

CHAPTER 11: ENVIRONMENTAL REQUIREMENTS

11.1 PURPOSE AND OVERVIEW

The purpose of this chapter is to describe the environmental requirements that must be met by the Agency and by the lender as a part of multifamily housing lending and loan servicing activities.

Key Topics in this Chapter

- Agency Reviews During Loan Origination
- Environmental Reviews During the Servicing Period
- Other Environmental Requirements

11.2 GENERAL ENVIRONMENTAL REQUIREMENTS

The lender will provide the Agency with the information required for the environmental review process. The environmental review process must be concluded by the Agency in accordance with National Environmental Policy Act (NEPA) of 1969 and 7 CFR part 1970 and its associated RD Instructions prior to taking any official action on an application for a loan guarantee.



NEPA requires that Agency actions be classified into three basic categories of action:

- Those that qualify as categorical exclusions;
- Those that require an Environmental Assessment (EA); and
- Those that require an Environmental Impact Statement (EIS).

Due to the range of activities that may qualify for a categorical exclusion, the Agency has established two types of categorical exclusions. Projects with no or minimal disturbance do not require an Environmental Report but may require additional documentation at the Agency's discretion (see 7 CFR 1970.53). Projects with small-scale development require submission of an Environmental Report (see 7 CFR 1970.54).

The Agency environmental review must examine the potential impacts of the proposed project on the environment and on a wide range of protected resources. Exhibit 11-1 provides a list of major resources that must be considered. For a complete list of resources that might present an “extraordinary circumstance” see 7 CFR 1970.52.

Exhibit 11-1	
Major Protected Resources	
Wetlands	Natural Landmarks
Floodplains	Important Farmland
Wilderness Areas	Prime Forestland
Wild and Scenic Rivers	Prime Rangeland
Historical and Archeological Sites	Coastal Zone Management
Critical Habitat or Endangered or Threatened Species	Areas
Coastal Barriers	Sole Source Aquifer
State Water Quality Standards	Recharge Area

The applicant/lender will provide to the Agency sufficient environmental information to:

- Demonstrate compliance with the requirements for the protection of the human environment, including the development of practicable alternatives (which must always include the “no action” alternative) to either avoid or lessen adverse environmental impacts.
- Demonstrate why the potential impact on the human environment is not considered to be significant, and therefore, an EIS is not required. Environmental files must include appropriate, detailed, and accurate supporting documentation, maps, results of consultation, and evidence that required public notices were published and sent to the parties listed in 7 CFR 1970 and its associated RD instructions.
- Demonstrate that all mitigation measures listed in the environmental review will be included in legally binding documents, such as the Letter of Conditions and Conditional Commitment for Guarantee.
- Show that mitigation measures were implemented during project completion. This evidence will be obtained and included in the environmental file.

11.3 ENVIRONMENTAL RISK MANAGEMENT

The Agency and the guaranteed lender will incorporate into their lending practices an environmental risk management program. The purpose of this risk management program is two-fold:

- To minimize adverse impacts to the security interests of the Agency and the lender in real property caused by potential contamination from hazardous substances, hazardous wastes, and petroleum products; and
- To establish a process by which the Agency and the lender can minimize their liability under the laws regulating management of hazardous substances, hazardous wastes, and petroleum products.

A major component of this risk management program will be the performance of due diligence. Due diligence is the process of inquiring into the environmental condition of the real estate, in the context of a real estate transaction, to determine the presence of contamination from hazardous wastes and petroleum products and to determine what impact such contamination may have on the market value of the property.

Lenders are required to perform due diligence in conjunction with appropriate loan processing and servicing actions. The minimum standard the Agency will accept as evidence of due diligence is the most current version of the *ASTM Standard E 1528-14, Phase I Environmental Site Assessment Process*, published by the American Society for Testing and Materials (ASTM), completed by a qualified environmental professional. Guaranteed lenders may incorporate the ASTM standards into their processing and servicing procedures or use an equivalent process of due diligence approved by the State Environmental Coordinator in consultation with the Regional OGC. Lenders must provide the Agency with a copy of the due diligence report and maintain a copy in the loan file. Non-compliance with this section may jeopardize the Agency's payment of loss claims due to environmental contamination.

Due diligence will be performed for:

- All applications for existing multifamily housing units when:
 - ◊ An appraiser reports to the Agency or to the guaranteed lender that potential contamination from hazardous substances, hazardous wastes, or petroleum products has been observed on the property or encountered through research or interviews with individuals knowledgeable about the property; or

- ◇ The Agency or the guaranteed lender becomes aware of possible contamination through some means other than the appraiser's report.
- All applications for new construction of multifamily housing units.
- The Agency takes a security interest in a commercial real estate loan in the amount of \$100,000 or more; or
- An appraiser reports to the Agency or to the guaranteed lender that potential contamination from hazardous substances, hazardous wastes, or petroleum products has been observed on the property or encountered through research or interviews with individuals knowledgeable about the property; or
- The Agency or the guaranteed lender becomes aware of possible contamination through some means other than the appraiser's report.
- All applications for new construction of multifamily housing units.

Additionally, if underground storage tanks are present at existing structures, the lender will ensure that the tanks comply with appropriate regulatory requirements or they will be removed.

11.4 RESPONSIBILITY FOR ENVIRONMENTAL REVIEWS

The Agency is responsible for determining the appropriate level of environmental review in accordance with 7 CFR RD Instruction 1970 and making the environmental determination. The applicant/lender is responsible for submitting sufficient environmental information to the Agency for making its determination. In consultation with the Agency, the applicant/lender will assemble and submit to the Agency the analysis of relevant material, the development and analysis of practicable alternatives and mitigation measures, and the development of recommendations. The Agency is responsible for the environmental decision.



The Agency will require information from the lender and the lender's applicant to complete this environmental review. Lenders have a responsibility to become familiar with Federal environmental requirements so that they can advise applicants and reduce the probability of unacceptable applications being submitted to the Agency. Lenders are also expected to cooperate in the collection of any environmental data which the Agency determines is necessary and in the resolution of potential environmental problems.

The Agency approval official will use the environmental review documents and the recommendations of the State Environmental Coordinator to make the Agency’s final decision regarding an environmental impact determination and compliance with environmental requirements, as well as flood insurance requirements. This decision will be documented on *RD Instruction 1970-B, Exhibit D, “Categorical Exclusion Form with Instructions”*, for a categorical exclusion, a Finding of No Significant Impact (FONSI) for an EA, or a Record of Decision (ROD) for an EIS.

The State Environmental Coordinator is available to provide technical assistance and guidance to Agency staff, lenders, and borrowers. They are also available to assist in problem resolution on environmental issues. Environmental issues or problems should be referred promptly to the State Environmental Coordinator.

11.5 ENVIRONMENTAL REVIEWS DURING LOAN ORIGINATION

The Agency’s environmental review of the property, as required under NEPA, will be initiated as early as possible, but no later than the selection of the proposal for further processing. This means the environmental review will normally be prepared simultaneously with the development of the application package. This review must be complete and a Categorical Exclusion or FONSI issued *prior* to the Agency’s issuance of a conditional commitment. Applicants and lenders must ensure no actions such as demolition, land clearing, initiation of construction prior to the Agency’s environmental decision (see 7 CFR 1970.5(b)(5)).

A. The Response to the Notice Stage

One of the requirements in the response to the Notice is a description of any “known environmental issues that may affect the project.” During this stage, the Agency will take note of environmental issues that are disclosed by the lender in assessing the preliminary feasibility of the property. It is important that all known information is disclosed at this stage. Information not disclosed, that was known to the lender or borrower, could be grounds for disqualification of funding at a later stage.

B. The Application Submission Stage

1. Submission Requirement

The lender must submit the following information (unless such information was previously submitted) as part of the loan application package (see Paragraph 4.8 B.):



- Lenders and applicants should refer to 7 CFR 1970 Subparts B and C, and their associated RD Instruction which contain applicant guides detailing information needed from the lender and/or applicants.
- Phase I Environmental Site Assessment report as prescribed by ASTM (ASTM Standard E 1527) or an equivalent process of due diligence approved by the State Environmental Coordinator in consultation with the Regional OGC.
- Lender comments regarding relevant off-site conditions.
- Land survey.
- *FEMA Form 086-0-32, Special Flood Hazard Determination Form*
- *FEMA Form 086-0-33, Elevation Certificate.*



2. Agency Response

As early as possible in the planning and decision making process, the Agency will inform the lender of the appropriate level of environmental review so that the lender or applicant can initiate the collection of environmental information in accordance with 7 CFR 1970 and its associated RD Instructions.

The environmental review will be completed prior to loan approval, obligation of funds, or other commitment of Agency resources, including issuance of a conditional commitment for guarantee whichever occurs first; and prior to the Agency decision on any servicing action which is subject to Agency environmental approval. Servicing actions that do not involve obligation of additional Agency funds are not subject to a new environmental decision by the Agency (although foreclosure actions may be subject to environmental due diligence requirements). A commitment of Agency resources may not be made subject to completion of the environmental review.

The environmental review is considered complete when the environmental documents have been properly executed, all applicable public notices have been published, the associated public comment periods have expired, and the Agency has taken any necessary actions to address the comments received and has issued its environmental decision.

11.6 ENVIRONMENTAL REVIEWS DURING THE SERVICING PERIOD

Routine servicing actions that do not obligate additional Agency funds are not subject to NEPA review and a new Agency environmental decision. However, it is the lender's responsibility to ensure that due diligence is conducted in conjunction with the appraisal for all loan servicing actions which require a determination of security value or which could lead to acquisition of real property by the Agency or the guaranteed lender.

If, through environmental audits, due diligence, or some other means, a release or threatened release of hazardous substances, hazardous wastes, or petroleum products is discovered on a borrower's property, the Agency official, in consultation with the State Environmental Coordinator and the guaranteed lender, will promptly notify the borrower in writing that immediate corrective action must be taken, consistent with appropriate regulatory authority requirements. Simultaneously, the State Environmental Coordinator will notify the appropriate regulatory authority for any necessary enforcement action.

In the case of a defaulted loan where the Agency may consider taking title from the lender, the Agency will review the due diligence report and the appraisal, prior to accepting title. If contamination is present and the cost of mitigation exceeds the market value or the amount of the debt, the Agency may decide not to accept title from the lender. If there is a loss claim due to contamination, the Agency will not finalize the loss claim until the lender has sold the property. The Agency will also review the due diligence report and appraisal prior to its consent to the release of security property by the guaranteed lender and when there are bankruptcy proceedings.

11.7 OTHER ENVIRONMENTAL REQUIREMENTS

A. Flood Hazard Determination

Properties located in Special Flood Hazard Areas (SFHAs) designated by FEMA are not eligible for Federal financial assistance, including loan guarantees, unless flood insurance through NFIP is available. The lender must ensure that NFIP flood insurance is purchased prior to loan closing and issuance of the guarantee, in accordance with the National Flood Insurance Act, as amended, and RD Instruction 426.2.



The lender is responsible for ensuring the completion of *FEMA Form 086-0-32* and completion of an elevation certificate (*FEMA Form 086-0-33*) and for submitting a copy to the Agency with the request for guarantee. The form provides specific information with regard to the proposal's location in a floodplain, the community's NFIP eligibility, its proximity to floodplains, and the availability of flood insurance. This information is necessary for a determination of site eligibility by the Agency. The environmental review conducted by the Agency will examine whether or not there is a reasonable alternative to a proposed purchase/construction in the floodplain.

Flood insurance must cover the lesser of the outstanding principle balance of the loan or the maximum amount of coverage allowed under FEMA's NFIP. Prior to loan closing, the lender is responsible for sending the applicant a copy of *Form RD 3550-6, Notice of Special Flood Hazards, Flood Insurance Purchase Requirements, and Availability of Federal Disaster Relief Assistance*. The applicant must sign and return the form at or before loan closing.

B. Clean Air Act and Water Pollution Control Act

Federal contracts that exceed \$100,000 must meet all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act, section 508 of the Clean Air Act, Executive Order 11738, and EPA regulations at 40 CFR part 15. The lender must ensure compliance with this requirement during construction of the property and throughout the servicing period.