



No. 2003-13  
December 12, 2003

# PROGRAM GUIDANCE

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**PROGRAMS:** Indian Housing Block Grant; Section 184 Loan Guarantee; Title VI – Financing Guarantees; Indian Community Development Block Grant.

*RJB*

**FOR:** Tribal Government Leaders and Tribally Designated Housing Entities

**FROM:** Rodger J. Boyd, Deputy Assistant Secretary, PN

**TOPIC:** Amendments and Clarifications to Environmental Review Procedures  
Effective Date – October 29, 2003

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**PURPOSE:** This guidance has been prepared to provide tribes and tribally designated housing entities (TDHEs) with a summary of changes to HUD's environmental review requirements that may affect the preparation and completion of environmental reviews for their HUD assisted programs. Please note that this summary does not include all of the amendments or clarifications published in the Federal Register on September 29, 2003, only those specifically affecting the above listed HUD tribal programs.

**REFERENCE:** Federal Register – Volume 68, No. 188 – Monday, September 29, 2003, pp. 56116-56131 – (Copy Attached)

## **SUMMARY OF AMENDMENTS AND CLARIFICATIONS:**

**References to IHAs deleted** Sections 58.1(b)(6) and 58.2(a)(7) are revised to delete references to Indian housing authorities (IHAs) under the U.S. Housing Act of 1937. This Act no longer provides direct assistance to IHAs since the effective date of the Native American Housing Assistance and Self-Determination Act (NAHASDA).

**Coverage of Part 58** In response to legislative authorization, Section 58.1(b) is amended to conform to current program regulations by adding Part 58 coverage of the following: Indian Housing Block Grant (IHBG) program and Title VI Federal Guarantees for Financing of Tribal Housing Activities at (10); Section 184 Loan Guarantees for Indian Housing (Section 184) program at (11).

**Revolving loan funds** Section 58.1(c) is revised to clarify that activities assisted with repayments to a revolving loan fund initially assisted with HUD funds are subject to environmental requirements if HUD program rules (regulations) continue to treat the activities as subject to the Federal requirements.

**Waivers** Section 58.1(d) now allows the Assistant Secretary for Community Planning and Development, for good cause and with appropriate conditions, to approve waivers and exceptions or establish criteria for exceptions from the requirements of Part 58. The standard is the same as the current environmental waiver policy under 24 CFR 50.10(b) and is similar to the waiver policy for other HUD programs, e.g. §1000.8 for the IHBG program. This provision does not, of course, permit the Assistant Secretary to approve waivers to regulatory requirements that are specifically based on, or reflect, statutory requirements.

**Clarification of recipient and responsible entity for purposes of environmental review** Section 58.2 (a) (5) and (a)(7), respectively, are revised to clarify that the Indian tribe is the “recipient” (for purposes of the environmental release of funds process only) and “responsible entity” with respect to assistance under NAHASDA and Section 184 programs. Section 58.2(a)(7) also is revised to clarify that Regional Corporations in Alaska are considered Indian tribes for purposes of environmental review. Please note: The revision in Section 58.2(a)(5) has no effect whatsoever on a TDHE’s ability to be the recipient of assistance under these programs – it only affects which entity can execute a Request for Release of Funds and Certification – Form HUD 7015.15 (RROF) as the recipient. This revision was necessitated by the specific language in section 105(b) of NAHASDA.

**Definition of release of funds for Section 184** Section 58.2(a)(6) is revised to add a definition of “release of funds” for the Section 184 program.

**Assumption of environmental review responsibilities a tribal option** Section 58.4(c) is amended to conform with the current program regulations for the NAHASDA (IHBG and Title VI) and Section 184 programs that allow for Indian tribes to choose whether or not to assume environmental responsibilities for those programs.

**Toxic chemicals and radioactive materials** Section 58.5(i) is revised to replace a reference to an obsolete HUD Notice 79-33 on toxic chemicals and radioactive materials with updated requirements regarding contamination including a policy that project sites be free of contamination that could affect the health and safety of occupants or conflict with the intended utilization of the property. The new requirement is similar to that currently identified in 24 CFR 50.3(i).

**Limitations on activities pending clearance** Section 58.22 is amended and clarified in several ways. Subsections (a) through (c) are revised to make clear the following: (i) limitations on activities apply not only to recipients, but also to other project participants, such as public or private non-profit or for-profit entities and their contractors; (ii) undertaking an activity that would have adverse environmental impact or limit the choice of alternatives, as well as committing non-HUD funds, to such an activity is prohibited before the RROF and environmental certification have been approved; and, (iii) in accord with the National Environmental Policies Act (NEPA) regulations of the Council on Environmental Quality (40 CFR 1506.1(b), if a recipient is considering an application from a prospective sub-recipient or

beneficiary and is aware that the applicant is about to take an action within the recipient's jurisdiction that is prohibited by §58.22(a), the recipient shall promptly notify the applicant that the recipient will take appropriate action to ensure that the objectives and procedures of NEPA are achieved. Conforming changes to §§58.72 and 58.75 cover other partners in the development process.

**Locally declared emergencies** Section 58.33(b) now allows the same treatment for a locally-declared emergency as is currently permitted for a Presidentially-declared disaster with respect to combining the pre-submission comment periods for the Notice of Finding of No Significant Impact and the Notice of Intent to Request Release of Funds with the post-submission period for objections to the RROF.

**Clarification of categorical exclusions from NEPA subject to the related laws and authorities** Section 58.35(a) is revised to clarify NEPA exclusions for: (i) rehabilitation by adding an exclusion at (a)(3) in the case of a building for residential use (with one to four units) when the density is not increased beyond four units, the land use is not changed, and the footprint of the building is not increased in a floodplain or in a wetland; (ii) individual actions at (a)(4) by limiting this exclusion to no more than four dwelling units on any one site whether in one or multiple buildings; and (iii) property acquisition for unchanged use at (a)(5) by including leasing and also covering equity loans. Conforming amendments are made to 24 CFR 50.20(a)(2)-(a)(4).

**Addition to categorical exclusions from NEPA not subject to the related laws and authorities** Section 58.35(b)(7) adds a NEPA exclusion and procedure for approval of supplemental assistance to a project previously environmentally approved.

**Public comment periods** Section 58.45 is revised to clarify that the periods provided for certain public comment periods are minimum required periods.

**Homebuyer assistance activities** Section 50.19(b)(15) is revised to conform to the existing comparable exclusion in §58.35(b)(5) for homebuyer assistance activities by revising the Part 50 exclusion to cover dwelling units under construction as well as existing dwelling units.

If there are any questions, please contact your Area Office of Native American Programs.

Attachment



# Federal Register

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**Monday,  
September 29, 2003**

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**Part V**

## **Department of Housing and Urban Development**

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**24 CFR Part 50, et al.**

**Environmental Review Procedures for  
Entities Assuming HUD's Environmental  
Responsibilities; Final Rule**

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****24 CFR Parts 50, 58, 574, 582, 583, and 970****[Docket No. FR-4523-F-02]****RIN 2501-AC83****Environmental Review Procedures for Entities Assuming HUD's Environmental Responsibilities****AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.**ACTION:** Final rule.

**SUMMARY:** This final rule updates the list of programs and statutory authorities in HUD's environmental regulation for which other entities may assume HUD's environmental responsibilities. This rule makes other changes to update these regulations that address the assumption of HUD's environmental responsibilities. This final rule also makes conforming changes to the affected environmental provisions contained in various program regulations. This final rule follows publication of a June 26, 2002, proposed rule and takes into consideration the public comments received on the proposed rule.

**DATES:** *Effective Date:* October 29, 2003.**FOR FURTHER INFORMATION CONTACT:**

Richard H. Broun, Director, Office of Community Viability, Office of Community Planning and Development, Room 7244, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-7000. For inquiry by phone or e-mail, contact Walter Prybyla, Environmental Review Division, Office of Community Planning and Development, at (202) 708-1201, extension 4466 (this is not a toll-free number), or mail to:

*Walter\_Prybyla@hud.gov.* Hearing-impaired or speech-impaired individuals may access the voice telephone number listed above by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:****I. The June 26, 2002, Proposed Rule**

On June 26, 2002 (67 FR 43208), HUD published a proposed rule that would make a number of changes to HUD regulations at 24 CFR part 58. For the convenience of the reader, the Department summarizes here some of the details of the proposed rule published in the preamble to the proposed rule. Readers are referred to the **SUPPLEMENTARY INFORMATION** section of the preamble of the published

proposed rule at 67 FR 43208-43210 for a fuller explanation of the rationale or justification for the various revisions in the rule.

The 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. The proposed rule advised that the Department would (1) update the list of programs and statutory authorities covered by part 58, and (2) make conforming changes to environmental provisions in certain program regulations to include a cross-reference to part 58. In addition, the proposed rule would make conforming changes in HUD's regulations at 24 CFR part 50, which govern when HUD is responsible to perform environmental responsibilities in accordance with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality Regulations (40 CFR parts 1500-1508), and other environmental requirements (as specified in 24 CFR 50.4).

The proposed rule described the additional programs that would be added to the list of programs in § 58.1. Among these programs are (1) Grants provided to private nonprofit organizations and housing agencies under the Supportive Housing Program and the Shelter Plus Care Program authorized by Title IV of the McKinney-Vento Homeless Assistance Act; (2) Assistance provided under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA); (3) Indian Housing Loan Guarantees under section 184 of the Housing and Community Development Act of 1992; (4) HOPE VI grants for FY 1999 and earlier and HOPE VI grants under section 24 of the United States Housing Act of 1937; and (5) Housing Opportunities for Persons With AIDS (HOPWA) grants under the AIDS Housing Opportunity Act.

The proposed rule also advised that the Rental Rehabilitation Program and the Housing Development Grant Program authorized by section 17 of the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) are no longer in use and would be removed from paragraph (b)(2) of the list in 24 CFR 58.1.

The proposed rule further indicated that the Department would add a new § 58.1(c) and § 58.1(d) to Title 24. New § 58.1(c) clarifies that activities assisted with repayments to a revolving loan fund initially assisted with HUD funds are subject to environmental requirements only if HUD program rules treat the activity assisted with repayments as being subject to federal

requirements. New § 58.1(d) clarifies that the Assistant Secretary for Community Planning and Development, to the extent permitted by applicable laws and the regulations of the Council on Environmental Quality (CEQ), may, for good cause and with appropriate conditions, approve waivers and exceptions or establish criteria for exceptions from the requirements of this part.

The June 26, 2002, rule proposed changes in § 58.2 to the definitions of "recipient" and "responsible entity" (RE). A new § 58.4(c) was proposed to clarify that under NAHASDA and the Section 184 program, Indian tribes have a choice whether or not to assume environmental responsibilities under 24 CFR part 58.

The rule also proposed updating the list of NEPA-related environmental authorities in § 58.5 to add new requirements similar to those identified in 24 CFR 50.3(i), which apply when HUD performs the environmental review for a project. The proposed rule indicated that environmental reviews for multifamily housing with five or more units (including leasing) and non-residential property must include evaluation of previous site uses and other evidence of contamination on or near the site.

Further, the proposed rule noted revisions to § 58.11 to exclude the term "Indian Housing" recipient and to add the term "HOPWA" recipient. Additionally, the rule announced that § 58.22(a) would be revised to make it clear that all participants in the development process are subject to the provisions of part 58.

The proposed rule added a new paragraph to § 58.22 to permit an organization, consortium, or affiliate under the Self-Help Homeownership Opportunity Program (SHOP) to advance nongrant funds to acquire land prior to completion of the environmental review process.

The rule also detailed revisions to be made to § 58.33(b) and § 58.35, along with conforming changes to 24 CFR part 50. In addition, the proposed rule included revisions to §§ 58.34(b), 58.45, 58.72, and 58.75. An additional proposal in the rule would add language to 24 CFR parts 574, 582, 583, and 970 to make conforming amendments to reflect the applicability of part 58 procedures.

The proposed amendments to §§ 58.34(b) and 58.35(d) regarding the timing of environmental documentation have been omitted from the final rule.

The proposed amendments to §§ 50.20(a)(2)(i) and 58.35(a)(3)(i) regarding conditions for eligibility for a

categorical exclusion for rehabilitation of buildings for residential use (with one to four units) are modified in the final rule. The threshold that “the dwellings do not result from a conversion of use from a non-residential use” is revised in the final rule to read “the land use is not changed.” The threshold that “the footprint of the building is not increased in a floodplain or in a wetland” is added to the final rule.

The final rule updates the reference to the FHA Multifamily Housing Finance Agency Pilot Program by removing the word “Pilot” because the program is now a permanent program. The term “Pilot” appears in the current regulation and the proposed rule at § 58.2(a)(5)(vii) and (6).

The Department has decided not to adopt the revisions to 24 CFR 970.4 as published in the proposed rule, in favor of making a simple cross-reference to part 58. The Office of Public Housing Investments, an office under the Office of the Assistant Secretary for Public and Indian Housing, plans to cover the removed guidance in an internal notice dealing with demolition or disposition of public housing projects pending issuance of a broader amendment to part 970 itself.

## II. This Final Rule

This final rule follows publication of the June 26, 2002, proposed rule and takes into consideration the 64 public comments received on the proposed rule. The public comment period on the rule closed on August 26, 2002. Comments were received from a federal agency, local housing and community development authorities, housing professionals, an Indian housing authority, city and county governments, housing associations, home inspection services, and several private individuals. In accordance with the consultation provision of the CEQ regulations at 40 CFR 1507.3, HUD submitted for CEQ review and comment the proposed amendment to part 58. The final rule implements HUD’s responsibility to identify and regulate HUD-assisted activities subject to NEPA. Section 102 of NEPA requires that all agencies of the federal government identify and develop methods and procedures, in consultation with the CEQ, which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.

In response to the public comments, the following revisions, summarized

here and discussed more fully in Part III, are made to the proposed rule.

Section 58.1(b)(10) is revised by adding the new program for Native Hawaiian Housing Block Grants authorized under title VIII of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), in accordance with section 806 (25 U.S.C. 4226).

Section 58.2(a)(5)(ix) is revised by adding as a recipient, the Department of Hawaiian Home Lands with respect to NAHASDA assistance under § 58.1(b)(10).

Section 58.2(a)(7)(ii) is revised by adding as a responsible entity, the Department of Hawaiian Home Lands with respect to environmental responsibilities under NAHASDA, when the Department of Hawaiian Home Lands is the recipient.

Section 58.35(a)(3)(i) is revised to clarify the conditions for a categorical exclusion for rehabilitation proposed in the case of buildings for residential use (with one to four units). The conditions are that the density is not increased beyond four units, the land use is not changed, and the footprint of the building is not increased in a floodplain or in a wetland. The effects of this provision are that: (1) It corrects in the current rule at § 58.35(a)(3) the apparent omission of the topic of “buildings for residential use (with one to four units)” by including an explicit reference to this topic in the listing for building rehabilitation activities, because the current listing cites categorical exclusions only for multifamily and non-residential buildings. Although under current regulations neither part 58 nor part 50 refers to the topic of rehabilitation proposed in the case of buildings for residential use (with one to four units), the topic was considered under part 58 as an “individual action,” whereas under part 50 it was covered under the generic topic “rehabilitation of structures.” The final rule removes this ambiguity; (2) it removes the proposed rule reference at § 58.35(a)(3)(i) to “dwellings do not result from a conversion of use from a non-residential use” and substitutes “the land use is not changed”; (3) it eliminates the need to perform environmental assessments by removing thresholds listed in the current regulations under both parts 50 and 58; (4) it adds a cross-reference within the individual actions criteria at §§ 58.35(a)(4) and 50.20(a)(3) to exclude rehabilitation of buildings for residential use (with one to four units) from the thresholds for individual actions; and (5) this categorical exclusion continues, as in the current

and proposed regulations, to be subject to the §§ 58.5 and 58.6 provisions. In addition, this rule amends § 50.20(a)(2) with identical language that applies when HUD itself performs the environmental review under part 50.

## III. Discussion of Public Comments Received on the June 26, 2002, Proposed Rule

*Comment:* HUD should mandate radon testing and remediation, if necessary, of every home, because the Department’s failure to enforce the environmental responsibilities required by the rule is contributing to thousands of preventable lung cancer deaths. Specifically, commenters noted that 24 CFR 50.3(i)(1) states HUD’s policy that all property proposed for use in HUD programs be free of hazardous materials and toxic substances, among other things, where a hazard could affect the health and safety of occupants. They stated that radon is a carcinogen, which can be inexpensively remediated, yet most home purchasers, in spite of the EPA recommendation, do not order a radon test.

Many commenters cited 24 CFR 50.3(i)(1) in arguing that HUD should enforce the regulation and mandate a radon test of residential property for it to qualify for a Department of Veterans Affairs (VA), Department of Housing and Urban Development (HUD), Federal National Mortgage Association (Fannie Mae), or Federal Home Loan Mortgage Corporation (Freddie Mac) mortgage. Commenters noted that the Government Sponsored Enterprises (GSEs) (regulated by HUD) are the largest source of housing finance in the country. They remarked that industry experts agree that once HUD imposes mandatory testing of radon hazards, the majority of primary market mortgage originators will follow suit.

*HUD Response:* After a careful review of the comments, the Department has decided not to revise the proposed rule. Mandatory testing of homes for radon hazards under HUD’s mortgage insurance programs for single-family home loans is outside the scope of this rulemaking. This rule deals primarily with HUD’s grant programs for which HUD’s environmental review responsibility is assumed by state, local, and tribal governments for compliance with NEPA and the related laws and authorities.

The Department would add that conforming § 58.5(i) in this final rule to the existing language in § 50.3(i)(1) signals its policy of establishing a uniform standard for dealing with toxic hazards in cases where an environmental review is required to

comply with NEPA and/or the related laws and authorities cited at § 58.5. As stated above, a requirement for mandatory testing for radon hazards for single-family homes is not within the scope of this rule. Nonetheless, the new language in § 58.5 reflects HUD's policy that, regardless of whether the environmental reviews are performed by HUD or by the responsible entity, the same standards would be used. Further, the conforming provision requires that the environmental review of multifamily housing with five or more dwelling units (including leasing) and non-residential property, must include the evaluation of previous uses of the site and other evidence of contamination on or near the site, to ensure that the occupants of proposed sites are not adversely affected by any of the hazards listed in § 58.5(i)(1). The provision requires that particular attention should be given to any proposed site on or in the general proximity of such areas as dumps, landfills, industrial sites, or other locations that contain or may have contained hazardous wastes. The new conforming provision would apply to addressing radon hazards within the context of the environmental review whenever it is known or suspected that such hazards exist.

The Department also notes that there is no HUD review or approval before the completion of construction or rehabilitation and the loan closing for single-family homes whose mortgages are endorsed by the FHA. Consequently, the program is excluded from environmental review regulations under part 50 (see § 50.19(b)(17)). However, environmental underwriting criteria for FHA mortgage insurance programs are listed elsewhere at 24 CFR 203.12(b), relating to "Builder's Certification of Plans, Specifications and Site" (Builder's Certification) for mortgage insurance on proposed or new construction of single-family homes. The Builder's Certification form covers "Other foreseeable hazards or adverse conditions." (See 24 CFR 203.12(b)(2)(vi)).

*Comment:* HUD should remove from the rule the language in part 58 that makes units of general local government, counties, and states responsible for environmental review of HOPE VI projects. The commenter recommended that HUD directly perform environmental review of HOPE VI projects and other projects undertaken by public housing agencies (PHAs) under the programs listed in § 58.1(b). The commenter stated that imposing environmental review responsibilities upon non-recipient

entities for such projects diverts limited administrative staff time not only to conduct the environmental review, but also to negotiate agreements with recipients regarding the environmental review work. The commenter noted that these agreements may need to be approved by one or more legislative bodies. The commenter also noted that the statutory authority under which HOPE VI is proposed to be added to part 58 does not require HUD to delegate environmental responsibilities to the non-recipient entities listed in § 58.2(a)(7).

*HUD Response:* The Department has carefully considered this comment, but declines to change the rule. Accordingly, the final rule is unchanged from the proposed rule on this issue. At this time, many more responsible entities perform environmental reviews for their own complex capital projects and have sufficient experience to be able to do so for other HUD-assisted recipients within their area. Where the responsible entity staff lacks time or skills, then services of consultants are recommended. Consultant support is also recommended in order to support certain kinds of technical environmental analysis.

Generally, negotiating agreements is an established operating practice and need not be viewed as a burden, but as an opportunity to partner. HUD expects responsible entities to reach out to partners and to readily negotiate agreements with public housing agencies and private non-profit organizations seeking environmental services of the responsible entity for their HUD-assisted project or activity. HUD understands that such agreements must comply with state and local laws and in some cases may need approval of the legislative body, as pointed out by respondents.

This rule is an environmental rule and therefore does not cover findings of consistency with the Consolidated Plan; however, such findings are required for the HOPE VI Program listed at 24 CFR 91.2(b)(12), Revitalization of Severely Distressed Public Housing. HUD has the discretion to perform environmental reviews, but such performance would be inconsistent with HUD's general direction to devolve this federal function for its grant programs to state, local, and tribal governments. HUD believes that effective environmental review and administration is best performed by the responsible entity. While HUD encourages units of general local government, counties, and states to perform environmental reviews for HOPE VI projects, such governments are not required to do so when they are not

the recipient of the HOPE VI assistance. HUD does not believe it advisable to prohibit any unit of a local government, county, or state from performing environmental reviews for PHAs under part 58 when many are willing to do so.

*Comment:* A commenter objected to the proposed change in §§ 58.1 and 58.2 that would make a governmental jurisdiction that is not providing the federal funding responsible for the environmental review for the assisted project. The commenter expressed concern that this rule change could force a certifying officer into court to defend a project in which the officer has no influence. The commenter asserted that effective environmental review and administration lies solely with the funding agency.

*HUD Response:* The final rule makes no change to the proposed rule in response to this comment. Generally, environmental litigation results from failure of the project managers to perform the requisite environmental review or to address environmental impacts satisfactorily. HUD believes that certifying officers, who are generally the top elected officials of the jurisdiction, are in a better position than the funding agency alone to guide and defend projects within their jurisdiction. The certifying officers live in their jurisdictions and are involved with governing their jurisdictions—including sitting on or appointing directors to boards of public housing agencies and private non-profit organizations. Responsible entities and their certifying officers, in performing environmental reviews under part 58, have no less authority than HUD under part 50. Either party is under the same legal duty to ensure full compliance with statutory and regulatory requirements for environmental quality irrespective of the type of HUD-assisted recipient, developer, or project.

HUD disagrees with the comment that effective environmental review and administration lies solely with the funding agency. HUD, as the funding agency, has a partnership role to play, but HUD partners with the local government that has jurisdiction and competency. At the project level, the responsible entity is the local government that "governs" by providing land use planning and consolidated planning; by permitting, through zoning, building, and building occupancy approvals for projects that are assisted by HUD; and by supplying infrastructure support for these projects. Thus, HUD believes the certifying officers and responsible entities are already involved with HUD-assisted projects.

The assumption of federal environmental responsibilities by tribal, local, and state governments is virtually unique among federal agencies. This assumption reflects the transfer of full authority to local, state, or tribal governments for environmental quality and protection for HUD-assisted projects, including the monitoring and implementation of any mitigation that the responsible entity requires. HUD believes that effective environmental review and administration is best performed by the responsible entity and not by the federal funding agency.

*Comment:* HUD's Office of Native American Programs requested the addition to § 58.1(b)(10) of the Native Hawaiian Housing Block Grants program authorized by section 513 of American Homeownership and Economic Opportunity Act of 2000 (Pub. L. 106-569, approved December 27, 2000) and section 203 of the Omnibus Indian Advancement Act (Pub. L. 106-568, approved December 27, 2000), each of which amended NAHASDA by adding a new title VIII. Section 806 of NAHASDA, as amended, authorizes HUD to permit the Director of the Department of Hawaiian Home Lands to assume environmental review responsibilities.

*HUD Response:* The final rule adds the Native Hawaiian Housing Block Grants program to § 58.1(b)(10).

*Comment:* Several commenters felt that an American Society for Testing and Materials (ASTM) Phase I assessment is a possible means for complying with § 58.5(i). As an alternative, some commenters suggested a simple "reasonableness" test and recommended that the regulation provide that grantees must determine to a reasonable level of certainty, as determined by the grantee, that sites are free of hazardous materials and other deleterious substances. One commenter wrote that the proposed amendment would create significant new cost and other burdens for Community Development Block Grant (CDBG) and HOME grantees. Another commenter wrote that requiring properties to be free of hazards without providing a safe harbor leaves a governmental jurisdiction potentially liable for damages caused by unknown or undiscovered hazards.

*HUD Response:* The final rule makes no change to the proposed rule in response to this comment. The policy in proposed § 58.5(i) requires due diligence in accordance with the language in that section, but is not intended to suggest any liability for damages caused by unknown or undiscovered hazards where an

appropriate review has been performed. In addition, the policy that sites be free from hazardous materials, etc., does not require a complete absence of such materials, but only that the property be free of hazards where the hazard could affect the health and safety of occupants or conflict with the intended utilization of the property. The policy also does not prescribe any specific form of remediation, which may vary depending upon the nature of the hazard.

With respect to the issue of costs, in most cases, the cost of the environmental study is eligible for HUD funding as administrative or project costs. The potential remediation costs to owners of existing property who are primarily interested in doing rehabilitation work or facade-type improvements are all costs that are eligible for HUD funding as project costs or for funding under other federal programs. There should be no financial burden to affected property owners benefiting from federal financial assistance to identify and remediate environmental hazards on their property. Significant benefits accrue to the value and desirability of the property. Generally, the benefits of remediation outweigh the costs. Remediation provides a safer environment, which the final rule advances in support of meeting a national goal of a suitable living environment expressed in housing and NEPA legislation.

The criteria in § 58.5(i) rely on a general performance standard. Section 58.5(i) does not require a Phase I environmental assessment for toxics (American Society for Testing and Materials, ASTM E 1527). Certainly, a Phase I report or equivalent analysis is a possible means for complying with § 58.5(i). Some HUD programs already require a Phase I report, a standard of private real estate transactions. Visual inspection of the property may not disclose enough information to ascertain toxic contamination. Permission of the property owner is a routine procedure for examining or testing on-site of a site that is not under the control of the prospective purchaser or environmental reviewer. Such permission includes testing, if the site is suspected or known to contain toxic contaminants. Checking existing federal, state, or local databases is routine procedure for the environmental review, but such databases are not all inclusive and up-to-date. Due diligence is required in making such determinations.

When HUD itself is responsible for performing the environmental review, the policy under § 50.3(i) is not to approve the provision of financial

assistance to residential properties located on contaminated sites that are not found to meet the criterion in current § 50.3(i)(1). Sites known or suspected to be contaminated by toxic chemicals or radioactive materials include, but are not limited to, sites which: (1) Are listed on an Environmental Protection Agency (EPA) Superfund National Priorities list or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*) (CERCLA) list or equivalent state list; (2) are located within 3,000 feet of a toxic or solid waste landfill site; or (3) have an underground storage tank that is not for residential fuel. For any of these conditions, the recipient provides HUD with an American Society for Testing and Materials (ASTM) Phase I environmental assessment for toxics report or equivalent analysis.

*Comment:* Some commenters objected to the provision in §§ 58.5(i)(2) and (3) requiring environmental review of multifamily housing and non-residential properties to include evaluation of previous site uses and other evidence of contamination on or near the site or in the general proximity. Commenters said that it is not possible to identify hidden conditions such as drug labs or other hazards out of plain sight. Five commenters recommended that the requirement should be limited to a reasonable determination of potential hazards that might include checking existing federal, state, and local databases that contain information on contaminated properties.

*HUD Response:* The final rule makes no change to the proposed rule in response to the commenters' objections. In general, multifamily housing refers to five or more units within one building. Properties are to be "free" of hazards that affect the health and safety of occupants or conflict with the intended utilization of the property. The rule sets a performance standard that includes evaluation of previous uses of the site and evidence of contamination on or near the site, to assure that occupants of proposed sites are not adversely affected by the hazards. Unacceptable sites are to be disapproved, unless the site can be made acceptable by the remediation of the toxic contaminants. Due diligence is the norm. The rule does not create a basis for liability of responsible entities for contamination or the effects of contamination that are not discovered as the result of the exercise of due diligence. Certainly, checking federal, state, and local data banks on toxic hazards is necessary, but the absence of the property in such data banks is not always conclusive on the hazards issue.



*Comment:* Some governmental jurisdictions may determine that under the § 58.5(i) standards, the potential legal or financial exposure is too high and would limit the range of activities they fund with CDBG and HOME funds. The commenter was of the opinion that property owners are unlikely to enter into purchase agreements that include contingencies allowing on-site testing of their property by a prospective purchaser or environmental reviewer to determine the presence or absence of toxic contamination.

*HUD Response:* Among HUD's missions is promotion of the national goal that every American family be able to afford a decent home in a suitable environment, and HUD's CDBG and HOME programs support that national goal. Accordingly, we disagree with the commenter's opinion that the potential legal or financial exposure is too high and would limit the range of activities that local governments fund with CDBG and HOME funds, should HUD implement § 58.5(i). That section simply conforms part 58 with identical policy at § 50.3(i), which, since 1996, HUD itself applies when HUD staff perform environmental reviews under part 50.

HUD does not share the commenter's opinion that property owners are unlikely to enter into purchase agreements that include contingencies allowing on-site testing of their property by a prospective purchaser or environmental reviewer to determine the presence or absence of toxic contamination for a HUD-assisted project. The federal subsidy is a significant incentive to ensure the cooperation of most property owners in this matter.

*Comment:* A commenter questioned the rationale for not requiring site evaluation for residential buildings with fewer than five units. The commenter wrote that a contaminated site would present environmental issues regardless of the number of people who will be served by the site.

*HUD Response:* The final rule makes no change to the proposed rule, but in response to the comment, HUD provides this clarification. The final rule renumbers the section in question. Section 58.5(i)(2)(i) of the final rule applies to all properties (*i.e.*, "covered" properties) that are being proposed for use in HUD programs covered under § 58.1(b) (*i.e.*, "covered" programs). Section 58.5(i)(2)(ii) applies specifically to multifamily residential properties and to non-residential properties proposed for use in "covered" programs; and it requires an evaluation of previous uses of the site or other evidence of contamination on or near

the site. HUD clarifies that the language of §§ 58.5(i)(2)(iii) and (iv) is not limited in its application to multifamily residential properties and to non-residential properties, but applies to all "covered" properties, including buildings for residential use (with one to four units). The language of § 58.5(i)(2)(iii) requires that particular attention should be given to any proposed site on or in the general proximity of such areas as dumps, landfills, industrial sites, or other locations that contain, or may have contained, hazardous wastes. The language of § 58.5(i)(2)(iv) requires the responsible entity to use current techniques by qualified professionals to undertake investigations determined necessary. In addition, HUD clarifies that all "covered" properties may include those properties subject to a categorical exclusion under § 58.35(b) in cases of extraordinary circumstances in accordance with § 58.35(c).

*Comment:* Not enough emphasis is made in the proposed rule on the high level of priority that should be placed on expediting environmental reviews, since the environmental review process can be a lengthy one that slows the funding and expending of HUD grant funds. The commenter suggested that the rule provide positive incentives to expedite the environmental review process as HUD adds new programs and entities to part 58.

*HUD Response:* The most significant incentive is intrinsic in the current part 58 regulations, because delays can be prevented by the recipient responsible entity since the calendar and pace of performing the environmental procedures is under the control of the responsible entity itself. With respect to non-recipient responsible entities, the final rule makes no change to the proposed rule to provide additional incentives to expedite the environmental review process as HUD adds new programs and entities to part 58. HUD believes that the current regulations provide the following incentives: (1) § 58.23 provides that the environmental review costs are eligible costs to the extent allowable under the HUD assistance program regulations. The assurance of payment for work performed is an incentive in expediting environmental reviews. Also, §§ 58.34(a)(1) and (3), respectively, exempt from environmental review procedures both "environmental and other studies" as well as "administrative and management activities." This exemption extends to the costs of environmental consultants and/or payments to local governments for this service; (2) The regulations

provide an opportunity for closer partnering arrangements among all local partners providing housing and economic opportunities to achieve the responsible entity's Consolidated Plan targets. HUD's local partners include local governments, public housing agencies, private non-profit and for-profit organizations. Such local arrangements should provide for time-efficient management of environmental reviews; (3) The regulations provide policy guidance to private non-profit organizations and public housing agencies requiring them to supply the responsible entity with all available, relevant information necessary for the responsible entity to perform for each property any environmental review required under part 58; (4) This rulemaking would expedite environmental reviews by simplifying the provision that provides a categorical exclusion for rehabilitation assistance in the case of a building for residential use (with one or four units) and a categorical exclusion for the approval of supplemental assistance to a project previously approved under this part; and (5) Often overlooked is the provision in the CEQ regulations that requires responsible entities to integrate the NEPA process with other planning "at the earliest possible time" to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts (40 CFR 1501.2).

Section 58.30(b) states that the environmental review process should begin as soon as a recipient determines the projected use of HUD assistance. The prohibition on commencing choice-limiting activities under § 58.22 and CEQ regulations at 40 CFR 1506.1 until after the environmental review process is completed may be an additional incentive to expedite the review.

*Comment:* The term "any participant in the development process" is not defined in the rule. The commenter observed that proposed § 58.22 would prohibit any participant in the development process from committing non-HUD funds or undertaking an activity on a project that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to release of funds. The commenter recommended limiting the application of the prohibition to subrecipients and adding the cited term to the definition of subrecipient in § 58.2(a)(5).

*HUD Response:* The Department did not incorporate this recommendation in the final rule. HUD does not believe that the phrase "any participant in the development process" needs further

clarification. The phrase covers the recipient's clients and partners that are project participants, such as public or private, non-profit or for-profit entities and their contractors. To narrow the application of this phrase to subrecipients is contrary to the intent of this provision to provide a broad and all-inclusive application of the phrase. The final rule would continue the generic usage contained in the proposed rule.

*Comment:* The rule should allow responsible entities approving supplemental assistance to a previously approved project to treat such projects as categorically excluded and not subject to § 58.5 authorities when the part 58 review and approval was conducted by a different responsible entity from the one that conducted the environmental review on the original project.

*HUD Response:* Section 58.35(b)(7) in both the proposed and final rule requires that the approval for the supplemental assistance be made by the original responsible entity. The original responsible entity has the environmental review record for the project and is more knowledgeable about the original project. For that reason, HUD believes that the original responsible entity can best judge whether supplemental assistance is eligible to be treated as a categorical exclusion not subject to the related laws, particularly since this judgment requires a determination by the original responsible entity under § 58.47 as to whether re-evaluation of the original environmental findings is required. Additionally, the Department views all the participants in the process as partners.

*Comment:* The existing requirement in § 58.22 restricting development before HUD approvals are received as "choice-limiting" actions is unworkable and most likely is misinterpreted. The commenter recommended modifying the restriction on "committing" HUD funds to a project until HUD has approved a Request for Release of Funds (RROF). The commenter said that many projects may have already been approved by other environmental processes and that construction may be underway before HUD funding is "committed" to the project. The commenter suggested substituting the word "expended" for the word "committed" to denote that while allocation of HUD funds is permissible, the actual expenditure of HUD funds is not permissible until the RROF has been approved.

*HUD Response:* The final rule makes no change to the proposed rule in

response to this comment. The term "commit" is broader and includes the meaning of the term "expend." The intent in using the term "commit" is to prevent any "choice-limiting" action from occurring prior to HUD or state approval of the environmental certification of compliance and the request for the release of funds for the HUD-assisted project. This provision does not affect the recipient's general allocation of funds, but only restricts commitment of such funds to choice-limiting actions, for example, site-specific activities such as real property acquisition, leasing, demolition, rehabilitation, and related site improvements.

The commitment to a HUD-assisted project of HUD and non-HUD funds by the recipient and its partners prior to completion of the environmental review and submission and approval of the recipient's environmental certification of compliance and request for the release of funds inherently diminishes and biases objective consideration of alternative locations for the proposed project (including a no action alternative). The Department believes that the consideration of alternatives is fundamental to the environmental review process for HUD-assisted projects complying with the procedures of part 58.

CEQ regulations at 40 CFR 1502.2(f) require that agencies not commit resources prejudicing selection of alternatives before making a final decision. The regulations at 40 CFR 1506.1 address limitations on actions during the NEPA process. Applicable statutes and regulations set decision points for environmental review and compliance for the various authorities at §§ 58.5 and 58.6. This standard is not in any way diminished by the participation of non-federal funding of the project.

As more programs are added to § 58.1(b) where the recipient is different from the responsible entity, and based on HUD's recent program experience, it is necessary for HUD to be clear in the rulemaking regarding this important environmental compliance issue. This demonstrates the need for responsible entities and recipients other than responsible entities to help each other perform timely compliance with part 58 with all partners selected to implement HUD-assisted projects. Substituting the words "not expend" for the words "not commit" as suggested by the respondent would not address HUD's concern. The restriction on undertaking or committing funds for choice-limiting actions does not apply to undertakings or commitments of non-federal funds for

a development by a party before the party applies to the part 58 recipient for federal funds for the project. Thus, a third party may begin a project in good faith as a private project and by so doing is not precluded from later deciding to apply for federal assistance. However, when the party applies for federal assistance, it will generally need to cease further choice-limiting actions on the project until the environmental review process is completed in accordance with procedures under part 58.

*Comment:* The "choice-limiting" requirements in 24 CFR 58.22 are overly restrictive. Two commenters wrote that there may be numerous "choice-limiting" requirements imposed upon a development even before HUD funding is available. The commenters want a distinction made in § 58.22 to recognize that "choice-limiting" requirements may not always be negative. For example, the imposition of requirements under the Endangered Species Act before the approval of the RROF should not be considered as limiting environmental choices. Further, §§ 58.22(a) and (c) would restrict development with non-HUD funds if an application for HUD funding was under consideration and the grantee was aware that some "choice-limiting" was going to or had already taken place. The commenters argued that the recipient has no way of knowing until the approval process is complete whether a particular application will or will not be funded. Additionally, the recipient has no legal authority to stop or limit development by an applicant before HUD funds have been committed to the activity. Also, many of the "choice-limiting" conditions would most likely be imposed upon the development anyway. The commenters recommended that HUD reconsider its policy of defining land acquisition as a "choice-limiting" activity, asserting that neither NEPA nor the CEQ regulation at 40 CFR 1506.1 defines "choice-limiting" activity.

*HUD Response:* The Department declines to adopt the commenters' recommendation here. Use of the term "choice-limiting" in this regulation does not apply to mitigation measures, as implied in the comment. The term applies to limitations on actions during the environmental review process as prescribed by the CEQ regulations for implementing the procedural provisions of NEPA (40 CFR 1506.1(a)).

HUD has reviewed court decisions on whether land acquisition or similar actions are choice-limiting activities under NEPA. Six federal circuit courts including the DC Circuit Court have

considered this issue. All six have ruled that land acquisition is a choice-limiting activity under NEPA. Two of these cases were appealed to the Supreme Court, which denied certiorari both times. Accordingly, the provisions of § 58.22 prohibiting the commitment of HUD or non-HUD funds for acquisition of property to be used in a HUD-assisted project before an environmental review is completed reflect existing case law on this point, which is law in all of the federal circuit courts that have ruled on this point and law that the U.S. Supreme Court has twice declined to overturn.

*Comment:* Four commenters wrote that any restriction on the ability to invest HUD funds in developments that are already underway could have a harmful effect on a grantee's ability to comply with CDBG program requirements for timely expenditure of grant funds.

*HUD Response:* The final rule is unchanged from the proposed rule with respect to this issue. In most cases, the cause of the delay in the recipient's expenditure of grant monies may be attributed to factors other than that of compliance with environmental review processing under part 58. Part 58 allows state, local, and tribal governments and other recipients to set and manage the schedule of their environmental review processing. CEQ regulations at 40 CFR 1501.2 require agencies to integrate the NEPA process with other planning at the earliest possible time. This requirement is intended to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.

Moreover, as noted in response to a previous comment, the restriction on undertaking or committing funds for choice-limiting actions does not apply to undertakings or commitments of non-federal funds for a development by a party before the party applies to the part 58 recipient for federal funds for the project. Where a third party has begun a project in good faith as a private project, the part 58 recipient is not precluded from considering a later application for federal assistance for the project, but must advise the third party applicant to cease further choice-limiting actions on the project until the environmental review is completed.

*Comment:* The final rule should clarify the term "nominal" as used in current § 58.22 for real estate options. The commenter asked whether it is a percent of the purchase price.

*HUD Response:* The final rule makes no change to the proposed rule in response to the commenter's request for

clarification. Real estate options are subject to the conditions regarding environmental acceptability and nominal price at § 58.22(d). The provision allows some flexibility regarding the term "nominal" and any reasonable interpretation is acceptable. In most instances, the deposit is not refundable if the property buyer fails to exercise the real estate option by purchasing the property within the defined time period.

*Comment:* The final rule should eliminate the proposed changes to § 58.22, because the changes would place unenforceable burdens on recipients to police the actions of subrecipients during the application phase. The commenter objected to the proposed changes for two reasons. The first concern is that recipients would be expected to analyze whether potential subrecipients are "about to take an action within the jurisdiction of the recipient that is prohibited by § 58.22(a)." The second concern of the commenter is the requirement that if the recipient becomes aware that a subrecipient is about to take a prohibited action, "the recipient will take appropriate action to ensure that the objectives and procedures of NEPA are achieved." It is unclear, in the view of the commenter, what would constitute "appropriate action" and what the recipient's actual responsibilities would be under this requirement. Some nationwide recipients are not in a position to determine NEPA's objectives at the local level nor to enforce them with their subrecipients. A recipient of HUD funds can ensure that its own and its subrecipients' actions conform to the HUD environmental review process once a legal relationship exists and HUD funds have been allocated and disbursed. But, wrote the commenter, recipients lack both the jurisdiction and enforcement power that would be required by proposed § 58.22(c) during the application phase.

*HUD Response:* The final rule makes no change to the proposed rule with respect to the commenter's first concern. The disqualification for the use of HUD assistance for violation of the limitation on activities pending clearance itself serves to influence the behavior of potential subrecipients. In fact, the rule provides the requisite power to enforce appropriate action. The final rule at § 55.22(c) states that "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

§ 58.22(a), then the recipient will take appropriate action to ensure that the objectives and procedures of NEPA are achieved." To enforce compliance with this procedure, the final rule requires that recipients, whether responsible entities or recipients other than responsible entities, be effectively responsible for establishing internal controls. The controls would prohibit the recipients' public and private development partners from the commitment and expenditure of HUD and non-HUD funds to implement a HUD-assisted project prior to compliance with part 58. These controls should apply to applicants, potential awardees, or development partners selected by the recipient.

The Department also carefully considered the commenter's second point, but declines to change the proposed rule in response to the comment. As stated earlier, HUD believes that the recipient has both the jurisdiction and the power to act under this provision. In the first place, the recipient, when seeking prospective applicants or potential developers, has the authority to market its relationship with conditions. The recipient may mandate that no implementation of the project to be assisted with HUD funds is to occur until there is compliance with part 58. During and after the application phase, recipients must refuse HUD assistance to an applicant or developer who has violated the provision for limitations on activities pending environmental clearance. HUD looks to recipients to enforce this provision as they approve or disapprove either applications for HUD financial assistance or partners in the development of HUD-assisted projects. The provision in § 58.22(c) simply serves to emphasize a provision in the CEQ regulations (40 CFR 1506.1(b)) that already applies to responsible entities under part 58, and also to apply these responsibilities to recipients regardless of whether they are the responsible entity.

*Comment:* Four commenters suggested that HUD should not amend the public comment periods in § 58.45 to reflect that the periods are minimum periods. The commenters objected to the proposed amendment on the basis that a person who fails to respond within the 15-day period could conceivably persuade a court that the comment period for a specific project was not long enough. Thus, if no maximum period is stated, a court could determine that the comment period could be any length of time. The result would be to delay needed development and negatively impact CDBG timeliness

requirements. Another commenter suggested eliminating the word "minimum" to avoid confusion that may be caused by the different interpretations of the word.

*HUD Response:* The Department was not persuaded to make changes to the proposed rule on this matter. The provision requires the minimum number of days for public comment periods. The rule does not require any longer comment period, but provides the responsible entity with the authority and flexibility to extend the number of days for public comment beyond the minimum number of days. The Department does not share the commenters' view on the possible actions a court may take.

*Comment:* Proposed § 58.75 language should be revised to parallel the prohibition in § 58.22 so that the basis for an objection is clearly limited to projects that have an adverse environmental impact or limit the choice of reasonable alternatives. The commenters wrote that the proposed rule would allow objections on the basis of a recipient or other participant having incurred costs or committed funds even if there was no actual adverse environmental impact or no actual limitation on the choice of reasonable alternatives.

*HUD Response:* The final rule makes no change to the proposed rule on this matter. The objection in § 58.75(e) as stated in the proposed rule is similar to the current regulations, because the limitation on activities pending clearance applies to both HUD and non-HUD funds for HUD-assisted projects. In contrast, the reference in the last sentence of § 58.22(a) on limitations on actions that have an adverse environmental impact or limit the choice of reasonable alternatives is too restrictive to be repeated as a more general basis for objection in § 58.75, because the language applies only to limitation on the use of non-HUD funds. The basis for objection in proposed § 58.75(e) does not refer to *all* incurring of costs or commitment of funds, but specifically refers only to those commitments of funds, incurring of costs and undertakings "not authorized by this part."

*Comment:* The commenter welcomes the proposed change that clarifies the categorical exclusions for (1) rehabilitation of one to four family units, and (2) individual actions on one to four family units." The commenter wrote that the intent to identify the rehabilitation of 1-4 unit residential buildings within this exclusion is a welcome clarification, which codifies a practice HUD has endorsed for years.

The commenter wrote that it is not clear from the reading of the proposed language whether this means all rehabilitation of buildings for residential use (with one to four units) is categorically excluded, or whether rehabilitation of these units needs to be less than 75 percent of replacement value, as the current threshold is for multifamily dwellings (or meet some other threshold value). The commenter wants the **SUPPLEMENTARY INFORMATION** reference to "minor rehabilitation" clarified in the final rule.

*HUD Response:* The final rule is not changed in response to the comment. With respect to environmental review procedures for all rehabilitation of buildings for residential use (with one to four units), the final rule allows a categorical exclusion subject to § 58.5 except that an environmental assessment is required only in the following circumstances: (1) the density is increased beyond four units; (2) the land use is changed; (3) the footprint of the building is increased in a floodplain or in a wetland; or (4) there are extraordinary circumstances (§ 58.35(c)). Under the final rule, the limitation on rehabilitation costs to 75 percent of replacement value applies only to multifamily residential buildings and non-residential structures, and does not apply to rehabilitation of buildings for residential use (with one to four units).

The final rule replaces the following criterion contained in the proposed rule: " \* \* \* the dwellings do not result from a conversion of use from a non-residential use" (proposed rule at § 50.20(a)(2)(i) and 58.35(a)(3)(i)) with a criterion that "the land use is not changed." HUD wishes to clarify the application of the provisions regarding "change in land use" found in the final rule at § 50.20(a)(2)(ii)(B) and (iii)(B) and its counterpart in part 58 in the current regulations, redesignated in the final rule as §§ 58.35(a)(3)(ii)(B) and (iii)(B). As a condition of eligibility for this categorical exclusion, the proposed project or activity must meet the condition that there will be no change in land use. When one reads the "categorical exclusion" sections of parts 50 and 58, the existing land use of the property and not its future land use is always the threshold to be used for determining eligibility for categorical exclusion. Any conversion or "change in land use" made to an existing property is ineligible for a categorical exclusion for rehabilitation and a full environmental assessment is required. The environmental assessment itself focuses its evaluation primarily on the future land use of the property and the

prospective and potential impacts resulting from the proposed land use.

*Comment:* The final rule should clarify the terminology in §§ 58.35(a)(3)(i) and (4). One commenter wrote that using the two phrases, "single-family residential building" together with "one to four units" conflicts because standard planning terminology suggests that a single-family residential building is one family per building. This term should be changed to read "Single buildings for family residential use (with one to four units)".

*HUD Response:* The final rule revises the phrase published in the proposed rule to read "a building for residential use (with one to four units)" in § 58.35(a)(3)(i) and its counterpart § 50.20(a)(2)(i). The rule removes from usage the phrase "one-to four-family dwelling" appearing in the current regulations at §§ 50.20(a)(3) and 58.35(a)(4). Generally, HUD considers five or more units within a residential building as multifamily housing, a term established for the internal administration of its mortgage insurance programs. Fewer than five units within a residential building are generally considered single-family housing. This explains the origins of the terms in HUD environmental and program regulations. The final rule replaces the term "one-to four-family dwelling" that is used in the current regulation.

*Comment:* The final rule should clarify the proposed language at §§ 58.35(a)(4)(i) and (ii) with respect to exclusion of an "individual action" on a one-to four-unit dwelling when there are no more than four dwelling units on any one site, whether in one or multiple buildings. According to the commenter, this particular categorical exclusion is unwieldy to apply in the field. A clear definition is needed regarding what an "individual action" is on a one-to four-family dwelling. The commenter asked the question, "Is it only new construction or new construction and substantial rehabilitation (depending on the intent of § 58.35(a)(3)(i))?" The commenter also wrote that the proposed language does not account for circumstances in a program of "scattered sites" where sites may be widely dispersed, but where there may be a limited number of homes that happen to be within 2,000 feet of each other. If the project is classified as categorically excluded, does the project sponsor have to guarantee that every site will be more than 2,000 feet apart? The commenter suggested adding the following language to § 58.35(a)(4)(ii) "or there are not more than four units within 2,000 feet of each other."

*HUD Response:* In response to this comment, the final rule amends the proposed rule language of the §§ 58.35(a)(4) and 50.20(a)(3) provision for “individual actions” by adding a cross-reference to the end of §§ 58.35(a)(4) and 50.20(a)(3) to exclude rehabilitation of a building for residential use (with one to four units) from the thresholds for individual actions. As discussed earlier, §§ 58.35(a)(4) and 50.20(a)(3) of the final rule will no longer apply to the rehabilitation of buildings for residential use (with one to four units), because the topic is covered under a new, separate provision at §§ 50.20(a)(2)(i) and 58.35(a)(3)(i) located with related rehabilitation thresholds for categorical exclusions pertaining to multifamily residential buildings and non-residential structures. Sections 58.35(a)(4) and 50.20(a)(3) of the final rule will continue to apply to all other types of individual actions (including, but not limited to, new construction, development, demolition, and acquisition, disposition, or refinancing regardless of future use) with respect to dwelling or housing units that meet the conditions in §§ 50.20(a)(3)(i) and (ii) and §§ 58.35(a)(4)(i) and (ii).

Although the 2000-foot standard was questioned, no other standards were suggested in any of the comments. The rationale for this threshold for an environmental assessment is based on the principle of aggregation and the need to examine the cumulative environmental effects (40 CFR 1508.7) of scattered site housing construction taking place in close proximity. This is consistent with the current provision in § 58.32, which calls for project aggregation of activities that are related either on a geographical or functional basis, or are logical parts of a composite of contemplated actions.

*Comment:* The Environmental Protection Agency (EPA) requested that HUD encourage responsible entities to limit distribution of the Findings of No Significant Impact (FONSI) notices to EPA regional offices, and not to send copies to EPA Headquarters in Washington, DC. The EPA also made two recommendations: (1) That HUD’s formats for FONSI add provisions to improve the description of the project and a good map; and (2) that HUD clarify that the EPA may review HUD environmental assessments, but that EPA does not reach a determination on the grant application; however, EPA may provide its views on the environmental document to the responsible entity or HUD.

*HUD Response:* Section 58.43(a) of the current rule remains unchanged. However, in response to the EPA comment, HUD will incorporate in guidance addressed to HUD staff and program participants the following information: (1) When sending FONSI notices and Notices of Intent to Request the Release of Funds (NOI/RROF) to EPA, responsible entities are not to send copies to EPA Headquarters in Washington, DC, but only to regional offices of the EPA having jurisdiction over the responsible entity; (2) notices sent to EPA regional offices should include a full description and location of the project; and (3) responsible entities are discouraged from requesting that the EPA serve as a lead or cooperating agency in preparing environmental assessments and impact statements for HUD-assisted projects. The role of the EPA is not to prepare, but rather to evaluate and comment on these documents.

*Comment:* The EPA suggested that HUD further define the categorical exclusion in § 58.35(a)(3)(i) by adding the following language at the end of § 58.35(a)(3)(i): “and which exterior building dimensions are not increased in a floodplain or in a wetland.”

*HUD Response:* HUD agrees, but has substituted the wording “and the footprint of the building is not increased in a floodplain or in a wetland” in lieu of EPA suggested wording. The wording “and the footprint of the building is not increased in a floodplain or in a wetland” is added to the final regulation at § 58.35(a)(3)(i) for the environmental review of proposed rehabilitation of buildings for residential use (with one to four units). The added language serves as a threshold for requiring an environmental assessment so as to evaluate and alleviate the environmental effects in cases where rehabilitation assistance is proposed for expanding the footprint of buildings for residential use (with one to four units) where such expansion is located within or would enter the floodplain or wetland. The added language is directly relevant in the case of minor repairs or improvements to one-to four-family properties that are currently excluded from HUD floodplain management decision-making procedures under 24 CFR 55.12(b)(2). The exclusion allowed at § 55.12(b)(2) does not apply to financial assistance for proposed rehabilitation of multifamily residential buildings and non-residential buildings. The exclusion is limited to “[f]inancial assistance for minor repairs or improvements on one-to four-family properties that do not meet the

thresholds for ‘substantial improvement’ under § 55.2(b)(8).”

*Comment:* Partially exempt projects in § 50.20 should be exempt from all federal environmental laws and should be moved to § 50.19. The commenter asserted that since these uses of federal funds involve no significant changes to structures that already exist, a presumption should apply that their repair or purchase cannot affect any federal environmental interest protected by federal law. The commenter said that compliance with the numerous laws listed in § 50.4 imposes a significant and costly administrative burden on Indian tribes that assume NEPA responsibilities. The commenter recommends moving to § 50.19 the categorical exclusions in §§ 50.20(a)(2) and (a)(4) when there is no change in the use of the structure, and revising § 50.19 to require compliance with the Historic Preservation Act only if the structure is over 50 years old.

*HUD Response:* The final rule makes no change to the proposed rule in response to this comment. First, HUD notes that part 58—not part 50—is applicable to Indian tribes that assume NEPA responsibilities. Under §§ 58.34 and 58.35(b), HUD has excluded from review those actions that by their nature do not trigger compliance requirements under NEPA and related authorities listed in § 58.5. However, environmental laws listed in § 50.4 and § 58.5 can apply to the actions listed in §§ 50.20(a)(2) and (4) and the comparable actions in §§ 58.35(a)(3) and (5). HUD lacks the authority to provide exemptions and exclusions from applicable statutory requirements and therefore cannot do what the commenter suggests under either part 50 or part 58. Compliance is mandatory whenever HUD funds are proposed for projects and activities subject to any of the related federal environmental laws and authorities cited in §§ 58.5, 58.6 and 50.4 “as applicable.” To the extent that HUD has authority, the rule provides relief in the case of categorical exclusions from the environmental assessment required under NEPA as allowed by the CEQ regulations. However, there are certain national objectives that each of the related federal environmental laws and authorities is designed to achieve at the project level through the support of federal financial assistance. The national objectives cover historic preservation, protection from toxic chemicals or radioactive materials, protection from flood hazards, protection of wetlands and coastal barrier resources, protection of endangered species, protection of sole

source aquifers, environmental justice, environmental standards, and others.

The current provision at § 58.34(a)(12) allows an exemption for any categorical exclusion listed in § 58.35(a), provided that there are no circumstances that require compliance with any other federal laws and authorities cited in § 58.5. A recipient does not have to submit an environmental certification and request for the release of funds, and no further approval from HUD or the state is needed by the recipient for the drawdown of funds to carry out exempt activities and projects. However, the responsible entity must document in writing its determination that each activity or project is exempt and meets the conditions specified for such exemption under § 58.34. The conversion to exempt status does not remove the need to comply with the other requirements at § 58.6 “as applicable.”

*Comment:* The final rule should clarify the phrase “except in extraordinary circumstances” as used in proposed § 58.22(b).

*HUD Response:* The final rule makes no change to the proposed rule on this matter. The phrase “except in extraordinary circumstances” is taken from CEQ regulations (40 CFR 1508.4) and is already defined at § 58.2(a)(3) of the current regulations. The term means a situation in which an environmental assessment (EA) or environmental impact statement (EIS) is not normally required, but due to unusual conditions, an EA or EIS is appropriate. Indicators of unusual conditions are: (1) Actions

that are unique or without precedent; (2) actions that are substantially similar to those that normally require an EIS; (3) actions that are likely to alter existing HUD policy or HUD mandates; or (4) actions that, due to unusual physical conditions on the site or in the vicinity, have the potential for a significant impact on the environment or in which the environment could have a significant impact on users of the facility.

*Comment:* Regarding § 582.230(b), the restrictions on a recipient and others limiting proposed acquisition for a project under Shelter Plus Care until HUD approves the recipient’s environmental certification of compliance and request for the release of funds would totally restrict a housing authority’s ability to move forward with a project. The commenter asserted that this will defeat HUD’s stated desires to achieve a speedy start-up in Shelter Plus Care projects, will discourage the housing authority’s partners from participating in such endeavors, and is an unwarranted incursion into their rights to perform standard business activities.

*HUD Response:* The final rule makes no change to the proposed rule in response to this comment. It appears that the commenter incorrectly construed the provision. The added language makes conforming amendments to the Shelter Plus Care program regulations, which do not currently adequately reflect the applicability of part 58 procedures (see § 58.1(b)(3)). Also, the Shelter Plus Care

program is designed to link rental assistance to supportive services for hard-to-serve homeless persons with disabilities. The current regulation excludes tenant-based rental assistance from any environmental review. Other eligible activities may be subject to reviews. Moreover, the restriction on the recipient, project “partners” and their contractors’ undertaking or committing funds for acquisition and development actions does not apply to undertakings or commitments of non-federal funds for a development by a party before the party applies to the Shelter Plus Care recipient for federal funds for the project. Where a third party has begun a project in good faith as a private project, the recipient is not precluded from considering a later application for federal assistance for the project, but must advise the third party applicant to cease further choice-limiting actions on the project until the environmental review is completed.

**IV. List of HUD Programs Covered by 24 CFR Part 58**

For ready reference and convenience of the reader, the below list indicates the HUD programs that are covered by 24 CFR part 58 by program name, program regulation, program office, and OMB number found in the Catalog of Federal Domestic Assistance. This list is not exhaustive as other programs may be added in the future. The final rule at § 58.1(b) includes the references to the statutory authorization of assumption of HUD environmental responsibilities by state, local, and tribal governments.

OMB number	Name of program	Regulation citation	Program office
14.188	Housing Finance Agencies Risk Sharing Project.	24 CFR part 266	Housing <sup>1</sup>
14.218	Community Development Block Grants/Entitlement Grants.	24 CFR part 570	CPD <sup>2</sup>
14.219	Community Development Block Grants/Small Cities Program.	24 CFR part 570	CPD
14.225	Community Development Block Grants/Special Purpose Grants/Insular Areas.	24 CFR part 570	CPD
14.228	Community Development Block Grants/State Program.	24 CFR part 570	CPD
14.231	Emergency Shelter Grants Program	24 CFR part 576	CPD
14.235	Supportive Housing Program	24 CFR part 583	CPD
14.238	Shelter Plus Care	24 CFR part 582	CPD
14.239	HOME Investment Partnerships Program	24 CFR part 92	CPD
14.241	Housing Opportunities for Persons with AIDS.	24 CFR part 574	CPD
14.246	Economic Development Initiative Grants ..	CFR: N.A. [NOFA <sup>3</sup> references 24 CFR part 570].	CPD
14.246	Brownfield Economic Development Initiative Grants.	CFR: N.A. [NOFA references 24 CFR part 570].	CPD
14.246	Economic Development Initiative—Special Projects (Congressionally earmarked).	.....	COD
14.247	Self-Help Homeownership Opportunity Program.	NOFA	CPD

OMB number	Name of program	Regulation citation	Program office
14.248	Community Development Block Grants/ Section 108 Loan Guarantees.	24 CFR part 570	CPD
14.249	Section 8 Moderate Rehabilitation Single Room Occupancy.	24 CFR part 582	CPD
14.850	Public Housing Operating Fund Program	24 CFR part 990	PIH
14.862	Indian Community Development Block Grant Program.	24 CFR part 1003	PIH <sup>4</sup>
14.865	Loan Guarantees for Indian Housing	24 CFR part 1005	PIH
14.866	Demolition and Revitalization of Severely Distressed Public Housing.	NOFA, 24 CFR part 970	PIH
14.867	Indian Housing Block Grants	24 CFR part 1000	PIH
14.869	Title VI Federal Guarantee for Financing Tribal Housing Activities.	24 CFR part 1000	PIH
14.871	Section 8 Project-Based Voucher Program.	24 CFR part 983	PIH
14.872	Public Housing Capital Fund	24 CFR part 905	PIH
14.873	Native Hawaiian Housing Block Grants	24 CFR part 1006	PIH
14.900	Lead-Based Paint Hazard Control in Privately-Owned Housing.	NOFA	OHHLHC <sup>5</sup>

<sup>1</sup> Office of Housing—Federal Housing Commissioner.  
<sup>2</sup> Office of Community Planning and Development.  
<sup>3</sup> Notice of Funding Availability.  
<sup>4</sup> Office of Public and Indian Housing.  
<sup>5</sup> Office of Healthy Homes and Lead Hazard Control.

*Findings and Certifications*

**Environmental Impact**

A Finding of No Significant Impact with respect to the environment for this rule was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of NEPA. The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of Regulations, Office of the General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street, SW., Washington, DC 20410-5000.

**Executive Order 12866, Regulatory Planning and Review**

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, "Regulatory Planning and Review." OMB determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made to this rule as a result of that review are identified in the docket file, which is available for public inspection in the Office of Regulations, Office of the General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street, SW., Washington, DC 20410-5000.

**Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) establishes

requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This final rule does not impose a federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

**Regulatory Flexibility Act**

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule would not have a significant economic impact on a substantial number of small entities. There are no anti-competitive discriminatory aspects of the rule with regard to small entities, and there are not any unusual procedures that would need to be complied with by small entities.

**Executive Order 13132, Federalism**

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have Federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Executive Order.

**List of Subjects**

*24 CFR Part 50*

Environmental impact statements.

*24 CFR Part 58*

Community Development Block Grants, Environmental Impact Statements, Grant programs—housing and community development, Reporting and recordkeeping requirements.

*24 CFR Part 574*

Community facilities, Grant programs—health programs, Grant programs—housing and community development, Grant programs—social programs, HIV/AIDS, Low and moderate income housing, Reporting and recordkeeping requirements.

*24 CFR Part 582*

Grant programs—housing and community development, Homeless, Rent subsidies, Reporting and recordkeeping requirements.

*24 CFR Part 583*

Community facilities, Grant programs—housing and community development, Reporting and recordkeeping requirements.

*24 CFR Part 970*

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

*Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance numbers are 14.165-18.900.



Also see section IV of the SUPPLEMENTARY INFORMATION.

■ Accordingly, for the reasons described in the preamble, the Department amends 24 CFR parts 50, 58, 574, 582, 583, and 970 as follows:

**PART 50—PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY**

■ 1. The authority citation for part 50 continues to read as follows:

**Authority:** 42 U.S.C. 3535(d) and 4332; and Executive Order 11991, 3 CFR, 1977 Comp., p. 123.

■ 2. Amend § 50.19 by revising paragraph (b)(15) to read as follows:

**§ 50.19 Categorical exclusions not subject to the Federal laws and authorities cited in § 50.4.**

\* \* \* \* \*

(b) \* \* \*

(15) Activities to assist homebuyers to purchase existing dwelling units or dwelling units under construction, including closing costs and downpayment assistance, interest buydowns, and similar activities that result in the transfer of title.

\* \* \* \* \*

■ 3. Amend § 50.20 by revising paragraphs (a)(2), (a)(3), and (a)(4), to read as follows:

**§ 50.20 Categorical exclusions subject to the Federal laws and authorities cited in § 50.4.**

(a) \* \* \*

(2) Rehabilitation of buildings and improvements when the following conditions are met:

(i) In the case of a building for residential use (with one to four units), the density is not increased beyond four units, the land use is not changed, and the footprint of the building is not increased in a floodplain or in a wetland;

(ii) In the case of multifamily residential buildings:

(A) Unit density is not changed more than 20 percent;

(B) The project does not involve changes in land use from residential to non-residential; and

(C) The estimated cost of rehabilitation is less than 75 percent of the total estimated cost of replacement after rehabilitation.

(iii) In the case of non-residential structures, including commercial, industrial, and public buildings:

(A) The facilities and improvements are in place and will not be changed in size nor capacity by more than 20 percent; and

(B) The activity does not involve a change in land use, such as from non-

residential to residential, commercial to industrial, or from one industrial use to another.

(3)(i) An individual action on up to four dwelling units where there is a maximum of four units on any one site. The units can be four one-unit buildings or one four-unit building or any combination in between; or

(ii) An individual action on a project of five or more housing units developed on scattered sites when the sites are more than 2,000 feet apart and there are not more than four housing units on any one site.

(iii) Paragraphs (a)(3)(i) and (ii) of this section do not apply to rehabilitation of a building for residential use (with one to four units) (see paragraph (a)(2)(i) of this section).

(4) Acquisition (including leasing) or disposition of, or equity loans on an existing structure, or acquisition (including leasing) of vacant land provided that the structure or land acquired, financed, or disposed of will be retained for the same use.

\* \* \* \* \*

**PART 58—ENVIRONMENTAL REVIEW PROCEDURES FOR ENTITIES ASSUMING HUD ENVIRONMENTAL RESPONSIBILITIES**

■ 4. The authority citation for part 58 is revised to read as follows:

**Authority:** 12 U.S.C. 1707 note, 1715z–13a(k); 25 U.S.C. 4115 and 4226; 42 U.S.C. 1437x, 3535(d), 3547, 4332, 4852, 5304(g), 11402, 12838, and 12905(h); title II of Pub. L. 105–276; E.O. 11514 as amended by E.O. 11991, 3 CFR 1977 Comp., p. 123.

■ 5. Amend § 58.1 by removing paragraph (b)(2) and designating it as “reserved,” redesignating and revising existing paragraph (b)(3) as paragraph (b)(3)(i), adding paragraph (b)(3)(ii), revising paragraphs (b)(6)(i), (ii), and (iii), deleting “and” at the end of paragraph (b)(8), replacing the period at the end of paragraph (b)(9) with a semicolon, and adding new paragraphs (b)(10), (11), (12), and new paragraphs (c) and (d), to read as follows:

**§ 58.1 Purpose and applicability.**

\* \* \* \* \*

(b) \* \* \*

(2) [Reserved]

(3)(i) Grants to states and units of general local government under the Emergency Shelter Grant Program, Supportive Housing Program (and its predecessors, the Supportive Housing Demonstration Program (both Transitional Housing and Permanent Housing for Homeless Persons with Disabilities) and Supplemental Assistance for Facilities to Assist the

Homeless), Shelter Plus Care Program, Safe Havens for Homeless Individuals Demonstration Program, and Rural Homeless Housing Assistance, authorized by Title IV of the McKinney-Vento Homeless Assistance Act, in accordance with section 443 (42 U.S.C. 11402);

(ii) Grants beginning with Fiscal Year 2001 to private non-profit organizations and housing agencies under the Supportive Housing Program and Shelter Plus Care Program authorized by Title IV of the McKinney-Vento Homeless Assistance Act, in accordance with section 443 (42 U.S.C. 11402);

\* \* \*

(6)(i) Public Housing Programs under Title I of the United States Housing Act of 1937, including HOPE VI grants authorized under section 24 of the Act for Fiscal Year 2000 and later, in accordance with section 26 (42 U.S.C. 1437x);

(ii) Grants for the revitalization of severely distressed public housing (HOPE VI) for Fiscal Year 1999 and prior years, in accordance with Title II of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999 (Pub. L. 105–276, approved October 21, 1998); and

(iii) Assistance administered by a public housing agency under section 8 of the United States Housing Act of 1937, except for assistance provided under part 886 of this title, in accordance with section 26 (42 U.S.C. 1437x);

\* \* \*

(10) Assistance provided under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), in accordance with:

(i) Section 105 for Indian Housing Block Grants and Federal Guarantees or Financing for Tribal Housing Authorities (25 U.S.C. 4115 and 4226); and

(ii) Section 806 for Native Hawaiian Housing Block Grants (25 U.S.C. 4226);

(11) Indian Housing Loan Guarantees authorized by section 184 of the Housing and Community Development Act of 1992, in accordance with section 184(k) (12 U.S.C. 1715z–13a(k)); and

(12) Grants for Housing Opportunities for Persons with AIDS (HOPWA) under the AIDS Housing Opportunity Act, as follows: competitive grants beginning with Fiscal Year 2001 and all formula grants, in accordance with section 856(h) (42 U.S.C. 12905(h)); all grants for Fiscal Year 1999 and prior years, in accordance with section 207(c) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations



Act, 1999 (Pub. L. 105-276, approved October 21, 1998).

(c) When HUD assistance is used to help fund a revolving loan fund that is administered by a recipient or another party, the activities initially receiving assistance from the fund are subject to the requirements in this part. Future activities receiving assistance from the revolving loan fund, after the fund has received loan repayments, are subject to the environmental review requirements if the rules of the HUD program that initially provided assistance to the fund continue to treat the activities as subject to the Federal requirements. If the HUD program treats the activities as not being subject to any Federal requirements, then the activities cease to become Federally-funded activities and the provisions of this part do not apply.

(d) To the extent permitted by applicable laws and the applicable regulations of the Council on Environmental Quality, the Assistant Secretary for Community Planning and Development may, for good cause and with appropriate conditions, approve waivers and exceptions or establish criteria for exceptions from the requirements of this part.

■ 6. Amend § 58.2 by revising paragraphs (a)(5)(v) and (a)(5)(vii), adding new paragraphs (a)(5)(ix) and (x), revising paragraphs (a)(6), (a)(7) introductory text, (a)(7)(i) and (a)(7)(ii) introductory text, and removing paragraphs (a)(7)(ii)(D) and (E), to read as follows:

§ 58.2 Terms, abbreviations and definitions.

(a) \* \* \*

(5) \* \* \*

(v) With respect to Public Housing Programs under § 58.1(b)(6)(i), fiscal year 1999 and prior HOPE VI grants under § 58.1(b)(6)(ii) or Section 8 assistance under § 58.1(b)(6)(iii), a public housing agency;

\* \* \*

(vii) With respect to the FHA Multifamily Housing Finance Agency Program under 58.1(b)(8), a qualified housing finance agency;

\* \* \*

(ix)(A) With respect to NAHASDA assistance under § 58.1(b)(10), the Indian tribe or the Department of Hawaiian Home Lands; and

(B) With respect to the Section 184 Indian Housing Loan Guarantee program under § 58.1(b)(11), the Indian tribe.

(x) With respect to the Shelter Plus Care and Supportive Housing Programs under § 58.1(b)(3)(ii), nonprofit organizations and other entities.

(6) Release of funds. In the case of the FHA Multifamily Housing Finance Agency Program under § 58.1(b)(8), Release of Funds, as used in this part, refers to HUD issuance of a firm approval letter, and Request for Release of Funds refers to a recipient's request for a firm approval letter. In the case of the Section 184 Indian Housing Loan Guarantee program under § 58.1(b)(11), Release of Funds refers to HUD's issuance of a commitment to guarantee a loan, or if there is no commitment, HUD's issuance of a certificate of guarantee.

(7) Responsible Entity. Responsible Entity means:

(i) With respect to environmental responsibilities under programs listed in § 58.1(b)(1), (2), (3)(i), (4), and (5), a recipient under the program.

(ii) With respect to environmental responsibilities under the programs listed in § 58.1(b)(3)(ii) and (6) through (12), a state, unit of general local government, Indian tribe or Alaska Native Village, or the Department of Hawaiian Home Lands, when it is the recipient under the program. Under the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.) listed in § 58.1(b)(10)(i), the Indian tribe is the responsible entity whether or not a Tribally Designated Housing Entity is authorized to receive grant amounts on behalf of the tribe. The Indian tribe is also the responsible entity under the Section 184 Indian Housing Loan Guarantee program listed in § 58.1(b)(11). Regional Corporations in Alaska are considered Indian tribes in this part. Non-recipient responsible entities are designated as follows:

\* \* \* \* \*

■ 7. Amend § 58.4 by revising paragraph (b)(2), removing paragraph (b)(3), and adding a new paragraph (c) to read as follows:

§ 58.4 Assumption authority.

\* \* \* \* \*

(b) \* \* \*

(2) States must exercise HUD's responsibilities in accordance with § 58.18, with respect to approval of a unit of local government's environmental certification and RROF for a HUD assisted project funded through the state. Approval by the state of a unit of local government's certification and RROF satisfies the Secretary's responsibilities under NEPA and the related laws cited in § 58.5.

(c) Particular responsibilities of Indian tribes. An Indian tribe may, but is not required to, assume responsibilities for environmental

review, decision-making and action for programs authorized by the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.) (other than title VIII) or section 184 of the Housing and Community Development Act of 1992 (12 U.S.C. 1715z-13a). The tribe must make a separate decision regarding assumption of responsibilities for each of these Acts and communicate that decision in writing to HUD. If the tribe assumes these responsibilities, the requirements of this part shall apply. If a tribe formally declines assumption of these responsibilities, they are retained by HUD and the provisions of part 50 of this title apply.

■ 8. Amend § 58.5 by revising paragraphs (a)(1) and (i) to read as follows:

§ 58.5 Related Federal laws and authorities.

\* \* \* \* \*

(a) Historic properties. (1) The National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), particularly sections 106 and 110 (16 U.S.C. 470 and 470h-2).

\* \* \* \* \*

(i) HUD environmental standards. (1) Applicable criteria and standards specified in part 51 of this title, other than the runway clear zone notification requirement in § 51.303(a)(3).

(2)(i) Also, it is HUD policy that all properties that are being proposed for use in HUD programs be free of hazardous materials, contamination, toxic chemicals and gases, and radioactive substances, where a hazard could affect the health and safety of occupants or conflict with the intended utilization of the property.

(ii) The environmental review of multifamily housing with five or more dwelling units (including leasing), or non-residential property, must include the evaluation of previous uses of the site or other evidence of contamination on or near the site, to ensure that the occupants of proposed sites are not adversely affected by any of the hazards listed in paragraph (i)(2)(i) of this section.

(iii) Particular attention should be given to any proposed site on or in the general proximity of such areas as dumps, landfills, industrial sites, or other locations that contain, or may have contained, hazardous wastes.

(iv) The responsible entity shall use current techniques by qualified professionals to undertake investigations determined necessary.

\* \* \* \* \*

■ 9. Revise § 58.10 to read as follows:

**§ 58.10 Basic environmental responsibility.**

In accordance with the provisions of law cited in § 58.1(b), except as otherwise provided in § 58.4(c), the responsible entity must assume the environmental responsibilities for projects under programs cited in § 58.1(b). In doing so, the responsible entity must comply with the provisions of NEPA and the CEQ regulations contained in 40 CFR parts 1500 through 1508, including the requirements set forth in this part.

- 10. Amend § 58.11 by revising paragraph (b) to read as follows:

**§ 58.11 Legal capacity and performance.**

\* \* \* \* \*

(b) If a public housing, special project, HOPWA, Supportive Housing, Shelter Plus Care, or Self-Help Homeownership Opportunity recipient that is not a responsible entity objects to the non-recipient responsible entity conducting the environmental review on the basis of performance, timing, or compatibility of objectives, HUD will review the facts to determine who will perform the environmental review.

\* \* \* \* \*

**§ 58.17 [Removed]**

- 11. Remove and reserve § 58.17.
- 12. Revise § 58.18 to read as follows:

**§ 58.18 Responsibilities of States assuming HUD environmental responsibilities.**

States that elect to administer a HUD program shall ensure that the program complies with the provisions of this part. The state must:

(a) Designate the state agency or agencies that will be responsible for carrying out the requirements and administrative responsibilities set forth in subpart H of this part and which will:

(1) Develop a monitoring and enforcement program for post-review actions on environmental reviews and monitor compliance with any environmental conditions included in the award.

(2) Receive public notices, RROFs, and certifications from recipients pursuant to §§ 58.70 and 58.71; accept objections from the public and from other agencies (§ 58.73); and perform other related responsibilities regarding releases of funds.

(b) Fulfill the state role in subpart H relative to the time period set for the receipt and disposition of comments, objections and appeals (if any) on particular projects.

- 13. Revise § 58.22 to read as follows:

**§ 58.22 Limitations on activities pending clearance.**

(a) 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. 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.

(b) If a project or activity is exempt under § 58.34, or is categorically excluded (except in extraordinary circumstances) under § 58.35(b), no RROF is required and the recipient may undertake the activity immediately after the responsible entity has documented its determination as required in § 58.34(b) and § 58.35(d), but the recipient must comply with applicable requirements under § 58.6.

(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.

(d) An option agreement on a proposed site or property is allowable prior to the completion of the environmental review if the option agreement is subject to a determination by the recipient on the desirability of the property for the project as a result of the completion of the environmental review in accordance with this part and the cost of the option is a nominal portion of the purchase price. There is no constraint on the purchase of an option by third parties that have not been selected for HUD funding, have no responsibility for the environmental review and have no say in the approval or disapproval of the project.

(e) *Self-Help Homeownership Opportunity Program (SHOP)*. In accordance with section 11(d)(2)(A) of the Housing Opportunity Program Extension Act of 1996 (42 U.S.C. 12805 note), an organization, consortium, or affiliate receiving assistance under the SHOP program may advance nongrant

funds to acquire land prior to completion of an environmental review and approval of a Request for Release of Funds (RROF) and certification, notwithstanding paragraph (a) of this section. Any advances to acquire land prior to approval of the RROF and certification are made at the risk of the organization, consortium, or affiliate and reimbursement for such advances may depend on the result of the environmental review. This authorization is limited to the SHOP program only and all other forms of HUD assistance are subject to the limitations in paragraph (a) of this section.

(f) *Relocation*. Funds may be committed for relocation assistance before the approval of the RROF and related certification for the project provided that the relocation assistance is required by 24 CFR part 42.

- 14. Amend § 58.33 by revising paragraph (b) to read as follows:

**§ 58.33 Emergencies.**

\* \* \* \* \*

(b) If funds are needed on an emergency basis and adherence to separate comment periods would prevent the giving of assistance during a Presidentially declared disaster, or during a local emergency that has been declared by the chief elected official of the responsible entity who has proclaimed that there is an immediate need for public action to protect the public safety, the combined Notice of FONSI and Notice of Intent to Request Release of Funds (NOI/RROF) may be disseminated and/or published simultaneously with the submission of the RROF. The combined Notice of FONSI and NOI/RROF shall state that the funds are needed on an emergency basis due to a declared disaster and that the comment periods have been combined. The Notice shall also invite commenters to submit their comments to both HUD and the responsible entity issuing the notice to ensure that these comments will receive full consideration.

- 15. Amend § 58.35 as follows:
  - a. Redesignating paragraphs (a)(3)(i) and (a)(3)(ii) as paragraphs (a)(3)(ii) and (a)(3)(iii);
  - b. Adding a new paragraph (a)(3)(i);
  - c. Revising paragraphs (a)(4) and (a)(5); and
  - d. Adding a new paragraph (b)(7).

The additions and revisions read as follows:

**§ 58.35 Categorical exclusions.**

- (a) \* \* \*
- (3) \* \* \*

(i) In the case of a building for residential use (with one to four units), the density is not increased beyond four units, the land use is not changed, and the footprint of the building is not increased in a floodplain or in a wetland;

(ii) \* \* \*

(iii) \* \* \*

(4)(i) An individual action on up to four dwelling units where there is a maximum of four units on any one site. The units can be four one-unit buildings or one four-unit building or any combination in between; or

(ii) An individual action on a project of five or more housing units developed on scattered sites when the sites are

more than 2,000 feet apart and there are not more than four housing units on any one site.

(iii) Paragraphs (a)(4)(i) and (ii) of this section do not apply to rehabilitation of a building for residential use (with one to four units) (see paragraph (a)(3)(i) of this section).

(5) Acquisition (including leasing) or disposition of, or equity loans on an existing structure, or acquisition (including leasing) of vacant land provided that the structure or land acquired, financed, or disposed of will be retained for the same use.

\* \* \* \* \*

(b) \* \* \*

(7) Approval of supplemental assistance (including insurance or guarantee) to a project previously approved under this part, if the approval is made by the same responsible entity that conducted the environmental review on the original project and re-evaluation of the environmental findings is not required under § 58.47.

\* \* \* \* \*

■ 16. Revise § 58.45 to read as follows:

**§ 58.45 Public comment periods.**

Required notices must afford the public the following minimum comment periods, counted in accordance with § 58.21:

(a) Notice of Finding of No Significant Impact (FONSI) .....	15 days when published or, if no publication, 18 days when mailing and posting
(b) Notice of Intent to Request Release of Funds (NOI-RROF) .....	7 days when published or, if no publication, 10 days when mailing and posting
(c) Concurrent or combined notices .....	15 days when published or, if no publication, 18 days when mailing and posting

■ 17. Amend § 58.72 by revising paragraph (b) to read as follows:

**§ 58.72 HUD or State actions on RROFs and certifications.**

\* \* \* \* \*

(b) HUD (or the state) may disapprove a certification and RROF if it has knowledge that the responsible entity or other participants in the development process have not complied with the items in § 58.75, or that the RROF and certification are inaccurate.

\* \* \* \* \*

■ 18. Amend § 58.75 by revising paragraph (e) to read as follows:

**§ 58.75 Permissible bases for objections.**

\* \* \* \* \*

(e) The recipient or other participants in the development process have committed funds, incurred costs or undertaken activities not authorized by this part before release of funds and approval of the environmental certification by HUD (or the state).

\* \* \* \* \*

**PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS**

■ 19. The authority citation for part 574 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12901–12912.

■ 20. Revise § 574.510 to read as follows:

**§ 574.510 Environmental procedures and standards.**

(a) Activities under this part are subject to HUD environmental

regulations in part 58 of this title, except that HUD will perform an environmental review in accordance with part 50 of this title for any competitive grant for Fiscal Year 2000.

(b) The recipient, its project partners and their contractors may not acquire, rehabilitate, convert, lease, repair, dispose of, demolish, or construct property for a project under this part, or commit or expend HUD or local funds for such eligible activities under this part, until the responsible entity (as defined in § 58.2 of this title) has completed the environmental review procedures required by part 58 and the environmental certification and RROF have been approved (or HUD has performed an environmental review and the recipient has received HUD approval of the property). HUD will not release grant funds if the recipient or any other party commits grant funds (*i.e.*, incurs any costs or expenditures to be paid or reimbursed with such funds) before the recipient submits and HUD approves its RROF (where such submission is required).

(c) For activities under a grant to a nonprofit entity that would generally be subject to review under part 58, HUD may make a finding in accordance with § 58.11(d) and may itself perform the environmental review under the provisions of part 50 of this title if the recipient nonprofit entity objects in writing to the responsible entity's performing the review under part 58. Irrespective of whether the responsible entity in accord with part 58 (or HUD in accord with part 50) performs the

environmental review, the recipient shall supply all available, relevant information necessary for the responsible entity (or HUD, if applicable) to perform for each property any environmental review required by this part. The recipient also shall carry out mitigating measures required by the responsible entity (or HUD, if applicable) or select alternate eligible property.

**PART 582—SHELTER PLUS CARE**

■ 21. The authority citation for part 582 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 11403–11407b.

■ 22. Revise § 582.230 to read as follows:

**§ 582.230 Environmental review.**

(a) Activities under this part are subject to HUD environmental regulations in part 58 of this title, except that HUD will perform an environmental review in accordance with part 50 of this title prior to its approval of any conditionally selected applications from PHAs for Fiscal Year 2000 and prior years for other than the SRO component. For activities under a grant to a PHA that generally would be subject to review under part 58, HUD may make a finding in accordance with § 58.11(d) and may itself perform the environmental review under the provisions of part 50 of this title if the recipient PHA objects in writing to the responsible entity's performing the review under part 58. Irrespective of whether the responsible entity in accord with part 58 (or HUD in accord with

part 50) performs the environmental review, the recipient shall supply all available, relevant information necessary for the responsible entity (or HUD, if applicable) to perform for each property any environmental review required by this part. The recipient also shall carry out mitigating measures required by the responsible entity (or HUD, if applicable) or select alternate eligible property. HUD may eliminate from consideration any application that would require an Environmental Impact Statement (EIS).

(b) The recipient, its project partners and their contractors may not acquire, rehabilitate, convert, lease, repair, dispose of, demolish, or construct property for a project under this part, or commit or expend HUD or local funds for such eligible activities under this part, until the responsible entity (as defined in § 58.2 of this title) has completed the environmental review procedures required by part 58 and the environmental certification and RROF have been approved or HUD has performed an environmental review under part 50 and the recipient has received HUD approval of the property. HUD will not release grant funds if the recipient or any other party commits grant funds (*i.e.*, incurs any costs or expenditures to be paid or reimbursed with such funds) before the recipient submits and HUD approves its RROF (where such submission is required).

**PART 583—SUPPORTIVE HOUSING**

■ 23. The authority citation for part 583 continues to read as follows:

**Authority:** 42 U.S.C. 3535(d) and 11389.

■ 24. Revise § 583.230 to read as follows:

**§ 583.230 Environmental review.**

(a) Activities under this part are subject to HUD environmental

regulations in part 58 of this title, except that HUD will perform an environmental review in accordance with part 50 of this title prior to its approval of any conditionally selected applications for Fiscal Year 2000 and prior years that were received directly from private nonprofit entities and governmental entities with special or limited purpose powers. For activities under a grant that generally would be subject to review under part 58, HUD may make a finding in accordance with § 58.11(d) and may itself perform the environmental review under the provisions of part 50 of this title if the recipient objects in writing to the responsible entity's performing the review under part 58. Irrespective of whether the responsible entity in accord with part 58 (or HUD in accord with part 50) performs the environmental review, the recipient shall supply all available, relevant information necessary for the responsible entity (or HUD, if applicable) to perform for each property any environmental review required by this part. The recipient also shall carry out mitigating measures required by the responsible entity (or HUD, if applicable) or select alternate eligible property. HUD may eliminate from consideration any application that would require an Environmental Impact Statement (EIS).

(b) The recipient, its project partners and their contractors may not acquire, rehabilitate, convert, lease, repair, dispose of, demolish or construct property for a project under this part, or commit or expend HUD or local funds for such eligible activities under this part, until the responsible entity (as defined in § 58.2 of this title) has completed the environmental review procedures required by part 58 and the environmental certification and RROF have been approved or HUD has

performed an environmental review under part 50 and the recipient has received HUD approval of the property. HUD will not release grant funds if the recipient or any other party commits grant funds (*i.e.*, incurs any costs or expenditures to be paid or reimbursed with such funds) before the recipient submits and HUD approves its RROF (where such submission is required).

**PART 970—PUBLIC HOUSING PROGRAM—DEMOLITION OR DISPOSITION OF PUBLIC HOUSING PROJECTS**

■ 25. The authority citation for part 970 continues to read as follows:

**Authority:** 42 U.S.C. 1437p and 3535(d).

■ 26. Amend § 970.4 by revising paragraph (b), removing paragraph (c) and designating it as reserved, to read as follows:

**§ 970.4 General requirements for HUD approval of applications for demolition or disposition.**

\* \* \* \* \*

(b) *Environmental review.* Activities under this part are subject to HUD environmental regulations in part 58 of this title. However, HUD may make a finding in accordance with § 58.11(d) and may itself perform the environmental review under the provisions of part 50 of this title if a PHA objects in writing to the responsible entity's performing the review under part 58.

(c) [Reserved]

\* \* \* \* \*

Dated: September 15, 2003.

**Mel Martinez,**  
*Secretary.*

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