



ASSISTANT SECRETARY FOR
COMMUNITY PLANNING AND DEVELOPMENT

JUL 28 2004

MEMORANDUM FOR: Regional Field Environmental Officers, Field Environmental Officers

FROM: Richard H. Brown, Director Office of Environment and Energy, DPV 

SUBJECT: Guidance for Obtaining Waiver of 24 CFR Part 58

Introduction

This memo provides guidance for obtaining a waiver of 24 CFR Part 58—"Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities." The Assistant Secretary for Community Planning and Development may grant a waiver of 24 CFR Part 58 where there is good cause to grant the waiver and no unmitigated adverse environmental impact will result.

It is anticipated that violations of the provisions in 24 CFR 58.22(a) may prompt recipients to apply for a waiver of 24 CFR Part 58 to enable the recipient to use HUD funds to complete the project. 24 CFR 58.22(a) states that a recipient and any participant in the development process may not commit HUD funds on an activity or project unless it is exempt under §58.34 or categorically excluded under §58.35(b), and may not undertake or commit non-HUD funds on an activity or project that would have an adverse environmental impact or limit the choice of reasonable alternatives, until the Request for Release of Funds (RROF) and related certification has been approved.¹

¹ Please note that 24 CFR 58.22(e) and (f) allow funding from Self-Help Homeownership Opportunity Program (SHOP) and relocation funds to be committed in certain circumstances before the approval of a RROF and certification. Section 58.22(e) reflects a unique SHOP statutory provision and permits an organization, consortium, or affiliate receiving assistance under the SHOP to advance non grant funds to acquire land prior to completion of an environmental review and approval of a RROF and Certification. 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. Section 58.22(f) permits the commitment of relocation assistance before approval of the RROF and related certification for the project provided that the relocation assistance is required by 24 CFR Part 42.

I. Determining Whether Waiver is an Appropriate Option

Waivers cannot be used to address all violations and should only be used as a last resort and never if granting a waiver request would result in environmental harm. Waivers can be used for regulatory violations only where there is good cause to grant the waiver and no unmitigated adverse environmental impact will result. Waivers cannot be used where there is a statutory violation (unless the statute authorizes the Secretary to waive statutory provisions).²

A statutory violation occurs when, for example, a recipient has filed an application for a CDBG project and subsequently commits HUD CDBG program funds to the project for an activity that is not exempt under §58.34 or categorically excluded under §58.35(b), prior to submission of a RROF and certification. This is a statutory violation of Section 104 (g)(2) of the Housing and Community Development Act of 1974 (HCDA), and the recipient will be precluded from using program funds subject to the provisions of Section 104 (g)(2) of HCDA of 1974. A regulatory violation occurs when a recipient has filed an application for a CDBG project and subsequently commits non-HUD funds to begin construction on the project (a choice-limiting action) prior to the receipt of an approved RROF and certification. This is a regulatory violation of 24 CFR 58.22(a).

The Assistant Secretary for Community Planning and Development may provide waivers for violations of HUD's environmental regulation, 24 CFR Part 58. If a waiver is granted, then the recipient may use eligible HUD funding to complete the project.

Instances where a waiver may be used:

A. Non-HUD funds are committed or spent on a choice-limiting or environmentally adverse activity, or a choice-limiting or environmentally adverse activity is undertaken, after application for HUD assistance, but prior to submission or approval of a Request for Release of Funds and certification (RROF)

A recipient or a participant in the development process, after an application for HUD assistance for the project has been filed, undertakes, or commits or spends non-HUD funds on a project for, non-exempt activities which would have an adverse environmental impact or which would limit the choice of reasonable alternatives prior to the submission and approval of a RROF and certification.

² The Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) is currently the only statute that provides that the Secretary may waive statutory environmental review requirements. Section 105(d) of NAHASDA provides that the Secretary may waive the requirements under this Section if the Secretary determines that a failure on the part of a recipient to comply with provisions of this section: (1) will not frustrate the goals of the National Environmental Policy Act of 1969 [42 U.S.C. 4331 et seq.] or any other provision of law that furthers the goals of that Act; (2) does not threaten the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community; (3) is a result of inadvertent error, including an incorrect or incomplete certification provided under subsection (c)(1); and (4) may be corrected through the sole action of the recipient. This Memorandum does not include provisions for granting a waiver of Sec. 105 of NAHASDA pursuant to Sec. 105(d) of NAHASDA.

Such an action is a violation of 24 CFR 58.22(a). The recipient and other participants in the development process must:

- (1) cease any expenditure and further commitment of funds;
- (2) cease any choice limiting actions; and
- (3) if justified, prepare a request for a waiver of the requirements of §58.22.

If a waiver request is not justified, or if prepared and not approved, then the recipient and other participants in the development process are not allowed to spend or commit further HUD funds that are subject to the statutory provision that was violated on the project or project site, unless such expenditure or commitment is on a new project substantially different from the project affected by the flawed environmental review. All environmental review requirements must be satisfied for any new project.

B. HUD funds committed or spent after RROF and certification submission, but prior to HUD (or state) approval of RROF and certification

The recipient can document submission of a RROF and certification, but the recipient committed or spent HUD funds prior to a HUD (or state) approval of RROF and certification.

Such an action is a violation of 24 CFR 58.22(a). The recipient and other participants in the development process must:

- (1) cease expenditure and further commitment of funds;
- (2) cease any choice limiting actions; and
- (3) if justified, prepare a request for waiver of the requirements of §58.22.

If a waiver request is not justified, or if prepared and not approved, then the recipient and other participants in the development process are not allowed to spend or commit further HUD funds that are subject to the statutory provision that was violated on the project or project site, unless such expenditure or commitment is on a new project substantially different from the project affected by the flawed environmental review. All environmental review requirements must be satisfied for any new project.

C. HUD funds committed or spent on project prior to approval of RROF and certification in violation of statute, and recipient subsequently applies for *eligible HUD funds*³ for the same project. See Appendix A to determine eligible HUD funds after statutory violation.

The recipient may apply for eligible HUD funds after the recipient committed or expended HUD funds prior to approval of RROF and certification in violation of program's statutory environmental requirements. However, the recipient will need to receive a waiver of 24 CFR Part 58 and an approved RROF and certification prior to the commitment of any funds under the new program and any further non-HUD funds. In order to apply for and commit eligible HUD funds, the recipient and participants in the development process must:

- (1) cease expenditure and further commitment of funds;
- (2) cease any choice limiting actions; and
- (3) prepare a request for a waiver of the requirements of §58.22.

If a waiver request is not approved, then the recipient and other participants in the development process are not allowed to spend or commit HUD funds on the project site unless such expenditure or commitment is on a new project substantially different from the project affected by the flawed environmental review. All environmental review requirements must be satisfied for any new project.

II. Request for a Waiver

Once a violation of 24 CFR Part 58 has been found or reported, the HUD Field Office Program Director whose recipient has violated the regulations may request the Assistant Secretary for Community Planning and Development to waive 24 CFR Part 58.

A. Recipient

The recipient must make a request to waive a violation of 24 CFR Part 58 to the applicable HUD Field Office Program Director. The request for waiver must include:

- (1) A description of the project, including list of activities to be undertaken, funding amounts and sources, and outcomes.

³ HUD cannot waive statutory violations, unless authorized by Congress in the statute (NAHASDA is the only statute that authorizes waiver of environmental requirements). The recipient is precluded from using all HUD program funds subject to the statute that was violated. One statute may have several HUD programs subject to its environmental review requirements. However, the recipient may use HUD funds from programs that are subject to a different statute's environmental review requirements. See Appendix A for details.

- (2) A completed environmental review, minus environmental public notices and Request for Release of Funds and Certification.
- (3) A description of the violation, including all relevant facts, chronology of events, and nature of violation. As described above, the violation must be regulatory (not statutory) to obtain a waiver. The request must identify the specific regulatory violation.
- (4) Evidence that good cause exists to justify the extraordinary action of granting a waiver.
- (5) Evidence that no unmitigated adverse environmental impacts will result from granting a waiver.
- (6) Report from site inspection conducted by HUD Field Office staff or a HUD contractor. The report will independently determine whether granting a waiver will result in an adverse environmental impact.

B. Field Office

The Field Office Program Director whose recipient violated the regulations must review the request for a waiver in consultation with Field Environmental Officer and make a recommendation to the Assistant Secretary for Community Planning and Development whether to approve or disapprove the request. All documentation provided by the Responsible Entity shall be included with the Field Office's recommendation.

C. Headquarters Office

The Headquarters program office will have the opportunity to review and provide comments on the request to the Assistant Secretary for Community Planning and Development and accompanying information, including the site inspection report. The Assistant Secretary for Community Planning and Development may approve the waiver where there is good cause and no unmitigated adverse environmental impact will result.

III. Requirements for Assistant Secretary for Community Planning and Development to Grant a Waiver

The Assistant Secretary for Community Planning and Development will review the request and accompanying information, including the site inspection report, and seek comments from the Headquarters program office and the Office of Environment and Energy. The Assistant Secretary for Community Planning and Development may approve the waiver where there is good cause and no unmitigated adverse environmental impact will result.

A. Evidence of Good Cause

The party requesting the waiver must present evidence that there is good cause to grant a waiver. Evidence of good cause includes demonstration of good faith, i.e. did not willfully non-comply but, nevertheless, acted in error; demonstration that project furthers HUD program goals; and the

recipient is firmly committed to receive training and/or technical assistance in environmental review procedures.

B. Evidence that Granting a Waiver will not Result in Unmitigated Adverse Environmental Impacts

A waiver will not be granted if the waiver will result in unmitigated adverse environmental impacts. A waiver request must contain an analysis of the environmental information for the project and an on-site inspection. The report must include either:

(1) a finding that the project in question has not produced, and is not likely to produce, any adverse environmental impact; or

(2) an identification of actual or potential adverse environmental impacts, the specific actions necessary to mitigate such impacts, and a firm commitment from the recipient to complete all necessary mitigation.

IV. Responsibilities After Obtaining a Waiver

A. Environmental Review

The recipient must complete an Environmental Review in accordance with 24 CFR Part 58.

B. Mitigation

The recipient must make a firm commitment to complete all necessary mitigation

C. Remedial/Corrective Actions

Remedial or corrective actions will be required of the recipient if the waiver is granted. Such actions may include requiring the recipient to obtain appropriate technical assistance to overcome the performance problem or requiring attendance at HUD sponsored or approved training.

APPENDIX A

Issue:

This guidance describes the conditions under which a recipient or participant in the development process who has committed **HUD assistance funds** to a project prior to submission of a Request for Release of Funds (RROF) and certification to HUD (or the state), and is precluded from using those HUD assistance funds, may apply for and use other eligible HUD program funds for the same project. It is important to note that before the recipient or participant in the development process commits other eligible program funds, the recipient must first obtain a regulatory waiver of §58.22(a).

Background:

First, it is necessary to determine whether a recipient or participant in the development process committed a statutory violation, in addition to a regulatory violation, when it committed funds prior to a HUD (or state) approved RROF and certification. A commitment of **HUD assistance funds** for a choice limiting action prior to submission of a RROF and certification has been determined by the Office of General Counsel to be a statutory violation. Under the Part 58 regulations, a commitment of HUD assistance funds or non-HUD funds before HUD (or state) approval of a RROF and certification is a regulatory violation of §58.22(a). The following actions are regulatory violations of §58.22(a) and not statutory violations: 1) a commitment of HUD assistance funds or non-HUD funds for a choice limiting action after submission of a RROF to HUD (or the state), but prior to a HUD (or state) approved RROF, and 2) a commitment of non-HUD funds prior to submission of RROF and certification to HUD (or the state).

HUD cannot waive statutory violations (unless the statute authorizes the Secretary to waive statutory provisions) and neither the recipient nor any participant in the development process can use any HUD funding subject to the environmental review requirements of the statute that was violated for the same project. However, a statutory violation does not prevent the recipient or participant in the development process from obtaining a waiver of the regulatory violation of §58.22(a) and applying for and using HUD funds that are subject to a different statute's environmental review requirements.¹

Once a regulatory violation or a statutory violation has been discovered, the recipient and participants in the development process **must** cease all choice-limiting action and cease commitment and expenditure of funds on the project. In order to preserve the ability to use any HUD funds in the project, the recipient and participants in the development

¹ In instances where the recipient used tiering as described in §58.15 for a project and subsequently committed a statutory violation by committing HUD assistance before submission of RROF and certification to HUD (or the state), the recipient will not be precluded from using HUD funds subject to the statutory violation, provided that the new project(s) is independent, site-specific, in accordance with the project aggregation provisions in §58.32 and provided that a waiver of §58.22(a) is granted and approval of a RROF and certification is properly obtained prior to commitment of any funds under the new program and any further non-HUD funds.

process will have to obtain a regulatory waiver of §58.22(a), which cannot be issued unless the recipient and participants in the development process stop expending and committing funding and take no further choice-limiting actions after the discovery of the violation.

Question: What HUD funding can be used in the situation where a recipient or party to the development process has committed **HUD funding** to a project before submitting a Request for Release of Funds (RROF) and certification to HUD (or the state), in violation of §58.22(a)?

Answer:

A commitment of HUD assistance funds prior to submission of a RROF and certification is a statutory violation, as well as a regulatory violation of §58.22(a).² Other than noted above, HUD cannot waive statutory violations and the recipient and other participants in the development process are precluded from using any further HUD assistance funds subject to the statute that was violated. One statute may have several HUD programs subject to its environmental review requirements. A recipient or any participant in the development process may, however, use HUD funding that is subject to a different statute's environmental review requirements, but only if the recipient first obtains a waiver of §58.22(a) from the Assistant Secretary for Community Planning and Development for the regulatory violation committed when the recipient or participant in the development process committed HUD fund assistance prior to an approved RROF and certification.

Appendix B lists seven different statutes and the HUD programs and assistance that are subject to each statute's environmental provisions. If there is a violation of the environmental provisions of a statute in Group A, then the recipient and any participant in the development process may not use any of the funds listed in Group A. In order to use the funding in any of the other Groups, the recipient first needs to obtain a waiver of §58.22(a) because it violated the regulations by committing funds from Group A before receiving an approved RROF and certification.

For example, if a recipient or participant in the development process commits HOME grants to a project before submitting a RROF and certification, the recipient and any participant in the development process are precluded from using HOME funds as well as

² Please note that 24 CFR 58.22(e) and (f) allow funding from Self-Help Homeownership Opportunity Program (SHOP) and relocation funds to be committed in certain circumstance before the approval of a RROF and certification. Section 58.22(e) reflects a specific SHOP statutory provision and permits an organization, consortium, or affiliate receiving assistance under the SHOP to advance nongrant funds to acquire land prior to completion of an environmental review and approval of a RROF and Certification. 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. Section 58.22(f) permits the commitment of relocation assistance before approval of the RROF and related certification for the project provided that the relocation assistance is required by 24 CFR part 42.

grants to State and local governments for lead-based paint hazard control for the same project, because both funding is in Group A and subject to the same statute, Section 288 of the Cranston-Gonzalez National Affordable Housing Act. However, the recipient or any participant in the development process could use any HUD assistance funds from Groups B, C, D, E, F, or G (subject to program eligibility requirements) for the project provided that a waiver of §58.22(a) is granted and approval of a RROF and certification is properly obtained prior to commitment of any funds under the new program and any non-HUD funds. It is important to note that although the recipient or participant in the development process may use HUD assistance funds from Groups B, C, D, E, F, or G, the recipient has still committed a regulatory violation of §58.22(a) since it committed HUD funds before HUD (or state) approval of a RROF and certification, and it will be necessary to obtain a waiver of §58.22 before the recipient or any participant in the development process commits eligible HUD funds for the project.

Question: What HUD funding can be used when the recipient or participant in the development process has committed both **HUD assistance funds and non-HUD funds** to a project prior to submission of the RROF and certification?

Answer:

A commitment of **HUD assistance funds** prior to submission of RROF and certification is a statutory violation as well as a regulatory violation of §58.22(a). In contrast, a commitment of **non-HUD funds** prior to submission or HUD (or state) approval of a RROF and certification is only a regulatory violation of §58.22(a)— (i.e. not a statutory violation).

The process discussed above applies. The recipient and any participant in the development process are precluded from using HUD assistance funds that are subject to the statute that was violated on the project. After obtaining a waiver of §58.22(a) from the Assistant Secretary for Community Planning and Development for committing HUD assistance funds and non-HUD funds prior to an approved RROF and certification, the recipient or any participant in the development process may commit and use HUD assistance funds that are subject to a different statute's environmental requirements provided that a waiver of §58.22(a) is granted and approval of a RROF and certification is properly obtained prior to commitment of any funds under the new program and any further non-HUD funds. (The waiver request needs to specify that the recipient violated §58.22(a) because it committed HUD assistance funds and non-HUD funds to the project before a HUD (or state) approval of a RROF and certification.)

APPENDIX B

GROUP A

Section 288 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12838)

- HOME
- Grants to State and local governments for lead-based paint hazard control

GROUP C

Section 542(c)(9) of the Housing and Community Development Act of 1992 (12 U.S.C. 1707 note)

- FHA Multifamily Housing Finance Agency Program

GROUP B

Section 26 of the United States Housing Act of 1937 (42 U.S.C. 1437x)

- Public Housing Assistance (Capital Improvements)
- HOPE VI Revitalization Grants
- Capital Fund Grants
- Mixed Finance Assistance under the USHA of 1937
- Conversions under Section 202 of USHA of 1937
- Section 8 (except the special allocation programs)
- Section 8 Moderate Rehabilitation for Single Room Occupancy for Homeless Individuals under Title IV, Subtitle E of the McKinney-Vento Homeless Assistance Act

GROUP D

Section 305(c) of the Multifamily Housing Property Disposition Reform Act of 1994 (42 U.S.C. 3547(c))

- Emergency Shelter Grants
- Shelter Plus Care Grants
- Supportive Housing Grants
- Shelter Plus Care Section 8 Moderate Rehabilitation Single Room Occupancy for Homeless Individuals
- Self-Help Homeownership Opportunity Program
- Special Project Grants

APPENDIX B

GROUP E

Section 104(g) of the Housing and Community Development Act of 1974 (42 U.S.C. 5304(g))

- Community Development Block Grant (entitlement)
- Community Development Block Grant (for States and Small Cities)
- Section 108 Loan Guarantees
- Brownfield Economic Development Initiative (BEDI) Grants
- Indian Community Development Block Grant

GROUP G

Section 806 of NAHASDA of 1996 (25 U.S.C. 4226)

- Native Hawaiian Housing Block Grants

GROUP F

Section 105 of the Native American Housing Assistance and Self-Determination Act (NAHASDA) of 1996 (25 U.S.C. 4115)*

- Indian Housing Block Grants
- Federal Guarantees for Financing for Tribal Housing Authorities
- Indian Housing Loan guarantees authorized by section 184 of the Housing and Community Development Act of 1992

*Note: Section 105(d) of NAHASDA provides that the Secretary may waive the requirements under this Section if the Secretary determines that a failure on the part of a recipient to comply with provisions of this section: (1) will not frustrate the goals of the National Environmental Policy Act of 1969 [42 U.S.C. 4331 et seq.] or any other provision of law that furthers the goals of that Act; (2) does not threaten the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community; (3) is a result of inadvertent error, including an incorrect or incomplete certification provided under subsection (c)(1); and (4) may be corrected through the sole action of the recipient.