

**Directive No. 17.01**

**Effective Date: 3-18-98**

## Transmittal

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

The attached Directive establishes the Economic Development Administration's (EDA) policies and procedures for implementing the Applicant Certification Clause and the Indemnification Standard Condition. These documents 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, and in collecting the necessary information for conducting the required environmental review in accordance with the National Environmental Policy Act (NEPA) of 1969.

Holders of EDA's Directives System should file this Directive in the appropriate place in the directives manual. This Directive supersedes Directive No. 17.01, effective Date 7-9-92.

Economic Development Administration Directives System

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

**GENERAL  
ADMINISTRATION  
& STAFF SERVICES**

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

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### **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.

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.

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;

- (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:

- (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.

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:

**Burden Hour Statement**

This form below is estimated to take 20 hours to complete. Time will vary depending upon the needs of the individual case. Any comments on the amount of time you require to complete this form should be sent to the Director, Compliance Review Division, Environmental Branch, Economic Development Administration, Room H7019, Department of Commerce, Washington, D.C. 20230, and to the office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (0610-0092), 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 ? YES ? NO

- b) treatment, storage (temporary or permanent), or disposal of solid or hazardous substances and/or waste ? YES ? NO
- c) storage of petroleum products ? YES ? NO
- d) used/waste oil storage or reclamation units ? YES ? NO
- e) research or testing laboratory ? YES ? NO
- f) ordnance research, testing, production, or storage ? YES ? NO
- g) chemical manufacturing or storage ? YES ? NO
- h) military weapons or ammunition training or testing ? YES ? NO
- i) iron works/foundry ? YES ? NO
- j) railroad yard ? YES ? NO
- k) industrial or manufacturing operation ? YES ? 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
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 result. ? 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 & provide information concerning state & 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 on or 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 executing 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