

Coordinated Environmental Review Process for Tribal Housing and Housing Infrastructure

Actions to Date

In a March 2014 report to the Congressional committees entitled “Native American Housing: Additional Actions Needed to Better Support Tribal Efforts,” the Government Accountability Office (GAO) made several recommendations, including the establishment of a “coordinated federal environmental review process for tribal housing development.”¹ Relying in part on the GAO report, in December 2014, the Senate Report accompanying the FY 2015 Transportation and Housing and Urban Development (HUD), and Related Agencies Appropriations Bill directed HUD “to collaborate with the Council on Environmental Quality and affected agencies . . . to develop a coordinated review process to simplify tribal housing development and its related infrastructure needs.”²

An interagency workgroup was formed. The interagency workgroup discussed and examined information collected from tribes and agencies and reviewed environmental review requirements. It became clear that no single effort or legislative change would ensure a coordinated and simplified environmental review process for tribal housing projects; but rather, an on-going effort between agencies to discover commonalities and foster collaborative relationships was required. The interagency workgroup focused on identifying measures that could be taken to coordinate agencies’ environmental review processes within the existing framework. Those measures are presented as recommendations in the Coordinated Environmental Review Process: Final Report, published on December 15, 2015.

Final Report Recommendations:

1. Incorporate Environmental Review Documents by Reference
2. Develop Common Categorical Exclusions
3. Address Resource Deficiencies at 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
9. Explore HUD-Specific Regulatory and Policy Improvements. NOTE: These recommendations items require HUD action.
10. Create More Predictable Funding Mechanisms
11. Establish an On-going Environmental Review Interagency Workgroup
12. Explore Expanding the Scope of this Effort

Since the Final Report was published, the workgroup has continued to meet. The Final Report recommends an interagency Memorandum of Understanding (MOU) to encourage the use of the National Environmental Policy Act (NEPA) efficiency tool of incorporation by reference. The workgroup has drafted an MOU and a companion Statement of Intent document for tribes which expands beyond incorporation by reference to include encouraging the use of other NEPA efficiency tools of cooperating

¹ GAO REP. NO. 14-255, at 34, *Native American Housing: Additional Actions Needed to Better Support Tribal Efforts* (March 2014) [hereinafter *GAO report*], available at <http://www.gao.gov/assets/670/662063.pdf>.

² S. REP. NO. 113-182, at 121 (2014), accompanying S.2438, available at <https://www.congress.gov/113/crpt/srpt182/CRPT-113srpt182.pdf>.

agency agreements and adoption. The draft documents were made available for review and comment in December, and the comment period expires on February 12, 2017. They can be accessed on the HUD Codetalk website.³

The Coordinated Environmental Review Process Workgroup is seeking input on ways to move forward with the Final Report recommendations. Below are some ideas. We are interested in feedback on these ideas, and in any other ideas you may have. We would also like your opinion on which recommendations should be prioritized.

1. Incorporate Environmental Review Documents by Reference
 - a. The Final Report recommends an interagency MOU, which the workgroup drafted along with a companion document for tribes. Those documents are out for comment until February 12, 2017.
 - b. The Final Report recommends working with tribes to ensure that their environmental reviews satisfy the needs of all agencies. What are effective ways to do that?
 - i. Design a one-stop website where tribes can look up the environmental review requirements of each agency, and each funding program
 - ii. Develop elaborate checklists
 1. What are typical projects?
 2. What are the typical levels of review?
 - a. For an example of a comparison of the levels of review amongst Federal agencies, please see the Federal Interagency Water Infrastructure Task Force's "Review of Agency Requirements for Complying with the National Environmental Policy Act (NEPA) for Tribes and Alaskan Native Villages"⁴
 3. How do the agency programs usually fit together?
 - a. Please see Appendix 6⁵ of the Final Report to see which laws and authorities are typically included in an environmental review
 4. What funding sources typically come first (in what order)?
 5. Consider checklists of Categorical Excluded and Environmental Assessment levels of review for one agency that connect with Categorical Excluded and Environmental Assessment levels of review checklists of other agencies
2. Develop Common Categorical Exclusions
 - a. Many of the same authorities apply, but the way they are implemented agency-to-agency may vary. One reason for this variance is that each Federal agency has NEPA implementing procedures that include Categorical Exclusions, and those Categorical Exclusions may vary for the same activity. It is important to keep in mind that Federal

³ The HUD Codetalk website is available at www.hud.gov/codetalk.

⁴ The *Review of Agency Requirements for Complying with the National Environmental Policy Act (NEPA) for Tribes and Alaskan Native Villages* is available at <https://www.epa.gov/sites/production/files/2015-07/documents/nepa-summary-matrix-and-appendices-08aug11.pdf>. Please note that this document is just an example, and that some of this information is out of date.

⁵ The Final Report appendices are available at https://portal.hud.gov/hudportal/documents/huddoc?id=appen_coorderprocess.pdf.

- agencies cannot use each other's Categorical Exclusions. Only those that are specifically listed in an agency's NEPA procedures can be applied to an agency's activities.
- b. Begin considering whether to align Categorical Exclusions by comparing how each agency applies Categorical Exclusions and Environmental Assessment levels of review based on various housing and housing-related infrastructure actions.
 - c. Where Categorical Exclusions cannot be aligned, what are other ways to be aware of and navigate the Categorical Exclusions issue?
 - i. Elaborate checklists (see 1.b.ii, above)
3. Address Resource Deficiencies at BIA
 - a. NOTE: This recommendation may require Congressional action.
 4. Provide Training for Agency Staff
 - a. The draft interagency MOU on NEPA tools calls for training.
 - b. What are effective ways to continue to highlight the need for training? To provide training?
 5. Provide Training for Tribes
 - a. The draft interagency MOU on NEPA tools calls for training.
 - b. What are effective ways to continue to highlight the need for training? To provide training?
 6. Continue Review of Related Environmental Laws and Authorities to Identify Opportunities for Greater Efficiencies
 - a. National Historic Preservation Act (NHPA) Compliance
 - i. Funding shortages to THPOs is a critical issue. NOTE: This requires Congressional action.
 - ii. What are other issues with NHPA compliance inefficiency? What are your recommendations to address them?
 - b. Floodplain Mapping
 - i. The workgroup could explore an interagency agreement on acceptable alternatives to FEMA floodplain maps in unmapped areas.
 - ii. What are your recommendations to address the lack of floodplain mapping on tribal land?
 - c. The Final Report discusses continuing the review of related laws and authorities to identify opportunities for efficiencies. Have you identified any opportunities for efficiencies?
 - d. Potential way to continue to identify opportunities for efficiencies: Align the way the related laws and authorities are implemented
 - i. Identify which authorities have agency-specific implementing regulations that need to be aligned
 1. EO 11988 (floodplains)
 2. EO 11990 (wetlands)
 - ii. Address issues with implementation
 - iii. Align implementation
 - e. Potential way to continue to identify opportunities for efficiencies: Identify which related laws and authorities have stand-alone implementing regulations and identify issues
 - i. NHPA Section 106
 - ii. Endangered Species Act Section 7
 - iii. Section 404 of Clean Water Act
 7. Create Regional Consortiums

- a. The Final Report contemplates utilizing regional consortiums to discuss and assist each other with issues related to environmental review for tribal housing and infrastructure projects. The workgroup considered utilizing the EPA Regional Tribal Operations Committee (RTOC) structure. However, RTOC does not seem to be the best fit, as it involves tribal environmental staff, and the reviews prepared for housing and housing-related infrastructure projects are generally prepared by housing staff and their consultants.
 - b. What are other options? Are there regional housing consortiums?
- 8. Explore the Development of an Interagency Environmental Review Automated Tool
 - a. How would we do this?
 - i. Could build an online system based on HUD's HEROS system and the elaborate checklists (see 1.b.ii, above)
 - ii. Is there another model?
- 9. Explore HUD-Specific Regulatory and Policy Improvements. NOTE: These recommendations items require HUD action.
 - a. Updating HUD's Acceptable Separation Distance (ASD) Regulations
 - i. HUD will consider revisions to the ASD regulations to allow residential propane tanks, likely up to 250 gallons, without a required separation distance.
 - ii. HUD will consider waiver requests.
 - b. Easing Paperwork Burdens for Administrative Activities
 - i. HUD continues to explore options to alleviate the paperwork burden of documenting environmental reviews for administrative activities, which may require regulatory changes.
- 10. Create More Predictable Funding Mechanisms
 - a. How can the workgroup help with identifying funding sources?
 - i. Would a one-stop website help?
 - b. How can the workgroup help with the issue of predictability of funding sources?
 - i. NOTE: Changes to the funding structure would require Congressional action.
 - ii. The workgroup could help tribes plan within the current structure of funding. For example, the workgroup could put together a "playbook" on project planning for various types of housing and housing-related infrastructure projects that identifies the progress that will need to be made and in what order, and when certain funding sources could be utilized during that process. This could facilitate more efficient environmental review as it could lead to reviews that take the entire scope of a project into account and are thus more likely to be able to be utilized by multiple agencies.
- 11. Establish an On-going Environmental Review Interagency Workgroup
 - a. The workgroup continues to meet. The draft MOU on NEPA tools commits to an ongoing workgroup.
- 12. Explore Expanding the Scope of this Effort
 - a. The Final Report recommends exploring expanding the scope to include projects outside of housing and housing-related infrastructure. When should expanding the scope be considered?