UNITED STATES DEPARTMENT OF AGRICULTURE
Farm Service Agency
Washington, DC 20250

Notice FLP-505

For: State and County Offices

Notifying Potential Purchasers of Environmental Conditions When Selling Inventory Property

Approved by: Deputy Administrator, Farm Loan Programs

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1 Overview

A Background

FSA's policy:

- is to notify potential purchasers of inventory properties of all known or potential environmental conditions on the property, including the presence of hazardous substances, petroleum products, lead-based paint (LBP), and asbestos-containing building materials

- of full disclosure goes beyond the notification required by applicable law, such as the notice required when transferring residential inventory properties that contain or may contain LBP (1-EQ, Part 7).

FSA will conduct environmental response or corrective actions when required under applicable law. However, in most cases, FSA will be exempt from liability for cleanup of hazardous substances and underground storage tanks under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA) lender liability exemptions. Although exempt from liability, FSA may in its discretion, conduct environmental response or corrective actions, when FSA determines that conducting the action is necessary to protect human health or the environment, protect FSA's security interest in the property, or otherwise facilitate the sale of the property. Conducting such response or corrective actions, when conducted according to applicable law and regulations, will **not** result in FSA losing its lender liability exemption.

Disposal Date	**Distribution**
April 1, 2009	State Offices; State Offices relay to County Offices

1 Overview

A Background (Continued)

To protect FSA from potential liability when transferring properties with environmental conditions, the contract for sale and deed should contain the following:

- notice of all known or potential environmental conditions
- a provision stating that the purchaser assumes any and all cleanup obligations
- an agreement by the purchaser to release and indemnify FSA from liability arising out of the environmental conditions.

FSA should only give the CERCLA, Section 120(h) deed covenants, when required by law. Generally, FSA will **only** be required to give the CERCLA, Section 120(h) covenants when FSA is no longer protected by the lender liability exemption. **Before** making a determination that FSA is no longer covered by the lender liability exemption or otherwise giving the CERCLA, Section 120(h) covenants, contact the State Environmental Coordinator (SEC), who will consult with the OGC Pollution Control Team.

B Purpose

This notice reminds Field Offices:

- of FSA's policies and responsibilities about notifying potential purchasers of environmental conditions when selling inventory property
- that they should consult with their respective SEC and OGC:
    - if they believe that they may no longer be covered by the CERCLA/RCRA lender liability exemption
    - before giving the CERCLA Section 120(h) covenants
- that they should never give the CERCLA, Section 120(h) covenants with respect to petroleum contamination.

C Contact

For further information about this notice contact Joseph Pruss, LSPMD at 202-690-2854.

2 Action

A Discussion

CERCLA, Section 120(h) (42 U.S.C. § 9620(h), generally requires that, whenever FSA enters into a contract for the sale or other transfer of real property on which a reportable quantity of hazardous substances was stored for 1 year or more or known to have been released or disposed of, FSA **must** conduct the necessary cleanup of the hazardous substances before the sale and the deed transferring the property **must** provide the following:

- notice of the hazardous substances
- covenant that all necessary response actions have been taken (the "no further action" covenant)
- covenant that any additional response action found to be necessary after the transfer will be conducted by FSA (the "comeback" covenant)
- clause granting FSA access to the property in the future in the event FSA must conduct a response or corrective action.

There are certain exceptions to the requirement to clean up the property before transfer.

Example: CERCLA, Section 120(h)(3)(B) provides that the Section 120(h)(3)(A)(ii) "no further action" and "comeback" covenant requirements do **not** apply when the property is transferred to a potentially responsible party, such as a previous owner or operator of the property.

CERCLA, Section 120(h) requirements apply **only** to "hazardous substances" as defined in CERCLA. Because petroleum has specifically been excluded from the definition of hazardous substances, under CERCLA, the Section 120(h) covenants should never be given with respect to petroleum contamination, such as from a leaking underground storage tank (LUST) or a heating oil tank (HOT). However, FSA should provide notice of any contamination from UST's or HOT's on the property.

2 Action (Continued)

A Discussion (Continued)

For CERCLA, Section 120(h) to apply, FSA **must** fall under the definition of an "owner" for purposes of CERCLA. Legislation enacted by Congress in 1996, and subsequent regulations published by EPA, resulted in FSA revising its policy about response and corrective actions for hazardous substances and petroleum products located on inventory property. Under the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, FSA is covered by the lender liability exemption (LLE), and under most circumstances, has **no** liability to clean up hazardous substances or petroleum contamination from LUST's on inventory properties.

Note: LLE (also known as the "secured creditor exemption") is found in CERCLA, Section 101(20)(A) (42 U.S.C. § 9601(20)(A), and specifies that the term "owner or operator" does **not** include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

CERCLA, Section 101(20)(E) through (G) set forth the factors that determine whether a lender has **not** "participated in management." RCRA, Section 9003(h)(9) (UST Subchapter) (42 U.S.C. § 6991b(h)(9)), applies CERCLA, Section 101(20)(E) through (G) LLE provisions to UST's. A lender that did **not** participate in management before foreclosure, to remain exempt after foreclosure, **must** seek to sell, re-lease, or otherwise divest the property at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements. FSA lending program statutory and regulatory requirements (such as the beginning farmer and rancher priority periods for inventory properties) may extend the reasonable time allowed under CERCLA lender liability provisions. Also, conducting a CERCLA response action, **not** inconsistent with the procedures set out in the National Contingency Plan (40 CFR Part 300), will **not** result in loss of LLE protection.

B Implementation

To continue to be covered by LLE after foreclosure or involuntary acquisition, FSA should exercise reasonable care over the conditions of the property that might cause environmental contamination. For instance, underground storage tanks should be inspected to make sure there is no free product remaining in them. The sale notice should include an express acknowledgement that there are empty underground storage tanks on the property. If it is known what the empty underground storage tanks were used for, that can be described in the sale notice.

2 Action (Continued)

B Implementation (Continued)

In the case where an underground storage tank exists on an inventory property, the following language may be used in the:

- notice of sale or advertisement:

  "The property is being sold "As is." (Provide general description of the condition of the property). An [or, # UST's] underground storage tank (UST), believed to have been previously used for the storage of _____, is located on this property. The UST has been confirmed to be empty (if it has been inspected). Pursuant to section 9003(h)(9) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991b(h)(9), and section 101(20) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601(20), the United States is a lender not participating in management of the property, and holds indicia of ownership and sells the property to protect a security interest. Therefore, the United States is excluded from "owner" or "operator" status pursuant to CERCLA and the underground storage tank provisions of RCRA. In addition, CERCLA specifically excludes petroleum from the definition of hazardous substances, pollutants, and contaminants. Accordingly, the provisions of section 120(h) of CERCLA, regarding the cleanup/remediation of property "owned" by the United States prior to transfer to another party, do not apply to this sale. The United States has not undertaken remediation of the property and makes no representation that the property has been remediated so as to be protective of human health and/or the environment."

2 Action (Continued)

B Implementation (Continued)

- contract for sale:

  "Pursuant to section 9003(h)(9) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991b(h)(9), and section 101(20) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601(20), the United States is a lender not participating in management of the property, and holds indicia of ownership and sells the property to protect a security interest. Therefore, the United States is excluded from "owner" or "operator" status pursuant to CERCLA and the underground storage tank provisions of RCRA. In addition, CERCLA specifically excludes petroleum from the definition of hazardous substances, pollutants, and contaminants. Accordingly, the provisions of section 120(h) of CERCLA, regarding the cleanup/remediation of property "owned" by the United States prior to transfer to another party, do not apply to this sale. The United States has not undertaken remediation of the property and makes no representation that the property has been remediated so as to be protective of human health and/or the environment.

  Purchaser acknowledges that the United States has not undertaken any inspection of possible soil or groundwater contamination associated with the underground storage tank located at the property, and makes no representation that the property is free from possible contamination associated with the underground storage tank located at the property. Purchaser assumes any and all cleanup obligations applicable to the property under Federal, State and local law. Purchaser agrees to indemnify, release, and hold harmless the United States from and against any future liabilities related to the environmental condition of the property, including but not limited to liabilities arising in tort or under any environmental law."

2 Action (Continued)

B Implementation (Continued)

When a property with CERCLA hazardous substances contamination will be sold "as is," add the following language to the:

- notice of sale or advertisement:

  "The property is being sold "As Is." [Provide a general description of the condition of the property and the hazardous substances]. Pursuant to Section 101(20)(E)through (G) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601(20)(E)-(G), the United States is a lender that did not participate in the management of the property, and therefore, the United States is excluded from the definition of an "owner" or "operator" pursuant to CERCLA. Accordingly, the provisions of section 120(h) of CERCLA, 42 U.S.C. § 9620(h), regarding the cleanup/remediation of property "owned" by the United States prior to transfer to another party, do not apply to this sale. The United States has not undertaken remediation of the property and makes no representation that the property has been remediated so as to be protective of human health and/or the environment." [**Or, if FSA has conducted a response action:** The United States has conducted a response action, not inconsistent with the National Contingency Plan (40 C.F.R. Part 300), with respect to the property (describe response action conducted and any remaining contamination). Because FSA is protected by the lender liability exemption, it can conduct a limited response action to protect human health or the environment and/or to protect its security interest in the property and not become an "owner" or "operator".]

2 Action (Continued)

B Implementation (Continued)

- contract for sale:

  "Pursuant to Section 101(20)(E)-(G) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601(20)(E)-(G), the United States is a lender not participating in management of the property, and holds indicia of ownership and sells the property to protect a security interest. Therefore, the United States is excluded from "owner" or "operator" status pursuant to CERCLA. Accordingly, the provisions of section 120(h) of CERCLA, 42 U.S.C. § 9620(h), regarding the cleanup/remediation of property "owned" by the United States prior to transfer to another party, do not apply to this sale. The United States has not undertaken remediation of the property and makes no representation that the property has been remediated so as to be protective of human health and/or the environment. [**Or, if FSA has conducted a response action:** The United States has conducted a response action, not inconsistent with the National Contingency Plan (40 C.F.R. Part 300), with respect to the property (describe response action conducted and any remaining contamination)]. Purchaser assumes any and all cleanup obligations applicable to the property under Federal, State, and local law. Purchaser agrees to indemnify, release, and hold harmless the United States from and against any future liabilities related to the environmental condition of the property, including but not limited to liabilities arising in tort or under any environmental law."

Questions about sales advertisement, contract, or deed provisions about environmental conditions should be directed to SEC and/or OGC.