



## **DEPARTMENT OF AGRICULTURE**

### **Rural Utilities Service**

#### **7 CFR Part 1970**

**[RUS-18-Agency-0005, RBS-18-None-0029, RHS-18-None-0026]**

**RIN: 0572-AC44**

### **Rural Development Environmental Regulation for Rural Infrastructure**

**AGENCY: Rural Utilities Service, USDA.**

**ACTION:** Final rule.

**SUMMARY:** The United States Department of Agriculture (USDA) Rural Development (RD), comprised of the Rural Business-Cooperative Service (RBS), Rural Housing Service (RHS), and Rural Utilities Service (RUS), hereafter referred to as the Agency, is issuing a final rule to update the Agency's Environmental Policies and Procedures regulation (7 CFR 1970) to allow the Agency Administrators limited flexibility to obligate federal funds for infrastructure projects prior to completion of the environmental review while ensuring full compliance with National Environmental Policy Act (NEPA) procedures, prior to project construction and disbursement of any RD funding. This change will allow RD to more fully meet the Administration's goals to speed the initiation of infrastructure projects and encourage planned community economic development without additional cost to taxpayers or change to environmental review requirements.

**DATES:** Effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Edna Primrose, Assistant Administrator, Water and Environmental Programs, Rural Utilities Service, USDA Rural Development, 1400

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## **SUPPLEMENTARY INFORMATION:**

### **Executive Order 12866, Regulatory Planning and Review**

This final rule has been determined to be not significant for purposes of Executive Order 12866, Regulatory Planning and Review and therefore has not been reviewed by the Office of Management and Budget (OMB).

### **Congressional Rulemaking Act**

Pursuant to the Congressional Review Act (5 U.S.C. § 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. § 804(2).

### **Executive Order 12372, Intergovernmental Review of Federal Programs**

The Programs listed in the Catalog of Federal Domestic Assistance under the following numbers are subject to the provisions of Executive Order 12372 which requires Intergovernmental Consultation with state and local officials:

10.760—Water & Waste Disposal System Systems for Rural Communities.

10.763—Emergency Community Water Assistance Grants.

10.766—Community Facilities Loans.

10.770—Water & Waste Disposal Loan and Grants (Section 306C).

10.855—Distance Learning & Telemedicine Grants and Grants.

### **Executive Order 12988, Civil Justice Reform**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. RUS has determined that this final rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all state and local laws and regulations that are in conflict with this

rule will be preempted, no retroactive effect will be given to this rule, and, in accordance with Sec 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(e)), if any, must be exhausted before an action against the Department or its agencies may be initiated.

### **Executive Order 13132, Federalism**

The policies contained in this final rule do not have any substantial direct effect on states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nor does this final rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with states is not required.

### **Regulatory Flexibility Certification**

The Agency has determined that this final rule will not have a significant economic impact on a substantial number of small entities, as defined in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), given that the amendment is only an administrative, procedural change on the government's part with respect to obligation of funds.

### **National Environmental Policy Act**

In this final rule, the Agency proposes to create limited flexibility for the timing of obligation of funds relative to the completion of environmental review. The Council on Environmental Quality (CEQ) does not direct agencies to prepare a NEPA analysis before establishing agency procedures that supplement the CEQ regulations for implementing NEPA. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing agency NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff'd*, 230 F.3d 947, 954–55 (7th Cir. 2000).

## **Catalog of Federal Domestic Assistance**

The Catalog of Federal Domestic Assistance (CFDA) numbers assigned to the RD Programs affected by this rulemaking are as follows:

10.760—Water & Waste Disposal System Systems for Rural Communities.

10.761—Technical Assistance and Training Grants.

10.762—Solid Waste Management Grants.

10.763—Emergency Community Water Assistance Grants.

10.770—Water & Waste Disposal Loan and Grants (Section 306C).

10.766—Community Facilities Loans and Grants.

10.850—Rural Electrification Loans and Loan Guarantees.

10.851—Rural Telephone Loans and Loan Guarantees.

10.855—Distance Learning & Telemedicine Grants.

10.857—State Bulk Fuel Revolving Loan Fund.

10–858—Assistance to High Energy Cost-Rural Communities.

10.863—Community Connect Grants.

10.865—Biorefinery, Renewable Chemical, & Biobased Product Manufacturing Assistance Program.

10.866—Repowering Assistance Program.

10.867—Advanced Biofuel Payment Program.

10.868—Rural Energy for America Program.

10.886—Rural Broadband Access Loan and Loan Guarantee Program.

10.752 – ReConnect Program

All active CFDA programs and the CFDA Catalog can be found at the following web site: <https://beta.sam.gov/>. The website also contains a PDF file version of the Catalog that, when printed, has the same layout as the printed document that the Government Publishing Office (GPO) provides. GPO prints and sells the CFDA to interested buyers. For information about purchasing the Catalog of Federal Domestic Assistance from GPO, call the Superintendent of Documents at 202– 512–1800 or toll free at 866–512–1800, or access GPO’s online bookstore at <http://bookstore.gpo.gov>. Rural Development infrastructure programs not listed in this section nor on the CFDA website, but which are enacted pursuant to the Rural Electrification Act of 1936, 7 U.S.C. 901 et seq., the Consolidated Farm and Rural Development Act of 1972, 7 U.S.C. 1921 et seq., or any other Congressional act for Rural Development, will be covered by the requirements of this action when enacted.

### **Unfunded Mandates**

This final rule contains no Federal mandates (under the regulatory provision of Title II of the Unfunded Mandates Reform Act of 1995) for State, local, and tribal governments or the private sector. Therefore, this final rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act of 1995.

### **Information Collection and Recordkeeping Requirements**

This final rule contains no new reporting or recordkeeping burdens under OMB control number 0572-0127 that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

### **Background**

The United States Department of Agriculture (USDA) Rural Development (RD) programs provide loans, grants and loan guarantees to support investment in rural infrastructure to spur

rural economic development, create jobs, improve the quality of life, and address the health and safety needs of rural residents. Infrastructure investment is an important national policy priority. As directed by E.O. 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, in 2017, USDA as a member of the Federal Permitting Improvement Steering Council has reviewed its NEPA implementing regulations and policies to identify impediments to efficient and effective environmental reviews and authorizations for infrastructure projects. This final rule is part of that effort to improve the efficiency and effectiveness of RD's environmental reviews and authorizations for infrastructure projects in rural America. On April 25, 2017, the President created the Interagency Task Force on Agriculture and Rural Prosperity (Task Force) through E.O. 13790 and appointed the Secretary of Agriculture as the Task Force's Chair. Among the purposes and functions of the Task Force was to, “. . . identify legislative, regulatory, and policy changes to promote in rural America agriculture, economic development, job growth, infrastructure improvements, technological innovation, energy security, and quality of life, including changes that remove barriers to economic prosperity and quality of life in rural America.” The Task Force Report issued on October 21, 2017, included calls to action on achieving e-Connectivity for Rural America, improving rural quality of life, harnessing technological innovation and developing the rural economy.

On November 28, 2018 the Agency concurrently published a proposed and final rule as a direct final rule without prior proposal because the Agency viewed this change as a non-controversial action and anticipated no adverse comments. The purpose of the proposed and direct final rule was to update the Agency's Environmental Policies and Procedures regulation (7 CFR 1970) to allow the Agency Administrators limited flexibility to obligate federal funds for

infrastructure projects prior to completion of the environmental review while ensuring full compliance with National Environmental Policy Act (NEPA) procedures prior to project construction and disbursement of any RD funding. The public comment period for the rule change ended on December 24, 2018. The rule was to be effective January 7, 2019, without further action, unless the Agency received significant adverse comments or, an intent to submit a significant adverse comment, by December 24, 2018. The Agency proposed to publish a timely *Federal Register* document withdrawing the rule if significant adverse comments were received.

Due to the lapse in funding that occurred from December 23, 2018 through January 25, 2019, the Agency was unable to publish a *Federal Register* notice withdrawing the rule by January 7, 2019. However, the Agency has not placed the rule into effect, nor taken any final actions with respect to the rule and is responding to public comments in this final rule. The Agency received four (4) comments in support of the rule from Daniel Spatz, Dave Anderson, Bly Community Action Team, and National Rural Electric Cooperative Association. The Agency also received a total of six letters with adverse comments from the following fifteen (15) organizations and three (3) individuals: Robert Ukeiley, Dinah Bear, Patricia Gerrodette, Center for Biological Diversity (2 separate commenters), Earth Justice, Environmental Law and Policy Center, Environmental Information Protection Center, Grand Canyon Trust, House/Citizens for Environmental Justice, International Fund for Animal Welfare, Klamath Forest Alliance, Natural Resources Defense Council (2 separate commenters), San Juan Citizens Alliance, Save EPA, Sierra Club, Southern Environmental Law Center, Western Environmental Law Center, Western Watersheds

### **Purpose of the Regulatory Action**

This rulemaking fulfills the mandate of E.O. 13807 as well as the goals of the President's Interagency Task Force on Agriculture and Rural Prosperity by identifying regulatory changes that promote economic development and improve the quality of life in rural America. The RD infrastructure projects impacted by this rule are often critical to the health and safety and quality of life in rural communities. In some cases, funding decisions made by Rural Development are the first step upon which a much larger process of community economic development depends. This amendment to existing regulation will allow the Agency to obligate funding conditioned upon the full and satisfactory completion of environmental review for infrastructure projects. This change will give applicants, and often the distressed communities they represent, some comfort to proceed with an economic development strategy, including the planning process associated with NEPA, without fear that funds may be rescinded before the NEPA process is completed. With this change in place, RD can more fully meet the government's goals of speeding up the initiation of infrastructure projects, encouraging planned community economic development, and leveraging investment without additional cost to taxpayers or any change in environmental review requirements. Infrastructure projects covered by this final rule include those, such as broadband, telecommunications, electric, energy efficiency, smart grid, water, sewer, transportation, and energy capital investments in physical plant and equipment.

#### **Changes to the Current Regulation.**

This final rule adopts the changes to 7 CFR 1970 from the proposed and direct final rules concurrently published in the *Federal Register* on November 23, 2018. It revises 7 CFR 1970.11(b) to change the point at which the environmental review must be completed prior to obligation in all cases. The rule change requires the environmental review process to be completed prior to obligation except in cases where the Administrator deems it necessary to

allow for the environmental review to occur after obligation, contingent upon the conclusion of the environmental review process prior to any action that would have an adverse effect on the environment or limit the choices of any reasonable alternatives. In instances where the environmental review is not completed by the end of the fiscal year after the funds were obligated or when findings of the environmental review do not support the decision to proceed with a proposed action, the Agency will rescind funds and reverse the decision to proceed. Nothing in this final rule reduces RD's obligation to complete the NEPA planning process prior to foreclosing reasonable alternatives to the federal action.

### **Comments**

*Issue 1:* Two individuals and two organizations expressed support for the proposed rule citing that the ability to obligate funds prior to completion of the NEPA process will allow borrowers to more easily secure financing for projects. They also commented that the rule change to expedite the timeframe for completing the NEPA process will provide an ability to more quickly initiate projects.

*RUS Response:* The Agency agrees that allowing obligation of funds prior to completion of the NEPA process will allow greater certainty for borrowers in securing funding for the projects. In reviewing the final regulation, to ensure conformity with NEPA regulations, the Agency wants to be clear what it means by providing "certainty" or "comfort" to a loan applicant. Due to the Departmental financial processes, even funds that are "available until expended" are swept at the end of the fiscal year and sometimes not returned to the programs for use for several months. That situation creates a period of time where projects cannot move forward even if the environmental review is completed because funds are not available to be obligated to a project. What the Agency means by "comfort" is that the funds will be available for the project once the

environmental review is completed. The purpose of the change is not to extend the NEPA time frame but to allow obligation prior to completing all requirements of NEPA.

*Issue 2:* Three individuals and fifteen organizations commented that the application of the direct to final rule in this instance is inconsistent with the Administrative Procedures Act because the changes to the regulations are major and substantive.

*RUS Response:* This rule was published concurrently with Proposed Rule 83 FR 59318 (November 23, 2018). Because adverse comments were received on the rule, RD did not allow the final rule with comment to go into effect. It has, instead, considered all comments received during the comment period and is addressing these in this notice in accordance with the Administrative Procedures Act. Unfortunately, due to the lapse in government funding in January 2019, the Agency was unable to notify the public that the final rule did not go into effect.

*Issue 3:* Two individuals and fifteen organizations commented that the Agency did not provide support and documentation to its decision to allow completion of environmental reviews after the decision to obligate funds to a project, and that the preamble of the proposed rule is notably silent on examples of how the process that has existed since 1970 is problematic for either applicants or agencies. They state that there is no record showing the problem this rule is trying to address and no data or record of the scope of the issue.

*RUS Response:* The Agency has been hearing about the effect of the timing of NEPA reviews and the inability of potential applicants to secure additional financing for a very long time. Despite this public perception, the agency has no data to support this contention. To the contrary, the agency has no evidence that its environmental reviews impede projects or the attainment of outside funding. Because the agency believes there were needed rural development projects that were never submitted for application because of the perceived delay in

processing, the agency has undertaken to change the rule. As stated in the final rule with comment, and the proposed rule, the agency is attempting to give applicants “comfort” with the extended timing. It does not anticipate environmental reviews to change in any manner. In reviewing the final regulation, to ensure conformity with NEPA regulations, the Agency wants to be clear what it means by providing “certainty” or “comfort” to a loan applicant. Due to the Departmental financial processes, even funds that are “available until expended” are swept at the end of the fiscal year and sometimes not returned to the programs for use for several months. That situation creates a period of time where projects cannot move forward even if the environmental review is completed because funds are not available to be obligated to a project. What the Agency means by “comfort” is that the funds will be available for the project once the environmental review is completed. The purpose of the change is not to extend the NEPA time frame but to allow obligation prior to completing all requirements of NEPA. The agency notes that four individuals responded to the proposed rule supporting the change on this basis.

*Issue 4:* Fifteen organizations commented that allowing an agency to proceed with a decision prior to completing the required environmental review under NEPA disregards the agency’s responsibility to inform the public and meaningfully consider public comments prior to decisions. They contend that deferring public input to a late, post-decisional stage of the decision-making process undermines the meaningfulness of public input and, as a result, will have a chilling effect on the willingness of the public to weigh in on decisions impacting their communities.

*RUS Response:* The Agency will continue to provide the same opportunity for public notice and comment and anticipates that the public input on proposed projects will not be significantly altered, if at all. Over 93 percent of all required reviews are already performed within 10 days.

As stated above, public perception of this process and the actual time for reviews are not in sync. As a result, the Agency does not believe that the public's input into agency decision-making will be impacted.

*Issue 5:* Three individuals and fifteen organizations stated that the Agency's plan to allow post-decisional completion of the environmental review does not fulfill its responsibility to incorporate environmental impacts into the decision-making process. Because, they argue, evaluation of alternatives would take place after the decision to proceed, the proposal would prejudice the selection of the reasonable alternatives. CEQ's regulations explicitly state that agencies shall not commit resources prejudicing selection of alternatives. The NEPA statute does not permit an agency to act first and comply later, nor does it permit an agency to condition performance of its obligation of a showing of irreparable harm. Furthermore, the courts have held that "it is far easier to influence an initial choice than to change a mind already made up." One commenter noted that the proposed rule would up-end guidance issued in 2017 and revised in 2018 that instructs RD agencies that environmental review must be completed and issued prior to agency issuance of any conditional commitment.

*RUS Response:* The Agency believes that completing the NEPA process post-obligation will continue to allow consideration of alternatives because it will rescind funds should the outcome of the NEPA process require any significant changes to the project. As a result, the public will have the same due consideration and public notice and comment requirements will not change.

*Issue 6:* One organization stated that the proposed rule conflicts with Council on Environmental Quality (CEQ) regulations of 40 CFR 1500 which require that environmental analysis be completed at the earliest possible time. Section 1501.2 of the CEQ regulations, is aptly named "Apply NEPA early in the process." This section provides that agencies shall

integrate the NEPA process “at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.”

*RUS Response:* The Agency believes that the proposed timing of the environmental process is still early enough in the planning stage to ensure decisions will reflect environmental values. Furthermore, the Agency believe that this process will result in fewer project delays, and will in fact, expedite the review process.

*Issue 7:* Three individuals and fifteen organizations commented that allowing rescission of funds if the results of an environmental review do not ultimately support to the Agency’s decision to obligate, does not undo the harm, error, or fatal bias that has already been introduced and tainted the process. Allowing agencies to reconsider and rescind a decision to obligate funds after review in no way corrects otherwise clearly unlawful application of NEPA. They argue that this approach would also leave the responsible agency official in the position of either taking away funding from an outside entity or pressuring the environmental review staff to expedite the process. The most likely, they argue, is shortchanging the environmental review process. The public commenting on such reviews will understand the initial decision has already been made, that bias has irrevocably attached, and that they are essentially asking the agency to “re-decide” the decision to obligate funds. Making a commitment prematurely may also cause harm to the applicant because the commitment may not be met, pending the outcome of the NEPA process.

*RUS Response:* The Agency believes that it will continue to make unbiased decisions on its environmental reviews, and that since 93 percent of reviews are finished before 10 days, the agency’s decision-making process will not be influenced.

*Issue 8:* Fifteen organizations commented that the arbitrary time limit for completion of the environmental review prior to the end of following fiscal year after obligation, conflicts with CEQ regulations that state that prescribed universal time limit for entire NEPA process is too inflexible and should be appropriate to individual actions. Therefore, they argue, the proposed time limits would result in rushed reviews to avoid rescinding funds.

*RUS Response:* The Agency does not believe that the completion deadline for the environmental review is arbitrary. As mentioned earlier, it was selected as a time that would give applicants confidence in going forward with projects. In addition, the agency would not rush reviews to avoid rescinding, as its current rate of processing is already extremely efficient. Those projects that would require more time, are already the result of reviews outside of the Agency.

#### **List of Subjects in 7 CFR Part 1970**

Administrative practice and procedure, Buildings and facilities, Environmental impact statements, Environmental Protection, Grant programs, Housing, Loan programs, Natural resources, Utilities.

Accordingly, for reasons set forth in the preamble, part 1970, title 7, Code of Federal Regulations is amended as follows:

#### **PART 1970—ENVIRONMENTAL POLICIES AND PROCEDURES**

1. The authority citation for part 1970 continues to read as follows:

**Authority:** 7 U.S.C. 6941 et seq., 42 U.S.C. 4241 et seq.; 40 CFR parts 1500–1508; 5 U.S.C. 301; 7 U.S.C. 1989; and 42 U.S.C. 1480.

2. In § 1970.11, revise paragraph (b) to read as follow:

**§ 1970.11 Timing of the environmental review process.**

\* \* \* \* \*

(b) The environmental review process must be concluded before the obligation of funds; except for infrastructure projects where the assurance that funds will be available for community health, safety, or economic development has been determined as necessary by the Agency Administrator. At the discretion of the Agency Administrator, funds may be obligated contingent upon the conclusion of the environmental review process prior to any action that would have an adverse effect on the environment or limit the choices of any reasonable alternatives. Funds so obligated shall be rescinded if the Agency cannot conclude the environmental review process before the end of the fiscal year after the year in which the funds were obligated, or if the Agency determines that it cannot proceed with approval based on findings in the environmental review process. For the purposes of this section, infrastructure projects shall include projects such as broadband, telecommunications, electric, energy efficiency, smart grid, water, sewer, transportation, and energy capital investments in physical plant and equipment, but not investments authorized in the Housing Act of 1949.

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Dated: September 16, 2019.

Misty Giles,  
Chief of Staff, Rural Development.

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Bill Northey,  
Under Secretary, Farm Production and Conservation.

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