

UNITED STATES DEPARTMENT OF AGRICULTURE

Farm Service Agency
Washington, DC 20250

Environmental Risk Management
2-EQ

Amendment 2

Approved by: Deputy Administrator, Farm Programs



Amendment Transmittal

A Reason for Issuance

Subparagraph 11 A has been amended to clarify the type of tanks that are **not** subject to regulation and update web site references.

Paragraph 13 has been amended to provide clarified guidance regarding lender due diligence and update web site references.

Subparagraph 51 A has been amended to clarify the applicability of HUD, Title X Lead Based Paint (LBP) regulations.

Subparagraph 51 B has been amended to clarify references to LBP regulations and related exemptions.

Subparagraph 52 A has been amended to clarify guidance for the sale or lease of FSA-owned property containing target housing, provide for related documentation of actions, and record retention.

Subparagraph 52 B has been amended to include reference to exemptions.

Subparagraph 52 D has been amended to clarify what constitutes project-based assistance and owner or borrower responsibilities for proving LBP documentation to FSA.

Subparagraph 52 E has been amended to provide a complete list of all LBP exemptions.

Subparagraph 52 F has been amended to update LBP resource contact information.

Exhibit 11 has been added to provide the HUD Disclosure Form for Target Housing Sales.

Exhibit 12 has been added to provide the HUD Disclosure Form for Target Housing Rentals and Leases.

Amendment Transmittal (Continued)

Page Control Chart		
TC	Text	Exhibit
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11 Statutory and Regulatory Requirement (Continued)

A CERCLA/RCRA Lender Liability Exemptions (Continued)

In 2005, Congress enacted USTCA that made significant changes to the RCRA, UST Title. USTCA significantly strengthened the inspection and enforcement authorities of EPA and States. In addition to new inspection, training, and reporting requirements, USTCA greatly expanded the waiver of sovereign immunity of the U.S. with respect to Federal, State, and local UST requirements. The RCRA lender liability exemption excludes lenders that do not participate in managing UST from being considered an “owner” or “operator” and; therefore, the lender will not be subject to the UST requirements. The purchaser of the inventory property with a UST will; however, be required to meet the UST requirements.

***--Note:** Tanks that do **not** fall within RCRA’s definition of UST are unregulated and **not** subject to RCRA requirements. Exemptions according to CFR Part 280.12 include:

- farm and residential tanks of 1,100 gallons or less capacity for storing motor fuel for noncommercial purposes
- UST’s of any size used for storing heating oil for consumptive use on the premises where stored
- other types of tank systems listed in 40 CFR Part 280.12, such as septic tanks; pipeline facilities; and surface impoundment, pit, pond, lagoons, or storm water retention facilities.

FSA should address non-RCRA regulated tanks just as it would any other environmental condition, and in consultation with SEC:

- take discretionary corrective actions, when appropriate, to protect public health, the environment, and FSA’s security interest in the property
- for the sale of inventory properties, disclose known conditions, seek an indemnification from the purchaser, and otherwise act to facilitate resale of the inventory property.--*

B Other CERCLA Liability Exemptions

In 2002, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Amendments) that created and clarified new landowner liability exemptions for “innocent landowners”, “bona fide prospective purchasers”, and “contiguous property owners”. It is not necessary to comply with EPA’s AAI Rule [40 CFR Part 312] for the lender to maintain the lender liability exemptions. However, conducting environmental due diligence is important for FSA to determine the best course of action to maintain the lender liability exemptions. In addition, potential purchasers of inventory properties likely will want to comply with EPA’s AAI Rule to qualify for the liability exemptions. Therefore, conducting due diligence likely will enhance the marketability of FSA inventory property.

11 Statutory and Regulatory Requirement (Continued)

B Other CERCLA Liability Exemptions (Continued)

The EPA's Lender Liability factsheet can be found at <http://www.epa.gov/oecaerth/resources/publications/cleanup/superfund/factsheet/lender-liab-07-fs.pdf>.

EPA's All Appropriate Inquiries Regulation:

- general information is available at <http://www.epa.gov/brownfields/regneg.htm>
- factsheet is available at http://www.epa.gov/brownfields/aai/aai_final_factsheet.pdf.

*--The EPA's Lender Liability factsheet can be found at http://www.epa.gov/swerosps/bf/aai/lenders_factsheet.pdf.

EPA's All Appropriate Inquiries Regulation:

- general information is available at <http://www.epa.gov/brownfields/aai/aaicerclafs.pdf>
- factsheet is available at <http://www.epa.gov/brownfields/aai/aaifs.pdf>.*

C Purpose

This section establishes and incorporates an environmental risk management policy for FSA lending practices in addition to land management practices for inventory properties. A major component of this risk management policy will be the performance of due diligence. Due diligence is the process of evaluating real estate, in the context of a real estate transaction, for the presence of contamination from the release of hazardous waste, petroleum products, or other environmental hazards, and determining the effect, if any, the contamination has on the regulatory status or security value of the property. Due diligence will:

- minimize adverse impacts to FSA's security interests in real property caused by potential contamination from hazardous substances, hazardous waste, and petroleum products
- establish a process that minimizes FSA's liability according to the laws regulating management of hazardous substances, hazardous waste, and petroleum products
- include FSA's policies and procedures for managing hazardous substances, hazardous waste, and petroleum products and implement requirements of the following environmental laws:
 - CERCLA [42 U.S.C. 9601 et seq]
 - RCRA [42 U.S.C. 6901 et seq]
 - TSCA [15 U.S.C. 2601 et seq]

11 Statutory and Regulatory Requirement (Continued)

C Purpose (Continued)

- help to reduce future losses from a reduction in market value and ensure compliance with applicable Federal, State, and local laws about the management of hazardous substances, hazardous waste, and petroleum products
- guide response or corrective actions when hazardous substances, hazardous waste, or petroleum products are present according to the changes to CERCLA and RCRA.

Note: Even though this section provides guidance on certain exceptions allowed according to CERCLA and RCRA to undertaking response or corrective actions on properties FSA disposes of, the full requirements of CERCLA and RCRA may be triggered if FSA does not act within the boundaries of the secured creditor/lender liability exemption.

13 Due Diligence Process

A Overview

*--Before perfecting a lien or acquiring an ownership interest in real estate security, FSA loan officials **must** determine if the property being offered is free of environmental hazards having the potential to expose FSA to risk of liability, affect marketability, or security value of the property; therefore, FSA **must** conduct a due diligence review of real property being offered as security.

[7 CFR Parts 1436.17, 764.51(b)(7), 766.112(b)(2), and 771.6] If market value is being determined, due diligence should be completed before the appraisal or simultaneous with the appraisal in those cases where the appraiser completes the site assessment.

There are 2 levels of due diligence reviews, as follows.

- FSA-851 (Exhibit 5) that is completed by FSA is the initial level of review for evaluating the environmental condition of the subject property. Properly and thoroughly completed FSA-851 will assist the loan official in determining if FSA can proceed as proposed, or if there are environmental issues associated with the property that preclude further action, require remediation, or warrant a higher level of review.

Because site screening alone will **not** satisfy EPA's AAI rule [**40 CFR Part 312**], care should be taken to properly conduct the review to identify properties that should be subject to a Phase I and/or II ESA.

When the results of FSA-851 are inconclusive and, in consultation with SEC, it is determined professional review and judgment are needed, the next level of review is a Phase I and/or II ESA.

- Phase I and/or II ESA's that are completed by environmental professionals are professionally prepared scientific studies. The applicant is responsible for the costs and related mediation that may be required to protect FSA's interest.

It is only necessary to complete the level of review required to ascertain and document environmental and economic risks associated with the subject property.

FSA shall conduct a due diligence review for the following real property:

- basic or additional security offered for:
 - FSFL's
 - initial or subsequent direct loans
 - EM's, including EM's **not** requiring an appraisal
 - servicing actions that require the debt be further secured

Note: If any new or additional security is found to be significantly contaminated or contains UST, it will be handled according to subparagraphs B and C.--*

13 Due Diligence Process (Continued)

A Overview (Continued)

- *--security for other servicing actions including:

- substitution of security
- subordinations when real estate subject to a FSA lien will be acquired; for example, as provided by 4-FLP, subparagraph 117 A (1)
- transfer and assumptions
- debt for nature

Note: FSA will complete FSA-851 to document the current condition of the property. If the security property is found to be contaminated, the borrower **must** remediate the property according to a plan approved by the appropriate regulatory agency **before** FSA will approve the requested action.

- security for which FSA may acquire ownership:

- foreclosure properties
- voluntary conveyance of real estate security.

Notes: FSA will complete FSA 851 and, if necessary, obtain further evaluation through a Phase I and/or II ESA to determine the following:

- foreclosure bid amount to take property into inventory
- acceptance of a voluntary conveyance offer
- deductions for potential cleanup of hazardous substances, hazardous waste, or UST's as determined by a Phase II ESA prepared by an environmental professional and included as part of 5-FLP, Exhibits 37 and 60.

Deduction estimates will include **only** items that can reasonable be assumed to be FSA's responsibility. Deduction adjustments can **only** be authorized by SEC. Estimates other than estimates derived by completing a Phase II ESA will **only** be allowed on 5-FLP, Exhibits 37 and 60 when the estimated cost to complete the Phase II ESA, as documented by SEC, exceeds the equity recovery value of the security. Inventory property will be managed and disposed according to subparagraph F.--*

13 Due Diligence Process (Continued)***--B CERCLA Issues**

If, based on FSA 851, FSA determines that the property being offered as security contains possible hazardous substances or petroleum contamination, FSA will notify the applicant that processing toward loan closing **cannot** continue because FSA has determined the proposed security to be unsuitable based on its current condition. Alternatively, the applicant can:

- provide an AAI compliant environmental site assessment completed by a qualified environmental professional showing the property offered for security is **not** contaminated
- if available, offer different suitable property as security for the loan
- provide documentation that the contaminated property being offered as security has been fully remediated according to a plan approved by the appropriate regulatory agency
- subdivide the contaminated property leaving a suitable noncontaminated property to offer as security.--*

Note: Proof **must** be provided that the potential contamination will **not** impact the adjoining property that is being used as security. This can be accomplished by the AAI compliant environmental site assessment provided by the applicant.

Any contamination found by FSA should be reported, in writing, to the applicant with instructions that the applicant may have a reporting requirement depending on applicable State regulatory requirements.

13 Due Diligence Process (Continued)

C * * * UST's

*--If FSA determines that the property being offered as security contains UST's, the applicant will be notified that processing toward loan closing **cannot** continue because FSA has determined the proposed security to be unsuitable based on its current condition.

Alternatively, in the absence of other suitable security, for:

- **regulated** UST's, the applicant shall provide either:
 - evidence that UST complies with all applicable environmental laws and regulations including, but **not** limited to, being registered with the appropriate State regulatory agency with tank installation data showing what type of tank was installed and measures employed to prevent or contain leakage

Note: Evidence may also consist of test results from a qualified environmental professional.

- evidence the tank has been removed, according to State regulations, and **no** contamination exists

Note: Removal and testing **must** be completed by a firm authorized by the State remove tanks with UST's.

- **nonregulated** UST's, as provided by subparagraph 11 A, the applicant shall either:
 - remove or permanently close UST, according to State and local laws and regulations, and provide evidence that no contamination exists

Note: Excavated UST's may **not** be left on the security property.

- provide evidence that the tank is **not** leaking and will **not** leak during the term of the loan.

Notes: Evidence may consist of tank installation data to show what type of tank was installed and measures employed to prevent leakage, or test results from a qualified environmental professional.--*

13 Due Diligence Process (Continued)

C * * * UST's (Continued)

Leaking tanks that affect water resources may be subject to the other Federal and State regulatory requirements; that is, SDWA and CWA.

Example: A single pint of oil released into the water can cover 1 acre of water surface area and can seriously damage an aquatic habitat. A spill of only 1 gallon of oil can contaminate a million gallons of water. In these types of situations the applicant should be **required** to remove or permanently close the tank, according to State and local laws and regulations, and provide evidence that no contamination exists.

States have the primary authority to implement the UST program within their boundaries. State regulations can be more, but no less stringent than the Federal UST Regulations. For the latest information on the status of the UST programs in the States, click on the applicable *--State at <http://www.epa.gov/oust/states/statcon1.htm>. If a State does **not** have primary authority, then the Federal UST regulations at <http://www.epa.gov/swerust1/fedlaws/cfr.htm> apply.--*

D * * * AST's

AST's are tanks or other containers that are above ground, partially buried, bunkered, or in a subterranean vault or basement.

Note: Although most AST's and heating oil tanks, that are considered farm use, are generally exempt from Federal regulations, there are fire codes and environmental regulatory requirements that vary from State to State. When assessing potential liabilities from these types of tanks use common sense and check State and local regulatory requirements.

If these types of tanks are leaking and are not following State and local BMP's, extra care should be taken to assess potential liability.

At the Federal level, EPA requires nontransportation-related facilities with a total above-ground oil storage capacity of greater than 1,320 gallons to meet SPCC requirements. Both petroleum and nonpetroleum oils; for example, vegetable oil, are regulated according to SPCC. SPCC and other Federal requirements about spill response and spill reporting can be *--found at <http://www.epa.gov/emergencies/content/spcc/index.htm>.

Any contamination found by FSA will be reported to the applicant, in writing, with instructions that reporting requirements may be necessary, depending on State regulatory requirements. The:

- AST factsheet is available at <http://www.epa.gov/oust/cmplastc/asts.htm>
- heating oil tank factsheet is available at <http://www.epa.gov/oust/faqs/heatoil.htm>.--*

13 Due Diligence Process (Continued)

E Guaranteed Loans

Guaranteed lenders are required to perform due diligence in conjunction with a request for a loan guarantee involving real estate as security. For loan guarantee requests, FSA will accept 1 of the following processes as documentation that due diligence has been completed:

- ASTM transaction screen questionnaire available from 100 Barr Harbor Drive, West Conshohocken, PA, 19428-2959
- similar environmental risk checklist that has been certified by the lender as AAI compliant or approved for use by FSA and supplemented, as necessary, by the ASTM Phase I environmental site assessment form.

After 1 of these has been completed, the potential environmental risks are noted by the lender, FSA may assist the lender in determining the best methods of ensuring that appropriate actions are taken so that adequate security is obtained for the loan request.

When processing loss claims for loan guarantees involving real estate security potentially affected by environmental risks, FSA will take into account the timing and quality of the due diligence completed by the lender in determining whether to pay a loss claim.

* * *

13 Due Diligence Process (Continued)**F Managing and Disposing of Inventory Property**

To take advantage of the secured creditor exemption, FSA must seek to sell or otherwise divest itself of acquired property at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements. FSA's statutory and regulatory requirements; for example, targeting sale of inventory property to beginning or SDA farmers or ranchers priority periods for inventory properties, may extend the reasonable time allowed according to the CERCLA lender liability provisions. The determination of whether the secured creditor exemption is available must be based on a review of the facts involved in each case. Consult SEC in cases where there is a question as to whether the lender liability exemption continues to apply. The OGC Pollution Control Team, through CEPD, should be consulted before making any covenants, excluding LBP covenants, in a deed for the transfer of inventory property.

Under normal circumstances, where the secured creditor exemption is available, FSA will not conduct cleanups or remediation of hazardous waste, hazardous substances, or petroleum contamination on inventory properties before, or as a condition of, a sale except where:

- FSA actively participated in managing the property before its acquisition, i.e., the CERCLA and RCRA UST lender liability exemptions do **not** apply
- the property has been held in inventory and no diligent efforts have been made by FSA to dispose of the property at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

Notes: There is no set maximum time period and the determination of whether the reasonable time period has elapsed and, therefore, the lender liability exemption has been lost, will be made on a case-by-case basis.

Consult SEC in cases where there is a question as to whether the lender liability exemption continues to apply.

FSA will not consider the reasonable time period to begin until clear title is obtained to the property. Also, FSA will take no corrective or remedial action on property under lease with an option to purchase. The reasonable time period begins for a leased property when it becomes available for sale (lease expires or option to purchase was not exercised) and all appeals or litigations are concluded.

13 Due Diligence Process (Continued)

F Managing and Disposing of Inventory Property (Continued)

- contamination is of such an extent or nature that it is of immediate concern to the health and safety of neighboring property owners or to the potential purchasers of the property

Note: The CERCLA lender liability exemption specifically provides that the lender does not lose the lender liability exemption when the lender conducts a response action that is not inconsistent with NCP [40 CFR Part 300]. Consult SEC to ensure that any cleanup conducted is not inconsistent with NCP.

- the property is being sold to a beginning or SDA farmer or rancher and FSA is providing credit assistance through direct, participation, or guaranteed loan programs

Notes: The sales price of the property shall reflect the value as if the property does not contain any contamination.

Because contamination issues can adversely affect the ability of beginning or SDA farmers and ranchers to be successful, severely contaminated inventory properties generally should **not** be considered for beginning or SDA farmers and ranchers.

A Phase I and/or II ESA will be required if UST on the inventory property has not been upgraded or replaced to meet the requirements of 40 CFR Part 280.20 for new UST systems, 40 CFR Part 280.21 for upgraded systems, or if no external release detection method is in operation.

Under normal circumstances, FSA will **not** conduct removal or corrective actions for UST's unless 1 of the following occurs:

- FSA actively participated in managing the property before its acquisition

Note: The CERCLA and RCRA UST lender liability exemptions do **not** apply.

13 Due Diligence Process (Continued)**F Managing and Disposing of Inventory Property (Continued)**

- the property has been held in inventory and no diligent efforts have been made by FSA to dispose of the property at the earliest, practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements

Notes: There is no set maximum time period and the determination of whether the reasonable time period has elapsed and, therefore, the lender liability exemption has been lost, will be made on a case-by-case basis.

Consult SEC in cases where there is a question as to whether the lender liability exemption continues to apply.

FSA will not consider the reasonable time period to begin until clear title is obtained to the property. Also, FSA will take no corrective/remedial action on property under lease with an option to purchase. The reasonable time period begins for these leased properties when they become available for sale and the lease expires or option was **not** exercised.

- any known leakage presents an immediate concern to the health and safety of neighboring property owners or to the potential purchasers of the property

Example: LUST may be contaminating groundwater that is used for human consumption.

Note: Conducting a corrective action for LUST does **not** mean that FSA will lose the lender liability exemption. It may be appropriate to address the immediate concern to human health by providing an alternative source of drinking water to the affected residences. FSA may then be able to find a willing purchaser who can deal with the potential cleanup of the groundwater contamination plume. Where possible, due diligence before foreclosure may be able to identify properties with serious contamination issues and FSA may be able to avoid foreclosing on such properties or portions thereof.

13 Due Diligence Process (Continued)

F Managing and Disposing of Inventory Property (Continued)

- the property is being sold to a beginning or SDA farmer or rancher and FSA is providing credit assistance through direct, participation, or guaranteed loan program.

Notes: The sales price of the property will be the as improved value, determined by an appraisal.

Because contamination issues can adversely affect the ability of beginning or SDA farmers and ranchers to be successful, contaminated inventory properties generally should not be considered for beginning or SDA farmers and ranchers. If FSA determines that it will conduct a corrective action at UST, FSA will take such corrective action by contracting with an environmental professional according to applicable Federal, State, and local laws and regulations.

EPA considers regulated UST's to be in use and in operation if petroleum is added to, dispensed from, or stored in UST. Therefore, FSA should **not** continue to use, store, dispense, or fill petroleum in a UST or UST systems after obtaining marketable title and access to UST or UST system. Affirmative actions such as tank emptying, capping, and securing lines, permanent or temporary closure, and release reporting are not considered participation in management and will not incur RCRA UST liability [40 CFR 280.210(b)(2)(B)]. For property under a Homestead Protection lease, SEC should be consulted for guidance in how to deal with using UST's during the term of the lease.

Note: This would not apply to an unregulated UST that provides heating oil to the house in which the Homestead Protection tenant resides as long as the tank is not leaking, was installed, and is functioning in compliance with all State and local regulations.

13 Due Diligence Process (Continued)**F Managing and Disposing of Inventory Property (Continued)**

Performing due diligence is no guarantee that existing UST's will be found. The property acquired by FSA may contain UST's which are not detectable, difficult to identify, or not registered with the State. If a tank is not discovered until after the property is sold, FSA may still take appropriate corrective action, if necessary, according to this section.

Property may be acquired by FSA that has been or is used for the production of oil or gas. Generally, petroleum contamination from oil and gas production activities is not covered by CERCLA or RCRA and FSA will not be responsible for conducting corrective actions concerning such oil or gas production activities. However, environmental contamination from oil and gas activities can adversely affect the value and use of real property and should be looked at in the course of due diligence. Also, releasing hazardous substances or disposing of hazardous waste from oil and gas production activities may trigger CERCLA, RCRA, and State hazardous substance laws. Other environmental laws that require reporting and/or corrective actions may be activated by spills and releases from oil and gas activities.

SEC should consult with the OGC Pollution Control Team, through CEPD, and the appropriate environmental regulatory authority to determine if Federal or State laws or regulations require corrective action. When the property is being sold back to the debtor who is a PRP according to CERCLA, FSA will not undertake response or corrective actions. In addition, although CERCLA, Section 120(h)(3)(A)(i) requires that FSA provide notice of the hazardous substance contamination in the deed, CERCLA, Section 120(h)(3)(B) provides that FSA is not required to provide CERCLA, Section 120(h)(3)(A)(ii) "no further cleanup action required" and "comeback" covenants when transferring property to PRP. The deed should refer to FSA-851 and ESA's as providing the notice required by CERCLA, Section 120(h)(3)(A)(i). **This documentation will be retained in a permanent file by SEC in the State Office.**

AST's and heating oil tanks are not regulated according to RCRA, Subchapter IX, but may also be regulated by State laws and regulations.

The appropriate environmental regulatory authority should be consulted to determine whether corrective action is necessary or if the State has statutory or regulatory exclusions for lenders who make loans to borrowers who own or operate AST's or heating oil tanks.

14-20 (Reserved)

51 LBP Background

A Overview

Regulations published by HUD implement the Residential Lead-Based Paint Hazard Reduction Act of 1992, Sections 1012 and 1013, Title X of the Housing and Community Development Act of 1992. Sections 1012 and 1013, Title X amended the Lead-Based Paint Lead-Based Paint Poisoning Prevention Act of 1971, the basic law covering LBP in Federally-associated housing. See:

- 24 CFR Part 35 for HUD regulations
- 40 CFR Part 745.227 for reference procedures in EPA regulations.

HUD, Title X LBP regulation:

- provides specific requirements for selling or leasing Federally-owned residential property and purchasing, repairing, or rehabilitating property receiving Federal assistance
- *--applies to and requires specific actions of FSA with respect to the disposition and management of certain types of inventory or voluntarily acquired property with residences meeting the definition of “target housing”, as follows: (see subparagraphs 52 A through C)

Target housing is any housing constructed before 1978, **except** housing for the elderly or persons with disabilities, **unless** any child who is less than 6 years of age resides in, or is expected to reside in, such housing, or any zero-bedroom dwelling. [24 CFR Part 35.86]

- applies to and **requires** specific actions of owners and borrowers receiving various forms of Federal assistance for certain types of actions, including FLP loan assistance, of more than \$5000 annually in project-based assistance (subparagraph 52 D).

For loan guarantees, the responsibility for ensuring compliance with the HUD LBP regulation, and any applicable State regulations, resides with the guaranteed lender. See <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=ecrc&topic=eer-lb>.

B Purpose

This paragraph and paragraph 52 provide guidance on specific LBP information disclosure and abatement requirements for which FSA or owners and borrowers are respectively responsible when FSA owns the property with nonexempt target housing or is providing more than \$5000 of annual project-based loan assistance for properties containing nonexempt target housing.

Note: Exemptions as provided by 24 CFR Part 35.82 and 35.115 are found in subparagraph E.--*

52 LBP Responsibilities**A Disclosure Requirements Applicable to the Sale or Lease of FSA-Owned Target Housing [24 CFR Part 35, Subpart A]**

The following activities shall be completed before the purchaser or lessee is obligated under any sales contract or lease agreement to purchase or lease target housing unless the transaction is exempt from the requirements according to 24 CFR Part 35.82.

Note: 24 CFR Part 35.82 exemptions from Subpart A disclosure regulations include the following:

- selling target housing at foreclosure
- leasing target housing found to be free of LBP by an inspector certified according to the Federal certification program or a Federally accredited State or Tribal certification program
- short-term leasing of 100 days or less, where no lease renewal or extension may occur
- renewing existing leases in target housing when the lessor has previously made the necessary disclosure and no new information has come into the possession of the lessor.

Target housing is any housing constructed before 1978, except housing for the elderly or persons with disabilities, unless any child who is less than 6 years of age resides in, or is expected to reside in, such housing, or any zero-bedroom dwelling. [24 CFR Part 35.86]

A zero-bedroom dwelling is any residential dwelling in which the living area is not separated from the sleeping area, which includes the following [24 CFR Part 35.86]:

- efficiencies
- studio apartments
- dormitory housing
- military barracks
- rentals of individual rooms in residential dwellings.

52 LBP Responsibilities (Continued)

A Disclosure Requirements Applicable to the Sale or Lease of FSA-Owned Target Housing [24 CFR Part 35, Subpart A] (Continued)

*--When selling or leasing FSA-owned, nonexempt target housing, complete HUD Disclosure Form for Target Housing Sales (Exhibit 11) or HUD Disclosure Form for Target Housing Rentals and Leases (Exhibit 12), as appropriate, to document disclosure of the following as provided in 24 CFR Part 35.88:

- purchaser or lessee has been provided an EPA-approved lead hazard information--* pamphlet such as, “Protect Your Family From Lead in Your Home”, available for download at http://www.fsa.usda.gov/Internet/FSA_File/pfflinyhbrochure.pdf, or an equivalent pamphlet that has been approved for use in the individual State by EPA [24 CFR Part 35.88(a)(1)]
- *--presence of any known LBP and/or LBP hazards in the target housing being sold or leased has been disclosed to the purchaser or lessee and any agents--* [24 CFR Part 35.88(a)(2),(3)]

Note: FSA shall disclose any additional information available about the known LBP and/or LBP hazards, such as the basis for the determination that LBP and/or LBP hazards exist, the location of LBP and/or LBP hazards, and condition of the painted surfaces.

- *--purchaser or lessee has been provided any records or reports available to FSA about--* LBP and/or LBP hazards in the target housing being sold or leased.

Note: This requirement includes records and reports about:

- common areas
- other residential dwellings in multi-family target housing, provided that the information is part of an evaluation or reduction of LBP and/or LBP hazards in the target housing as a whole.

If any of the disclosure activities identified in this subparagraph occur after an offer to purchase or lease the housing is made, FSA shall:

- complete the required disclosure activities before accepting the prospective purchaser’s or lessee’s offer
- allow the prospective purchaser an opportunity to review the information and possibly amend the offer.

52 LBP Responsibilities (Continued)

A Disclosure Requirements Applicable to the Sale or Lease of FSA-Owned Target Housing (24 CFR Part 35, Subpart A) (Continued)

Before a purchaser is obligated under any contract to purchase target housing, FSA shall permit the purchaser a 10 calendar day period, unless the parties mutually agree, in writing, to a different period of time, to conduct a risk assessment or inspection for the presence of LBP and/or LBP hazards. The purchaser may waive the opportunity to conduct a risk assessment or inspection by so indicating in writing. [24 CFR Part 35.90] Include language in Exhibit 10 as an addendum to the sales contract.

Note: A LBP inspection completed by a home buyer would be in addition to any LBP inspection that FSA may have completed.

*--Contracts for the **sale** of FSA-owned target housing shall include a completed HUD Disclosure Form for Target Housing Sales (Exhibit 11) **and** the following elements as provided by 24 CFR Part 35.92(a).--*

- A lead warning statement with the following language.

“Every purchaser of any interest in residential real property on which a residential dwelling was built before 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller’s possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.”

- A statement disclosing the presence of known LBP and/or LBP hazards in the target housing being sold or indicating no knowledge of the presence of LBP and/or LBP hazards.

Note: FSA shall also provide any additional information available about the known LBP and/or LBP hazards, such as the basis for the determination that LBP and/or LBP hazards exist, the location of the LBP and/or LBP hazards, and the condition of the painted surfaces.

52 LBP Responsibilities (Continued)

A Disclosure Requirements Applicable to the Sale or Lease of FSA-Owned Target Housing (24 CFR Part 35, Subpart A) (Continued)

- A list of any records or reports available to FSA about LBP and/or LBP hazards in the housing that have been provided to the purchaser.

Note: FSA shall so indicate if no such records or reports are available.

- A statement by the purchaser affirming receiving the LBP information and the lead hazard information pamphlet.
- A statement by the purchaser that the opportunity to conduct the risk assessment or inspection required by 24 CFR Part 35.90(a) was received or the opportunity was waived.

Note: If agents are used to represent FSA in sales of target housing, there are disclosure requirements applicable to agents according to 24 CFR Part 35.94, and additional language about agents would be required to be included in the sales contract according to 24 CFR Part 35.92(a)(6).

- The signatures of the sellers, agents, and purchasers, certifying the accuracy of their statements to the best of their knowledge, along with the dates of their signatures.

***--Lease** agreements for FSA-owned property containing nonexempt target housing shall include a completed HUD Disclosure Form for Target Housing Rentals and Leases (Exhibit 12) **and** the following elements as provided by 24 CFR Part 35.92(b).--*

- A lead warning statement with the following language.

“Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of LBP and/or LBP hazards in the dwelling. Lessees must also receive a Federally approved pamphlet on lead poisoning prevention.”

- A statement disclosing the presence of known LBP and/or LBP hazards in the target housing being leased or indicating no knowledge of the presence of LBP and/or LBP hazards.

Note: FSA shall disclose any additional information available about the known LBP and/or LBP hazards, such as the basis for the determination that LBP and/or LBP hazards exist in the housing, the location of LBP and/or LBP hazards, and the condition of the painted surfaces.

52 LBP Responsibilities (Continued)

A Disclosure Requirements Applicable to the Sale or Lease of FSA-Owned Target Housing (24 CFR Part 35, Subpart A) (Continued)

- A list of any records or reports available to FSA about LBP and/or LBP hazards in the housing that have been provided to the lessee.

Note: FSA shall so indicate if no such records or reports are available.

- A statement by the lessee affirming receiving the LBP information and the lead hazard information pamphlet.

Note: If an agent was used on behalf of FSA, there are additional disclosure responsibilities of agents according to 24 CFR Part 35.94, and additional language about agents would be required to be included in the sales contract according to 24 CFR Part 35.92(b).

- The signatures of the lessors, agents, and lessees certifying the accuracy of their statements to the best of their knowledge, along with the date of their signatures.

Record Retention. According to 24 CFR Part 35.92(c), **FSA shall retain a copy of the sales contract or lease agreement**, amended according to this section, for no less than 3 years from the completion date of the sale or commencement of the leasing period.

***--Note:** FSA shall **indefinitely** retain copies of sales contract or lease agreement documentation as part of the official record.--*

In the case of any parcel sold with LBP restriction on the deed, all data about this restriction and how it was determined including, but not limited to, tests, photos, etc., must be retained until such time as the restriction is removed from the quit claim deed.

52 LBP Responsibilities (Continued)

B Investigative and Abatement Requirements Applicable to the Sale of Target Housing Owned by the Agency (24 CFR Part 35, Subpart C)

--The following summarizes the LBP-related obligations of FSA relating to the sale of FSA-owned target housing. Requirements differ depending on when the property was-- constructed.

If the property was constructed...	THEN FSA will...
before 1960	<ul style="list-style-type: none"> • have a risk assessment and an LBP inspection of the property performed before the sale closing, and performed no more than 12 months before the beginning of the abatement [24 CFR Part 35.210(a) and (b)] • abate all LBP hazards identified in the risk assessment according to 40 CFR Part 745.227 <p>Note: An abatement shall not be considered complete until a clearance examination has been completed and the clearance levels in 40 CFR 745.227(e)(8) have been achieved [24 CFR Part 35.210(b)].</p> <ul style="list-style-type: none"> • in the case where abatement is not completed before the closing of the sale, FSA will ensure, with the following purchase agreement and deed language, that abatement is carried out by the purchaser before occupancy of the property [24 CFR Part 35.210(b)]: <p style="padding-left: 40px;">“The Grantee is restricted from inhabiting or allowing the occupation of _____ (include a brief description of the dwelling) until any LBP hazards of the said dwelling have been abated according to the requirements of 40 CFR 745.227 and a copy of the abatement report described at 40 CFR 745.227(e)(10) has been provided to the Grantor.”</p> <p>***</p>
in or after 1960 but before 1978	<ul style="list-style-type: none"> • have a risk assessment and a LBP inspection of the property performed before the sale closing [24 CFR Part 35.215] • make available the results of the risk assessment and LBP inspection to prospective purchasers according to disclosure requirements of HUD Title X, Subpart A. [24 CFR Part 35.88]

52 LBP Responsibilities (Continued)**B Investigative and Abatement Requirements Applicable to the Sale of Target Housing Owned by the Agency (24 CFR Part 35, Subpart C) (Continued)**

Indemnification. Include the following indemnification provision in the sales contract and deed.

“[[GRANTEE]] hereby agrees to indemnify, release, defend, and hold harmless the United States, its agencies, employees, agents, assigns, and successors from and against any liability, judgment, claim, penalty, fine, or other adverse action (whether legal or equitable in nature, and including without limitation, court costs and attorneys fees) brought against the United States after the date of this agreement by any person or entity under any Federal, State, or local law, including but not limited to environmental and tort laws, with respect to any lead-based paint associated with the property. This covenant to indemnify, release, defend, and hold harmless the United States shall survive the subsequent conveyance of all or any portion of the property to any person and shall be construed as running with the real property, and may be enforced by the United States in a court of competent jurisdiction.”

C Renovating or Repairing Residential Property Owned by FSA [24 CFR Part 35, Subpart R]

LBP abatement activities may often be assumed by the purchaser of residential property. See subparagraph B. [24 CFR Part 35.210(b)]

52 LBP Responsibilities (Continued)

C Renovating or Repairing Residential Property Owned by FSA [24 CFR Part 35, Subpart R] (Continued)

However, if FSA undertakes renovation or repair of residential property, LBP activities should be performed by certified individuals according to 24 CFR Part 35, Subpart R [24 CFR Part 35.1300-1355] which specifies requirements for LBP inspections, paint testing, risk assessments, lead hazard screens, occupant protection and worksite preparation; safe work practices, abatement, interim controls, clearance, maintenance, and reevaluation activities, and references the LBP activities work standards of 40 CFR Part 745.227.

Notes: As a general matter, FSA should not exercise decision-making control over environmental compliance matters when it holds indicia of ownership to protect a security interest and the borrower is still in possession of encumbered property, lest it risk being considered an “owner” or “operator” and losing the lender liability protection provided according to CERCLA. However, FSA generally can undertake LBP activities to prepare property for sale upon foreclosure if necessary without threat of being considered an “owner” or “operator” according to CERCLA, provided it seeks to sell the property within a reasonable period of time.

CERCLA, Section 101(20)(E) [42 USC 9601(20)(E)] excludes from the definition of “owner” or “operator” lenders who are not participants in managing the facility at issue. Specifically according to CERCLA, Section 101(20)(E)(i) the term “owner” or “operator” does **not** include a person that is a lender that, without participating in managing a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.

[42 U.S.C. 9601(20)(E)(i)] Additionally, according to CERCLA, Section 101(20)(E)(ii) “owner” or “operator” does not include a person that is a lender that did not participate in managing a vessel or facility before foreclosure, notwithstanding that the person:

- forecloses on the facility
- after foreclosure, sells, re-leases, or liquidates the facility, maintains business activities, winds up operations, or undertakes a response action according to CERCLA, Section 107(d)(1)
- takes any other measure to preserve, protect, or prepare the facility before sale or disposition, as long as the person seeks to sell, re-lease, or otherwise divest the person of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

52 LBP Responsibilities (Continued)

D Provision of Project Based Assistance by FSA (24 CFR Part 35, Subpart D)

*--The following actions are **required** of the property owner or borrower when FSA provides loan funds of more than \$5,000 annually, per project, in project-based assistance for the purchase, repair, or rehabilitation of a residential property that is **not** exempt as provided by subparagraph E, and meets the definition of “target housing” [24 CFR Part 35.82]. See--* subparagraph A.

- A notice of evaluation or hazard reductions must be provided to any occupants of the property according to 24 CFR 35.125.
- The owner of the property must provide the lead hazard information pamphlet to any occupants according to 24 CFR 35.130.
- The owner must complete a risk assessment according to 40 CFR 745.227(d), with a schedule established by FSA.
- The owner must conduct interim controls consistent with the findings of the risk assessment report, and must conduct hazard reduction according to 24 CFR Part 35, Subpart R.
- If a child less than 6 years of age, living in a Federally-assisted dwelling unit has an environmental intervention blood lead level, the owner shall immediately conduct a risk assessment according to 40 CFR 745.227(d). Interim controls of identified LBP hazards must be conducted according to 24 CFR 35.1330. Interim controls are complete when clearance is achieved according to 24 CFR 35.1340. FSA must establish a timetable for completing risk assessments and hazard reduction when an environmental intervention blood lead level child is identified.

--Loan closing and provision of funds should ordinarily be made contingent on FSA receiving the following:--

- owner’s signed statement that the requisite notice to occupants has been provided
- a copy of the risk assessment completed by the owner
- either:
 - documentation of completing interim controls and hazard reduction activities
 - in the case of child with an environmental intervention blood lead level residing in the property, a copy of the clearance report according to 24 CFR 35.1340 showing that clearance has been achieved.

52 LBP Responsibilities (Continued)

E Properties Exempt from Parts of the HUD Title X Regulation

*--Exemptions from LBP regulations, as provide by 24 CFR Part 35.82, include the following:

- selling target housing at foreclosure
- leasing target housing found to be free of LBP by an inspector certified according to the Federal certification program or a Federally accredited State or Tribal certification program
- short-term leasing of 100 calendar days or less, where **no** lease renewal or extension may occur
- renewing existing leases in target housing when the lessor has previously made necessary disclosure and **no** new information has come into the possession of the lessor.--*

The following types of property and actions are exempt from HUD Title X, [24 CFR Part 35.115 Subparts B through R]:

- housing built **after** December 31, 1977
- housing exclusively for the elderly or for people with disabilities, unless a child under age 6 is expected to reside there
- zero-bedroom dwellings, including efficiency apartments, single-room occupancy housing, dormitories, or military barracks found to have no LBP
- property where all LBP has been removed
- unoccupied property that will remain vacant until it is demolished and occupancy is restricted in the deed
- nonresidential property
- any rehabilitation or housing improvement that does not disturb a painted surface
- emergency repair actions needed to safeguard against imminent danger to human life, health, or safety, or to protect property from further structural damage
- residences sold or leased according to the Homestead Protection Program.

52 LBP Responsibilities (Continued)**F Requesting Professional Services**

Contact the appropriate Regional EPA to identify companies certified to perform LBP inspections, risk assessments, and abatement in specific States. A listing of lead service providers, lead inspectors, risk assessors, and abatement contractors, renovators trained in lead-safe practices (lead-trained renovators), EPA-recognized lead analysis laboratories, and lead training providers can be found by either of the following:

- *--on the Internet at
<http://www.rst2.edu/ties/LEAD/university/resources/leadsuite/Manuals/11FPblist.pdf>
- by telephone at either of the following:
 - 1-800-424-LEAD (National Lead Clearinghouse)
 - 1-800-LEADFYI (National Lead Information Center).--*

53-65 (Reserved)

Reports, Forms, Abbreviations, and Delegations of Authority

Reports

None

Forms

This table lists all forms referenced in this handbook.

Number	Title	Display Reference	Reference
	HUD Disclosure Form for Target Housing Rentals and Leases	Ex. 12	52
	HUD Disclosure Form for Target Housing Sales	Ex. 11	52
FSA-851	Environmental Risk Survey Form	Ex. 5	13, 31, 81

Abbreviations

The following abbreviations are not listed in 1-CM.

Approved Abbreviation	Term	Reference
AAI	All Appropriate Inquiries	11, 13
ACM	asbestos-containing building material	81
AST	above ground storage tank	13, Ex. 2
ASTM	American Society for Testing and Materials	13
BMP	best management practice	13
CAA	Clean Air Act	Ex. 2, 5
CDC	Center for Disease Control	66
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act	Text, Ex. 5
CWA	Clean Water Act	13, Ex. 2, 5
ESA	Environmental Site Assessment	12, 13
HUD	Department of Housing and Urban Development	51, 52, Ex. 2
LBP	lead-based paint	Part 2, 81, Ex. 2, 10
LUST	leaking underground storage tank	13, 31, 41
NCP	National Contingency Plan	11, 13, 41
OSHA	U.S. Occupational Safety Health Administration	66
PRP	potentially responsible party	13, 66, Ex. 2
RCRA	Resource Conservation and Recovery Act	1, 11, 13, 41, 66, Ex. 2
SEC	State Environmental Coordinator	Text
SPCC	Spill Prevention, Control, and Countermeasure	13
SDWA	Safe Drinking Water Act	13
TSCA	Toxic Substances Control Act	1, 11, Ex. 2, 5
UST	underground storage tank	Text, Ex. 2, 5
USTCA	Underground Storage Tank Compliance Act	11

***--HUD Disclosure Form for Target Housing Rentals and Leases**

When leasing FSA-owned, nonexempt target housing, the following, that is available at http://portal.hud.gov/hudportal/documents/huddoc?id=20264_rentalform.pdf, shall be completed to document disclosure of lead-based paint and/or lead-based paint hazards, as provided in 24 CFR Part 35.88.

**Disclosure Form for Target Housing Rentals and Leases
Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards**

Lead Warning Statement

Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of known lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

Lessor's Disclosure (initial)

_____ (a) Presence of lead-based paint or lead-based paint hazards (check one below):

- Known lead-based paint and/or lead-based paint hazards are present in the housing (explain).

- Lessor has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

_____ (b) Records and reports available to the lessor (check one below):

- Lessor has provided the lessee with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below).

- Lessor has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Lessee's Acknowledgment (initial)

- _____ (c) Lessee has received copies of all information listed above.
- _____ (d) Lessee has received the pamphlet *Protect Your Family From Lead in Your Home*.

Agent's Acknowledgment (initial)

_____ (e) Agent has informed the lessor of the lessor's obligations under 42 U.S.C. 4852d and is aware of his/her responsibility to ensure compliance.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information provided by the signatory is true and accurate.

_____	_____	_____	_____
Lessor	Date	Lessor	Date
_____	_____	_____	_____
Lessee	Date	Lessee	Date
_____	_____	_____	_____
Agent	Date	Agent	Date

--*

