Chapter 2: Environmental Review

Introduction

The purpose of the environmental review process is to analyze the effect a CDBG-funded project may have on the people in and the natural environmental features of a project area.

Grantees who are recipients of KCDBG funds are considered responsible entities (REs) and must complete an environmental review of all project activities prior to obligating any project funds. This requirement also applies to projects funded with KCDBG-generated program income.

This chapter will cover the environmental regulations and requirements that must be followed on all KCDBG funded projects. Definitions, forms and step-by-step instructions on how to complete the environmental reviews are provided within this chapter and its attachments.

Section 2-A. Applicable Regulations

24 CFR Part 58:
Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities

The HUD rules and regulations that govern the environmental review process can be found at 24 CFR Part 58. The provisions of the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations in 40 CFR Parts 1500 through 1508, and a myriad of other state and federal laws and regulations (some of which are enforced by state agencies) also may apply depending upon the type of project and the level of review required. These laws and authorities are referenced in the HUD and NEPA regulations and are listed in several of the chapter attachments.

The information contained in this chapter summarizes a number of state and federal statutes and regulations and is solely intended to give the grantee (responsible entity) an overview of its obligations in the environmental review process. Citation of these summaries may not be used as the basis for any action or inaction or as a defense in any litigation. The grantee (responsible entity) and the Environmental Certifying Officer are responsible for referring to and complying with the specific citations listed herein.

Section 2-B. Legal Responsibilities

The Responsible Entity

Under 24 CFR Part 58, the term “responsible entity” (RE) means the grantee (unit of local government) under the state CDBG Program. Therefore, these terms are used interchangeably with grantee throughout this chapter and the attachments. (The term “funding agency” is used in place of DLG, but can be interpreted to include any agency that provides funds to a project and has environmental oversight responsibilities.) The responsible entity must complete the environmental review process.

Environmental review responsibilities have both legal and financial ramifications. As part of the assurances and agreements signed by the responsible entity, the Chief Executive Officer (CEO) of the

responsible entity agrees to assume the role of "responsible federal official" under the provisions of the National Environmental Policy Act (NEPA). This means that if someone brings suit against the responsible entity in federal court on environmental grounds, the CEO will be named as the defendant. There may be financial implications associated with any lawsuit and, of course, any fines, judgments or settlements that may result. The Commonwealth of Kentucky accepts no responsibility or liability for the quality or accuracy of the local environmental review process. DLG's responsibility is to inform the grantee of the proper procedural requirements of various environmental statutes, regulations, and executive orders and review that process.

Environmental Certifying Officer

Under Part 58, the local chief elected or appointed official must assume the role of the Environmental Certifying Officer (ECO) or formally designate another person to do so. If the CEO does designates a staff person to serve as the ECO, this designation must be made in writing and signed by the CEO and placed in the Environmental Review Record (ERR).

The ECO accepts full responsibility for the completeness and accuracy of the review and compliance with applicable laws and regulations. Local officials should review the municipal liability and indemnification statutes as well as the status and coverage of local liability insurance policies when accepting responsibility under environmental laws. The responsibilities of the ECO include making findings and signing required certifications.

Other key points regarding the ECO designation include:

- ✓ The ECO must be a line officer of the responsible entity who is authorized to make decisions on behalf of the grantee.
- ✓ This person does not need to be a technical expert, but should be credible if it becomes necessary to defend whether or not the required procedures were followed and completed. Further, that resolution and/or mitigation of adverse effect, if any, are incorporated into and accounted for in the project implementation.
- ✓ The ECO is not the one who actually conducts the review and completes the applicable documentation in the ERR. That responsibility is given to a staff person or consultant that is hired by the grantee.

Environmental Review Record

Each responsible entity must prepare and maintain a written record of the environmental review undertaken for each project. This written record or file is called the Environmental Review Record (ERR), and it must be available for public review.

24 CFR Part 58.38

The ERR shall contain all the environmental review documents, public notices, and written determinations or environmental findings required by 24 CFR Part 58 as evidence of review, decision making, and actions pertaining to a particular project. The document shall:

- ✓ Describe the project and each of the related activities comprising the project, regardless of individual activity funding source;
- ✓ Evaluate the effects of the project or the activities on the human environment;

- ✓ Document compliance with applicable statutes and authorities; and
- ✓ Record the written determinations and other review findings required by 24 CFR Part 58.

The ERR will vary in length and content depending upon the level of review required for the categories of proposed activities.

Public comments, concerns and appropriate resolution by the recipient with regard to public notices that have been issued by the grantee are extremely important and must be fully documented in the ERR.

Section 2-C. Actions Triggering Environmental Review and Limitations Pending Clearance

Actions Triggering the Requirements of Part 58

All HUD-assisted activities must have some level of environmental compliance review completed for them. Compliance with the Part 58 requirements is initiated with the acceptance of applications from applicants for KCDBG funds to the state.

Activities that have physical impacts or which limit the choice of alternatives cannot be undertaken, even with the grantee or other project participant's own funds, prior to obtaining environmental clearance. If prohibited activities are undertaken after submission of an application but prior to receiving approval from the state, the applicant is at risk for the denial of CDBG assistance. The reason is that these actions interfere with the grantee's and the state's ability to comply with NEPA and Part 58. If prohibited actions are taken prior to environmental clearance, then environmental impacts may have occurred in violation of the federal laws and authorities and the standard review procedures that ensure compliance.

There are certain kinds of activities that may be undertaken without risking a violation of requirements of Part 58. For example, the act of either hiring a consultant to prepare a Phase I Environmental Site Assessment (an investigative study for environmental hazards), or hiring a consultant to complete an engineering design study or plan, or a study of soil and geological conditions, would be allowed. Environmental compliance reviews for these activities may be completed early on, and even prior to the grantee's execution of a grant agreement with the state.

24 CFR Part 58.22

Limitations Pending Environmental Clearance

According to the NEPA (40 CFR 1500-1508) and Part 58, the RE is required to ensure that environmental information is available before decisions are made and before actions are taken. In order to achieve this objective, Part 58 prohibits the commitment or expenditure of CDBG funds until the environmental review process has been completed and, if required, the grantee receives a release of funds from the state. This means that the grantee may not spend either public or private funds (CDBG, other federal or

The RE should note that, on the average, an environmental review usually takes at least 45 to 60 days to complete. Environmental assessments may take longer depending upon the environmental conditions and applicable requirements.

non-federal funds), or execute a legally binding agreement for property acquisition, rehabilitation, conversion, repair or construction pertaining to a specific site until environmental clearance has been achieved. In other words, grantees must avoid any and all actions that would preclude the selection of alternative choices before a final decision is made – that decision being based upon an understanding of the environmental consequences and actions that can protect, restore and enhance the human environment (i.e., the natural, physical, social, and economic environment).

Note that HUD issued a policy in April of 2011 that states that a grantee (or other project participants) cannot go to bid on activities that would be choice limiting (e.g., construction, demolition) until an environmental review is complete. This policy is based on NEPA and requires the environmental process to be completed prior to bidding in order to allow for an unprejudiced decision about the action and to allow for any modifications or project cancellation based upon the environmental review. To comply with this policy, grantees must have a signed environmental clearance from DLG prior to bid advertisement.

Moreover, until the grantee has completed the environmental review process (and received a release of funds), these same restrictions apply to project participants (e.g., subrecipients, developers, consultants, real estate agents, etc.) as well. It is the responsibility of the grantee to ensure project participants are apprised of these restrictions.

For the purposes of the environmental review process, "commitment of funds" includes:

- ✓ Execution of a legally binding agreement (such as a property purchase or construction contract);
- ✓ Expenditure of CDBG funds (e.g., hiring a consultant to prepare a preliminary design and engineering specifications or a Phase I Environmental Site Assessment);
- ✓ Use of any non-CDBG funds on actions that would have an adverse impact—e.g., demolition, dredging, filling, excavating; and
- ✓ Use of non-CDBG funds on actions that would be "choice limiting"—e.g., acquisition of real property; leasing property; rehabilitation, demolition, construction of buildings or structures; relocating buildings or structures, conversion of land or buildings/structures.

It is acceptable for grantees to execute non-legally binding agreements prior to completion of the environmental review process and receiving DLG approval. A non-legally binding agreement contains stipulations that ensure the project participant does not have a legal claim to any amount of CDBG funds to be used for the specific project or site until the environmental review process is satisfactorily completed.

It is also acceptable to execute an option agreement for the acquisition of property when the following requirements are met:

- ✓ The option agreement is subject to a determination by the grantee on the desirability of the property for the project as a result of the completion of the environmental review in accordance with Part 58; and
- ✓ The cost of the option is a nominal portion of the purchase price.

In a memo issued by HUD on August 26, 2011, the use of conditional contracts in acquisitions of existing single family and multifamily properties that involve the use of CDBG funds was clarified. A conditional contract for the purchase of property is a legal agreement between the potential buyer of a real estate property and the owner of the property. The conditional contract includes conditions that must be met

for the obligation to purchase to become binding. Conditional contracts can be used in more limited circumstances than option contracts. As already mentioned, conditional contracts are allowed only for residential property acquisition.

Secondly, for single family properties (one to four units):

- ✓ The purchase contract must include the appropriate language for a conditional contract (See the text box below); and
- ✓ No transfer of title to the purchaser or removal of the environmental conditions in the purchase contract occurs unless and until the grantee determines, on the basis of the environmental review, that the transfer to the buyer should go forward and the grantee has received release of funds and environmental clearance; and
- ✓ The deposit must be refundable or, if a deposit is non-refundable, it must be in an amount of $1,000 or less.

Finally, for multi-family properties:

- ✓ The structure may not be located in a Special Flood Hazard Area (100-year floodplain or certain activities in the 500-year floodplain);
- ✓ The purchase contract must include the appropriate language for a conditional contract (See the text box below);
- ✓ No transfer of title to the purchaser or removal of the environmental conditions in the purchase contract occurs unless and until the grantee determines, on the basis of the environmental review, that the transfer to the buyer should go forward and the grantee has received release of funds and environmental clearance; and
- ✓ The deposit must be refundable or, if a deposit is non-refundable, it must be a nominal amount of three percent of the purchase price or less.

Language that Must be Included in Conditional Contracts for Purchase of Residential Property

"Notwithstanding any other provision of this Contract, Purchaser shall have no obligation to purchase the property and no transfer of title to the Purchaser may occur, unless and until [the RE name] has provided purchaser and/or seller with a written notification that: 1) it has completed a federally-required environmental review and its request for release of funds has been approved and subject to any other contingencies in this contract, (a) the purchase may proceed or (b) the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property; and 2) it has determined that the purchase is exempt from federal environmental review and a request for release of funds is not required. [RE name] shall use its best efforts to conclude the environmental review of the property expeditiously."

Please contact DLG if assistance is needed with options or conditional contract language.

Section 2-D. Classifying Activities and Conducting the Review

To begin the environmental review process, the responsible entity must first determine the environmental classification of each activity in the project. This section will focus upon the five environmental classifications that are recognized under the CDBG program:

- ✓ Exempt activities;
- ✓ Categorically excluded activities not subject to Part 58.5;
- ✓ Categorically excluded activities subject to Part 58.5;
- ✓ Activities requiring an environment assessment (EA); or
- ✓ Activities requiring an environmental impact statement (EIS).

This section discusses the types of classifications and the steps required for each classification to ensure compliance with the applicable requirements.

24 CFR Part 58.32

The environmental regulations at 24 CFR Part 58.32 require the responsible entity to "…group together and evaluate as a single project all individual activities which are related geographically or functionally," whether or not HUD-assistance will be used to fund all the project activities or just some of the project activities. Once this has been done, the responsible entity must decide if the project is exempt, categorically excluded, or the project requires an environmental assessment or an environmental impact statement. The level of environmental review will be dictated by whichever project activity that requires the higher level of review. For example, if one activity in a project requires an environmental assessment then the entire project must be assessed at this level of review.

Exempt Activities

Certain activities are by their nature highly unlikely to have any direct impact on the environment. Accordingly, these activities are not subject to most of the procedural requirements of environmental review. Listed below are examples which may be exempt from environmental review. For complete details refer to the environmental regulations at 24 CFR Part 58.34(a)(1) through (12).

- ✓ Environmental and other studies;
- ✓ Information and financial services;
- ✓ Administrative and management activities;
- ✓ Engineering and design costs;
- ✓ Interim assistance (emergency) activities if the assisted activities do not alter environmental conditions and are for temporary or permanent improvements limited to protection, repair or restoration actions necessary only to control or arrest the effects of disasters, or imminent threats to public safety, or those resulting from physical deterioration;
- ✓ Public service activities that will not have a physical impact or result in any physical changes;
- ✓ Inspections and testing of properties for hazards or defects;
- ✓ Purchase of tools or insurance;

- ✓ Technical assistance or training;
- ✓ Payment of principal and interest on loans made or guaranteed by HUD; and
- ✓ Any of the categorically excluded activities subject to Part 58.5 (as listed in 58.35(a)) provided there are no circumstances which require compliance with any other federal laws and authorities listed at Part 58.5 of the regulations. Refer to the section below on categorically excluded activities subject to Part 58.5. NOTE: This decision is based upon the results of having completed a "Finding of Categorical Exclusion Subject to Section 58.5" (Attachment 2-2).

24 CFR Part 58.34 (a)(12)

If a project is determined to be exempt the responsible entity is required to document in writing that the project is exempt and meets the conditions for exemption. The responsible entity must complete the HUD form titled *Environmental Review for Activity/Project that is Exempt or Categorically Excluded not Subject to Section 58.5* (Attachment 2-1). The form must be signed by the certifying official and a copy sent to the appropriate funding agency for review.

Attachment 2-1: Environmental Review for Activity/Project that is Exempt or Categorically Excluded not Subject to Section 58.5

Categorically Excluded not Subject to Part 58.5 Activities

The following activities, listed at 24 CFR Part 58.35(b), have been determined to be categorically excluded from NEPA requirements and are not subject to Section 58.5 compliance determinations.

24 CFR 58.35(b)

- ✓ Tenant based rental assistance;
- ✓ Supportive services including but not limited to health care, housing services, permanent housing placement, short term payments for rent/mortgage/utility costs, and assistance in gaining access to local, state, and federal government services and services;
- ✓ Operating costs including maintenance, security, operation, utilities, furnishings, equipment, supplies, staff training, recruitment, and other incidental costs;
- ✓ Economic development activities including but not limited to equipment purchase, inventory financing, interest subsidy, operating expenses and similar costs not associated with construction or expansion of existing operations;
- ✓ Activities to assist homebuyers to purchase existing dwelling units or dwelling units under construction such as closing costs, down payment assistance, interest buy downs and similar activities that result in the transfer of title to a property; and
- ✓ Affordable housing predevelopment costs with ***NO*** physical impact such as legal, consulting, developer and other costs related to obtaining site options, project financing, administrative costs and fees for loan commitments, zoning approvals, and other related activities which do not have a physical impact.
- ✓ Approval of supplemental assistance to a project previously approved under Part 58, if the approval was made by the same RE that conducted the environmental review on the original project AND re-evaluation of the findings is not required under Part 58.47. See the section later in the chapter on re-evaluation of previously cleared projects for further guidance.

To complete environmental requirements for Categorically Excluded projects not Subject to 24 CFR Part 58.5, the responsible entity must make a finding of Categorical Exclusion Not Subject to 58.5 for activities that qualify under that category (using Attachment 2-1) and put in the ERR. The RE must also carry out any applicable requirements of 24 CFR Part 58.6 and document the ERR.

Attachment 2-1: Environmental Review for Activity/Project that is Exempt or Categorically Excluded not Subject to Section 58.5

- ✓ Finally, the RE must complete the Request for Approval of Evidentiary Materials and Release of Funds form and submit to DLG along with the Environmental Review for Activity/Project that is Exempt or Categorically Excluded not Subject to Section 58.5 form (Attachment 2-1).

Attachment 1-1: Sample Request for Approval of Evidentiary Materials and Release of Funds Form

The RE does not have to publish or post the Notice of Intent to Request Release of Funds (NOI/RROF) or execute the environmental certification.

Categorically Excluded Subject to Part 58.5 Activities

The list of categorically excluded activities is found at 24 CFR Part 58.35 of the environmental regulations. While the activities listed in 58.35(a) are categorically excluded from National Environmental Protection Act (NEPA) requirements, the grantee must nevertheless demonstrate compliance with the laws, authorities and Executive Orders listed in 58.5.

24 CFR Part 58.35(a) and 58.5

The following are categorically excluded activities subject to 58.5:

- ✓ Acquisition, repair, improvement, reconstruction, or rehabilitation of public facilities and improvements (other than buildings) when the facilities and improvements are in place and will be retained in the same use without change in size, or capacity of more than 20 percent.
- ✓ Special projects directed toward the removal of material and architectural barriers that restrict the mobility of and accessibility to elderly and disabled persons.
- ✓ Rehabilitation of buildings and improvements when the following conditions are met:
  - For residential properties with one to four units:
    - The density is not increased beyond four units, and
    - The land use is not changed.
  - For multi-family residential buildings (with more than four units):
    - Unit density is not changed more than 20 percent;
    - The project does not involve changes in land use from residential to non-residential; and
    - The estimated cost of rehabilitation is less than 75 percent of the total estimated replacement cost after rehabilitation.

- For non-residential structures including commercial, industrial and public buildings:
  - The facilities and improvements are in place and will not be changed in size or capacity by more than 20 percent; and
  - The activity does not involve a change in land use, e.g. from commercial to industrial, from non-residential to residential, or from one industrial use to another.

✓ An individual action on up to four-family dwelling 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;

✓ 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;

✓ 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.

✓ Combinations of the above activities.

To complete environmental requirements for Categorically Excluded projects subject to 24 CFR Part 58.5, the responsible entity must take the following steps:

✓ Determine whether or not the project is located in or will have an impact on floodplains and/or wetlands.

- It is highly desirable to avoid floodplains and wetlands when undertaking project activities. However, when this cannot be avoided, specific review procedures contained in 24 CFR Part 55 (Floodplain Management and Wetlands Protection) must be completed. Since development in these areas is clearly an environmental issue, the effects of these actions must be clearly articulated in one of the decision processes described in §§ 55.12(a)(3) and 55.20, whichever process is applicable.

NOTE: For acquisition and/or "minor" improvement of single family (1-4 unit) residential buildings, neither decision process must be undertaken. However, it must be documented on Attachment 2-4 that § 55.12(a)(1) and/or (2) is applicable.

- If the project is located in the floodplain or proposes construction in a wetland, the RE must provide written documentation of the decision process in the ERR. See the section, "Projects in Floodplains and Wetlands" later in this chapter for more information.

✓ Complete the Environmental Review for Activity/Project that is Categorically Excluded Subject to Section 58.5 (Attachment 2-2). The checklist helps to comply with the other (non-NEPA) federal laws.

Attachment 2-2: Environmental Review for Activity/Project that is Categorically Excluded Subject to Section 58.5

- In regard to "Historic Properties," review Clearinghouse comments prior to writing to the State Historic Preservation Officer (SHPO) for comments. (The Clearinghouse may have already stated that the SHPO has no objection to the project.) If the Clearinghouse states that a SHPO review is required, send a letter describing the activities and the reviewer's determination if the activity (or activities) have an effect on

Attachment 2-3a & b: SHPO Project Cover Sheet & Instructions

historic preservation or not, to the SHPO allowing 30 days for comments. Respond to these comments as required and file all correspondence and evidence of response in your ERR. Be sure reliable sources are cited on each line of the checklist. All historic property reviews must be done prior to the responsible entity making a final determination of environmental status.

- Consultation with tribal entities is also required. See Attachment 2-4 for a Sample Tribal Consultation letter. Refer to HUD Notice 12-006 for more guidance.

Attachment 2-4:
Sample Tribal Consultation Letter

✓ For those projects that cannot convert to exempt, publish and distribute the Notice of Intent to Request a Release of Funds (NOI/RROF). The Notice, which has been updated for 2015, informs the public that the grantee will accept written comments on the findings of its ERR and of the grantee's intention to request release of funds from the state. At least seven (7) calendar days after the date of publication must be allowed for public comment. The notice also says that DLG will receive objections for at least 15 days following receipt of the grantee's request for release of funds (Attachment 2-5).

Attachment 2-5:
Sample Notice of Intent to Request a Release of Funds (NOI/RROF)

Attachment 2-6:
Sample Public Notice Distribution List

✓ **The NOI/RROF must be published in a newspaper of general circulation**. The grantee must retain the "tear sheet" from the newspaper evidencing that the notice was published and on what date.

✓ **The grantee must also send a copy of the notice (NOI/RROF) to interested parties** (i.e., persons and entities that have commented on the environmental process or that have requested to be notified of environmental activities), local news media, appropriate local, state, and federal agencies, the regional Environmental Protection Agency (EPA) and the HUD Kentucky State Office (Attachment 2-5).

✓ The grantee may also post the notice in prominent public locations (e.g., library, courthouse, etc.); however, publication is still required.

TIP: **All time periods for notices shall be counted in calendar days. The first day of a time period begins at 12:01 a.m. local time on the day following the publication of the notice.**

Attachment 1-1:
Request for Approval of Evidentiary Materials and Release of Funds

Attachment 2-7:
Sample Environmental Certification

✓ After the seven-day comment period has elapsed, the responsible entity must prepare and submit the actual Request for Approval of Evidentiary Materials and Release of Funds (Attachment 1-1) and Environmental Certification (Attachment 2-7) and attachments to the appropriate funding agencies. The Environmental Certification certifies that responsible entities are in compliance with all the environmental review requirements.

Attachment 2-8: Environmental Review Record Checklist

✓ At the completion of the review, check the ERR using the Environmental Review Record Checklist provided in the attachments to ensure that it contains the following documents:

- Completed Environmental Review for Activity/Project that is Categorically Excluded Subject to Section 58.5 (including statutory checklist and other elements as well as supporting documentation)
- Correspondence with the SHPO (and documentation of mitigating measures, if applicable);

- Floodplain notices and documentation of alternatives considered, if applicable;
- Full tear sheet from newspaper with Notice of Intent to Request Release of Funds (NOI/RROF);
- Request for approval of evidentiary materials and release of funds, environmental certification and related correspondence; and
- DLG's approval of the release of funds.

Projects in Floodplains and Wetlands (24 CFR Part 55)

When a project meets one or more of the following criteria, the implementation of a specific decision-making process is required for compliance with Executive Orders 11988 and 11990 and 24 CFR Part 55:

Executive Order 11988 and 11990
24 CFR Part 55

- ✓ Is in the 100-year floodplain (Zones A or V mapped by FEMA, or best available information);
- ✓ Is a "critical action" in a 500-year floodplain (Sec. 55.(b)(3)). A critical action is any activity where even a slight chance of flooding would be too great, because such flooding might result in loss of life, injury to persons, or damage to property. Critical actions include activities that create, maintain or extend the useful life of those structures or facilities that (1) produce, use or store highly volatile, flammable, explosive, toxic or water-reactive materials; (2) provide essential and irreplaceable records or utility or emergency services that may become lost or inoperative during flood and storm events; or (3) are likely to contain occupants who may not be sufficiently mobile to avoid loss of life or injury during flood or storm events (e.g., hospitals, nursing homes, etc.). For more details, refer to 24 CFR Part 55; or
- ✓ Proposes construction in a wetland.

There are two decision-making processes identified in Part 55 concerning floodplains. They are the 8-step process (sec. 55.20) and the 5-step process (sec. 55.12(a)(3)). The 8-step process will apply unless a project falls under the allowed criteria for using the 5-step decision making process, which are:

- Disposition of multifamily and single family (1-4 unit) properties [sec. 55.12(a)(1)].
- Repair, rehabilitation, modernization, weatherization, or improvement of existing residential properties (multifamily, single family, assisted living, etc.) [Sec. 55.12.(a)(3)]
    - Number of units is not increased more than 20%;
    - Does not involve conversion from non-residential to residential; and
    - Does not meet definition of "substantial improvement" [sec. 55.2(b)(10)(i)(A)(2)].
- Repair, rehabilitation, modernization, weatherization, or improvement of nonresidential properties (i.e., public facilities, commercial/retail, and industrial) [sec. 55.12(a)(4)]
    - Does not meet the threshold of "substantial improvement" (i.e., the cost equals or exceeds 50% of the market value before damage occurred; and
    - The structure footprint and paved area is not increased more than 10%.

- Repair, rehabilitation, modernization, weatherization, or improvement of a structure listed on the National Register of Historic Places or on a State Inventory of Historic Places. ["Substantial improvement" does not apply to historic properties, Sec. 55.2(b)(10)(ii)(B)].

The grantee must document in writing which process is applicable and each step of the applicable process.

There are also two decision-making processes identified in Part 55 concerning proposed construction in wetlands. Typically, the 8-Step process is required (sec. 55.20). However, there may be circumstances for which the U.S. Army Corps of Engineers (COE) has issued a section 404 permit. In this case, a 3-Step decision process may be followed instead, provided that all the stipulations outlined in sec. 55.28 are met.

NOTE: When a project is located in a floodplain AND also proposes construction in a wetland, the 8-Step decision process must be completed (sec. 55.20(a)(3)). Below is an overview of each of the steps in the 8-Step decision process. When the 5-Step decision process is permissible for floodplains, only Steps 1, 4 through 6, and 8 are applicable. For construction in wetlands, when the 3-Step decision process is permissible due to a Section 404 permit, Steps 6-8 are applicable. All steps must be documented in writing.

✓ **Step One: Floodplain Determination**. Determine if the project is located in a base (100-year) floodplain. A floodplain refers to any land area susceptible to being inundated from any source of flooding including those which can be flooded from small and often dry water course.

- The maps identified below are published by the Federal Emergency Management Agency (FEMA). Check the following maps to determine if the project is located within a floodplain:
  - Flood Hazard Boundary Map; and/or
  - Flood Insurance Rate Map (both can be found here: https://msc.fema.gov/portal).
- If the community has been identified as flood-prone by FEMA, a copy of the community's most recently published map (including any letters of map amendments or revisions) should be obtained. The map will identify the community's special flood hazard areas.
- If the FEMA maps are not available, a determination of whether the project is located in a floodplain may be made by consulting other sources, such as:
  - U. S. Army Corps of Engineers - Hydrology, Hydraulics, and Coastal Team;
  - Local Soil Conservation Service District;
  - Floodplain Information Reports;
  - USGS Flood-prone Area;
  - Topographic Quadrangle maps; or
  - State and local maps and records of flooding.
- The responsible entity should request developers to provide an evaluation by an engineer or hydrologist for areas which are not covered by FEMA or these other sources. Further information may be available at the Kentucky Division of Water (DOW).
- Use floodplain maps to make this decision and record date in the ERR

- ✓ **Step Two: Early Public Review**. Executive Order (E.O.) 11988 includes requirements that the public be provided adequate information, opportunity for review and comment, and an accounting of the rationale for the proposed action affecting the floodplain. Involve the public in the decision making process as follows:
  - **Publish the Floodplains and Wetlands Early Public Notice in the non-legal section of the newspaper** of general circulation in the area to make the public aware of the intent. Refer to sec. 55.20(a) for the minimum information that must be given in the notice. See also the sample in Attachment 2-9: Sample Floodplains and Wetlands Early Public Notice. **The Floodplains and Wetlands Early Public Notice *must* be published (it cannot be posted).**
  - The notice must provide a complete description of the proposed action.
  - The notice must allow at least a 15-day comment period for public comments.

Attachment 2-9:
Sample Floodplains and Wetlands Early Public Notice

- ✓ **Step Three: Identify and Evaluate Alternate Locations**. Determine if there is a practical alternative. This determination requires the responsible entity to consider whether the base floodplain can be avoided:
  - Through alternative siting;
  - Through alternative action that performs the intended function but would minimize harm to/within the floodplain; or
  - By taking no action.
- ✓ **Step Four: Identify Impacts of Proposed Project**. Regardless of whether the location is located within a floodplain or outside a floodplain, both the direct and indirect potential impacts must be identified and reviewed.

If negative impacts are identified, methods must be developed to prevent potential harm as discussed in Step 5. The term ***harm***, as used in this context, applies to lives, property, natural and beneficial floodplain values.

- ✓ **Step Five: Identify Methods to Restore and Preserve Potential Harm to Floodplains and Wetlands Area**. If the proposed project has identifiable impacts (as identified in Step 4), the floodplains and wetlands must be restored and preserved.
  - The concept of minimization applies to harm.
  - The concept of restoration and preservation applies only in floodplain values.

Methods to be used to perform these actions are discussed in Step 6.

- ✓ **Step Six: Re-evaluate Alternatives**. At this stage, the proposed project needs to be re-evaluated, taking into account the identified impacts, the steps necessary to minimize these impacts and the opportunities to restore and preserve floodplain values.
  - If the proposed project is determined to be no longer feasible, you should consider limiting the project to make non-floodplain sites practicable.

- If the proposed project is outside the floodplain but has impacts that cannot be minimized, the recipient should consider whether the project can be modified or relocated in order to eliminate or reduce the identified impacts or, again, take no action.
- If neither is acceptable, the alternative is no action.

The reevaluation should also include a provision for comparison of the relative adverse impacts associated with the proposed project located both in and out of the floodplain. The comparison should emphasize floodplain values and a site out of the floodplain should not be chosen if the overall harm is significantly greater than that associated with the floodplain site.

✓ **Step Seven: Publish the Floodplains and Wetlands Notice of Explanation**. If the re-evaluation results in the determination that the only practicable alternative is to locate the project in the floodplain, the grantee must ***publish*** the Floodplains and Wetlands Notice of Explanation in the non-legal section of a local newspaper of general circulation (Refer to sec. 55.20(a) and (g) for the minimum information that must be given in the notice. See also the sample in Attachment 2-10: Sample Floodplains and Wetlands Notice of Explanation).

Attachment 2-10: Sample Floodplains and Wetlands Notice of Explanation

- The Floodplains and Wetlands Notice of Explanation (described previously) may ***not*** be posted.
- It should be noted that when a project triggers the E.O. 11988 "Eight Step Process," the Notice of Early Public Review should be published first and the minimum 15-day comment period elapsed ***before*** the grantee can publish the Floodplains and Wetlands Notice of Explanation.
- The Floodplains and Wetlands Notice of Explanation can be published simultaneously with the 24 CFR Part 58 required Combined/Concurrent Notice of Finding of No Significant Impact (FONSI) and Notice of Intent to Request Release of Funds (NOI/RROF) (Attachment 2-14).

Attachment 2-14: Combined Concurrent FONSI NOI RROF Notice

- Any written comments received in response to the above required notice must be addressed and filed in the ERR.
- Document compliance with E.O. 11988/11990 by using the sample documentation memorandum provided (See Attachment 2-11: Sample Documentation Memorandum for Floodplains/Wetlands Eight Step Process.)
- File all documentation and responses relating to the above described procedures in the ERR.

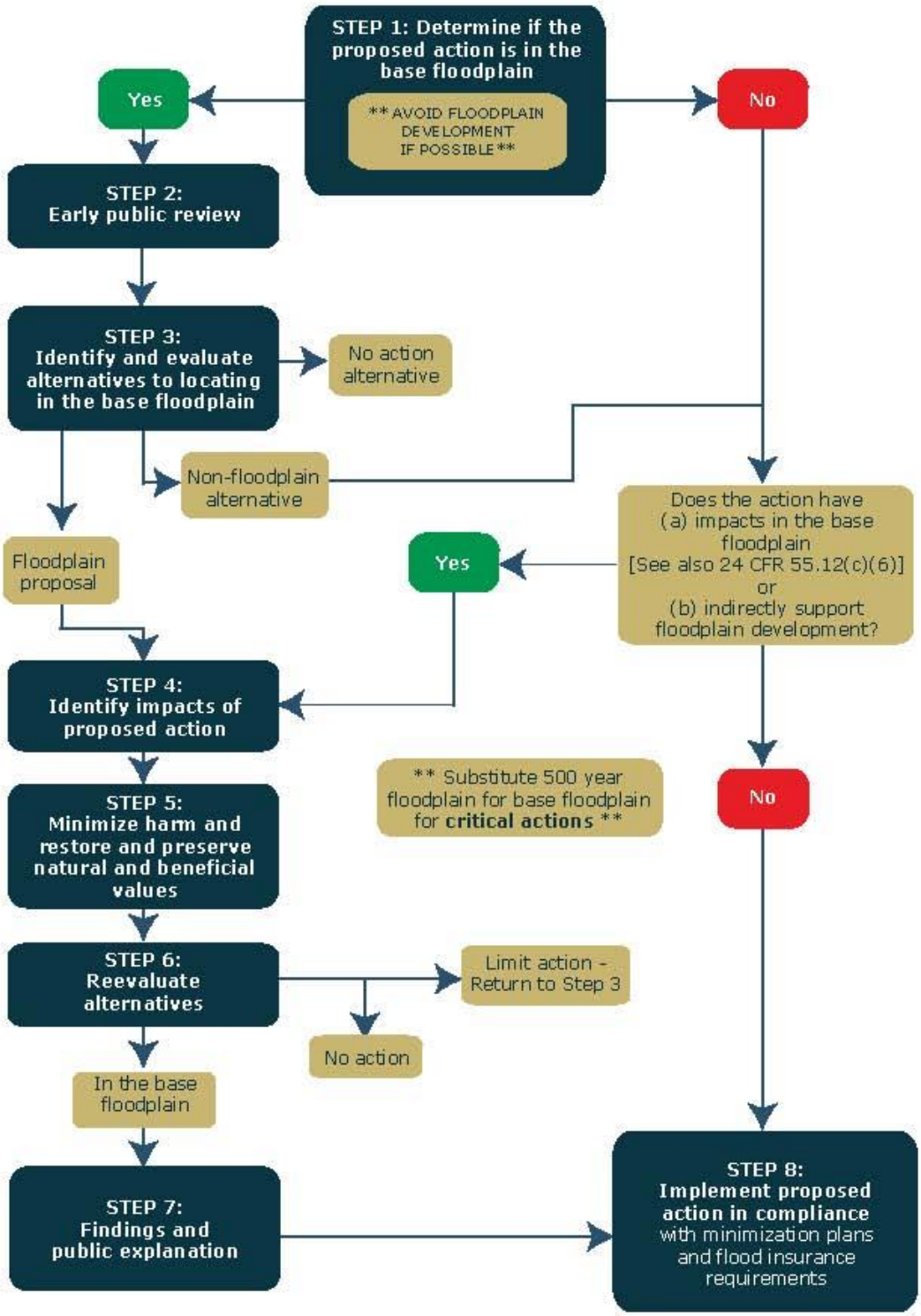
Attachment 2-11: Sample Documentation Memorandum for Floodplains/Wetlands Eight Step Process

✓ **Step Eight: Implement the Proposed Project**. Implement the project with appropriate mitigation.

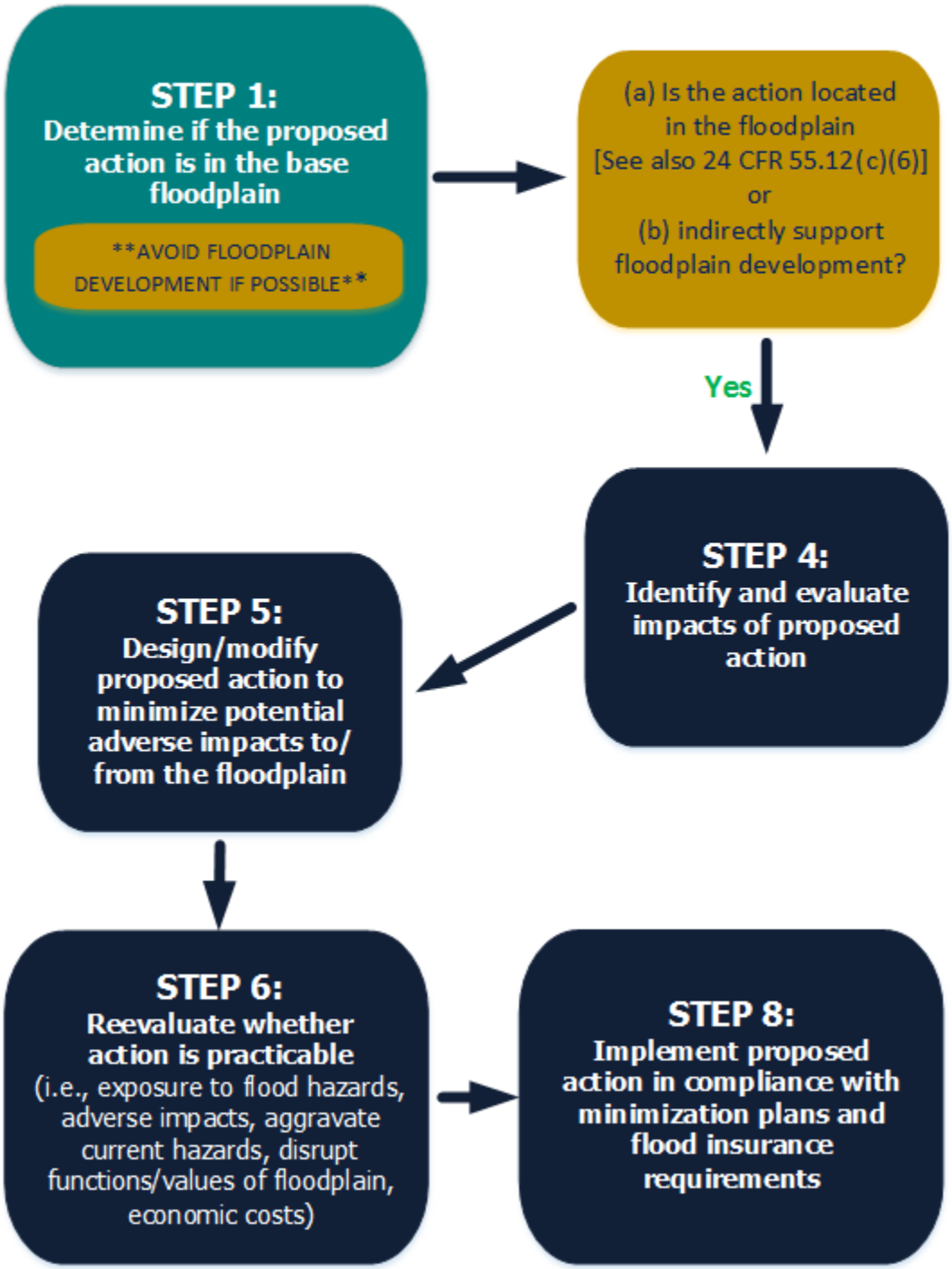
NOTE: If directional boring or drilling beneath a wetland is anticipated, please consult with DLG prior to undertaking the Eight-Step Process. HUD issued guidance in 2011 that exempts directional boring/drilling beneath wetlands from the Eight-Step Process *provided that* certain conditions are met.

As stated previously, when the 5-Step decision process is required, only Steps 1, 4 through 6, and 8 are applicable. For construction in wetlands when the 3-Step decision process is permissible due to a Section 404 permit, Steps 6-8 are applicable. The flow charts to follow show the 8-Step, 5-Step, and 3-Step processes. All steps must be documented in writing.

8- Step Decision-Making Process for Executive Order 11988

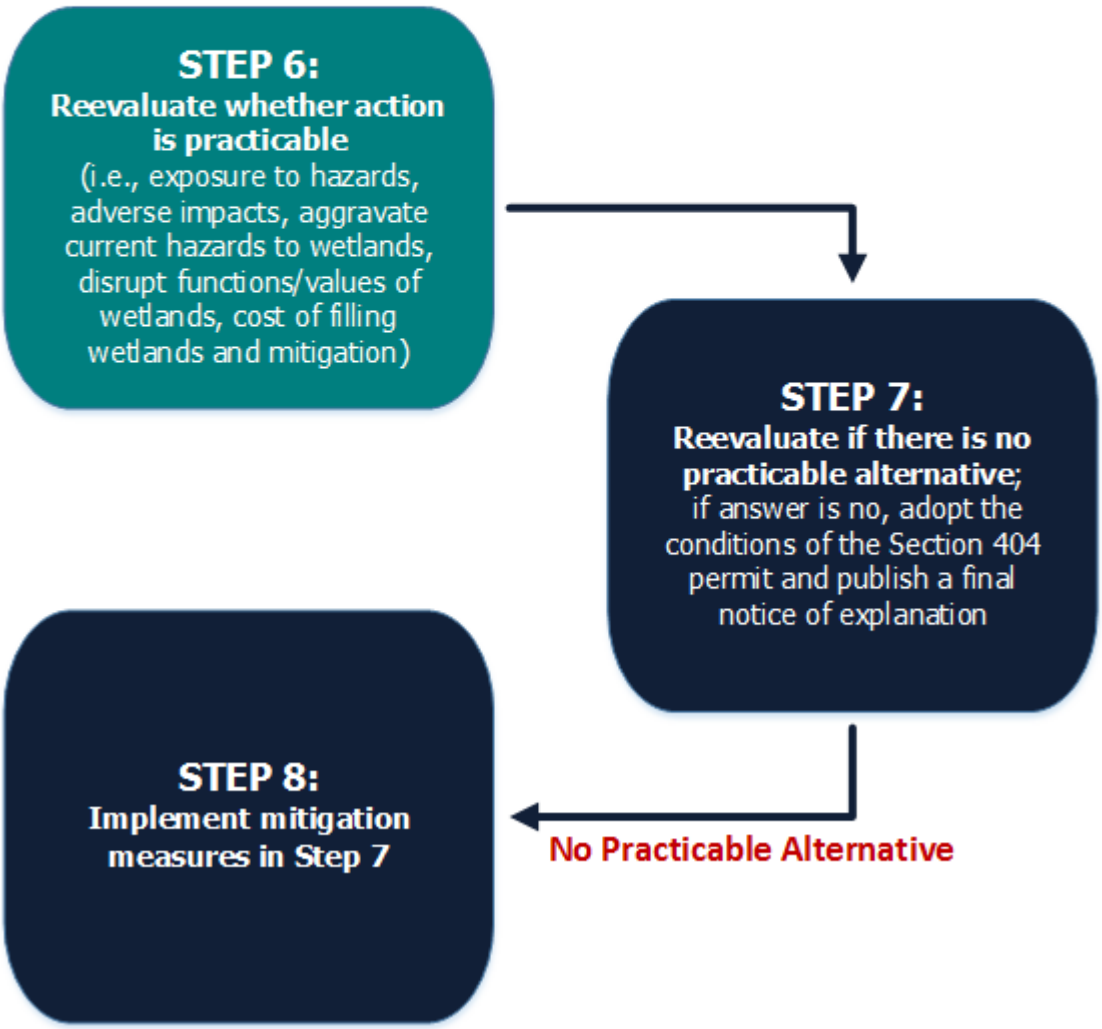


5-Step Decision-Making Process for Executive Order 11988 (Floodplain Management)



3-Step Decision-Making Process for Executive Order 11990 (Wetlands Protection)

NOTE: All of the following conditions must be met for the 3-Step decision-making process to be applicable: the applicant must have submitted the Section 404 permit with their application for HUD-assistance, the proposed action is outside the floodplain, and the proposed action is covered by the permit, and the Section 404 permit that was issued is not a general permit. (24 CFR 55.28)



Circumstances Requiring NEPA Review

If a responsible entity determines that an activity or project identified under the above sections about categorical exclusions (both subject to and not subject to Part 58.5) because of extraordinary circumstances and conditions at or affecting the location of the activity or project may have a significant environmental effect, it shall comply with all the requirements of 24 CFR Part 58.35(c).

24 CFR Part 58.35(c)

The responsible entity is responsible for determining that a given activity qualifies under the definitions for exclusion and/or expedited procedures. 24 CFR Part 58.2(a)(3) an activity's clearance level may be elevated if it exhibits extraordinary circumstances that affect its impact on the environment.

24 CFR Part 58.2(a)(3)

Such circumstances are defined as actions that are unique and without precedent; are substantially similar to those which would require an Environmental Assessment (EA) or Environmental Impact Statement (EIS); are unlikely to alter HUD policy or HUD mandates; or due to unusual physical conditions on the site or in the vicinity, have a potential for a significant impact on the environment or in which the environment could have a significant impact on users of the facility.

The environmental review record must contain a well-organized written record of the process and determinations made per 24 CFR Part 58.38.

Activities Requiring an Environmental Assessment

Activities that are not determined to be exempt or categorically excluded will require an environmental assessment (EA) to document compliance with NEPA, HUD environmental requirements and other federal laws.

24 CFR 58.36 and 58.5

The responsible entity must be aware that if a project consists of several activities that by themselves would fall under various levels as outlined above, the responsible entity must conduct an environmental assessment on the entire project.

The responsible entity must take the following steps to complete environmental requirements for projects requiring an environmental assessment:

- ✓ Follow the instructions for categorically excluded projects subject to 24 CFR Part 58.5 to complete the statutory checklist, including historic preservation and floodplain requirements.
- ✓ The floodplain requirements do not apply if the project is not located within a floodplain.
- ✓ Complete the Environmental Assessment form. The responsible entity must ensure that reliable documentation sources are cited and incorporated into the ERR for every item on the EA checklist (see Attachment 2-12).

Attachment 2-12: Environmental Assessment

- ✓ The final step in the process involves making a determination as to whether the project will or will not have a significant impact on the environment. This can be done once the review has been completed and all comments have been addressed appropriately. The RE must select one of the following two findings/determinations:
- ✓ The project is not an action that significantly affects the quality of the human environment and, therefore, does not require the preparation of an environmental impact statement; or

- ✓ The project is an action that significantly affects the quality of the human environment and, therefore, requires the preparation of an environmental impact statement. Both the finding and the environmental assessment must be signed by your environmental certifying officer and included in the ERR. A sample checklist for completing the environmental assessment is included as Attachment 2-13.

Attachment 2-13: Sample Environmental Assessment Process/File Checklist

No Environmental Impact Statement Required

In most instances, the environmental assessment will result in a finding that the project is not an action that significantly affects the quality of the human environment and, therefore, does not require an environmental impact statement. If this is the case, the responsible entity must complete the following:

- ✓ Provide public notice called the Combined/Concurrent Notice of Finding of No Significant Impact (FONSI) and Notice of Intent to Request Release of Funds (NOI/RROF) from the appropriate funding agency. A sample notice is provided as Attachment 2-14.
  - The FONSI and NOI/RROF must **be published in a newspaper of general circulation**.
  - The grantee must retain the "tear sheet" from the newspaper evidencing that the notice was published and on what date.
    - The notice must also be distributed to interested parties, local news media, appropriate local/ state/federal agencies, regional EPA, and Kentucky HUD. (See Attachment 2-6: Sample Public Notice Distribution List for a more complete listing of potentially interested parties.)
    - The notice must also be posted in public buildings within the project area.

Attachment 2-14: Sample Combined/Concurrent Notice to Public of No Significant Impact on the Environment and Notice to Public of Request for Release of Funds

Attachment 2-6: Sample Public Notice Distribution List

- ✓ It is very important to remember this requires two separate 15-day review periods. A 15-day period for comment to the city/county and, after that period, a 15-day period for comment to the appropriate funding agency. The appropriate funding agency 15-day comment period does not commence until the date the appropriate funding agency receives the notice, or the date specified in the published notice, whichever is later. Call or email the appropriate funding agency to verify dates on the combined/concurrent notice before publishing.
    - Any written comments received in response to these notices must be addressed and filed in the ERR. The persons that provided the comments should be added to the distribution list of interested parties.
  - The environmental certification, request for approval of evidentiary materials and release of funds forms must be submitted to the appropriate funding agency at least 16 days after publishing the combined/concurrent notice.
  - Check the ERR. Be sure this file contains all items listed on the ERR Checklist (Attachment 2-15).

Attachment 2-15: Sample Environmental Review Record Checklist

Environmental Impact Statement

An Environmental Impact Statement (EIS) is required when a project is determined to have a potentially significant impact on the environment. Consult with DLG if an EIS is anticipated.

Section 2-E. Re-Evaluation of Previously Cleared Projects

Sometimes, projects are revised, delayed or otherwise changed such that a re-evaluation of the environmental review is necessary. The purpose of the responsible entity's re-evaluation is to determine if the original findings are still valid. If the original findings are still valid, but the data and conditions upon which they were based have changed, the responsible entity must amend the original findings and update their ERR by including this re-evaluation and its determination based on its findings. A sample determination is provided as Attachment 2-16. It has to document the following:

24 CFR 58.47

Attachment 2-16: Sample Re-Evaluation Determination

- ✓ Reference to the previous environmental review record,
- ✓ Description of both old and new projects activities and maps delineating both old and new project areas,
- ✓ Determination if FONSI is still valid, and
- ✓ Signature of the certifying officer and date.

Place the written statement in the ERR and send a copy to the appropriate funding agency with the Request for Release of Funds (RROF).

If the responsible entity determines that the original findings are no longer valid, it must prepare an EA or an EIS if the evaluation indicates potentially significant impacts.

Section 2-F. Environmental Reviews Prepared by or for Other Federal Agencies

DLG will accept environmental reviews prepared by or for other federal funding agencies provided that the ERR, including consultation with other agencies and documentation, as well as associated public notifications meet or exceed the requirements established by 24 CFR Part 58 and are NEPA-like reviews. Contact DLG for further guidance.