

TO: Rural Development State Directors

ATTN: Deputy Administrator of MFH Programs
Area Directors
MFH Loan Specialists
Housing Program Directors
State Environmental Coordinators
State Architects

FROM: Tammye Treviño (signed by Tammye Treviño)
Administrator
Housing and Community Facilities Programs

SUBJECT: Response to the 2011 MFH 514/515/516 Management Control Review
(MCR) Weaknesses

PURPOSE AND INTENDED OUTCOME

Results from the 2011 Management Control Review (MCR) for the Multi-Family Housing (MFH) sections 514/515/516 programs revealed several areas of concern regarding the design and construction process and required documentation for projects funded in the MFH programs. This Administrative Notice (AN) shall serve as clarification and emphasis on the guidance and direction provided in RD Instructions 1924-A and 1940-G, as well as MFH's regulatory requirements and Handbook provisions in order to address the concerns raised in the 2011 MCR. The issues raised in the MCR are as follows:

1. There was evidence that reports were being incorrectly categorized as a Life Cycle Cost Analysis;
2. Rural Development concurrence of the construction contracts was not documented as required;
3. The project files failed to indicate that "As-Built" documents were received and properly filed;

EXPIRATION DATE:
May 31, 2013

FILING INSTRUCTIONS:
Preceding RD Instruction 1924-A
& 1940-G

4. The reviewed files indicated that all required suspension and debarment investigations were not performed as required;
5. The MCR report indicated that the environmental site assessment was not consistently included in the file;
6. Documentation of the required Lead-Based Paint actions were not consistently found in the files of the applicable projects;
7. The MCR report noted that categorization of some projects as being Categorical Excluded (CATEX) from National Environmental Policy Act (NEPA) review was not properly documented ; and
8. The MCR review revealed that in some cases, the Federal Emergency Management Agency (FEMA) Form 81-93, “Standard Flood Hazard Determination Form” and documentation of flood insurance was not included in the project file.

COMPARISON WITH PREVIOUS AN

There is no previous AN on this subject.

IMPLEMENTATION RESPONSIBILITIES

Field staff involved in the 514/515/516 programs should review the construction, environmental and debarment and suspension requirements established in RD Instructions 1924-A, 1940-G, 1940-M, HB-1-3560, 7 C.F.R. parts 3560, 1924, 1940, and 2 C.F.R. parts 180 and 417 in order to implement the proper procedures and requirements. Listed below, this AN sets forth specific RD Instructions, handbook provisions, regulatory requirements, and forms that will assist offices in complying with the concerns raised in the 2011 MCR.

Issue #1: Life Cycle Cost Consideration:

The definition of what constitutes life cycle costs and a life cycle cost analysis can be found at 7 C.F.R. §3560.11. The Life Cycle Cost Analysis is similar in nature to a Capital Needs Assessment (defined in 7 C.F.R. §3560.11). . The reported information for both provides an estimated repair and replacement cost schedule that assists with the building physical and financial burdens required to maintain the facility for the duration of the useful life of the property. When the life cycle cost analysis is prepared in anticipation of construction the owner has the opportunity to select products and materials that work best for the financial life of the facility.

Issue #2: Agency concurrence of Contract Documents:

Construction contracts selected for use on 514/515/516 projects can be Form RD 1924-6 “Construction Contract” or a commercially available document such as an AIA contract or something similar that is considered acceptable by the industry. The language in these contracts should be fair to all parties and be adequate to achieve the expected outcome. Very specific language will bring the greatest chance of a successful result. Any requirements that are weak on specifics may open a door for interpretation, risk exclusion from the agreement or cause the need for a contract change order.

Construction contract documents, which can include plans, specifications and legal contracts, better protect the owner, Agency and the contractor from misunderstandings, claims and disputes. When possible, the documents should be reviewed by the Rural Development Staff prior to the final agreement to assess their adequacy and regulatory compliance for the project. The contract documents may include standard and special conditions that should be addressed and resolved by all parties involved named in the contract. Rural Development shall be an integral part of the contract and construction document development process for the benefit of the Agency and the applicant. Refer to 7 C.F.R. §§ 1924.5 and 1924.6, as well as RD Instruction 1924-A for additional guidance..

Issue #3: As-Built Documents:

The As-Built documents are a record of the actual construction performance of the project. The documents should be maintained by the construction contractor during the project implementation showing the actual placement of components, materials and equipment. Accurate dimensions should be noted on the plans for future records and reference. These documents should also indicate any changes made during the construction process that are critical to the future operation and maintenance of the facility. The requirement for the maintenance of the “as-built record” shall be noted in the construction contract as a requirement for the project architect or general contractor.

Issue #4: Debarment and Suspension

For debarments and suspensions, screening includes but is not limited to applicant, contractors and/or subcontractors that exceed the \$25,000 threshold. Screening should be completed at two points in the loan/grant making process. The first check of the participants, should be upon receipt of a pre-application or application for Rural Development financial assistance, the reviewing official must determine whether the contractor and/or applicant's name appears on the current debarment list in accordance with 2 C.F.R. §§ 180.425 and 180.430.. The second check should occur immediately before the loan closing or grant award to prevent granting assistance to applicants that could subsequently appear on the list after an application has been approved in accordance with 2 C.F.R. §§ 180.425 and 180.430.

Please refer to RD Instruction 1940-M as well as 2 C.F.R. parts 180 and 417 for further guidance on suspension and debarments.

Issue #5: Environmental Site Assessment.:

Pursuant to 7 C.F.R. 3560.59, MFH is required to conduct an environmental review. As HB-1-3560, Chapter 3, paragraph 3.13 (A) sets forth, the acceptable format for documentation of the MFH's due diligence efforts will be ASTM Standard E-1528 Transaction Screen Questionnaire (TSQ). The TSQ should be included in project's file. Please note, both the TSQ form and its accompanying “Standard Practice” are copyrighted by ASTM. Rural Development has paid ASTM a fee for the right to copy and redistribute these documents FOR AGENCY USE ONLY. Attached are copies of the Standard Practice and TSQ form for distribution exclusively to Rural Development staff. SECs can access electronic versions of these documents at the USDA Connect site at:

<https://connections.usda.gov/communities/service/html/communityview?communityUuid=7abb787c-4708-49b8-a2d0-ab9e8d00bddf>

Note: If a message appears when trying to open the Adobe Acrobat program regarding using an updated version of the software, click on the “cancel” button. The fillable form will still function properly. Please note that Rural Development may use the TSQ for any Agency program, but

due to copyright restrictions is prohibited from providing it to applicants or anyone outside the Agency.

Agency employees should read the ASTM Standard Practice prior to completing the TSQ form. If you have any questions, please contact your State Environmental Coordinator. If they are unavailable you may contact Frank Mancino in the National Office Program Support Staff at (202) 720-1827.

Issue #6: Lead-Based Paint Compliance

Both the U.S. Environmental Protection Agency and the U.S. Department of Housing and Urban Development have adopted regulations regarding standards associated with Lead-Based Paint (LBP). See 40 C.F.R. part 745 and 24 C.F.R. part 35, respectively. RD is subject to the LBP standards in relation to the renovation, purchase or sale of a residence or child-occupied facility. RD has issued an Administrative Notice to explain the LBP standards and provide guidance on effectively implementing the LBP rules. See RD AN 4602 (1924-A) which can be found at <http://www.rurdev.usda.gov/SupportDocuments/an4602.pdf>. This Administrative Notice includes a Lead-Based Paint “Compliance Key,” (LBP Key), to assist staff with understanding and effectively implementing the LBP rules and regulations. The LBP Key is an interactive flow chart that helps staff determine the necessary actions required for certain types of properties. Documentation regarding LBP should be placed in project’s file. The AN also directs staff to resources available from HUD and the EPA for Rural Development internal use and for information that should be shared with applicants/owners.

Issue #7: Documentation of Categorical Exclusion

To ensure properties are being properly categorized as Categorical Exclusions (CATEX), please review RD Instruction 1940-G which specifies which types of projects are CATEX.s It is important to note, pursuant to 7 C.F.R. § 1940.317, that if extraordinary circumstances exist the property may lose its CATEX classification. If extraordinary circumstances exist, such as wetlands, historic properties, floodplain, important farmland or other protected resources, a proposal will require an environmental assessment. It is the Agency that is responsible for determining whether there is any reason – i.e. the presence of “extraordinary circumstances”-- to conduct an environmental review., consistent with 7 C.F.R. § 1940.317. In addition, Form RD 1940-22, “Environmental Checklist for Categorical Exclusions” is available and should be used as an objective tool for making a CATEX determination. The Form RD 1940-22 should be carefully completed and included in the project file. The regulations addressing the documentation of a CATEX can be found at 7 C.F.R. §1940.317.

Issue #8: FEMA Form 81-93 “Standard Flood Hazard Determination Form”

RD’s regulations at 7 C.F.R. part 1806, subpart B sets forth the requirements for the use of flood insurance in RD financed properties. RD Instruction 426.2 and RD AN No. 4562, “Rural Development Use of Federal Emergency Management Agency Form 81-93, ‘Standard Flood Hazard Determination’ and Form 81-31, ‘Elevation Certificate’” specify that offices use FEMA Form 81-93. FEMA Form 81-93 identifies the presence of floodplain and certifies the availability of flood insurance. This form should be completed and included in the project file. For further guidance on when flood insurance is required please refer to 7 C.F.R. §1806.24 and for a list of exceptions to the FEMA flood insurance requirement refer to RD AN 4562. It should be noted that flood insurance is required . . . *“whenever federal agency financing, including direct or guaranteed loans, is secured by a lien on improved real estate, where a building is or*

will be located, within the 100-year floodplain (or Special Flood Hazard Area (SFHA)).” See RD AN 4562. Some exceptions to this requirement are as follows:

- **Land Only.** The National Flood Insurance Program does not insure land and the law does not address mortgages secured by land alone (without buildings);
- **Inventory.** Flood insurance is not required for a loan financing inventory where the secured collateral is stored in a building located in a 100-year floodplain and the building is not security for the loan; flood insurance for personal property is not required by law for residential loans in the SFHA, flood insurance for personal property or inventory for commercial loans in the SFHA is not required by law unless the personal property/inventory, in addition to a building, secures the loan.
- **Small loans.** If the original outstanding principal balance is \$5,000 or less with a repayment term of 1 year or less, the SFHDF and flood insurance is not required. The dual criteria must be met in order for this exemption to apply; and
- **Federal/State Owned Property.** If the security property is Federal or State-owned property and covered by adequate policies of self-insurance (refer to the list at 44 CFR, Chapter 1, Part 75), flood insurance is not required. This does not apply to county- or city-owned property.

POINT OF CONTACT

Please direct all questions pertaining to this AN to your State Architect or the National Office Program Support Staff: William Downs, Program Support Staff, at (202) 720-1499 or email: william.downs@wdc.usda.gov.