Environmental Review Requirements for Public Housing Demolition and Disposition

HUD has issued two sets of regulations to implement NEPA environmental review provisions: 24 C.F.R. Part 50, governing review conducted by HUD and 24 C.F.R. Part 58, governing review conducted by designated "responsible entities."[1] These HUD regulations operate in tandem with generally applicable Council on Environmental Quality regulations.[2]

The two sets of HUD regulations set forth essentially the same review procedures, although Part 58 is significantly more detailed. The principal difference between the two sets of regulations is which agency conducts the review: HUD or a "responsible entity." In the context of the demolition or disposition of public housing units, a "responsible entity" is the "unit of general local government within which the project is located that exercises land use responsibility,"[3] usually a city.[4] The regulations governing HUD review allow HUD the option to conduct review in place of a responsible entity when it deems this appropriate.[5]

In general, the purpose of the NEPA review process is "to ensure that government agencies act on full information and that interested groups have access to such information. NEPA thus imposes procedural requirements, but not substantive results on agencies."[6] However, HUD has set forth a more substantive purpose in its Part 50 regulations. These regulations were drafted in order to identify significant environmental impacts that will result from decisions made in the administration of the federal housing program so that these effects may be mitigated or prevented.[7] Under Part 50, where a proposal poses "significant adverse environmental impacts" that cannot be mitigated, it must be rejected.[8]

"Environmental impacts" is an open-ended concept and no exhaustive list of categories is set forth in the regulations. The definition of the effects agencies are required to consider is very broad:

> Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.[9]

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[1] HUD has also issued HUD, ENVIRONMENTAL ASSESSMENT GUIDE FOR HOUSING PROJECTS 1390.2 (Jan. 1985). It pre-dated current regulations and does not apply explicitly to demolition and disposition of public housing units, but may be used a reference by HUD staff or responsible entities.
[2] 40 C.F.R. Parts 1500-1508 (2012).
[3] *See* 24 C.F.R. § 58.2(a)(7)(ii)(B) (2012).
[4] If HUD determines this to be infeasible, the county may conduct review, unless that is infeasible, in which case, the state may conduct review. *See id.*
[5] 24 C.F.R. § 970.13(a) (2012).
[6] *See, e.g.*, Sierra Club v. U.S. Forest Service, 46 F.3d 835, 837 n.2 (8th Cir. 1995) (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)).
[7] *See, e.g.*, 24 C.F.R. § 50.3(c) (2012).
[8] *See id.* § 50.3(a).
[9] 40 C.F.R. § 1508.8 (2012).

In the HUD review process, displacement is a non-ecological effect that is considered.[10] SAC applications must expressly demonstrate compliance with environmental justice requirements.[11]

In the public housing demolition and disposition context, the NEPA review process has three stages: an initial review to determine regulatory applicability; the environmental assessment (EA); and, if necessary, the environmental impact statement (EIS). A basic summary of these stages is presented below.[12]

Initial Environmental Review **--** The first step in the NEPA review process is to determine whether the activity under review is exempt or a categorically excluded from the EA and EIS requirements. The HUD regulations set forth a list of exempt[13] and categorically excluded activities.[14] Demolition does not fall under any of these exemptions or exclusions. Disposition may fall under an exclusion, depending on whether review is being conducted pursuant to Part 50 or 58. Under Part 50, the "disposition of . . . an existing structure" is categorically excluded from review, unless HUD determines that "extraordinary circumstances"[15] are present.[16] Under Part 58, the "disposition of an existing structure" is categorically excluded from review "provided that the structure . . . disposed of will be retained for the same use."[17]

Environmental Assessment **--** Provided that the activity under review is not exempt or categorically excluded, HUD or the responsible entity must prepare an environmental assessment (EA) to determine whether the activity poses significant environmental impacts. An EA is a "concise public document" that "briefly provide[s] sufficient evidence and analysis" to determine whether an environmental impact statement (EIS) is necessary, aids in an agency's compliance with NEPA, and facilitates the preparation of an EIS, when necessary.[18]

HUD field offices are required to use Form HUD-4128 in preparing EAs.[19] HUD has produced an "Environmental Assessment Checklist" in MS Excel format,[20] similar to Form HUD-4128, apparently for use by responsible entities preparing EAs. Both the HUD form and the checklist cover a broad range of topics at a very low level of detail. These topics range from soil erosion to effects on the delivery of municipal services to the displacement of residents. In both documents, HUD or the responsible entity is to assess the severity of each type of impact and indicate whether mitigation measures are required.

An EA will result in one of two conclusions: a finding of no significant impact (FONSI), in which case no EIS is required, or a finding of significant impact, in which case an EIS is required.[21]

Environmental Impact Statement **--** An environmental impact statement (EIS) is a "detailed" statement on impacts, potential adverse effects, alternatives, and related issues.[22] EIS preparation

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[10] *See* notes 17 and 18, *infra*, and accompanying text.
[11] HUD Notice PIH 2012-7, *supra* note __, at ¶ 6 (specifically referencing the environmental justice requirements of 24 C.F.R. §§ 50, 58, which in turn incorporate Executive Order 12898—*Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 FR 7629 (Feb. 11, 1994)).
[12] NEPA is not the only source of federal environmental regulation. Other federal and state authorities may apply — *e.g.*, the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* (2012) — depending on particular circumstances. *See* 24 C.F.R. §§ 50.4, 58.5 (2012) (listing related federal authorities).
[13] *See* 24 C.F.R. § 58.34 (2012).
[14] *See id.* §§ 50.19, 50.20, 58.35.
[15] *See* 40 C.F.R. § 1508.4 (2012) (cited in 24 C.F.R. § 50.20(a) (2012)).
[16] 24 C.F.R. § 50.20(a)(4) (2012).
[17] *Id.* § 58.35(a)(5). "Same use" is not defined in the regulations.
[18] *See* 40 C.F.R. § 1508.9(a) (2012).
[19] *See* 24 C.F.R. § 50.31(a) (2012).
[20] Available online at http://www.hudclips.org/sub_nonhud/cgi/pdf forms/eacheck.xls. *See also* 24 C.F.R. § 58.40 (2012).
[21] *See id.* §§ 50.33(b), 58.40(g).

requirements under 24 C.F.R. Part 58, Subpart G are more detailed than those set out under Part 50, requiring responsible entities to submit a draft EIS to the Environmental Protection Agency.

Legal Handles Provided by the NEPA Review Process — HUD NEPA regulations provide some rights of public participation in the environmental review process, but these rights are particularly anemic. Under Part 50, the public is entitled to notice of the review process.[23] Under Part 58, the public is entitled to submit comments to EAs, which responsible entities are required to "consider," but responsible entities are not expressly required to respond to comments they receive.[24] Should HUD or a responsible entity fail to comply with these public participation requirements, or fail to comply with the review process altogether, its decision would be vulnerable to litigation.[25]

In addition, a substantial body of case law has developed around agencies' duties of environmental review under NEPA. Numerous challenges have been brought against the sufficiency of agencies' FONSIs and EISs. The case law is somewhat uneven, but agencies have often been held to a fairly exacting standard.[26] Where HUD or a city government serving as a responsible entity seeks to encourage the demolition or disposition of public housing units, it may have an incentive to take shortcuts and issue a FONSI without adequate basis in order to avoid the delay involved in preparing an EIS. In such cases, litigation may produce useful results.[27]

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[22] 40 C.F.R. § 1508.11 (2012).
[23] *See* 24 C.F.R. § 50.23 (2012).
[24] *See id.* §§ 58.43(c), 58.45. *See also id.* § 58.59 (describing optional EIS public hearing process).
[25] *See*, *e.g.*, Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 143 (1981).
[26] For example, the Ninth Circuit has recently emphasized that an agency is required to take a "hard look" at project's environmental consequences before issuing a FONSI. *See* National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (2001). The FONSI must include a "convincing statement of reasons to explain why a project's impacts are insignificant." *Id.* (citing Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir. 2000)). If an EA indicates that a project "*may* have a significant effect upon the . . . environment, an [EIS] must be prepared." *Id*. (emphasis in original; citing Foundation for N. Am. Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982)).
[27] Litigation should usually be preceded by involvement in the NEPA public participation process so as to establish a favorable administrative record. In Harris v. U.S. Dep't of HUD, No. CV-02-1481 (W.D.Wa. filed 2002) (Companion Website), plaintiffs challenged a HOPE VI revitalization plan on NEPA and affirmatively furthering grounds, and reached a favorable settlement after the trial court denied a preliminary injunction but an injunction pending appeal was obtained. The NEPA claims concerned the inadequacy of the assessment and FONSI.