



U.S. Department of Housing and Urban Development
Community Planning and Development

Special Attention of:

Notice: CPD-11-010

Tribes

Tribally Designated Housing Entities (TDHE's) Issued: December 15, 2011

Area Office ONAP Administrators and Staff

Supervisory Environmental Protection Specialists

Cross References: 24 CFR 1000.20(b) and (c)

This notice is effective until amended, superseded, or rescinded.

SUBJECT: Waiving Statutory Environmental Review Requirements for the Indian Housing Block Grant Program for Tribes that Have Assumed Environmental Review Responsibilities under 24 CFR Part 58

I. Purpose and applicability

This Notice applies only to the waiver of provisions related to environmental reviews in Section 105 of the Native American Housing Assistance and Self-Determination Act (NAHASDA, 25 U.S.C. 4115(d)) and clarifies the procedures to follow in cases where HUD is requested to waive statutory environmental review requirements. The purpose of this Notice is to provide further guidance on waiving statutory requirements for the Indian Housing Block Grant (IHBG) Program, as authorized by Section 105(d) of NAHASDA if the Tribe has assumed environmental review responsibilities under 24 CFR Part 58, "Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities" (Part 58).

Section 105(d) of NAHASDA allows for statutory waivers of the requirements of Section 105(a)-(c) subject to certain conditions. Section 105(a)-(c) covers the Request for Release of Funds process, procedures for seeking approval from the Secretary of HUD and the commitment of funds, and the certification of environmental reviews, respectively. Section 105(d) allows these provisions to be waived if the recipient's failure to comply:

- (1) will not frustrate the goals of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) or any other provision of law that furthers the goals of that Act;
- (2) does not threaten the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community;
- (3) is a result of inadvertent error, including an incorrect or incomplete certification; and
- (4) may be corrected through the sole action of the recipient.

Section 105(d) does not allow for the waiver of the requirements of other statutes. For example, the statute does not allow the waiver of statutory provisions of NEPA or of the related laws cited at §§ 58.5 or 58.6 (e.g., Section 106 of the National Historic Preservation Act, Executive Orders 11988 and 11990 [respectively Floodplain Management and the Protection of Wetlands], or Section 7 of the Endangered Species Act). Additionally, the waiver cannot correct a willful error or an error that endangers community health or safety.

This Notice includes environmental requirements and explanations regarding: (a) the publication or posting of a “Notice of Finding of No Significant Impact” (FONSI) within the community in which the project is located; (b) review and concurrence by the Office of Environment and Energy within the Office of Community Planning and Development (CPD) and by the Office of General Counsel (OGC); and (c) approval signature of the Assistant Secretary for Public and Indian Housing (PIH) jointly with the Assistant Secretary for CPD. The Notice provides a format for the Notice of FONSI (see Attachment A).

This Notice replaces Notice CPD-04-08 “Waiving statutory environmental review requirements for the Indian Housing Block Grant Program for Tribes that Have Assumed Environmental Review Responsibilities under 24 CFR Part 58.”

II. Authority

The only authority for waiving statutory environmental review requirements for the IHBG program is Section 105(d) of NAHASDA. Section 105(d) states:

- (d) ENVIRONMENTAL COMPLIANCE. -- The Secretary may waive the requirements under this section if the Secretary determines that a failure on the part of a recipient to comply with provisions of this section—
- (1) will not frustrate the goals of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or any other provision of law that furthers the goals of that Act;
 - (2) does not threaten the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community;
 - (3) is a result of inadvertent error, including an incorrect or incomplete certification provided under subsection (c)(1); and
 - (4) may be corrected through the sole action of the recipient.

III. Responsibilities

A. Waiver applicant’s responsibility

Waiver applicants shall:

- (1) make a written request to the HUD Area Office of Native American Programs (ONAP) Administrator in whose jurisdiction the project is located. The request must cite Section 105(d) of NAHASDA and discuss the reasons for the waiver request;
- (2) supply all available, relevant information necessary for HUD to perform any environmental review required in 24 CFR Part 50, "Protection and Enhancement of Environmental Quality" and to make the four determinations of Section 105(d) of NAHASDA. The information supplied to HUD must include the Tribe's environmental review record (ERR) for the project (if an ERR exists) or any consultant-prepared environmental information and related analysis of the environmental impacts of the project. Also, the information must include any inquiries or concerns raised by individuals and organizations that are interested or may be affected by the environmental impacts of the project as well as any agency having jurisdiction by law or expertise relating to the environmental impacts of the project. Waiver applicants are to aggregate into a single waiver request information on any and all project properties and activities as described in §50.21 so that a single evaluation by the Area ONAP in whose jurisdiction the project is located can be made. Refer to PIH Notice 2001-31 (TDHEs) – "Indian Housing Block Grant Program: Guidance and procedures if Tribes do not assume environmental review responsibilities under 24 CFR Part 58." The notice was reinstated by PIH Notice 2002-25 (TDHEs). Although this Notice deals with information that must be submitted when HUD initiates the environmental review, it includes a description of relevant information that an applicant could provide to HUD in a waiver request under Section 105 of NAHASDA. If the waiver is approved, the review would be completed under 24 CFR Part 50;
- (3) not acquire, rehabilitate, demolish, convert, lease, repair or construct property, nor commit or expend HUD or any non-HUD funds for these project activities with respect to any eligible project property, until HUD written approval of the waiver is received for the project covered by the waiver request;
- (4) cease all work including that of project partners (including public or private nonprofit or for-profit entities, contractors and subcontractors) on the project. Work may recommence upon receipt of written HUD approval of the waiver request;
- (5) carry out mitigating measures required by HUD or select an alternate eligible project property or project;
- (6) publish and/or post the Notice of FONSI (see Attachment A) in the community in which the project is located and mail a copy to individuals or groups known to be interested in the proposed action including federal and state environmental agencies with jurisdiction or expertise. The notice should be performed after the completion of the review by the Area ONAP Administrator and should direct the public to submit comments to the Area ONAP Administrator;
- (7) make the Notice of FONSI available for at least 15 days for public review and comments unless the requirements of §50.34 are present. Additional requirements apply if the

project is subject to exceptional circumstances provided by § 50.34. If a 30 day FONSI is required in accordance with § 50.34, the notice shall be published in accordance with § 50.23(b)-(d); and

(8)submit the Notice of FONSI to the Area ONAP Administrator for review.

B. HUD Area ONAP Administrator and staff responsibilities

The Area ONAP Administrator and staff will review the information in the Tribe's ERR, independently evaluate the Tribe's information for accuracy, and supplement the information, if necessary to conform with Part 50. The Area ONAP Administrator shall serve as the "HUD approving official" as defined in §50.2 for the environmental assessment and FONSI as documented in form HUD-4128, "Environmental Assessment and Compliance Findings for the Related Laws". A HUD employee will complete an on-site examination of the project (or have such investigation completed by a qualified HUD contractor), complete the environmental assessment (form HUD-4128) and prepare the environmental determination. If the tribal environmental review record is unavailable or incomplete, ONAP staff must work with the tribe to gather documentation to support the environmental assessment. Documentation should include relevant maps, consultation letters, relevant studies and other sources that support HUD's findings under 24 CFR Part 50.

The Area ONAP Grants Management Division Director shall have the lead responsibility and determine the completeness and acceptability of the information for waiver request, and proceed with the assistance of the ONAP Headquarters Office of Grants Evaluation:

- (1) by completing the environmental assessment (form HUD-4128). If the Tribe's ERR is available and complete, ONAP may use the Tribe's environmental review, provided that ERR is used and evaluated in accordance with Sections 50.32 and 50.35. ONAP should supplement the documentation in projects whenever the tribal ERR is incomplete, or lacking in professional quality and comprehensive analysis of impacts. If no tribal environmental review record is available, a Sample Field Notes Checklist (SFNC) (10/96) should be completed prior to and as support for the environmental assessment (form HUD-4128).
- (2) by identifying in line 11 of form HUD-4128 the following information: (a) list of any conditions or requirements to be undertaken by the Tribe as a condition of HUD approval of the waiver; and (b) if the waiver request results in the waiver of the requirements of Section 105;
- (3) by having the Area ONAP Grants Management Division Director sign line 13 of form HUD-4128 as Supervisor, and then by having the ONAP Area Administrator provide any comment and sign item 15 of form HUD-4128 as HUD Approving Official;
- (4) by receiving and responding in writing to all comments received during the public comment period for the Notice of FONSI;

- (5) by preparing an approval package for the waiver and attaching a copy of the ERR and transmittal memorandum to the PIH Assistant Secretary through the Deputy Assistant Secretary for ONAP for joint signature by both the PIH and CPD Assistant Secretaries in that order;
- (6) by obtaining the concurrences of the HUD and the OGC Environmental Clearance Officers on the approval package for the waiver of Section 105 of NAHASDA prior to signatures of the Assistant Secretaries;
- (7) by maintaining in the project file the original copy of HUD's environmental review record and approval package for the approval of waiver of Section 105 statutory requirements for the project; and
- (8) by monitoring the implementation of any conditions or requirements to be undertaken by the Tribe as a condition of HUD approval of the waiver and release of funds.

IV. If the waiver cannot be approved

A. If on the basis of investigation and review HUD determines that:

- (1) the recipient's noncompliance did result in a substantive violation or will frustrate the goals of NEPA (42 U.S.C. 4321 et seq.) or any other provision of law that furthers the goals of NEPA;
- (2) the recipient's noncompliance threatens the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community;
- (3) the recipient's noncompliance is not the result of an inadvertent error, including an incorrect or incomplete certification provided under Section 105(c)(1) of NAHASDA; or
- (4) the recipient's noncompliance may not be corrected through the sole action of the recipient,

HUD will make a determination that a waiver is not possible or warranted.

B. HUD will also:

- (1) require the Tribe to repay the program account from non-HUD sources for any IHBG funds spent on non-exempt project activities;
- (2) require that any financial liabilities incurred by the Tribe as a consequence of the obligation of IHBG funds for non-exempt project activities be paid using non-HUD funds;

- (3) inform the Tribe that no additional IHBG funds (including funds reimbursed to the program account) may be spent on the project or for the same purpose on the project site. In addition, HUD funding assistance provided (or funds guaranteed) under the same statutory authority (i.e., Title I of NAHASDA and Section 184) cannot be obligated or expended on the same project or for the same purpose on the project site;
- (4) require the Tribe to undertake corrective or remedial actions such as obtaining technical assistance in environmental review requirements, submitting progress reports on program activities and regulatory compliance (failure on the part of the Tribe to undertake and complete such actions may be the basis for HUD action under the provisions of 24 CFR 1000.532); and
- (5) determine, under the provisions of 24 CFR 58.11(c), that the Tribe lacks the capacity to assume environmental review and decision making responsibilities for all of the current IHBG projects for which environmental certifications have not been approved and for which HUD has not approved a Request for Release of Funds and Certification (RROF/C). HUD will undertake and complete these responsibilities in a manner consistent with the requirements and intent of 24 CFR 1000.20(a). In addition, HUD will not allow the Tribe to assume these responsibilities for future IHBG projects until the Tribe has demonstrated to HUD's satisfaction that it has obtained or developed the necessary capacity.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[NOTICE FOR PUBLIC COMMENT]

Notice of Finding of No Significant Impact on the Environment**To All Agencies, Groups, And Individuals****Date of Notice:** [See Note #1]**Project Information:** [See Note #2]

Summary: The Office of Native American Programs (ONAP), U.S. Department of Housing and Urban Development (HUD), based on its completed investigation and environmental assessment of the project, has determined that approval of the proposed waiver from compliance with Section 105 of the Native American Housing Assistance and Self-Determination Act (NAHASDA) of 1996, 25 U.S.C. 4115, for the subject project: (i) will not frustrate the goals of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) or any other provision of law that furthers the goals of the Act; (ii) does not threaten the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community; (iii) is a result of inadvertent error, including an incorrect or incomplete Certification provided under Section 105(c)(1) of NAHASDA; (iv) may be corrected through the sole action of the recipient; and (v) will **not** have a significant impact on the human environment. Therefore, an Environmental Impact Statement under the National Environmental Policy Act is **not** required. The documentation that supports the determination made by HUD Office of Native American Programs is available for public examination and copying at: [See Note #3].

Request for Public Comment: Any party who wishes to comment on this finding may send written comments to the HUD at the address shown below. All comments received will be considered and no waiver action will be taken by the Assistant Secretary for Public and Indian Housing prior to the comment due date.

Comment Due Date: All comments must be received on or before [See Note #4]. Address all comments to: [See Note #5].

For Further Information: (Optional) Contact [See Note #6].

Explanations for Completing the FONSI Notice:

Enter information in the space on the sample format where the **Note #** is inserted.

Note # Insert the Following Information:

1. Enter the month, day and year of the notice.

2. Enter the following information:
 - Cite Section 105 of NAHASDA, 25 U.S.C. 4115
 - Reasons for the need for such waiver
 - Identify:
 - Project title or name:
 - Project location: street address, city, county, and state:
 - Description of the project:
 - Name(s) of the HUD Program: Indian Housing Block Grants
 - Name of recipient agency (if different from responsible entity)
 - Cite conditions, if any, of the approval.

3. Enter the name and address of location(s) where the documentation that supports the determination may be examined and copied and the days of the week and hours of the day it is available to the public. Examples of locations accessible to the public for examining and copying are the tribal offices, the public library, post office, and suitable locations within the project area.

4. Enter the month, day, and year that public comments are due. The due date will be at least 15 calendar days following the date that the Notice of FONSI was published, posted, or mailed. Note: if the circumstances in 24 CFR 50.34 are applicable, the Notice of FONSI must comply with 24 CFR 50.23(b)-(d), including publication and a 30 day comment period.

5. Enter the name and title of the HUD official, street address, city, state, zip code, suite or room number, telephone number (Optional: fax number and e-mail address). It is recommended that the official identified is the Area ONAP Administrator.

6. Enter the name, telephone number, and e-mail address of the contact person who can answer questions regarding this notice. It is recommended that this be the Area ONAP Grants Management Division Director.