



STATE OF WASHINGTON

OFFICE OF THE INTERAGENCY COMMITTEE

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May 17, 2007

Topic #19: Conversion and Compliance Policies

Prepared By: Jim Eychaner

Approved by the Director 

Presented By: Marguerite Austin

Proposed Action: Decision

Summary:

The proposed policy is intended to better explain compliance with grant agreements. The policy also introduces new concepts intended to increase accountability. The proposed policy was presented to the Board in February 2007. Minor changes were made as a result of the Board's comments.

Staff Recommendation:

Adopt the revised compliance policy, which will replace section 3 of Manual 7 *Funded Projects: Policies and the Project Agreement*.

Background:

Last year, staff worked with an advisory committee of affected sponsors and interested stakeholders, including a citizen member of the IAC and a citizen member of the SRFB.¹

The advisory committee was tasked with helping staff to develop better policy statements, definitions, proposals for new concepts, and appropriate procedure where needed. The advisory committee conducted a systematic, section by section, review of new text proposed for Manual 7, Section 3.

Results included:

- Improved definitions: that is, what is meant by compliance versus degrees of non-compliance from minor element change to conversion.
- Recognition of the need for reasonable public involvement in project-specific compliance processes.

¹ The members of the advisory committee were: Sharon Claussen, King County Parks; Jeroen Kok, Vancouver-Clark Parks; Arvilla Ohlde, citizen; Jeff Parsons, IAC Board; Peggy Panisko, citizen; Joe Ryan, Salmon Recovery Funding Board; and Pene Speaks, Department of Natural Resources.



- Recognition of the logic that "perpetuity" may be more relevant to an interest in real property than in a structure or facility.
- Clarification of procedures for deciding when non-compliance or conversion issues may be resolved at the staff level, at the Director level, or at the Board level.
- Introduction of a new concept concerning consequences for unresolved compliance issues.

In August 2006, we posted the first draft of the committee-reviewed text on the agency web site, and notified nearly 3,000 individuals and organizations that we were seeking review and comment. We received 18 comments. Subsequently, staff developed a second draft, incorporating many of the comments we received.

The second draft was posted on our web site in December 2006, and we again notified several thousand individuals and organizations that we were seeking additional review and comment. In all, we received four comments on the second draft.

All comments on both drafts were documented, verbatim, in tables that include staff's detailed reply. These tables are available for review. Based on the two sets of comments we received, staff again revised the text. The IAC Board reviewed the text during its February 2007 meeting and made suggestions for clarity. The changes have been made (e.g., consistent use of phrases such as "substantial progress").

Analysis:

The draft does not change basic policy on grant compliance. However, it introduces some new concepts including the need for public involvement when addressing compliance issues, and consequences for those sponsors not appearing to be interested in making good faith efforts to resolve non-compliance issues.

Next Steps:

We have completed the work necessary to incorporate the new compliance text in Manual 7. If adopted, the new policy will go into effect immediately.

However, we recommend that the Board include a delayed implementation date for section 10, "Unresolved Non-compliance or Conversion Issues." We suggest an implementation date of July 1, 2009. Section 10 creates a sponsor identifier called "high risk." Staff believes that current and potential grantees need time to consider the implications of the "high risk" identifier. Also, staff believes agency grant programs would be best served if sponsors potentially affected by the identifier have the opportunity to resolve outstanding, often complex compliance issues.

Attachments:

- Proposed text.
- Resolution adopting text and approving revision of Manual 7.

RESOLUTION 2007-14
Policy on Grant Compliance, Revising Manual 7
"Funded Projects: Policies and Project Agreement"

WHEREAS, state and federal law require grantees to be in compliance with grant agreements for the protection of outdoor recreation and habitat investments in perpetuity, and

WHEREAS, it has become necessary to better explain, define, and emphasize the policies guiding implementation of these regulations, and

WHEREAS, the policies are published in section 3 of Manual #7 *Funded Projects: Policies and Project Agreement*, and

WHEREAS, the proposed replacement for section 3 of Manual #7 has been reviewed for consistency with state law and legislative direction, and

WHEREAS, review of the proposed replacement for section 3 of Manual #7 has been done with the assistance of a committee of experts as well as citizens with an interest in grant compliance issues, and

WHEREAS, the public has been afforded an opportunity to review and comment on the policies proposed to be incorporated into section 3 of Manual #7;

NOW, THEREFORE, BE IT RESOLVED that the text of section 3 in Manual #7 shall be replaced with the "Compliance" text dated June 2007; and,

BE IT FURTHER RESOLVED that Manual #7, as revised, is approved for immediate use, with the sole exception of the section 3 paragraphs titled "10. Unresolved Non-Compliance or Conversion Issues." The paragraphs titled "10. Unresolved Non-Compliance or Conversion Issues" are approved for use starting July 1, 2009.

Resolution moved by _____

Resolution seconded by _____

Adopted/Defeated/Deferred

Date: June 8, 2007

Proposed Final Text: Manual 7, Section 3. Compliance

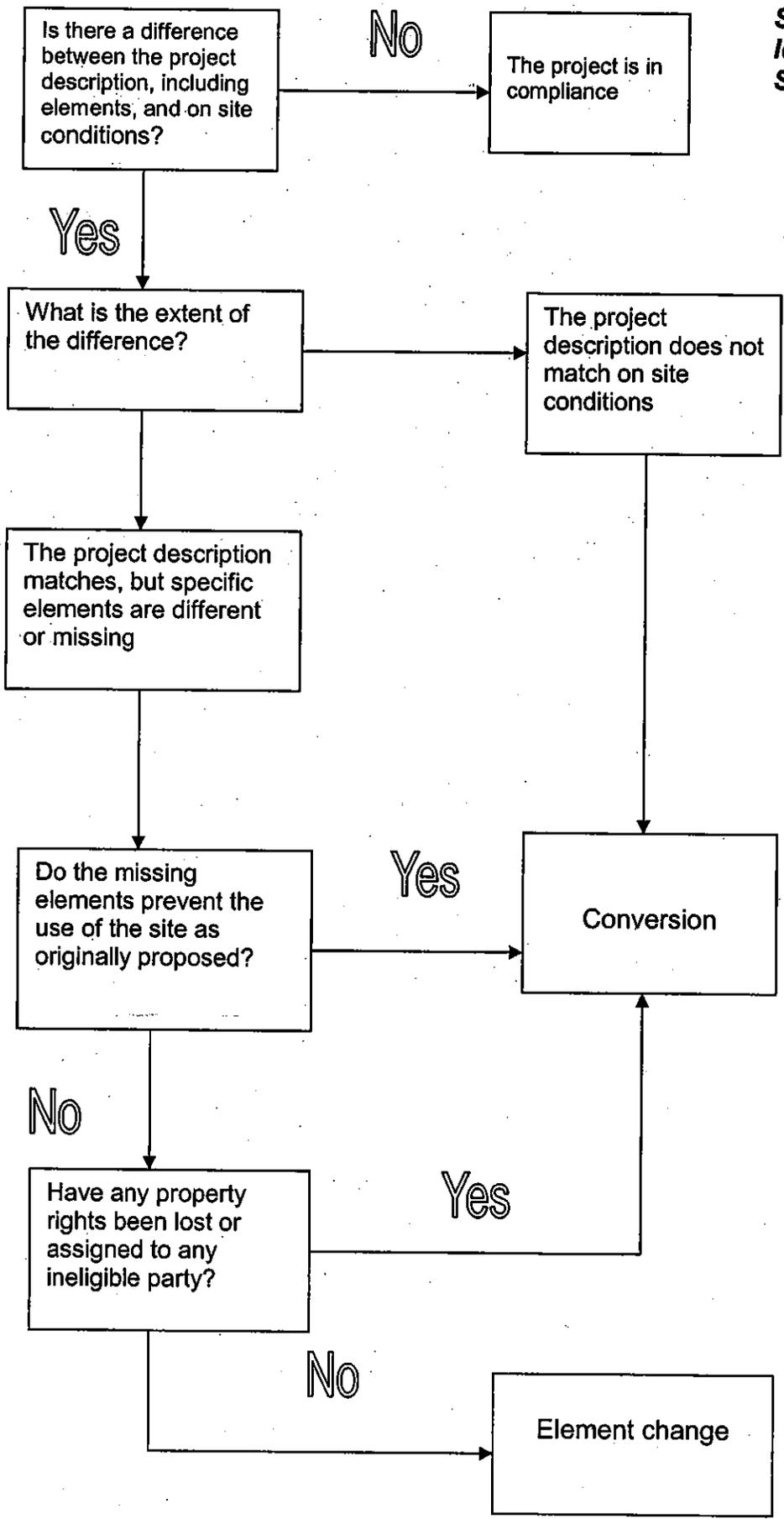
1. Introduction	<p>It is your responsibility as the project sponsor to comply with the terms and conditions of IAC/SRFB grant-in-aid funding assistance. After your project is complete (that is, after final reimbursement is made), IAC/SRFB documents you have signed continue to govern the site, structures, or facilities for which funds have been granted. Unless otherwise allowed by policy, program, or agreement, IAC/SRFB expects that your project will continue to function as originally funded in perpetuity – that is, forever. Changes may be made only with the approval of IAC/SRFB.</p>
2. Policy	<p>Use of IAC/SRFB grant-in-aid funds creates a condition under which property and structures funded become part of the public domain in perpetuity.</p> <p>The original fund source will help determine compliance. Funds from recreation programs are intended to result in opportunities for public recreation in perpetuity. Funds from habitat programs are intended to result in habitat values or functions in perpetuity.</p> <p>It is the policy of IAC/SRFB, consistent with state law,¹ that interests in real property, structures, and facilities acquired, developed, enhanced, or restored with IAC/SRFB funds are not to be changed, either in part or in whole, nor converted to uses other than those for which the funds were originally approved. If an IAC/SRFB funded project is found to be changed or converted (out of compliance with the project agreement or agreement amendments), the project sponsor is responsible for replacing the changed or converted interests in real property, structures, or facilities with interests, structures, or facilities of equivalent size, value, and utility.</p> <p>There are a number of ways a project can be out of compliance with a project agreement, the most serious of which is a conversion. If a compliance issue arises, IAC/SRFB works with sponsors to resolve the compliance issue.</p>

¹ See especially RCW 79A.25.100 and RCW 79A.15.030(8).

<p>2a. Policy on Recreation Structures and Facilities</p>	<p>IAC/SRFB recognizes a difference between projects that acquire interest in real property (land) and projects that fund structures or facilities.² Compliance with project agreements involving structures or facilities for outdoor recreation will be tied to a reasonable agreed-upon service life for the structure or facility, with the further provision that the development of the structure or facility constitutes the sponsor's agreement to provide outdoor recreation opportunity on the development site in perpetuity.</p> <p><i>Example:</i> IAC funding for a baseball field results in the underlying property remaining in the public domain as outdoor recreation property. The specific recreation use may change from a baseball field to an outdoor soccer field without resulting in a conversion. Changing use of the land to any non-outdoor, non-recreation purpose will result in a conversion.</p>
<p>2b. Policy on Habitat</p>	<p>IAC/SRFB habitat grants seek to support properly functioning habitat conditions.</p> <p>If a plant or animal is specified in a grant agreement and that plant or animal is lost as the result of events beyond the control of the sponsor, it does not constitute a non-compliance issue. Examples of events beyond the control of the sponsor include but are not limited to: acts of nature (floods, drought), actions of upstream or adjacent landowners, and ocean conditions.</p> <p>If a plant or animal is specified in the agreement and that plant or animal is lost as the result of events in the control of the sponsor, including sponsor inaction, it may result in a non-compliance issue even if a habitat function remains. The sponsor is expected to act with due diligence as steward of the property in question.</p> <p>If no plant or animal is specified in the grant agreement, loss of a specific species does not constitute a non-compliance issue as long as the site continues to support properly functioning habitat conditions.</p>

² Post-completion compliance is generally not an issue for projects in which IAC/SRFB has provided funds for planning, maintenance, operation, education, and enforcement activities.

Summary Guidance for Identifying Compliance Status



3. Definitions.

Non-compliance. A project status that results when one or more elements of a completed project is found to be inconsistent with one or more elements of a project agreement. Non-compliance does not necessarily result in conversion.

Conversion. A project status that results when use or function of recreation or habitat land or facilities paid for by IAC/SRFB changes to uses or functions other than those for which assistance was originally approved.

Obsolescence. IAC/SRFB limits the application of "obsolescence" to built structures and facilities.

"Obsolescence" is when one or more of the following applies:

- an IAC/SRFB funded structure or facility has become outmoded due to change in generally accepted professional design and construction practices that now renders the structure or facility out-of-date;
- significant and documented changes in prevailing outdoor recreation participation in the sponsor's jurisdiction over a period of not less than five (5) years;
- a structure reaches the end of its anticipated or agreed upon service life;
- or, in the instance of a structure placed or built for habitat purposes, to habitat changes beyond the control of the sponsor.

Perpetuity. Perpetual, seemingly ceaseless³, or the condition of an estate that is limited so as to be inalienable either perpetually or longer than the period determined by law⁴.

Remediation. Actions taken by a project sponsor to restore or replace changed elements, or to correct conversions. Return of grant funds is currently allowed only in the Firearms and Archery Range Recreation (FARR) program.

Replacement. Structure or property interest of equivalent size, function, and value to any structure or property lost to conversion.

³ Princeton University WordNet Internet site <http://wordnet.princeton.edu>

⁴ Webster's II New Riverside University Dictionary

<p>4. Policy Implementation: Compliance Inspections</p>	<p>IAC/SRFB staff is responsible for implementation of the compliance policy. IAC/SRFB has a policy to inspect completed projects to compare actual conditions to the terms and conditions of the project agreement. An inspection may be done at any time during the life of the signed grant documents. Inspection will result in a determination of compliance, non-compliance, or conversion.</p> <p>Sponsors are encouraged to regularly inspect their projects and to advise IAC/SRFB if potential compliance issues exist.</p>
<p>5. Non-compliance: Element Change</p>	<p>Non-compliance is when at least one element of a completed project does not meet the terms and conditions of the agreement. Element changes may be minor or major. In most cases, remediation will be required.</p> <ul style="list-style-type: none"> • Minor element changes are those that do not conform to the project agreement but with no negative effect on the recreational opportunity or habitat function for which the project was originally funded. <p>A project amendment will be required to account for the change, and <u>may</u> be subject to review by IAC/SRFB's Director or governing Board.</p> <ul style="list-style-type: none"> • Major element changes are those that do not conform to the project agreement and negatively affect, but do not eliminate, the recreational opportunity or habitat function for which the project was originally funded. <p>IAC/SRFB staff will work with the sponsor to find remedies for major element changes. A project amendment will be required to account for the change, and <u>will</u> be subject to review by IAC/SRFB's Director or governing Board.</p>
<p>5a. Examples of Element Changes</p>	<p><i>Recreation minor element change:</i> IAC helps fund a trailhead. The original agreement calls for 15 vehicle parking stalls. Actual construction results in 12 stalls. The results do not conform to the project agreement but do not have a negative affect on the recreational experience.</p> <p><i>Recreation major element change:</i> A sponsor intends to pave a 5-mile trail. Inspection reveals that 3 miles have been</p>

	<p>paved, and 2 miles have been surfaced with crushed rock.</p> <p><i>Habitat minor element change:</i> SRFB funds the removal of 5500 feet of levee in order to expose 50 acres of floodplain to natural channel migration. 5200 feet of levee are removed, but the target of 50 acres is achieved.</p> <p><i>Habitat major element change:</i> SRFB funds a project to improve riparian conditions by fencing out cattle and planting trees and shrubs. The final project results in fencing and shrub planting, but no trees. Lack of "trees" as a project element results in poor shading and therefore water temperature goals are compromised, but fish are not lost.</p>
<p>5b. Element Change: Exceptions</p>	<p>Under certain circumstances, an element change beyond the control of the sponsor may be deleted from a project agreement without a need for remediation. The conditions are:</p> <ol style="list-style-type: none"> 1. Obsolescence, defined above. 2. Extraordinary vandalism that renders the element useless or dangerous. 3. Acts of nature including but not limited to floods, earthquake, volcanic eruption, forest fire, and adverse weather. 4. Fire, whether criminal arson or accidental. 5. Permit requirements that disallow specified elements. 6. Interstate Commerce Commission National Trails System Act reversion order (National Trails System Act 8(d), 16 U.S.C. § 1247(d); WAC 286-27-060(2)).
<p>5c. Review for Approval or Remediation of an Element Change</p>	<p>As soon as the sponsor or IAC/SRFB staff identifies a non-compliance issue or element, steps shall be taken to begin approval for remediation of the issue or element. Usually, remediation will be documented in a revised grant agreement.</p> <p>The sponsor must:</p> <ol style="list-style-type: none"> 1. Arrange for a site visit with IAC/SRFB staff. 2. After initial contact and the site visit, prepare documentation to accompany a written request for IAC/SRFB approval of the project replacement or project change. Staff

	<p>will work with the sponsor to determine the kind and amount of documentation necessary to support a revised grant agreement.</p> <p>Documentation</p> <p>The sponsor may be required to provide the following, in writing:</p> <ol style="list-style-type: none"> 1. A description of the element change. 2. Justification for the element change, including evidence that all practical alternatives to the element change have been evaluated on a sound basis. 3. A list and discussion of alternatives for replacement or remediation of the element change. 4. If a major element change has taken place, evidence that the public has been given a reasonable opportunity to participate in development of the request. 5. Additional documents that help explain the element change such as maps, plans, graphics, and/or photographs.
<p>6. Non-compliance: Conversion</p>	<p>A conversion would be determined when one or more of the following has taken place, whether affecting an entire site or any portion of a site funded by IAC/SRFB:</p> <ul style="list-style-type: none"> • Property interests are conveyed for non-public outdoor recreation, habitat conservation, or salmon recovery uses. • Property interests are conveyed to a third party not otherwise eligible to receive grants in the program from which funding was derived.⁵ • Non-outdoor recreation, habitat conservation, or salmon recovery uses (public or private) are made in a manner that impairs the originally intended purposes of the project area. • Non-eligible indoor facilities are developed within the project area. • Public use of the property or a portion of the property acquired or developed/restored with IAC/SRFB assistance is terminated, unless public use was not

⁵ An exception is allowed under SRFB rules: property acquired for salmon recovery purposes may be transferred to federal agencies, provided the property retains adequate habitat protections, and with written approval.

	<p>allowed under the original grant.</p> <ul style="list-style-type: none"> • If a habitat-project, the property or a portion of the property acquired, restored, or enhanced no longer provides the environmental functions for which IAC/SRFB funds were originally approved. <p>Note: prior approval of temporary closure of public access sites will not result in a conversion if the sponsor demonstrates that the closure will last 180 days or less.</p>
<p>6a. Review for Approval or Remediation of a Conversion</p>	<p>As soon as the sponsor and/or the Office determine that a project change may constitute a conversion, the sponsor must begin resolution of the conversion. The steps to take are listed below.</p> <ol style="list-style-type: none"> 1. Arrange for a site visit with the grant manager. 2. After initial contact and the site visit, prepare documentation to accompany a written request for IAC/SRFB approval of the project replacement or project change. The request, including a cover letter to the director, must contain a description of the original project, a description of the proposed change or conversion, and the proposed remediation. 3. If the conversion is referred to IAC/SRFB, the sponsor must be prepared to attend the IAC/SRFB meeting at which the proposed conversion will be presented and decided. <p>Documentation</p> <p>The sponsor must provide the following in writing:</p> <ol style="list-style-type: none"> 1. A description of the original project proposal funded by IAC/SRFB. 2. A description of the proposed conversion. 3. A list and discussion of all alternatives for replacement or remediation of the conversion, including avoidance. All practical alternatives to the conversion must be evaluated on a sound basis. 4. Evidence that the public has been given a reasonable opportunity to participate in the identification, development, and evaluation of alternatives. The minimum requirement is publication of notice and a 30-day public comment period.

	<p>5. Justification that supports the replacement site as reasonably equivalent recreation or habitat utility and location.</p> <p>The fair market value of any interest in converted real property must be established and the interest proposed for substitution must be of at least equal current fair market value. The fair market value must be established by appraisal as provided in Manual #3.</p> <p>Property improvements will be excluded from all fair market value consideration for interest in real property to be substituted. Exceptions may be considered only in those cases where interest in real property proposed for substitution contains improvements that directly enhance its outdoor recreation or habitat conservation utility.</p> <p>6. Additional documents for specific types of projects:</p> <p><i>Acquisition:</i> copies of any appraisal or appraisal review of the proposed conversion.</p> <p><i>Development or restoration of structures of facilities:</i> a site plan that clearly indicates the development/restoration proposed for conversion.</p> <p><i>For all projects:</i> submit maps, plans, graphics, a completed State Environmental Protection Act (SEPA) check list, archeological or cultural resource reviews, and other documents as requested by the Office.</p>
<p>6b. Conversions: exceptions</p>	<p>Generally, exceptions to conversions are the same as exceptions to element changes. See 5b, above.</p>
<p>6c. Conversions of Land and Water Conservation Fund (LWCF) Projects</p>	<p>In addition to compliance with the rules found above, sponsors of facilities acquired, developed, or restored with federal LWCF assistance must provide:</p> <ol style="list-style-type: none"> 1. A National Park Service Project Description / Environmental Screening Form (PD/ESF), an environmental assessment (EA), environmental impact statement (EIS), or other documentation. 2. Evidence of an appropriate intergovernmental review process. If the proposed conversion and substitution are significant, this includes a notice of intent that contains:

	<ul style="list-style-type: none"> • A detailed description of the proposal • An address where comments may be forwarded, and • The deadline for comment. <p>At least 30 days before the end of the comment period, the notice must be mailed to the State Historic Preservation Officer (SHPO) and all affected state, area, regional agencies, and Tribal Historic Preservation Offices (THPOs).</p> <p>3. Copies of all comments, even if "no comment" is indicated.</p> <p>Director or IAC/SRFB approval of conversions under LWCF is interim, pending final approval from the National Park Service.</p>
<p>7. Review by the Director</p>	<p>Once all documents are received, staff will determine whether the proposal requires approval by the Director or by the IAC/SRFB using the following guidelines.</p> <p>1. The Director may review the following conversion replacement requests:</p> <p>Those in which conversion of use impacts less than 20 (twenty) percent of the original project scope AND the dollar value of the conversion is \$75,000 or less in today's dollars.</p> <p>The Director may choose one of three courses of action: approval of the request, denial of the request, or deferral of the decision to the IAC/SRFB.</p> <p>The Director's decision may be appealed to the IAC/SRFB.</p> <p>2. All other requests are sent directly to IAC/SRFB as appropriate.</p>
<p>7a. Appeals of a Director's Decision</p>	<p>An appeal must be in writing, at minimum a letter addressed to the Chair of the funding Board in question. The appeal must include the reason for the appeal, the preferred outcome, and facts supporting the appeal.</p>

<p>8. Review by IAC/SRFB</p>	<p>Both IAC/SRFB meet in open public forums according to pre-published schedules. Review of a replacement/remediation proposal will be subject to a timetable based on the meeting schedule.</p> <p>A sponsor's request for IAC/SRFB review must be received at least six weeks prior to a scheduled meeting. Sponsors will be notified at least six weeks in advance of the open public IAC/SRFB meeting at which the proposal will be reviewed.</p> <p>IAC/SRFB staff will prepare a memorandum explaining the conversion and the proposed replacement/remediation. IAC/SRFB will review the request in an open public meeting. Upon examination of the available documentation, IAC/SRFB may approve or deny the request.</p> <p>If a project has been funded in part or whole through federal funds, the IAC/SRFB decision may be forwarded to the appropriate federal agency for further review. Federal law and regulations will apply.</p>
<p>9. Implementing IAC/SRFB approval</p>	<p>If approval is granted by the Director, or by the IAC/SRFB, staff will amend the appropriate project agreement(s) to reflect the change.</p>
<p>10. Unresolved Non-Compliance or Conversion Issues</p>	<p>Effective July 1, 2009, the Director may recommend to IAC/SRFB that a sponsor with unresolved non-compliance or conversion projects be identified as a "high-risk" sponsor.</p> <p>A "high-risk" sponsor is one that meets either of these tests:</p> <ul style="list-style-type: none"> has one or more unresolved conversions of which the combined IAC/SRFB dollar total exceeds \$1 million or 25% of all IAC/SRFB funds received by that sponsor, whichever dollar amount is less (NOT including local match or contribution) and has no record of substantial progress toward resolving the conversion <li style="text-align: center;">OR has a conversion of <i>any size or amount</i> that has been unresolved for two (2) or more years and has no record of substantial progress toward resolving the

conversion.

The IAC/SRFB will consider the recommendation in an open public meeting. If the IAC/SRFB agrees to identify a sponsor as "high-risk," the following policies will apply:

1. The Director will notify a sponsor in writing that it has been identified as "high risk." Notification will include specific project references and suggestions for remediation.
2. The "high risk" sponsor may still apply and compete for additional grants for one grant round or calendar year (whichever is longer).
3. If the sponsor's new application is successful, the sponsor will be given a 90-day time period following the IAC/SRFB funding meeting to demonstrate substantial, if not complete, progress toward resolving any outstanding conversions. *Substantial progress* is indicated when a sponsor has taken steps such as identified potential replacement property, has convened a task force or other assigned staff, can demonstrate some kind of public involvement process, has ordered an appraisal or appraisal review, and other relevant actions.
4. If the sponsor has not demonstrated substantial progress or has not resolved outstanding conversions in that 90-day period, the new grant will be withdrawn and assigned to the next eligible project in the same grant program and category.
5. After the 90-day period, the "high risk" sponsor may not submit further applications until all outstanding conversions are resolved.