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## MEMORANDUM

September 18, 2024

TO: TRIBAL HOUSING CLIENTS

FROM:  ED CLAY GOODMAN AND CARI L. BAERMANN  
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***HUD Presentations***

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On September 17, 2024, the United States Department of Housing and Urban Development (HUD) Regional Environmental Office and the Office of Native American Programs (ONAP) staff made a series of presentations in conjunction with the Northwest Indian Housing Association (NWIHA) quarterly meeting at the Muckleshoot Tribal Resort and Casino in Washington State.

### I. Environmental Review

Brian Sturdivant of the HUD Region X Environmental Review Office gave a “high level overview” of the current environmental review requirements for HUD-funded projects. Brian and his office have been active partners with the HUD Northwest ONAP office to problem-solve environmental review questions.

**Brian focused first on the new Federal Flood Risk Management Standard (FFRMS).** See [https://www.hud.gov/program\\_offices/comm\\_planning/environment\\_energy/ffrms](https://www.hud.gov/program_offices/comm_planning/environment_energy/ffrms). The HUD regulations for dealing with floodplains are found at 24 CFR part 55. This portion of the regulations has recently been updated. It tells HUD program participants to consider whether they can move a project into another area outside of a floodplain. To understand the new requirements, Brian began by explaining terminology. Floodways are the area where flood water is most often running through; floodplains are where the flooding water goes when there is too much water for the floodway. The area to be considered in environmental review is the floodplain. The first change is to expand the time to be considered from a 100 year flood event to 500 year flood event. The second change is to expand the area to be considered the floodplain plus two feet. The third change is to establish new usage maps (from the Climate-Informed Science Approach [CISA] or FEMA), and if there are no such maps, to use the “best available data” standard. The latter can be based on any number of resources available to the community, including marks on the landscape, testimony of elders, or hydrological and hydraulic studies. Once CISA maps are available, it will be HUD’s preferred mapping. CISA is available now on a voluntary basis in some areas. Once it is more widely-available, HUD will ultimately adopt CISA as a requirement. But it is not yet widely available. It is more precise than the FEMA mapping, as it is based on forward-looking site-specific data.

The 100-year floodplain is an area with at least 1% chance of inundation from a flood in any given year. FEMA maps take into account past data, and as a result they are not as resilient because they do not take into account changes in the environment. A 500-year floodplain is an area with a 0.2% chance of inundation in any given year. The latter is the new standard.

The floodway is the portion of the floodplain which is effective in carrying flow, where flood hazards are generally greatest, and water depths and velocities are highest. HUD pretty much prohibits any construction in the floodway (only allowed in very limited circumstances). The new rule also focuses on ocean level hazards. HUD has a category known as Coastal High Hazard Area, which is the area subject to high velocity waters including, but not limited to, hurricane wave wash and tsunamis. The standard related to these Areas is the Limit of Moderate Wave Action (LiMWA). This is the inland limit of the area expected to receive 1.5 foot or greater breaking waves during a 100-year flood. These are treated as Coastal High Hazard Areas. As with floodways, these areas are generally off-limits for using HUD assistance to construct homes.

There are also events known as “Sunny Day Floods” which have to do with very high tides or regular rain unrelated to an intense rain event. Part 55 does not address flooding in these areas.

A key concept for the Part 55 analysis is a “critical action”. Section 55.2 defines “critical action” as any activity for which even a slight chance of flooding would be too great, because such flooding might result in a loss of life, injury to persons, or damage to property. “Critical action” includes projects that: produce, use, or store highly volatile, flammable, explosive, toxic or water-reactive materials; addresses critical actions and functionally dependent uses, substantial improvements; provide essential or irreplaceable records or utility/emergency services; likely to obtain occupants who may not be sufficiently mobile to avoid loss of life or injury during flood events (such as hospitals or nursing homes, but not housing for independent living for the elderly). One qualification for “critical action” is a “functionally dependent use,” which is a land use that must necessarily be conducted in close proximity to water, such as dams, marinas, port facilities, water-front parks, shore stabilization, rip-rap and bridges. Another qualifier is the concept of “substantial improvements,” which involve in the costs of improvements at or greater than 50% of the market value or the structure, or repairs/rehab/reconstruction that results in less than 20% increase in dwelling units or customers/employees on site.

Part 55 prohibits nearly all HUD assistance in floodways and most construction in coastal high hazard areas. There are some limited exceptions in Section 55.8, but it is still not advisable to construct in a floodway. Critical activities may not take place in coastal high hazard areas unless they are functionally-dependent uses, or if they do not involve substantial improvements. Actions are allowed in the FFRMS floodplain if you follow the eight-step process at 24 CFR Section 55.8 and no practicable alternatives are found. Section 55.4 requires notification of current or prospective tenants and private parties participating in the transaction of the location of the project in a floodplain.

When does the new FFRMS apply? These went into effect on June 24, 2024, and all projects whose environmental review commences after that date will be covered. Projects that were evaluated prior to June 24, 2024 will not need to reevaluate to comply with the new rule. Projects that have published a Request for Release of Funds (RROF) prior to June 24, 2024 will not need to comply. Projects that have published a final floodplain notice prior to June 24, 2024 will not need to comply.

**Brian then spoke about the new Programmatic 24 CFR Part 50.** This section sets out the option for a simplified environmental review, and HUD has created a Programmatic Part 50 to exempt certain types of projects from any further environmental review. The work that is covered by this section include: soft costs, tenant based rental assistance, public and support services, and certain activities to assist homebuyers, and these do **not** require a part 58 review by the Tribe/tribally designated housing entity (TDHE). The programmatic review requirements are set out in PIH Notice 2024-24. See [https://www.hud.gov/sites/dfiles/PIH/documents/PIH\\_2024-24.pdf](https://www.hud.gov/sites/dfiles/PIH/documents/PIH_2024-24.pdf). So long as you identify the activity as a programmatic activity as a memo to the environmental review file, your environmental review requirements are satisfied.

PIH Notice 2024-24 sets out the details of the activities that are covered under the Part 50 Programmatic Review requirements. One of the key exemptions is maintenance that does not change the value or structure of a building. What is not covered under maintenance: rehab, new construction, acquisition/leasing, or emergency repairs. In other words, if the activity does not alter anything or is limited to maintenance, you should use Part 50. All that is required is a simple memo to the file.

## II. HUD ONAP Update

Staff from HUD ONAP gave a presentation and update on some critical Indian housing issues. The presenters were: Tom Carney, Regional Administrator; Katie Wilson, Team Lead for Grants Evaluation; and David Boyd, Grants Management Director.

Tom Carney began by covering the continued spend down of COVID pandemic funding. IHBG and ICDBG CARES have been almost 90% spent down. The IHBG and ICDBG ARPA funds are at 57% and 69% spend down, respectively. Please note that if you have unexpended IHBG CARES funds, it will result in a point reduction in competitive applications going forward, so it is critical to spend down those funds. This same reduction will soon be applied to unexpended IHBG ARPA funds. Tom also reiterated some of the issues that were raised and discussed at last week's Tribal Interagency Advisory Committee meeting, which we described in detail in our memo of September 13, 2024.

David Boyd gave a grants management update. The GEMS platform is to be used for submission of IHP and the S-425s. ONAP grant recipients are expected to submit a single SF-425 for each open grant 90 days after the end of your program year. However, IHBG investment approved tribes must continue to submit an SF-425 at the end of each quarter. David also mentioned that the ICDBG FY 2024 is in the midst of rating and ranking, and the process is nearing completion. IHBG FY 2024 is complete. The THUD-VASH FY 2024 funding process is nearing completion. For FY 2025 IHBG funding, the estimates are available online, but the final

numbers will depend on Congressional appropriations. For IHBG FY 2025 interim funding for the first quarter (as well as for ICDBG Imminent Grant funding), you should reach out to your grants management or grants evaluation specialist at your HUD ONAP.

Some other Grants Management updates covered were: HUD's new fair market rents go into effect on October 1, 2024; the current HUD waiver for Tribes/TDHEs from the BABA requirements expires on September 30, 2024, and federal funds obligated after that date will be subject to BABA requirements; new income limits for Program Participants are set out in Program Guidance 2024-01 - [https://www.hud.gov/sites/dfiles/PIH/documents/2024-01\\_FY24\\_IHBG\\_Income\\_Limits.pdf](https://www.hud.gov/sites/dfiles/PIH/documents/2024-01_FY24_IHBG_Income_Limits.pdf); the new TDC rates are set out in PIH 2024-28 - [https://www.hud.gov/sites/dfiles/PIH/documents/PIH\\_2024-28.pdf](https://www.hud.gov/sites/dfiles/PIH/documents/PIH_2024-28.pdf).

Katie Wilson gave a grants evaluation update. She first gave an overview of FY 2024 monitoring. The most common findings were the failure to conduct the correct level of environmental review, and a failure to complete or maintain sufficient documentation on procurement. HUD is willing and able to provide training and technical assistance in these areas if needed. Kitty also noted upcoming reporting due dates: ICDBG FY 2024 Annual Status and Evaluation Report is due on November 14, 2024 (HUD does not have the ability to grant an extension of the ASER); for Tribes/THDEs with a September 30 fiscal year, the APR for any and all IHBG funding is due on December 29, 2024; if your FY ends December 31, your IHBG APRs are due on March 31, 2025. Further, she noted that the Housing Opportunity Through Modernization Act (HOTMA) implemented changes to the Section 8 income calculation method, and the changes will apply to Tribes and TDHEs who use Section 8 methodology to calculation income on January 1, 2025. There is a new PIH Notice 2024-27, which contains the updated information based on HOTMA. The changes include the following: "anticipated" income is no longer included, only past income will be evaluated; the calculation overall has been significantly simplified; any earned income by household members under 18 is not included, but unearned income for household members under 18 is included; nonrecurring income is now more clearly defined, and the guidance includes a list of examples (non-recurring income is excluded from income under the new Section 8 definition). Please review the notice for more detail. <https://www.hud.gov/sites/dfiles/OCHCO/documents/2024-07pihn.pdf>

### ***Conclusion***

If you have any questions about this memorandum or any of the topics discussed in this memorandum, please contact Ed Clay Goodman ([egoodman@hobbsstrauss.com](mailto:egoodman@hobbsstrauss.com)) or Cari Baermann ([cbaermann@hobbsstrauss.com](mailto:cbaermann@hobbsstrauss.com)); both may be reached by phone at 503-242-1745.