**Reg. 216 Primer**

Background

* *NEPA – The National Environmental Policy Act.*  <https://ceq.doe.gov/nepa/Citizens_Guide_Dec07.pdf>

This act was signed into law on January 1, 1970.  The intent of the law is three fold:

1. To ensure that actions taken by the federal government are in harmony with the environment,
2. To ensure that stakeholders affected by the project are given adequate opportunity to participate in the planning process; and
3. To give decision-makers sufficient information with regards various alternatives so as to make an informed decision.

This act applies to ALL US Government Agencies, whether they work abroad or domestically, including USAID.

* *22 CFR 216 – Regulation 216.* [*http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title22/22cfr216\_main\_02.tpl*](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title22/22cfr216_main_02.tpl)

*Or* [*http://www.usaid.gov/our\_work/environment/compliance/22cfr216*](http://www.usaid.gov/our_work/environment/compliance/22cfr216)

OK – Here is today’s civics lesson.  Once a law is passed by Congress and signed by the President, it must be “codified”; that is to say, put into a form that directs executive branch agencies to act.  This is called the United States Code, or the Code of Federal Regulations (CFR).  Title 22 is where all regulations regarding Foreign Relations are placed.  Chapter II, part 216 is the section regarding USAID’s Environmental Procedures.  Thus 22 CFR 216 is where NEPA is codified as it pertains to USAID.

* *Automated Directive System (ADS) 204* [*http://www.usaid.gov/sites/default/files/documents/1865/204.pdf*](http://www.usaid.gov/sites/default/files/documents/1865/204.pdf)

The ADS is where all that is contained in the CFR’s is translated into pragmatic guidance regarding the latest agency policy.  ADS 204 is where USAID’s policy on environmental compliance is located. It provides general overall guidance.

So why do I need this booklet?

Although ADS 204 provides general guidance, there are many actions and procedures that are not clearly spelled out.  This booklet is intended to help the reader find practical answers to many commonly asked questions. It is broken down chronologically as if you were going through the process from planning through procurement. Shall we begin?

I. The Initial Environmental Examination (IEE)(see LAC annotated guidance)

The IEE is the fundamental environmental compliance document for USAID. It makes recommendations from the operating unit to the Bureau Environmental Officer (BEO) regarding the potential environmental effects of specific USAID actions being contemplated. The approved IEE (whose actual title is an *Environmental Threshold Decision*; see below in Section II) is required for **ALL** USAID activities and funds cannot be obligated until the IEE is approved by the BEO for the Latin and Caribbean (LAC) Bureau.

The IEE development procedure is as follows:

1. An IEE is drafted by a technical team, normally concurrent with the development of a Project Appraisal Document (PAD) <http://pdf.usaid.gov/pdf_docs/Pdacs686.pdf>
2. Once a draft IEE is written, it is submitted to the technical Office Director for concurrence and then to the Mission Environmental Officer (MEO) for review and concurrence (Please see your Mission Order regarding environmental compliance for mission-specific guidance.)
3. Once approved by the MEO, the MEO forwards the document to the Regional Environmental Advisor (REA) (Lima, San Salvador, or Santo Domingo) for concurrence.
4. With MEO and REA concurrence, the document goes to the Mission Director for approval and submission to the BEO.  This submission to the BEO is normally done electronically by the MEO.
5. IEEs are amended when:
   1. There is a change in Life of Activity funding;
   2. There is a time extension; and/or
   3. There are new/unforeseen/deferred activities that were not previously examined.

II. The Environmental Threshold Decision (ETD)

The BEO reviews the recommendations in the Mission’s submitted IEE and based on the information provided, issues one of five possible Environmental Threshold Decisions that determine the level of additional environmental analysis required to ensure that USAID meets its obligations under NEPA.  The BEO may issue an ETD that does not match the recommendation.

1. **Exemption** – Only issued with an approved disaster declaration signed by the Agency Administrator (ex: 2010 Haiti earthquake).  An Ambassador’s Emergency Declaration **DOES NOT** allow for an exemption.
2. **Deferral** – Only issued if there is not enough information to accurately evaluate the possible environmental effects of a particular action.  An IEE Amendment is required before activities under a Deferral can commence.
3. **Categorical Exclusion** – These are classes of actions that have been determined not to cause significant environmental effects and thus **normally** do not require additional environmental analysis beyond the ETD. USAID has 15 categories. See REG 216.2(c)(2).

<http://www.ecfr.gov/cgi-bin/text-idx?SID=1c14d0d2666eea51b52855f946f54938&mc=true&node=se22.1.216_12&rgn=div8>

1. **Negative Determination (usually with Conditions)  -** Issued for activities that are not envisioned to have significant environmental effects but are either a) not covered by one of the 15 categories in the Categorical Exclusion link above (unlikely),  b) those effects are deemed to be made not significant through the application of “Conditions” or mitigation activities (common), or c) for sub-grants component of an Activity where the specific actions of the sub-grant is not known at the time of the IEE.  In LAC, the development of an Environmental Mitigation and Monitoring Plan (EMMP) is required for all Negative Determinations with Conditions with exception of DCAs (see *EMMP* below in Section III).  In most countries this is done through the use of word documents, but some countries have developed automated systems. EMMPs may be completed in local official language rather than English.
2. **Positive Determination** - Issued for all activities where significant environmental effects are likely.  See REG 216.2(d).  Significance is commonly determined by the size, scale, and scope of the activity(s) and whether or not there is an “irreversible or irretrievable commitment of resources”. All activities under a Positive Determination require the development of an Environmental Assessment (EA) (see *EA* below in Section III).

III. Environmental Compliance Documents – Who prepares them, when are they prepared, and how are they approved

* *The Environmental Mitigation and Monitoring Plan* (*EMMP*) (See EMMP format)

The development and approval of an EMMP is a requirement for all activities covered under a Negative Determination with Conditions. Its purpose is to identify areas of environmental risk, design mitigation measures to eliminate or minimize those risks, and develop a monitoring plan to determine the effectiveness of the mitigation measures.  The EMMP is normally developed by the implementing partner, submitted to the AOR/COR for review, and then passed to the MEO and REA for approval.  Final approval authority rests with the REA unless otherwise specified in the ETD.  For sub-grants, the EMMP serves as the environmental review that is required by Reg 216 for all actions that are implemented with USAID funds. The EMMP shall be developed by the sub-grantees with assistance from the prime contractor (see section V below).  USAID Sector Guidelines should be reviewed as part of the EMMP development (<http://www.usaidgems.org/sectorguidelines.htm>).

The following is the common procedure for the development and implementation of an EMMP:

1. Language that highlights the requirement to develop an EMMP is included in solicitation packages for projects authorized under a Negative Determination with Conditions (see section IV below).  (See ADS 204 appendix).
2. A draft EMMP that reflects proposed mitigation measures (including estimated cost) is submitted with the proposals and may be used as a selection criterion.
3. Upon award, a final initial EMMP is submitted and approved.
4. An annual review of the EMMP is required as part of the implementing mechanism’s Environmental Compliance Report.  Results from monitoring should be incorporated and a year two EMMP is submitted for approval. This process continues for the life of the project.

There are two types of EMMPs

1. Site-specific  - which analyzes a particular action or group of actions in a specific location.  For example, construction of one health clinic with a potable water supply at a particular location.
2. Programmatic – which analyzes a set of similar actions to be implemented in multiple locations using the same approach.   For example, constructing 100 latrines using the same design in different locations.  One plan for all 100 latrines.

Tips for good EMMPs

1. Provide a clear and precise description of the proposed action(s).
2. Avoid words like “when appropriate”, “as needed”, or “when necessary” when describing mitigation measures.  Be prescriptive as possible to reduce ambiguity.
3. Make sure that cost estimates are realistic.  Not having enough money is no excuse for not implementing an approved/required mitigation measure.

* *The Environmental Assessment (EA)*

The Environmental Assessment is used to evaluate the potential environmental effects of actions that have received a Positive Determination in a corresponding ETD.  Remember that a Positive Determination is issued for projects that are likely to have significant environmental effects. See REG 216.2(d) for more direction on activities that generally have a significant effect on the environment.  The purpose of the EA is three-fold:

1. Involve relevant stakeholders in the planning process, aka “Scoping”.
2. Analyze and disclose the potential environmental effects and cost/benefit for a range of alternatives.
3. Provide the decision maker with a recommended alternative based on this analysis.

The development of an EA would be conducted as follows:

1. A Positive Determination for a particular proposed action is received.
2. USAID, through a professional environmental consultancy, or Implementing Partner, prepares the first three sections of the EA (Existing Condition, Purpose and Need, and Proposed Action). Note: the ideal situation to best comply with Reg 216 direction that an environmental analysis is conducted prior to obligation of funds to avoid irreversible commitment of resources is that the EA be prepared prior to solicitation by USAID.
3. The scoping process is conducted with relevant staked holders to identify issues, concerns, and opportunities regarding the proposed action.
4. A Scoping Statement that details the Purpose and Need, Existing Condition, Description of the Proposed Action, Results of Scoping (i.e. issue statements in response to the Proposed Actions), Issues considered but dismissed, and a proposed work plan for finalizing the EA is submitted by the operating unit and approved by the BEO.
5. A range of potential alternatives is developed that identify different actions that address issues raised in scoping.
6. The final EA, (which includes the Existing Condition, Purpose and Need, Description of the Proposed Action and Alternative actions, Results of Scoping, Environmental Effects Analysis of Alternatives, and a recommendation for a Preferred Alternative that includes an Environmental Mitigation and Monitoring Plan), is submitted to the MEO and REA for clearance, and then to the Mission Director for approval.
7. The operating unit submits the EA to the BEO for approval.
8. Depending on when the EA was completed in the Project cycle, The Preferred Alternative including the associated EMMP is used to: 1. if EA was prepared pre-solicitation-develop the Terms of Reference for the solicitation package to complete the work or 2. if EA is prepared after award- incorporate into the annual work plans of the Implementing Partner to ensure implementation occurs.

* *Pesticide Evaluation Report and Safer Use Action Plan (PERSUAP)*

The PRESUAP is a specialized analysis that is developed when USAID propose to purchase, utilize, or train beneficiaries in the utilization of pesticides, including biological agents.  Fertilizers are not pesticides.  This includes organic pesticides that are purchased such as neem. Organic recipes that are made locally/artisanal and not purchased or registered by the USEPA do not require a PERSUAP.  The PERSUAP may be developed by a particular implementing partner for a specific activity, but the trend in LAC has been to develop an independent, country-wide PERSUAP that includes all likely uses of pesticides; including those not necessarily associated with agriculture production such as food storage, construction site preparation, vector control etc.  If you are contemplating the use of pesticides in your proposed activities, please consult your MEO.

IV.  Compliance for solicitations and procurement documents

Environmental compliance language and criteria are included in the Request for Applications or Proposals (RFA or RFP) when there is a potential for environmental impacts. The IEE and EMMP form shall be attached to the solicitation when there is an NDWC ETD, The review panel factors in compliance issues when reviewing proposals and applications for these activities (i.e. the quality of the EMMP mitigation plan should be considered). The COR/AOR ensures that OAA includes appropriate language in the award. Additional help and best practices on how to incorporate environmental conditions and mitigating measures required by 22 CFR 216 determinations into solicitations and awards is available at (See  ADS 204 annex).

V. Frequently Asked Questions

* *Field support mechanisms and buy-ins*

When an Indefinite Quantity Contract (IQC), Participating Agency Partnership Agreement (PAPA) or other global implementing mechanisms are awarded at the headquarters-level, an IEE is produced and an ETD is issued.  The global mechanism is beholding to the terms and conditions of the associated ETD.  As such, when missions “buy –in” to one of these global mechanisms, they buy into all the terms and conditions associated with it.  Therefore, environmental compliance procedures associated with the mission’s ETD and those described in specific Mission Orders do not apply.  The regional bureaus are in discussions with the pillar bureaus to resolve this issue.

* *Multi funded/multi donor projects/Global Development Alliance/Public-Private Partnerships*

There are a number of Categorical Exclusions (iv, vi, xiii) that allow USAID to be “excluded” from additional environmental analysis beyond the IEE for multi-donor/multi-funded projects of this nature.  However, each of these categories has specific caveats regarding when these CE’s apply.  In many cases, our involvement with partners in the identification and development of actions is substantial and thus, when the proposed activities have the potential to create environmental effects, they must be given a Negative Determination with Conditions or a Positive Determination.  As such, all the terms and conditions of the associated ETD must apply and be included in the partnership agreement. In the case where the USAID does not control the details of the activities that the PIO will be identifying and implementing (i.e. Program Contribution grants), the PIO is responsible for following their own environmental policies (ADS 308.3.11c).

* *Development Credit Authority (DCA)*

Generally speaking, DCAs fall under Categorical Exclusion (x), “Support for intermediate credit institutions”.  However, when the intended activities being supported by loans authorized under this program have the potential to cause environmental effects, this CE does not apply.  A Negative Determination with Conditions will be issued with a condition that USAID review the lending institutions policies regarding the environment and provide training to loan officers to familiarize them with possible environmental effects and standard mitigation measures, such as those found in the sector guidelines (<http://www.usaidgems.org/sectorguidelines.htm> ).  The ETD may also specifically prohibit the lending institution from supporting certain activities that are deemed to have significant environmental effects.

* *Sub-awards*

Implementing mechanisms where sub awards are envisioned are normally given a Negative Determination with Conditions that requires potential sub-awardees to complete an Environmental Risk Assessment (Table 1 of the EMMP).  If the assessment indicates the proposed activity has a medium risk, a full EMMP will be required.  This must be done prior to authorizing the sub-award to ensure that sufficient budget has been allocated to implement the agreed-upon mitigation measures.