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ONE HUNDRED EIGHTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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CHAIRMAN

October 5, 2004

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BUD ALBRIGHT, STAFF DIRECTOR

The Honorable David Sampson
Assistant Secretary for Economic Development
Economic Development Agency
14th and Constitution, N.W.
Washington, D.C. 20230

Dear Mr. Sampson:

We are writing to request information on the Economic Development Agency's (EDA) environmental assessment and clean-up projects, including investments in brownfields sites. This information is necessary in order to clarify the nature and scope of this program.

The scope of EDA's program has been the subject of recent House and Senate discussions in connection with the Reauthorization of the Public Works and Economic Development Act of 1965, as amended. A clear picture of the program has not emerged from these discussions.

We are particularly concerned that EDA may be engaged in projects beyond EDA's level of expertise and resources. For example, EDA Directive No. 17.01 indicates that the EDA frequently receives applications for funds at sites which could involve hazardous or toxic waste remediation. The EDA Directive goes on to list projects that would be given careful scrutiny, but that may be funded by the agency. These include: any type of sanitary, municipal, solid, or hazardous waste landfills containing friable asbestos, areas with contaminated soil or groundwater, PCB contamination, areas under litigation for environmental contamination, and areas adjacent to high risk industries or activities which could pose adverse public health risks. A copy of this Directive is attached.

We are also seeking clarification of the nature and scope of the program in light of your contrasting statement on April 28, 2004, before the Senate Committee on Environment and Public Works where you indicated that "EDA's investments in Brownfields rarely involve even the most residual clean-up activity."

Projects involving a significant degree of risk and complexity require an appropriate level of expertise and oversight if public health and the environment are to be protected. In order to address our concerns regarding the EDA program, we ask that you respond to the following questions by no later than Friday, October 15, 2004.

1. Please provide a description and analysis of the legal authority supporting EDA's performance of assessment or clean-up activities or payment for these activities in connection with EDA investments.
2. In your statement on April 28, 2004, before the Senate Committee on Environment and Public Works regarding the reauthorization of the Public Works and Economic Development Act of 1965, you indicated that from FY99-FY03, EDA made 269 investments in Brownfields totaling \$266,579,653, or 15 percent of the EDA total program appropriation during that time period. You estimated that an average of 54 Brownfields sites were addressed annually with an average annual expenditure of \$53,315,931.

For each of the EDA cleanups and investments from FY99-the present, please provide the following information.

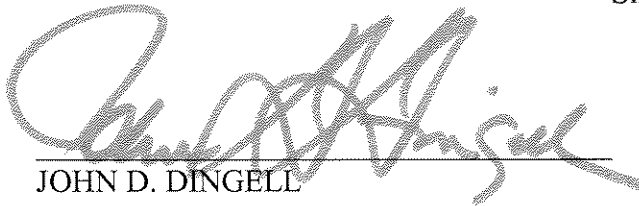
- a. A description of the site of each cleanup or investment, including the environmental conditions identified at the site.
- b. A description of the assessment and clean-up activities conducted in connection with each site, including those activities conducted in whole or part with EDA funds and the amount expended;
- c. A description by site of all information provided to EDA prior to the Agency's decision to invest in the project on the environmental condition at the sites requiring some level of assessment or cleanup.
- d. A description by site of any potential or current EDA environmental liabilities associated with projects invested in by EDA;
- e. A description by site of any EDA projects requiring cleanup that are now or in the past were under the jurisdiction custody or control of the Department of Defense (DOD) and any clean-up or assessment activities at these sites paid for or performed by EDA. Please also indicate whether EDA has been reimbursed by DOD for these expenditures.

- f. A description of all EDA personnel involved in environmental assessment and clean-up activities, including their qualifications to perform this work. Please also describe the responsibilities of each of these individuals and the process they follow when evaluating an investment requiring environmental assessment or cleanup.
3. Please indicate whether information relating to site conditions, potential or actual liabilities, and cleanup and assessment work performed or paid for by EDA has been collected in one central place and whether a complete written assessment of this information by site has been provided to headquarters and the management of EDA.
4. Please provide all EDA policies, directives, memoranda of understanding, or other guidance documents that relate to environmental cleanup or assessment by EDA or an investment by EDA.
5. In an MOU dated July 25, 2002, between the Department of Commerce (DOC) and the Environmental Protection Agency (EPA), EPA and DOC agreed to work together on brownfields cleanup. These joint activities may include crafting a joint brownfields strategy.
 - a. Have any such strategies been developed?
 - b. If so, please provide copies of any related documents.
6. The July 25, 2002, MOU also provides that should EPA and EDA decide to collaborate on a specific project or projects, one agency will be selected as a lead agency and will be responsible for all grant management, financial, and accounting services in awarding funds to the recipient. In addition the supporting agency will transfer funds to the lead agency to manage the project.
 - a. Please identify all joint brownfields projects undertaken between EPA and EDA and indicate which agency acted as the lead.
 - b. Please provide copies of any interagency agreements entered by EDA in connection with any joint EPA/EDA activities.
 - c. Please provide, by project, the environmental activities performed or paid for by each agency and the funds expended.
 - d. Please provide a legal analysis of the authority for EDA to act as lead on an EPA brownfields project, including the application of EPA Brownfields regulations to EPA projects lead by EDA.

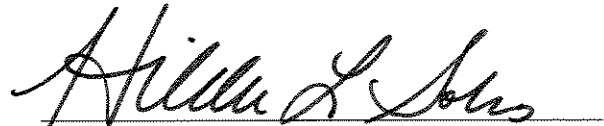
7. Please describe the steps taken by EDA to reduce exposure to liability under federal, state and local law for environmental clean-up projects and investments. Please include in this description an analysis of how the due diligence and the "Applicant Certification Clause" currently required by EDA does or does not meet the legal criteria necessary to obtain protection from liability under the Comprehensive, Environmental, Response, Compensation and Liability Act (CERCLA).

If you need further information regarding this request, please have your staff contact Bettina Poirier, Minority Counsel with Committee on Energy and Commerce Democratic staff, at (202) 226-3400.

Sincerely,



JOHN D. DINGELL
RANKING MEMBER



HILDA L. SOLIS
RANKING MEMBER
SUBCOMMITTEE ON ENVIRONMENT AND
HAZARDOUS MATERIALS

cc: The Honorable Joe Barton, Chairman
Committee on Energy and Commerce

The Honorable Paul E. Gillmor, Chairman
Subcommittee on Environment and Hazardous Materials



Economic Development Administration Directives System

**GENERAL
ADMINISTRATION &
STAFF SERVICES**

**Directive No. 17.01
Effective Date: 3/18/98**

**EDA PROGRAM TO REDUCE THE RISK OF
HAZARDOUS WASTE LIABILITY**

Sections

- .01 Purpose**
- .02 Scope**
- .03 Policy**
- .04 Procedures**
- Attachment-- Applicant Certification Clause**

**17.01.01
PURPOSE**

This Directive establishes the Economic Development Administration's (EDA) policies and procedures for implementing the Applicant Certification Clause, and the Indemnification Standard Condition. These provisions will aid in reducing the risks to EDA for liabilities related to environmental cleanups under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. 9601-9675, and the Superfund Amendments and Reauthorization Act (SARA) of 1986, U.S.C., and in collecting the necessary information for conducting the required environmental review in accordance with the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321-4347.

**17.01.02
SCOPE**

EDA frequently receives applications for projects which could involve hazardous or toxic waste remediation. Under the CERCLA, owners or operators of sites involving toxic or hazardous contamination can be held liable for the costs of cleanup. Because EDA takes first lien or a covenant of use and purpose on grant projects involving real property, it is necessary for EDA to avoid the position of owner or operator of a contaminated site.

17.01

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17.01.02

Certain types of actions in connection with projects are termed "deal-killers" by the private sector due to excessive costs and time required for remediation, and such projects should be given careful scrutiny by EDA before funding. These include any type of closed landfill site, e.g., sanitary, municipal, solid or hazardous waste projects containing friable asbestos, areas with contaminated soil or groundwater, PCB contamination, areas under litigation for environmental contamination, and areas adjacent to high risk industries or activities which could pose adverse public health risks.

It is standard practice at most levels of government and in the lending and banking industry to conduct environmental contamination investigations prior to real estate transactions. The SARA, which reauthorizes CERCLA, allows an innocent landowner defense which can protect an owner from environmental liabilities, but only if the owner, at the time the property is acquired, has made all appropriate inquiries, i.e., due diligence, into the previous history and uses of the site.

The need for remedial action would not necessarily negate an EDA proposed project. Minor removal or a simple cleanup can be completed to allow the project to proceed. These remedial actions can be required environmental conditions to the offer of grant. It should be noted that EDA, if determined by a court to be an owner or operator, may be liable for any remedial actions necessary and would be forced to seek reimbursement from the grantee or other potentially responsible party.

17.01.03

POLICY

To reduce the risk of EDA's liability for the cleanup of a hazardous or toxic waste site under CERCLA, and to protect EDA's investment in a project, EDA requires all prospective recipients of EDA grants (and loans) for projects involving real property to complete and sign an "Applicant Certification Clause," which is part of EDA's application. This requires applicants to certify regarding their knowledge (based on a "due diligence" examination of the project site and files) of any hazardous or toxic contamination that may affect real property for which EDA might be placed in the chain of title, or may be affected by EDA-assisted construction activities. This includes easements, rights-of-way, or sites required for the construction and operation of the EDA-assisted project, including real property for which EDA will have a recorded lien interest or covenant of use and purpose.

17.01.03

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17.01

In addition, the applicant must agree to the Indemnification Standard Condition to indemnify, and hold harmless, EDA from all liabilities concerning hazardous or toxic wastes.

17.01.04
PROCEDURES

Procedures for the Identification of Projects Involving Hazardous or Toxic Waste

a. In the application, applicants are required to:

(1) complete the Applicant Certification Clause which should address the EDA-funded portion of the project and the entire scope of the project, including future phases of the project, and all areas where construction will occur, e.g., property through which water or sewer lines will be laid; and

(2) describe prior uses of the project site.

b. The Regional Environmental Officer, upon review of the above mentioned information, may recommend to the Regional Director that, before the NEPA environmental review can be completed, the site be surveyed for hazardous and/or toxic waste contamination by a qualified environmental consultant, i.e., a physical inspection of the site, and possibly with selective sampling of suspected areas of contamination. Several options exist for funding an environmental contamination survey (any EDA participation would be at the discretion of the Assistant Secretary):

(1) the applicant would pay the entire cost of the survey;

(2) the applicant would pay a percentage of the cost equivalent to the grant rate; or

(3) EDA would pay through a separate TA grant.

c. During the application process, if a toxic or hazardous waste problem is found, the applicant must:

(1) define the toxic or hazardous waste problem;

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17.01.04.c.(2)

- (2) define the measures to be taken to correct the problem;
- (3) estimate costs and time for the cleanup, if required;
- (4) identify the source(s) of non-EDA funds to implement remediation measures;
- (5) identify other potentially responsible parties;
- (6) indicate when the cleanup will occur; and
- (7) obtain approval or clearance from the necessary regulatory authority (U.S. EPA or the State) for the hazardous or toxic waste remediation.

d. During the NEPA environmental review, the Regional Environmental Officer will evaluate the results of the environmental contamination survey (if required) and the environmental information presented to make a determination that:

- (1) an environmental assessment (EA) with a Finding of No Significant Impact (FONSI) can be made and that the project can proceed; or
- (2) an EA with a FONSI can be made with special conditions in the grant agreement that will require remediation in order that the project may proceed; or
- (3) an EA with a FONSI with special conditions where no hazardous or toxic waste remediation is necessary; or
- (4) a FONSI cannot be made and an Environmental Impact Statement (EIS) and/or Remedial Investigation/Feasibility Study (RI/FS) may be required before the project can be approved; or
- (5) the project is not feasible due to serious environmental contamination problems and should be denied.

e. Any recommendation to Headquarters by the Regional Offices that EDA assist in a project which could involve hazardous or toxic waste contamination should include:

17.01.04.e(1)

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17.01

- (1) full information as to the known extent of such conditions;
- (2) potential risks and remedies associated with the situation; and
- (3) recommendations for further actions which may be taken to protect EDA's investment and reduce liabilities.

f. Indemnification is a means of offering limited protection to EDA for any project with a toxic or hazardous waste issue in which there exists potential for EDA to become owner or operator. The value of indemnities is limited since most liabilities arise from third party claims.

The following condition will be incorporated into EDA's Standard Terms and Conditions:

Indemnification Standard Condition

To the extent permitted by law, the Recipient agrees to indemnify and hold the Government harmless from and against all liabilities that the Government may incur as a result of providing an award to assist, directly or indirectly, preparation of the project site or construction, renovation, or repair of any facility on the project site, to the extent that such liabilities are incurred because of toxic or hazardous contamination of groundwater, surface water, soil or other conditions caused by operations of the Recipient or any of its predecessors (other than the Government or its agents) on the property.

Phillip A. Sigerman
Assistant Secretary
for Economic Development

Attachment

EXHIBIT B-IV.A.9.c

OMB Control Number 0610-0094
Expiration Date 01/31/2000

Applicant's Name: _____ Project Number: _____

This form below is estimated to take 10 to 15 minutes to complete. It is a non-dependent sample for needs of the individual case. Any comments on the amount of time for a specific case should be sent to the Director, Compliance Resources Division, Environmental Branch, Economic Development Administration Room 17019, Federal Office of Commerce, Washington, D.C. 20230, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (0610-0094), Washington, D.C. 20503.

APPLICANT CERTIFICATION CLAUSE

The Applicant represents and certifies that it has used due diligence to determine that the description of the site described herein is accurate with respect to the presence or absence of contamination from toxic or hazardous substances. The term "site" includes the entire scope of the project, including future phases of the project and all areas where construction will occur.

1. Is the site currently, or has it in the past fifty years, been used for any of the following operations or activities:

a) generation of hazardous substances and/or waste	<input type="checkbox"/> YES	<input type="checkbox"/> NO
b) treatment, storage (temporary or permanent), or disposal of solid or hazardous substances and/or waste	<input type="checkbox"/> YES	<input type="checkbox"/> NO
c) storage of petroleum products	<input type="checkbox"/> YES	<input type="checkbox"/> NO
d) used/waste oil storage or reclamation units	<input type="checkbox"/> YES	<input type="checkbox"/> NO
e) research or testing laboratory	<input type="checkbox"/> YES	<input type="checkbox"/> NO
f) ordnance research, testing, production, or storage	<input type="checkbox"/> YES	<input type="checkbox"/> NO
g) chemical manufacturing or storage	<input type="checkbox"/> YES	<input type="checkbox"/> NO
h) military weapons or ammunition training or testing	<input type="checkbox"/> YES	<input type="checkbox"/> NO
i) iron works/foundry	<input type="checkbox"/> YES	<input type="checkbox"/> NO
j) railroad yard	<input type="checkbox"/> YES	<input type="checkbox"/> NO
k) industrial or manufacturing operation	<input type="checkbox"/> YES	<input type="checkbox"/> NO

If any of the above operations ever occurred at the site, and appropriate cleanup or other action was performed in accordance with the local, state and Federal laws, provide documentation of such cleanup.

2. Do wells draw water from an underlying aquifer to provide the local domestic water supply? YES NO

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Project Number: _____

- 3. Has a Federal, state or local regulatory authority ever conducted an environmental assessment, environmental impact statement, or a preliminary assessment/site inspection, or similar environmental survey or inspection report at the site? If yes, provide copies of reports or results. YES NO
- 4. Have any environmental or OSHA citations or notices of violation been issued to the facility? If yes, provide copies. YES NO
- 5. Have any unpermitted releases of hazardous substances occurred at the facility which resulted in notification to the EPA's National Response Center? If yes, what was the nature of the release? YES NO
- 6. Is asbestos containing material currently in the facility? If yes, describe and provide information concerning state and Federal regulatory compliance. YES NO
- 7. Is there any equipment (electrical transformers, etc.) containing polychlorinated biphenyls (PCB) on the site? If yes, describe condition of the equipment i.e. age, leaking, etc. YES NO
- 8. a. Are there underground storage tanks on the site? YES NO
 b. If so, how many are there? _____
 c. Have they been inspected for leaks within the past year? If so, what were the results? If not, provide explanation. YES NO
- 9. Has the facility been tested for radon? If yes, provide results. YES NO
- 10. Have there been or are there now any environmental investigations by Federal, state or local government agencies which could affect the site in question? If yes, provide available information. YES NO

The applicant acknowledges that this certification regarding hazardous substances and/or waste is a material representation of fact upon which the Government relies when extending this award.

The Government reserves the right to terminate the award, if at any time during the useful life of the project it becomes aware that hazardous substances and/or waste are present thereon, or that such hazardous substances and/or waste have been inappropriately handled thereon. Further, if it is determined at any time that the presence of hazardous substances and/or waste, or inappropriate handling thereof, has been misrepresented, the Government will utilize other available legal remedies against the applicant.

Authorized Signature

Title & Date