**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**24 CFR Parts 50, 55 and 58**

**[Docket No. FR–4142–P–01]**

**RIN 2501–AC33**

## Floodplain Management and Protection of Wetlands

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would adopt procedures implementing Executive Order 11990, Protection of Wetlands. The rule proposes to codify policies and procedures to avoid the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative. The procedures would apply to HUD and certain State and local responsible entities before their respective decisions to approve a proposed action that involves HUD financial assistance and that would affect a wetland. The wetland procedures would be incorporated into HUD's existing floodplain management regulations.

The rule proposes several other changes to HUD's regulations that govern floodplain management and that would also govern the protection of wetlands. These include, among others, broadening the use of the abbreviated four-step decision making process used by HUD and responsible entities when considering the impact on floodplains in connection with the repair of existing structures. Specifically, the rule proposes to authorize the use of the abbreviated process for all of HUD's rehabilitation programs, not just for repairs financed under its mortgage insurance programs. This rule would also add a requirement that, for residential new construction in a 100-year floodplain, an applicant must secure a final Letter of Map Amendment or final Letter of Map Revision as a condition for approval of HUD financial assistance.

**DATES:** *Comment due date:* August 3, 1998.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–0500. Comments should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying during regular business hours (7:30 a.m. to 5:30 p.m. Eastern time) at the above address.

**FOR FURTHER INFORMATION CONTACT:** Richard H. Broun, Director, Office of Community Viability, Office of Community Planning and Development, Department of Housing and Urban Development, Room 7240, 451 Seventh Street, SW, Washington, DC 20410–7000. For inquiry by phone or e-mail: contact Walter Prybyla, Deputy Director for Policy, Environmental Review Division at (202) 708–1201, Ext. 4466 or e-mail: Walter__Prybyla@hud.gov. This phone number is not toll-free. Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### I. Discussion

*Wetland-Related Amendments*

This rule proposes to codify the procedures for complying with Executive Order 11990, Protection of Wetlands (42 FR 26961, May 25, 1977). The Executive Order directs each agency to provide leadership and take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; (2) providing Federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.

The Department published a proposed rule on January 4, 1990 (55 FR 396) to implement Executive Order 11990 and also Executive Order 11988, Floodplain Management (42 FR 26951, May 25, 1977). The January 4, 1990 rule proposed to codify HUD's policies and procedures implementing these Executive Orders in a new 24 CFR part 55. Because the wetland policies were under review by the Administration, the part 55 final rule (59 FR 19100, April 21, 1994) implemented only the floodplain management Executive Order. The Department advised the public (59 FR at 19100) that it would continue to follow outstanding instructions in implementing the wetlands Executive Order.

This proposed rule would amend 24 CFR part 55 to implement the requirements of Executive Order 11990. The proposed rule generally reflects HUD's current practices for complying with the Executive Order.

The rule would amend § 55.2 (Terminology) by adding a definition of the term ''wetlands'' (§ 55.2(b)(9)). The proposed definition provides that wetlands are designated wetland areas identified or delineated on maps issued by the Fish and Wildlife Service of the U.S. Department of the Interior as areas that are inundated by surface or ground water with a frequency sufficient to support, and under normal circumstances do or would support, a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth or reproduction. This definition would encompass, but not be limited to, swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.

The proposed rule would also make several conforming amendments to 24 CFR part 55 to reflect the implementation of Executive Order 11990. For example, § 55.1, which describes the purpose of 24 CFR part 55, would be amended to state that part 55 implements the requirements of Executive Order 11990. The proposed rule would also make conforming amendments to HUD's environmental regulations at 24 CFR part 50 (Protection and Enhancement of Environmental Quality) and 24 CFR part 58 (Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities) to reflect the amendments made to 24 CFR part 55.

### Other Amendments

*Abbreviated decision making process.* HUD's current regulations at § 55.12(a) authorize HUD or the responsible entity (as applicable) to use an abbreviated decision making process when considering the impact on floodplain management in connection with several listed categories of actions. The steps currently include identifying floodplain location (and wetland location under this proposed rule), determining impact, considering minimization of impact, reevaluating the proposed action, and deciding on the action.

This rule proposes two changes to this procedure. The first proposed revision is a clarification. As § 55.12(a) is currently drafted, step 6 (§ 55.20(f)), reevaluate proposed action, is part of the abbreviated process. A major component of that reevaluation, however, is to reconsider alternatives to

locating the proposed action in the floodplain or wetland that had been addressed under step 3 (§ 55.20(c)). The reference to step 3 in the context of the abbreviated process is confusing because step 3 is not a part of the abbreviated process. The rule, accordingly, would add step 6 to the list of steps in § 55.12(a) that do not apply under the abbreviated process.

For proposed actions covered by the abbreviated decision making process, the balance of reevaluation described in step 6 (§ 55.20(f)(1)) can be addressed in considering minimization of impact in step 5. Therefore, step 5 (§ 55.20(e)) would be revised to provide that actions covered by § 55.12(a) must be rejected if the proposed minimization is financially or physically unworkable.

The second proposed revision concerns § 55.12(a)(3), which currently applies the abbreviated decision making process to HUD mortgage insurance actions for the repair, rehabilitation, modernization or improvement of existing multifamily housing projects. This procedure has proven to be efficient and effective for the covered programs. The Department, therefore, proposes to include all of its programs that involve repair, rehabilitation, modernization or improvement of existing multifamily housing projects.

The proposed rule also would add a reference to § 55.12(a) in the introductory text of § 55.20 to make it clearer that not all actions are subject to all eight steps in the decision making process.

The rule also would revise paragraph (b) of § 55.12 to exclude the leasing of not more than a total of four units of existing housing located in a building in a 100-year floodplain (or the 500-year floodplain for Critical Actions) from the floodplain management decision making process at § 55.20. For example, such exclusion would occur under HUD's programs providing assistance to the homeless. This exclusion would cover leasing of not more than four units in a building under the circumstances described in § 582.100(c) for sponsor-based rental assistance under the Shelter Plus Care Program regulations as well as in § 583.115 for grants for leasing under the Supportive Housing Program regulations. Under § 582.100(c), a sponsor, itself, may lease from an owner the housing in which the program participants will reside. The exclusion would not apply, however, if the sponsor owned the project. Under § 583.115, HUD may provide grants to support the recipient's cost of leasing structures or a portion of a structure that is to be used to provide the supportive housing or supportive services.

This exclusion from the floodplain management decision making process at § 55.20 would apply only if the existing housing is located outside the floodway or coastal high hazard area, the community is participating and in good standing in the Regular Program of the National Flood Insurance Program (NFIP) and the financial assistance does not pay for repair or rehabilitation. Leasing of four units or less under these conditions should have minimal impacts (if any) for which the floodplain management decision making process at § 55.20 would be warranted.

*Obsolete Provisions*. This proposed rule would remove §§ 55.12(c)(9) and 55.12(c)(10). Paragraph (c)(9) currently provides that part 55 does not apply to HUD's acceptance of a housing subdivision approval action by the Department of Veterans Affairs (DVA) or Farmers Home Administration (now the Rural Housing and Community Development Service (RHCDS)). The Department is removing the paragraph because neither the DVA nor the RHCDS currently approves subdivisions.

Paragraph (c)(10) provides guidance on the effect of part 55 on actions pending on May 23, 1994, the effective date of the part 55 final rule published on April 21, 1994 at 59 FR 19100. The paragraph would be removed as unnecessary. Its removal would not substantively alter the requirements of the part.

*Revisions to step 3 for multifamily insurance projects*. HUD proposes to revise § 55.20(c), Step 3, to add a new paragraph (c)(2) to address the consideration of practicable alternatives to floodplains and wetlands projects proposed by third parties that involve multifamily mortgage insurance. In these cases, HUD's consideration of practicable alternatives is limited to a particular site identified in the application. HUD cannot require applicants to develop another site that is beyond the floodplain or wetland. In such cases, HUD's option in reviewing practicable alternatives is limited to proceeding to the next step in the decision making process. This includes either considering design modifications under Step 5 or rejecting the application.

*Residential new construction in 100-year floodplain*. This proposed rule would add a requirement that HUD financial assistance involving residential new construction in a 100-year floodplain may not be approved unless the applicant secures a final Letter of Map Amendment (LOMA) or final Letter of Map Revision (LOMR). These are letters issued by the Federal Emergency Management Agency (FEMA) indicating that the property is not, or is no longer, located within the special flood hazard area (100-year floodplain). The proposed rule would similarly amend § 55.20(g), step 7 of the decision making process, to require whenever a reevaluation of proposed residential new construction results in a determination that there is no practicable alternative to locating the proposal in the 100-year floodplain, a statement that a final Letter of Map Amendment (LOMA) or a final Letter of Map Revision (LOMR) will be secured by the applicant.

The reasons for this change are to encourage: (i) public safety, in that the potential threat to the loss of life from flooding would be diminished for prospective residents and visitors; (ii) site selection and planning, which avoids encroachment on the floodplain;[1] (iii) early coordination between the HUD applicant and FEMA for the purpose of obtaining a LOMA or LOMR in that FEMA has jurisdiction both by law for designation of special flood hazard areas (SFHA) and by Executive Order 11988 for advising Federal agencies on implementation of the Order; and (iv) cost savings that result once the LOMA or LOMR excludes the property from the SFHA and eliminates the applicant's legal obligation to obtain and maintain flood insurance coverage for the term of the loan or life of the building being proposed for HUD financial assistance. The savings may make the property more affordable for low- and moderate-income housing.

*Other amendments*. This proposed rule would make several other amendments to conform to earlier amendments to 24 CFR parts 50 and 58. The rule would replace ''grant recipient'' with ''responsible entity'' in several places where the term occurs in part 55. Section 55.3, Assignment of responsibilities, would be revised to specify the respective responsibilities of responsible entities and recipients. These amendments would conform part 55 to the change in terminology adopted in the final rule that revised 24 CFR part 58 (61 FR 19122, April 30, 1996).

Section 55.12(c) describes the categories of activities that are not subject to part 55. This proposed rule would revise paragraph (c) to conform

[1] Even if avoiding encroachment is impracticable, the change requires increasing the elevation to minimize potential financial loss due to flooding damage for uninsurable elements under the National Flood Insurance Program (NFIP), which include outdoor playgrounds and recreational amenities, vehicular parking and freight access areas, public plazas and walkways, landscaping, and the land itself.

to amendments to parts 50 and 55. Paragraph (c)(1) would be revised to reflect the fact that the activities that are not subject to review under environmental authorities such as Executive Orders 11988 and 11990 include activities listed in 24 CFR 58.35(b) as well as those listed in § 58.34. A new paragraph (c)(2) would be added to include the activities described in 24 CFR 50.19 (which was revised by a final rule published at 61 FR 50914 on September 27, 1996). Section 50.19 lists those activities that are categorically excluded from the environmental assessment required by NEPA and are not subject to the individual compliance requirements of the related laws and authorities referred to in § 50.4.

A new paragraph (c)(12) (which is similar to § 50.20(a)(1)) would be added to provide that special projects directed to the removal of material and architectural barriers that restrict the mobility of and accessibility to elderly and persons with disabilities are not subject to part 55.

Finally, the proposed rule would add an exclusion from the requirements of the part for the approval of financial assistance for acquisition, leasing, construction, rehabilitation, repair, maintenance, or operation of ships and other water-borne vessels that will be used for transportation or cruises and will not be permanently moored.

## II. Findings and Certifications

*Paperwork Reduction Act Statement*

The proposed information collection requirements contained at §§ 55.21, 55.22 and 55.27 of this rule have been submitted to the Office of Management and Budget (OMB) for review, under section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

The public reporting burden for each of these collections of information is estimated to include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided in the following table.

FLOODPLAIN MANAGEMENT AND PROTECTION OF WETLANDS

| Information collection | Number of respondents | Responses per respondent | Total annual responses | Hours per response | Total hours | Regulatory reference |
|---|---|---|---|---|---|---|
| Notification of floodplain hazard | 300 | 1 | 300 | 1 | 300 | 55.21 |
| Owner notice to tenants concerning Critical Action flood hazard | 1 | 50 | 50 | 1/20 | 2.5 | 55.22 |
| Documentation of compliance | 300 | 1 | 300 | 8 | 2,400 | 55.27 |
| Total Annual Burden | | | | | 2,702 | |

In accordance with 5 CFR 1320.8(d)(1), the Department is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Comments must be received within sixty (60) days from the date of this proposal. Comments must refer to the proposal by name and docket number (FR–3447) and must be sent to: Joseph F. Lackey, Jr., HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

*Environmental Impact*

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. 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 the Rules Docket Clerk at the above address.

*Regulatory Planning and Review*

This rule has been reviewed in accordance with Executive Order 12866, issued by the President on September 30, 1993 (58 FR 51735, October 4, 1993). Any changes to the rule resulting from this review are available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk.

*Regulatory Flexibility Act*

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this proposed rule, and in so doing certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. The proposed rule would codify HUD's policies and procedures implementing Executive Order 11990, Protection of Wetlands. The goal of the Executive Order is to prevent the adverse impacts associated with the destruction or modification of wetlands. Executive Order 11990 establishes a uniform set of requirements designed to meet this goal, and which are applicable to both large and small entities. However, in developing the proposed rule HUD has attempted to minimize the regulatory burden placed on responsible entities. For example, the proposed rule would broaden the use of the abbreviated decision making process used by HUD and responsible entities when considering the impact on floodplains in connection with the repair of existing structures. Specifically, the rule proposes to authorize the use of the abbreviated process for all of HUD's rehabilitation programs. The current regulations limit the use of the abbreviated decision making process to repairs financed under HUD's mortgage insurance programs.

Notwithstanding HUD's determination that this rule would not have a significant economic impact on a substantial number of small entities, HUD specifically invites comment regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

*Unfunded Mandates Reform Act*

The Secretary has reviewed this rule before publication and by approving it certifies, in accordance with the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), that this rule does not impose a Federal mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

*Federalism*

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. HUD's regulations at 24 CFR part 58, implementing section 104(g) of the HCD Act of 1974 and other similar statutory provisions, have long provided for State and local governmental assumption of NEPA, Executive Order, and other environmental review responsibilities. State and local governments thus already have been assuming and carrying out these responsibilities for many years. These amendments to part 55 merely describe and codify more specifically the implementing policies and procedures under Executive Order 11990.

*Catalog of Federal Domestic Assistance Number*

The programs affected by this rule are listed in the Catalog of Federal Domestic Assistance under program numbers 14.108 through 14.900.

**List of Subjects**

*24 CFR Part 50*

Environmental assessments, Environmental impact statements, Environmental policies and review procedures.

*24 CFR Part 55*

Environmental impact statements, Flood plains, Wetlands.

*24 CFR Part 58*

Community development block grants, Environmental impact statements, Grant programs—housing and community development, Reporting and recordkeeping requirements.

Accordingly, 24 CFR parts 50, 55, and 58 are proposed to be amended 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, 1997 Comp., p. 123.

2. In § 50.4, paragraph (b)(2) is revised and paragraph (b)(3) is removed and reserved, to read as follows:

### § 50.4 Related Federal laws and authorities.

* * * * *

(b) * * *

(2) HUD Procedure for the Implementation of Executive Order 11988 (Floodplain Management) (3 CFR, 1977 Comp., p. 117) and Executive Order 11990 (Protection of Wetlands) (3 CFR, 1977 Comp., p. 121)—24 CFR part 55, Floodplain Management and Protection of Wetlands.

* * * * *

## PART 55—FLOODPLAIN MANAGEMENT AND PROTECTION OF WETLANDS

3. The heading for part 55 is revised to read as set forth above.

4. The authority citation for part 55 is revised to read as follows:

**Authority:** 42 U.S.C. 3535(d), 4001–4128 and 5154a; E.O. 11988, 42 FR 26951, 3 CFR, 1977 Comp., p. 117; E.O. 11990, 42 FR 26961, 3 CFR, 1977 Comp., p 121.

5. Section 55.1 is amended by revising paragraph (a), redesignating paragraph (b) as paragraph (b)(1), adding a new paragraph (b)(2), and adding a new paragraph (d), to read as follows:

### § 55.1 Purpose and basic responsibility.

(a) This part implements the requirements of Executive Order 11988, Floodplain Management (3 CFR, 1977 Comp., p. 117), and Executive Order 11990, Protection of Wetlands (3 CFR, 1977 Comp., p. 121), and employs the principles of the Unified National Program for Floodplain Management. It covers the proposed acquisition, construction, improvement, disposition, financing and use of properties located in a floodplain or a wetland for which approval is required either from HUD under any applicable HUD program or from a responsible entity subject to 24 CFR part 58. This part does not prohibit approval of such actions (except for certain actions in high hazard areas), but provides a consistent means for implementing the Department's interpretation of the executive orders in the project approval decision making processes of HUD and of responsible entities subject to 24 CFR part 58. The implementation of Executive Orders 11988 and 11990 under this part shall be conducted by HUD for Department-administered programs subject to environmental review under 24 CFR part 50 and by responsible entities for financial assistance subject to environmental review under 24 CFR part 58.

(b)(1) * * *

(2) Under section 582 of the National Flood Insurance Reform Act of 1994, 42 U.S.C. 5154a, HUD disaster assistance that is made available in a special flood hazard area may not be used to make a payment (including any loan assistance payment) to a person for repair, replacement or restoration of damage to any personal, residential or commercial property if:

(i) The person had previously received Federal flood disaster assistance conditioned on obtaining and maintaining flood insurance; and

(ii) The person failed to obtain and maintain the flood insurance.

* * * * *

(d) No HUD financial assistance (including mortgage insurance) may be approved for residential new construction in a 100-year floodplain unless a final Letter of Map Amendment (LOMA) or final Letter of Map Revision (LOMR) will be secured by the applicant as a condition of HUD's or the responsible entity's approval of the assistance.

6. Section 55.2 is amended by revising paragraph (a); revising the introductory text of paragraph (b); removing, in paragraph (b)(1), the term ''(§ 55.2(b)(8))'' and adding in its place the term ''(§ 55.2(b)(7))'', and adding a new paragraph (b)(9), to read as follows:

### § 55.2 Terminology.

(a) With the exception of those terms defined in paragraph (b) of this section, the terms used in this part shall follow the definitions contained in section 6 of Executive Order 11988, in section 7 of Executive Order 11990, and in the Floodplain Management Guidelines for Implementing Executive Order 11988 issued by the Water Resources Council (copies of the Guidelines are available from the Environmental Review Division, Department of Housing and

Urban Development, 451 Seventh Street, SW, Washington, DC 20410); and the terms ''special flood hazard area,'' ''criteria'' and ''Regular Program'' shall follow the definitions contained in FEMA regulations at 44 CFR 59.1.

(b) The definitions of the following terms in Executive Order 11988, Executive Order 11990, and related documents affecting this part are modified for purposes of this part:

* * * * *

(9) *Wetlands* means only those designated wetland areas identified or delineated on maps issued by the Fish and Wildlife Service of the U.S. Department of the Interior as areas that are inundated by surface or ground water with a frequency sufficient to support, and under normal circumstances do or would support, a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth or reproduction. They are the areas subject to coverage under this part.

7. Section 55.3 is amended by revising paragraphs (a)(1)(i), (a)(1)(ii), (b)(1), (b)(2), and (c) and adding a new paragraph (d), to read as follows:

**§ 55.3 Assignment of responsibilities.**

(a)(1) * * *

(i) The Department's implementation of the orders and this part in all HUD programs; and

(ii) The implementation activities of HUD program managers and, for HUD financial assistance subject to 24 CFR part 58, of grant recipients and responsible entities.

* * * * *

(b) * * *

(1) Ensure compliance with this part for all actions under their jurisdiction that are proposed to be conducted, supported, or permitted in a floodplain or wetland;

(2) Ensure that actions approved by HUD or responsible entities are monitored and that any prescribed mitigation is implemented;

* * * * *

(c) *Responsible entity Certifying Officer.* Certifying Officers of responsible entities administering or reviewing activities subject to 24 CFR part 58 shall comply with this part 55 in carrying out HUD-assisted programs.

(d) *Recipient.* Recipients subject to 24 CFR part 58 shall monitor approved actions and ensure that any prescribed mitigation is implemented.

8. The heading for subpart B is revised to read as follows:

## Subpart B—Application of Executive Orders on Floodplain Management and Protection of Wetlands

9. Section 55.10 is revised to read as follows:

**§ 55.10 Environmental review procedures under 24 CFR parts 50 and 58.**

(a) Where an environmental review is required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332, and 24 CFR part 50 or part 58, compliance with this part shall be completed before the completion of an environmental assessment (EA) including a finding of no significant environmental impact (FONSI), or an environmental impact statement (EIS), in accordance with the decision points listed in 24 CFR 50.17(a)–(h), or before the preparation of an EA under 24 CFR 58.40 or an EIS under 24 CFR 58.37. For types of proposed actions that are categorically excluded from National Environmental Policy Act (NEPA) requirements under 24 CFR part 50 or part 58, compliance with this part shall be completed before the Department's initial approval (or approval by a responsible entity subject to 24 CFR part 58) of proposed actions in a floodplain or wetland.

(b) The categorical exclusion of certain proposed actions from environmental review requirements under NEPA and 24 CFR parts 50 and 58 (see 24 CFR 50.20 and 58.35(a)) does not exclude those actions from compliance with this part.

10. Section 55.11 is revised to read as follows:

**§ 55.11 Applicability of Subpart C decision making process.**

(a) Before reaching the decision points described in § 55.10(a), HUD (for Department-administered programs) or the responsible entity (for HUD financial assistance subject to 24 CFR part 58) shall determine whether Executive Order 11988 or 11990 and this part apply to the proposed action.

(b) If Executive Order 11988 or 11990 applies, the approval of a proposed action or initial commitment shall be made in accordance with this part. The primary purpose of Executive Order 11988 is to ''avoid direct or indirect support of floodplain development.'' Consistent with section 2 of Executive Order 11990, the decision making process in § 55.20 only applies to Federal assistance for new construction in wetland locations.

(c) The following table indicates the applicability, by location and type of action, of the decision making process for implementing Executive Orders 11988 and 11990 under subpart C of this part:

TABLE 1

| Type of proposed action (new reviewable action or an amendment) [1] | Type of proposed action | | | |
|---|---|---|---|---|
| | Floodways | Coastal high hazard areas | Wetland or 100-year floodplain outside high hazard area | Non-wetland area between 100-year and 500-year floodplain |
| Critical actions as defined in § 55.12(b)(2). | Critical actions not allowed | Critical actions not allowed ..... | Allowed if the proposed critical action is processed under § 55.20.2. | Allowed if the proposed critical action is processed under § 55.20.[2] |
| Non-critical actions not excluded under § 55.12(b) or (c). | Allowed only if the proposed non-critical action is a functionally dependent use and processed under § 55.20.2.[2] | Allowed only if the proposed non-critical action: (1) Is either (a) designed for location in a high hazard area or (b) a functionally dependent use; and (2) is processed under § 55.20.[2] | Allowed if the proposed non-critical action is processed under § 55.20.[2] | Any non-critical action is allowed without processing under this part. |

[1] Under Executive Order 11990, the decision making process in § 55.20 only applies to Federal assistance for new construction in wetland locations.

[2] Or those paragraphs of § 55.20 that are applicable to an action listed in § 55.12(a).

11. Section 55.12 is amended by:

a. Revising the introductory text to paragraph (a);

b. Revising paragraph (a)(3);

c. Removing ''and'' at the end of paragraph (b)(3);

d. Removing the period at the end of paragraph (b)(4) and adding ''; and'' in its place;

e. Adding a new paragraph (b)(5);

f. Revising paragraph (c)(1);

g. Removing paragraphs (c)(9) and (c)(10);

h. Redesignating paragraphs (c)(2), (c)(3), (c)(4), (c)(5), (c)(6), (c)(7), (c)(8), (c)(11), and (c)(12) as paragraphs (c)(3), (c)(4), (c)(5), (c)(6), (c)(7), (c)(8), (c)(9), (c)(10), and (c)(11), respectively;

i. Adding a new paragraph (c)(2);

j. Revising newly redesignated paragraphs (c)(6) and (c)(7);

k. Revising the introductory text to newly redesignated paragraph (c)(9);

l. Removing ''and'' at the end of newly redesignated paragraph (c)(10);

m. Removing the period at the end of newly redesignated paragraph (c)(11) and adding a semicolon in its place; and

n. Adding new paragraphs (c)(12) and (c)(13), to read as follows:

**§ 55.12 Inapplicability of this part 55 to certain categories of proposed actions.**

(a) The decision making steps in § 55.20(b), (c), (f), and (g) (steps 2, 3, 6, and 7) do not apply to the following categories of proposed actions:

* * * * *

(3) HUD actions under any HUD program involving the repair, rehabilitation, modernization or improvement of existing multifamily housing projects (including nursing homes, board and care facilities and intermediate care facilities) and existing one-to four-family properties, in communities that are in the Regular Program of the NFIP and are in good standing, provided that the number of units is not increased more than 20 percent, the action does not involve a conversion from nonresidential to residential land use, and the footprint of the structure and paved areas is not significantly increased.

(b) * * *

(5) The approval of financial assistance to lease not more than a total of four units of existing housing in a building located within the 100-year floodplain (or the 500-year floodplain for Critical Actions), but only if—

(i) The housing is located outside the floodway or coastal high hazard area, and is in a community that is in the Regular Program of the National Flood Insurance Program (NFIP) and in good standing (i.e., not suspended from program eligibility or placed on probation under 44 CFR 59.24);

(ii) The leasing is in a structure insured under the NFIP; and

(iii) The financial assistance does not pay for repair or rehabilitation.

(c) * * *

(1) HUD-assisted activities described in 24 CFR 58.34 and 58.35(b);

(2) HUD-assisted activities described in 24 CFR 50.19, except as otherwise indicated in § 50.19;

* * * * *

(6) A minor amendment to a previously approved action with no additional adverse impact on or from a floodplain or wetland;

(7) HUD's approval of a project site, an incidental portion of which is situated in an adjacent floodplain or wetland, but only if:

(i) The proposed construction and landscaping activities (except for minor grubbing, clearing of debris, pruning, sodding, seeding, or other similar activities) do not occupy or modify the 100-year floodplain (or the 500-year floodplain for Critical Actions) or the wetland;

(ii) Appropriate provision is made for site drainage; and

(iii) A covenant or comparable restriction is placed on the property's continued use to preserve the floodplain or wetland;

* * * * *

(9) HUD's approval of financial assistance for a project on any non-wetland site in a floodplain for which FEMA has issued:

* * * * *

(12) Special projects directed to the removal of material and architectural barriers that restrict the mobility of and accessibility to elderly and persons with disabilities; and

(13) The approval of financial assistance for acquisition, leasing, construction, rehabilitation, repair, maintenance, or operation of ships and other water-borne vessels that will be used for transportation or cruises and will not be permanently moored.

12. The heading for subpart C is revised to read as follows:

## Subpart C—Procedures For Making Determinations on Floodplain Management and Protection of Wetlands

13. Section 55.20 is amended by revising the introductory text; revising paragraph (a); revising the introductory text of paragraph (b); revising paragraph (b)(3); revising paragraph (c); revising paragraph (d); revising the introductory text of paragraph (e); revising paragraph (f)(1); revising paragraph (g); and revising paragraph (h), to read as follows:

**§ 55.20 Decision making process.**

Except for actions covered by § 55.12(a), the decision making process for compliance with this part contains eight steps, including public notices and an examination of practicable alternatives. The steps to be followed in the decision making process are:

(a) *Step 1.* Determine whether the proposed action is located in a 100-year floodplain (or a 500-year floodplain for a Critical Action) or a wetland. If the proposed action would not be conducted in one of those locations, then no further compliance with this part is required.

(b) *Step 2.* Notify the public at the earliest possible time of a proposal to consider an action in a 100-year floodplain (or a 500-year floodplain for a Critical Action) or a wetland and involve the affected and interested public in the decision making process.

* * * * *

(3) A notice under this paragraph (b) shall state: the name, proposed location and description of the activity; the total number of acres of floodplain or wetland involved; and the HUD official and phone number to contact for information. The notice shall indicate the hours and the HUD office or responsible entity's office at which a full description of the proposed action may be reviewed.

(c) *Step 3.* Identify and evaluate practicable alternatives to locating the proposed action in a 100-year floodplain (or a 500-year floodplain for a Critical Action) or wetland. The evaluation shall focus on the potential impacts inside and outside the floodplain or wetland area as such impacts relate to the protection of human life, real property, and the natural and beneficial values served by the floodplain or wetland.

(1) Except as provided in paragraph (c)(2) of this section, HUD's or the responsible entity's consideration of practicable alternatives to the sites which they select for a project should include:

(i) Locations outside the 100-year floodplain (or the 500-year floodplain for a Critical Action) or wetland;

(ii) Alternative methods to serve the identical project objective including feasible technological alternatives; and

(iii) A determination not to approve any action.

(2) For multifamily projects involving HUD mortgage insurance that are initiated by third parties, HUD's or the responsible entity's consideration of practicable alternatives should include a determination not to approve the request.

(d) *Step 4.* Identify and evaluate the potential direct and indirect impacts

associated with the occupancy or modification of the 100-year floodplain (or the 500-year floodplain for a Critical Action) or the wetland.

(e) *Step 5.* Where practicable, design or modify the proposed action to minimize the potential adverse impacts within the 100-year floodplain (or the 500-year floodplain for a Critical Action) or the wetland and to restore and preserve its natural and beneficial values. Actions covered by § 55.12(a) must be rejected if the proposed minimization is financially or physically unworkable. All critical actions in the 500-year floodplain shall be designed and built at or above the 100-year floodplain (in the case of new construction) and modified to include:

* * * * *

(f) * * *

(1) Whether it is still practicable in light of its exposure to flood hazards in the floodplain or its possible adverse impact on the floodplain or wetland, the extent to which it will aggravate the current hazards to other floodplains or wetlands, and its potential to disrupt floodplain or wetland values; and

* * * * *

(g) *Step 7.* If the reevaluation results in a determination that there is no practicable alternative to locating the proposal in the 100-year floodplain (or the 500-year floodplain for a Critical Action) or the wetland, publish a final notice that includes:

(1) The reasons why the proposal must be located in the floodplain or wetland;

(2) A list of the alternatives considered;

(3) All mitigation measures to be taken to minimize adverse impacts and to restore and preserve natural and beneficial values; and

(4) For residential new construction in a 100-year floodplain, a statement that a final Letter of Map Amendment (LOMA) or final Letter of Map Revision (LOMR) will be secured by the applicant as a condition of HUD's or the responsible entity's approval of floodplain development.

(h) *Step 8.* Upon completion of the decision making process in Steps 1 through 7, implement the proposed action. There is a continuing responsibility on HUD and the recipient to ensure that the mitigating measures identified in Step 7 are implemented and, where applicable, that the LOMA or LOMR is secured.

14. In § 55.22, the introductory text to paragraph (a) and paragraph (a)(1) are revised to read as follows:

**§ 55.22 Conveyance restrictions for the disposition of multifamily real property.**

(a) In the disposition (including leasing) of multifamily properties acquired by HUD that are located in a 100-year floodplain (or a 500-year floodplain for a Critical Action) or a wetland, the documents used for the conveyance must:

(1) Refer to those uses that are restricted under identified federal, state, or local floodplain or wetland regulations; and

* * * * *

15. Section 55.24 is revised to read as follows:

**§ 55.24 Aggregation.**

Where two or more actions have been proposed, require compliance with this subpart, affect the same floodplain or wetland, and are currently under review by the Department (or by a responsible entity subject to 24 CFR part 58), individual or aggregated approvals may be issued. A single compliance review and approval under this section is subject to compliance with the decision making process in § 55.20.

16. Section 55.25 is amended by removing the period at the end of paragraph (d)(3)(iii) and adding a semicolon in its place; by removing the period at the end of paragraph (d)(6) and adding ''; and'' in its place; and by revising paragraphs (a), (b), (d)(4) and (d)(5), to read as follows:

**§ 55.25 Areawide compliance.**

(a) A HUD-approved areawide compliance process may be substituted for individual compliance or aggregated compliance under § 55.24 where a series of individual actions is proposed or contemplated in a pertinent area for HUD's examination of floodplain hazards or the protection of wetlands. In areawide compliances, the area for examination may include a sector of, or the entire, floodplain or wetland—as relevant to the proposed or anticipated actions. The areawide compliance process shall be in accord with the decision making process under § 55.20.

(b) The areawide compliance process shall address the relevant executive orders and shall consider local land use planning and development controls (e.g., those enforced by the community for purposes of floodplain management under the National Flood Insurance Program (NFIP)) and applicable state programs for floodplain management and wetland protection. The process shall include the development and publication of a strategy that identifies the range of development and mitigation measures under which the proposed HUD assistance may be approved and that indicates the types of actions that will not be approved in the floodplain or wetland.

* * * * *

(d) * * *

(4) An open scoping process (in accordance with 40 CFR 1501.7) shall be used for determining the scope of issues to be addressed and for identifying significant issues related to housing and community development for the floodplain or wetland;

(5) Federal, state and local agencies with expertise in floodplain management, wetland protection, flood evacuation preparedness, land use planning and building regulation, or soil and natural resource conservation shall be invited to participate in the scoping process and to provide advice and comments;

* * * * *

17. Section 55.26 is amended by revising the introductory text and paragraph (a), to read as follows:

**§ 55.26 Adoption of another agency's review under the executive orders.**

If a proposed action covered under this part is already covered in a prior review performed under the executive orders by another agency, that review may be adopted by HUD or by a responsible entity authorized under 24 CFR part 58, provided that:

(a) There is no pending litigation relating to the other agency's review for floodplain management and wetland protection;

* * * * *

18. Section 55.27 is amended by revising the introductory text to paragraph (a) and paragraph (a)(1) to read as follows:

**§ 55.27 Documentation.**

(a) For purposes of compliance with § 50.20, the responsible HUD official who would approve the proposed action (or Certifying Officer for a responsible entity subject to 24 CFR part 58) shall require that the following actions be documented:

(1) When required by § 55.20(c), practicable alternative sites have been considered outside the floodplain or wetland, but within the local housing market area, the local public utility service area, or the jurisdictional boundaries of a recipient unit of general local government, whichever geographic area is more appropriate to the proposed HUD action. Actual sites under review must be identified and the reasons for the non-selection of those sites as practicable alternatives must be described; and

* * * * *

**§§ 55.21, 55.25, and 55.27 [Amended]**

19. In addition to the amendments set forth above, in 24 CFR part 55:

a. Remove the words ''grant recipient'' and add, in their place, the words ''responsible entity'' in the following places:

i. Section 55.21;

ii. Section 55.25(c); and

iii. Section 55.27(b); and

b. Remove the words ''grant recipients'' and add, in their place, the words ''responsible entities'' in the following places:

i. Section 55.25(d)(2); and

ii. Section 55.27(c).

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

20. The authority citation for part 58 continues to read as follows:

**Authority:** 12 U.S.C. 1707 note; 42 U.S.C. 1437o(i)(1) and (2), 1437x, 3535(d), 3547, 4332, 4852, 5304(g), 11402, and 12838; E.O. 11514, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 3 CFR, 1977 Comp., p.123.

21. In § 58.5, paragraph (b)(2) is revised to read as follows:

**§ 58.5 Related Federal laws and authorities.**

* * * * *

(b) * * *

(2) Executive Order 11990, Protection of Wetlands, May 24, 1977 (42 FR 26961), 3 CFR, 1977 Comp., p. 121, as interpreted in HUD regulations at 24 CFR part 55, particularly sections 2 and 5 of the order.

* * * * *

Dated: April 27, 1998.

**Andrew Cuomo,**

*Secretary.*

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