Hot Topics:
Davis Bacon, Mortgage Credit, Environmental, and Beyond!

ELA CONFERENCE

MARCH 6, 2018

DAVIS BACON SPLIT WAGE DECISIONS

Where we were…. A 40-year history

Since at least 1976:

Residential meant residential. Period.

- HUD initiated the residential construction category / conducted residential wage surveys
- DOL determined character of work for most HUD projects – never issued split wage decisions
- DOL conducted/s numerous wage investigations on HUD projects – never raised split wage decisions as a concern
- DOL conducted/s numerous training sessions – only recently focused at all on split wage decisions

DOL guidance

All Agency Memoranda (AAM) 130 & 131; Manual of Operations

- AAM 130 (3/17/78): RESIDENTIAL CONSTRUCTION - Residential projects for Davis-Bacon purposes are those involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets and sidewalks.
- AAM 131 (7/14/78): Possible split wages –20% guide / No mention of residential work
- Manual of Operations (04/86): Residential Construction. Residential projects for Davis-Bacon purposes are those involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets and sidewalks, unless there is an established area practice to the contrary.

HUD guidance

Labor Relations Letter 96-03; HUD Handbook 1344.1, Rev 2*

- LR96-03 / HUD HB 1344.1/2:

  The primary component, which determines the character of work, is the housing. Elements such as site work, parking areas, etc., are incidental items and are included within the definition of residential construction.

  Generally, any housing development project (4 stories or less) is classified as "residential." This classification is not altered by the cost of incidental items, even if such costs exceed the guide(s) for "substantial." Except in the most extraordinary circumstances, such as where local industry practice clearly demonstrates otherwise, only residential wage schedules shall be issued for housing development projects.

* Both documents vetted through and approved by DOL prior to issuance.

Where we are…

- 2013: DOL asserts split wages decisions for residential projects citing "long-standing practice" – 20% and/or $1MM rules
- 2016: HUD begins issuing split wage decisions – primarily in Southeast (Atlanta) Region
- 2017: HUD HQ DBLS cedes to DOLs split wage decision position / HUD DBLS seeks guidance from DOL
- 2016/2107: Some projects secure relief through appeals to HUD / DOL
- 2018: HUD Denver/Seattle Region becomes most active assigning split wage decisions

  DOL/HUD split wage decision parameters in flux

- *So far:*
  - DOL hasn't provided written guidance to HUD on its more aggressive stance / application parameters
  - HUD hasn't committed its current standards to writing / shared with industry partners

Where we're going…

- DOL/HUD split wage decision parameters become ever more restrictive
  - 20% and/or $1MM thresholds applied as ***bright line tests***
  - "Disparate" elements viewed in ***aggregate*** *vs* individually
  - More components declared "disparate"
  - Split wage decisions on residential projects ***trend to the norm*** (rather than the extraordinary exception envisioned in earlier DOL/HUD guidance)

- HUD to execute split wage decision application nationwide / preparing "desk aids" for HUD staff
  - Opportunity for industry comment?

What to do…. Keep at it.

- Arm yourselves with knowledge
- As advocates for specific projects
  - Challenge decisions by HUD to apply split wage decisions
  - Insist HUD provide and justify its rationale in writing as to split wage decisions on a project-by-project basis
    - Its difficult to challenge HUDs assessment when HUD won't put that assessment and its bases in writing
    - What written guidance is HUD using? Where are these specific parameters codified?
  - Press on ***area practice – it's the golden rule***

Collaborate

- As industry/proponents of FHA-insured multifamily development
  - Insist DOL/HUD return/adhere to its decades-long policy and practice
    - …that residential projects are subject only to residential wage decisions unless there is an established area practice to the contrary
  - Emphasize split wages are supposed to be rare exception ***not*** the norm
  - Reject the notion that a 20%/$1M threshold has relevance to residential construction
  - Insist that HUD solicit industry input in developing/instituting any new policy / practice

Mortgage Credit

Concentrated Risk

- Increased size of principal balances, recurring approvals and limited staff induced proposed changes to process
- Suggested Changes might include:
  - Increase size of application threshold to $500M
  - Increase length of approval to two years (from one)
  - May require additional review/approvals as loan balances increase

Passive Principals - Defined

- **MAP Guide 8.3.A**: *“ […] "Passive Principals" are persons or entities who singly or with others have limited or no decision-making power or control over the Borrower but who have an ownership interest of 25% or more (10% for corporations) in the Borrower.*

Passive Principals - Defined

- **MAP Guide 8.3.B.3.d***: Principals not subject to credit review: […] Passive Principals who have limited or no decision making power or control over the ownership entity*

Passive Principals

- 8.3.A is designed to track 2530 regs
  - If interest is greater than 25% in a Specified Capacity, assumed to be a Controlling Interest, unless excluded as a passive participant
- 8.3.B.3.d eliminates credit review for passive principals
  - If passive, not subject to credit review, regardless of percent of ownership
  - Also eliminates need to file Form 2530

Foreign Nationals

- Active or Passive Principal (same determination)
- Domestic Principal
  - US citizen with operational control – assets and net worth commensurate with planned project
- Active, require SSN, green card
  - No SSN, cannot be an Active Principal
- Passive, no SSN as no 2530 filing required
  - ITIN's cannot be used in place of an SSN

FLOODPLAINS, FLOODWAYS, AND WETLANDS

8-Step Decision Making Process

When is the 8-step necessary?

- For multi-family, the 8-Step is required whenever a proposed HUD undertaking involves impacts to identified wetlands (inclusive of off-site impacts) and/or the 100-year floodplain.
- For new construction, either:
  - Obtain a Conditional Letter of Map Amendment (CLOMA) or Conditional Letter of Map Revision (CLOMR) removing the entire property from the floodplain, or
  - HUD must conduct the 8-step process, as defined in in 24 CFR Part 55.20, and a Conditional Letter of Map Amendment (CLOMA), Conditional Letter of Map Revision based on Fill (CLOMR-F), or Conditional Letter of Map Revision (CLOMR) removing the proposed structure(s) from the floodplain, must be obtained.
- For existing properties:
  - A modified 8-step (5-step process) must be conducted, which includes an elevation survey to verify that building grade levels in relation to the flood plain elevation.
  - Publishing of an Early and Final Public Notices and Evaluate Practical Alternatives steps are omitted.

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8-Step Decision Making Process

24 CFR 55.20

HUD must complete the 8-Step analysis, with assistance from the lender/consultant to determine that there is no practical alternatives to the project.

- Step 1. Determine whether the proposed action is located in 100-year floodplain (or 500-yr for critical action).
- Step 2. Publish "Early Public Notice" of the proposal to consider an action in the floodplain or wetland (15 day minimum comment period).
- Step 3. Evaluate practicable alternatives to locating the proposed action in a floodplain or wetland.
- Step 4. Identify the potential impacts associated with occupancy and modification of the floodplain or wetland.
- Step 5. Design or modify the action to minimize adverse impacts and preserve the beneficial values of the floodplains.
- Step 6. Reevaluate whether proposed action is practicable.
- Step 7. Publish "Final Public Notice" of decision to identify why there is "no practicable alternative," and the alternatives and mitigation measures adopted (7 day minimum comment period).
- Step 8. Implement proposed action with mitigation measures.

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HUD's 8-Step Decision Making Process

Helpful Hints

- Proper identification of the full project scope and boundaries prior to beginning any of the environmental reporting is critical.
- Understanding "functional dependence" and "project aggregation" and being able to identify the proper boundaries of the site up-front.
  - If any portion of the HUD collateral is dependent upon construction of roadways, utilities, etc. with another phase of development, these areas must be included in the environmental reporting and the 8-Step.
- Communication with HUD early and frequent throughout the process is a crucial element of the 8-Step.
  - It is important to note that every step of the Process must be approved by HUD.
  - Notices should not be published without HUD approval on their content.
- The Final Notice cannot be published and the 8-Step Report cannot be finalized, until HUD has approved the environmental reporting.
- All completed agency correspondence (SHPO, USFWS, CZM, etc.) must be included in the 8-Step Process.

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HUD's 8-Step Decision Making Process

Helpful Hints: Regulatory Floodway

- A property would not be eligible for HUD financing if there is regulatory floodway or coastal high hazard area on the property, and there are any improvements within the floodway or the floodplain areas.
  - No structures, parking lots, roadways, fences, landscaped areas, etc. may be located within the floodplain if there is an on-site regulatory floodway or coastal high hazard area, UNLESS the property is exempt per 24 CFR 55.12(c), OR a waiver is approved by HUD.
- Subdividing the regulatory floodway or coastal high hazard area out of the property may allow for development in the identified floodplain areas with proper permitting, documentation, and completion of the 8-step process.
- STAY AWAY FROM FLOODWAYS!!!

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HEROS PARTNER WORKSHEETS

HEROS UPDATE

- HEROS Roll-out for Partners working with RAD was released on February 1, for Part 50 Environmental Reviews only.
- HEROS Roll-out for Partners working with FHA Multifamily has been delayed to May 2018 (estimated).
- Due to the delays, Consultants should continue submitting information using HEROS-compatible worksheets posted on the HUD Exchange (https://www.hudexchange.info/resource/4707/environmental-review-record-related-federal-laws-and-authorities-worksheets/)

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HEROS UPDATE

- A few lessons learned from the HEROS Partner Pilot for RAD transactions:
  - Early and thorough evaluation of all NEPA related laws and authorities is paramount, to maintain compliance with HUD guidelines and streamline HEROS data input.
  - Detailed supporting documentation for all NEPA related laws and authorities is absolutely necessary, again to streamline HEROS data input.
  - Understand that HEROS is not designed solely for MAP Guide compliance.
    - In some cases, HEROS can lead one to believe that compliance has been met; however, further steps to comply with the MAP Guide may be required (ie, vicinity ASTs/explosive and flammable hazards)
  - Early adoption of the completion of HEROS-compatible worksheets in 2016, will allow for an almost seamless transition when HEROS is rolled out for Partners.
    - HEROS functionality is very similar to the flow of the HEROS-compatible worksheets

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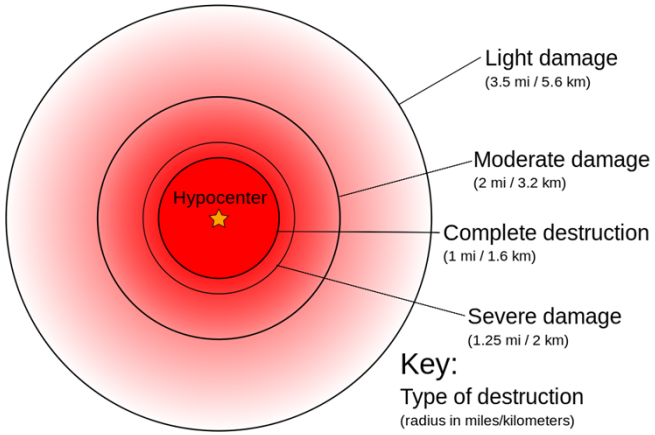
You Heard it First: Environmental Updates

High Pressure Pipelines

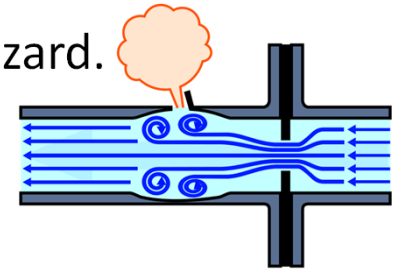
- MAP 2016 update included confusing requirements for calculating risk from pipelines. (232 Guidebook did not make this change.)
- MF will revisit this requirement with 2019 MAP update

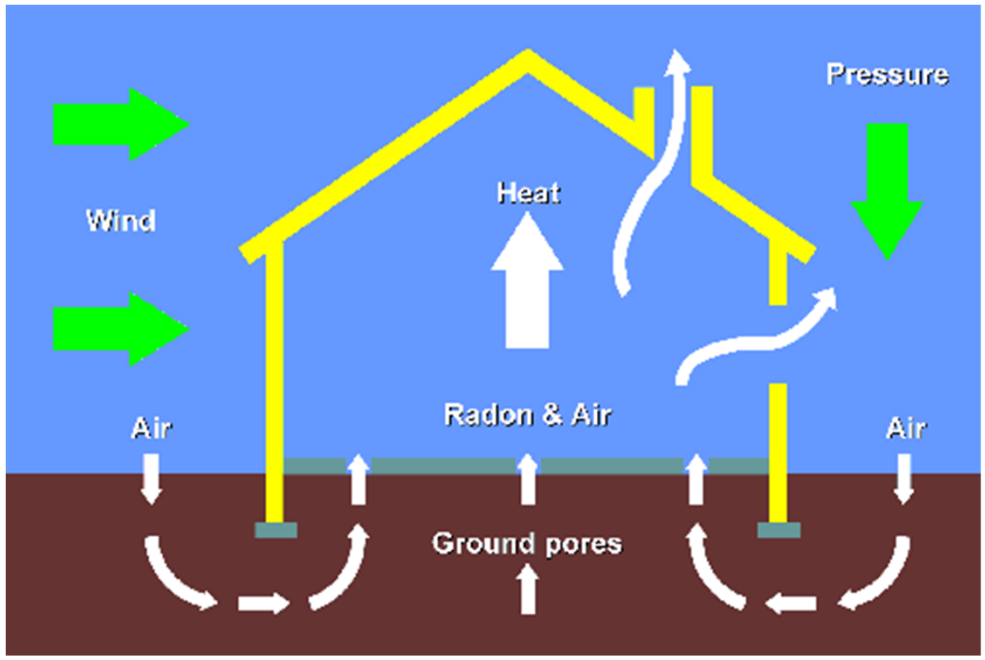


High Pressure Pipelines

- In the meantime, use this standard:

  All parts of any structure must be at least 10 feet from the outer boundary of the easement for any high-pressure gas or liquid petroleum transportation pipeline.
- Include in underwriting summary
  - description of the hazard
  - an assessment of the overall threat to the health and safety of the existing/proposed residents as determined by the environmental assessor and
  - any existing or proposed mitigation of the hazard.





What's that Smell....(Just Kidding)

Radon Standards

- ANSI-AARST MAMF 2017
  - March 1, 2017, Updated testing protocol for MF buildings.
  - New standard requires retesting in 100% of all ground level units/rooms and not less than 10% of the dwellings on each upper floor in all buildings associated with the testing survey. Alternatively, all ground level units/rooms in all buildings must be mitigated.
- ASTM E-1465-08a New Construction Standard
  - Withdrawn July 2017
- ANSI-AARST CC-1000 Soil Gas Control Systems in New Construction of Buildings Standard
  - Replaces ASTM standard above, March 2017

Questions?