

considered this issue. All six have ruled that land acquisition is a choice-limiting activity under NEPA. Two of these cases were appealed to the Supreme Court, which denied certiorari both times. Accordingly, the provisions of § 58.22 prohibiting the commitment of HUD or non-HUD funds for acquisition of property to be used in a HUD-assisted project before an environmental review is completed reflect existing case law on this point, which is law in all of the federal circuit courts that have ruled on this point and law that the U.S. Supreme Court has twice declined to overturn.

*Comment:* Four commenters wrote that any restriction on the ability to invest HUD funds in developments that are already underway could have a harmful effect on a grantee's ability to comply with CDBG program requirements for timely expenditure of grant funds.

*HUD Response:* The final rule is unchanged from the proposed rule with respect to this issue. In most cases, the cause of the delay in the recipient's expenditure of grant monies may be attributed to factors other than that of compliance with environmental review processing under part 58. Part 58 allows state, local, and tribal governments and other recipients to set and manage the schedule of their environmental review processing. CEQ regulations at 40 CFR 1501.2 require agencies to integrate the NEPA process with other planning at the earliest possible time. This requirement is intended to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.

Moreover, as noted in response to a previous comment, 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. Where a third party has begun a project in good faith as a private project, the part 58 recipient is not precluded from considering a later application for federal assistance for the project, but must advise the third party applicant to cease further choice-limiting actions on the project until the environmental review is completed.

*Comment:* The final rule should clarify the term "nominal" as used in current § 58.22 for real estate options. The commenter asked whether it is a percent of the purchase price.

*HUD Response:* The final rule makes no change to the proposed rule in response to the commenter's request for

clarification. Real estate options are subject to the conditions regarding environmental acceptability and nominal price at § 58.22(d). The provision allows some flexibility regarding the term "nominal" and any reasonable interpretation is acceptable. In most instances, the deposit is not refundable if the property buyer fails to exercise the real estate option by purchasing the property within the defined time period.

*Comment:* The final rule should eliminate the proposed changes to § 58.22, because the changes would place unenforceable burdens on recipients to police the actions of subrecipients during the application phase. The commenter objected to the proposed changes for two reasons. The first concern is that recipients would be expected to analyze whether potential subrecipients are "about to take an action within the jurisdiction of the recipient that is prohibited by § 58.22(a)." The second concern of the commenter is the requirement that if the recipient becomes aware that a subrecipient is about to take a prohibited action, "the recipient will take appropriate action to ensure that the objectives and procedures of NEPA are achieved." It is unclear, in the view of the commenter, what would constitute "appropriate action" and what the recipient's actual responsibilities would be under this requirement. Some nationwide recipients are not in a position to determine NEPA's objectives at the local level nor to enforce them with their subrecipients. A recipient of HUD funds can ensure that its own and its subrecipients' actions conform to the HUD environmental review process once a legal relationship exists and HUD funds have been allocated and disbursed. But, wrote the commenter, recipients lack both the jurisdiction and enforcement power that would be required by proposed § 58.22(c) during the application phase.

*HUD Response:* The final rule makes no change to the proposed rule with respect to the commenter's first concern. The disqualification for the use of HUD assistance for violation of the limitation on activities pending clearance itself serves to influence the behavior of potential subrecipients. In fact, the rule provides the requisite power to enforce appropriate action. The final rule at § 55.22(c) states that "if a recipient is considering an application from a prospective subrecipient or beneficiary and is aware that the prospective subrecipient or beneficiary is about to take an action within the jurisdiction of the recipient that is prohibited by

§ 58.22(a), then the recipient will take appropriate action to ensure that the objectives and procedures of NEPA are achieved." To enforce compliance with this procedure, the final rule requires that recipients, whether responsible entities or recipients other than responsible entities, be effectively responsible for establishing internal controls. The controls would prohibit the recipients' public and private development partners from the commitment and expenditure of HUD and non-HUD funds to implement a HUD-assisted project prior to compliance with part 58. These controls should apply to applicants, potential awardees, or development partners selected by the recipient.

The Department also carefully considered the commenter's second point, but declines to change the proposed rule in response to the comment. As stated earlier, HUD believes that the recipient has both the jurisdiction and the power to act under this provision. In the first place, the recipient, when seeking prospective applicants or potential developers, has the authority to market its relationship with conditions. The recipient may mandate that no implementation of the project to be assisted with HUD funds is to occur until there is compliance with part 58. During and after the application phase, recipients must refuse HUD assistance to an applicant or developer who has violated the provision for limitations on activities pending environmental clearance. HUD looks to recipients to enforce this provision as they approve or disapprove either applications for HUD financial assistance or partners in the development of HUD-assisted projects. The provision in § 58.22(c) simply serves to emphasize a provision in the CEQ regulations (40 CFR 1506.1(b)) that already applies to responsible entities under part 58, and also to apply these responsibilities to recipients regardless of whether they are the responsible entity.

*Comment:* Four commenters suggested that HUD should not amend the public comment periods in § 58.45 to reflect that the periods are minimum periods. The commenters objected to the proposed amendment on the basis that a person who fails to respond within the 15-day period could conceivably persuade a court that the comment period for a specific project was not long enough. Thus, if no maximum period is stated, a court could determine that the comment period could be any length of time. The result would be to delay needed development and negatively impact CDBG timeliness