

Webinar on 24 CFR Part 55: Floodplain Management for Multifamily and Office of Residential Care FHA Programs (May 12, 2020)

Questions and Answers

Note that in some cases, similar questions have been combined.

Contents:

| | |
|--|---|
| I. Resources for more information | 1 |
| II. Completing the 5- and 8-Step Processes | 2 |
| III. Maps | 2 |
| IV. Flood Insurance | 3 |
| V. Critical Actions | 3 |
| VI. Wetlands | 4 |
| VII. Project-specific questions..... | 5 |

I. Resources for more information

HUD Exchange Resources

- Floodplain Management: <https://www.hudexchange.info/programs/environmental-review/floodplain-management/>
- Flood Insurance: <https://www.hudexchange.info/programs/environmental-review/flood-insurance/>
- HUD’s primary Environmental Review page: <https://www.hudexchange.info/programs/environmental-review/>
- Office of Housing page: <https://www.hudexchange.info/programs/environmental-review/housing/>
 - See Housing Environmental Guidance tab for links to Multifamily MAP Guide and Healthcare Mortgage Insurance Program Handbook

Mapping Resources

- FEMA’s Map Service Center: <https://msc.fema.gov/portal/search>
- Flood Map Changes Viewer: <https://fema.maps.arcgis.com/apps/webappviewer/index.html?id=e7a7dc3ebd7f4ad39bb8e485bb64ce44>
- Guidance on finding current and preliminary maps for HUD projects: <https://www.hudexchange.info/resource/5834/floodplain-maps-for-hud-projects/>

Wetlands Resources

- On the HUD Exchange: <https://www.hudexchange.info/programs/environmental-review/wetlands-protection/>
- 3/31/20 Floodplain and Wetland Protection webinar: <https://www.hudexchange.info/trainings/courses/24-cfr-part-55-floodplain-management-and-wetlands-protection-rules-webinar/>
- Water Elements module in WISER: <https://www.hudexchange.info/trainings/wiser/>

II. Completing the 5- and 8-Step Processes

Question: How is "practicable alternative" defined in terms of new construction multifamily development? Which sorts of alternatives should be examined?

Housing staff are considering an application for FHA mortgage insurance at a particular site and therefore are limited to considering three alternatives: the action as proposed, modifications within the aggregated project site, or no action, i.e., rejection of the application. HUD will focus on practicable mitigation options to minimize harm and preserve floodplains and wetlands within the proposed site.

Question: When does the requirement that new construction in the 100-year floodplain be two feet above BFE go into effect versus the current MAP Guide guidance of 12 inches?

This change will go into effect when the MAP guide update is published. Target date is late 2020.

Question: Is there a Reg change in the works for publication of notices?

HUD is considering options to reduce this kind of regulatory burden but cannot discuss specifics at this time.

Question: Does an 8-step process expire if the MF project was not built at initial submission and wants to come in a few years later?

This will depend on the circumstances. As a general rule, environmental reviews are considered current for five years if the circumstances have not changed. If there are any significant changes to the project site or design (e.g. a new map is made available) before the project is completed, the 8-Step must be updated regardless of its age.

Question: Is a 5-step required for a 223(f) with no rehab or repairs that exceed routine maintenance if improvements are located within a SFHA?

The answer depends on the level of environmental review required for the 223(f) transaction. If the 223(f) is a refinance of an already HUD-insured mortgage and with no rehabilitation or physical changes beyond routine maintenance (as defined in the CPD maintenance memo, Notice CPD-16-02), then the project meets the Categorical Exclusion at 50.19(b)(21) and does not need to comply with HUD's Floodplain Management or Wetland Protection regulations at Part 55. No 5 step is required.

If the project does not meet the criteria at 50.19(b)(21), then a 5 step is required as per 24 CFR Part 55.12(a)(2).

Question: When a covenant is made due to a floodway would the covenant be nullified if the floodway is moved by FEMA in a future FIRM?

No, the covenant must be permanent for the incidental floodplain exception to apply.

III. Maps

Question: Do FEMA maps take into consideration climate change and rising sea levels? Do they reflect the past or future projected conditions when mapping floodplains?

No, FEMA maps are based only on past flooding. They do not account for climate change or other anticipated changes.

Question: Can you provide a checklist guidance sheet for searching for a preliminary pending map?

Please see <https://files.hudexchange.info/resources/documents/Floodplain-Maps-for-HUD-Projects.pdf> for instructions on finding best available information.

Question: What are typical reasons that an area would be unmapped or zone D? Do units of government have the option of opting out of mapping? There is one city in MN that is unmapped, even though all of the area surrounding the city boundaries is mapped. Could this be a deliberate decision by the City, or does FEMA independently decide not to map some areas?

In general, FEMA focuses on mapping areas with the densest populations, so sparsely populated areas are less likely to be mapped. Communities may resist mapping in some cases to avoid participation in the NFIP, but HUD can't speculate about the exact reasons any particular area is unmapped.

IV. Flood Insurance

Question: Did you say flood insurance need only be effect during construction?

Flood insurance is required for all insurable structures in the SFHA for the term of the FHA loan. HUD or the lender may require it for sites adjacent to the floodplain or for sites with past flooding. In addition, HUD requires flood insurance during the construction period as soon as the building becomes insurable.

Question: How do we know when a community is not participating in the program?

Refer to the National Flood Insurance Program Community Status Book at <https://www.fema.gov/national-flood-insurance-program-community-status-book>

Question: If a community does not participate in NFIP, how is FDPA implemented in that community?

The consequence of non-participation is that federal assistance cannot be used within the floodplain. In communities that are not participating in the NFIP, sites within the floodplain are ineligible for FHA insurance.

Question: If a project is in a community that does not participate in the NFIP, will it have to do the 8 step?

If the community is not participating in the NFIP, federal assistance cannot be used in the floodplain. Therefore, FHA is required to reject any site in this situation prior to completing a 5- or 8-Step Process.

V. Critical Actions

Question: Is a skilled nursing facility considered a critical action?

Yes. All Office of Residential Care Facility (ORCF) projects are considered a critical action.

Question: Could you confirm that 232/223(a)(7) projects with repairs that exceed routine maintenance are subject to an environmental review, including Part 55 floodplain management regulations?

The MF MAP guide limits the 223(a)(7) program to actions that fall under the maintenance threshold as defined in the CPD Maintenance Memo (Notice CPD-16-02). As a result, MF 223(a)(7) transactions are always Categorically Excluded, Not Subject to the Related Laws and Authorities (CENST) level of review. (See MAP 5.1.C and 5.10.B)

In contrast, the Office of Residential Care Facilities (ORCF) allows limited rehab in the 232/223(a)(7) program and therefore HUD must determine whether a project is Categorically Excluded Subject to the Related Laws and Authorities (CEST) or CENST for each application.

CENST projects do not have to comply with the floodplain management or wetland regulations at Part 55, while CEST projects do. Both CENST and CEST projects are subject to flood insurance requirements.

VI. Wetlands

In general, refer to <https://www.hudexchange.info/programs/environmental-review/wetlands-protection/> and <https://www.hudexchange.info/trainings/courses/24-cfr-part-55-floodplain-management-and-wetlands-protection-rules-webinar/> for information on wetlands.

Question: What if a HUD funded site is in these two areas? Freshwater Emergent Wetland? or in a Freshwater Forested/Shrub Wetland?

The 8-Step Process would be required for any proposed project that would involve new construction (as defined in section 55.2(b)(8)) in these areas.

Question: What do we do about wetlands that are still shown on NWI Map but were obviously removed years ago based on aerial photos? What would you require to prove that a man-made retention pond that shows up on NWI Map as a wetland, but obviously man-made based on historical maps.

The National Wetlands Inventory should be used as a primary screening tool. When the map is clearly incorrect because the site has already been paved and any wetlands have been destroyed, this can be demonstrated through maps and/or photographs of the site along with documentation of when the wetland was disturbed. However, HUD must always make a reasonable attempt to consult with US Fish and Wildlife Service for information on the presence or absence of wetlands.

Manmade retention/detention ponds are not considered wetlands unless they have the characteristics of a wetland as per HUD's wetland definition. Consult with US Fish and Wildlife Service for confirmation of whether an artificial pond that appears on the NWI meets HUD's definition. (See 55.2(b)(11)(ii)). If USFWS is unavailable to consult, an appropriate wetlands professional must find that no wetland is present in order for HUD to proceed without 5 or 8-step processing.

Question: If a proposed property (New Construction) includes land listed within the USFWS National Wetlands Inventory but a wetland delineation report (accepted by USACE) shows no wetlands in the project area, or impact to surrounding wetland, is the project subject to any additional compliance? (i.e. is 8-step required?)

HUD's definition of a wetland is broader than the definition used by USACE. HUD would need to confirm that the wetlands delineation shows that there are no wetlands as defined by HUD. This may require an updated delineation that follows HUD wetlands definition and consultation with USFWS as per 55.2(b)(11)(ii).

For project specific guidance, please reach out to the MF office processing the application or to ORCF via LeanThinking@hud.gov.

Question: Can you confirm that HUD's wetland definition is or is not the same as WOTUS?

HUD's definition of a wetland is broader than the definition of Waters of the US (WOTUS) used by USACE and EPA. Please refer to 55.2(b)(11) for HUD's definition, which will include many areas that would not be categorized as a WOTUS.

Question: Is the 3-step wetland process allowed now, or do we have to wait for MAP updates?

The provision allowing individual Section 404 permits to cover steps 1-5 of the 8-step analysis for wetlands located outside of a floodplain is in the regulation at 24 CFR Part 55.28. The MAP guide does not currently refer to this provision, but the proposed MAP updates will. Although not in the current MAP guide, MF's intention is to allow this provision. If there is an issue on a particular project, please raise this with the Housing Program Environmental Clearance Officer.

The 232 Handbook already incorporates the 55.28 regulation in Section 7.5.1.2.

Question: For a property completely depicted within a wetland, including all improvements, undergoing refinancing under 232/223(f), would the Modified 5-Step Process be applicable? Or would the property be exempt from the 5-Step Process due to a lack of proposed new construction and significant repairs? In this instance, all repairs would be routine.

For a definitive answer, please submit this question through LeanThinking. In general, if there is no proposed new construction as defined in 55.2(b)(8) and the site is not in a floodplain, then the 5 or 8-Step Process is not required. If there is also a floodplain on the site and the proposal meets all the criteria in 55.12(a)(2), then the 5-Step would be appropriate.

When wetlands exist at a project site, the Office of Residential Care Facilities (ORCF) will require assurance from the Borrower that no activities that may impact a wetland will be undertaken without prior approval from HUD.

VII. Project-specific questions

Question: As an example, a new construction project with a floodway/floodplain on a portion of the site, but with all buildings constructed outside of floodplain. However, the only nearby sewer line runs adjacent to the floodway, but on the OTHER side of the creek. Temporary disturbance of the floodplain/floodway would be required to run a sewer attachment under the creek to tap into the sewer. I've been told by 3rd party Environmental firms that HUD would not approve a deal that needed to disturb the floodway. However, I was also told that there were discussions within HUD about this type of deal that needed to disturb only temporarily. Just curious if you thought there would be any change to allow temporary disturbance.

While HUD can confirm that it does not consider existing underground infrastructure to occupy or modify the floodplain, it is still developing policies on activities that would temporarily modify the floodplain to install underground infrastructure. Please bring these projects to Housing's attention on a case by case basis.

Question: A community was built over a floodplain and backfield by the developers. Some single-family residents are now experiencing water in their basement that they pump daily. Can funding be used to demolish and rebuild the single-family homes at a higher elevation?

While not a candidate for FHA Multifamily or ORCF assistance, this could be an eligible activity for a number of other HUD programs. HUD encourages the use of HUD assistance to demolish housing in the floodplain and replace it in a safer location when allowed under program rules.