

The assumption of federal environmental responsibilities by tribal, local, and state governments is virtually unique among federal agencies. This assumption reflects the transfer of full authority to local, state, or tribal governments for environmental quality and protection for HUD-assisted projects, including the monitoring and implementation of any mitigation that the responsible entity requires. HUD believes that effective environmental review and administration is best performed by the responsible entity and not by the federal funding agency.

*Comment:* HUD's Office of Native American Programs requested the addition to § 58.1(b)(10) of the Native Hawaiian Housing Block Grants program authorized by section 513 of American Homeownership and Economic Opportunity Act of 2000 (Pub. L. 106-569, approved December 27, 2000) and section 203 of the Omnibus Indian Advancement Act (Pub. L. 106-568, approved December 27, 2000), each of which amended NAHASDA by adding a new title VIII. Section 806 of NAHASDA, as amended, authorizes HUD to permit the Director of the Department of Hawaiian Home Lands to assume environmental review responsibilities.

*HUD Response:* The final rule adds the Native Hawaiian Housing Block Grants program to § 58.1(b)(10).

*Comment:* Several commenters felt that an American Society for Testing and Materials (ASTM) Phase I assessment is a possible means for complying with § 58.5(i). As an alternative, some commenters suggested a simple "reasonableness" test and recommended that the regulation provide that grantees must determine to a reasonable level of certainty, as determined by the grantee, that sites are free of hazardous materials and other deleterious substances. One commenter wrote that the proposed amendment would create significant new cost and other burdens for Community Development Block Grant (CDBG) and HOME grantees. Another commenter wrote that requiring properties to be free of hazards without providing a safe harbor leaves a governmental jurisdiction potentially liable for damages caused by unknown or undiscovered hazards.

*HUD Response:* The final rule makes no change to the proposed rule in response to this comment. The policy in proposed § 58.5(i) requires due diligence in accordance with the language in that section, but is not intended to suggest any liability for damages caused by unknown or undiscovered hazards where an

appropriate review has been performed. In addition, the policy that sites be free from hazardous materials, etc., does not require a complete absence of such materials, but only that the property be free of hazards where the hazard could affect the health and safety of occupants or conflict with the intended utilization of the property. The policy also does not prescribe any specific form of remediation, which may vary depending upon the nature of the hazard.

With respect to the issue of costs, in most cases, the cost of the environmental study is eligible for HUD funding as administrative or project costs. The potential remediation costs to owners of existing property who are primarily interested in doing rehabilitation work or facade-type improvements are all costs that are eligible for HUD funding as project costs or for funding under other federal programs. There should be no financial burden to affected property owners benefiting from federal financial assistance to identify and remediate environmental hazards on their property. Significant benefits accrue to the value and desirability of the property. Generally, the benefits of remediation outweigh the costs. Remediation provides a safer environment, which the final rule advances in support of meeting a national goal of a suitable living environment expressed in housing and NEPA legislation.

The criteria in § 58.5(i) rely on a general performance standard. Section 58.5(i) does not require a Phase I environmental assessment for toxics (American Society for Testing and Materials, ASTM E 1527). Certainly, a Phase I report or equivalent analysis is a possible means for complying with § 58.5(i). Some HUD programs already require a Phase I report, a standard of private real estate transactions. Visual inspection of the property may not disclose enough information to ascertain toxic contamination. Permission of the property owner is a routine procedure for examining or testing on-site of a site that is not under the control of the prospective purchaser or environmental reviewer. Such permission includes testing, if the site is suspected or known to contain toxic contaminants. Checking existing federal, state, or local databases is routine procedure for the environmental review, but such databases are not all inclusive and up-to-date. Due diligence is required in making such determinations.

When HUD itself is responsible for performing the environmental review, the policy under § 50.3(i) is not to approve the provision of financial

assistance to residential properties located on contaminated sites that are not found to meet the criterion in current § 50.3(i)(1). Sites known or suspected to be contaminated by toxic chemicals or radioactive materials include, but are not limited to, sites which: (1) Are listed on an Environmental Protection Agency (EPA) Superfund National Priorities list or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*) (CERCLA) list or equivalent state list; (2) are located within 3,000 feet of a toxic or solid waste landfill site; or (3) have an underground storage tank that is not for residential fuel. For any of these conditions, the recipient provides HUD with an American Society for Testing and Materials (ASTM) Phase I environmental assessment for toxics report or equivalent analysis.

*Comment:* Some commenters objected to the provision in §§ 58.5(i)(2) and (3) requiring environmental review of multifamily housing and non-residential properties to include evaluation of previous site uses and other evidence of contamination on or near the site or in the general proximity. Commenters said that it is not possible to identify hidden conditions such as drug labs or other hazards out of plain sight. Five commenters recommended that the requirement should be limited to a reasonable determination of potential hazards that might include checking existing federal, state, and local databases that contain information on contaminated properties.

*HUD Response:* The final rule makes no change to the proposed rule in response to the commenters' objections. In general, multifamily housing refers to five or more units within one building. Properties are to be "free" of hazards that affect the health and safety of occupants or conflict with the intended utilization of the property. The rule sets a performance standard that includes evaluation of previous uses of the site and evidence of contamination on or near the site, to assure that occupants of proposed sites are not adversely affected by the hazards. Unacceptable sites are to be disapproved, unless the site can be made acceptable by the remediation of the toxic contaminants. Due diligence is the norm. The rule does not create a basis for liability of responsible entities for contamination or the effects of contamination that are not discovered as the result of the exercise of due diligence. Certainly, checking federal, state, and local data banks on toxic hazards is necessary, but the absence of the property in such data banks is not always conclusive on the hazards issue.