



RD AN No. 4719 (1940-G)
May 2, 2013

TO: Rural Development State Directors
National Office Program Officials

ATTN: Rural Housing and Business Programs
Deputy Administrators, Assistant Administrators,
Program Directors, Area Directors, Area Specialists,
Loan Specialists and State Environmental Coordinators

FROM: Tammye Treviño (*Signed by Dominique M. McCoy*) *for*
Administrator
Rural Housing Service

Lilian Salerno (*Signed by Lilian Salerno*)
Acting Administrator
Rural Business-Cooperative Service

SUBJECT: Environmental Compliance When Construction Has Been
Initiated

PURPOSE/INTENDED OUTCOME:

The purpose of this Administrative Notice (AN) is to clarify the environmental requirements contained in RD Instruction 1940-G when construction has been initiated prior to application. Related issues such as applications for equipment purchase, refinancing of existing debt, and requests for authorization of interim financing are also addressed. For the purposes of this AN, Housing and Community Facilities Programs and Business and Cooperative Programs are collectively referred to as “Rural Development.”

COMPARISON WITH PREVIOUS AN:

This AN replaces RD AN No. 4617 (1940-G) dated January 5, 2012, which expired on January 31, 2013. There are no changes since the last issued AN on this subject.

EXPIRATION DATE:
May 31, 2014

FILING INSTRUCTIONS:
Preceding RD Instruction 1940-G

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IMPLEMENTATION RESPONSIBILITIES:

Notice to the applicants and lenders: When a preapplication or application is filed, Rural Development will immediately notify the applicant that during the period of application review and processing, the applicant must not take any actions, such as initiation of construction, that may have an adverse impact on the environment or limit the range of alternatives to be considered by Rural Development during the environmental review process.

In addition, the applicant will be notified that the environmental review must be completed prior to the issuance of a conditional commitment for guaranteed loans or prior to loan approval or obligation of funds for direct loans and grants. Rural Development will ensure that all guaranteed lenders and relenders (such as intermediaries) are aware of this requirement and will recommend that the lenders provide this notice to their clients at the earliest point of contact between the guaranteed lender and their client. Refer to RD Instruction 1940-G, §1940.309(e) and §1940.315.

Construction and the Environmental Review: It is very difficult for Rural Development to satisfy its environmental compliance responsibilities when construction has been completed or is underway at the time of application. If construction is in progress at the time of preapplication or application, Rural Development must determine and document whether or not there is any evidence that the applicant initiated construction to avoid environmental compliance requirements, such as ignoring prior Agency notice. If evidence to that effect exists, then Rural Development is not in a position to complete an environmental review or to consider a financial assistance request.

If Rural Development is able to ascertain that no evidence exists of an attempt to avoid environmental compliance, then the application is subject to the same environmental requirements as any other application. The following guidance applies when construction is still in progress.

- The applicant must be informed that Rural Development must fulfill its environmental compliance responsibilities and that if environmental compliance cannot be achieved, the approval for financial assistance may be in jeopardy. It is recommended that the applicant halt or delay construction until Rural Development has completed the environmental review.
- Rural Development must document in the environmental review, to the extent practicable, whether protected resources have been affected or destroyed by the construction. Immediate steps must be taken by Rural Development to identify any remaining resources and to put in place appropriate mitigation measures to protect remaining resources from the construction's progress.
- Rural Development is required to consult with other Federal and State agencies in order to identify what resources may have been affected or destroyed, what remains, and to develop appropriate mitigation measures for those remaining. This may mean that the



applicant must halt or delay the construction's progress until such consultations can take place. If the applicant is unwilling or unable to cooperate, or if the oversight agencies are unwilling to participate, Rural Development may be unable to complete the environmental review.

- Oversight agencies may provide notice that their opportunity to comment has been foreclosed by the initiation of construction. In this case, it is recommended that immediate consultation be undertaken to resolve the situation. The oversight agency should be advised that there is nothing in the Rural Development program regulations to prevent an applicant from initiating construction prior to filing a preapplication or application. The oversight agency should also be informed that Rural Development reviewed the actions of the applicant and has found no evidence that the applicant initiated construction to avoid environmental compliance requirements, if that is the case. If, after consultation, the oversight agency is unwilling to assist in the environmental review process, the applicant should be informed that Rural Development is unable to complete its environmental review. Rural Development will either deny the request for assistance or raise the issue to the National Office level. Program Support Staff can advise the State Environmental Coordinator (SEC) of possible alternatives.

If construction has been completed at the time of application, Rural Development will follow a process similar to that outlined above. Even when construction is completed it may be necessary to require mitigation measures for the project to comply with environmental requirements.

To avoid the above situations, Rural Development should counsel applicants and consultants, and guaranteed lenders should counsel their clients, to consider their total financial assistance needs at the earliest planning stages of their proposals. Applications to Rural Development will be filed prior to the start of construction whenever possible. In addition, Rural Development will ensure that all parties have a clear understanding of Rural Development's environmental review process and their respective responsibilities while that review is in process.

Environmental mitigation may affect project construction and operating budgets. The loan official will inform the applicant and designers of any mitigation required in order to establish accurate budgets.

Interim financing: If a guaranteed lender requests that Rural Development authorize interim financing, Rural Development must complete the appropriate level of environmental review prior to giving such authorization. Authorization for interim financing cannot be given "subject to" completion of the environmental review.

Equipment purchase: A proposal to purchase equipment for an existing facility is normally considered a categorical exclusion, however, this assumes that such a proposal is not part of a larger action and that there are no connected actions, which must also be examined as part of the same environmental review. A common example of connected actions is when the equipment purchase is dependent upon the construction of a new facility or the expansion of an existing facility. In this example, the scope of the environmental review normally is broadened to cover



the environmental impacts of the construction, whether the construction is in progress or proposed, and regardless of the source of financing for the construction. There may be exceptions to this on a case-by-case basis. The loan official should contact their SEC for advice.

Additional guidance on related activities may be found in:

- RD Instruction 1940-G, §1940.317(d)
- RD Instruction 1940-G, Exhibit H, II, “Primary Beneficiaries and Related Activities”
- The Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act at 40 CFR section 1508.25.

Refinancing existing debt: A proposal to refinance existing debt for a facility is normally considered a categorical exclusion, unless there is ongoing or recently completed construction. In such a case, refer to the paragraph on Construction and the Environmental Review of this AN.

If there are any questions regarding these issues, they should be discussed with your SEC. You may also contact Frank Mancino at (202) 720-1827, email: frank.mancino@wdc.usda.gov, or Juliet Bochicchio at (202) 205-8242, email: juliet.bochicchio@wdc.usda.gov, Program Support Staff, Rural Housing Service.