBG proposals.[27] In fact, this project was planned well before the hurricane. Prior to Hurricane Katrina, the Port of Gulfport was undertaking a $114-million, five-year construction plan from 2000 to 2005. Between 2000 and 2010, Port of Gulfport expected projects to total $200 million.[28]

In its proposal for a Port of Gulfport Restoration Program, the State seeks a diversion of $600 million from the Homeowners' Assistance Program. But, amazingly, there is

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26 The Rand Gulf States Policy Institute (RGSPI) will be releasing a new study on September 26, 2007 which is the most recent assessment of the hurricane. Its discussion of the impact of the storm, the continuing crisis that exists today and the failure of the State's plan to address the rental housing crisis corroborates much of the information set forth in this comment letter. The RGSPI is a partnership involving the RAND Corporation and seven universities in the Gulf Coast region. It served as advisors to the Governor's Commission in preparation of the 2005 report. Because the full extent of the damage and the specific effects on the Gulf Coast housing market remained unclear during the course of the Commission's work, one of the RGSPI's recommendations was to conduct a more detailed study of the housing market and what might be done to promote its recovery. In the summer and fall of 2006, RGSPI was funded by a groups of sponsors—Oxfam America, a private donor, the Mississippi Association of Realtors, and the National Association of Realtors—to conduct the study that will be released on September 26.

27 In the December 31, 2005 Governor's Commission Report, there were recommendations that (1) a Coastal Port Council be created to run the ports and (2) an inland port similar to that proposed here be built. But, use of CDBG funds was not contemplated and it was recommended that the Coastal Port Council make use of MDA, State and county funds. (pp. 34-35)

28 A report of the Mississippi Legislature's Joint Committee Performance Evaluation and Expenditure Review, June 20, 2006 (PEER Report) discusses this at p. 95. The Report also notes that:

> The Port of Gulfport last had an update to its master plan in 2003. One of the main issues the port has faced is the balance between the shipping process and the recreational activities on leased port property. The port is working with the Department of Transportation regarding access for both recreational and cargo handling purposes. The port authority also has design plans for a cruise market whereby the port would receive per passenger wharf age of $2.50 to $4.75, plus charges for parking and miscellaneous items. The port authority also plans to continue expansion into the forest products arena, with importation of Brazilian lumber and exportation of paper and pulp products. The port has attracted some of Louisiana's cargo through the Crowley *liner* service, and may obtain some of New Orleans's lumber, frozen goods, and other cargo." (page 40)

absolutely no discussion whatsoever about the extent of the damage to the Port caused by the hurricane. A review of the Joint Legislature's PEER Report makes it clear that the damage to, and even the value of, the Port of Gulfport, is only a fraction of the amount that would be diverted to this project. According to this report, a January 31, 2006 assessment of the Port found damage from the hurricane to be \$50.576 million and the assessed value to be \$127,573 million. (PEER Report, p. x).[29] The State Port had at least \$108 million in insurance on the premises and is in negotiations with its carrier.[30]

These figures make it obvious that this proposal is designed for something far beyond the repair of the damage to the Port of Gulfport caused by the hurricane.[31] Rather, it is plain from its content that the proposal is for a vast expansion of, and new concept for, the Port which had been planned and discussed well before the hurricane. "Eligible Activities" are defined at p.5 of the proposal to include the construction of a new "intermodal/inland port facility" two miles inland and a rail yard and wheeled storage area. In short, this is a major new development which will cost *twelve times* more than the damage to the existing report and about *five times* the assessed value of the existing port. This is a dramatic departure from the purpose of the CDBG emergency hurricane relief grant. In short, the State is taking advantage of the extensive hurricane relief money for an economic development project that was drawn well before the damage caused by the hurricane.

It is important to note that ports typically do not receive government funding for expansion and usually fund such projects through financing bonds that are guaranteed with expected revenues. Ports often also provide private enterprises with an incentive to fund infrastructure improvements by offering land grants in exchange for investment. In any event, \$586 million of the CDBG hurricane appropriation has already been approved by HUD for infrastructure, but *only \$4.935 million* has been spent. Similarly, \$500 million of the CDBG funds has been approved for economic development, and only *250 dollars* has been spent.[32] In other words, there is a significant amount of money allocated for the type of project the Port is without having to divert the badly need housing funds.

Moreover, the State has already received extremely large amounts of federal money for infrastructure projects and economic development. For instance, the Governor's 2-year report states that **"**FEMA has obligated more than *\$2.3 billion* to Mississippi through the Public Assistance reimbursement program to repair, replace or restore damaged publicly-owned facilities and those of certain nonprofit organizations." Furthermore, "rebuilding

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29 It also appears that until now the State never contemplated using the CDBG grants for this program. The PEER report indicates that the expected source of funds to repair the Port of Gulfport were "Port funds, FEMA and insurance." PEER Report, Exhibit B. p. x. The Governor's Commission report states that funds would come from MDA, the State of Mississippi, and Harrison and Jackson Counties. Governor's Commission Report, p. 35.

30 Holbrook Mohr, "House Chairman Refuses to allow updated on Katrina-damaged port during hearing," Associated Press, February 15, 2007.

31 In addition, although the Port was damaged by the storm, data in the September 7 proposal indicates that the Port is on its way to recovery. By 2006 it was already operating at approximately two-thirds of 2004 pre-hurricane capacity. (Port of Gulfport Restoration Program, p. 2)

32 State's June 30, 2007 Quarterly Report to HUD

of public buildings and replacement of their contents – represents the largest permanent work category. There are 865 large building projects set to take place, with an estimated price tag of nearly $500 million. Small public facility projects account for another $30 million."[33]

Finally, the Port may also qualify for other types of federal funding from the International Trade Administration at the Department of Commerce.[34] There are also several state grant programs for which the Port of Gulfport may qualify.[35]

Thus, it is obvious that there are far more appropriate categories of funds from many different sources available for the Port project than diverting funding from the housing programs that are so needed. This is what makes this proposal so astounding. The State seems to be saying that the housing crisis is over and that it allocated far more money than necessary for the housing crisis. Nothing could be further from the truth. The mere fact that at least 50,000 people remain in unhealthy FEMA trailers with no alternative housing available makes this so obvious that one wonders what motivated shifting housing funds to this project rather than drawing on the over one billion dollars of CDBG money for economic development and infrastructure this proposal. We do not question that repair of the Port of Gulfport is important to economic recovery on the coast. But we do seriously question and object to a program that goes far beyond hurricane recovery to a major new economic development at the expense of the thousands of persons who remain without decent housing, especially when there are far more appropriate sources of funding for this project.

V. LEGAL PROBLEMS WITH THE PLAN

There are several legal problems with this proposal especially in the context of the failure of the overall plan to address the housing crisis, especially for low and moderate income persons. It is important to remember that Congress rejected another massive infrastructure relocation proposal as part of an earlier supplemental - the CSX railway project. What this proposal amounts to is the State trying to sneak in a similar pork project through the back door.

Failure to Seek Waiver: First, the proposal does not meet the requirements of the CDBG appropriation because the State has sought no waiver of the requirement in the CDBG appropriation bill that "at least 50 percent of the funds made available . . . must

[33] *Hurricane Katrina Two Years Later,* August 29, 2007, p.20.

[34] On the TIFIA website, it states: "The program's fundamental goal is to leverage Federal funds by attracting substantial private and other non-Federal co-investment in critical improvements to the nation's surface transportation system. The DOT awards credit assistance to eligible applicants, which include state departments of transportation, transit operators, special authorities, local governments, and private entities.

[35] Miss. Code Ann. § 65 1-20 (1972) has established the Office of Intermodal Planning to fund infrastructure improvements including for ports. Miss Code Ann. § 57-61-41 authorizes the Mississippi Development Authority to provide low interest loans for ports that are seeking to revitalize or to expand. Miss. Code An. § 65-1-707 provides for grants for improvements in public facilities. About 40% of these funds are specifically allocated for port development. Ports can use the funds for dredging activity or to fund capital improvement.

benefit primarily persons of low and moderate income." Such a waiver requires a "finding of compelling need." Pub. L. No. 109-148, 119 Stat. 2780 (Dec. 31, 2005). In the past, the State has acknowledged that most of its proposals for these CDBG funds required such a waiver and have accordingly sought such one, including for Phase 1 of the Homeowners Assistance Program, Ratepayer and Windpool Mitigation, Economic Development and Community Revitalization, and Infrastructure. Indeed, as noted above in fn. 3, above, these waivers covered 80% of the total CDBG appropriation for Mississippi.

But, in this proposal the State does not even seek such a waiver – even though it is very evident that this proposal falls far short of the 50% requirement and thus a waiver is necessary. According to its proposal, pre-Katrina only 10% of the direct maritime jobs were held by individuals of low and moderate income and in 2007 that figure is only 11%. It cannot seriously be argued that significant expansion of this project will draw any greater precentage of low and moderate income people. The state fails to explain how it will suddenly increase by fivefold the number of low and moderate wage workers helped. In fact, there is no indication that any of the new jobs at the port will be low skill and there is no explicit promise to seek, train and hire low wage workers for the more highly skilled jobs. Thus, it is absurd to think a port renovation will result in more jobs for low-skilled labor. It is much more likely that, through increased mechanization, the proposed plan will result in *fewer* jobs for low skilled labor. For this reason alone, this proposal does not meet the waiver requirement of CDBG appropriation provision.

The State does request that the waiver of the standards for evaluating public benefit that was approved under the State's Economic Development Plan be extended to this plan. See 24 C.F.R. 570.482(f). This argument would make more sense if these funds were sought to be diverted from the Economic Development Program, not the Housing Assistance Program. Indeed, as we point out above, if there is reprogramming to be sought, it should be sought from the Economic Development or Infrastructure Programs [36] More basically, as we have discussed, this proposal does not approach the national objective of benefiting low and moderate income people.

The public benefit waiver request goes to the requirement that economic development activities for job creation can only be measured in the aggregate and must create or retain at least one full-time, permanent job per $35,000 of CDBG funds used. It is not HUD policy to include indirect jobs in the expected job creation total, and it is not HUD practice to use such a long time horizon as this proposal does (until 2015). This is

[36] On page 6 of their proposal, the State says restored and new jobs will be "made available" first to lower income applicants. The term "made available to" has a specific meaning: (1) 24 CFR 570.483(a)(4)(iii)(A) "Special skills that can only be acquired with substantial training or work experience or education beyond high school are NOT a prerequisite to fill such jobs, or the business agrees to hire unqualified persons and provide training; AND," (2) 24 CFR 570.483(a)(4)(iii)(B) "The unit of general local government and the assisted business take actions to ensure that low and moderate income persons receive first consideration for filling such jobs." Since only 10% of the pre-storm jobs and 10% of the post-storm jobs were actually held by lower income people, how can one reasonably assume that any significant number of the 1.062 new jobs projected by 2010 will actually be "available to" lower income people? CDBG historically takes a "here and now" approach to assessing eligibility and benefit.

especially the case here where there is such an immediate and direct need. Indeed, any fair assessment of the proposal indicates the ratio of CDBG dollars spent per job would be astronomical under this proposal. If the State were allowed until 2010 to meet its jobs creation potential, there is, according to the projections in their proposal at p. 3, a net increase of only 1,062 direct jobs *which adds up to about $600,000 per job*.
Finally, and of central concern, given the complete lack of affordable housing, there will be no place for low and moderate income workers to live.

Pattern of Failing to Meet Commitment to Meet needs of Low and Moderate Income People: As noted at p. 2 above, HUD has conditioned waivers on the following language on at least four occasions: "...provided that the state must give reasonable priority for the balance of its funds to activities that will primarily benefit persons of low and moderate income." Indeed, in each of their approvals, HUD repeats the State's commitment to meet this basic purpose of CDBG funding: "Previously, the state agreed to examine other housing needs and to pursue other sources of funding to provide assistance for other compelling housing needs [for special needs and low income renters]...HUD expects that state to continue these efforts."

Despite these many promises, this proposal again ignores this purpose. What has evolved is a consistent pattern of not meeting this commitment, a pattern that violates the requirement of the CDBG appropriation. HUD regulations concerning this law require that the State certify that "the action plan has been developed so as to give the maximum feasible priority to activities that will benefit low and moderate income families." 71 Fed. Reg. 7666, 7671 at ¶ 20(I) (2) (emphasis added). The pattern of the State's promising but not delivering on such promises results in no priority being given to this requirement and is a violation of the law.

Failure to Meet the Fair Housing Act Obligation to "Affirmatively Further" Fair Housing: Numerous courts have recognized that the Fair Housing Act is broad and inclusive and will be given a generous construction to carry out the policy that Congress considered to be of the highest priority.[37] In administering these CDBG funds, the State is unequivocally subject to the Fair Housing Act, which prohibits discrimination by intent or effect. 42 U.S.C. § 3604(a). Further, the State, like HUD and other agencies administering federal programs "relating to housing and urban development," is required to administer all such programs "in a manner affirmatively to further" fair housing. 42 U.S.C. §§ 3608(d), (e). This provision imposes "a substantive obligation to promote racial and economic integration" in federal housing programs. *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982).

Under the Fair Housing Act, this affirmative duty is not merely to refrain from discrimination, but also to use federal programs to actively promote the goals of the Fair Housing Act – including, of course, not intentionally or disproportionately excluding

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[37] *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 209 (1972); *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1234 (D.C. Cir. 1997); *Nevels v. Western World Ins. Co., Inc.*, 359 F. Supp. 2d 1110 (W.D. Wash. 2004); *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 731 (E.D. Va. 1992).

African-Americans or other minorities, as well as persons with disabilities and families with children, from participating in proposed programs, and not contributing to the displacement and exclusion of members of groups protected by the Fair Housing Act from the Mississippi Gulf Coast.[38] At a minimum, this obligation to affirmatively further fair housing requires that the State (like HUD and other state agencies, such as housing authorities) consider the effects of housing policy decisions on racial segregation.[39]

In past proposals, the State has included a blanket statement that, in general, the State has conducted an Analysis of Impediments to Fair Housing ("AI"), and that these impediments "will be addressed" at annual implementation workshops. This simply does not meet its Fair Housing Act obligation.[40] A general reference to the AI conducted in July 2004 is grossly inadequate. Not only is that AI outdated, but the Plan's rote statement effectively concedes that State has not even attempted to identify, much less address, any impediments to fair housing goals since Katrina. Failure to assess current impediments since the storm – even on an interim basis – falls far short of their affirmative obligation. Merely parroting the wording of required fair housing certifications, *see* 42 U.S.C. § 5304(b) (2); 24 C.F.R. § 91.325(a) (1), is insufficient. If the State does not actually consider impediments to fair housing in its proposed Plan – including the disproportionate exclusion of minorities – its certification here does not comport with the affirmative obligations, and should be denied by HUD as "inaccurate." 24 C.F.R. § 91.500(b) (3). Moreover, the overall Plan itself is a new impediment to fair housing, since it will disproportionately exclude people of color from the housing assistance needed.

To make this proposal even worse, the State does not even include their standard fair housing language in this proposal. In sum, as proposal after proposal has been made by the State, it has become more and more clear that large numbers of low- and moderate-income persons, who are disproportionately minority and persons with disabilities, have been displaced because of the loss of housing stock in the storm – and by rent increases

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[38] *See*, *e.g.*, *NAACP, Boston Chapter v. Sec'y of HUD,* 817 F.2d 149, 154-55 (Breyer, J.) (1st Cir. 1987); *Anderson v. Alpharetta*, 737 F.2d 1530, 1535 (11th Cir. 1984); *see also Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 72 (D. Mass. 2002).

[39] In the seminal *Shannon v. HUD*, 436 F.2d 809, 820 (3d Cir. 1970), the Third Circuit found an agency's failure to consider the effects of its housing policies on racial segregation "impermissible." The holding is clear: an agency cannot meet its affirmative obligations unless it gathers data and considers all relevant racial and socioeconomic factors related to its decision's effects. *See id*. at 822-23, 821. Numerous precedents similarly require agencies to collect data and consider the racial impacts of their housing decisions. *See*, *e.g.*, *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 78 (D. Mass. 2002); *Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637, 642 (D.R.I. 1991); *Young v. Pierce*, 685 F. Supp. 975, 978 (E.D. Tex. 1988); *Business Ass'n of Univ. City v. Landrieu*, 660 F.2d 867, 869 (3d Cir. 1981); *Jones v. Tully*, 378 F. Supp. 286, 292 (E.D.N.Y. 1974); *Blackshear Residents Org. v. Housing Auth. of the City of Austin*, 347 F. Supp. 1138, 1147 (W.D. Tex. 1971).

[40] *See* Plan at 15 ("The State has a current Analysis of Impediments (AI) to Fair Housing, which was submitted to HUD in July 2004. Many of the identified impediments have been or will be addressed during the annual application and implementation workshops for the HOME and CDBG programs. The State certifies that it will affirmatively further fair housing through conducting and implementing the AI and that it will maintain records reflecting the analysis and actions taken.").

which have priced many out of the market since. The failure to address this indicates a violation of the Fair Housing Act .

VI. CONCLUSION

Based on the foregoing analysis, we urge the State to reconsider and withdraw this ill-advised proposal. The housing crisis remains extremely severe, especially the need for affordable rental housing. Only 6% of the CDBG funds have been allocated to rental housing despite the fact that it is clear that the impact of the storm fell disproportionately on renters. **Most important, 50,000 or more persons remain trapped in FEMA trailers most of which are contaminated by formaldehyde, and they have nowhere to go because of the lack of affordable rental housing.** Approximately two-thirds of the Homeowners' Assistance Program remains unspent and it is obvious that any diversion of this money should go to address this disastrous situation. Significant expansion of programs for rental property is especially needed. Thus, if Homeowners' Assistance funds are to be diverted, they should be diverted to the small rental assistance program and to the Katrina cottage pilot program, which could alleviate the terrible situation of persons remaining in trailers.

Sincerely,

The Steps Coalition, Inc. (an alliance of 35 member organizations and 16 affilliated allies) http://www.stepscoalition.org/coalition/

(Research provided by Mississippi Center for Justice, Lawyers Committee for Civil Rights Under Law, National Fair Housing Allliance, National Low Income Housing Coalition, and Oxfam America)

Mississippi Conference of National Association for the Advancement of Colored People

Mississippi Center for Justice

Lawyers Committee for Civil Rights Under Law

National Low Income Housing Coalition

National Fair Housing Alliance

Oxfam America

Alabama Arise, a coalition of religious, community and civic groups.

Sisters of Mercy

Mississippi Human Services Agenda

National Policy and Advocacy Council on Homelessness

Attachment: July, 2006 damage estimate.