

For: State and County Offices

Environmental Risk Management in Real Estate Transactions

Approved by: Acting Deputy Administrator, Farm Programs



1 Overview

A

Background

Because of legislation enacted by Congress in 1996, along with regulations published by EPA, FSA has revised its policy concerning corrective actions for hazardous substances, hazardous waste, and petroleum products located on its inventory property. Subtitle E of the Omnibus Consolidated Appropriations Act of 1997, the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (the 1996 Act), Pub. L. 104-208, amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 et seq.

For the purpose of this notice, the term “petroleum products” includes underground storage tanks (UST’s). Also, this notice establishes policy concerning these issues in relationship to loan making activities.

In administering its loan programs, FSA must ensure that adequate security is obtained and its risks from being associated with environmental contamination are greatly minimized. FSA must comply with applicable Federal, State, and local laws concerning managing and disposing of hazardous substances, hazardous waste, and petroleum products.

Section 2502 of the 1996 Act made several amendments to section 101(20) of CERCLA. The most significant change effected by the 1996 Act was revising the definition of “owner-operator” to **exclude** lenders that did not participate in managing a facility before foreclosure and who seek to sell, lease, or otherwise dispose of the facility at the earliest practicable, commercially reasonable time on commercially-reasonable terms, taking into account market conditions and legal and regulatory requirements.

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| <p>Disposal Date</p> <p>September 1, 2002</p> | <p>Distribution</p> <p>State Offices; State Offices relay to County Offices</p> |
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Notice EQ-113

1 Overview (Continued)

A

Background (Continued)

Section 2503 of the 1996 Act amended section 9003(h) of the Solid Waste Disposal Act by adding the following:

The terms “owner” and “operator” do **not** include a person that, without participating in the management of UST and otherwise not engaged in petroleum production, refining, or marketing, holds indicia of ownership primarily to protect the person’s security interest.

On September 7, 1995, EPA published a final rule in the Federal Register, Underground Storage Tanks-Lender Liability, at 60 FR 46692 (Resource Conservation and Recovery Act (RCRA), Subtitle I-Regulation of UST’s). This rule, at 40 CFR Parts 280 and 281:

- specifies conditions limiting the regulatory obligations of persons who hold a security interest in UST or in real estate containing UST, or that acquires title or deed to UST or property on which UST is located
 - adopts changes made to the definition of the terms “owner” and “operator” made by the 1996 Act.
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B

Purpose

This notice establishes and incorporates an environmental risk management policy for FSA lending and land management practices for inventory properties. A major component of this risk management policy will be the performance of due diligence to:

- 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 by which FSA can minimize its liabilities under the law regulating management of hazardous substances, hazardous waste, and petroleum products.
 - include the Agency’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. 6991 et seq.
 - Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 et seq.
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1 Overview (Continued)

B

Purpose (Continued)

- provide guidance to conduct due diligence to reduce future losses from a reduction in market value and to ensure compliance with applicable Federal, State, and local laws about the management of hazardous substances, hazardous waste, and petroleum products
- provide guidance concerning 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 notice provides guidance on certain exceptions allowed under CERCLA and RCRA to undertaking corrective actions on properties the Agency disposes of, the full requirements of CERCLA and RCRA may be triggered if FSA does not act within the boundaries of the secured creditor exemption.

C

Definitions

Ancillary equipment are any devices including, but not limited to, such devices as piping, fittings, flanges, valves, and pumps used to distribute, meter, or control the flow of regulated substances to and from UST. (40 CFR 280.12)

Appropriate environmental regulatory authority refers to, unless otherwise stated, the Federal, State, or local regulatory agency granted oversight authority for management of 1 or more hazardous substances, hazardous waste, or petroleum products.

Due diligence is the process of evaluating real estate in the context of a real estate transaction for the presence of contamination from release of hazardous substances, hazardous waste, petroleum products, or other environmental hazards and determining what effect, if any, the contamination has on the regulatory status or security value of the property.

Emergency response action is an action required immediately to temporarily contain and stabilize a release or threatened release of hazardous substances, hazardous waste, or petroleum products that pose imminent and substantial threats to human health and the environment on property that FSA has a security interest. See 42 U.S.C. 9604 and 9606.

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1 Overview (Continued)

C

Definitions (Continued)

Encapsulation is resurfacing or covering surfaces and sealing or caulking the surface with durable materials to prevent or control chalking, flaking, or lead-containing substances from becoming part of house dust or accessible to children. The covering material may be rigid, such as gypsum board or paneling, or it may be liquid that dries into a durable flexible coating. Paint is not an acceptable encapsulate. (24 CFR Part 35)

Environmental professional is a non-FSA individual who possesses the technical and scientific credentials necessary to conduct due diligence evaluations, and from the information gathered by such evaluations, has the ability to develop conclusions concerning potential environmental contamination. In addition, an environmental professional will be able to provide technical oversight, direction, and management of response actions pursuant to CERCLA and RCRA.

Facility is a building, structure, installation, equipment, pipe or pipeline, storage container, motor vehicle, rolling stock or aircraft; or any site or area where a hazardous substance has been deposited, stored, disposed of, or otherwise comes to be located. (42 U.S.C. 9601)

Hazardous substance is a hazardous substance identified by 42 U.S.C. 9601 as:

- any substance designated under the Clean Water Act (CWA), section 311(b)(2)(A)
- any element, compound, mixture, solution, or substance designated according to CERCLA, section 102
- any hazardous waste having characteristics listed under RCRA, section 3001
- any toxic pollutant listed under CWA, section 307(a)
- any hazardous air pollutant listed under the Clean Air Act, section 112
- any imminently hazardous chemical substances or mixture with respect to which the Administrator, EPA, has taken action according to TSCA, section 7.

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1 Overview (Continued)

C

**Definitions
(Continued)**

Hazardous waste is a solid waste or combination of solid waste, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. Refer to 40 CFR 261.3 for the regulatory definition of a hazardous waste and 40 CFR 261.4 for waste material excluded from the definition of hazardous waste.

Indicia of ownership is evidence of a secured interest, evidence of an interest in a secured interest, or evidence of an interest in real or personal property security for a loan or other obligation, including any legal or equitable title or deed to real or personal property acquired through or incident to foreclosure. Evidence of such interests include, but are not limited to mortgages, deeds of trust, liens, surety bonds and guarantees for obligations, and legal or equitable title obtained according to foreclosure or voluntary conveyance. (40 CFR 280.200)

Participate in management is a term used to describe a lender who exercised decisionmaking control over the environmental compliance concerning the facility or operation or exercised control at a level comparable to that of a manager of the facility or operation, such as undertaking responsibility for hazardous substance handling or disposal practices (40 CFR 280.210), while the borrower was still in possession of the property.

Petroleum products (and their derivatives) are uncontaminated petroleum products which are not, by definition, a hazardous substance. Petroleum products include crude oil or any fraction thereof which is not specifically listed under the definition of "hazardous substance" in 42 U.S.C. 9601(14).

Potentially responsible party (PRP) is a term encompassing the following definitions found at 12 U.S.C. 9607:

- current owner, operator, or owner and operator of a facility from where there is a release or a threatened release of hazardous substances regardless of whether or not they disposed of hazardous substances during their ownership
- prior owner, operator, or owner and operator of a facility, if they disposed of hazardous substances during ownership or acquired actual knowledge of a release or threatened release during ownership and later transferred ownership without disclosure of the knowledge to the purchaser

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1 Overview (Continued)

C

Definitions (Continued)

- transporters who brought hazardous substances to a facility selected by them
- generators and other owners or possessors of hazardous substances, who arranged for disposal or treatment.

Release is the spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substances. (40 CFR 280.12)

This definition excludes:

- releases that result in exposure to persons solely within a workplace
- emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine.

Response action is all investigative and remedial activities concerning a resolution of an environmental threat or contamination caused by a release or disposal of hazardous substances, hazardous waste, or petroleum products. (42 U.S.C. 9601)

Underground Storage Tank (UST) is any one or combination of tanks, including underground piping connected thereto, that is used to contain an accumulation of regulated substances, and the volume of which, including the volume of underground pipes connected thereto, is 10 percent or more beneath the surface of the ground. For the purposes of this notice, regulated tanks are those subject to Federal regulation under RCRA. (40 CFR 280.12).

Underground Storage Tank (UST) System is UST, connected underground piping, underground ancillary equipment, and containment equipment, if any. (40 CFR 280.12)

Unregulated UST are tanks not included in the definition of UST found at 40 CFR 280.12 and are not subject to the requirements of RCRA, Subtitle I. These include the following:

- 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

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1 Overview (Continued)

C

Definitions (Continued)

- other types of tank systems listed in 40 CFR 280.12, such as septic tanks; pipeline facilities; surface impoundments, pit, pond, or lagoons; storm water
 - wastewater collection system; flow-through process tanks; liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; and storage tanks situated in an underground area (that is, basement, cellar, mineshaft, etc.) if the tank is situated on or above the surface of the floor.
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2 Responsibilities

A

FSA Official Responsibilities

The FSA loan approval official is responsible for ensuring compliance with the requirements of this notice and coordinating activities with the State Environmental Coordinator (SEC), as needed.

B

Applicant Responsibilities

Applicants are responsible for identifying and complying with all laws regulating management of hazardous substances, hazardous waste, and petroleum products that affect their financial operation or business interest. Recipients of FSA Direct Loans and Farm Storage Facility Loans involving real estate security are expected to maintain their operations in an environmentally sound manner and not place FSA's security interests at risk.

C

Appraiser Responsibilities

Appraisers are responsible for notifying or reporting to the appropriate FSA official any concerns about potential contamination from hazardous substances, hazardous waste, and petroleum products, which they become aware of, either through disclosure by interested parties or through normal observations or research conducted during an appraisal assignment. When an environmental professional is employed to assist the appraiser in determining the security value of real estate, the appraiser should be in a position to estimate the property's "as is" value if the appropriate supporting documentation is available from an environmental professional.

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2 Responsibilities (Continued)

D Environmental Professional Responsibilities

A qualified environmental professional shall:

- perform all Phase II Environmental Site Assessments (ESA)
 - perform all analytical procedures, including sampling and testing activities, concerning any environmental media, response actions, and environmental audits
 - be responsible, in the context of due diligence, for evaluating remedial options and providing a cost estimate for response actions on a subject property;
- Note:** These cost estimates will be used by appraisers and FSA officials in security value determinations and in making risk analyses in loan processing and servicing decisions.
- be responsible for obtaining and analyzing environmental samples according to proper health and safety procedures required by 29 CFR 1910.120, “Hazardous Waste Operations and Emergency Response,” and the most current sampling and laboratory protocols promulgated by the appropriate environmental regulatory authority.
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E SEC Responsibilities

SEC is responsible for the oversight of all technical and regulatory interactions under this section with CEPD in the National Office, other FSA staff, and the appropriate environmental regulatory authorities.

3 Environmental Risk Management for Direct Loan Making and Loan Servicing

A Due Diligence

FSA must conduct due diligence on property being offered as security for initial loans or subsequent loans including Farm Storage Facility Loans, and property offered as additional security to determine the presence of hazardous substances and to accurately determine market or security values.

FSA will conduct due diligence for EM loans including those where an appraisal is not required. FSA will also conduct due diligence for acquisition of real property. Certain servicing actions described in this notice will also require due diligence.

FSA’s due diligence process consists of 2 steps that include: (1) Environmental Risk Survey Form, FSA-851, and (2) Phase II ESA’s. FSA-851 is available from SEC for FSA’s use. When it is necessary to conduct an ESA, the environmental professional will supply the form.

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3 Environmental Risk Management for Direct Loan Making and Loan Servicing(Continued)

A

Due Diligence (Continued)

It may not be necessary to complete both steps in performing due diligence. It is necessary only to complete the level of review required to ascertain and document environmental and economic risk posed by potential contamination.

If market value is being determined, due diligence should be completed before the appraisal or as part of the appraisal.

The 2-step due diligence process is further explained as follows.

- FSA-851 is defined as the initial level of inquiry which evaluates the environmental condition of security and concludes whether additional evaluation is necessary. Proper completion of FSA-851 will assist FSA in qualifying for the innocent landowner's defense to CERCLA liability. FSA-851 is designed as a series of questions that determine present or past land uses or activities which may have or appear to have the potential for adversely impacting the environmental conditions and market value of collateral or acquired property.

If the results of FSA-851 are inconclusive and professional review and judgment are needed, then the next level of review, Phase II ESA, shall be completed to clarify the issues raised by FSA-851. The instructions for completion of FSA-851 are contained in Exhibit 1.

- A Phase II ESA and ASTM Standard E-1528 (Standard Guide for Environmental Site Assessments, Phase II Environmental Site Assessment Process) is a detailed investigation and evaluation of a property's environmental condition and involves a review of all pertinent records, a site reconnaissance of the property, and the preparation of a brief narrative report communicating the findings and conclusions about the environmental condition of the property. In most cases, the environmental professional will be requested to provide cost estimates to remediate the environmental hazards to an acceptable level according to Federal, State, and local laws and regulations.

B

Safety

Any FSA personnel who may come in contact with hazardous materials or hazardous waste must be provided appropriate safety training by SEC. A training guide that incorporates safety training with the use of FSA-851 is available from CEPD.

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3 Environmental Risk Management for Direct Loan Making and Loan Servicing (Continued)

C

**Loan Making -
Direct Loans
CERCLA/
RCRA**

The release or presence of a hazardous substance, hazardous waste, or a leaking UST on a property could affect the value of the property offered as security for a loan or as additional security. Furthermore, an applicant or borrower with substantial CERCLA or RCRA (UST) liability may have a severely diminished ability to repay. Therefore, due diligence will be performed for all initial and subsequent loans including Farm Storage Facility Loans involving real estate as security, including real estate offered as additional security. Also, due diligence will be conducted for all real property being offered as security for subsequent loans.

It will not be necessary to perform due diligence on real property where FSA has a review on file that is less than 1 year old and there is no reason to suspect that any changes in the property's condition have taken place. For real property with a due diligence review on file that is 1 year old or older, it will only be necessary to update the existing review to reflect current information.

If FSA determines that the property being offered as security contains possible hazardous waste contamination based on FSA-851, FSA will notify the applicant that no further processing of the loan application can take place until one of the following occurs:

- applicant provides an environmental assessment completed by a qualified environmental professional that shows the property offered for security is not contaminated
- new noncontaminated property is offered as security for the loan
- contaminated property being offered as security has been fully remediated by the applicant according to a plan approved by the appropriate regulatory agency
- contaminated property can be subdivided, thus leaving a noncontaminated property to offer as security.

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

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3 Environmental Risk Management for Loan Making and Loan Servicing (Continued)

D

Loan Making - Direct Loans UST's

When it is determined that real property being offered as security for a loan contains UST, FSA will notify the applicant that no further processing of the loan application can take place until the following requirements are met.

- If the property being offered as security contains a regulated UST, the applicant will be requested to provide evidence that it is complying with all applicable environmental laws and regulations including, but not limited to, the following:
 - UST is registered with the appropriate State regulatory agency along with tank installation data to show what type of tank was installed and measures employed to prevent leakage. Evidence may also consist of test results from a qualified environmental professional.
 - If the property being offered as security contains a **nonregulated** UST, the applicant will be required to either:
 - remove or permanently close the tank according to State and local laws and regulations and provide evidence that no contamination exists
 - provide evidence that the tank is not leaking and will not leak during the term of the loan. Such evidence may consist of tank installation data to show what type of tank was installed and measures employed to prevent leakage. Evidence may also consist of test results from a qualified environmental professional.

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

E

Loan Servicing Direct Loans

For transfers and assumptions, FSA-851 will be completed to document the condition of the property at the time of approving the transfer or assumption. If the security property is found to be contaminated, the transferor must fully remediate the property according to a plan approved by the appropriate regulatory agency before FSA will approve the transfer and assumption.

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3 Environmental Risk Management for Loan Making and Loan Servicing (Continued)

E

Loan Servicing Direct Loans (Continued)

For debt restructuring involving new or additional security being offered, FSA will complete FSA-851. If any new or additional security is found to be significantly contaminated or contains UST, it will be handled according to subparagraphs C and D.

For a Debt for Nature contract, FSA will complete FSA-851 for all property being placed under the contract. As a member of the contract-review team, FSA will be responsible for completing FSA-851 at the time of the field visit. If required, any corrective action must be taken by the borrower before FSA approves the conservation contract.

F

Foreclosure/ Voluntary Conveyance

Due diligence will be completed on all properties being considered for foreclosure or voluntary conveyance by first completing FSA-851. If necessary, further evaluation in the form of a Phase II ESA will be completed.

To determine the foreclosure bid amount to take property into inventory or accept as a voluntary conveyance offer, deductions for the potential cleanup of hazardous substances, hazardous waste, or UST's, as determined by a Phase II ESA prepared by an environmental professional will be included in RD Instruction 1955-A, Exhibits G or G-1, line 3k. Estimates other than those derived by completion of a Phase II ESA will only be allowed on Exhibits G or G-1 when the estimated cost to complete the Phase II ESA exceeds the value of the security.

4 Management and Disposal of Inventory Property

A

Hazardous Substances/ Hazardous Waste

To take advantage of the secured creditor exemption, FSA must seek to sell or otherwise divest itself of acquired property (foreclosure or voluntary conveyance) in a reasonably expeditious manner using whatever commercially reasonable means are available or appropriate and according to the statute, after taking all facts and circumstances into account. The determination of whether the secured creditor exemption is available must be based on a review of the facts involved in each case.

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Notice EQ-113

4 Management and Disposal of Inventory Property (Continued)

**A
Hazardous
Substances/
Hazardous
Waste
(Continued)**

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

- FSA actively participated in the management of the property before its acquisition
- property has been held in inventory for longer than the statutorily prescribed maximum period and no diligent efforts have been made by FSA to dispose of the property

Note: FSA will not consider the maximum prescribed period to begin until clear title is obtained to the property. Also, FSA will take no corrective or remedial action on property which is under lease with an option to purchase. The maximum prescribed period begins for a leased property when it becomes available for sale (lease expires or option to purchase was not exercised).

- 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
- property is being sold to a beginning farmer and FSA is providing credit assistance through direct, participation, or guaranteed loan programs. The sales price of the property shall reflect the value as if the property does not contain any contamination.

While the 1996 Act precludes FSA's liability for corrective action costs if FSA retains its eligibility for the secured creditor exemption, the appropriate State or local environmental regulatory agency may attempt to require FSA to undertake corrective action measures on the inventory property based on its assessment of the risks posed by any contamination identified on the property. This will usually occur only when State or local law supersedes the requirements of Federal law. In such situations, the national office should be contacted before any action is taken.

When the secured creditor exemption applies and the property is being sold back to PRP such as the former owner, FSA will not undertake any corrective action.

Even though no corrective action may be taken on a property as a condition of disposal, FSA will obtain the proper level of documentation according to subparagraph 3 A. This documentation will be retained in a permanent file for each individual property by SEC in the State Office.

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4 Management and Disposal of Inventory Property(Continued)

B

Petroleum Products/UST's

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

Aboveground storage tanks (AST's) and heating oil tanks are not regulated under RCRA, Subtitle I, but may 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 that make loans to borrowers who own or operate AST's or heating oil tanks.

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

- FSA actively participated in managing the property before its acquisition
- the property has been held in inventory for longer than the statutorily prescribed maximum period and no diligent efforts have been made by FSA to dispose of the property

Note: FSA will not consider the maximum prescribed period to begin until clear title is obtained to the property. Also, FSA will take no corrective/remedial action on property which is under lease with an option to purchase. The maximum prescribed period begins for these leased properties when it becomes available for sale (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: A leaking UST may be contaminating groundwater that is used for human consumption.

- the property is being sold to a beginning farmer or rancher and FSA is providing credit assistance through direct, participation, or guaranteed loan program. The sales price of the property will be the "as improved" value determined by an appraisal.

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Notice EQ-113

4 Management and Disposal of Inventory Property (Continued)

B

Petroleum Products/UST's (Continued)

If it is determined that corrective action may be necessary for UST, FSA will take corrective action by contracting with an environmental professional to remove UST and backfill the removal site according to Federal, State, and local laws and regulations. In addition to removing UST, FSA must also ensure that all contaminated soil has been removed and disposed of according to all applicable laws and regulations.

EPA considers UST's to be in use and in operation if petroleum is added to, dispensed from, or stored in UST. Therefore, FSA cannot continue to use, store, dispense, or fill petroleum in UST or UST system after obtaining marketable title and access to UST or UST system without incurring Subtitle I liability. 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 Subtitle I liability. (60 FR 46692, 46669 (September 7, 1995))

Performing due diligence is no guarantee that UST's will be found. The property acquired by FSA may contain UST's which are not detectable, difficult to identify, and 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 notice.

Property may be acquired by FSA which has or is used for the production of petroleum. The production of petroleum includes, but is not limited to, activities involved in the production of crude oil or other forms of petroleum, as well as the production of petroleum products from purchased materials, either domestically or abroad. In most of these cases, FSA will not be liable under Federal law for corrective action concerning the production of petroleum, but may be liable under RCRA for spills, releases, or remedial action resulting from some actions concerning the production activities.

SEC should consult with the Regional Office of the General Counsel and the appropriate environmental regulatory authority to determine whether State laws or regulations require corrective action.

When the property is being sold back to PRP who was the debtor, FSA will not undertake response or corrective actions.

Even though no corrective action may be taken on a property as a condition of disposal, FSA will obtain the proper level of documentation according to subparagraph 3 A. This documentation will be retained in a permanent file by SEC in the State Office.

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4 Management and Disposal of Inventory Property (Continued)

C

Solid/Medical Waste

Nonhazardous solid waste (garbage) and medical waste are not regulated by CERCLA, but may be regulated under the provisions of RCRA as in the case of abandoned batteries or appliances containing substances regulated under RCRA or CERCLA. Unless required by State or local laws or regulations, solid waste may be cleaned up at the discretion of FSA depending on the effect of the waste on the market value of the property and whether it contains significant amounts of regulated substances which require cleanup.

In the case of medical waste, SEC should consult with the appropriate environmental regulatory authority to determine State or local requirements for response or corrective actions.

When the property is being sold to PRP or other person who may be responsible for the dumping of waste, FSA will not undertake any response or corrective action.

D

Leasing

When leasing property, appropriate restrictions should be placed in the lease agreement to avoid further contamination of the inventory property. Restrictions may include:

- restricting any use of UST
 - restricting the filling of spray equipment within close proximity to wells
 - prohibiting the dumping of hazardous substances on the subject property.
-

E

Reporting to Regulatory Authority

Regardless of whether corrective action is taken, FSA is still responsible, following foreclosure or voluntary conveyance, for reporting to the appropriate environmental regulatory authority any discovery of a release of regulated substances or a suspected release at UST site or in the surrounding area.

Such reporting is necessary to ensure protection of human health and the environment.

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4 Management and Disposal of Inventory Property (Continued)

F

Notification and Advertisement

For property that is contaminated as determined according to paragraph 2, FSA will provide notice in the sales advertisement that the property contains hazardous waste contamination or UST's and that a copy of the environmental documentation may be reviewed at the local FSA office.

The advertisement of an inventory property that is subject to a response or corrective action by the Government according to subparagraph A shall contain the following:

- brief statement acknowledging that the property is contaminated with hazardous substances, hazardous waste, or a leaking UST
- guarantee to the purchaser that the Government will clean up the contamination present on the property at the time of the sale
- description of the contaminated area.

The advertisement of an inventory property that is not subject to a response or corrective action by the Government shall contain the following:

A brief statement acknowledging that the property is contaminated with hazardous substances, hazardous waste, or a leaking UST; but that no corrective action will be taken by FSA. The property will be sold "as is".

FSA will not provide notification or warranties in its deeds conveying the title of inventory property when corrective action is not to be undertaken by FSA. When corrective action will be taken by FSA, the language included in Exhibit 2 should be included as part of the deed.

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5 Action

A

State Office Action

State Offices:

- may implement the requirements of this notice through issuance of State notices or an instruction
 - must obtain approval by CEPD for any revisions or modification to this notice, unless the revision is specifically required by State law, in which case the revision must be approved by the applicable Regional Attorney
 - may direct questions about this notice or assistance about contracting for an environmental professional to James P. Fortner, CEPD, at 202-720-5533.
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Instructions for Completing FSA-851

GENERAL

FSA-851 is to be used by FSA personnel as a first step in the due diligence process to screen real property for the presence of contaminants, hazardous materials, underground storage tanks (UST), lagoons, pits, ponds or other features which pose potential environmental hazards. Environmental contamination may have a significant adverse effect on the value of real estate offered as collateral for loans or on property being offered for sale.

The use of FSA-851 assists the preparer in complying with the Comprehensive Environmental Response, Compensation and Liability Act; the Resource Conservation and Recovery Act; the Clean Water Act; the Clean Air Act; and the Toxic Substances Control Act. FSA-851 may also be used by lenders participating in the FSA guaranteed loan program.

Proper completion of FSA-851 enables FSA to determine whether a higher level of site assessment by an environmental professional is necessary to determine the exact level of threat to the environment. Generally, completion of FSA-851 will be sufficient as the only level of review needed to document environmental risks associated with FSA's loan making and servicing actions unless significant environmental risks are observed.

In conducting the site inspection, the preparer should only conduct a visual inspection and indicate hazardous conditions on FSA-851. Do not attempt to touch, sample, taste, or smell any hazardous substances or containers. Sampling these substances must be done by an environmental professional. The preparer should not attempt to open any containers or enter any unsafe areas such as confined spaces or buildings which may not be structurally sound. If a building cannot be safely entered, this information should be noted on FSA-851.

PART A - SITE PREPARATION

The following items will be attached to the completed FSA-851 and labeled as follows:

- Attachment A - Legal description
- Attachment B - Plat map or aerial photo with the boundaries of the property outlined
- Attachment C - Photographs (This is highly recommended but not an absolute requirement)

If wetlands or floodplains are located on the property, indicate their presence in items 11 and 12 and Part F.

PART B - SITE OWNERSHIP HISTORY AND BACKGROUND

Every attempt should be made to search records and trace the use of the property back to 1940. The preparer should review the FSA file to determine ownership history of the property. The preparer should make every attempt to interview the current property owner as well as adjoining property owners to determine the past uses of the property. If the property has been used solely for agricultural purposes, it will not require a large amount of detailed review. Pay close attention to the ownership history and background to determine whether the property was ever used for an industrial use or for a location of a facility such as a gas station.

PART C - SITE DATA & PART D - WATER AND WASTE INFORMATION

The completion of this part requires that the preparer make a site inspection of the real property and conduct a records search as a supplement. The preparer must make every possible attempt to interview either the owner or the occupant of the property.

Continued on the next page

Instructions for Completing FSA-851 (Continued)

Tables 1 through 7 and items 31 through 34, 38, and 39 require the insertion of a map symbol to aid in identifying the location of specific contaminants or other environmental risks. The map symbols will be obtained from part F.

For item 16 and Table 1, structures include any buildings with walls and a roof including open type pole sheds, grain bins, and silos.

For item 28 and Table 2, consolidate similar types of containers into 1 line. For example, if there are 12 55-gallon drums of waste oil, list "12 55-gal" under the "Estimated Quantity" column.

For item 31, check for signs of fresh fill dirt or areas where it is apparent that fill dirt was dumped such as areas with differences in the growth of vegetation.

For item 35 and Table 5, identify any UST's or AST's that are present on the property. The preparer should answer the questions in Table 5, columns E through H, to the best of their ability and with the assistance of records and interviews with the owner or occupant of the property.

For item 36 and Table 6, identify any holding facilities such as ponds or lagoons that may contain hazardous waste or serve as treatment facilities for animal waste, thus creating a potential environmental risk. In the primary use column, the preparer should note the past and present use of the facility such as animal waste lagoon or sewage lagoon.

PART E - RECORDS SEARCH

Items 42 through 46 pertain to lists maintained by either Federal or State regulatory authorities. The Federally maintained lists can usually be obtained through the Environmental Protection Agency's website at www.epa.gov/superfund/sites and www.epa.gov/enviro/html/ej/ or through The Right-To-Know Network at www.rtk.net. The State maintained lists can be obtained either through accessing websites hosted by the appropriate State Regulatory Authority or by calling their office and requesting a hard copy. The FSA State Environmental Coordinator (SEC) should be contacted if necessary for assistance in completing this part if data is difficult to obtain. If yes is checked on any question, the preparer should provide further information in an attachment by describing the type of site, location, and distance from the subject property.

PART F - SKETCH OF PROPERTY

A sketch of the property is very important in locating any environmental risk factors such as UST's, stained soil, or leaking containers. Start with a rough outline of the property boundaries in blue ink and include any roads, railways, water channels, buildings, or other landmarks. Then draw in the appropriate map symbols provided in the legend. If additional map symbols are needed, they should be added to the legend by the preparer. Also, indicate the orientation of the map. The preparer should list the map symbols on the back of applicable photographs.

When there are numerous findings of similar objects or sites, the preparer will add a number to the map symbol. For example, there may be two (UST's) on the property. The first UST would be given a map symbol of U-1 and the second UST would be given a map symbol of U-2.

Continued on the next page

Instructions for Completing FSA-851 (Continued)

PART G - CONCLUSION

Include all applicable information as requested. The preparer should draw a conclusion to the best of his or her ability. If the preparer has any doubt as to the significance of a potential threat, he or she should recommend further investigation by a trained environmental professional or seek further advice from the SEC. The Agency's conclusion on future action is based on the following.

- **Evidence of contamination was found or observed on the property and further evaluation through a Phase II Environmental Site Assessment (ESA) is recommended.***

Choose this response if signs of contamination were observed that could potentially have significant effects upon the value of the real property and the environment. Examples would include, but not be limited to, large amounts of abandoned hazardous waste, large areas of stained soil, or known or suspected leaking UST's. The preparer should evaluate each property differently as a small stained area of sandy soil on one property may be just as significant as a large stained area of clay soil on another property. Another example of when further evaluation would be warranted is if the subject property is adjacent to or in close proximity to a Superfund National Priorities List (NPL) site.

- **The preliminary environmental evaluation results were found to be inconclusive and further evaluation through a Phase II ESA is recommended.**

Choose when the preparer is alerted to the fact through interview or research that the real property may be more significantly affected by environmental risks than is apparent through normal observation. One example of this scenario would be the discovery by the preparer that unknown objects or substances were buried on the real property. Another example would be that research or interview indicates that the property once contained a facility such as a gas station which could cause significant environmental contamination.

- **Evidence of contamination was found but was not noted to be significant to require further evaluation.**

Choose this response if small amounts of environmental contamination are noted on the property but are not present in sufficient quantities to pose a significant threat to the environment. Examples that meet the requirements for this response include, but are not limited to, small shallow and insignificant soil stains, empty and rinsed pesticide containers, small quantities of tires, and containers of hazardous substances stored in a protective structure.

- **No evidence of contamination was found or observed and no further evaluation is needed.**

Choose this response when the review of the property does not reveal any signs of potential contamination or other environmental concerns. Normal and safe storage of agricultural chemicals, tires, petroleum products, and batteries will not be considered as potential sources of contamination.

* Phase II ESA is a detailed investigation and evaluation of a property's environmental condition, including a review of all pertinent records, a site reconnaissance of the property and taking soil, water and our air samples to determine contaminant content or verify that no contaminants are present or likely to be present.

Continued on the next page

Instructions for Completing FSA-851 (Continued)

The preparer must sign and date FSA-851 upon completion as well as supply the preparer's title, address, and telephone number. The preparer should note where copies of the completed FSA-851 are filed.

PART H - UPDATE INFORMATION

Use this part when it is necessary to only update a previously completed FSA-851 as allowed by procedure. FSA-851 may only be updated twice before a new form will need to be completed.

Deed Language

When disposing of inventory properties for which FSA will provide corrective actions, the servicing official shall incorporate the following 2 paragraphs into the main body of the deed:

The GRANTOR agrees to be responsible for responding to hazardous substances (as defined by 42 U.S.C. § 9601(14)) located on the property at the time of transfer, whether such hazardous substances have been identified at the time of transfer of title to the Grantee or are identified after transfer of title. Subject to availability of appropriations, the Grantor agrees to respond to hazardous substances on or from the property, not inconsistent with the requirements of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), as amended (42 U.S.C. § 9601 et seq.) and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 CFR Part 300).

The GRANTOR and its employees, agents, contractors, and subcontractors have the right, upon reasonable notice to the Grantee or any assignee, to enter upon the property for response actions.

The servicing official shall incorporate the following notice as an attachment to the deed where hazardous substances are or have been stored for more than 1 year, or released, on the property in excess of the quantities described in 40 CFR 373.2 and regardless of whether corrective action will be taken by FSA. If FSA records include a site investigation or other environmental report regarding hazardous substances, FSA should provide a copy of the report to the prospective purchaser before the purchaser signs any contract for the sale of the property.

**Notification
Hazardous Substance Activity**

The property described as:

[insert legal description or reference legal description in deed]

is known to have had hazardous substances stored on it for one year or more, or released or disposed of based on a complete search of Agency files. The identity of such hazardous substances and available information is contained in the following table.

The following table documents the hazardous substances detected in a site investigation conducted by [insert name of environmental professional firm that prepared the investigation report along with the title of report and its date]. The TYPE identifies the hazardous substance by product name and chemical name, the REPORTED SITE CONCENTRATIONS indicates the amount in mg or kg or ppm for release solids and liquids, and the AMOUNT OF STORED CONTAMINANT indicates the amount in kilograms for hazardous substances stored on the property in containers.

Continued on the next page

Deed Language (Continued)

| Hazardous Substance | Regulatory Synonyms for Hazardous Substance 40 CFR Part 261, If Applicable | Hazardous Waste CASRN Number <u>1/</u> | Reported Site Concentrations <u>2/</u> (mg/kg or ppm) | Amount of Stored Contaminant <u>3/</u> | Date of Storage, Release, or Disposal If Known |
|---------------------|--|--|---|--|--|
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List any other information pertinent to describing the history of hazardous substances located on the property.

The information contained in this notification is required under the authority of regulations promulgated under section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9620(h).

SIGNATURE: _____

NAME: _____

TITLE: _____

DATE: _____

1/ CASRN - Chemical Abstracts Service Registry Number. This is a specific number assigned to known hazardous substances and is available from the analytical laboratories or USEPA lists. If known, the number must be on the notification that accompanies this deed, according to 40 CFR 373.3(a).

2/ If hazardous substances have been stored on the property but there were no releases, the completion of this column is not required.

3/ Use this column for reporting amounts of stored hazardous substances which are located on the property.