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TO: HOUSING CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***HUD Releases Draft Coordinated Environmental Review Implementation Plan with Opportunity to Comment***

On May 27, 2021, the U.S. Department of Housing and Urban Development (HUD) released its draft implementation plan (Draft Plan) for the 2015 Coordinated Environmental Review Process: Final Report (2015 Final Report). This was the result of work done by the Tribal Housing and Related Infrastructure Interagency Task Force (Task Force), which built upon the efforts of the 2015 previous participating working group agency partners. The goal of the Task Force was “to develop a coordinated review process to simplify tribal housing development and its related infrastructure needs.”¹ The previous working groups also drafted an implementation plan, but due to staffing shortages, HUD never finalized or published the draft. This memorandum summarizes the key provisions of the renewed Draft Plan and areas on which the Task Force seeks Tribal input and comment.

2015 Final Report

The Final Report made the following recommendations:

1. Incorporate Environmental Review Documents by Reference
2. Develop Common Categorical Exclusions
3. Address Resource Deficiencies at the Bureau of Indian Affairs (BIA)
4. Provide Training for Agency Staff
5. Provide Training for Tribes
6. Continue Review of Related Environmental Laws and Authorities to Identify Opportunities for Greater Efficiencies
7. Create Regional Consortiums
8. Explore the Development of an Interagency Environmental Review Automated Tool

¹ S. Rep. 113-182, at 121 (2014), accompanying S.2438, <https://www.congress.gov/113/crpt/srpt182/CRPT-113srpt182.pdf>.

9. Explore HUD-Specific Regulatory and Policy Improvements
10. Create More Predictable Funding Mechanisms
11. Establish an On-going Environmental Review Interagency Task Force
12. Explore Expanding the Scope of this Effort

2021 Task Force Action Items

The Task Force developed eleven specific action items to implement the 2015 Final Report recommendations, many of which are still in the abstract goal-setting phase. These actions items roughly correspond to the 2015 Final Report recommendations.

First, the Task Force seeks to “develop a coordinated approach for tribes and agencies to collect and share environmental information to reduce duplication of effort for environmental reviews for housing and housing-related infrastructure projects.” To accomplish this, the Task Force will utilize a consultant to interview tribes to gain further information to understand the scope, need, and objectives of a single process. This consulting should result in recommendation on the substance and format of a single approach, at which point the Task Force will consult with tribes on the recommendations. The Draft Plan notes that this action item stems from comments received from tribes, as opposed to any formal recommendation in the 2015 Final Report. The Draft Plan has this action item scheduled to begin in FY 2021, and continue into FY 2022.

Second, the Task Force would “ensure tribal input” for environmental review. On March 4, 2021 HUD issued a Dear Tribal Leader Letter seeking nominations for tribal members to join the Task Force after receiving comments recommending more robust tribal participation. The Draft Plan reports that the Task Force anticipates “a monthly meeting of the entire Task Force” presumably with tribal leaders, and “a separate federal agency work group meeting, as needed.” The Task Force also plans to develop a working list of regional consortiums, as well as hold meetings and listening sessions to plug in tribal input and facilitate information sharing between tribes. The Draft Plan has this action item scheduled through FY 2023.

Third, the Task Force plans to develop common categorical exclusions. Categorical exclusions to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, allow agencies to expedite environmental review “for certain activities that the agency has determined do not individually or cumulatively have a significant effect on the human environment.” According to the Draft Plan, the Task Force “will continue to explore the potential for common categorical exclusions by identifying the most common housing and housing-related infrastructure activities” to incorporate into related agency NEPA procedures. Changes to categorical exclusions generally requires public notice and comment on the Federal Register, as well as review by the Council on Environmental Quality (CEQ) to ensure conformity with the CEQ NEPA Implementing Regulations. The Draft Plan anticipates that “[r]evising and updating categorical exclusions [will] involve a significant amount of time, effort, and coordination” from potentially reluctant agencies. The Draft Plan has a timeline of starting in FY 2021, and finishing in FY 2022, though it categorizes the task as a “very heavy lift.”

Fourth, the Task Force will create a “planning playbook” with accompanying resources to facilitate the planning process. The Draft Plan proposes that the playbook would address pre-screening based on contemplated use and funding, as well as planning for multiple sources of funding. This playbook would ideally help connect and align BIA trust resource plans, Indian Housing Plans, and Indian Health Service Preliminary Engineering Reports. The Draft Plan anticipates that the Task Force “will initiate work on the playbook by soliciting ideas from tribes” and that “tribal input will be essential” in finalizing it. The Draft Plan has this slated for FY 2022 completion.

Fifth, the Task Force aims to “[d]evelop resources to encourage wider use of NEPA efficiency tools.” The Task Force hopes that a guidance document will “encourage agencies and tribes to use incorporation by reference as well as adoption and lead agencies to promote a coordinated environmental review.” The Task Force notes that it is awaiting further direction on how to develop these tools from CEQ. The Draft Plan aims for FY 2022 completion on this task.

Sixth, the Task Force plans to work with agencies and tribes to identify how to provide appropriate training on environmental review to ensure that review requirements are being applied consistently. The Task Force anticipates accomplishing this by seeking additional funding for trainings, or using online programming such as webinars, recorded training sessions, internal training, peer-to-peer exchanges, and developmental assignments. The Task Force is also considering leveraging training by bringing multiple agencies to tribal training events. The Draft Plan notes that “[t]raining or guidance will be provided for any changes that come out of the coordinated environmental review process effort.” This action item also includes assessing “whether policy and/or regulatory changes are needed to facilitate consistency, and whether there are any other pathways to consistent interpretation and application of review requirements.” Finally, the Task Force “plans to identify ways to assess whether consistency is being accomplished” although the Draft Plan does not provide details on how this will occur. The Draft Plan anticipates this action item will commence in FY 2022 and continue into FY 2023.

Seventh, the Task Force will identify opportunities for greater efficiencies within HUD’s Related Environmental Laws and Authorities. The Draft Plan notes that tribes and Tribal Historic Preservation Officers under the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, face barriers and inefficiencies on historic review as part of the larger environmental review process, such as with archaeological surveys and floodplain mapping. The Task Force also plans to develop guidance on sharing completed NHPA Section 106 documents “to avoid the time and expense associated with duplicative consultation[.]” as well as propose an interagency agreement on acceptable alternatives to Federal Emergency Management Agency (FEMA) maps. The Task Force hopes to work with other agencies and outside groups to develop programmatic agreements for the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and aligning processes in other related laws and authorities such as Section 404 of the Clean Water Act, 33 U.S.C. § 1344, Executive Order (EO) 11988 (floodplains), and Executive Order 11990 (wetlands). This is the longest-term goal, as the Draft Plan shows progress from FY 2021 into FY 2024.

Eighth, the Task Force has already created a website on the coordinated environmental review process initiative and “will continue to build this website with tools, guidance, and training materials as they are developed.” This action item has been marked as completed.

Ninth, the Task Force seeks to expand its efforts to include actions that are not housing-related, such as broadband, transportation, and transmission projects. To address this, the Task Force “will keep possible expansion in mind and begin to assemble information about the other agencies and funding programs that will be involved.” The Draft Plan does not have a timeline on this action item.

Tenth, the Task Force plans to develop an interagency environmental review automated tool, as commenters to the 2015 Final Report identified interest in having an automated tool that covers all funding sources. The Draft Plan highlights that an environmental review automated tool already exists for HUD environmental reviews, though tribes are not required to use this tool. The Draft Plan notes that this tool would “need to accommodate the requirements of all federal agencies, including any simplified process that is developed by the Task Force[,]” and “will also involve contract support and decisions and agreements amongst the Task Force agencies on resources.” The Task Force, however, is holding off developing an automated tool until a simplified environmental review process is determined. The Draft Plan notes a FY 2022 to FY 2023 timeline for this item, to secure funding.

Last, the Task Force seeks to ease paperwork burdens for HUD administrative activities. The Draft Plan observes that HUD has already updated its acceptable storage tank separation distance regulations, and that HUD “will continue to explore ways to ease paperwork burdens for administration activities at HUD.” Again, specifics on this action item were not detailed. The Draft Plan anticipates that the Task Force will “prepare guidance for yearly reviews of administrative activities” in FY 2022.

Opportunity to Comment

Comments on the Draft Plan must be sent to HUD by July 23, 2021, at 11:59:59 EDT, and can be submitted via email to Codetalk@hud.gov. The National Congress of American Indians will also be hosting a virtual consultation session on the Draft Plan during its virtual Mid-Year Conference on June 21, 2021, from 4:30 PM to 7:00 PM EDT. We are happy to assist in preparing and drafting comments for submission in anticipation of the July 23 deadline.

The Task Force cautions for interested parties to “keep in mind that implementation of the action items is dependent on Federal agency resources and prioritization.” Given the broad, overarching nature of many of these action items, and the number of interested coordinating parties, this is likely to be a lengthy process with concrete goals not realized for several years. We recommend reviewing the Draft Plan and the 2015 Final Report to get a sense for any comments or concerns you have with this proposed implementation.

Questions regarding this memorandum may be directed to Ed Clay Goodman at egoodman@hobbsstrauss.com or (503) 242-1745.