CHAPTER 3
ENVIRONMENTAL REVIEW

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CHAPTER 3
ENVIRONMENTAL REVIEW

3.0 Introduction

The Grant Recipient is responsible for compliance with federal environmental review requirements. This chapter includes a summary and basic understanding of the process. Any periodic updates provided by HUD environmental compliance staff will be required for TxCDBG Grant Recipients, and personnel completing the environmental review should be familiar with the resources and forms found on the HUD Environmental Review website (also known as "HUD Exchange") and should contact the TDA Environmental Regulatory Officer for technical assistance. **See HUD Exchange:** *https://www.hudexchange.info/programs/environmental-review/*

HUD guidance uses the term Responsible Entity (RE) to refer to the unit of government responsible for meeting environmental review requirements, which includes the TxCDBG Grant Recipient. This means that the Grant Recipient is responsible for completing the review, with or without assistance from a third party, and certifying the results. When the Certifying Officer signs the documents, (s)he certifies that not only has the project been found to have or not have significant impacts on the environment, but also that the required process was completed to reach this finding.

TDA must monitor the Grant Recipient's compliance with HUD environmental review requirements; failure to comply with these requirements will jeopardize the project and could lead to disallowed costs, repayment of funds, and debarment from the program for the Grant Recipient and administrators involved with the environmental review process. **If it is not known how to proceed, then contact the TDA's Environmental Regulatory Officer.**

An environmental review must be performed before any funds, regardless of source, are committed to a project. Therefore, Responsible Entities are required to complete their environmental reviews, Requests for Release of Funds and clearance related paperwork **before**:

- Any commitment of TxCDBG funds for activities; and
- Any commitment of non-TxCDBG funds that would have an adverse environmental impact or limit the choice of alternatives.

A key factor in performing an environmental review is the fact that the environmental review process must consider the ultimate effect of a proposed project. That is, the effects of both the TxCDBG and related project activities must be considered. For example, if TxCDBG funds are being used to acquire a site for a new construction project, the ultimate effect of the project is not solely the acquisition of the site, but also the construction of the project, including infrastructure. Therefore, the environmental review must address the impacts of both the TxCDBG-funded land acquisition and the privately financed construction of the project. The review must address the actual project site and the surrounding area.

Basics of Environmental Review

1) What is there now?
2) What will be there when the project is complete?
3) How will this be accomplished?

3.1 Environmental Review Process

Under 24 CFR Section 58.30(b), the environmental review process should begin as soon as the Grant Recipient determines the projected use of HUD assistance. TDA considers the earliest determination of "the projected use of HUD assistance" as noted in 24 CFR 58.30 to be any formal action taken by the Grant Recipient (Responsible Entity) to prepare for or file an application directly with TDA for TxCDBG funding. This includes any resolution or formal action whereby the Grant Recipient/Applicant will hire an administrator or an engineer for the project or application for funding.

Step 1 Determine Project Description

A complete and clear project description is the first step in the environmental review process. The project description should provide location specific information and geographic boundaries, a delineation of all activities included in the overall scope of the project as well as a description of the existing conditions of the site. This should include specific addresses of locations of where the work is located or will be performed even when the Contract Performance Statement does not provide such detail. *However,* all elements described in the TxCDBG contract Performance Statement (Exhibit A) must be included in the description; in addition, any activities not funded by the TxCDBG grant but that are part of the aggregate impact of the project on the environment must also be included in the description and in the environmental assessment, including any business attached to a CDBG project. This description is the foundation for the review process and must be listed on the Environmental Review Record Summary Sheet.

Note:

1. Floodways – HUD does not fund projects in a floodway, regardless of the absence of water, unless the project is a functionally dependent use and goes through an eight step process and any Army Corps of Engineers (ACOE) permitting. Floodways are marked Zone AE hatched. This definition is based on the map and not on the elevation.
2. In addition, exempt projects must not be located in a floodplain, a known critical habitat for endangered species, a historic property, or a known hazardous site. (See HUD Memo 12-11-2012)

Step 2 Determine Level of Review

The Grant Recipient must determine the most appropriate level of review for the grant-funded project. It is critical that the project receive an adequate review to meet statutory requirements; however, it is not appropriate to require reviews that exceed the statutory guidance.

The Grant Recipient must determine the level of review for:

- Administrative and engineering services. The Exemption Determination for Activities Listed at 24 CFR § 58.34 **must** be completed prior to executing service contracts and must be submitted to TDA prior to executing any contract for these services. Best practice: Submit the Exemption Determination with the TxCDBG application for funding.
- All other project activities.

The Grant Recipient should initially determine the most appropriate level of review, which will be confirmed or adjusted as it completes the review process.

Three regulations identify activities that fall under review levels less than the Environmental Assessment:

- 24 CFR 58.34: Exemption;
- 24 CFR 58.35(a) Categorically Excluded Subject To (CEST); and
- 24 CFR 58.35(b) Categorically Excluded Not Subject To (CENST).

The following forms are required to be in the Environmental Review Record (ERR) that identify the work done for each of these reviews as applicable:

- Categorically Excluded Not Subject to 58.5 and Exempt under 58.34 **(Form A303)**
- Categorical Exclusion Subject to §58.5 **(Form A304)**

Each of these forms should be completed and signed if any project activities are identified by the categories in the regulation. If any activities described in the project description are not included in the regulation, an Environmental Assessment **(Form A302)** must be conducted for the entire project.

Step 3 Complete Checklists

The HUD Exchange includes various checklists intended to help the Grant Recipient address all issues and regulations for HUD environmental review requirements. For each of these checklists, the Grant Recipient must respond to each element with information from a verifiable source, to be included in the Environmental Review Record.

For reviews under the categories Exempt and Categorically Excluded, Not Subject to §58.5:

- Categorically Excluded Not Subject to §58.5 and Exempt under 58.34**(Form A303)**

For reviews under the category Categorically Excluded, Subject to §58.5:

- Categorical Exclusion Subject to §58.5 **(Form A304)**

For reviews under the category Environmental Assessment:

- Environmental Assessment checklist and associated worksheet **(A302)**

A more detailed explanation of some of the laws most commonly applicable to TxCDBG projects can be found on **the Environmental Review webpage** in the HUD **Exchange** *(click on the "View Resources" link).* **https://www.onecpd.info/environmental-review**

Documentation of compliance with these laws must be included in the Environmental Review Record. If the project will affect or be affected by any of these laws and authorities, the Grant Recipient should initiate correspondence with the appropriate regulatory agency. All written correspondence should reference the TxCDBG Contract number. **Photos of the project site <u>must</u> be included** in the Environmental review record to document the project site visit required by several checklist items.

Historic Preservation Requirements

As part of the Statutory Checklist (under Categorical Exclusion 24 CFR 58.35(a) and Environmental Assessment projects), each Grant Recipient/Applicant must have concurrence from the State Historic Preservation Officer (SHPO) that the project will not adversely affect historically or archaeologically significant areas or structures. The SHPO in Texas is the Commissioner of the Texas Historical Commission.

TDA has reached a Programmatic Agreement with the Texas Historical Commission, a section of which is included with the *Request for Exemption from SHPO Review* (**Form A301**). Grant Recipients/Applicants meeting certain criteria may satisfy the Historical Preservation requirements by submitting a *Request for Exemption from SHPO Review* **(Form A301)** to TDA. If the project does not meet the criteria outlined in the Programmatic Agreement, or if the Grant Recipient/Applicant does not provide an adequate project description or other information needed to determine compliance, TDA will not approve the exemption.

If the project does not have an exemption from SHPO Review approved by TDA, the Grant Recipient must submit to the SHPO a Historic Preservation Notice, found at **http://www.thc.state.tx.us** and

allow at least thirty-five (35) calendar days for the SHPO to review. A copy of the Historic Preservation Notice and response must be kept in the Environmental Review Record.

Categorical Exclusion Converted to Exemption 24 CFR 58.34(a)(12) & 58.35(a) Under rare circumstances the Grant Recipient could find their Categorically Excluded project falls under Exempt status per section 58.34(a)(12) and that none of the statutory requirements under section 58.5 apply to the project. Using the Categorical Exclusion Subject to §58.5 **(Form A304),** the Grant Recipient will determine if the project it is preparing to undertake can be converted to Exempt under section 58.34(a)(12).

Environmental Impact Statement
An Environmental Impact Statement (EIS) is required when the Grant Recipient's *Environmental Assessment* **(Form A302)** results in a Finding of Significant Impact, indicating that its proposed project or activity will significantly impact the human environment. It is unlikely that any TxCDBG-funded activity will trigger an EIS. In the event a Grant Recipient finds itself involved with this level of review, the Grant Recipient should contact the Environmental Regulatory Officer at TDA immediately for further instructions.

Tiered Review
For projects with multiple, non-contiguous locations, such as a housing rehabilitation project with work sites that are scattered throughout a county, a tiered environmental review is appropriate. For the project as a whole, complete a **Broad-Level Tiered Environmental Review** using the format provided on the HUD website. This review will identify which review requirements must be addressed site-by-site. *(See TDA website)* For each specific site, document compliance with the review requirements identified in the Broad-Level Tiered Environmental Review.

- The Grant Recipient may request a Release of Funds based on the Broad-Level review; however, the Site-Specific review must be completed prior to obligating funds for each site.
- *Tiering is generally only appropriate for single family rehabilitation projects that do not require an environmental assessment.*

Step 4 Publish Notice of Intent to Request Release of Funds, and FONSI if applicable

For reviews under the categories Environmental Assessment and Categorically Excluded, Subject to §58.5:

Once the Grant Recipient has verified compliance with related laws and authorities, a Notice of Intent to Request Release of Funds (NOI/RROF) must be published at least once in a newspaper of general circulation in the affected community.

This Notice must also be sent, at a minimum, to the following: (24 CFR §58.43)

- Local news media;
- Individuals and groups known to be interested in its activities; and
- Appropriate tribal, local, State, and Federal agencies and TDA.
    - Notice to the regional office of the Environmental Protection Agency having jurisdiction is included in this requirement only if a Finding of No Significant Impact is issued (i.e. Environmental Assessment Level of Review).

<u>The Notice must include</u>: (24 CFR 58.43)

- TxCDBG contract number;

- Description of the project (Performance Statement, Exhibit A, of the TxCDBG contract and may also include alternatives to the project as appropriate.);
- Detailed description of the project location(s); and
- The start and end dates of the period that the Grant Recipient will accept public comment on the Notice. Ending dates cannot be on days where the Entity's office of operation is closed.
- Utilize the approved HUD notice format found in the HUD Exchange Website *or TDA Website* *Sample NOI/RROF (Form A305) or Sample Notice of a FONSI (Form A306)*
- Explanation of why the action is not significant. If the Grant Recipient completes an Environmental Assessment and makes a Finding of No Significant Impact (FONSI), a FONSI notice must be prepared and distributed in accordance with 24 CFR 58.43 and 58.45. The FONSI notice may be published at the same time as the NOI/RROF. If the notices are released as a combined notice, the combined notice must clearly indicate that it is intended to meet two separate procedural requirements, and advise the public to specify in their comments which "notice" their comments address.

Minimum public comment periods:

Level of Review	**Period that the Grant Recipient must accept public comment on the Notice**
Categorically Excluded, Subject to §58.5 (Notice of Intent to Request Release of Funds)	at least 7 calendar days following the date of publication
Environmental Assessment (Combined FONSI and NOI/RROF Notice)	at least 15 calendar days following the date of publication

If this notice is posted rather than published as allowed by 24 CFR 58.43 and 58.45, three (3) additional days are required for public comments on the review.

Public comment periods and publications are not required for the following review categories:

- Exempt
- Categorically Excluded, Not Subject to §58.5

Step 5 Prepare Request for Release of Funds and Certifications

For reviews under the categories Environmental Assessment and Categorically Excluded, Subject to §58.5:

After the public comment period has expired and all comments, if any, are resolved, the Grant Recipient's Certifying Officer (mayor or county judge) shall complete the Request for Release of Funds (RROF) and Certification form, HUD form 7015.15 found on the HUD Environmental Review webpage.(See also Form A308 on TDA's website.)

- The RROF must be **printed on both sides** and one original copy must be submitted to TDA.
- The RROF is a federal form and must not be altered in any way.
- Because the Certification form certifies that the dates of the comment periods have expired, the Request form SHALL not be signed prior to the **day after the end of the public comment period**.

  NOTE: False claims or information could lead to criminal and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802)

The Certifying Officer must sign two copies of the RROF. One must be placed in the Environmental Review Record and maintained at the locality. The other originally signed RROF must be submitted to TDA.

A Request for Release of Funds is not required for the following review categories:

- Exempt
- Categorically Excluded, Not Subject to §58.5

Step 6 Submit Clearance Documentation to TDA

The Grant Recipient must submit the following documentation to TDA in order to obtain a release of funds:

For reviews under the category Exempt:

1) Letter from the Grant Recipient supporting the Exempt level of review
2) **Categorically Excluded Not Subject to 58.5 and Exempt under 58.34 (Form A303)**

For reviews under the category Categorically Excluded, Not Subject to §58.5:
Once the Grant Recipient has verified compliance with related laws and authorities, the Grant recipient must submit the following to TDA:

1) Letter from the Grant Recipient supporting the Categorical Exclusion level of review
2) **Categorically Excluded Not Subject to 58.5 and Exempt under 58.34 (Form A303)**

For reviews under the category Categorically Excluded, Subject to §58.5:

1) Letter from the Grant Recipient declaring its intent to ask for a Release of Funds.
2) *Categorical Exclusion Subject to 58.5* **(Form A304)**
3) Evidence of Publication of the Notice of Intent to Request Release of Funds **(NOI/RROF)**:
   - The actual published newspaper page with the Notice; **or**
   - A copy of the newspaper publication and the publisher's affidavit certifying the date of publication. **NOTE:** If the copy is clear and shows one single page of the publication with the date and other identifying information, then an affidavit is not required. As necessary, two pages of the publication may also be included showing identification information as necessary. Cutting and pasting pieces from the publication will still require an affidavit.
4) Request for Release of Funds and Certification, HUD Form 7015.15 (**See Form A308)**
5) Exemption Determination certification is provided on Form A304 and must be selected if converting to Exempt under 24 CFR 58.34(a)(12).

For reviews under the category Environmental Assessment (Form A302):

1) Letter from the Grant Recipient declaring its intent to ask for a Release of Funds.
2) Evidence of Publication consisting of FONSI and NOI/RROF: (24 CFR 58.43)
   - The actual published newspaper page with the combined notice, or
   - A copy of the newspaper publication with the combined notice and a publisher's affidavit certifying the date of publication. **NOTE:** If the copy is clear and shows one single page of the publication with the date and other identifying information, then an affidavit is not required. As necessary, two pages of the publication may also be included showing identification information as necessary. Cutting and pasting pieces from the publication will still require an affidavit.
3) Request for Release of Funds and Certification HUD Form **7015.15** (See also Form A308).

Although the original RROF is required prior to release of funds, TDA recommends submitting the required documentation by email initially, including a color scan of the publication and signed RROF, and then mail the originally signed RROF to TDA.

Step 7 State Objection Period and release of funds

Once TDA receives a scanned copy of the RROF and other required documentation, the TDA Environmental Regulatory Officer will begin the 15-day **State Objection period**. The State Objection time period is in addition to the time already allowed for public commentary as described above. Any person or agency may object to a certified RROF. However, the objections must meet the conditions and procedures set forth in 24 CFR Part 58 Subpart H. Required documentation submitted for Exempt and Categorically Excluded Projects Not Subject to 58.5 will not experience a 15 day Objection Period but will receive a Release of Funds from TDA.

If there are no objections received after 15 days, and if the originally signed RROF has been received by TDA, TDA will provide a clearance letter, an Authorization to Use Grant Funds, to the Grant Recipient.

- This clearance is for the environmental condition only; other Special Conditions in the Contract must also be met before any construction funds can be released.
- The authorization is completed based on the Certifying Official's signature certifying that all required procedures have been completed, along with the limited support documentation provided. This is not an indication that TDA has reviewed and approved the entire environmental review record for the project.

Step 8 State's Post-Release Review

Following the Authorization to Use Grant Funds, TDA will conduct a post-release monitoring review in accordance with 24 CFR 58.18. This review may occur at any time after the release of funds and prior to the closeout of the grant contract. TDA will request either:

- Completed Statutory Checklist and Assessment Checklist (if applicable) referencing verifiable supporting documentation; or
- Completed Environmental Review Record.

If TDA determines that the Grant Recipient's environmental review was inadequate or incorrect, the Environmental Regulatory Officer will provide technical assistance and guidance for corrections. If necessary, a finding letter will be issued and the contract may be placed on hold until any issues are resolved. Significant violations of federal requirements may result in disallowed costs and/or requirement to return grant funds in whole or part if funds have been obligated based on an RROF found to be invalid.

Step 9 Re-Evaluation of the Environmental Determination

According to 24 CFR 58.47, the environmental determination must be re-evaluated any time that the Grant Recipient "proposes substantial changes in the nature, magnitude or extent of the project." The re-evaluation assists in determining whether or not the original determination and/ or finding are still valid. Project amendments that **may** result in the need for an updated FONSI include but are not limited to:

- Any change in activity
    - Ex. Adding water line improvements to a sewer line improvement project
    - Ex. Adding sewer plant improvements to a sewer line improvement project
- Any new project location not addressed in the original review
    - Ex. Adding additional streets to a street paving project
    - Ex. Changing the location of a proposed water tower

- An increase in infrastructure capacity of more than 20%
    - Ex. Increasing a proposed water storage tank from 100,000 gallons to 150,000 gallons
    - Ex. Adding traffic lanes to widen a street
- A change in method or design that impacts the physical environment
    - Ex. Adding lift stations not previously proposed to a sewer line improvement project
    - Ex. Adding fire hydrants to a water line improvement project where none had been proposed
- A change to accommodate new circumstances and environmental conditions that have arisen during project implementation
    - Ex. Addressing damage caused by a natural disaster
    - Ex. Changing strategies from rehabilitation of a building to reconstruction or expansion as a result of the actual building conditions

Any project changes that were not addressed by the original environmental review require a re-evaluation. The Grant Recipient must notify TDA when the re-evaluation has been completed as to whether or not the FONSI or any other determination is still valid. The **Form A1101** requesting a change in the TxCDBG contract addresses this requirement – a separate letter is not required unless additional information is requested – and a copy must be included in the Environmental Review Record.

Re-Evaluation of the Finding

Any project changes that were addressed by the original environmental review will likely not require additional clearance requirements. The Grant Recipient should clearly document that the changes are not substantial and that the EA/FONSI or Categorical Exclusion/Exempt determination are still valid after re-evaluation. The Environmental Review Record should be updated with any new project locations, etc.

If the proposed project amendment is a change in scope or activity and is not covered by the original Environmental Review, then the Entity must start over at the beginning of the process, including a new environmental review, public notices, public comment and objection periods, and new release of funds by TDA.

TDA strongly recommends that the Grant Recipient include any anticipated alternatives (additive alternatives) to the original project in the original environmental review. TDA also recommends if a construction bid is substantially less than anticipated and additional construction funds will be available, that the Grant Recipient begin the request for an amendment as soon as possible. Thus, in the event the amendment is approved and environmental clearance is obtained, administrative requirements will not delay construction.

Note that any modified project activities not included in the original TxCDBG Contract will generally require a re-evaluation but *not* necessarily a new full Environmental Review and associated publications. In addition, the publication required for the amendment process should also note the change in locations or activities so the persons or parties interested in the project will have a chance to comment in compliance with the dissemination requirements of 24 CFR 58.43

Any amendment submitted from the Grant Recipient will be evaluated by TDA for compliance with 24 CFR 58.47. If the Environmental Regulatory Officer has concerns regarding the proposed changes to the contract, the Grant Recipient, Contract Specialist, and Administrative Consultant will be contacted to discuss the concerns.

3.2 Environmental Laws and Regulations

The following provisions of law authorize state governments to assume HUD's environmental review responsibilities. TDA will act for HUD for environmental reviews, decision-making, and action that would otherwise apply to HUD under NEPA (National Environmental Policy Act) and other provisions of laws that further the purposes of NEPA, as specified in 24 CFR Part 58. These regulations are referenced in 24 CFR 58.1(b).

3.2.1 Laws

The foremost Environmental law is NEPA and implementing Executive Order 11514 (35 FR 4247, 3 CFR, 1966-1970 Comp., p. 902) as amended by Executive Order 11991 and the implementing regulations of the Council on Environmental Quality (40 CFR parts 1500-1508). This is not an all-inclusive list as projects can cross over into other laws and authorities not listed here.

NEPA

42 USC § 4321 provides: The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Executive Order 11514

Protection and Enhancement of Environmental Quality

Executive Order 11991

Relating to Protection and Enhancement of Environmental Quality

Historic Preservation Requirements:

National Historic Preservation Act of 1966, 54 USC 300101 *et seq*.
Archeological and Historic Data Preservation Act of 1974, 54 USC 312501-312508
Executive Order 11593, Protection and Enhancement of the Cultural Environment
Antiquities Code of Texas, Chapter 191 Natural Resources Code
Tribal Consultation in Projects that are Reviewed under 24 CFR Part 58
https://www.onecpd.info/resources/documents/Notice-CPD-12-006-Tribal-Consultation-Under-24-Cfr-Part-58.pdf

3.2.2 Regulations

24 CFR Part 51: Environmental Criteria and Standards

Description: This regulation provides environmental standards for determining project acceptability and necessary measures to ensure that activities assisted by HUD achieve the goal of a suitable living environment. The environmental criteria include noise abatement and control and the siting of HUD-assisted projects near hazardous operations including explosives, flammables, runway clear zones at civil airports, and accident potential zones at military airfields.

24 CFR Part 55: Floodplain Management and Protection of Wetlands

Description: HUD regulations to implement executive order on development in floodplains. See HUD Exchange for more information and publication requirements. This could add 15 days to the Environmental Process.

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

Responsibilities
Description: The procedures outlined in this regulation are used by entities that assume HUD's environmental review responsibilities in determining program compliance with the intent of the NEPA and other related statutes. Applicable HUD programs under this regulation include only those in which a specific statute allows governing entities to assume the Federal responsibility.

36 CFR Part 800: Protection of Historic Properties
Description: The Advisory Commission on Historic Preservation Rules, used by HUD for all HUD projects.

3.2.3 Resources

Website for cleanups and hazardous materials:

http://www2.epa.gov/cleanups/cleanups-my-community