

PART 1970 - ENVIRONMENTAL

Subpart J - Environmental Risk Management

Table of Contents

<u>Sec.</u>		<u>Page</u>
1970.451	Purpose.	1
1970.452	Authority and Background.	2
	(a) Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq.	2
	(b) Environmental Protection Agency's (EPA) "All Appropriate Inquiries" (AII) rule (40 CFR Part 312)	2
	(c) Resource Conservation and Recovery Act (RCRA), 42 USC §§6901-6992k	3
	(d) National Environmental Policy Act (NEPA) (42 U.S.C. § 4331.101(b)and 40 C.F.R. § 1500.2)	3
1970.453	Definitions.	3
1970.454	Levels of Environmental Due Diligence.	7
	(a) Transaction Screen Questionnaire (TSQ).	7
	(b) Phase I Environmental Site Assessment (Phase I ESA).	7
	(c) Phase II Environmental Site Assessment (Phase II ESA).	9
1970.455	General Policy and Guidance.	11
	(a) When to Complete Environmental Due Diligence for Security Interests.	11
	(b) Environmental Condition(s) Exists During Direct or Guaranteed Loan Processing.	15
	(c) If an Environmental Condition(s) Exists During Direct or Guaranteed Loan Bankruptcy/Foreclosure/Real Estate Owned (REO) Sales.	17
1970.456	Roles and Responsibilities.	20
	(a) Agency Officials.	20
	(b) Applicants for Direct Loans.	21
	(c) Guaranteed Lenders, Intermediaries or Other Lending Partners.	22

<u>Sec.</u>		<u>Page</u>
	(d) Real Estate Appraisers.	23
1970.457	Special Topics.	23
	(a) Relationship to NEPA Compliance.	23
	(b) Relationship to Environmental Audits.	24
	(c) Asbestos, Asbestos-Containing Vermiculite Insulation, Lead-based Paint, Mold, Radon, and Formaldehyde Insulation.	24
	(d) Brownfields Redevelopment.	28
	(e) Recognizing HazMat on Sites.	
	(f) Underground Storage Tanks (USTs).	29
	(g) Methamphetamine (Meth) Laboratories.	32

Exhibit A: ASTM Transaction Screen Questionnaire (1528-14)

Exhibit B: Applicant Questionnaire Regarding CERCLA Bona Fide Prospective
Purchaser Status (All Appropriate Inquires)

Exhibit C: Environmental Cleanup of Meth Laboratories

Part 1970 - ENVIRONMENTAL

Subpart J - Environmental Risk Management

§ 1970.451 Purpose.

This subpart provides environmental risk management guidance to the staff of Rural Development (RD), which includes Rural Housing Service (RHS), Rural Business-Cooperative Service (RBS) and Rural Utilities Service (RUS) (hereinafter referred to as the "Agency") in connection with issuance of all grant, direct loan, guaranteed loan and loan servicing activities. The focus of this environmental risk management guidance is to inform Agency staff on the proper procedures for environmental due diligence relating to hazardous substances, hazardous wastes, and petroleum waste products, hereafter collectively referred to as "hazardous materials" or "HazMat." If properly conducted, environmental risk management proactively recognizes potential hazards and legal and financial vulnerabilities associated with the major HazMat federal and state laws as well as possible hazards to the human environment in compliance with NEPA. Environmental risk management provides protection to the Agency and its applicants who could be borrowers, lenders/guarantors, or intermediaries, and thereby minimizes costs and liabilities due to HazMat conditions.

Environmental due diligence is the process of inquiring into the environmental condition of real property to determine the potential for contamination from the release of hazardous materials, as well as the impacts of any such contamination on the regulatory status and security value of the property. Environmental due diligence is necessary in order to:

- (a) Limit liability under various laws for the borrower, lender, property owner or operator;
- (b) Determine an accurate value of real estate;
- (c) Protect the government's security and overall financial interests;
- (d) Assure the continued marketability of real property;
- (e) Assure that costs for remediation are properly reflected; and
- (f) Protect the health and safety of occupants and the public.

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Environmental Policies
and Procedures

§ 1970.452 Authority and Background.

(a) Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq. Releases of hazardous materials have the potential to cause significant adverse legal and financial impacts on the Agency in connection with its loan-making and servicing activities, regardless of whether the loan in question is a direct loan made by the Agency or a loan made by a third party that the Agency has guaranteed. Perhaps the most well-known environmental law impacting guaranteed lenders, intermediaries and other lending partners is the federal Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as "CERCLA" or "Superfund". CERCLA is one of the primary federal laws imposing liability and obligations for the remediation of contaminated properties. CERCLA requires responsible parties to conduct or pay for the investigation and cleanup of contaminated property, which is often quite costly. Liable parties under CERCLA include, but are not limited to, the current "owner" or "operator" of a contaminated facility. Although its liability provisions are often viewed as harsh and far-reaching, CERCLA does provide specific exemptions from liability, including a "secured creditor exemption" (also known as the "Lender Liability Exemption") that often protects lenders from CERCLA liability with respect to a particular facility. CERCLA Section 101(20) exempts lenders that hold a security interest in real property from owner/operator liability under CERCLA provided they do not "participate in the management of the facility." Accordingly, lenders need to understand and comply with this exemption. If a lender, including either the Agency (in the case of a direct loan) or other lender (in the case of a guaranteed loan), fails to comply with the requirements of the secured creditor exemption, the lender may become directly liable under CERCLA. Even if the Agency itself or other lender is not subject to CERCLA liability, the Agency may still incur significant financial losses if HazMat-related cleanup or compliance costs jeopardize the borrower's ability to repay its loan or impair the value of the loan collateral. In addition to CERCLA, there are other federal and state laws that impose costly cleanup and compliance obligations on the owners and operators of contaminated sites.

(b) U.S. Environmental Protection Agency's (EPA) AII rule (40 CFR Part 312). This rule is intended to benefit purchasers of real property who wish to be protected from CERCLA liability in the event that the acquired property is discovered to be contaminated. Completing a Phase I ESA that complies with EPA's rule prior to acquisition is one of the

§ 1970.451(b) (Con.)

requirements that must be met in order for a purchaser of real property to satisfy EPA's AII rule. Purchasers of real property that comply with EPA's rule and meet other requirements specified in CERCLA may qualify for one of CERCLA's "landowner liability protections" that constitute a defense to CERCLA liability.

(c) RCRA, 42 USC §§ 6901-6992k. Borrowers, lenders and guarantors may also be subject to or affected by RCRA, a federal law aimed at protecting human health and the environment from the potential hazards of waste disposal, reducing the amount of waste generated, and ensuring that wastes are managed in an environmentally sound manner. RCRA regulates the management of hazardous waste, solid waste (e.g., garbage), and underground storage tanks holding petroleum products or certain chemicals. Failure to comply with RCRA requirements can potentially lead to civil and criminal enforcement actions.

(d) NEPA (42 U.S.C. § 4331.101(b) and 40 C.F.R. § 1500.2). The Agency is subject to NEPA, which requires all applications for federal financial assistance to be reviewed for, among other things, any risks to health and safety (42 U.S.C. § 4331.101(b)(3)). Furthermore, 40 C.F.R. § 1500.2(f) states that "[Federal agencies shall to the fullest extent possible] use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to ... avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." Environmental due diligence actions overseen by the Agency are geared toward identifying any releases of hazardous materials that may impact a borrower's real property or operations and thereby create potential legal and financial risks. Such actions are also undertaken to comply with NEPA. As part of its NEPA responsibilities, the Agency determines whether or not taking the property as security or providing financial assistance on this property would pose an adverse effect to the human environment, including those who will occupy the premises.

§ 1970.453 Definitions.

The following definitions and those contained in the Agency's NEPA procedures are applicable to this subpart:

Agency Official. The Agency employee with primary responsibility for processing the grant, loan, guarantee, loan servicing action or contract in question. The Agency official may or may not be the Agency approval official.

AI1. This refers to the process of conducting inquiry into the previous ownership and uses of real property consistent with good commercial or customary practice. EPA's rule on AAI, which is applicable to purchasers of real property, is set forth at 40 CFR Part 312 and can be used for purchasers of real property who wish to maintain CERCLA liability protection in the event that the acquired property is discovered to be contaminated. Completing an ASTM Phase I ESA is one of the requirements that must be met in order to qualify for this defense.

ASTM International (formerly known as the American Society for Testing and Materials (ASTM)). An internationally-recognized organization that has developed and published many technical standards, including the lending industry's voluntary consensus standards for environmental due diligence and testing for HazMat.

Applicant. An Agency applicant can be a borrower, guarantor, or a lender.

Bona Fide Prospective Purchasers. The bona fide prospective purchaser (BFPP) provision in the [2002 Brownfields Amendments](#) dramatically changed the Superfund liability landscape for landowners. Persons may now acquire property knowing, or having reason to know, of contamination on the property if they: 1) acquire property after January 11, 2002, 2) meet the threshold criteria and ongoing obligations outlined below, and 3) do not impede the performance of a response action or natural resource restoration. To qualify as a BFPP, a landowner must meet certain criteria, which is described in the "[Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability \("Common Elements"\)](#)" published by the EPA. To receive the liability protection under the CERCLA, a BFPP must perform AI1 prior to acquiring the property, and demonstrate "no affiliation" with a liable party.

Brownfields. Real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

§ 1970.453 (Con.)

CERCLA List of Hazardous Materials. The Clean Air Act §112(r) Consolidated List of Lists - March 2015 Version. EPA publishes this consolidated list of chemicals subject to:

- Emergency Planning and Community Right-to-Know Act,
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and
- Section 112(r) of the Clean Air Act.

It was prepared to help facilities handling chemicals determine, for a specific chemical, whether they may be subject to certain reporting requirements. These lists should be used as a reference tool, not as a definitive source of compliance information. Please refer to the requirements in the appropriate part of the Code of Federal Regulations listed here:

www2.epa.gov/epcra/epcracerclacaa-ss112r-consolidated-list-lists-march-2015-version

Environmental Due Diligence. The process of inquiring into the environmental condition of real property to determine the potential for contamination from the release of hazardous materials, as well as the impacts of any such contamination on the regulatory status and security value of the property.

Environmental Risk Management. This refers in general to the Agency's process and procedures for identifying and responding to releases or threatened releases of hazardous substances, hazardous wastes, and/or petroleum wastes, including strategies for minimizing potential agency liability and financial exposure in connection with issuances of grants, or direct and guaranteed loan-making and servicing.

Environmental Audit. An independent investigative procedure to determine if the processes, equipment, and operations used by a facility are in compliance with applicable environmental laws and regulations. This audit is primarily focused on the environmental regulatory compliance of the business processes of the facility, rather than the conditions of the real property. The term "environmental audit" is not synonymous with the "environmental due diligence" process.

Environmental Professional. A person or entity, typically an outside contractor or consultant, which possesses the technical and scientific credentials necessary to conduct environmental due diligence evaluations and has the ability to develop conclusions regarding potential environmental contamination. The environmental professional must be able to provide

technical oversight, direction, and management of response actions pursuant to CERCLA and RCRA. This term may also refer to a person or entity with the skills necessary to perform environmental audits. EPA's AAI rule defines "environmental professional" for purposes of compliance with that rule (see 40 CFR 312.10).

ESA. The industry accepted ASTM International methods for determining whether contamination is present on a parcel of real property, the extent of contamination, risks posed by the HazMat, and cleanup costs. This site assessment begins with a Phase I and may require a Phase II if contamination is indicated by the Phase I. A Phase II may be done without a Phase I if the presence of contamination is already known. Both levels of review are explained in detail within the text of this subpart.

HazMat. The acronym for hazardous materials, which includes hazardous substances, hazardous wastes, and petroleum products, collectively.

Leaking Underground Storage Tank (LUST). Any underground storage tank that is presently or has in the past been found to leak. A list of LUST sites is maintained by an environmental regulatory agency in each state and should be referenced in ESA reports.

Lender Liability Exemption (also referred to as secured creditor exemption). CERCLA Section 101(20), 42 U.S.C. § 9601(20), provides an exemption from "owner/operator" liability for secured creditors who are not deemed to participate in the management of a contaminated facility and who hold ownership in a CERCLA facility primarily to protect their security interest in that facility. This CERCLA exemption does not cover other federal or state laws.

Notice of Violation (NOV). A written letter from an environmental regulatory agency to any party who is deemed to be out of compliance with one or more environmental laws and may include associated monetary fines.

Potentially Responsible Party (PRP). An individual or entity (e.g., an owner, operator, transporter, or generator of hazardous waste) that is potentially responsible for investigation and cleanup at a contaminated waste site. Whenever possible, EPA and the states require PRPs to clean up hazardous waste sites they have contaminated.

TSQ. A preliminary, limited inquiry by non-professionals consisting of a checklist of questions to determine if HazMat may be present on a parcel of real property. This process is described in ASTM E1528-14. ASTM developed

§ 1970.453 (Con.)

this protocol, but the Agency no longer considers this adequate due diligence, with the exception of small real estate sites that are highly unlikely to be contaminated, such as SFH.

Underground storage tank (UST). A tank or combination of tanks and any connected underground piping that has at least ten percent of its combined volume underground.

§ 1970.454 Levels of Environmental Due Diligence.

There are different types of environmental due diligence. ASTM International, a not-for-profit standards organization, has developed three standard protocols for conducting and documenting environmental due diligence that have become industry standards. These three standard protocols are acceptable environmental due diligence methods for use by the Agency in different contexts as discussed below:

(a) TSQ. (Also referred to as ASTM Standard E1528.) The TSQ is a lengthy questionnaire leading a non-professional through a basic HazMat screening process. It consists of the completed questionnaire, interviews with the property owner and any tenants, a visual inspection, and a limited records check. No sampling or testing is done. A TSQ is only used for an initial screening and is not recognized as adequate environmental due diligence for purposes of compliance with EPA's AII rule (40 CFR Part 312).

(1) For small real estate sites that are highly unlikely to be contaminated, such as SFH, a TSQ or equivalent checklist completed by a trained Agency official delegated the authority to complete TSQs may suffice for Agency environmental risk management purposes.

(2) Agency staff will contact their state environmental coordinator (SEC) or National Office environmental staff (NES) to obtain a copy of the ASTM Standard (**Exhibit A**), which is for use by the Agency only and not by consultants, and training on proper TSQ completion.

(3) A TSQ is not a prerequisite to performing an ESA-Phase I. If a TSQ is not sufficient for the type of real property being evaluated, such as business, retail or industrial sites, or if any HazMat is known to be present, a Phase I ESA should be performed as a first step instead of a TSQ.

(b) Phase I ESA. The Phase I ESA is the method which is consistent with the EPA's AII rule (40 CFR Part 312) and ASTM International industry standards in assessing potential "HazMat" conditions as outlined in this subpart. The ASTM standard for undertaking Phase I environmental site assessments is ASTM E1527-13. The Phase I ESA was developed to establish good site assessment practices that satisfy the due diligence responsibilities of participants in commercial real estate transactions. The Phase I ESA is widely recognized standard practice for the lending industry and is accepted by the EPA's AII rule for properties with prior or proposed commercial use when completed by an environmental professional and the independent conclusions issued in a written report. The Phase I ESA includes, among other things, a site visit by an environmental professional, an investigation of past uses and owners/tenants of the property and adjacent properties, and a regulatory file search for environmental compliance violations and other potential issues. No physical testing of the site is performed. Specifics regarding the Phase I ESA are as follows:

(1) The Phase I ESA involves examination of standard historical sources including aerial photographs, fire insurance maps, property tax files, recorded land title records, minute topographical maps, street directories, building department records, and zoning and land use records. In addition, the environmental professional conducting the study will also inspect the site and all buildings and structures to look for signs of hazardous substances (as defined by CERCLA) and petroleum products.

(2) Some HazMat, such as asbestos, lead-based paint, mold, radon, vermiculite and formaldehyde insulation, will not be covered under typical Phase I ESA investigations (refer to § 1970.457). If the Phase I ESA work was undertaken more than 180 days prior to the applicant's property acquisition date, the following five components of the Phase I ESA should be updated by the original report preparer to be within 180 days of property acquisition in order to make it possible for the applicant to be consistent with the USEPA's "all appropriate inquires rule":

- (i) Interviews with past and present owners, operators, and occupants;
- (ii) Searches for recorded environmental cleanup liens;
- (iii) Reviews of federal, tribal, state, and local government records;

§ 1970.454(b)(2) (Con.)

(iv) Visual inspections of the facility and of adjoining properties; and

(v) The declaration by the environmental professional. If the Phase I ESA is not completed, or not updated within 180 days of the applicant's acquisition of the real property at issue, this may jeopardize the applicant borrower's ability to satisfy the "all appropriate inquires rule". If the user or preparer conducting environmental due diligence has actual knowledge that the previous Phase I ESA information being used is not accurate, an updated Phase I ESA should be requested. Please note the Phase I ESA is used in order to provide decision-makers useful information regarding a proposed loan or servicing/foreclosure action. As a policy matter, the decision-makers will want the ESA to reflect current site conditions. At the same time, if the ESA does not meet the "shelf life" requirements of EPA's AAI rule, then the applicant/purchaser will not be able, as a legal matter, to qualify for one of the CERCLA landowner liability protections- which could potentially make loan repayment problematic if the property turns out to be contaminated and the applicant is subject to CERCLA liability. Where a Phase I ESA indicated the likelihood that a site is contaminated, a Phase II ESA will be needed.

(c) Phase II ESA. (Also referred to as ASTM Standard E1903.) When a Phase I ESA or other reliable information indicates the likelihood that a site is contaminated, a Phase II ESA conducted by an environmental professional is necessary to determine the presence and extent of contamination. A Phase II ESA involves site sampling and laboratory analysis and helps to determine, among other things, the type, extent and costs associated with remediation of the contamination and the market value of real property.

(1) The Agency or lender must ensure that the environmental professional has documented:

(i) Whether the contamination levels and quantities exceed the reportable or actionable levels;

(ii) Whether remediation is necessary;

(iii) An estimate of any remediation costs (environmental professionals may use ASTM E2137-06 Standard Guide for Estimating Monetary Costs and Liabilities for Environmental Matters); and

(iv) The estimated completion time of any remediation.

(2) The Phase II ESA should conclude with a report that describes the investigation, including complete documentation of the research and tests conducted, detailed laboratory analysis reports, credentials of each environmental professional involved in the investigation, the opinion of the environmental professional on the potential impacts of any identified environmental condition and all materials required by the ASTM standard.

(3) When requested, a Phase II ESA will evaluate remediation options and provide cost estimates as part of the environmental due diligence report. Such remediation options and cost estimates may then be used by the Agency, appraisers, guaranteed lenders, or intermediaries, as appropriate, to make security property value determinations and risk analyses for loan processing and servicing decisions.

(4) If contamination is present on the site, but there is no remediation underway, the process for regulatory actions likely to be required by the state or EPA should be outlined, and the costs of potential remediation actions should be detailed. Such costs need to be carefully evaluated by the Agency, with the remediation undertaken prior to the decision to move toward loan closing, since remediation costs will depend greatly upon the accuracy of testing and cost estimates, as well as the extent of actions required by the appropriate environmental regulatory authority. If remediation is not undertaken prior to loan closing, coordination with NES is required to protect the Agency from liability or financial loss. The Agency will normally not be involved in any type of site cleanup or compliance work unless the matter has been fully reviewed in writing by NES. If requested by any federal or state environmental authority to undertake any site investigation, cleanup or compliance activity, Agency officials must contact and consult with NES, who will consult with the Office of General Counsel (OGC).

§ 1970.455 General Policy and Guidance.(a) When to Complete Environmental Due Diligence for Security Interest.

Prior to any Agency decision on a proposed loan or loan guarantee, or servicing actions which require a determination of security value or which could lead to acquisition of real property by the guaranteed lender, intermediary or Agency, it is essential that the Agency conduct or require the applicant, lender, or guarantor to conduct appropriate assessments of the environmental condition of the affected real property to determine the potential for contamination from the release of hazardous materials as well as the impacts of any such contamination on the regulatory status and security value of the property. Environmental due diligence should be completed on all direct loans, guaranteed loans, and loan servicing activities as detailed below in "Categories and Threshold Levels". In addition, the Agency and other lending partners, to the extent practicable, will make observations of site and building conditions, noting any signs of HazMat concerns during all servicing visits to real property held as loan security. Environmental due diligence should be undertaken by the applicant or lender prior to any real property acquisition by the applicant if at all possible. The Agency should review the results of that due diligence prior to loan/guarantee approval or servicing/foreclosure activities. The environmental due diligence results need to be reviewed **prior** to the Agency action, whether it be issuance of a loan approval (issuance of conditional commitment/letter of conditions, etc.), or prior to servicing activities (acceleration of the foreclosure process/bankruptcy etc.). Completion of environmental due diligence will also screen properties for any existing NOV associated with the property, or the presence of Superfund or other contamination. If an NOV or contamination is known, seek assistance from the NES prior to proceeding with any financial assistance. Please note that environmental due diligence should be completed regardless of whether or not land is purchased or leased, prior to the agency issuance of financial assistance. If a direct or guaranteed borrower operates a facility on a leased property and contamination is discovered, the applicant/borrower can potentially be responsible for the cleanup even if the applicant/borrower had nothing to do with the contamination. All Phase I and Phase II ESAs must be shared with the real estate appraiser so that an accurate appraised value of the affected property can be determined. Costs: If

the applicant/borrower does not wish to comply with the Agency's request to complete environmental due diligence, then it is up to the program to make the determination as to what risk the Agency is willing to take and require the appropriate environmental due diligence or decline to provide financial assistance. The current guidance is a departure from previous guidance in that previously the Agency had indicated that for guaranteed loans the Agency would deem whatever environmental due diligence the guaranteed lender performed as acceptable to the Agency. However, the current guidance recommends that the Agency and other lenders follow the prevailing industry standard, which is the completion of a Phase I ESA on all commercial loans where doing so would reduce financial risk without significant costs. This guidance document uses the \$100,000 threshold based on an estimated average cost of a Phase I ESA at around \$5,000 depending on size of the property, region of country, and contractor. All costs are paid for by the applicant/borrower and are not necessarily reimbursable program costs. Environmental due diligence costs are a cost of doing business. Currently there is no consistency between the program rules and accompanying application processes for requiring a Phase I ESA versus a TSQ, therefore applicants may need to be notified directly by the Agency of this requirement during the application process. As programs develop new rules/application processes they should consult with the NES and incorporate the requirements of this subpart for environmental due diligence into their regulations and procedures. Timing: Completion of the Phase I ESA may require additional time compared to the TSQ based on the need to negotiate a contract and have an environmental professional complete the work. Therefore environmental due diligence requirements should be considered early in the application review process and communicated to the applicants as soon as possible.

(1) Categories and Threshold Levels.

(i) Issuance of Commercial Real Estate Direct or Guaranteed Loans of an Amount Greater Than or Equal to \$100,000. For all commercial real estate direct or guaranteed loans equal to or greater than \$100,000 (any business, retail, community facility, housing or industrial site) where a security interest is taken in the property, a Phase I ESA, as described in 1970.454 and completed by an environmental professional, should

§ 1970.455(a)(1)(i) (Con.)

be completed for Agency environmental risk management purposes unless otherwise authorized by the program following discussions with the NES. The ASTM TSQ as described in 1970.454 should not be used for loans equal to or greater than \$100,000 unless authorized by the program following discussions with the NES. The applicant or lender is responsible for the costs of all Phase I ESAs, unless otherwise specified in the program rule. If an environmental condition is known from previously performed environmental site assessments, refer to 1970.455.

(ii) Servicing of Commercial Real Estate Direct or Guaranteed Loans of an Amount Greater Than or Equal to \$100,000. The Agency shall require that the applicant/borrower, guaranteed lender, intermediary and other lending partners, as appropriate, conduct environmental due diligence for all loan servicing actions on commercial loans equal to or more than \$100,000 which require a determination of security value or which could lead to acquisition of real property by the guaranteed lender, intermediary or Agency REO Property, such as loan acceleration, foreclosure or liquidation. The applicant/borrower will then be required to share the environmental due diligence results with the lender and the Agency, as applicable, in order to assist the lender and Agency in their decision-making and update the appraised values if needed. Also, in some programs the Agency may partially fund costs associated with environmental due diligence on servicing actions. For servicing on direct loans, the Agency will conduct a Phase I ESA to be completed before deciding foreclosure or abandonment. For servicing on guaranteed loans, the Agency will require the lender to conduct a Phase I prior to any proposed abandonment. If known or suspected hazmat is discovered, the Agency official will consult with the SEC, who will consult with the NES. The NES will seek advice from the OGC Pollution Control Team to protect the Agency against possible financial loss. It is also important for the program director and NES to review the program regulations regarding lender abandonment. For example, refer to the program for guidance on how to minimize guarantee payments for situations involving HazMat, and procedures to follow regarding residual value in the collateral. If an independent appraisal is

necessary in bankruptcy or foreclosure proceedings, environmental due diligence in the form of a Phase I ESA will normally be conducted in conjunction with that appraisal.

(iii) Issuance and Servicing of Commercial Real Estate Direct or Guaranteed Loans of an Amount Less Than \$100,000. For all commercial real estate direct or guaranteed loans less than \$100,000, including their servicing (refer to 1970.455(c)), where a security interest is taken in the property, the Agency may allow the use of the TSQ as described in 1970.454. The Agency may complete the TSQ in these cases or may request the applicant or lender to complete the TSQ.

(iv) Issuance and Servicing of Individual Direct or Guaranteed Single Family Housing Loans. Environmental due diligence for issuance and servicing of SFH-direct loans and SFH-guaranteed loans are specified in their respective program rules/instruction and utilize a combination of site visits and appraisal reviews to conduct environmental due diligence. Environmental due diligence may be performed by the Agency in the case of SFH-direct Loans. For the Guaranteed Single Family Housing Program, environmental due diligence will be performed by the guaranteed lender as established under the lender's normal procedures. For SFH servicing actions, environmental due diligence will normally consist of a TSQ conducted by Agency staff or other non-environmental professionals. If the TSQ is inconclusive or shows evidence that HazMat may be present, the next step would be to hire an environmental professional to complete a Phase I ESA. When HazMat is present for any type of Agency program, a Phase II ESA may be necessary to quantify contaminants and to estimate remediation costs.

(v) Issuance and Servicing of Utility Program Direct or Guaranteed Loans. Environmental due diligence in the form of a TSQ or Phase I ESA, as described in 1970.454, is required when utility loans use real estate for collateral rather than bonds. The Agency recommends that in issuance or servicing of loans equal to or above \$100,000 a Phase I ESA should be completed and for those less than \$100,000, a TSQ may be utilized, unless otherwise approved by the Program. Environmental due diligence

§ 1970.455(a)(1)(v) (Con.)

may also be needed along routes of utility lines if there is reason to believe that HazMat may be present to affect construction or design.

(vi) Grants. The Agency will not normally conduct environmental due diligence for grant-only applications (even where a grant agreement may be filed), unless it comes to the attention of the Agency that a HazMat problem may exist. This is because there is no financial liability for repayment of a grant, and there is also no security interest for grants. However, for all grants, if environmental due diligence with respect to the safety of the human environment is a recommended action based on the NEPA review, it should be required by the Agency prior to issuance in order to protect human health as described in 1970.457(a). Applicants are expected to pay for the costs of environmental due diligence for grants.

(b) If an Environmental Condition(s) Exists During Direct or Guaranteed Loan Processing.

(1) Commercial Programs. If during the loan process prior to obligation of funds, environmental due diligence results in a finding (environmental condition) that a release of contaminants is present on the property, or if, for example, a NOV has been issued, which may adversely affect security values, the intended use of the property, or the applicant's financial viability, the issue should be raised to the NES. The Agency should inquire as to whether or not the applicant has purchased the property yet, and if not they should consider the merits of moving to another site. If the applicant has already purchased the property, the Agency, guaranteed lender or intermediary, as appropriate, will notify the applicant that no further processing of the application can take place until one of the following actions is taken by the applicant, guaranteed lender, or intermediary:

(i) Contaminated property is fully addressed according to a plan approved by the appropriate environmental regulatory authority. The plan must be issued **prior to issuance of a conditional commitment or prior to loan closing (disbursement of funds)** (this is frequently referred to as a "release of

environmental compliance letter'' from the state environmental regulatory agency);

(ii) A Phase II ESA is conducted to provide a reliable cost estimate for remediation; it must then be provided to the real estate appraiser to develop an appraisal report that provides a reliable value estimate with deductions for remediation and any stigma. If that appraisal shows adequate security for the government's interest, the loan may proceed with conditions included within a binding loan agreement (often referred to as the conditional commitment) approved by the NES. The loan agreement must state that the site is to be cleaned up according to a plan approved by the appropriate environmental regulatory authority **prior to loan closing (disbursement of funds)**; or

(iii) Other, non-contaminated property is offered as security. At this point the Agency (directed by the NES) may request additional information from the applicant or lender so that the Agency can confirm that the applicant qualifies as a CERCLA BFPP in order to reduce the risk of applicant liability under CERCLA. The applicant would then need to take certain steps, including preparation of a Phase I ESA, prior to its acquisition of the real property at issue. A template for such request is located in **Exhibit B** ''Applicant Questionnaire Regarding CERCLA Bona Fide Prospective Purchaser Status.''

(2) SFH Programs. Environmental due diligence in the form of a TSQ or Phase I ESA, in addition to the SFH program requirements regarding site inspection, will be performed by the Agency, applicant, guaranteed lender or intermediary, as appropriate, regardless of whether or not the Agency is taking the real property as security, if:

(i) An appraiser reports to the Agency, guaranteed lender, or intermediary that potential contamination has been observed on the property or identified through research or interviews with individuals knowledgeable about the property; or

§ 1970.455 (b)(2) (Con.)

(ii) Agency personnel determine in the process of performing a site inspection that hazardous materials are present or likely present on a site, or in close proximity and might affect the site; or

(iii) The Agency, guaranteed lender, or intermediary becomes aware of possible contamination through any other means. If an appraiser reports that potential contamination has been observed or is suspected to be on the property, or if the Agency or the guaranteed lender becomes aware of possible contamination through some means other than the appraiser's report, the Agency may request or complete additional environmental due diligence.

(c) If an Environmental Condition Exists During Direct or Guaranteed Bankruptcy/Foreclosure/REO Sales.

(1) Direct Loan Bankruptcy/Foreclosure Procedures. For direct loans, where the security for the loan is the property, if the environmental due diligence report shows that contamination is present and that the cost of remedial or corrective response actions plus the amount of the debt exceeds the security value, the Agency may choose not to accept title to the property. In this circumstance, a NEPA compliance review by the Agency is not required.

(2) Guaranteed Loan Bankruptcy/Foreclosure Procedures. In the case of guaranteed loans, if the Agency official decides not to accept a conveyance in lieu of foreclosure or to foreclose on security property, whether in whole or part, because of HazMat contamination, the Agency will ensure that its decision is adequately supported with an environmental due diligence report and other relevant material including independent estimates of remediation costs and an as-is appraisal, and that such material is made a permanent part of the case file. When such property is released from the Agency's security instrument, the Agency is not responsible for HazMat remediation or completion of NEPA on such action. In foreclosure or bankruptcy situations for guaranteed loans, the Agency should notify lenders as soon as possible of the lender's

responsibility to coordinate with the Agency and to take prudent actions in order to help minimize the amount of any payment obligation incurred by the Agency under the loan guarantee. For all loan guarantees greater than \$100,000, the lender should complete a Phase I ESA **prior** to management of the facility and **prior** to foreclosure actions.

(3) REO Property Servicing.

(i) General. For servicing of Agency/REO property without any known environmental conditions: If the environmental due diligence report was a Phase I ESA and was prepared within one year, the Agency official may decide that no further reports are needed except for the administrative record documenting that no change is noted. When the property is in a remote area and could be subject to unauthorized dumping of contaminated materials, the Agency official may wish to update, and is encouraged to update, the original Phase I ESA or complete a new Phase I ESA no more than 180 days prior to sale of the property. If the environmental due diligence report was anything other than a Phase I ESA, the Agency official should take into consideration the benefits of expending Agency funds to protect the Agency from financial liability associated with environmental cleanup of potential HazMat. For servicing of Agency/REO property which have known environmental conditions, before initiating repair activities, lease, or disposal of REO property, the Agency official will review any prior environmental due diligence reports and document the current condition of the property regarding HazMat. If the Agency holds title to contaminated real property and wants to convey the property out of federal ownership, it also needs to comply with the requirements of CERCLA section 120(h), 42 USC 9620(h), and 40 CFR Part 373 to the extent that there are CERCLA "hazardous substances" present at the property. In essence, whenever an agency enters into any contract for the sale or other transfer out of federal ownership of real property on which any CERCLA hazardous substance was stored for 1 year or more, known to have been released, or disposed of, the agency must include in such contract a notice of the type and quantity of such hazardous substance and a notice of the time at which such

§ 1970.455(c)(3)(i) (Con.)

storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of the agency files. Furthermore, in certain situations, the agency may need to commit to clean up any existing "hazardous substance" contamination prior to or after the conveyance of the property out of Agency ownership. NES and OGC should be consulted prior to any attempt to convey out of federal ownership any property that has known contamination

(ii) Emergency Response Actions. If Agency staff determine that known or potential contaminants have been disposed of, released, or are discovered on abandoned, custodial, or REO property, staff will promptly notify the SEC for advice. The SECs should in turn immediately contact the NES and OGC to determine the best manner in which to proceed. If such a case is a known or potential immediate threat to human health or the environment, the SEC will also promptly notify the appropriate environmental regulatory agency. The Agency will take emergency response actions under the guidance, direction, and supervision of the appropriate environmental regulatory agency.

(iii) Notice. Consistent with all applicable legal requirements, the Agency official will disclose in writing to prospective lessees, tenants, or purchasers of Agency-owned property any information the Agency possesses concerning contamination of the property and any remedial actions taken. All advertisements, lease or sales agreements, and deeds for REO property will contain the following:

(A) Acknowledgment of hazardous materials, hazardous waste, petroleum products, or a LUST;

(B) A brief description of the type and extent of contamination and a discussion of whether or not any corrective actions have been taken; and

(C) A statement that a report of the Agency's investigation into contamination at the site (environmental due diligence report) is available for public review (provide address and telephone number of the appropriate Agency office).

(iv) Lease Agreements. All lease agreements for REO property shall contain, among other things, a covenant requiring compliance with applicable federal, state, and local laws relating the use, transportation, storage, and disposal of hazardous substances, hazardous wastes, and petroleum products, and include the option for immediate termination clauses in the agreement should violations occur and the Agency determine that such action is necessary. NES and OGC should be consulted prior to entering into any such lease agreements in order to ensure the agency's interests are protected, and that all appropriate lease terms are included.

§ 1970.456 Roles and Responsibilities.

The Agency will require program participants to follow appropriate environmental risk management standards in real estate transactions as follows:

(a) Agency Officials. The Agency official is responsible for the following:

- (1) Informing applicants, borrowers, guaranteed lenders, intermediaries, and other funding partners about Agency environmental risk management policies and the need to undertake appropriate environmental due diligence as discussed in this subpart;
- (2) As part of direct or guaranteed loan making activities, ensuring that appropriate environmental due diligence has been completed and reviewing the results of same as appropriate;
- (3) During loan servicing visits, observing the environmental condition of real estate held as security and advising borrowers of their responsibilities to maintain their operations in an environmentally sound manner;
- (4) Assuring that the Agency, as a federal lender, maintains the secured creditor exemption from liability under CERCLA by not participating in the management of any applicant/borrower's operation;
- (5) Prior to proposed foreclosure actions by guaranteed lenders, ensuring that environmental due diligence has been conducted and

§ 1970.456(a)(5) (Con.)

any necessary remediation has been properly evaluated in the real estate appraisal and the Agency's proposed bid in the pending foreclosure property sale (if the property owner is not cooperative in providing access to the property, the Agency will request the services of the U.S. Marshall to accompany the contractor or the Agency will obtain the contractor's best estimate);

(6) Prior to sale of REO property, conferring with NES and OGC to ensure agency compliance with all applicable requirements, including CERCLA Section 120(h) requirements, including ensuring that environmental due diligence has been conducted and any necessary remediation has been properly completed with the circumstances described in the sale's advertisements and the quit claim deed conveying the property out of government ownership; and

(7) Consulting with the SEC or NES whenever a question arises concerning this subpart or if the presence of HazMat is suspected in any real estate transaction.

(8) If an Agency official receives an NOV or other "adverse" notification from an environmental regulatory agency, he/she must forward it within seven days to the SEC, who must immediately advise the NES. The NES will immediately consult with the OGC-PCT.

(b) Applicants for Direct Loans. Under CERCLA, owners and operators of real estate may be liable as PRPs. Applicants will be asked to provide ASTM-compliant environmental due diligence reports as requested by the Agency as stated in 1970.455. If prior contamination was identified and subsequent remediation completed, the applicant will provide all relevant documentation to prove that no further contamination needs to be addressed.

(1) Documents. All direct and guaranteed loan agreements will include a provision for compliance with any measures required as conditions of financial assistance and with all applicable environmental laws relative to the use, transportation, storage, and disposal of hazardous substances, hazardous wastes, and petroleum products. The applicant may be required to provide periodic documentation of compliance for Agency records.

(2) Noncompliance. Applicants who do not comply with environmental laws related to the use, transportation, storage, and

disposal of hazardous substances, hazardous wastes, and petroleum products, including NOVs, or with the environmental compliance conditions set forth by the Agency, guaranteed lender, or intermediary, as appropriate, in loan and grant documents, may be subject to foreclosure actions, denied further Agency assistance, or debarred or suspended from U.S. government-wide benefits under procedures found at 7 CFR part 3017.

(c) Guaranteed Lenders, Intermediaries or Other Lending Partners. As stated in 1970.455, guaranteed lenders, intermediaries and other lending partners will conduct or require environmental due diligence for all proposals consistent with this guidance prior to Agency loan guarantee decisions. In addition, all guaranteed lenders, intermediaries, and other lending partners will work with the Agency to minimize any guaranteed loan payments from the Agency with respect to HazMat issues. Guaranteed lenders, intermediaries, and other lending partners will then be required to share the environmental due diligence results with the lender and the Agency, as applicable. Whenever the Agency is promulgating program regulations for guaranteed loans, intermediary relending, or other types of lending partners, the Agency will provide within the program regulations appropriate instruction to those lenders in accordance with this Subpart, to ensure that:

- (1) Environmental due diligence is performed in conjunction with loan processing and proposed abandonment actions as outlined in this subpart.
- (2) Real estate appraisers are provided copies of due diligence or other HazMat reports and that the conclusions are reflected within appraisal reports as required by the Uniform Standards of Professional Appraisal Practice and outlined within this Subpart;
- (3) Mitigation measures and other compliance concerns are contained in loan closing conditions, binding loan agreements, construction contracts, and inspection reports to document mitigation requirements and ensure implementation;
- (4) Lending partners inform the Agency, in a timely manner, of any applicant/borrower HazMat issues or concerns;

§ 1970.456(c)(2) (Con.)

(5) Lending partners require their applicants/borrowers to promptly notify appropriate environmental regulatory authorities and the Agency of any release of a reportable quantity of HazMat on property; and

(6) Lending partners require their applicants/borrowers to maintain copies of environmental due diligence reports, environmental audits, UST data, and other relevant information, as applicable, and to provide the Agency with copies if requested.

(d) Real Estate Appraisers. Under Uniform Standards of Professional Appraisal Practice, certified real estate appraisers must reflect in their appraisal report any site contamination known or suspected. This includes estimated deductions for both the associated remediation costs and anticipated stigma that the market indicates for this property due to any current or prior contamination. The Agency, guaranteed lender, or applicant shall provide to the appraiser all known information concerning HazMat. When an environmental due diligence report has been obtained for a property with HazMat issues, it must be provided to the appraiser, who shall take the findings of the report into consideration in the formulation of property value. Often, this will necessitate the preparation of two separate values for the property: an "as is (contaminated)" value and a hypothetical "as remediated (clean)" value.

§ 1970.457 Special Topics.

(a) Relationship to NEPA Compliance. The results of all TSQs and Phase I and II ESAs will be incorporated into the Agency's NEPA documentation for the proposal being considered. For proposals with no security interest in property, it is at the Agency's discretion to move forward with completing a TSQ or to require the applicant to complete a Phase I or II ESA. Agency staff should coordinate with NES in these decisions as needed. The TSQ, Phase I and Phase II ESA summaries and recommendations should be reviewed by the NEPA reviewer/loan specialist and the SEC/NES. If any recommendation is necessary to reduce the environmental impacts below the NEPA definition of significance, it will be included as a mitigation measure in the NEPA review document and listed as a binding grant or loan condition. If any recommendation is necessary to assure adequate Agency environmental risk management, but does not meet the NEPA threshold of significance, it will be mentioned

in the NEPA review, but not listed as a mitigation measure; however, the recommendation will be listed as a loan condition. The presence of environmental contamination defined as HazMat under this Subpart listed below on a site, may be considered an extraordinary circumstance, and thereby the Agency may raise the level of environmental review above a Categorical Exclusion under NEPA for the following:

- (1) Any violation of applicable federal, state, or local statutory, regulatory, or permit requirements for environment, safety, and health (1970.52(b)(1)); or
- (2) Any proposal that is likely to cause uncontrolled or unpermitted releases of hazardous substances, pollutants, contaminants, or petroleum and natural gas products ((1970.52(b)(3)).

(b) Relationship to Environmental Audits. As part of its loan conditions for certain actions, the Agency or a lending partner may require an applicant/borrower to provide an environmental audit periodically to monitor their on-going HazMat compliance. Normally, this is limited to those entities where HazMat is a common part of the applicant/borrower's operation, for example in manufacturing facilities (SFH programs will not be subject to environmental audits). Environmental professionals familiar with the type of facility being investigated will perform these audits to:

- (1) Determine compliance status with HazMat laws;
- (2) Evaluate HazMat management practices, such as storage, transportation, and disposal of hazardous wastes;
- (3) Identify HazMat risks and liabilities, including those attributed to past practices, particularly as they may adversely affect the financial viability of the applicant/borrower's facility; and
- (4) Monitor past and present HazMat compliance activity.

(c) Asbestos, Asbestos-Containing Vermiculite Insulation, Lead-Based Paint, Mold, Radon, and Formaldehyde Insulation Asbestos, asbestos-

§ 1970.457(c) (Con.)

containing vermiculite insulation, lead-based paint, mold, radon, and formaldehyde insulation are not normally considered under environmental due diligence and are therefore not covered in detail in this subpart but are briefly discussed below. The presence of these materials is closely linked to construction practices and therefore covered in RD Instruction 1924-A, "Planning and Performing Construction and Other Development" and its implementing guidelines. For more information on these topics, you may contact the Agency architects or engineers. If an asbestos, lead-based paint, mold, radon, vermiculite or formaldehyde insulation contamination problem is discovered to exist, contact NES.

(1) Asbestos. While asbestos is not considered a hazardous waste under RCRA, it is actionable under CERCLA if it is released in air, water, or on land (for example if it is friable). In most cases the removal of asbestos-containing building materials in place is regulated through Section 112 of the National Emissions Standards for Hazardous Air Pollutants. EPA regulates asbestos in school buildings, public and commercial buildings, at clean-up sites, and in certain asbestos products. EPA and the Occupational Safety and Health Administration are also responsible for regulating environmental exposure and protecting workers from asbestos exposure. Many states administer their own asbestos programs, and the state department of environmental protection or health is generally the best place to start with questions about requirements and/or regulations that may apply to any given asbestos situation. Refer to the following EPA website: www.epa.gov/regulatory-information-topic/regulatory-information-topic-cross-cutting-issues#asbestos. The Consumer Product Safety Commission has a useful website regarding the presence of asbestos in homes: www.cpsc.gov/en/safety-education/safety-guides/home/asbestos-in-the-home/ **Below is general guidance of the Agency's responsibility with respect to the presence of asbestos.** Agency personnel should investigate as appropriate for the presence of asbestos in properties intended for loan making, leasing, or for transfer and should take or require necessary steps to mitigate it or warn prospective buyers about its presence if properly confirmed.

(i) Purchase of Existing Structures: If the Appraisal (or site inspection) indicates asbestos is present the appraisal

should document "yes" there is a potential environmental hazard. If friable asbestos containing materials are confirmed the structure should be considered to contain hazardous material. If the presence of friable asbestos containing materials is suspected but unknown a test for asbestos should be conducted by the lender, applicant or seller. The Agency relies on certified asbestos abatement contractors paid for by the lender or applicant to make these determinations.

(ii) For proposals where no renovation/construction was proposed and the asbestos containing materials were found to be in good, NON FRIABLE condition by a certified asbestos contractor, the agency would not need to require remediation or disclosure. However, if the asbestos containing materials were found to be in disrepair or a deteriorating state, or partially intact, and therefore potentially FRIABLE, then the Agency would need to require remediation or disclosure.

(iii) For proposals where asbestos is intact and non-friable, but repairs are proposed, proper asbestos mitigation must be performed. Mitigation of asbestos containing materials is very complex, involving containment, dust control, encapsulation, and proper disposal and is beyond the capabilities of most homeowners and small contractors. Only EPA approved measures and state and local certified contractors should be used for its mitigation.

(2) Asbestos-Containing Vermiculite Insulation: Vermiculite is a naturally-occurring mineral composed of shiny flakes, resembling mica. Vermiculite is a light-weight, fire-resistant, and odorless material and has been used in numerous products, including insulation for attics and walls. A mine near Libby, Montana, was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990. There was also a deposit of asbestos at that mine, so the vermiculite from Libby was contaminated with asbestos. Vermiculite from Libby was used in the majority of vermiculite insulation in the United States and was often sold under the brand name Zonolite. If you suspect vermiculite insulation is present in a structure, you should assume this material may be contaminated with asbestos and be aware of steps you can take to protect occupants from exposure to asbestos. Refer to EPA's website

§ 1970.457(c)(2) (Con.)

on asbestos-containing vermiculite insulation at:
www.epa.gov/asbestos/protect-your-family-asbestos-contaminated-vermiculite-insulation. Refer to RD Instruction 1924-A for additional information.

(3) Lead Based Paint: There is specific guidance under RD Instruction 1924-A regarding the presence of lead-based pain. EPA has an extensive lead-based paint abatement program which can be accessed online at www.epa.gov/lead. Refer to RD Instruction 1924-A for additional information.

(4) Mold: Molds are part of the natural environment, and can be found everywhere, indoors and outdoors. Mold is not usually a problem, unless it begins growing indoors. **The best way to control mold growth is to control moisture.** Molds can have a big impact on indoor air quality. This website provides guidance about mold and moisture for homes, schools, multifamily and commercial buildings.: www.epa.gov/mold. Also refer to RD Instruction 1924-A for additional information.

(5) Radon: **Radon is a naturally occurring radioactive gas that can cause lung cancer.** The gas is invisible and odorless, and testing is the only way to determine the level of exposure. Radon can have a big impact on indoor air quality. Refer to EPA's website: www.epa.gov/radon for general information. The EPA's "Citizen's Guide to Radon" is a useful informational document: www.epa.gov/radon/citizens-guide-radon-guide-protecting-yourself-and-your-family-radon. Also refer to RD Instruction 1924-A for additional information.

(6) Insulation: Formaldehyde is used mainly to produce resins used in particleboard products and as an intermediate in the synthesis of other chemicals. Exposure to formaldehyde may occur by breathing contaminated indoor air, tobacco smoke, or ambient urban air. Acute (short-term) and chronic (long-term) inhalation exposure to formaldehyde in humans can result in respiratory symptoms, and eye, nose, and throat irritation and has been linked to cancers. One of the most common uses of formaldehyde in the U.S is manufacturing urea-formaldehyde resins, used in particleboard products:www3.epa.gov/airtoxics/hlthef/formalde.html. Also refer to RD Instruction 1924-A for additional information.

(d) Brownfield Redevelopment. Brownfields are real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. Cleaning up and reinvesting in these properties takes development pressures off of undeveloped, open land and both improves and protects the environment. The Agency will support the Departmental initiative to find new uses for brownfields. The Agency will give consideration to the advice received from appropriate environmental regulatory authorities with respect to suitable uses of such sites and any precautions that should be taken in providing financial assistance under any Agency program. Development on brownfields requires a level of documentation, cost analysis and investigation that is greater than normal. In the United States, investigation and cleanup of brownfield sites is largely regulated by state environmental agencies. Many of the most important provisions on liability relief are contained in state codes that can differ significantly from state to state. The USEPA, together with state and local governments, can provide technical assistance and possibly some funding for assessment and cleanup of designated brownfield sites (refer to EPA's webpages on brownfields). Coordination with the NES is mandatory whenever the Agency engages in grants, direct loans, or guaranteed loans that involve brownfield cleanup or redevelopment.

(e) Recognizing HazMat on Site. While performing site visits for new proposals or existing portfolio properties, Agency staff should look for indicators of incorrect hazardous waste storage and disposal. Evidence of improper waste handling includes, but is not limited to, stained soil, an odor of petroleum, dead or dying vegetation, standing pools of liquid of an unusual color or odor, and rusted piping or storage containers. If during a site visit Agency staff notice anything of potential concern, they should consult with their SEC. If vent and fill pipes protruding from the ground are observed, further investigation will be required, as detailed in part(f) below.

§ 1970.457 (Con.)

(f) USTs.

(1) UST Regulation. USTs are of special concern due to the often invisible, below-ground nature of any leaking that may occur. Federally regulated USTs are those subject to federal regulation under RCRA. The majority of states have been authorized by EPA to regulate USTs in lieu of the federal regulations (see www.epa.gov/oust/fsstates.htm). USTs that are not federally regulated are those not subject to EPA's installation, monitoring, and notification standards of RCRA but may be subject to state and local requirements. USTs not federally regulated include:

(i) Farm and residential USTs with a capacity of 1,100 gallons or less used for storing motor fuel for non-commercial purposes;

(ii) USTs of any size used for storing heating oil for consumption on the premises where stored; or

(iii) Other types of tank systems listed in 40 CFR § 280.12, such as septic tanks; pipeline facilities; surface impoundments; pits, ponds, or lagoons; storm water or wastewater collection systems; 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 (i.e., basement, cellar, mineshaft, etc.) if the tank is situated on or above the surface of the floor. The generalized chart below shows what the Agency should require of the applicant or lender prior to loan closing in each of the following cases. Check your state's regulations to ensure that they do not require further action on abandoned above and below ground tanks.

<u>Storage Tanks</u>	Guaranteed Programs - RD Takes No Collateral	Direct - Single Family Housing	Direct - Community Facility, Multi-Family Housing
Abandoned Underground (At least 10% Underground) **Likely to Leak at some point in time.	Lender Due Diligence, but preference is to REMOVE	Recommend REMOVE, but can't require unless we know about soil contamination	Highly Recommend to REMOVE - more affordable for these types of projects and will leak eventually
Abandoned Above Ground	Lender Due Diligence	May REMOVE, but Likely Empty - therefore no hazard so may Do Nothing	Highly Recommend to REMOVE - relatively easy to remove and dispose of
Working Underground (At least 10% Underground)	Lender Due Diligence	No Action Needed unless known contamination	Removal Not Needed if Regulated
Working Above Ground	Lender Due Diligence	No Action Needed unless known contamination	Removal Not Needed if Regulated

(2) New Storage Tanks.

(i) For proposals requiring new storage tanks that will be non-regulated, an above ground storage tank (AST) will normally be used.

(ii) For proposals requiring new storage tanks that will be regulated, either a UST or above ground storage tank (AST) may be used.

(3) Existing USTs on Real Estate Proposed for Security Interests.

(i) Where a UST that is state or federally regulated pre-exists on a property proposed for the Agency's security interest (or that of any guaranteed lender, intermediary

§ 1970.457(f)(3)(i) (Con.)

lender, or other type of lending partner), the Agency will request evidence that the tank is regulated and compliant with current state requirements. The loan will not be closed until proof of compliance is obtained. For additional online information refer to: www.epa.gov/oust/overview.htm.

(ii) Where a non-regulated UST exists on a property proposed for the Agency's security interest (or that of any guaranteed lender, intermediary lender, or other type of lending partner), there is no requirement for removal or closure, but several alternatives are acceptable:

(A) The applicant provides a current (within one year) pressure test report on the UST by a competent professional in accordance with appropriate regulatory standards showing that the tank is intact; or

(B) The preferable alternative is closure in-place or permanent removal of the UST documented by a licensed professional's closure report showing testing evidence of no prior leakage or, if leakage had occurred, that it was cleaned up to the satisfaction of the authorized environmental regulatory agency.

(iii) Where an unused UST pre-exists on a property proposed for the Agency's security interest (or that of any guaranteed lender, intermediary lender or other type of lending partner), it is highly recommended that it be closed, removed, or replaced with an AST. When replacing a non-regulated UST, an AST with spill containment will be installed whenever **practicable** to facilitate maintenance and leak detection (location in a basement is acceptable). If the UST is replaced underground, appropriate containment or monitoring for the lifetime of the loan is recommended. UST closure, including removal and corrective action or closure in-place, will normally be undertaken by the seller of the property unless the Agency concurs otherwise. In some circumstances, the buyer of the property may conduct closure after the sale if the Agency concurs. Closure should follow the applicable requirements of

the appropriate regulatory authority, even if the tank is not required to be registered. Doing so normally results in a written report that provides evidence that no leakage occurred previously and this evidence should be appended to the title transfer instrument to protect the buyer and the Agency.

(4) Foreclosure and REO Property Actions.

If a regulated UST is in compliance with current requirements, it will be documented and the UST may be retained if needed. However, all contents of the tank will be removed and properly disposed prior to turning off electricity that may affect the spillage alarm system of regulated tanks. All other USTs will normally be removed under appropriate state closure procedures prior to resale of the property unless there is documented evidence that such USTs have passed tank pressure tests and are of an acceptable age and condition. The Agency official will attach a copy of any closure report to the conveyance instruments for lease or sale. If necessary, a UST will be replaced with an AST having proper spill containment. If any LUST is discovered, it will be reported to the proper authorities and remediated by the Agency prior to sale of the property. In such a situation, consult with the NES and OGC. Temporary closure of USTs is not recommended. If necessary, the tank must be emptied and maintained during the temporary closure period in accordance with directives from the appropriate environmental regulatory agency. For example, many tanks may need to have electric power supplied even when empty to provide cathartic protection from corrosion due to soil conditions. Turning off utilities can violate UST permits and make the Agency vulnerable to NOVs and fines.

(g) Meth Laboratories. Agency field staff must know how to recognize and properly handle properties previously or currently used for the illegal production of meth. This section provides general guidance to field staff on how to recognize when a building may have been or is currently being used as a meth lab. Exhibit C provides more detailed guidance on the dangers of the HazMat associated with the illegal production of meth and their cleanup. Exhibit C also provides information to Agency staff for proper disposal of REO properties used as illegal meth labs by outlining standard remediation procedures for the cleanup of contaminated meth labs.

§ 1970.457(g) (Con.)

(1) Agency staff shall not conduct any sampling or cleanup at suspected or confirmed meth labs. Contact your local environmental protection or law enforcement agency for guidance and information regarding specialized HazMat contractors.

(2) Meth labs are typically located in sparsely populated or isolated rural areas in order to avoid detection. The fact that these labs are frequently found in rural America increases the likelihood that Agency field staff might encounter one. Therefore, it is critical that Agency field staff is able to recognize the signs that a property has been used, or is still being used, as an illegal meth lab. The timely identification of a property as a meth lab reduces the chance that Agency staff will encounter potentially dangerous criminals and the HazMat associated with meth production. Knowledge that a property was once used as an illegal meth lab can also be critical information when calculating property market value and net recovery value. It is important to remember that costs to remediate a meth lab vary tremendously so an accurate cost estimate is critical.

(3) The following list outlines some common indicators that a property may have been used as an illegal meth lab:

- (i) Access denied to landlords, neighbors, and other visitors;
- (ii) Renters who pay their landlords in cash (most drug dealers trade exclusively in cash);
- (iii) Covering or blacking-out windows;
- (iv) Burn pits, stained soil, or dead vegetation;
- (v) Waste in trash pits or piles, with high amounts of
 - (A) Packaging from over-the-counter cold medications;
 - (B) Empty containers of antifreeze, white gas, ether, starting fluids, Freon, lye, drain unclogging products, paint thinner, acetone, or alcohol;

(C) Compressed gas cylinders or camp stove (e.g., Coleman) fuel containers;

(D) Packaging from Epsom salts or rock salt; Anhydrous ammonia tanks, propane tanks, or coolers containing anhydrous ammonia;

(E) Pyrex/glass/Corning containers or other laboratory or kitchen glassware with hoses or duct tape;

(F) Coolers, Thermos bottles, or other cold storage containers;

(G) Respiratory masks and filters, dust masks, rubber gloves, funnels, hosing, and clamps; and

(H) Coffee filters, pillowcases or bed sheets stained red (used to filter red phosphorous).

(vi) Apartments or buildings having a distinct chemical smell, particularly a strong sweet, bitter, ammonia, or solvent smell.

Exhibit: A, B and C

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ASTM Transaction Screen Questionnaire (1528-14)

<http://bennett-ea.com/wp-content/uploads/2014/01/E1528-14-ESA-TS.pdf>

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Exhibit B: Applicant Questionnaire for EPA "all appropriate inquiries" rule
(40 CFR Part 312).

The Agency is requesting that the applicant provide additional information with respect to whether the applicant qualifies as a "bona fide prospective purchaser" pursuant to sections 107(r) and 101(40) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) with respect to the subject property. This information will better enable the Agency to evaluate potential liability and financial risks of the applicant in connection with its ownership of the property and reach a timely decision on the proposed loan guarantee.

Please respond to the following questions to the best of your knowledge and ability. As you may know, a person claiming to be a CERCLA bona fide prospective purchaser bears the burden of proving that they, in fact, meet the conditions of this statutory exemption from liability.

Threshold Criteria

1. When did applicant acquire the property?
2. Was the Phase I environmental site assessment that applicant caused to be prepared completed and updated in a timely manner as required by EPA's "all appropriate inquiries" rule and ASTM E1527-13 (including key components being updated prior to and within 180 days of closing)?
3. Is applicant affiliated with any other person who may be potentially liable for response costs at the property?

Continuing Obligations Criteria

4. Is applicant complying with land use restrictions and institutional controls at the property?
5. Is applicant taking reasonable steps to stop continuing releases; prevent future releases; and prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases?
6. Is applicant providing full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration?
7. Is applicant complying with any CERCLA information requests and administrative subpoenas (if applicable)?
8. Has applicant provided all legally required notices related to the discovery or release of hazardous substances at the property?

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Environmental Cleanup of Meth Laboratories

(a) POTENTIAL HEALTH EFFECTS. There are dozens of hazardous (explosive, flammable, or toxic) chemicals that are used interchangeably to produce meth. Hazardous chemical by-products may also be formed during the manufacture of meth. A minimum of five to seven pounds of chemical waste is produced for each pound of meth manufactured.

(1) The effects caused by exposure to meth lab chemicals depend on the lab process used, the amount of chemicals and length of exposure, and the age and health of the person exposed. The chemicals found in an illegal meth lab may enter the body by being breathed, eaten, or absorbed through the skin.

(2) Acute exposure to the chemicals typically found in an illegal meth lab can cause shortness of breath; coughing; chest pain; dizziness; lack of coordination; disorientation; and irritation or burns to skin, eyes, nose, and mouth. Death could result when exposure is to a particularly toxic chemical, a particularly high concentration of a chemical, or if the person exposed is particularly vulnerable. The chance of acute exposure is greatest during or immediately after meth production. Anyone who enters an illegal meth lab without appropriate personal protective equipment, during production or shortly after production has stopped but before proper ventilation, will be exposed to hazardous volatile chemicals and will experience unhealthy or potentially life threatening effects. Less severe exposure can cause headaches, nausea, dizziness, or fatigue. These less-severe symptoms usually subside after several hours of exposure to fresh air. However, there have been reports of people who have taken up residence in a former meth lab site who have suffered chest and respiratory symptoms months after lab chemicals were removed.

(b) ON-SCENE SAFETY. If you believe you have discovered an illegal meth lab or the site of an abandoned lab, immediately notify local law enforcement. DO NOT ENTER THE SITE. Do not touch, inhale, or otherwise expose yourself to chemicals. Anyone who inadvertently enters a meth lab should immediately leave the area without disturbing the cooking process, chemicals, or equipment. Illegal meth lab sites are not only dangerous but they are crime scenes as well. Law enforcement officers will decide when the property can be entered. If you feel that you may have been exposed to hazardous chemicals, you should immediately consult with a physician. In

addition, thoroughly clean your shoes and any other items of clothing or personal property that may have been exposed.

(1) Agency field personnel who encounter a known or suspected meth lab, or former meth lab, will observe the following guidelines:

(i) Only enter a known or suspected meth lab after authorized to do so by law enforcement officials and after ventilation and gross cleanup are complete.

(ii) Limit time on-site to minimize exposure.

(iii) If exposed, take action to contain or eliminate contaminants (e.g., wash exposed skin, remove contaminated clothing).

(iv) Avoid spreading contamination via clothes or shoes.

(v) Seek medical care if needed or so advised.

(vi) When a known or suspected meth lab has been identified, the SEC must to be notified.

(c) SITE EVALUATION AND SAMPLING. Other than performing adequate NEPA analysis of all agency actions, the Agency has no specific regulations associated with methamphetamine contamination and cleanup. The EPA has published guidelines entitled the "Voluntary Guidelines for Methamphetamine Laboratory Cleanup" which located online at:www.epa.gov/sites/production/files/documents/meth_lab_guidelines.pdf

General Recommendations: According to the EPA guidelines, if there is no state standard, meth lab cleanup is a voluntary process, and up to the owner of the property. For both direct loans and guaranteed loans, it is up to the owner of the property to conduct methamphetamine contamination cleanup. Since the Agency needs to cover any financial and environmental exposure liabilities, the following general recommendations should be followed:

(1) Determine if there is a state certification process in place for contractors in the state the contamination is located.

(2) The owner of the property will need to hire a contractor who has a certified industrial hygienist (CIH) to conduct the

preliminary assessment and post-remediation sampling, at a minimum. If there are no companies with a CIH, contact NES to discuss.

(3) The owner should hire a contractor who is well experienced in meth lab cleanup to perform the work.

(4) Since there is no consensus as to what threshold level meth needs to be remediated to, the Agency recommends that the default cleanup/remediation standard of 1.5 $\mu\text{g}/100 \text{ cm}^2$ of meth should be used. This standard in accordance with many other states currently; which means that remediation could end when no areas test at or above 1.5 $\mu\text{g}/100 \text{ cm}^2$.

(5) The Agency recommends that the site is tested for Volatile Organic Compounds as well as meth, at a minimum.

(6) The Agency recommends the contractor determine what type of meth lab it was based on EPA's Guidance document Appendix A (Nazi/Birch Reduction, Red Phosphorus/Hydriodic Acid, P2P Amalgam, or One-Pot). Discuss with the CIH and determine which of the following additional chemicals may need to be screened during the initial testing: corrosives, lead, mercury and iodine. The Agency recommends using the most conservative concentration as documented in EPA's guide.

(7) **Consult with NES** with any questions along this process.

Overview of the Site Specific Evaluation to be completed by environmental consultant

A site evaluation is needed to (1) assess immediate and potential long-term dangers from any contamination and (2) determine the need for and best method for decontamination. The areas of contamination are divided into primary and secondary areas. The primary areas include production, inside disposal, and outside disposal areas. The secondary areas are areas where contamination has or may have migrated.

(i) The primary area of contamination directly related to meth production can include areas contaminated by spills, boiling over, explosions, or chemical fumes created during production. Such contamination may be found on floors, walls, ceilings, glassware, containers, working surfaces, furniture, carpeting, draperies, other textiles, plumbing fixtures and drains, and heating and air-conditioning vents. The primary areas of

contamination directly related to indoor disposal of meth production waste can include: sinks, toilets, bathtubs, plumbing traps, floor drains, vents, vent fans, and chimney

flues. The primary areas of contamination directly related to outdoor disposal of meth production wastes can include: soils contaminated by dumping or burning on or near the soil, surface water, groundwater, sewer or storm systems, septic systems, and cesspools.

(ii) The secondary areas of contamination are areas where contamination has or may have migrated through the air or foot traffic, or other means. These may include: hallways and high traffic areas, common areas in multiple dwelling units, adjacent apartments or rooms, and common ventilation or plumbing systems in hotels and multiple dwelling units.

(iii) If the Agency does not own the property (i.e., it is not an REO property), a determination must be made as to the best course of action. Consultation with local law enforcement officials is required and consultation with the NES is strongly recommended. If the Agency owns the site (i.e., it is an REO property), the Agency should contract for the services of a qualified hazardous materials professional and the NES. This professional will determine what chemical sampling will be necessary. The contractor will determine if any federal, state, or local action levels have been exceeded and if further cleanup is necessary. Cleanup requirements will depend on the types of chemicals found, the manufacturing process used, and how long the lab was active. Cleanup requirements will also be based on applicable federal, state, and local protocols.

(d) CLEANUP OF ILLEGAL METH LAB. Cleanup of a site may be as simple as venting and the removal of chemicals, apparatus, and wastes. However, in some cases the contamination is extensive and demolition of a contaminated structure may be the best option if costs for cleanup exceed appraisal value. Cost estimates for cleanup should be determined by the environmental professional responsible for the site evaluation and will be reflected in the appraisal of value. In any case, the Agency will work with federal, state, and local health officials to verify that any illegal meth lab is properly cleaned and contamination levels are below those considered hazardous. It may be necessary to notify neighboring property owners of cleanup activities.

This determination should involve discussion and direction from the site assessment professional and state or local officials.

(1) Indoor contamination found at illegal meth labs may require one or more of the following procedures:

- (i) Removal,
- (ii) Ventilation,
- (iii) Neutralization,
- (iv) Washing, or
- (v) Encapsulation.

(2) Outdoor contamination found at an illegal meth lab may require one or more of the following procedures:

- (i) Removal,
- (ii) Drainage control,
- (iii) Removal or treatment of contaminated water or soil,
- (iv) Alternate water supplies when the potable water source is contaminated, or
- (v) Site controls such as fencing or signs.

(3) The Agency will not allow occupancy of a property under its custodial care or ownership that formerly contained an illegal meth lab until cleanup has been completed and verified by a hazardous material professional. If the property will be going into foreclosure, another option, in lieu of cleanup, is to disclose the previous existence of the meth lab, obtain a real estate appraisal report for the "as is (contaminated)" market value and restrict all occupancy until the property is proven to be cleaned up.

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