

**ELIMINATE INCONSISTENCY  
AND INEQUITIES OF  
CURRENT MEDIAN INCOME  
DEFINITIONS  
(NAHASDA NEGOTIATED RULE MAKING)**

**ISSUE**

- I. Currently the NAHASDA allocation formula regulations include several low income components that are based on Formula Median Income (§1000.324 (d), (e) and (f)) and they define Formula Median Income as follows (§1000.302):

*Formula Median Income.* For purposes of the formula median income is determined in accordance with section 567 of the Housing and Community Development Act of 1987 (42 U.S.C. 1437a note).

The Housing and Community Development Act of 1987 (42 U.S.C. 1437a note) defines Median Income for eligibility purposes in public housing and certain other HUD and Rural Development programs as follows:

*Median Area Income.* Section 567 of Pub. L. 100-242 provided that: "For purposes of calculating the median income for any area that is not within a metropolitan statistical area...the Secretary of Housing and Urban Development or the Secretary of Agriculture (as appropriate) shall use whichever of the following is higher: (1) the median income of the county in which the area is located or (2) the median income of the entire non-metropolitan area of the state."

- II. However, in prescribing low-income Indian family eligibility for NAHASDA program activities the NAHASDA statute (25 U.S.C. 4131 (b)) defines low-income family and median income as follows (25 U.S.C. 4131(b) and 4102 (13)):

(13) **LOW-INCOME FAMILY** — The term "low-income family" means a family whose income does not exceed 80% of the median income for the area, as determined by the Secretary ...

(14) **MEDIAN INCOME** — The term “median income” means, with respect to an area that is an Indian area, the greater of –

- (A) the median income for the Indian area, which the Secretary shall determine; or
- (B) the median income for the United States

The NAHASDA regulations (§1000.10) then define median income for Indian areas in another definition section of the regulations as follows:

Median income for an Indian area is the greater of:

- (1) The median income for the counties, previous counties or their equivalent in which the area is located; or
- (2) The median income for the United States

III. This means that currently there is a double standard in the NAHASDA regulations. Tribes and TDHEs are obligated to use the larger of county median income or the national median income for eligibility. However, for funding tribes in the non-metropolitan statistical areas, the median income standard is the larger of the county or the entire non-metropolitan area of the state. Therefore, currently eligibility and formula criteria in the regulations use different median income definitions.

In addition to conflicting standards, another consequence of the current formula median income definition is that tribes in states with lower income populations are being unfairly penalized. They are not getting their rightful share of low-income populations funding because the NAHASDA Indian Housing Block Grant formula does not allow the use of the national median income option.

## RESOLUTION

It is therefore proposed that the current regulatory definition for formula median income be changed to match the eligibility median income definition. This is done easily by striking the current definition in §1000.302, Formula Median Income, and replacing it with the eligibility definition as follows:

*Formula Median Income.* See median income definition in §1000.10

**ADDRESSING CURRENT  
INEQUITIES IN THE  
FORMULA'S AEL FACTOR  
BY ESTABLISHING THE  
NATIONAL AEL AVERAGE  
AS A BASELINE  
(NAHASDA NEGOTIATED RULE MAKING)**

## ISSUE

The NAHASDA regulations establish Formula Current Assisted Stock component to insure that housing built under the 1937 Housing Act can be maintained and former Section 8 rental assistance continued. Currently the regulations establish two adjustment factors to reflect local costs (§1000.320). One is “operating subsidy as adjusted by the greater of the AEL or FMR” and the other is “modernization as adjusted by TDC”.

For a significant number of those tribal recipients who rely on AEL this provision as currently worded unfairly reduces their NAHASDA Indian Housing block Grant funding.

Annual Expense Level or AEL was a non-project based program formally utilized by the 1937 Housing Act program to try to establish operating expenses for each Indian housing authority. It was identical to what is used in public housing. Many, including HUD, now believe this process and method is flawed and the alternative methods are being explored to more fairly and accurately determine cost. HUD and tribal officials have explained to the Negotiated Rule Making Committee and its Work Groups that individual AELs are not consistent or particularly accurate. When originally developed or updated, individual levels often were determined by the skill levels of the particular housing authority staff and the differing practices of the particular HUD offices.

Currently, an analysis of individual AELs for NAHASDA current assisted stock recipients illustrates the flawed AEL process. However, the Current Assisted Stock Negotiated Rule Making Work Group determined, by consensus, to not recommend to the full Negotiated Rule Making Committee to replace the AEL factor. For many Work Group members, the reason for doing this was that currently a method has not yet been developed that could be used as a replacement of AEL.

There are many examples where local cost areas and individual programs are similar but great variances existing between AELs. In addition, unexplainable variances exist between similar regions and between regions and national AEL averages. HUD's Southwest Region had an AEL average much higher than HUD's Northern Plains Region. The Northern Plains Region's average AEL average is inexplicably only about half of the national AEL.

For tribal recipients who do not have particularly high fair market rates, some other method needs to be used to accommodate unfair variances in AELs.

## RESOLUTION

Section §1000.320 of the NAHASDA regulations should be modified to read as follows:

§1000.320. How is Formula Current Assisted Stock adjusted for local area costs? There are two adjustment factors that are used to adjust the allocation of funds for the Current Assisted Stock portion of the formula. They are:

(a) Operating Subsidy as adjusted by the greater of the following —

- (1) individual AEL factor
- (2) national average AEL factor; or
- (3) FMR factor, and

(b) Modernization as adjusted by TDC

**THE WEIGHTING OF THE  
FORMULA NEED COMPONENTS  
SHOULD BE CHANGED TO  
BETTER REFLECT BOTH THE  
NEED OF LOW-INCOME FAMILIES  
AND THE STATED PURPOSE OF  
THE ACT  
(NAHASDA NEGOTIATED RULE MAKING)**

**ISSUE**

A primary objective of the NAHASDA law is “to assist and promote affordable housing activities to develop, maintain and operate affordable housing in safe and healthy environments on Indian reservations and in other Indian areas for occupancy by low-income Indian families” (25 U.S.C. 4131(a) (1)).

The Act defines “affordable housing” as housing that complies with Title II, Affordable Housing Activities, of the Act (25 U.S.C. 4103(2)).

The Act also defines “low-income families” as families whose incomes does not exceed 80% of the median income. (25 U.S.C. 4103 (13)).

Eligible affordable housing activities are limited under NAHASDA to the development and support or the providing of services to only affordable rental or homeownership housing.

The NAHASDA statute requires that the “allocation formula” be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities. This and a plain reading of the “need component” of the allocation formula in the regulations illustrate that most if not all of the needs formula should be based on the number of low-income Indian households that a tribal recipient has in its formula area.

Currently the needs components contained in the NAHASDA Indian Housing Block Grant allocation formula only gives 40% of its total points for low-income families in the recipients formula area (13% for households with less than 30% of formula median income and 7% each for households with between 30% & 50% and 50% & 80%). This current weighting of need does not adequately reflect the primary purpose and goals of the Act. It also has the effect of inadequately providing NAHASDA resources to areas where housing needs are the greatest.

For Indian households with income exceeding 80% of median income there are other resources that are available including the HUD 184 program. However low-income families on most reservations are primarily dependent upon NAHASDA funding and the previous assistance provided under the 1937 Housing Act.

Low and very low-income housing (households with less than 30% of median income and between 30% and 50% of median) requires more support, assistance, financing and funding because there is less opportunity to leverage funding for their housing and the tenants are not able to make a significant financial contribution to the cost of maintaining their homes. Most importantly there is also often a very significant need to provide substantial ongoing financial support or subsidy for these units during the management or operations of low and very low-income housing.

For these reasons the weighting of low-income households in the NAHASDA Indian Housing Block Grant formula should be substantially increased.

## RESOLUTION

The total weight currently given in the NAHASDA Indian Housing Block Grant formula for the need components for low-income households should be increased from 40% to 70%.

The formula needs component for households with less than 30% of median income component should be weighted at 45%. The component for households between 30% and 50% should be weighted at 15% and the component for households between 50% and 80% should be weighted at 10%.

**AMENDING FORMULA  
CURRENT ASSISTED STOCK  
REGULATIONS TO (1) EXPRESSLY  
STATE THE IMPORTANCE OF  
ACCURATELY REPORTING SUCH  
STOCK AND THE CONSEQUENCES OF  
NOT DOING SO AND (2) ALLOWING  
UNDERCOUNTS TO BE SET-OFF  
AGAINST OVERCOUNTS  
(NAHASDA NEGOTIATED RULE MAKING)**

## ISSUE

Currently HUD is administratively seeking from a significant number of tribes and TDHEs repayment of NAHASDA Indian Housing Block Grant monies for previous year "over funded" allocations. However, HUD has refused to set off against such over payments any "under funded" allocation for those same years.

In the allocation formula tribes and TDHEs currently receive funding for formula current assisted stock. Sections §§1000.312 and 314 of the NAHASDA regulations define Formula current assisted stock as (1) current assisted stock that is owned or operated pursuant to an ACC and under management as of September 30, 1997, as indicated in the Formula Response Form, (2) 1937 Act units in the development pipeline when they become owned or operated by the recipient and are under management as indicated in the Formula Response Form, or (3) Section 8 units where their current contracts have expired and the Indian tribe continues to manage the assistance in a manner similar to the Section 8 Program as indicated on the Formula Response Form.

Many TDHEs and Tribes, since the commencement of the NAHASDA program, have failed to correctly report such stock and have in the same year either on such occasions over reported, under reported or both. The regulations currently do not expressly state what the consequences are of such misreporting.

Until recently HUD failed to monitor or verify the required reporting. After being advised of this problem in an Office of Inspector General program audit in 2001, HUD has now taken some steps to try to verify current reporting and review or audit past reporting. Though HUD currently has not developed a procedure to fully verify and audit such reporting, it has made some findings. According to those findings a significant number of tribes and TDHEs have either over reported or over reported and underreported formula current assisted stock on Formula Response Forms. HUD has requested those tribes and TDHEs to voluntarily agree to deduct the overpayments over the next five years from their future Indian Housing Block Grant funding.

However, HUD has refused to allow any set off of under counting against over counting even when such miscounting occurs in the same year. HUD has threatened to unilaterally adjust these recipients' future grant if a voluntary repayment schedule is not developed.

HUD and tribes should agree that as long as current assisted stock is counted in the formula that every reasonable and fair effort be taken by recipients to accurately report the numbers of such stock and HUD to do the same in trying to verify such reporting.

HUD and tribes should agree that with clear and specific notice in both the regulations and the Formula Response Form that discovery of net over counting may result in sanctions, repayment of allocated grant funds or reduction or withdrawal of future grant funds.

HUD and tribes should agree that there should be a three (3) year limitation on HUD to challenge such reporting.

HUD and tribes should also agree that where an undercounting and an overcounting is discovered for the same year that it is fair and standard auditing practices to allow the undercount to be set off against the over count.

## RESOLUTION

The following amended and new provisions should be made to the current NAHASDA regulations.

§1000.315 What could happen if formula current assisted stock is misreported by recipients.

- (a) Recipients need to take all steps necessary to insure that they accurately report formula current assisted stock on Formula Response Forms.
- (b) HUD will take reasonable steps to advise recipients of the importance of correctly reporting the formula current assisted housing stock and the possible consequences of error. This includes, but is not limited to, HUD expressly stating on the Formula Response Form the possible consequences of misreporting formula current assisted stock.
- (c) HUD may propose Formula Current Assisted Stock figures on individual Formula Response Forms but recipients are responsible to verify and correct those figures and to insure that the Formula Response Form they verify is accurate.
- (d) HUD may for up to three years challenge Formula Current Assisted Stock figures on Formula Response Forms.

(e) If a recipient has overcounted and undercounted Formula Current Assisted Stock in the same year, the undercount may be credited against the overcount.

(f) If a recipient had agreed to a repayment or reduction of future grants prior to September 1, 2003 because of an over count and that payment or reduction has not been implemented or fully carried out and there is an undercount as described above, the recipient will be allowed to reduce that repayment or reduction by the appropriate undercount set off.