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Via E-Mail

Ms. Lopa Kolluri
Principal Deputy Assistant Secretary for the Office of Housing and Federal Housing Administration
U.S. Department of Housing and Urban Development
451 Seventh Street, S.W., Room 9100
Washington, D.C. 20410

RE: Application of Choice-Limiting Restrictions To HUD Mortgage Insurance Programs

Dear Ms. Kolluri:

On behalf the Multifamily Lenders Council (the "Council") and the Mortgage Bankers Association, we ask HUD to withdraw recent statements made with respect to the application of HUD's rules implementing the National Environmental Policy Act ("NEPA") to HUD mortgage lending programs, including specifically loans insured pursuant to the Section 223(f) program. In recent years, HUD has been steadily expanding the scope of environmental review of its insured mortgage programs without a statutory or regulatory basis to do so. Indeed, HUD's position now conflicts with new regulations issued by the Council on Environmental Quality ("CEQ"), which establishes NEPA policy at the Federal level. HUD's position also conflicts with the text and structure of its own NEPA regulations, which confirm that to the extent they are not categorically excluded from environmental review, such review of HUD mortgage lending decisions are governed by its Part 50 regulations, which contain no choice-limiting restrictions. Under the circumstances, HUD should take prompt action to clarify that persons participating in its mortgage lending programs – including the 221(d)(4) and 223(f) programs – are not subject to choice-limiting restrictions.

A. Background

1. HUD Develops Its Framework For Environmental Review

NEPA was originally enacted in 1970 to provide a mechanism for environmental review of "Major Federal Actions" that may significantly affect the quality of the human environment. 42 U.S.C. 4321 *et seq*. In addition to several Executive Orders, NEPA is implemented by regulations issued by CEQ, found at 40 CFR Parts 1500-1508. According to HUD's regulations implementing NEPA, the CEQ regulations "establish the basic procedural requirements for compliance with NEPA," and "are to be followed by all Federal agencies and are incorporated

by reference" into HUD's regulations. 24 CFR §50.1(c). HUD explained that its NEPA rules "provide[] supplemental instructions to reflect the particular nature of HUD programs" and are "to be used in tandem with" CEQ's regulations.

a. **Part 50 review of HUD "policy actions" and "project actions."** Over time, HUD issued multiple sets of its own environmental review regulations, including its Part 50 and Part 58 regulations. Fundamental to these regulations is the distinction between HUD-based actions and actions taken by grantees using HUD-sourced funds. In general, Part 50 applies to programs operated by HUD itself; Part 58 applies to programs that are operated by HUD grantees and other state and local agencies. Thus, HUD explains that the Part 50 regulations "apply to all HUD policy actions . . . and to all HUD project actions." 24 CFR §50.1(d). "Policy actions" refers to "all proposed FEDERAL REGISTER policy documents and other policy-related Federal actions (40 CFR 1508.18)." *Id.*, §50.16 (capitalization original). "HUD project actions" refers to "an activity, or a group of integrally-related activities, undertaken directly by HUD or ***proposed for HUD assistance or insurance***." *Id.*, §50.2(a) (emphasis added). As a general matter, Part 50 requires completion of an "Environmental Assessment" or an "Environmental Impact Statement" prior to approval of a policy action or a project, although a lengthy list of such actions and projects are categorically excluded from environmental reviews. See *id.*, §§50.16, .17, .19 and .20. Significantly, among the types of "projects" covered by the Part 50 rules are "project mortgage insurance or other financial assistance for multifamily housing projects" as well as "[r]ehabilitation projects." *Id.*, §50.17(a)(1) & (b).

As noted above, some types of HUD policy actions or projects are categorically excluded from environmental review under Part 50. Thus, HUD's rules exclude large categories of HUD decisions. For example, "[r]efinancing of HUD-insured mortgages that will not allow new construction or rehabilitation, nor result in any physical impacts or changes except for routine maintenance," with the exception of some flood control and insurance issues, are categorically excluded pursuant to §50.19(b)(21). "Rehabilitation of buildings and improvements" that meet certain conditions are categorically excluded from NEPA review but remain subject to review under other Federal statutes pursuant to §50.20(a)(2).

b. **Part 58 Review of actions by HUD grantees and other third parties.** Part 58 has a very different focus. Rather than looking at *HUD's* approval of "policy actions" or "projects," Part 58 "applies to ***activities*** and projects where specific statutory authority exists for ***recipients or other responsible entities*** to assume environmental responsibilities." *Id.*, §58.1(b) (emphasis added). The term "Activity" refers to "an action that a ***grantee or recipient*** puts forth as part of an assisted project. . . ." *Id.*, §58.2(a)(1) (emphasis added). A "recipient" is defined as "any of the following entities, when they are eligible recipients or grantees under one of the programs listed in §58.1(b), which includes the Community Development Block Grant program, emergency shelter program, the HOME program, and a variety of other programs that make grants to state and local agencies, public housing agencies, and nonprofits. *Id.*, §§58.2(a)(5), 58.1(b)(1)-(12). Examples of "recipients" include States, territories, units of local government, Indian tribes, nonprofits, and certain "direct grantees" of HUD funds. *Id.*, §58.2(a)(5).

Thus, Parts 50 applies to HUD itself and explains what HUD must do to implement NEPA review when it implements "policies" or approves "projects," while Part 58, on the other hand, applies to environmental review delegated by HUD to state and local agencies and other entities with respect to activities *they* undertake as participants in the programs listed in §58.1(b), almost all of which involve grants of HUD-sourced funds. Environmental review under Part 58 is not intended to overlap with review under Part 50. The two parts cover the activities of different actors, with Part 50 covering actions by HUD and Part 58 covering state and local grantees receiving HUD funds. The scope of Part 58 review is not open-ended and is not intended to cover other HUD programs that do not involve the programs and "grantee[s] or recipient[s]" listed in §§58.1(b)(1) and 58.2(a)(5).

c. **"Choice-limiting" restrictions are unique to Part 58.** Another significant difference between Part 50 and Part 58 is the so-called "choice-limiting" restrictions solely imposed by Part 58. In practice, Part 58 requires a HUD grantee to undertake an environmental assessment ("EA") or, if necessary, prepare a more detailed environmental impact statement ("EIS") at the time when the grantee determines the projected use of HUD assistance, unless the proposed activity or project is exempt or categorically excluded from the environmental review process. *Id.*, §§58.30(b), .34(a), .35(a) & (b), .36 and .37. When the environmental review is completed, the "responsible entity" that prepared the EA or EIS submits a Request for Release of Funds ("RROF"), signaling the environmental review process is complete and requesting the release of HUD funding. *Id.*, §58.71(b).

Specifically, §58.22(a) tightly restricts the scope of permissible activities that a grantor can take before completing required environmental review and issuing the RROF:

> Neither a recipient nor any participant in the development process, including public or private nonprofit or for-profit entities, or any of their contractors, may commit HUD assistance under a program listed in §58.1(b) on an activity or project until HUD or the state has approved the recipient's RROF and the related certification from the responsible entity.

24 CFR §58.22(a). Furthermore, §58.22(a) not only prohibits use of HUD funds prior to the issuance of the RROF, it also limits the use of ***non***-HUD funds and forbids the grantee from taking any other action if doing so would limit the choice of other alternatives:

> In addition, until the RROF and the related certification have been approved, neither a recipient nor any participant in the development process may commit non-HUD funds on or undertake an activity or project under a program listed in §58.1(b) if the activity or project would have an adverse environmental impact or limit the choice of reasonable alternatives.

Id., §58.22(a). This "choice-limiting" provision is intended to prevent recipients from committing HUD funds or even their own funds, until the state or local agency involved has, after completing required environmental reviews, taken the required steps to request a release of HUD funds, unless the activity is exempt (such as administrative and management activities, inspections and testing, engineering and design costs listed in §58.34) or categorically excluded from NEPA review (such as acquisition or rehabilitation of existing public facilities that will not be significantly expanded, rehabilitation of other existing facilities, tenant-based rental assistance, assistance to purchase existing dwellings, and some types of affordable housing predevelopment costs). *Id.*, §§58.34(a), .35(a) & (b).[1] §58.71, which requires submission of the RROF prior to disbursement of HUD funds, also warns that "the ***recipient must . . . refrain from undertaking any physical activities or choice limiting actions*** until HUD . . . has approved its request for release of funds." *Id.*, §58.71(b) (emphasis added).

Significantly, Part 50 does not contain choice-limiting rules parallel to those in Part 58. There is no need for such rules: the choice-limiting rules in Part 58 are needed to constrain the actions of independent third parties, such as state and local agencies, to prevent them from committing funds – HUD's funds or even their own funds – in a way that would constrain the effectiveness of the environmental review tasks that they are assigned to conduct under Part 58. It would be all too easy, for example, for a local community development agency that has already purchased a parcel or spent money to clear a site, to justify its investment by glossing over environmental issues that might otherwise weigh against acquisition or development. Once a grantee has exercised its choice, the ability to fairly consider the environmental consequences is compromised. Worse, HUD funds could be committed to projects that present significant environmental concerns; at a minimum, allowing state and local grantees to make acquisition/development decisions prior to completing environmental reviews makes it difficult to extricate HUD funds from those activities. Part 58 is designed to assure that before any significant decisions are made about a third-party grantee's use of HUD's funds, the environmental issues have been thoroughly and fairly vetted.

Those concerns do not apply to matters covered by Part 50. As noted above, Part 50 focuses on HUD's decision-making process. The fears that third-party grantees may constrain HUD's decision making under Part 58 don't apply where HUD itself is the decision-maker. Indeed, rather than impose choice-limiting restrictions on environmental review for HUD's own activities and projects, Part 50 simply directs that prior to certain "decision points" for "policy actions" and for "projects," HUD has completed its own environmental review. *Id.*, §§50.16 and .17. The concerns that require choice limitations on state and local grantees to assure that they fully and fairly perform their environmental review duties and to prevent preemption of HUD's oversight duties do not apply where HUD's own decision making is involved.

[1] The only significant exception to these strict choice limitations is entering into an option agreement on a proposed site or property so long as the option is contingent on the satisfactory outcome of the environmental review process and "the cost of the option is a nominal portion of the purchase price." *Id.*, §58.22(d).

Consequently, there are no grounds to impose choice-limiting restrictions on activities covered by Part 50, including HUD mortgage insurance programs.

2. <u>In recent years, HUD has attempted to expand choice limitations into activities that are not covered by Part 58.</u>

Recently, HUD has issued statements that have eroded the careful distinction between activities covered by Part 50 and Part 58, and such erosion has made some mortgage lending activities under Part 50 subject to choice-limiting restrictions similar to those in Part 58. For example, over the course of more than 20 years, HUD has adopted its Multifamily Accelerated Processing ("MAP") program, to reduce the time, cost and complexity of obtaining mortgage insurance. During that period, HUD has issued several versions of its MAP Guide, which discusses the steps necessary to obtain mortgage insurance for properties it covers. Language regarding choice-limiting restrictions was not included in the environmental review chapter of the original MAP Guide published in 2000, but as a result of incremental changes over time, these requirements have expanded in more recent versions.

To support application of choice-limiting restrictions to its mortgage insurance programs, HUD has repeatedly pointed to Section 9.2.1 of the MAP Guide. According to subsection 9.2.1(C),

> HUD environmental policy requires that there be a limitation of certain activities or actions by any direct or indirect parties to the transaction from the time of pre-application (or application for straight to Firm deals) until HUD has completed the environmental review process. Specifically, no action concerning the proposal shall be taken prior to completion of the environmental review which could: (1) have an adverse environmental impact, (2) limit the choice of reasonable alternatives, or (3) prejudice the ultimate decision on the proposal. Activities that limit the choice of reasonable alternatives include an action or commitment to repair, rehabilitate, construct, demolish or clear the site.

2020 MAP Guide at § 9.2.1(C). Borrowers risk rejection of their application if they undertake activities in violation of HUD's requirements and lenders are required to advise borrowers about these requirements. *Id.*, §9.2.1(C)(3) and (5). Aside from the reference to the requirements of "HUD environmental policy," however, Section 9.2.1 provides no regulatory or legal support for imposing these choice-limiting restrictions on HUD mortgage insurance programs, including Section 221(d)(4) and Section 223(f) loans.

More recently, we received a short memorandum (the "Memorandum") which expressly claims that loans made pursuant to the Section 223(f) program are subject to choice-limiting restrictions. See <u>Attachment A</u>. Although the author is not identified, we understand that Memorandum was prepared by staff of HUD's Office of Community Planning and Development ("CPD"), which oversees implementation of HUD's environmental review process. *Id.*, §50.10(b). Generally, the Memorandum makes unobjectionable statements about the scope of NEPA review government-wide. However, it also contends that even matters that

are categorically-excluded are not completely free from environmental review, and that broadly contends that to accommodate that review, such matters are also subject to choice limitation:

> Since HUD cannot determine whether extraordinary circumstances requiring an [environmental assessment or "EA"] are present until completion of the categorically excluded review, and HUD cannot permit choice-limiting actions to occur until completion of the EA, HUD also may not permit choice limiting actions prior to the completion of the categorically excluded review.

Memorandum at 1. Oddly, to support its claim that Section 223(f) loans are subject to choice limitations, the Memorandum cites CEQ rules, but does not identify any support for such choice-limiting restrictions in HUD's own environmental review rules in either Part 50 or Part 58.

The Memorandum further argues for an expansive application of choice-limiting rules as applied in the MAP Guide, stating that "[t]he restrictions on choice-limiting actions described [in] MAP [Guide] 9.2.1.C help to ensure that HUD FHA Multifamily programs including Section 223(f) comply with the laws and authorities listed above." *Id*. at 2. The Memorandum cites to the 2011 and 2016 MAP Guides to further support its claim that Section 223(f) loans are subject to choice limitations. *Id*.

However, the original MAP Guide published in 2000 and subsequent revisions published in 2002 did not include language regarding restriction on choice-limiting actions in the respective environmental review chapters. The restrictions were first added in the 2011 MAP Guide and have expanded over time. As the Memorandum points out, the 2011 MAP Guide included restrictions on choice-limiting actions, including "acquisition, demolition, modification of a wetland or significantly adversely affecting a historic property." MAP Guide, Sec. 9.2.A.3, Aug. 2011. Activities included under these limitations expanded in 2016 to also include repair, rehabilitation, and site clearance. MAP Guide, Sec. 9.2.A.6, Jan. 2016. As stated above, the 2020 MAP Guide points to "HUD environmental policy" as the source for these requirements, which mirrors language in the 2011 and 2016 MAP Guides, but none of these versions cite to a provision in 24 CFR Part 50 that incorporates restrictions on choice-limiting actions into the application process for the 223(f) program. MAP Guide, Sec. 9.2.A.3, Aug. 2011; MAP Guide, Sec. 9.2.A.6, Jan. 2016; MAP Guide, Sec. 9.2.1.C, Mar. 2021.

3. <u>Extending Choice Limitation to HUD's Mortgage Insurance Programs Imposes Additional Costs, Delays, and Complexity, especially in the 223(f) Program.</u>

CPD's policy of imposing choice limitation on HUD's insured mortgage programs imposes additional cost, delay and complexity on participating developers and lenders. While all mortgage insurance programs would suffer from imposing choice-limiting restrictions, the Section 223(f) program provides particularly clear examples of these unnecessary burdens. The Council has collected a number of examples of existing projects that were in the process of

seeking Section 223(f) refinancing when they were told that those renovations violated HUD's expanded choice-limiting restrictions:

- In Trenton, NJ, the owner planned to expand the property's community building that was to be used for an after-school care program for low-income children. As a result of HUD's position, HUD funds will not be used for the planned expansion.
- In Houston, TX, the owner of a market rate property had plans to convert its one-bedroom units to 2 bedrooms, and to convert its 2-bedroom units to 3 bedrooms, at an approximate cost of $8,000/unit. Application of choice limitation to this project would stop the planned renovations while they are reviewed by HUD, completely upsetting the owner's carefully-planned schedule of planned vacancy and rolling renovations, increasing the owner's cost and delaying these renovations that would benefit resident families.
- In Tunica Springs, MS, the choice limitation restrictions interfered with a number of planned renovations at a market-rate property, including unit upgrades, accessibility modifications, HVAC replacements, amenity upgrades, roofing replacements, and exterior lighting improvements. Here too, imposition of choice limitation would upset the planned vacancy schedule and would also negatively impact the lending process: the planned renovations would have increased rents at the property, allowing a larger loan value. Delays caused by HUD review will frustrate the owner's relation with its tenants, whose support for the planned renovations is critical in light of the anticipated displacement the renovations will require.
- In a market rate property in Mesa, AZ, the owner had acquired a property where 42 units had not yet been renovated. Renovations for the remaining units, which will be made at turnover, are budgeted at $10,000/unit. The project was submitted to HUD in March and is not expected to begin environmental review until July 2021 at the earliest. Because of the need to vacate units to complete renovations, units will be held offline until approval is obtained, resulting in a loss of rental income from the vacant units, and will also complicate contractor dealings, material ordering and deliveries, and other matters.
- In a market rate project in Robbinsville, MS, unit upgrades were planned for a transaction expected to close in April 2021, including extensive accessibility modifications. Applying choice limitations while HUD reviews the transaction will halt ongoing work, disrupt the vacancy schedule, delay obtaining "Green" certification, resulting in higher resident utility bills, delay important accessibility improvements, and complicate relations with tenants, whose support for the renovation program is important.
- In connection with multiple 223(f) loan applications for properties in the Midwest, a lender asked about the application of the choice-limiting rules contained in Sec. 9.2.1(c) of the 2020 MAP Guide to planned repairs of the property. In response, HUD explained that to the extent that repairs had been identified prior to the submission of the Project Capital Needs Assessment ("PCNA"). According to HUD, once an application for a 223(f) loan is submitted to HUD, no repair activities associated with the property can be

completed until HUD has completed its review, except for "maintenance" activities permitted by Notice CPD-16-02 or for "Life Safety" repairs. The HUD guidance demonstrates the increasing complication of applying choice-limiting restrictions to Section 223(f) loans, with HUD expanding both the scope of the requirement and exceptions to it, while providing no regulatory basis for either.

- Another property faced the need to do radon mitigation and to replace sewer lines, to avoid future backups. HUD advised that the radon mitigation was a life/safety issue that was permitted notwithstanding the restrictions on choice-limiting activities, but required the borrower to submit waivers nevertheless to permit the work to proceed.
- At a Florida property, the PCNA revealed that the property failed to meet legally-required accessibility requirements. When the lender approached HUD to seek guidance with respect to whether the borrower could proceed with these repairs, HUD's response was that once the Section 223(f) application was filed, further repairs – including the legally-required accessibility requirements – could not proceed until HUD's review was completed. HUD's ad-hoc application of its choice-limiting rules demonstrates how difficult it is for borrowers and lenders to figure out in advance what is or is not permitted. HUD's response also improperly places borrowers in a double-bind, where they face possible rejection of their application if they initiate urgently needed repairs after an application is filed, or possible legal action or risks to life and health if they do not.

This is just a small sample of the impact of expanding the scope of choice-limiting restrictions to 223(f) lending activities. Similar additional cost, delay and complications can be expected throughout the portfolio of HUD's insured mortgage programs, including the Section 221(d)(4) and Section 223(f) programs, if HUD approval becomes subject to choice limitations.

B. Discussion

1. CEQ has narrowed the scope of "Major Federal Actions" to essentially eliminate loan guarantees/mortgage insurance from NEPA coverage where the Federal insurer lacks sufficient control over the environmental impact of the Federal assistance

As noted above, Congress adopted NEPA to provide a mechanism for environmental review of "Major Federal Actions" that may significantly affect the quality of the human environment. On July 16, 2020, however, CEQ published a final rule (the "Final Rule") amending NEPA's implementing regulations to, among other things, clarify the definition of "Major Federal Action." Specifically, the Final Rule amended 40 CFR § 1508.1 to explicitly exclude from the definition of Major Federal Action "[l]oans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of such assistance…." See 85 Fed. Reg. 43304-01, 43347 (July 16, 2020). In support of this clarification, CEQ stated in the preamble to the Final Rule that loan guarantee programs do not provide Federal funding to participating borrowers, and no Federal funds are expended under these programs unless borrowers default on the applicable loans. In the context of NEPA,

courts have held that "[t]he mere possibility of [F]ederal funding in the future is too tenuous to convert a local project into [F]ederal action." *Pres. Pittsburgh v. Conturo*, No. 2:11cv998, 2011 U.S. Dist. LEXIS 101756, at *1, *13 (W.D. Pa. Sept. 9, 2011). *See also, Rattlesnake Coal v. U.S. EPA*, 509 F. 3d. 1095, 1102 ("The United States must maintain decisionmaking authority over the local plan in order for it to become a major [F]ederal action.").

This limitation is consistent with the mandate of NEPA, as stated in the Final Rule: to require Federal agencies to consider environmental impacts of proposed actions as part of agencies' decision-making process. The decision of whether to guarantee or insure a mortgage is necessarily a decision of financial risk, and not environmental impact. Mortgage guarantee and insurance programs are, at their core, relationships between lender and insurer.[2] Where no Federal funding is expended and the Federal agency does not maintain sufficient control of the environmental effects of the subject activity, there is no Major Federal Action to trigger NEPA.[3]

2. **The justifications that allow HUD to impose choice-limiting restrictions on third-parties exercising HUD's environmental review duties do not apply when HUD is conducting environmental reviews itself.** HUD's practice of expanding the scope of its environmental review requirements for its mortgage insurance programs, especially the Section 223(f) program, violates both the Administrative Procedure Act and the requirements of HUD's own administrative practice rules. When it adopted its rules implementing NEPA, HUD created two separate frameworks for analyzing the environmental impacts of its own actions, which are set forth in Part 50, and rules for assessing the impacts of actions to be undertaken by third-parties, including HUD grantees, which are set forth in Part 58. As noted above, one of the chief differences between the Part 50 and Part 58 rules is the extensive set of prohibitions against "choice limiting activities" imposed on third parties by Part 58. Under these rules, HUD grantees and other third parties are prohibited from engaging in a broad range of activities, such as site development and property acquisition, until the environmental review process is completed. As HUD has explained, "[t]he regulations at 24 CFR Part 58 implement statutory authorities that permit certain entities other than HUD to assume HUD's environmental responsibilities for various HUD programs." 68 Fed. Reg. 56116, 56116 (Sept. 29, 2003). In other words, the entities covered by Part 58 exercise environmental activities *in place of HUD*, and HUD therefore had to impose these choice-limiting restrictions to prevent those third parties from undertaking projects and actions – and possibly committing Federal funds – before suitable environmental review was completed.

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[2] Section 42 of the HUD Regulatory Agreement for FHA insurance programs (Form HUD-92466M) explicitly states that the only parties to the mortgage insurance are the approved lender and HUD, and that the only intended beneficiary to the mortgage insurance is the approved lender.

[3] Although applications for FHA mortgage insurance, which applications include plans and specifications, are subject to HUD review and approval as part of the standard underwriting process, such review and approval should not be viewed as sufficient control over environmental effects of a project to constitute "Major Federal Action."

The justification for §58.22 is that in the absence of these "choice limiting activities" prohibitions, HUD grantees and other third parties participating in HUD programs covered by Part 58 could commit themselves – and possibly HUD funding – to projects and actions that might not meet NEPA requirements. Indeed, this policy of assuring compliance with HUD's delegated duties is stated expressly in §58.22 itself:

> (c) If a recipient is considering an application from a prospective subrecipient or beneficiary and is aware that the prospective subrecipient or beneficiary is about to take an action within the jurisdiction of the recipient that is prohibited by paragraph (a) of this section, then the recipient will take appropriate action to ensure that the objectives and procedures of NEPA are achieved.

24 CFR §58.22(c). Thus, in the regulation itself, HUD explains that imposing choice-limiting restrictions was intended to make sure that those entities to which HUD delegates its NEPA responsibilities did not prematurely undertake actions that might compromise the integrity of the environmental review process entrusted by Congress to HUD. In other words, the prohibition on choice-limiting activities was a necessary component of HUD's NEPA oversight responsibilities, to make sure that state and local agencies and other grantees did not abuse the environmental review tasks HUD was delegating to them.

None of those considerations apply to environmental review of HUD's own projects and actions under Part 50. By definition, all environmental matters covered by Part 50 are undertaken by HUD itself, so the possibility that a third party will abuse its delegated authority and initiate a project or take other action without appropriate environmental review is nonexistent. Part 50 applies to HUD's own actions, and so the threat that justifies imposing choice-limiting restrictions in Part 58 – the possibility that a grantee or other third party will initiate a project without appropriate environmental review – simply does not arise where HUD retains ultimate environmental review authority.

3. **HUD cannot informally impose a restriction on actions covered by Part 50 that is expressly excluded from those regulations**. If HUD had wished to impose choice-limiting activities on entities participating in programs covered by Part 50, it would have done so as part of its past regulatory rulemaking activities. Certainly, in drafting its Part 58 environmental review provisions, HUD demonstrated an intent and an ability to impose choice-limiting restrictions on state and local entities and other grantees to which, as discussed below, HUD was delegating its environmental review authority. But nothing in the four corners of Part 50 indicates that HUD intended to impose the same choice-limiting restrictions on activities covered by Part 50, such as its mortgage insurance programs like Section 221(3)(4) and Section 223(f) loans, that it imposed on activities and entities covered by Part 58. Clearly, HUD understood how to engage in rulemaking to impose choice-limiting restrictions on those third parties in connection with activities covered by Part 58. One of the oldest principles of legal constructions is that where two rules address similar issues and a unique provision is inserted

into one rule but not the other, the omission of the unique provision is no accident but reflects a conscious decision:

> [W]here the legislature has inserted a provision in only one of two statutes that deal with closely related subject matter, it is reasonable to infer that the failure to include that provision in the other statute was deliberate rather than inadvertent.

In re Federal-Mogul Inc., 684 F.3d 355, 373 (3d Cir. 2012), quoting 2B ***Sutherland Statutes and Statutory Construction*** § 51.2.

The fact that HUD did not include similar language with respect to its own environmental review activities under Part 50 demonstrates either that HUD recognized that its Part 50 procedures did not incorporate choice-limiting restrictions, that it lacked authority to adopt such rules for activities covered by that part of its regulations, or that such restrictions were unnecessary where HUD was conducting the environmental review. In any case, the omission of choice-limiting restrictions from Part 50 must be viewed "as deliberate rather than inadvertent," and forecloses HUD from adopting choice-limiting restrictions with respect to actions covered by Part 50, including Section 221(d)(4), Section 223(f), and other mortgage insurance programs.[4]

4. **HUD cannot impose its choice-limiting restrictions on mortgage insurance programs because HUD has failed to comply with the Administrative Procedure Act and its own administrative requirements.** There are additional reasons, however, why HUD's unilateral decision to impose choice-limiting restrictions on Section 223(f) borrowers is unenforceable. In implementing its environmental review functions under NEPA, HUD properly engaged in a long series of formal rulemaking activities, designed to assure compliance with the Administrative Procedure Act ("APA") and with HUD's own administrative requirements contained in Part 10. According to the APA,

> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> * * *

[4] HUD may argue that imposing choice-limiting restrictions on activities covered by Part 50 is necessary as an administrative expedient, to allow it time to conduct its own environmental review. Since HUD has never formally discussed choice-limiting restrictions in connection with its past Part 50 rulemaking, we have no reliable statement from HUD with respect to how or whether choice-limiting restrictions relate to its other tasks under Part 50. One thing we can be sure of, however, is that absent appropriate rule-making, mere administrative convenience does not support imposing choice-limiting restrictions on otherwise legitimate activities of private sector entities.

> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.

5 U.S.C. § 552(1)(D). Thus, when adopting "substantive rules" or "statements of general policy or interpretations of general applicability," agencies are required by the APA to engage in formal rulemaking. As one court explained, "[g]enerally ... binding regulations are required to be published in the Federal Register." *Feldman v. U.S. Dept. of Hous. & Urban Dev.*, 430 F. Supp. 1324, 1327 (E.D. Pa. 1977). The purposes of this rule are obvious – through pursuing notice and comment rulemaking, an agency legitimizes its decision-making process by submitting proposals to public scrutiny, so that the public may have an opportunity to engage in the process of formulating the rules that society will live by. Formal rulemaking is also important to avoid the possibility of adopting procedures that overstep the limitations of statutory authority, or that are impractical or inefficient. *Steinhorst Assocs. v. Preston*, 572 F. Supp. 2d 112, 119 (D.D.C. 2008)("[T]he notice requirement improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review").

In addition to the formal requirements of the APA, HUD's own administrative rules compel it to engage in rulemaking "with respect to all HUD programs and functions":

> It is the policy of the Department of Housing and Urban Development to provide for public participation in rulemaking with respect to all HUD programs and functions, ***including matters that relate to public property, loans, grants, benefits, or contracts*** even though such matters would not otherwise be subject to rulemaking by law or Executive policy.

24 CFR §10.1 (emphasis added).[5] The balance of Part 10 sets out in minute detail the elaborate procedures HUD requires for its rulemaking activities, including publication of Advance Notice of Proposed Rulemaking in the Federal Register (§§10.7 and .8), and rules for public participation in that process:

[5] There are some exceptions to HUD rulemaking activities. According to other portions of §10.1, "[n]otice and public procedure may also be omitted with respect to statements of policy, interpretative rules, rules governing the Department's organization or its own internal practices or procedures, or if a statute expressly so authorizes." None of these exceptions excuse HUD's failure to engage in formal rulemaking activities with respect to extending choice-limitation restrictions to) participants in its mortgage insurance programs, including the Section 221(d)(4) and Section 223(f) programs. For example, HUD's decision to impose choice-limiting restrictions on borrowers is a requirement for participation in its mortgage insurance programs – it is not a mere "statement[] of policy" or "interpretive rule[]." Likewise, the prohibition is imposed on borrowers and lenders who want to participate in those programs and so does not relate to HUD's "organization or its own internal practices or procedures." Nor is there anything in NEPA itself that expressly authorizes HUD to impose choice-limiting restrictions on borrowers in its mortgage insurance programs.

> (a) Unless the notice otherwise provides, any interested person may participate in rulemaking proceedings by submitting written data, views or arguments within the comment time stated in the notice. . . .

Id., §10.10(a). The procedures outlined in Part 10 demonstrate a policy of rigorous rulemaking seeking public comment and input in all matters relating to HUD "programs and functions, including matters that relate to . . . loans . . . ." Clearly, imposing choice-limiting restrictions on parties participating in the Section 223(f) mortgage refinance program relates to HUD "programs and functions including matters that relate . . . to loans," and should have been the subject of rulemaking pursuant to §10.1.

Courts have recognized that Part 10 imposes a hefty burden on HUD to engage in rulemaking when it is considering any matters "with respect to all HUD programs and functions, including matters that relate to . . . loans." As one court explained, "HUD has voluntarily subjected itself to rulemaking requirements that are substantially the same as those prescribed in the APA." *Lee v. Kemp,* 731 F. Supp. 1101, 1112-13 (D.D.C. 1989). As another court explained, "HUD has expressed a policy of promulgating all of its substantive rules in accordance with the [APA]." *St. Nicholas Apartments v. United S*tates, 943 F. Supp. 966, 969 n.1 (C.D. Ill. 1996). This requires notice and comment rulemaking including publication of proposed rules in the Federal Register. *Farrington Apartments of Lafayette v. United States*, 7 Cl. Ct. 647, 651 (1985) ("HUD regulations require that any regulation promulgated by the agency be published in the Federal Register"). Because it chose not to observe in its self-imposed rulemaking requirement, the choice-limiting restrictions imposed by the CPD Memorandum cannot be made mandatory. *Steinhorst Assocs.*, 572 F. Supp. 2d at 120 (vacating HUD regulation and deeming it invalid because "[a]gency actions [that] establish new methods for determining the obligations of the regulated parties and the distribution of funds are subject to notice and comment rulemaking") (citing *Committee for Fairness v. Kemp,* 791 F. Supp. 888, 895 (D.D.C. 1992)); *see also Bridgeport Towers, LLC v. Berrios*, No. BSRP079841, 2013 WL 6171376, 57 Conn. L. Rptr. 108 at *1, *3 (Conn. Super. Ct. Mar. 20, 2013) (rejecting enforceability of tenant eviction procedures contained in HUD handbook: "If HUD's intent was to promulgate the Handbook as regulatory law, it would presumably have chosen to codify its requirements in the Code of Federal Regulations.") Where, as here, HUD imposes requirements on third-parties that should have been subject to formal rulemaking pursuant to Part 10, the requirements are not enforceable.

Where HUD fails to comply with the rulemaking requirements of the APA and Part 10, the failure is fatal to the enforcement of noncompliant policies. In *Committee for Fairness,* the court addressed complaints raised by a number of public housing authorities that complained about changes made by HUD in calculating the PHAs' operating subsidies. In the 1970s, HUD published regulations explaining that process but by 1982, some HUD officials determined the method of calculating portions of the operating subsidies were "unsatisfactory" and thereafter began changing the operating subsidy formulas by a series of memorandums and handbook modifications, some of which were imposed retroactively. *Id.*, 791 F. Supp. at 891-893.

Reviewing HUD's conduct, the court explained that both the APA and Part 10 applied to HUD's post-hoc efforts to change its regulations by administrative "guidance":

> HUD is subject to the rulemaking requirements of the Administrative Procedure Act (APA). 24 C.F.R. Part 10; Accordingly, when HUD intends to promulgate a substantive or legislative rule (as distinguished from an interpretative rule), it must first afford interested persons general notice of the proposed action and an opportunity to comment. . . . Substantive or legislative rules have also been described as those "affecting individual rights and obligations," for this is "an important touchstone for distinguishing those rules that may be binding 'or have the force of law.'"

Id. at 893 (citing 24 CFR Part 10; other internal citations omitted). Ultimately, the court enjoined enforcement of the modified subsidy formula due to HUD's failure to comply with its notice and comment rulemaking duties under the APA and Part 10. *Id*. at 898. See also *Steinhorst*, 572 F. Supp. 2d at 118-125 (adjustment to Section 8 contract renewal procedures were legislative rules and in the absence of compliance with notice-and-comment rulemaking, were invalid).

Just this month, HUD itself recognized the importance of the notice and comment requirements of the APA and Part 10, and the consequences of failing to comply with those duties. On June 10, 2021, HUD published an interim final rule (the "AFFH Rule") reestablishing provisions of its Affirmatively Furthering Fair Housing ("AFFH") regulations that had been peremptorily repealed last year by HUD. 86 Fed. Reg. 30779 (June 10, 2021). In 2015, HUD had overhauled its existing rules requiring state and local agencies and other grantors to undertake extensive planning activities to demonstrate compliance with their statutory duty to affirmatively further fair housing. Those rules proved to be extremely controversial and in January 2020, HUD proposed to repeal and replace the 2015 rule. 85 Fed. Reg. 2014 (Jan. 14, 2020). HUD proposed yet another overhaul of the AFFH regulations later in 2020. Thus, according to the preamble to the AFFH Rule, "on August 7, 2020 . . . HUD abandoned [the January 2021] proposed rulemaking" and adopted a new AFFH rule [the "August 2020 Rule"] "which not only repealed the 2015 AFFH rule, but eliminated the regulatory framework that preexisted that rule." 86 Fed. Reg. at 30783. Without complying with notice and comment rulemaking, the August 2020 Rule adopted a variety of new definitions that, according to the AFFH Rule, were "not a reasonable interpretation of the statutory mandate" to affirmatively further fair housing. *Id*.

The parallels between HUD's flawed adoption of the August 2020 Rule and its imposition of choice-limitation restrictions on mortgage insurance programs are both obvious and startling. In both cases, HUD

> downplayed the statutory requirement that HUD maintain its Part 10 regulation, as well as the general principle that notice-and-comment rulemaking for major legal change best serves the public interest.

AFFH Rule at 30784. As the AFFH Rule explains, "fundamental changes in how the agency understands and implements a statutory obligation are of the magnitude that should warrant notice and comment." *Id*. at 30785. If notice and comment rulemaking is good enough for HUD's affirmatively furthering fair housing rules, it is good enough for applying choice-limiting restrictions to the Section 221(d)(4), Section 223(f) and other mortgage insurance programs. Following the same arguments made by HUD in the AFFH Rule, imposing choice-limiting restrictions on participants in its mortgage insurance program in the absence of formal rulemaking is as invalid as the changes wreaked by the August 2020 Rule. If failure to comply with those rulemaking requirements condemned the August 2020 Rule, they also condemn HUD's imposition of choice-limiting restrictions on participants in its mortgage insurance programs.

There is no question that imposing choice-limiting restrictions on participants in HUD's mortgage insurance programs, including the Section 221(d)(4) and Section 233(f) programs, is a "substantive or legislative rule," because it directly impacts their ability to operate and maintain their properties – restrictions that unmistakably "affect[] individual rights and obligations" of mortgage insurance program participants. As HUD has recently recognized, agency action carrying such potent consequences must be subject to formal rulemaking to meet the requirements of the APA and Part 10. Similarly, HUD's decision to impose choice-limiting restrictions on parties participating in the mortgage insurance programs should have been subject to formal notice and comment rulemaking. Because HUD failed to comply with its rulemaking responsibilities, it cannot impose choice-limiting restrictions through the MAP Guide or other mere "interpretive" rules.

5. **It is particularly inappropriate to impose choice limitation restrictions on the Section 223(f) program.** The preceding arguments show that there is no basis to impose choice-limiting restrictions on Section 221(d)(4) or other mortgage insurance programs generally. But it is particularly unwise and inappropriate to impose such restrictions on Section 223(f) loans. As explained in more detail elsewhere, Section 223(f) loans necessarily involve existing properties, many of which need repairs or legally-required improvements, including requirements needed to comply with Section 504 and other accessibility requirements. Because most environmental impacts at existing properties have already been incurred, and because only existing properties face the need to make repairs, applying choice-limiting restrictions to existing properties is particularly burdensome and frustrating to owners, especially given the ad-hoc nature of HUD's guidance concerning what repairs are allowed or prohibited. The factual examples discussed in Section A(3) above show that imposing choice limitation restrictions in Section 223(f) loans unnecessarily imposes a variety of burdens, including extra cost, delay and needless complexity. To take just one example, in connection with the restrictions imposed by MAP Guide §9.2.1(C), how could any repair at an existing property actually "limit the choice of

reasonable alternatives"? Imposing HUD's choice-limiting restrictions onto Section 223(f) applicants improperly puts housing providers at risk of inadvertently making their properties ineligible for those loans every time they make even the most basic and urgent repairs.

6. **HUD should clarify that most Section 223(f) refinancings are categorically excluded from any environmental review.** The prior sections have shown that mortgage insurance activities by HUD are not "Major Federal Actions" subject to NEPA review or, if they are subject to NEPA review, should not be subject to choice-limiting restrictions of the sort imposed by the CPD Memorandum. Part 50, however, already embraces the concept that many refinancings and rehabilitation activities are categorically excluded from environmental review. See 24 CFR §§ 50.19(b)(21) and 50.20(a)(2). That's appropriate: for example, loans insured pursuant to Section 223(f) by definition apply to refinancings of existing projects, many of which were completed many years ago. As noted above, to the extent that such projects involved any environmental consequences at all – which is a matter of pure speculation – those consequences have already occurred and should not be the subject of further environmental review. For that reason, HUD should adopt the default position that Section 223(f) loans should generally be excluded from environmental review under Part 50.

Part 50 recognizes that refinancing of existing buildings should generally be excluded from environmental review. Thus, as noted, §50.19(b) identifies a long list of 24 different HUD programmatic activities that are categorically excluded from review under NEPA and other federal statutes listed in §50.4, including refinancings of existing HUD-insured mortgages:

> (21) Refinancing of HUD-insured mortgages that will not allow new construction or rehabilitation, nor result in any physical impacts or changes except for routine maintenance; however, compliance with § 50.4(b)(1) is required.

24 CFR §50.19(b)(21). Thus, subsection (b)(21) expressly recognizes that by itself, a refinancing should not trigger Part 50 review. An exception is carved out for "new construction or rehabilitation, [and for projects that do not] result in any physical impacts or changes except for routine maintenance."[6]

The scope of that exception has remained a matter of debate. In 2016, CPD issued Notice CPD-16-02 (the "Notice"), providing guidance about the interpretation of what the term "maintenance" means in connection with §50.19(b)(21). The definition adopted by the Notice, however, is excessively narrow and frustrates the legitimate needs of property owners and residents. Thus, according to the Notice, "maintenance activities slow or halt deterioration of a building and do not materially add to its value or adapt it to new uses." Notice at 2. Further, the Notice says that "[f]or environmental review purposes, deferred maintenance that has

[6] Compliance with §50(b)(1), dealing with compliance with the Flood Disaster Protection Act (42 U.S.C. §4001-4128) and the National Flood Insurance Reform Act of 1994 (Pub. L. 103-325) remains required.

resulted in a need of extensive repairs or rehabilitation does not qualify as maintenance." *Id*. at 3. The Notice provides "general examples of maintenance activities for environmental review purposes," such as

> (1) Cleaning activities;
> (2) Protective or preventative measures to keep a building, its systems, and its grounds in working order;
> (3) Replacement of appliances that are not permanently affixed to the building;
> (4) Periodic replacement of a limited number of component parts of a building feature or system that are subject to normal wear and tear;
> (5) Replacement of a damaged or malfunctioning component part of a building feature or system. (Replacement of all or most parts or an entire system is not maintenance.)

Id.

The problem with the guidance provided by the Notice is that it is both too specific and too general. It includes as "maintenance activities" efforts that "slow or halt deterioration of a building," but then says that "replacement of appliances," which has nothing to do with slowing or halting deterioration of a building, also are forms of maintenance activities. Likewise, "deferred maintenance that has resulted in a need for extensive repair and rehabilitation"– which would seem to be the epitome of something needed to "slow or halt the deterioration of a building" – is not maintenance. HUD says that "replacement of a damaged or malfunctioning component part of a building features or system" is okay, but "replacement of all or most parts or an entire building system is not maintenance." So apparently replacement of a single shingle is an appropriate maintenance activity but reroofing a building in dire need of repair is not. Likewise, repairing a leaky faucet presumably is an allowed maintenance activity but replacing non-code plumbing with new, safer and more reliable components is not. For that matter, how does a housing provider, a lender, or a HUD official figure out what the difference is between "deferred maintenance" which apparently is forbidden, and "protective or preventative measures to keep a building, its systems and its grounds in working order," which are allowed? Indeed, it appears that HUD's definition of maintenance would restrict property owners to steps needed to prevent building collapse, and would not include additional measures, like upgrading surfaces, installing additional insulation, or other measures that could materially add to the useful life of a building, and to the quality of the residents' life. The "guidance" provided by the Notice is riddled with caprice, ambiguity and inconsistency, and in some cases is simply nonsensical, making it virtually impossible for anyone to accurately predict what is a "maintenance activity" and therefore, what the scope of the categorical exclusion provide by §50.19(b)(21) actually is.

HUD should withdraw the Notice and reissue guidance that focuses on the actual expected environmental impact of maintenance activities. Given the fact that maintenance activities only apply to existing buildings, then any steps reasonably related to maintaining the physical components of an existing building and its common areas should be deemed to constitute

allowed maintenance activities that do not trigger environmental review. Further, allowance should be made to comply with any modification of an existing structure necessary to maintain compliance with applicable laws, such as measures to promote accessibility under Section 504 of the Rehabilitation Act of 1973. Rather than attempt to codify all of the possible types of permitted maintenance activities, HUD should consider identifying a narrow list of activities that would be likely to result in measurable environmental impacts different from those already associated with the existing buildings and improvements. Again, the focus should not be on defining what sort of maintenance activities are allowed – the Notice demonstrates that is a virtually impossible task – but rather on what activities at an existing structure are likely to have consequential environmental impacts. Anything without such impacts should presumptively be treated as "maintenance activities" that do not remove a property from the categorical exclusion provided by §50.19(b)(21).[7]

Conclusion

NEPA remains a cornerstone of the nation's effort to protect the environment, and HUD has an important role to play in that process. HUD's role, however, must comport with both the duties assigned to it by NEPA and other equally valid rules imposed by the APA and Part 10, that constrain the means to carry out that task. Here, HUD has improperly attempted to extend its oversight of the operations of would-be borrowers beyond the bounds set by its own regulations. In order to meet both its environmental and administrative duties, HUD should withdraw the CPD Memorandum and make clear that borrowers and lenders participating in the Section 221(d)(4), Section 223 (f), and other HUD mortgage insurance programs are not subject to choice-limiting restrictions, and should clarify its guidance concerning the scope of §50.19(b)(21), to make clear that section allows housing providers to take reasonable actions to maintain an existing building and its improvements and to comply with applicable laws.

[7] Because, as explained above, there is no regulatory basis to apply choice-limiting restrictions to activities covered by Part 50, there is no basis to apply such choice-limiting restrictions to activities that are or may be categorically excluded by §50.19(b)(21), as the Memorandum claims.

Please let us know if you have any questions. We would be happy to arrange a video conference with members of the Multifamily Lenders Council and the Mortgage Bankers Association to discuss this letter with you. We look forward to your response.

Very truly yours,

Harry J. Kelly

HJK

cc: Damon Smith, Principal Deputy General Counsel, Acting General Counsel
Ethan Handelman, Deputy Assistant Secretary for Multifamily Housing
Tom Bernaciak, Deputy Director Multifamily Production
Amy Brown, Deputy General Counsel for Housing Programs

ATTACHMENT A

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Choice Limiting Actions in Categorically Excluded FHA Activities

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) requires "all agencies of the Federal Government" to prepare environmental reviews for Federal actions. NEPA authorizes the President's Council on Environmental Quality (CEQ) to promulgate regulations governing federal agency implementation of NEPA, which are in turn implemented by HUD's own regulations in 24 CFR 50. As explained at 24 CFR 50.1(c),

> "The regulations issued by CEQ at 40 CFR parts 1500-1508 establish the basic procedural requirements for compliance with NEPA. These procedures are to be followed by all Federal agencies and are incorporated by reference into this part."

It is important to note that HUD and other agencies are permitted by CEQ's implementing regulations to categorically exclude certain activities from the Environmental Impact Statement (EIS) and Environmental Assessment (EA) levels of review *under* NEPA. However, these provisions do not exclude such activities *from* NEPA as a whole. CEQ's 40 CFR 1501.4 allows agencies to identify "actions that do not normally have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement."[1] For such activities the agency must nevertheless "evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect."[2] HUD identifies such circumstances, if present, by completing the categorically excluded review. If extraordinary circumstances are present, NEPA then requires HUD to conduct an EA for the proposed activity. Since HUD cannot determine whether extraordinary circumstances requiring an EA are present until completion of the categorically excluded review, and HUD cannot permit choice-limiting actions to occur until completion of the EA,[3] HUD also may not permit choice limiting actions prior to the completion of the categorically excluded review.

Apart from NEPA and its implementing regulations, other federal laws and authorities listed in 24 CFR 50.4 that are applicable to categorically excluded reviews carry their own restrictions on activity prior to completion of the relevant review, including any required intergovernmental consultation and public notice. Under the National Historic Preservation Act, for example, "[t]he goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties."[4] Commencing rehabilitation of a property prior to completion of the consultation clearly conflicts with this process.[5] Accordingly, the Act prohibits activities such as demolition or building modification – even prior to application – that are carried out with the intent of circumventing historic preservation review.[6] Due to the fact that the Act and implementing regulations do not clearly specify what constitutes intent, resolving potential violations of this restriction is a complex process that may delay HUD approval significantly or even indefinitely.

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[1] 40 CFR 1501.4(a).
[2] 40 CFR 1501.4(b).
[3] 40 CFR 1506.1(a). As noted in the preamble to CEQ's 2020 final rule, this prohibition on choice-limiting actions was revised to cover Findings of No Significant Impact (resulting from an EA) as well as EISs, "to clarify existing practice and judicial determinations that the limitation applies when an agency is preparing an EA as well as an EIS." 85 FR 43335.
[4] Regulations of the Advisory Council on Historic Preservation (ACHP) at 36 CFR 800.1(a).
[5] The ACHP regulations have been in effect with minor amendments since 2000.
[6] 54 U.S.C. § 306113.

Similarly, for projects in a floodplain or involving construction activities in a wetland, HUD's regulations implementing Executive Order 11988 (Floodplain Management) and Executive Order 11990 (Protection of Wetlands) generally require a five-step review and decision-making process for refinancing or rehabilitation involving less than substantial improvement.[7] The regulations require that the proposed action be implemented only upon completion of the decision-making process.[8]

Finally, under 24 CFR 50.3(i), HUD has a responsibility to ensure that properties proposed for HUD program participation are free from toxic or radioactive substances, including radon. To the extent construction work on units during the review process interferes with radon testing under closed conditions representative of normal operation, HUD risks failure to meet its 50.3 responsibility.

The restrictions on choice-limiting actions described MAP 9.2.1.C help to ensure that HUD FHA Multifamily programs including Section 223(f) comply with the laws and authorities listed above. It is therefore important for applicants to adhere to these requirements, including with respect to categorically excluded rehabilitation projects.

HUD's prohibition on choice-limiting actions applied to 223(f)s prior to the 2020 MAP Guide revisions. The 2011 version described which actions do and do not fall within the limits of a choice limiting action, and referenced a few selected examples:

> … Specifically, no action concerning the proposal shall be taken which would: (1) have an adverse environmental impact; (2) limit the choice of reasonable alternatives, or (3) prejudice the ultimate decision on the proposal. Certain actions do not fall within such limitations such as development of plans or designs or performance of other work necessary to support an application for Federal, State or local permits. Other actions do fall within such limitations, such as acquisition, demolition, modification of a wetland or significantly adversely affecting a historic property. If any party is unsure as to whether an action would fall within such limitations it should seek advice and possibly approval by HUD. [Sec. 9.2.A.3, Aug. 2011]

The 2016 version adds the statement:

> Activities that limit the choice of reasonable alternatives include an action or commitment to undertake real property acquisition, **repair, rehabilitation**, construction, demolition or site clearance. [Sec. 9.2.A.6, Jan. 2016]

The 2020 MAP version imposes no new requirement for activities proposed as part of a 223(f) application, but does clarify that existing multifamily properties may continue normal operations during the FHA process, including leasing to new tenants, completing maintenance and repairs related to unit turnover, and regularly scheduled or emergency repairs.

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[7] 24 CFR 55.12(a)(2) and (3).

[8] 24 CFR 55.20(h). This requirement has been in effect since 1994.