

clarification. The phrase covers the recipient's clients and partners that are project participants, such as public or private, non-profit or for-profit entities and their contractors. To narrow the application of this phrase to subrecipients is contrary to the intent of this provision to provide a broad and all-inclusive application of the phrase. The final rule would continue the generic usage contained in the proposed rule.

*Comment:* The rule should allow responsible entities approving supplemental assistance to a previously approved project to treat such projects as categorically excluded and not subject to § 58.5 authorities when the part 58 review and approval was conducted by a different responsible entity from the one that conducted the environmental review on the original project.

*HUD Response:* Section 58.35(b)(7) in both the proposed and final rule requires that the approval for the supplemental assistance be made by the original responsible entity. The original responsible entity has the environmental review record for the project and is more knowledgeable about the original project. For that reason, HUD believes that the original responsible entity can best judge whether supplemental assistance is eligible to be treated as a categorical exclusion not subject to the related laws, particularly since this judgment requires a determination by the original responsible entity under § 58.47 as to whether re-evaluation of the original environmental findings is required. Additionally, the Department views all the participants in the process as partners.

*Comment:* The existing requirement in § 58.22 restricting development before HUD approvals are received as "choice-limiting" actions is unworkable and most likely is misinterpreted. The commenter recommended modifying the restriction on "committing" HUD funds to a project until HUD has approved a Request for Release of Funds (RROF). The commenter said that many projects may have already been approved by other environmental processes and that construction may be underway before HUD funding is "committed" to the project. The commenter suggested substituting the word "expended" for the word "committed" to denote that while allocation of HUD funds is permissible, the actual expenditure of HUD funds is not permissible until the RROF has been approved.

*HUD Response:* The final rule makes no change to the proposed rule in

response to this comment. The term "commit" is broader and includes the meaning of the term "expend." The intent in using the term "commit" is to prevent any "choice-limiting" action from occurring prior to HUD or state approval of the environmental certification of compliance and the request for the release of funds for the HUD-assisted project. This provision does not affect the recipient's general allocation of funds, but only restricts commitment of such funds to choice-limiting actions, for example, site-specific activities such as real property acquisition, leasing, demolition, rehabilitation, and related site improvements.

The commitment to a HUD-assisted project of HUD and non-HUD funds by the recipient and its partners prior to completion of the environmental review and submission and approval of the recipient's environmental certification of compliance and request for the release of funds inherently diminishes and biases objective consideration of alternative locations for the proposed project (including a no action alternative). The Department believes that the consideration of alternatives is fundamental to the environmental review process for HUD-assisted projects complying with the procedures of part 58.

CEQ regulations at 40 CFR 1502.2(f) require that agencies not commit resources prejudicing selection of alternatives before making a final decision. The regulations at 40 CFR 1506.1 address limitations on actions during the NEPA process. Applicable statutes and regulations set decision points for environmental review and compliance for the various authorities at §§ 58.5 and 58.6. This standard is not in any way diminished by the participation of non-federal funding of the project.

As more programs are added to § 58.1(b) where the recipient is different from the responsible entity, and based on HUD's recent program experience, it is necessary for HUD to be clear in the rulemaking regarding this important environmental compliance issue. This demonstrates the need for responsible entities and recipients other than responsible entities to help each other perform timely compliance with part 58 with all partners selected to implement HUD-assisted projects. Substituting the words "not expend" for the words "not commit" as suggested by the respondent would not address HUD's concern. The restriction on undertaking or committing funds for choice-limiting actions does not apply to undertakings or commitments of non-federal funds for

a development by a party before the party applies to the part 58 recipient for federal funds for the project. Thus, a third party may begin a project in good faith as a private project and by so doing is not precluded from later deciding to apply for federal assistance. However, when the party applies for federal assistance, it will generally need to cease further choice-limiting actions on the project until the environmental review process is completed in accordance with procedures under part 58.

*Comment:* The "choice-limiting" requirements in 24 CFR 58.22 are overly restrictive. Two commenters wrote that there may be numerous "choice-limiting" requirements imposed upon a development even before HUD funding is available. The commenters want a distinction made in § 58.22 to recognize that "choice-limiting" requirements may not always be negative. For example, the imposition of requirements under the Endangered Species Act before the approval of the RROF should not be considered as limiting environmental choices. Further, §§ 58.22(a) and (c) would restrict development with non-HUD funds if an application for HUD funding was under consideration and the grantee was aware that some "choice-limiting" was going to or had already taken place. The commenters argued that the recipient has no way of knowing until the approval process is complete whether a particular application will or will not be funded. Additionally, the recipient has no legal authority to stop or limit development by an applicant before HUD funds have been committed to the activity. Also, many of the "choice-limiting" conditions would most likely be imposed upon the development anyway. The commenters recommended that HUD reconsider its policy of defining land acquisition as a "choice-limiting" activity, asserting that neither NEPA nor the CEQ regulation at 40 CFR 1506.1 defines "choice-limiting" activity.

*HUD Response:* The Department declines to adopt the commenters' recommendation here. Use of the term "choice-limiting" in this regulation does not apply to mitigation measures, as implied in the comment. The term applies to limitations on actions during the environmental review process as prescribed by the CEQ regulations for implementing the procedural provisions of NEPA (40 CFR 1506.1(a)).

HUD has reviewed court decisions on whether land acquisition or similar actions are choice-limiting activities under NEPA. Six federal circuit courts including the DC Circuit Court have