



**U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**  
Office of Community Planning and Development  
Region IX Office  
One Sansome Street, Suite 1200  
San Francisco, CA 94104-4430

## **CPD MONITORING REPORT**

February 22, 2022

City of Cupertino  
Jim Throop, City Manager  
10300 Torre Avenue, Cupertino, CA 95014-3202  
[Manager@Cupertino.org](mailto:Manager@Cupertino.org)

Dear Mr. Throop;

**SUBJECT:** Remote Environmental Monitoring of the City of Cupertino's Community Development Block Grant program for Plan Years 2015 to 2020.

From March 1st to 11th, 2021, this Office conducted a remote monitoring of the Community Development Block Grant program in order to assess your organization's performance and compliance with applicable Federal requirements. Program performance was assessed through a review of operations, file documentation, and interviews. The purpose of this letter is to transmit HUD's monitoring report, which provides the details of our review. HUD's review of these areas of program performance may result in the identification of Findings, Concerns, or exemplary practices.

A Finding is a deficiency in program performance based on a violation of a statutory or regulatory requirement. A Concern is a deficiency in program performance that is not based on a statutory or regulatory requirement but is brought to the grantee's attention. Corrective Actions to address the noncompliance are identified for all Findings. Recommended Corrective Actions are identified for Concerns.

The enclosed report contains three Findings and no Concerns. Within 30 days of receipt of this letter, you have the opportunity to provide additional information demonstrating that you have met the requirements of each Finding. If you fail to respond within 30 days, or if the response is unsatisfactory to HUD, you must undertake corrective actions. Similarly, if you disagree with any of HUD's determinations or conclusions in this monitoring letter, please address these issues in writing to this Department within 30 days of receipt of this letter. Your written communication should either provide supporting information to demonstrate the requirement has been met, or explain your reasons why you disagree, along with supporting evidence. Written responses should be sent to the address listed below.

I would like to thank you and your staff for your professionalism and cooperation during the review. The City of Cupertino is carrying out valuable programs that are successfully supporting housing and community development activities. Your HUD representative, Stanley W. Toal, Field Environmental Officer, is available to discuss the results of this monitoring report or provide technical assistance, if requested, and can be reached at [Stanley.W.Toal@HUD.gov](mailto:Stanley.W.Toal@HUD.gov) or 415-489-6668. All written communication should be sent to the Covid email address [CPD\\_COVID-19OEE-SFO@hud.gov](mailto:CPD_COVID-19OEE-SFO@hud.gov).

Sincerely,

**KIMBERL  
Y NASH**

Digitally signed by: KIMBERLY NASH  
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O = U.S. Government OU =  
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Kimberly Nash, CPD Director  
Office of Community Planning and Development

**City of Cupertino, California**

**U.S. Department of Housing & Urban Development  
Region IX San Francisco, CA**



**Environmental Monitoring Report  
Community Development Block Grant Program (CDBG)  
City of Cupertino, CA**

**Remote Monitoring Dates: March 1 to 11, 2021**  
**OGC Final Review Date: January 14, 2022**  
**Monitoring Report Date: January 19, 2022**

## City of Cupertino, California

### **OVERVIEW:**

Monitoring is the principal means by which the US Department of Housing and Urban Development (HUD) ensures that programs and technical areas are carried out efficiently, effectively, and that the programs comply with related regulations, laws, and authorities. It is an opportunity to provide technical assistance focused on improving the quality of the environmental review, to inform the Responsible Entity (RE) of new guidance regarding the substantive review for the related regulations, laws, and authorities, and/or to recommend strategies that may assist with making the environmental review process more efficient. It assists REs in improving their performance, developing or increasing capacity, and augmenting their management and technical skills. Monitoring provides HUD a method for staying abreast of the efficacy of the Office of Community Planning and Development (CPD) administered programs and technical areas within the communities HUD programs serve. Monitoring is not limited to a one-time review but is meant to be an ongoing process that assesses the quality of a RE's performance over a period involving continuous communication and evaluation.

Specifics relating to this monitoring are as follows:

Date(s) Monitoring Conducted: March 1 - 11, 2021  
Type of Monitoring: Remote  
Programs Reviewed: CDBG, Program Years 2015 to 2020  
HUD Reviewer(s): Stanley Toal, Environmental Protection Specialist  
Remote Entrance Conference Date: February 16, 2021  
Remote Exit Conference Date: March 24, 2021  
City Management and Program Representatives:  
    Kerri Heusler, Housing Manager  
    Gabriel Borden, Senior Housing Planner

### **PROGRAM AREAS:**

The City of Cupertino (City) is a designated "entitlement" jurisdiction participating in HUD's CDBG Program and is the RE for the Program. The Housing Division, a division of the City's Community Development Department, is responsible for preparing and implementing the Consolidated Plan and administering the City's CDBG program. For Grant Year 2020, the CDBG Authorized Amount was \$618,266. The City joined the Santa Clara County's HOME Consortium in 2014 and has received HOME funds through the County of Santa Clara. If a developer applies and is awarded HOME funds, the City provides the match for the project, using its Below Market Rate (BMR) Affordable Housing Fund (AHF). The HOME program was not included as a part of this monitoring, as the County serves as the Lead Agency and RE for the Consortium.

### **SCOPE OF ENVIRONMENTAL MONITORING:**

This report is based on the Office of Environment and Energy's (OEE) interviews and discussions with program staff as well as post-monitoring communications, a review of records in the IDIS reporting system, a review of activities described in the 2015-2020 Consolidated Plan and the following administrative documents were in effect during the program years of the environmental monitoring: City of Cupertino Community Development Block Grant Program - Construction Project Guide November 2020 (Draft); City of Cupertino Community Development Block Grant (CDBG) Program - Minor Repair Housing Program Policies and Procedural Manual [Revised: February 11, 2014 *Updated October 28, 2020*]; City of Cupertino Community Development Block Grant (CDBG) Program - Subgrantee Agency Administrative Manual 2013; and, City of Cupertino Community Development Block Grant (CDBG) Program Desk Guide Revised: February 5, 2014.

Further, the City's electronic ERRs listed below were evaluated to assess procedural and technical compliance with the provisions of the National Environmental Policy Act (NEPA);<sup>1</sup> the Council of Environmental Quality (CEQ) regulations implementing NEPA;<sup>2</sup> and, HUD's environmental regulations at 24 CFR Part 58 (Part

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<sup>1</sup> 42 U.S.C. §4321 et seq.

<sup>2</sup> 40 CFR Parts 1500-1508 (2005)

## City of Cupertino, California

58) as well as other related regulations, laws, and authorities. NEPA and HUD's environmental regulations under Part 58 are crosscutting requirements that apply to many Department programs and its federally funded activities.

IDIS Activity ID 185:	2020/4/Rental Unit Rehabilitation
IDIS Activity ID 184:	2020/3/Homeowner Rehabilitation
IDIS Activity ID 141:	2019/4/Housing Repair and Rehabilitation Program
IDIS Activity ID 137:	2018/5/Vista Village Rehabilitation Project
IDIS Activity ID 135:	2018/4/Housing Repair and Rehabilitation Program
IDIS Activity ID 134:	2018/3/Senior Adult Day Care
IDIS Activity ID 131:	2017/2/Administration
IDIS Activity ID 128:	2017/6/Vista Village Renovation Project
IDIS Activity ID 121:	2016/2/City-wide Curb Ramp Installation Project
IDIS Activity ID 119:	2015/6/Cupertino Housing for the Disabled, Inc. – Le Beaulieu Rehab (Phase II)

### **SUMMARY OF RESULTS AND CONCLUSIONS:**

The RE must ensure that activities that are HUD-assisted, in total or in part, are in compliance with NEPA and Part 58 regulations. This means creating a written ERR for every activity regardless of the level of review (§58.38). The RE is required to maintain technical and administrative capability to ensure compliance with NEPA and Part 58 is achieved (§58.12).

Regarding technical capability, the RE's staff needs to have sufficient knowledge of the related regulations, laws, and authorities, as well as a specific understanding of Part 58 requirements in order to make informed decisions about whether: • Appropriate level of review has been completed; • Compliance with NEPA and Federal regulations, laws, and authorities has been achieved; • Public notification requirements have been met (if required); • When HUD approval is necessary; and, • Mechanisms are in place to ensure project funds are not committed or spent prior to the environmental review process having been completed. And, regarding administrative capability, the RE's staff needs to have sufficient knowledge about Part 58 procedures to understand: • When funds may be committed and spent; • Time periods for the public notification and release of funds process; and • Minimum content of the ERR.

OEE has determined that the City in its capacity as the RE has failed to ensure that the environmental effects of each activity carried out with CDBG funds complied with the provisions of HUD regulations implementing NEPA and the applicable environmental laws, Executive Orders, and related requirements listed in HUD's implementing regulations at 24 CFR Part 58. OEE has identified **three Findings** that require corrective action and **no Concerns**.

The results of the review were summarized during a remote exit conference on March 24, 2021, attended by Ms. Kerri Heusler, Housing Manager and Mr. Gabriel Borden, Senior Housing Planner. Throughout the remote monitoring, OEE discussed the initial monitoring observations, addressed the City's questions, and provided more specific technical assistance. One specific topic of the technical assistance included the procedures for an individual other than the Certifying Officer to sign and certify the environmental record. OEE strongly encouraged the City to reach out to OEE to answer questions and to provide further technical assistance.

**Finding No. 1:** a) City obligated and expended CDBG funds on a project prior to HUD's approval of the Request for Release of Funds and Certification (RROF-C) in violation of Section 104 of the Housing and Community Development Act of 1974 [42 U.S.C. §5304(g)(2)].

b) City and/or subrecipient obligated and expended CDBG and/or non-HUD funds on a project prior to City having documented its environmental compliance and/or determination of exemption in violation of the provisions in §58.22 or §58.34(b).

**Finding No. 2:** City failed to sufficiently characterize impacts and determine whether any circumstances exist that would require formal compliance or mitigation. A corollary to Finding No. 1.

**Finding No. 3:** ERRs for several projects undertaken by the City were incomplete. City failed to adequately document its compliance with Federal environmental laws and authorities under 24 CFR §58.5 and §58.6. Further, several ERRs state an incorrect standard used in the compliance determination.

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### **FINDINGS and CONCERNS:**

A Finding is identified as a deficiency in program performance based on a statutory, regulatory, or program requirement for which sanctions or other corrective actions are authorized. Required corrective actions are identified for all Findings. The type of sanctions applicable to Findings varies in spectrum from administrative corrections to a request for repayment of Federal funds. Findings must be responded to within **30 days of receipt** of this report. A Concern is a deficiency in program performance not based on a statutory, regulatory, or other program requirement, for which sanctions and corrective actions are not authorized.

The Community Planning Department (CPD) Program Monitoring page, available at <https://www.hudexchange.info/programs/cpd-monitoring/#monitoring-overview>, provides information and resources to CPD grantees and CPD Field Office staff to assist in preparing for a Department monitoring review, conducting a self-review, or monitoring subrecipients and other partners. Exhibit 21-2 Environmental Monitoring of the *CPD Monitoring Handbook 6509.2*, was used to guide this specific review. It is available at [https://www.hud.gov/program\\_offices/administration/hudclips/handbooks/cpd/6509.2](https://www.hud.gov/program_offices/administration/hudclips/handbooks/cpd/6509.2).

Your OEE representative, Stanley Toal, Environmental Protection Specialist, is available to discuss the results of this monitoring report or provide technical assistance, if requested, and can be reached at: 415-489-6668 or by email at [Stanley.W.Toal@HUD.gov](mailto:Stanley.W.Toal@HUD.gov). If you disagree with any of the HUD's determinations or conclusions in this monitoring report, please address these issues in writing to the San Francisco Region Office within **30 days of receipt** of this report. Your written communication should explain the reasons why you disagree along with supporting evidence and documentation. All communication should be sent to the Department of Housing and Urban Development, Community Planning and Development Division, Office of Environment & Energy via email to the Attention: Stanley W. Toal.

- Finding No. 1:** a) City obligated and expended CDBG funds on a project prior to HUD's approval of the Request for Release of Funds and Certification (RROF-C) in violation of Section 104 of the Housing and Community Development Act of 1974 [42 U.S.C. §5304(g)(2)].  
b) City and/or subrecipient obligated and expended CDBG and/or non-HUD funds on a project prior to City having documented its environmental compliance and/or determination of exemption in violation of the provisions in §58.22 or §58.34(b).

### Conditions:

- IDIS Activity ID 121: 2016/2/City-Wide Curb Ramp Installation Project:

Funded Amount:	\$224,184.00	
Drawn Amount:	\$224,184.00	
IDIS Voucher #6039135	\$218,019.07	Submitted 05/08/17
IDIS Voucher #6063484	\$6,164.93	Submitted 07/24/17

City of Cupertino, Public Works, the subrecipient, filed a CDBG project application for the City-Wide Curb Ramp Installation project. The subrecipient subsequently solicited bids and executed the contract for the related scope of services. Although the title of the project in the contract is *2017 CDBG City-Wide Curb Ramp Installation*, the contract does not specifically state the funding will be sourced from the City's CDBG account. OEE can only conclude that the City committed to pay the contractor for this project regardless of the source(s) of the funds. The City, however, expended \$224,184 of its programmed CDBG funds to this project under the two vouchers #6039135 and #6063484. IDIS Activity ID 121 has no unexpended CDBG fund balance programmed to this project.

The City failed to conduct the environmental review, disseminate and/or publish the Notice of Intent to Request Release of Funds (NOI/RROF), and submit to HUD the RROF-C. Consequently, the City failed to comply with NEPA, and the related authorities listed in HUD's implementing regulations at Part 58, as well as failed to comply with Part 58 Subpart H – Release of Funds for Particular Projects, prior to obligating and expending CDBG funds. The City committed a *Statutory Violation* of Section 104 of the Housing and Community Development Act of 1974 [42 U.S.C. §5304(g)(2)] when it submitted the two vouchers #6039135 and #6063484 prior to submitting the RROF-C.

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This also results in a *Regulatory Violation* of provisions in §58.22. The first sentence of §58.22(a) prohibits a recipient or any participant in the development process from committing HUD assistance until HUD or the state has approved the recipient's RROF-C from the RE. The drawdown of the funds for the project without a RROF-C was in violation of §58.22(a). The City is also in violation of the second sentence of §58.22(a) ... *until the RROF and the related certification have been approved, neither a recipient nor any participant in the development process may commit non-HUD funds on or undertake an activity or project under a program listed in §58.1(b) if the activity or project would have an adverse environmental impact or limit the choice of reasonable alternatives*. Executing the construction contract committed non-HUD funds and limited the choice of alternatives in violation of §58.22(a). Although the contract did not commit HUD funds, the title of the project in the contract referenced CDBG identifying the contract as part of a CDBG project that would be subject to the restrictions in §58.22(a).

▪ IDIS Activity ID 137: 2018/5/Vista Village Rehabilitation Project:

Funded Amount:	\$176,201.24	
Drawn Amount:	\$176,201.24	
IDIS Voucher #6226913	\$29,480.75	Submitted 01/17/19
IDIS Voucher #6240811	\$73,353.51	Submitted 03/01/19
IDIS Voucher #6272969	\$65,517.74	Submitted 06/06/19
IDIS Voucher #6291372	\$7,849.24	Submitted 08/01/19

West Valley Community Services (WVCS), the subrecipient, filed a CDBG project application for the Vista Village Rehabilitation Project. WVCS subsequently executed an agreement for construction services committing non-HUD funds to the project. WVCS and contractor both incurred costs, with the latter beginning repairs and improvements to the project. WVCS submitted invoices to the City and the City provided reimbursement from the programmed CDBG funds. The City obligated and expended \$176,201.24 of CDBG funds that were programmed for this project.

The Agreement Between West Valley Community Services and Paramount Construction for Construction Services for Vista Village Rehabilitation Project [see Paragraph 7 Labor Laws and Appendix C therein], executed 09/11/18, and voucher #6226913, submitted 01/17/19, for the reimbursement of the cost of these services both occurred before completion of the Categorically Excluded under §58.35(a), subject to the laws and authorities at §58.5 (CEST), and determination of the conversion to Exempt per §58.34(a)(12). An obligation and expenditure of CDBG funds for a CEST activity, such as rehabilitation, prior to any determination by the City that the project may convert to Exempt per §58.34(a)(12), is a *Statutory Violation* of Section 104 of the Housing and Community Development Act of 1974 [42 U.S.C. §5304(g)(2)]. IDIS Activity ID 137 has no unexpended CDBG fund balance programmed to this project.

This also results in a *Regulatory Violation* of provisions in §58.22. Under §58.22(b), if a project or activity is Exempt under §58.34, no RROF-C is required, and the recipient may undertake the activity immediately after the RE has documented its determination. However, until the conversion to Exempt is documented, the project must still comply with §58.22(a). The City documented its completion of the CEST and conversion to Exempt on 02/26/19. The agreement committing HUD funds and voucher #6226913, both occurred before the City had documented the conversion to Exempt, limiting the choice of reasonable alternatives and resulting in a violation of §58.22(a).

▪ IDIS Activity ID 131: 2017/2/Administration:

Funded Amount:	\$60,127.52	
Drawn Amount:	\$60,127.52	
IDIS Voucher #6121884	\$8,229.56	Submitted 02/08/18
IDIS Voucher #6121884	\$30,625.92	Submitted 02/08/18
IDIS Voucher #6178409	\$21,272.04	Submitted 08/03/18

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The City obligated and expended \$60,127.52 CDBG funds that were programmed for Administration, an Exempt activity listed at §58.34(a)(3). The City failed to document its determination as required at §58.34(b) and failed to document its compliance with the other applicable requirements of §58.6. This is a violation of §58.34(b).

### Criteria:

- Section 104(g)(2) of the Housing and Community Development Act of 1974 [42 U.S.C. 5304(g)(2)]. (g.) *Environmental protection measures applicable for release of funds to applicants for projects; issuance of regulations by Secretary subsequent to consultation with Council on Environmental Quality; request and certification to Secretary for approval of release of funds; form, contents and effect of certification. (2) The Secretary shall approve the release of funds for projects subject to the procedures authorized by this subsection only if, at least fifteen days prior to such approval and prior to any commitment of funds to such projects other than for purposes authorized by section 5305(a)(12) of this title or for environmental studies, the recipient of assistance under this chapter has submitted to the Secretary a request for such release accompanied by a certification which meets the requirements of paragraph (3). The Secretary's approval of any such certification shall be deemed to satisfy his responsibilities under the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] and such other provisions of law as the regulations of the Secretary specify insofar as those responsibilities relate to the releases of funds for projects to be carried out pursuant thereto which are covered by such certification.*
- 24 CFR §58.22 Limitations on activities pending clearance.
  - §58.22(a): *Neither a recipient nor any participant in the development process, including public or private nonprofit or for-profit entities, or any of their contractors, may commit HUD assistance under a program listed in §58.1(b) on an activity or project until HUD or the state has approved the recipient's RROF and the related certification from the RE. HUD's approval of the recipient's RROF and related certification is the issuance of the AUGF. In addition, until the RROF and the related certification have been approved, neither a recipient nor any participant in the development process may commit non-HUD funds on or undertake an activity or project under a program listed in §58.1(b) if the activity or project would have an adverse environmental impact or limit the choice of reasonable alternatives.*
  - §58.22(b): *If a project or activity is exempt under §58.34, or is categorically excluded (except in extraordinary circumstances) under §58.35(b), no RROF is required and the recipient may undertake the activity immediately after the responsible entity has documented its determination as required in §58.34(b) and §58.35(d), but the recipient must comply with applicable requirements under §58.6.*
- 24 CFR §58.34(b) Exempt activities. (b) *A recipient does not have to submit an RROF and certification, and no further approval from HUD or the State will be needed by the recipient for the drawdown of funds to carry out exempt activities and projects. However, the responsible entity must document in writing its determination that each activity or project is exempt and meets the conditions specified for such exemption under this section.*

### Cause:

The City has limited staffing resources at its disposal and a high staff turnover rate. Further, it has not taken advantage of the resources available to assist in the environmental review process available on the HUD Exchange. It has not registered as a user of HEROS. Staff has not attended HUD's 24 CFR Part 58 Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities 3-day training session nor completed any of HUD's Web-Based Instructional System for Environmental Review (WISER) training modules.

HUD noted that the following administrative documents in effect during and post program years of the environmental monitoring: 1) City of Cupertino Community Development Block Grant (CDBG) Program Desk Guide Revised: February 5, 2014; 2) City of Cupertino Community Development Block Grant (CDBG) Program - Subgrantee Agency Administrative Manual 2013; 3) City of Cupertino Community Development Block Grant (CDBG) Program - Minor Repair Housing Program Policies and Procedural Manual [Revised: February 11, 2014 Updated October 28, 2020]; and 4) City of Cupertino Community Development Block Grant Program - Construction Project Guide November 2020 (Draft).



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Administrative document 1), the earliest, does include a general limitation under the Scope of Selection Decisions with respects to the RROF-C. It states on page 2 ... *The sixth step is to complete the environmental review and clearance procedures for the project of which the activity is a part. Those procedures are set forth in 24 CFR Part 58. HUD is prohibited by law from releasing funds for a CDBG activity until the grantee certifies that it has met its responsibilities with respect to environmental protection.* Administrative document 2), combined with the subrecipient agreements the City uses in its administration of the CDBG program, provides for the subrecipient to assure and certify that it will comply with all regulations, policies, guidelines, and requirements applicable to the acceptance and use of CDBG program funds for the HUD-assisted project. The assurances and certifications are consistent with the standard CDBG regulations under 24 CFR Part 570, including §570.604 Environmental Standards. These two administrative documents combined with the subrecipient agreements, while useful, did not establish the necessary management oversight and internal controls to ensure the City and subrecipients do not obligate or expend HUD and non-HUD funds before the completion of the environmental review process. The stated violations are illustrations of the importance of establishing oversight and controls to ensure the City properly implements the mandated provisions of the Statute and Part 58.

OEE was pleased to find the City's two recent administrative documents which included the following guidance: 3) Under Environmental Review and National Environmental Policy Act (NEPA) page 12, it states ... *The City and the Subrecipient will follow HUD's rules and regulations governing the environmental review process that are found in Part 58. The provisions of the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations in 40 CFR Parts 1500 through 1508 may also apply in certain instances and the City and the Subrecipient will follow the regulations as applicable.* 4) Under Section II. General Information on page 5, it states ... *CDBG funding is strictly contingent upon the following ... 2. Environmental Reviews are completed, and the City is in receipt of the "Authority to Use Grant Funds" from HUD. ... Funds cannot be committed, and costs cannot be incurred prior to satisfaction of Items 1 – 3.* Further, under Environmental Review it states ... *Federal rules prohibit the commitment or expenditure of federal funds until an Environmental Review (ER), in compliance with Title 24 CFR Part 58, is completed. Based on the findings of the ER the CDBG-funded project may be modified, cancelled, or proceed without changes. The ER will be conducted by City staff. The Agency may need to account for these expenses when considering the total cost of the project.* These administrative documents, 3) and 4), were post program years included in this monitoring; however, they demonstrate that the City understands the need to establish more thorough environmental review procedures, oversight, and internal controls, and is moving toward resolving this deficiency.

Another control that the City had implemented involved the use of a contract auditor for its programmatic and fiscal year monitoring of its subrecipients. For example, IDIS Activity ID 135: 2018/4/Housing Repair and Rehabilitation Program, the auditor observed the following concern: *During the monitoring of the client files, the environmental forms were reviewed. It was noted that the environmental review forms in the two client files were not complete. Additionally, the forms were submitted to the City with the quarterly reimbursement requests, which was after the completion of the repairs at the various properties. The environmental forms must be fully completed and the consultant requests that Rebuilding Together staff review the FY 2017/2018 environmental forms and fill in any missing information.* Further, the auditor's Corrective Action Needed was ... *City staff should review the completed forms and sign as required. A final signed copy should be provided to Rebuilding Together by City staff and the original should be maintained in the City's records.* The auditor requested that this process be completed by the end of January 2019. *Moving forward, Rebuilding Together should complete the environmental form prior to starting work on a repair project.* Finally, the auditor provided the following explanation as the resolution of this concern ... *This concern has been resolved and in FY 18/19 Rebuilding Together has followed the new process to ensure that the environmental forms are approved by the City staff and completed as required.*

While OEE recognizes the importance of the observations and resolutions made during the programmatic and fiscal year monitoring of its subrecipients by the contract auditor, the fact is the non-compliance finding was revealed in only one audit and only after the occurrence. The allocation of CDBG program funds to a subrecipient or the use of contractors does not absolve the City of ensuring it has a system to ensure compliance with environmental regulations under Part 58. The City, as the RE, is solely responsible for compliance with Part 58. The stated violations are illustrations of the City's lack of establishing oversight and controls to ensure it properly

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implements mandated environmental requirements before undertaking physical activities, committing to a project, expending non-HUD funds, and/or releasing HUD program funds.

### Effect:

Commitment of HUD funds must not be made until the Part 58 environmental review process is completed including documenting the City's determination of a categorical exclusion and its conversion to Exempt. HUD regulations at §58.22 place limitations on activities pending environmental clearance. Neither a recipient nor any participant, including public or private nonprofit or for-profit entities, or any of their contractors, can commit HUD funds on an activity or project until HUD or the state has approved the recipient's certified RROF. This ensures that actions are not taken that would have an adverse environmental impact or limit the choice of reasonable alternatives. Remedies and sanctions can be imposed when §58.22 is violated and when the environmental review process is not properly completed. This can mean the recipient may be required to repay HUD funds or finance mitigation measures from their own funds.

Undertaking physical activities, committing to a project, expending non-HUD funds, and/or releasing HUD program funds prior to properly completing and documenting an environmental review as well as prior to submission of the RROF-C or receipt of an Authority to Use Grant Funds (AUGF) are serious deficiencies. They may cause the project to become ineligible for federal assistance for the life of the project, occupants may be exposed to human health and safety hazards, and/or there may be environmental degradation. Binding agreements that include commitment agreements and/or construction contracts potentially forecloses the opportunity for the City to reject the project, choose an alternative or implement mitigation, should the environmental review reveal issues that could affect the health and safety of people or cause the property to be unusable for the proposed intended purpose, or result in significant adverse impacts to the environment.

### Required Corrective Action:

- Section 104(g)(2) of the Housing and Community Development Act of 1974 (42 U.S.C. 5304(g)(2)) provides that the Secretary of HUD may not release funds for a project unless the recipient has submitted a RROF-C prior to any commitment of funds to the project. HUD's Office of General Counsel has interpreted the word "funds" in the Act to mean HUD funds. Due to the fact that the City obligated and expended CDBG program funds prior to submission of a RROF-C, a statutory violation has occurred of Section 104(g)(2) of the Housing and Community Development Act of 1974 (42 U.S.C. 5304(g)(2)), and neither the City nor any participant in the activity can use any HUD funding subject to the environmental review requirements of the statute that was violated for the same project. Therefore, IDIS Activity IDs 121 and 137 are prohibited from using HUD program funds associated with the Housing and Community Development Act of 1974.
- Repayment to the line of credit: City must repay the funds disbursed from non-Federal funds to the CDBG program account for IDIS Activity IDs 121 and 137. The City must provide OEE an assurance that it will not provide additional CDBG program funds to any of these activities, and any commitments must be de-obligated and the unexpended CDBG fund balances, if any, for the projects must be reprogrammed.
- It is possible for the City or any participant in the development process to use HUD funding that is subject to a different statute's environmental review requirements, but only if the recipient first obtains a waiver of §58.22(a) for the regulatory violation. If the City determines that IDIS Activity IDs 121 and 137 might be eligible for HUD funding under a different statute, the City will notify HUD so that it may share guidance for requesting a waiver of the regulatory violation. HUD will only grant such a waiver where there is good cause, the violation was inadvertent, and no unmitigated adverse environmental impact resulted or will result. Note that approving HUD assistance to a project that incurred a §58.22(a) violation is an extraordinary action; there is no guarantee that HUD will approve the request to provide assistance to the project.
- City must electronically submit the complete environmental review record and RROF to OEE for the next two environmental reviews conducted as either environmental assessment per §58.36 or categorically excluded per §58.35(a) subject to laws and authorities listed at §58.5 and not capable of converting to Exempt per §58.34(a)(12).
- The City must submit to OEE assurances that this systemic deficiencies will not reoccur and to document the practical steps taken to prevent their reoccurrence. Further, the City must submit to OEE a final approved

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comprehensive environmental review policy and procedure for all HUD-funded projects. At a minimum, the policy and procedures must identify the city department/staff responsible for conducting reviews; coordination efforts with other city departments to identify projects; coordination and tracking efforts with project sponsors, subrecipients, and other entities that receive HUD program funds to ensure reviews are completed prior to obligating and disbursing funds; documentation requirements; retention and location of documents; on-going staff training; and management review/approval of environmental reviews. The submission must include an organizational chart and an environmental review process flow chart. In addition to policies, procedures, and training considerations, OEE requests the City include in the submission ways it will preserve knowledge of the environmental review process which can be shared with new staff during periods of transitions.

- City must provide a plan describing the steps it will take to secure additional training to develop current staff environmental review capacity. This may include use of HUD's environmental review web resources on the HUD Exchange at <https://www.hudexchange.info/programs/environmental-review/> including, without limitation to, the Web-Based Instructional System for Environmental Review (WISER) at <https://www.hudexchange.info/trainings/wiser/>, the HUD Environmental Review Online System (HEROS) at <https://www.hudexchange.info/programs/environmental-review/heros/>, and HUD Region IX's environmental review virtual training covering Part 58. OEE recommends that staff responsible for completing environmental reviews attend Part 58 training at least every two years, but also take advantage of the recording of the past 3-day training session that occurred September 2020. OEE strongly encourages that all staff conducting environmental reviews use the WISER resource and complete all modules. If the City agrees, the City must send the completion certificates of the staff to the attention of Stanley W. Toal, Environmental Protection Specialist.
- City must submit to OEE contract language that complies with §58.22(d) and consistent with HUD Assistant Secretary for Community Planning and Development Mercedes Marquez's HUD memo guidance. The environmental review procedures described above shall specify that this language is incorporated into contracts and other agreement documents, when appropriate.
- City must submit to OEE an assurance that it will utilize the HUD Environmental Review Online System (HEROS) to submit and manage all HUD environmental review records.

### **Finding No. 2: City failed to sufficiently characterize impacts and determine whether any circumstances exist that would require formal compliance or mitigation. A corollary to Finding No. 1.**

#### Conditions:

- City failed to process a critical action under 24 CFR Part 55, §55.20.

#### IDIS Activity ID 119: 2015/6/Cupertino Housing for the Disabled, Inc. – Le Beaulieu Rehab (Phase II)

Le Beaulieu Apartments has a target population of disabled adults, a critical action. The ERR states ... *Residents are qualified to live at Le Beaulieu by having a sensory or mobility impairment. Such disabilities make it even more difficult for them to find suitable housing in the private market. To meet the needs of these tenants, Le Beaulieu features full ADA, including ADA-compliant ramps to second floor units.* The level of the environmental review determined by the City was Categorical Exclusion per §58.35(a)(3)(ii), subject to the laws and authorities at §58.5, converting to Exempt per §58.34(a)(12)

The City ambiguously states in the environmental review under Floodplain Management that the *project is neither within a known FEMA floodplain nor within the Flood Map prepared for the City of Cupertino.* Per review of the FEMA Flood Insurance Rate Map (FIRM), the project is located in Zone X (shaded), the 0.2 percent annual chance flood hazard (500-year floodplain), per FIRM 06085C0208H, bearing an effective date 05/18/09. The environmental review was signed by the RE Agency Official on 06/29/15.

The City failed to make the threshold determination in its initial evaluation that the project is a critical action and is within the 500-year floodplain (the critical action floodplain). Critical actions may only be approved if the City determines there are no practicable alternatives as a result of completing the decision-making process under §55.20. Since the decision-making process was required (including initial and final public notification and

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mitigation), the conversion to Exempt would not be permissible. The City did not publish a Notice of Intent to Request Release of Funds (NOI/RROF), execute a certification, and submit a RROF to HUD.

- City failed to complete the environmental reviews for the Minor Home Repair Program.

IDIS Activity ID 184: 2020/3/Homeowner Rehabilitation

IDIS Activity ID 141: 2019/4/Housing Repair and Rehabilitation Program

IDIS Activity ID 135: 2018/4/Housing Repair and Rehabilitation Program

For the Minor Home Repair Program activities where the City reasonably expected to award assistance to Rebuilding Together Silicon Valley (RTSV) each program year during the Five-Year Consolidated Plan, the level of the environmental review determined by the City was Categorically Excluded per §58.35(a)(2) and (a)(3)(i), subject to the laws and authorities at §58.5, converting to Exempt per §58.34(a)(12). The City conducted the environmental review for each program year's CDBG funding. Each review was signed by the Director of Community Development. As the individual sites and repairs were later established by RTSV, site-specific reviews to evaluate other requirements under §58.6 were completed by RTSV and then accepted by the City.

However, compliance with environmental factors like historic preservation, explosive/flammable hazards (ASTs), contamination and toxic substances, airport hazards, and flood insurance could not possibly be determined until RTSV provided the individual sites and activities. Further, the City could not have determined upon its completion of each yearly program review whether any circumstances exist that require formal compliance including modification or mitigation, as they required more site-specific information to document compliance. Consequently, the conversion to Exempt was unsupported.

OEE also noted that the scope of repairs proposed by RTSV for its Minor Repair Housing Program claimed to fall under the definition of maintenance activities and, therefore, the City, in addition to the program reviews, assumed the subsequent level of review would be the evaluation of other requirements under §58.6. However, many proposed activities by RTSV included more extensive repairs and improvements that should have been described as rehabilitation and thus would require compliance with the related Federal laws and authorities at §58.5, including NHPA. For example, under IDIS Activity ID 141, RTSV included in its scope roof replacement to a home ca 1950. [See 10594 Felton Way.] Per Notice: CPD-16-02 *Guidance for Categorizing an Activity as Maintenance for Compliance with HUD Environmental Regulations, 24 CFR Parts 50 and 58*, roof replacement has been determined a rehabilitation and therefore related federal environmental laws at §58.5, including the NHPA, apply. In other examples, RTSV established assistance to qualified homeowners with repairs and modifications to make the home more accessible for the homeowner. This is a Categorically Excluded activity at §58.35(a)(2). Under the City's assumption, the City misclassified the level of environmental review for several of the program activities, which resulted in the completion of a lower level of review than required under Part 58.

### Criteria:

- In addition to Criteria under Finding No. 1, the proper level of environmental review is governed by the thresholds provided at 24 CFR Part 58, specifically §58.34 Exempt and §58.35 Categorical Exclusion. §58.34(a)(12) states ... *Any of the categorical exclusions listed in §58.35(a) provided that there are no circumstances which require compliance with any other Federal laws and authorities cited in §58.5.* §58.34(a)(12) provides that a categorically excluded review per §58.35(a), subject to laws and authorities listed at §58.5, may "convert to Exempt" if none of the statutes or authorities require formal consultation or mitigation.
- 24 CFR Part 58, §58.38 Environmental review record. (a) *ERR Documents. The ERR shall contain all the environmental review documents, public notices and written determinations or environmental findings required by this part as evidence of review, decision-making and actions pertaining to a particular project of a recipient. The document shall: (1) Describe the project and the activities that the recipient has determined to be part of the project; (2) Evaluate the effects of the project or the activities on the human environment; (3) Document compliance with applicable statutes and authorities, in particular those cited in §58.5 and 58.6;*

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and (4) Record the written determinations and other review findings required by this part (e.g., exempt and categorically excluded projects determinations, findings of no significant impact).

- Floodplain management requirements are found at 24 CFR Part 55. These regulations implement the requirements of Executive Order 11988 and are designed to avoid the adverse impacts associated with the occupancy and modification of floodplains and to avoid floodplain development whenever there are practicable alternatives. Projects, except those that are functionally dependent, are discouraged from being carried out in a 100-year floodplain. Critical actions, as defined at §55.2(a)(2)(i), are activities, where even a slight chance of flooding might result in loss of life, injury to persons or damage to property and are discouraged even during a 500-year flood event. Critical actions include activities that create, maintain, or extend the useful life of structures or facilities that are likely to contain occupants who may not be sufficiently mobile to avoid loss of life or injury during flood or storm events. The regulations at §55.20 provide a decision-making process relative to activities in a floodplain. Critical actions may be approved, with modification or mitigation, if the RE determines there are no practicable alternatives as a result of completing the decision-making process under §55.20.

### Cause:

The City has limited staffing resources at its disposal and a high staff turnover rate. Further, it has not taken advantage of the resources available to assist in the environmental review process available on the HUD Exchange. It has not registered as a user of HEROS. Staff has not attended HUD's 24 CFR Part 58 Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities 3-day training session nor any of HUD's Web-Based Instructional System for Environmental Review (WISER) training modules.

City was unaware of the specific requirements under 24 CFR Part 55 to conduct an evaluation of the proposed action to determine if it is a Critical Action. Further, the City was unaware that the minimum floodplain of concern for a Critical Action is the 500-year floodplain, and that the action is to be processed under §55.20.

City was unaware that the maximum scope of the proposal must be known prior to undertaking the environmental review, and to distinguish between maintenance and rehabilitation in determining the appropriate level of environmental review. Thus, the City failed to correctly categorize activities under its initial evaluation. Further, there appears to be a misunderstanding that health and safety repairs being addressed by the Minor Repair Home Program's definition (e.g., *rectification of safety hazards*) are Categorically Excluded at §58.35(b)(3), and not subject to the laws and authorities at §58.5.

City was unaware that it may *tier* its environmental reviews for the minor housing repair program. [See §58.15 Tiering.]

### Effect:

For projects under 24 CFR Part 58, environmental reviews are not considered complete until i) HUD has approved the RROF-C, or ii) the RE has made a valid determination that the project is Exempt under §58.34 or categorically excluded not subject to §58.5 (CENST) under §58.35(b) and does not require a RROF-C. Failure may result in a Statutory Violation of the Housing and Community Development Act of 1974 and/or Regulatory Violation under §58.22 [See Finding No. 1.]

The NEPA process is intended to help public officials make decisions and take actions that protect, restore, and enhance the environment. NEPA's purpose is to foster excellent action (40 CFR §1500.1). Failure to complete the Part 58 environmental review for activities Categorically Excluded under §58.35(a) or require an EA under §58.36, subject to the Federal environmental laws and authorities at §58.5, undermines NEPA and denies the public and beneficiaries the careful consideration of impacts, as well as identification and implementation of project modification and mitigation. Failure to address compliance with the federal laws and authorities at §58.5 and the other requirements at §58.6 for the projects cited above may have resulted in an adverse effect under one or more of the applicable authorities, exposed beneficiaries to an adverse impact, and/or compromised the federal investment.

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the responsible entity has made a valid determination that the project is exempt under 24 CFR 58.34 or CENST under 24 CFR 58.35(b) and does not require form HUD-7015.15. For projects under 24 CFR part 50, the environmental review is complete when the HUD Approving Official certifies the review.

The purpose of EO 11988 is to require Federal agencies (e.g., the RE) to consider practicable alternatives to developing projects in a 100-year floodplain or for critical actions in a 500-year floodplain when other alternatives are available that achieve the same objective. When alternatives are impracticable, impacts must be identified and mitigated, and the public must be notified, if applicable per §55.12. This is to avoid risking lives and loss of property that results from occupying a floodplain, and to avoid losing the beneficial values of the floodplain. Since the decision-making process (a formal compliance process under §55.20) was required for the above project, the review could not convert to Exempt per §58.34(a)(12). The City was required to publish a NOI-RROF, execute a certification, and submit a RROF to HUD. Until the review has been processed under §55.20 by the City, the full extent of the effects of the action is uncertain.

At OEE's request, the City was able to obtain from the project sponsor, MidPen Housing, its Emergency Action Plan (Version Date 01.2014), which was in effect at the time of the City's environmental review. The Plan includes section 14.2.4 Water Intrusion, Sewer Backup, or Flood and section 14.3.3. Natural Flood or Fire. The Plan was not reviewed by OEE for acceptance.

While not isolated cases of non-compliance, activities under the Minor Repair Home Program would have a low probability of adverse environmental consequence. They did, however, foreclose any opportunity for concerned parties to participate in the Section 106 process, which is a formal compliance step.

### Required Corrective Action:

- For IDIS Activity ID 119, the City must complete the procedures for making determinations on Floodplain Management under 24 CFR Part 55, Subpart C, specifically the decision-making process under §55.20, excepting public notification requirements associated with §55.20(b) and (g). The City must send the completed determination to the attention of Stanley W. Toal, Environmental Protection Specialist. The City must include in its determination, without limitation to, the following assessments:
  - Would occupants of this structure be sufficiently mobile and have available transport capability to avoid loss of life and injury given the flood warning lead times available?
  - Would emergency services functions be delayed or unavailable as a result of the location of the action?
  - Are there routes to and from the structure that would be inaccessible during a flood and hinder evacuation?
  - Would the location of the structure result in unacceptable hazards to human safety, health, and welfare of the occupants?
  - Is the Emergency Action Plan (Version Date 01.2014) which was submitted to the City by the project sponsor acceptable to the City?
  - Does this action involve a significant financial investment that would be either extremely expensive or extremely time consuming to replace were it to be damaged by flood waters?
- HUD retains the authority to require additional corrective action to remediate adverse effects or otherwise remedy the City's noncompliance based on the results of the City completing the decision-making process for IDIS Activity ID 119.
- As stated under Required Corrective Action Finding No. 1, the City must submit to OEE a final approved comprehensive environmental review policy and procedures for all HUD funded projects. The City must formally adopt management oversight measures to be taken to avoid recurrence of these deficiencies. The measures must describe the internal procedures and controls that will be implemented to ensure that the responsibilities described at §58.22 and §58.34 through §58.36 are upheld. The City must submit to OEE its procedures and management oversight controls for our review and comment.
- All City staff that performs environmental reviews must take the WISER learning module *Water Elements* at: <https://www.hudexchange.info/trainings/wiser/>. The City must send the completion certificates to the attention of Stanley Toal, Environmental Protection Specialist.

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**Finding No. 3: ERRs for several projects undertaken by the City were incomplete. City failed to adequately document its compliance with Federal environmental laws and authorities under 24 CFR §58.5 and §58.6. Further, several ERRs state an incorrect standard used in the compliance determination.**

Conditions:

- The following ERRS were missing the RE Agency Official signature and date.

IDIS Activity ID 141: 2019/4/Housing Repair and Rehabilitation Program: 6362 Blackwood Drive, Cupertino - CENST §58.5 per §58.35(b)(3); 10415 Plum Tree Lane, Cupertino - CENST §58.5 per §58.35(b)(3); 10594 Felton Way, Cupertino - CENST §58.5 per §58.35(b)(3); 19937 La Mar Drive, Cupertino - CENST §58.5 per §58.35(b)(3); and 19990 Pear Tree Lane, Cupertino - CENST §58.5 per §58.35(b)(3)

IDIS Activity ID 128: 2017/6/Vista Village Renovation Project - CEST §58.5 per §58.35(a)(3)(ii) converting to Exempt per §58.34(a)(12)

- Several ERRs state an incorrect standard in support of the determination of compliance.

For example, under Coastal Barrier Resources factor, California does not have any identified undeveloped Coastal Barrier Resources System units. The determination that was made in the ERRs, however, was in the context of the Coastal Zone Management Act and was not specific to the Coastal Barrier Resources Act.

In another example, under the Endangered Species Act (ESA) factor, the City states ... *The project is in a residential zone and is not subject to the endangerment of any species. Chapter 6: Environmental Resources and Sustainability Element, General Plan (Community Vision 2015-2040).* In this example, the City did not consult the US Fish & Wildlife Service (USFWS) list of protected species and critical habitats that are known to occur within the City limits. Chapter 6 provides a limited reference to endangered species under Policy ES-5.6: Recreation and Wildlife. It states ... *Provide open space linkages within and between properties for both recreational and wildlife activities, most specifically for the benefit of wildlife that is threatened, endangered, or designated as species of special concern.* In general, we noted from the USFWS Information for Planning and Consultation (IPaC) planning tool, Cupertino has nine Endangered or Threatened Species within its limits, which are afforded protection under the ESA. The critical habitats for two protected species were not available per IPaC and the remaining species were noted as *wherever found*. Further, the City failed to conduct an analysis of the potential for occurrence of each protected species and an effect determination (e.g., *No Effect; May Affect, Not Likely to Adversely Affect; or, Likely to Adversely Affect*).

As a last example, under Historic Preservation, the City mistakenly assumed that the lack of presence of a listed historic building in itself rules out the need for further investigation and consultation under Section 106 of the National Historic Preservation Act (NHPA) simply because the building is not identified or listed. However, all historic properties listed in or *eligible for* the National Register of Historic Places (NR) must be evaluated within an Area of Potential Affect (APE) collectively agreeable to the SHPO, Native American tribes, and other potentially interested parties. It is not sufficient for the City to simply view that if no properties are listed, the proposed project is exempt from further Section 106 consultation.

- ERRs reviewed failed to document determinations with verifiable source documents and relevant base data.

For example, under the Flood Disaster Protection Act factor, the City provided links to the Zone Classifications and to the City of Cupertino, General Plan: Community Vision 2015-2040 Chapter 7 Health and Safety. Figure HS-6 of Chapter 7 identifies the flood inundation area for a failure of the Stevens Creek Reservoir and Figure HS-7 identifies the 100-year flood, which is contained within the streambeds or channels that traverse the City. The City did not provide the effective FEMA Flood Insurance Rate Map (FIRM). Although the projects reviewed were not located within the Special Flood Hazard Area (SFHA), the flood zone cited in the environmental factor was inaccurate. The projects reviewed, as well as most of the City of Cupertino, are located within Flood Zone X (shaded or X-500) which is defined as ... *Areas of 0.2% annual chance flood; areas of 1% annual chance flood*

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*with average depths or less than 1 foot or within drainage areas less than 1 square mile; and areas protected by levees from 1% annual chance flood. The City, however, inaccurately states ... A portion of the City of Cupertino falls within the FEMA Flood Zone X. The FEMA Flood Zone X has been determined to be outside 500-year floodplain and determined to be outside the 1% and 0.2% annual chance floodplains.*

A corollary to the above example is Floodplain Management. The compliance determination is ambiguous as to whether the project is within a Special Flood Hazard Area. The City states ... *Cupertino benefits from the maintenance and protection of the Santa Clara Valley Water District flood protection. Half of the "Planning Area Valley Floor" lies within Special Flood Hazard Areas and flood control is provided by federal, state and local agencies that identifies potential flood issues: U.S. Army Corps of Engineers, Federal Emergency Management Agency (FEMA) and Federal Insurance Administration. (Chapter 7: Health and Safety Element, General Plan, HS17, Figure HS-6, Figure HS-7, and FEMA flood maps).* The projects reviewed, as well as most of the City of Cupertino, are located within Flood Zone X (shaded), which is not a Special Flood Hazard Area.

In another example (IDIS Activity ID 185), the City makes an ambiguous compliance determination under the environmental factor 24 CFR Part 51, Subpart C, Siting of HUD-Assisted Projects Near Hazardous Operations Handling Conventional Fuels or Chemicals of an Explosive or Flammable Nature. The City simply states ... *The project is not near any explosive and/or flammable operations nor will it trigger this type of activity.* Our review of aerial maps revealed a suspect AST (\*) at the Santa Clara County Fire Department Cupertino Station on Stevens Creek Blvd, a parcel contiguous with the Vista Village Apartments (subject of the Vista Village Rehabilitation Project IDIS Activity IDs 128, 135, 137, and 185). The City failed to conduct a site visit to identify the presence of ASTs, as well as review City records for any planned stationary ASTs. Compliance would be strengthened by documenting the two lines of inquiry as stated on the HUD Exchange at <https://www.hudexchange.info/programs/environmental-review/explosive-and-flammable-facilities/>. (\*) Note: Cupertino Fire Station No. 1 20215 Stevens Creek Blvd Cupertino CA 95014. The AST may be incorporated within a generator for emergency services. It was also noted that if an AST were to be contained within the generator, a concrete block wall and carports separate the two uses, and the AST would not be within line-of-site of the project.

As a last example, the City makes an ambiguous and inaccurate compliance determination under the environmental factor §58.5(i)(2) Contamination and Toxic Substances. The City states ... *The project is not near any contamination and toxic contamination substances or operations nor will it trigger this type of activity. In addition, the last superfund site was in the South Bay Asbestos Area and was mitigated in 1998.* The ERRs failed to provide the databases reviewed and the results of the screening for potential on-site and off-site facilities that could pose health and safety problems, as well as toxic clean-up sites that were under analysis or remediation at the time of the environmental review. Further, our review of the US EPA Superfund (NPL) sites for the City revealed the following two concerns. The first concern is that the 550-acre South Bay Asbestos Area NPL site, cited by the City, is located in the Alviso District of San Jose CA, +-8 miles to the Northeast of the Cupertino City Hall on Torre Ave, exceeding the threshold distance. Between the Alviso District and City Hall, there are 11 NPL sites excluded from the compliance evaluation. The second concern is that 1 of these 11 Superfund NPL sites, Intersil/Siemens NPL site, is located within Cupertino's city limits and directly undermines the City's written determination. The Intersil/Siemens NPL site is +-1.5 miles from City Hall with residential and commercial properties located within a one-mile radius of the NPL site. Note: Investigations conducted in the 1980s as part of the California Regional Water Quality Control Board's (Regional Board's) underground storage tank (UST) leak detection program found volatile organic compounds (VOCs) in the soil on- and off-site. The primary contaminant of concern at this NPL site is the VOC trichloroethene (TCE). The 6<sup>th</sup> Five-Year Review Report identifies the off-site migration of the plume to be to the north of the NPL site and into the City of Sunnyvale. This NPL site's Performance Measures are identified as "Yes" status for all measures with the exception of a "No" status for Sitewide Ready for Anticipated Use.

As stated above, the City's environmental reviews do not include conducting a site visit and inspecting adjacent properties to identify, without limitation to, the presence or likely presence of any environmental hazards or conditions that indicate the presence of contamination, current land uses that may contain explosive and flammable facilities, occurrence of protected species, and/or likely presence of wetlands or historic properties.

Also as stated above, most ERRs reviewed reference specific chapters of the General Plan: Community



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Vision 2015-2040. Although the General Plan (GP) may be a valid source document for some factors like land use and planning elements, it is questionable as a source document for most of the laws and authorities in §58.5 and §58.6. This is because the GP has a long-time frame, in this case 25 years. During the 25-year period, the GP remains static, but protected species, critical habitats, floodplains, air quality conformance, historic property / district lists, for example, change over time. Therefore, a GP is generally invalid to ensure statutory compliance, and it usually does not contain the specific and relevant base data to be used as a source document.

- In its initial environmental examination, the City did not provide the basis for a threshold decision and/or determine the required steps for compliance with the environmental factor under consideration.

For example, the City failed to conduct the first step in complying with the Clean Air Act, which is to determine whether the projects include new construction or conversion of land use that facilitates the development of public, commercial, or industrial facilities or five or more dwellings. If so, the City must then demonstrate that the project conforms to the appropriate State Implementation Plan. None of the projects reviewed would challenge the air quality thresholds of significance and would not individually or cumulatively have a significant effect on air quality. While the project description identifies that the projects do not involve new construction or conversion of land use, the City failed to make the determination that emissions would be below de minimis levels, and affirmatively state the project is in compliance with the Act. The City simply states ... *The project will not undergo any demolition or renovation that would trigger asbestos mitigation. The project is slated for health and safety repairs.*

In another example, the City failed to conduct the first step in complying with 24 CFR Part 51, Subpart B Noise Abatement and Control, which is to determine if the project is a noise sensitive use and includes assistance for land development, redevelopment, or any other provisions of facilities and services that are directed to making land available for housing or noise sensitive development. While the project description identifies that the projects do not involve the development thresholds, the City failed to make the written determination that HUD's noise standards do not apply, and affirmatively state the project is in compliance with the section. The City simply states a conclusion without the steps or analysis. The City states ... *The project will include repairs inside homes resulting in very low noise pollution and therefore mitigation is not required.* Note: None of the projects reviewed would require a noise assessment, and noise attenuation requirements would not be warranted.

- Five following ERRs reviewed contained an insufficient project description by not describing the full range of the principal activities that are contemplated and/or their location.

IDIS Activity ID 185: 2020/4/Rental Unit Rehabilitation

IDIS Activity ID 184: 2020/3/Homeowner Rehabilitation

IDIS Activity ID 141: 2019/4/Housing Repair and Rehabilitation Program

IDIS Activity ID 137: 2018/5/Vista Village Rehabilitation Project

IDIS Activity ID 135: 2018/4/Housing Repair and Rehabilitation Program

The ERR project description of Activity 185 is not consistent with the scope of services cited in the agreement for construction services. The ERR description states ... *In fiscal year 2020-2021, four units that are occupied by low-income households will be rehabbed. The repairs include painting, new kitchen countertops, cabinets, replacing old carpets, and new laminate floors in the bathroom.* The Scope of Services Itemized Budget, Appendix A to the agreement is more extensive and lists both the kitchen and bath being remodeled, flooring, new ceiling lights with switches, interior painting, kitchen appliances, blinds, hydro drain cleaning consisting of hydro jet waste lines at kitchen/bath sinks and at main/laterals from clean outs at 12-unit single building. The ERR project description does not agree with the agreement as well as the CDBG Capital Housing Project Application in the number of units to receive the repairs and improvements. In addition, the ERR project description did not identify the units that are planned to receive these repairs and improvements (e.g., units 115, 208, and 201 per the agreement). In the agreement, the subrecipient included the cost for motel relocation expenses for the residents occupying these units, but the relocation was not cited in the project description.

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Similar to Activity 185, the project description of Activity 137 does not provide the full range of the repairs and improvements as listed in the agreement for construction services. Specifically, it failed to include the new bathroom countertops, removal and replacement of the tub/stall enclosures, new kitchen appliances, window replacements, and roof cover. It also did not identify the units that are planned to receive these repairs and improvements (e.g., units 206, 207, 109, 202, and 111 per the agreement).

The project descriptions of the CEST §58.5 environmental reviews for activities 135, 141, and 184 failed to provide the potential number of housing units to be served by the program implementation and the timeline for implementation. The project descriptions further do not provide the full range of the repairs and improvements, which are detailed in the CDBG Capital Housing Project Application. The project description of Activity 135 failed to take note that one of the properties to receive repairs and improvements includes the community facilities of Vista Village property.

### Criteria:

- In accordance with the provisions of law cited in §58.1(b), the RE must assume responsibilities for environmental review, decision-making, and action that would apply to HUD under the following specified laws and authorities:
  - §58.5(a) requires compliance with the National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*), particularly Sections 106 and 110, and its implementing regulations found at 36 CFR Part 800.
  - §58.5(b) requires compliance with Executive Orders 11990 and 11988 on Floodplain Management and Wetlands Protection and 24 CFR Part 55.
  - §58.5(e) requires compliance with the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1536), particularly Section 7.
  - §58.6 Other Requirements: In addition to the duties under the laws and authorities specified in §58.5 for assumption by the RE under the laws cited in §58.1(b), the RE must comply with the Flood Insurance / Flood Disaster Protection Act.
- In accordance with HUD's environmental standards articulated at §58.5(i)(1), compliance is required with the applicable criteria and standards specified in 24 CFR Part 51 of this title. Further, it is HUD policy at §58.5(i)(1) that all properties proposed for use in HUD programs be free of hazardous materials, contamination, toxic chemicals and gasses, and radioactive substances, where a hazard could affect the health and safety of occupants or conflict with the intended utilization of the property.
- 24 CFR §58.38 Environmental review record. (a) *ERR Documents. The ERR shall contain all the environmental review documents, public notices and written determinations or environmental findings required by this part as evidence of review, decision-making and actions pertaining to a particular project of a recipient. The document shall: (1) Describe the project and the activities that the recipient has determined to be part of the project; (2) Evaluate the effects of the project or the activities on the human environment; (3) Document compliance with applicable statutes and authorities, in particular those cited in §58.5 and 58.6; and (4) Record the written determinations and other review findings required by this part (e.g., exempt and categorically excluded projects determinations, findings of no significant impact).* (b) *Other documents and information. The ERR shall also contain verifiable source documents and relevant base data used or cited in EAs, EISs or other project review documents. These documents may be incorporated by reference into the ERR provided that each source document is identified and available for inspection by interested parties. Proprietary material and special studies prepared for the recipient that are not otherwise generally available for public review shall not be incorporated by reference but shall be included in the ERR.*

### Cause:

The City has limited staffing resources at its disposal and a high staff turnover rate. Further, it has not taken advantage of the resources available to assist in the environmental review process available on the HUD Exchange. It has not registered as a user of HEROS. Staff has not attended HUD's 24 CFR Part 58 Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities 3-day training session nor any of HUD's Web-Based Instructional System for Environmental Review (WISER) training modules.

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City was not fully aware of the requirement to finalize the characterization of environmental issues prior to concluding the environmental review process. Staff did not have a clear understanding of what is required for evaluation of site contamination, explosive and flammable hazards, and ESA-listed species and designated critical habitats. Further, the City does not have site-specific field contamination procedures as well as procedures to evaluate threats to ESA-listed species and designated critical habitats.

City uses a template/blanket statement of determination for each environmental compliance factor that has been created during previous environmental reviews over many program years and carried forward. The preparer does not tailor them to an individual property, independently evaluated them for their accuracy, and/or supplemented them, where necessary, to conform to the requirements of Part 58. Further, the City was unaware of the initial environmental examination needed for determining the applicability of the project relative to the compliance factor, as well as the supporting documentation requirements to validate each template statement. Since the City utilizes this template/blanket statement process, the inaccuracies have been repeated each program year in each review.

City was unaware that to correctly determine the level of environmental review and complete a review that ensures the proposal complies with Part 58, the maximum scope of the proposal must be known prior to undertaking the environmental review. Thus, ERRs must contain a clear and concise project description that describes all contemplated activities.

As the RE under HUD's environmental regulations 24 CFR Part 58, the City must assume the decision-making authority and must certify that it has complied with these requirements. [See §58.10 Basic environmental responsibility.] HUD recommends that a duly delegated Certifying Officer sign every ERR, regardless of whether a RROF is required. A Certifying Officer's signature provides evidence that the RE made the environmental review determination. In some instances, a RE may choose to provide evidence that it made the environmental review determination through other means including a delegation of authority. However, at a minimum, HUD would expect a RE to have a procedure in place requiring each ERR to be signed by the RE Agency Official consistent with the delegations of authority that are outstanding in the City's organization. This was not the case as evidenced by the lack of the RE Agency Official signature.

### Effect:

The NEPA process is intended to help public officials make decisions and take actions that protect, restore, and enhance the environment. NEPA's purpose is to foster excellent action (40 CFR §1500.1). Failure to complete the Part 58 environmental review for activities Categorically Excluded under §58.35(a) or require an EA under §58.36, subject to the Federal environmental laws and authorities at §58.5, undermines NEPA and denies the public and beneficiaries the careful consideration of impacts, as well as identification and implementation of project modification and mitigation. Failure to address compliance with the federal laws and authorities at §58.5 and the other requirements at §58.6 for the projects cited above may have resulted in an adverse effect under one or more of the applicable authorities, exposed beneficiaries to an adverse impact, and/or compromised the federal investment. However, based on the projects' scope, there would be minimal, if any, environmental hazards and/or adverse environmental effects.

The information contained in the ERR must clearly describe proposed activities, convey a comprehensive picture of the existing environment, and develop conclusions about the impacts of the proposal. A "barebones", unsupported checklist is extremely vulnerable to any challenge.

The absence of a RE Agency Official signature and date on several of the environmental review forms demonstrate that there is no staff member responsible for ensuring that the environmental reviews are complete, accurate, and demonstrated compliance with Part 58.

### Required Corrective Action:

- For IDIS Activity ID 185, the City must reevaluate the Explosive and Flammable Hazards determination in compliance with 24 CFR Part 51, Subpart C. The City must send the completed determination to the attention of Stanley W. Toal, Environmental Protection Specialist.

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- HUD retains the authority to require additional corrective action to remediate adverse effects or otherwise remedy the City's noncompliance based on the results of the City completing the Explosive and Flammable Hazards determination for IDIS Activity ID 185.
- As stated under Required Corrective Action Finding No. 1, the City must submit to OEE a final approved comprehensive environmental review policy and procedures for all HUD funded projects. The City must formally adopt management oversight measures to be taken to avoid recurrence of these deficiencies. The measures must describe the internal procedures and controls that will be implemented to ensure that the responsibilities described at §58.34 through §58.36 are upheld. The City must submit to OEE its procedures and management oversight controls for our review and comment.
- City must provide a plan describing the steps it will take to secure additional training to develop staff environmental review capacity. This may include use of HUD's environmental review web resources on the HUD Exchange at <https://www.hudexchange.info/programs/environmental-review/> including, without limitation to, the Web-Based Instructional System for Environmental Review (WISER) at <https://www.hudexchange.info/trainings/wiser/>, the HUD Environmental Review Online System (HEROS) at <https://www.hudexchange.info/programs/environmental-review/heros/>, and HUD Region IX's environmental review virtual training covering Part 58. OEE recommends that staff responsible for completing environmental reviews attend Part 58 training at least every two years, but also take advantage of the recording of the past 3-day training session that occurred September 2020. OEE strongly encourages that all staff conducting environmental reviews use the WISER resource and complete all modules. If the City agrees, the City must send the completion certificates of the staff to the attention of Stanley W. Toal, Environmental Protection Specialist.

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