

APPENDIX

S

HAZARDOUS MATERIALS PROCEDURES FOR PROPERTY ACQUISITION

Generally, FEMA, the state grantee agency, and the applicant (local government/subgrantee) should coordinate as early as possible with state environmental agencies having regulatory authority over hazardous materials generation, storage, and contamination as well as those agencies with authority for tracking underground and above ground storage tanks. State laws and policies vary from state to state therefore, it is important to check with state agencies when encountering any hazardous materials issues.

FEMA, the state grantee agency and the applicant must take responsibility for assessing whether the property under consideration may be contaminated by hazardous materials and whether any liability would be incurred because of such contamination. The applicant is responsible for taking the lead in collecting information and investigating the property as well as responding to issues raised by such inquiry. The applicant will likely be the entity holding title and thus the majority of the strict liability if problems should arise later, thus they should be the most concerned regarding hazardous materials. The applicant also has the most direct access to property owners and state agencies. FEMA is responsible for providing guidance, oversight, and evaluation of issues with respect to the project grant process. The state grantee agency should consult with and assist the applicant regarding contamination issues.

I. EASEMENT AND DEVELOPMENT RIGHTS ACQUISITION ON AGRICULTURAL PROPERTY

A. Rationale for Use of Indemnity Agreement

Acquisition of easements possibly could subject the applicant, the state grantee agency, and/or FEMA to liability for contamination of the property and legal responsibility to clean the property if the aforementioned parties are found to be in the chain of ownership or to be an operator of the contaminated property. An indemnity agreement is intended to relieve the applicant, the state grantee agency, and FEMA of responsibility for contamination caused by past, current, and future owners of the property. The acquisition of the easement, in combination with the use of an indemnity agreement, assigns responsibility for the operation of activities on the property and any associated liability to the owner that has fee-simple rights to the property.

B. Indemnity Agreement

The property owner needs to complete the Hazardous Materials - Property Survey (Attachment D). An indemnity agreement (Attachment F) shall be signed by the property owner, applicant, state grantee agency, and FEMA. The property owner should have a chance to review the indemnity agreement before closing. This should be signed before or at the time of closing and should be attached to the deed. The Regional Director or delegate should sign for FEMA.

II. FEE SIMPLE ACQUISITION OF PROPERTY

A. Rationale for Assessments and Investigations

It is very important to make sure that the property is clean before acquiring the property in fee simple in order to avoid potential environmental liability and the associated costs. This issue should be of particular concern to the applicant because they will hold the title to the acquired property. If contaminated properties are acquired, in addition to the applicant, the state grantee agency and FEMA are likely to be held responsible for clean up costs. Therefore, the presence of contamination must be identified so that FEMA does not participate in the acquisition of contaminated property.

Procedures to account for toxic and hazardous materials are standard real estate industry practice to protect against environmental liability in transactions involving the purchase and transfer of property. The liability risk has been established by the Federal regulatory and statutory framework and by case law.

If there is an indication, based on non-survey information, that a property is currently or has previously been used for governmental, commercial, light industrial, or industrial activities the procedure in Section II. C. should be followed for the property in question.

B. Acquisition of Residential and Vacant Properties

1. Preliminary Investigation and Property Survey

A FEMA representative should coordinate with the state and applicant to ensure that all property owners participating in a property acquisition using FEMA funds complete the Hazardous Materials - Property Survey [Attachment D]. FEMA and the state grantee agency must coordinate with applicants very early in the project formulation process so the applicant can send out the survey to the landowners immediately after the list of properties is formulated. A suggested cover letter to accompany the survey is in attachment B. The survey should be mailed by the applicant as soon as properties are identified to allow for time for further investigation. The applicant should send the surveys by certified mail to retain verification that the surveys were sent and delivered to avoid confusion later. The applicant must gather the completed surveys and provide copies to the state grantee agency, which will then provide copies to FEMA. Any party may initiate consultation to determine the appropriate course of action regarding an issue on a particular property or when a survey question is answered as "YES". The appropriate state environmental agencies should also be consulted to determine the appropriate course of action.

2. Addressing Identified Issues

If any survey questions are answered "YES" this indicates an issue requiring further investigation [see Survey Guidance - Attachment E]. If no issues that are either listed on the survey or discovered from other sources are indicated, the property may be considered clear for acquisition with regard to hazardous materials.

C. Acquisition of Governmental, Commercial, Agricultural, Light Industrial, and Industrial Property

1. Preliminary Investigation, Phase I Environmental Site Assessments, And Non-Leaking Fuel Tanks

a. Phase I Investigations

Properties proposed for fee simple acquisition currently or previously used for governmental, commercial, light industrial, or industrial activities should undergo a Phase I Hazardous Materials Environmental Site Assessment (Phase I ESA) [see Attachment A for a brief summary of the phases of investigation]. This assessment should examine the site conditions on those properties and include records searches that note any potential for contamination. If the properties examined in the Phase I ESA are identified as having potential for contamination to exist on site, the landowner must prepare a Phase II Environmental Site Assessment (Phase II ESA) or equivalent investigation that addresses all potential issues identified in the Phase I ESA. It is the responsibility of all parties (applicant, grantee, and FEMA) to ensure that an appropriate investigation is carried out.

b. Non-Leaking Fuel Tanks

If the only issue identified during a Phase I ESA on a property is the presence of non-leaking tanks, FEMA and the applicant must require the land owner to obtain a certification of clean removal of the tanks before funds will be released for acquisition of property (consult with the appropriate state agency). Most states have an agency that tracks the status of underground storage tanks (UST) and aboveground storage tanks (AST). Generally, these agencies also provide this third party certification of the tank's clean removal, and are also responsible for regulatory environmental compliance. In some states more than one agency handles these responsibilities. FEMA, the state grantee agency, and the applicant should establish coordination with this agency or agencies. This process should not require effort much greater than that which the state agency would normally use to certify removal of tanks and leaking tanks. No further investigation is required.

2. Phase II Environmental Site Assessments

For properties requiring a Phase II ESA, the applicant, the state grantee agency and FEMA will evaluate the Phase II ESA results and require clean up from the seller as appropriate. The seller shall ensure that the property is cleaned up and shall obtain a clean site certification from the state agency providing such certifications. An agreement should be reached with the appropriate state agency regarding the level of effort to provide certification of clean sites. This certification must address all contamination issues identified in the Phase II ESA investigation. FEMA will not provide funding for Phase III activities, cleanup, or certification of the property. FEMA, the state grantee agency, and the applicant shall have evidence that such certification has been obtained before acquiring the property.

Other issues to discuss with state agencies include: appropriate laws and regulations governing property transfer and hazardous material contamination/liability and re-use/recycling of materials from damaged structures.

III. DEMOLITION FOR ACQUISITION PROJECTS

If issues are identified that may impact demolition of the structure, FEMA or applicant should initiate consultation among all parties, including the state regulatory agency responsible for such issues, to discuss a reasonable method of investigating and resolving the issue. Reasonable precautions should be taken to ensure that demolition and removal of structures does not aggravate existing minor contamination or create additional contamination, such as improper removal of asbestos. The contractor hired for demolition should be provided all available information concerning hazardous or toxic materials to aid in planning demolition activities. Contractors performing demolition or removal of structures should exercise care and follow appropriate regulations to limit disturbance of the existing site. It is essential that a bonded (insured) and licensed contractor be used so that incidents where the contractor may have been negligent or operated illegally and worsened contamination will be covered by insurance. However, if the proposed and all available alternate methods of demolition of a structure are likely to result in the significant disruption or worsening of existing contamination or creation of contamination, further consultation with relevant state agencies and FEMA headquarters is warranted to identify a solution. An environmental assessment under the National Environmental Policy Act is required if FEMA will be participating in demolition where significant hazardous materials may be an issue.

Attachment A

PHASES OF INVESTIGATION

Phase I ESA (non-invasive): To determine the potential for contamination of the property(s).

- data gathering and review of site use history and relevant site information
- site reconnaissance
- observations of surrounding properties
- regulatory list search to identify nearby hazardous waste facilities and suspected contamination sites
- identification of major environmental regulatory non-compliance issues

Phase II ESA (invasive): To determine the general extent or presence of specific toxic or hazardous materials.

- sampling and testing of soil
- sampling and testing of groundwater
- sampling and testing of surface water
- laboratory analysis for potential contamination
- testing of underground storage tanks

Phase III (remediation study and plan): Clean-up and related activities plan.

- assessment and recommendation of remedial alternatives for clean-up
- clean-up plan

Clean-up Phase - Removal of contamination to acceptable state and federal standards for the intended use of the property

- clean-up activities
- assessment and certification of clean property

Depending on the circumstance surrounding the property in question, only certain components of the Phase I or Phase II ESA investigations may be appropriate.

State environmental agencies are the primary source for technical assistance in conducting components of the Phase I and Phase II ESA investigations, and in certifying clean properties.

If the investigation requires a large effort beyond that which the state environmental agency is able to provide, assistance should be sought from sources such as a technical assistance contractor or FEMA environmental office.

Attachment B - SAMPLE COVER LETTER TO ACCOMPANY PROPERTY SURVEY

DATE

Dear property owner;

You have volunteered to be included on the list of flood damaged properties considered for acquisition by the _____ [city/county applicant] _____, _____ [state] _____. As part of the property transfer process, _____ [state] _____; the State of Minnesota Emergency Management Agency; and the Federal Emergency Management Agency require information regarding hazardous materials issues as a condition of a property purchase. You must complete the attached two page property survey to be considered in the buyout. Also attached you will find an instruction sheet to aid in preparing the survey. The survey must be returned by _____ [date] _____. Please retain a signed copy for your records. If you have questions please call _____ at _____.

Thank you for your cooperation in this matter.

Sincerely,

[APPLICANT'S CONTACT PLACES NAME,
TITLE; AND
SIGNATURE HERE]

Steve Noname
State Hazard Mitigation Officer
Minnesota Emergency Management Agency

Jim Doe
Hazard Mitigation Officer
Federal Emergency Management Agency Region 5
Chicago, Illinois

AN ORIGINAL COPY WITHOUT APPLICANT INFO, SIGNED BY FEMA AND THE STATE GRANTEE AGENCY, SHOULD BE KEPT ON FILE BY FEMA AND THE STATE GRANTEE AGENCY. WHEN A POTENTIAL APPLICANT PROPOSES PROPERTY ACQUISITIONS, THE APPLICANT SHOULD RECEIVE COPIES OF THE SIGNED LETTER TO FILL IN THE APPLICANTS NAME, CONTACT PERSON, CONTACT PERSONS NUMBER, AND SIGNATURE.

Attachment C

INSTRUCTIONS TO PROPERTY OWNER FOR THE HAZARDOUS MATERIAL PROPERTY SURVEY

WHY ARE WE ASKING FOR THIS INFORMATION ABOUT YOUR PROPERTY?

Normal property transactions involve an inspection of the property by the buyer before the purchase occurs. One area of concern to buyers is the potential for hazardous materials liability. Sellers are usually required to provide assurances or information to the buyer that the property is not contaminated. This survey is intended to provide this assurance and facts about the property to the government, who is proposing to acquire the property, as well as to provide some legal protection to the seller. A factual acknowledgement of what the seller is aware of can clear up confusion later if problems arise. If contamination is suspected the government may be able to take steps to assist in cleaning up your property.

POINTS TO CONSIDER WHEN ANSWERING QUESTIONS.

- ◆ Please type or print form.
- ◆ All owners of the property should be identified and participate in filling out this survey, as well as sign it.
- ◆ You might want to have someone else help you prepare this survey. Write down their name at the end of the survey under preparer.
- ◆ Answer this survey to the best of your knowledge, fully investigating answers to each question.
- ◆ Consult with previous owner/s and/or neighbors, if possible, regarding past use of your property, underground storage tanks, the presence of hazardous materials, and environmental violations or studies.
- ◆ Walk your property looking for things you might not normally have noticed.
- ◆ Attach a sheet of paper to complete your answers to the questions that did not fit on the survey form itself and note any information of interest not specifically asked for in the survey which may indicate contamination of the property by hazardous substances.
- ◆ On a residential property, commercial and light industrial uses could include activities such as commercial auto repair in the home garage, paint stripping, hair dresser, woodworking, etc.

Because not all in home commercial activities involve hazardous materials, make sure to indicate the specific type of "in home" commercial business activity under question #1.

◆ If there was a previous transportation facility, note in question #4 what the specific use may have been. For example: A parking lot used to store heavy equipment, serve a repair shop, or used for storage of vehicles or equipment.

PLEASE RETAIN A SIGNED COPY FOR YOUR RECORDS.

FOR ANSWERS TO QUESTIONS ABOUT THIS SURVEY CONTACT THE PERSON IN YOUR LOCAL GOVERNMENT LISTED ON THE COVER LETTER ATTACHED TO THE SURVEY.

Attachment D

Hazardous Materials Property Survey

**HAZARDOUS MATERIALS - PROPERTY SURVEY
INDIVIDUAL PROPERTY SURVEY FORM**

NAME OF OWNER(S) [1] _____
[2] _____
[3] _____

PROPERTY ADDRESS: _____
TOWN: _____ STATE: _____ ZIP: _____

OWNER(S) ADDRESS: _____
TOWN: _____ STATE: _____ ZIP: _____

PHONE NUMBER OF OWNER(S): [1] () - : [2] () - : [3] () -

I (We), _____

as owner(s) of the above referenced property that lies within the jurisdiction of _____, in the State of _____ represent and certify that I (we) have used due diligence to determine, to the best of my (our) knowledge, that the description of the property described herein is accurate with respect to the presence or absence of contamination from toxic or hazardous substances. The term "property" refers to the physical piece of legally recorded land that is to be acquired.

1. Is or was the property currently or previously used for governmental, commercial, light industrial, or industrial activities? YES NO

If yes, list specific type and nature. _____

2. Are there any Aboveground Storage Tanks (AST), Underground Storage Tanks (UST), or Leaking Underground Storage Tanks (LUST) present on the property? YES NO

If yes, list type of each tank, capacity and condition. _____

3. Is there presently or has there been in the past any generation, treatment, storage, disposal, release, or spill of petroleum products, solid or hazardous substances and/or wastes (this includes pesticides, herbicides, or rodenticides), other than normal quantities of household substances? YES NO

If yes, list type of activity, substance, and quantity involved. _____

4. Is there presently or has there been in the past a transportation facility on what is now your property? This includes parking lots, railroad yards, railroad or roadway right-of-way.

YES NO

If yes, list type of facility or activity. _____

5. Have you noticed any unusual odors or discoloration in your drinking water or on your property?

YES NO

If yes, describe the location, color, and odor of the water.

6. For your property, is there presently or has there been in the past any:

(A) environmental investigations conducted by Federal, state, local government agencies, or private firms; or

YES NO

(B) environmental or Occupational Safety and Health Administration (OSHA) citations or notices of violation?

YES NO

If yes, list the type of investigation or violation and the preparer or origin of the investigation or violation. _____

7. Are there any drinking water wells or sewage septic tanks/systems on your property, or do any of the structures contain asbestos or lead containing materials?

YES NO

If yes, please _____

8. If there are any issues not raised by the previous questions, please attach an extra sheet describing any other issues.

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The property owner(s) acknowledge that this certification regarding hazardous substances and/or waste is a material representation of fact upon which the Hazard Mitigation Grant Applicant (local government) and other government entities rely upon to execute the property purchase. The property owner(s) certify that the information contained within this HAZARDOUS MATERIAL - PROPERTY SURVEY FORM is a full disclosure of all available information to the best of their knowledge and that the owner(s) has exercised due diligence in obtaining all relevant information.

Preparer

Signature: _____ Date: _____

Typed or Printed Name:

Title:

Owner(s)

Signature: _____ Date: _____

Typed or Printed Name:

Signature: _____ Date: _____

Typed or Printed Name:

Signature: _____ Date: _____

Typed or Printed Name:

Attachment E
HAZARDOUS MATERIAL PROPERTY SURVEY
SURVEY GUIDANCE FOR FEE SIMPLE ACQUISITION

Follow the given guidance if each question is answered as YES or NO.

1. **If YES -** Consult with the land owner and appropriate state agency or seek technical assistance to determine if the listed use has a potential for contamination. If it is suspected that the use may have the potential for contamination a Phase I ESA shall be conducted. Copies of the survey responses should be turned over to the entity that will be conducting a Phase I ESA investigation. The responses to the remaining questions should aid in the conduct of the Phase I ESA investigation.

If NO - Proceed with remaining questions.
2. **If YES -** For residential or vacant properties not associated with a previous governmental, commercial, light industrial, or industrial use, but where the presence or history of underground or aboveground storage tanks (UST or AST) is noted, contact the state agency with responsibility for storage tanks to arrange for a records search and possibly a site visit. Certified clean removal of all tanks is required before acquisition of property occurs.

If NO - Proceed with remaining questions.
3. **If YES -** There is a wide range of combinations of activities and substances with some being more serious than others. Seek appropriate technical assistance if there appears to be a significant issue. The state agency with regulatory authority over a regulated substance or activity should be contacted. If a significant issue is identified, a more thorough site investigation should be considered.

If NO - Proceed with remaining questions.
4. **If YES -** Railroad rights-of-way and railroad yards are well known for their potential for Polychlorinated Biphenyls (PCB) and spills/leaks of other toxic or hazardous substances. Many historical railroad yards and rights-of-way have been abandoned and reverted back to adjoining landowners. State agencies with knowledge of past uses of these facilities or knowledge of potential contamination should be contacted. A limited Phase I ESA site investigation should be conducted.

Parking lots and roadways also have the potential for contamination. Abandoned parking lots and abandoned road rights-of-way that have reverted to adjoining landowners have the potential for contamination from spills or leaks. The specific use of the parking lot or abandoned roadway should be researched. For example, if the parking lot was used to store heavy equipment, served a repair shop, or was used for storage of vehicles or equipment there may be potential for contamination. A limited Phase I ESA site investigation should be conducted.

If NO - Proceed with remaining questions.

5. If YES - A phone contact with the property owner is warranted to obtain details about the unusual circumstance. Consult with the state agency with regulatory or hazardous materials responsibility regarding the significance of the activity and substance in question.

If NO - Proceed with remaining questions.

6. If YES - Obtain a copy or summary of the results of the investigation. If the results of the investigation include little or no conclusion or site specific information, then a Phase I or Phase II ESA may be warranted. If the results of the investigation indicate fairly site specific information that and a moderate or high probability for contamination to be present, Phase II ESA sampling and testing should be performed. Results of Phase I or Phase II ESAs should be evaluated, in coordination with the relevant state environmental agency, to determine what issues must be addressed before acquisition of the property can occur.

If there was a violation, contact the agency with regulatory responsibility to determine nature and significance of the violation. Consult with that agency to determine if the violation was addressed and if any current concerns are likely to remain on the property that should be addressed before acquisition occurs. Depending on the circumstances, it may be necessary to perform a Phase I or Phase II ESA.

If NO - Proceed to examine any other issues not addressed specifically by these six questions.

Other possible issues:

Removal of septic systems and sealing/closure of wells is required but may occur before or after acquisition of property occurs only for residential properties. Appropriate state and Federal regulations should be followed for the removal of tanks and septic systems, and the closure of wells

Lead piping and asbestos are likely to be encountered in older structures. In many post disaster situations state agencies with waste disposal regulatory responsibility may develop protocols or special procedures for disposal of disaster debris containing hazardous materials or lead and asbestos. No investigation is needed, but contractors should determine what is present in the demolition debris and should follow all appropriate local, state, and Federal regulations.

◆ If all questions were answered NO and no other issues were identified that required further investigation then the acquisition should proceed as planned for that property assuming all other local, state, and federal regulations are met.

Attachment F

**ENVIRONMENTAL INDEMNITY AGREEMENT
FOR
ACQUISITION OF EASEMENTS ON PRIVATE PROPERTIES**

ENVIRONMENTAL INDEMNITY AGREEMENT

THIS INDEMNITY AGREEMENT made this ____ day of _____, 199_ by and among _____ [Property owner(s)] _____, his/her successors, heirs and assigns (Grantor/Indemnitor), _____ [Applicant] _____, its successors and assigns (Grantee/ Indemnatee), the _____ [State] _____, its successors and assigns (Indemnatee), and the Federal Emergency Management Agency (FEMA), its successors and assigns (Indemnatee).

WHEREAS, pursuant to Section 404 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 93-288, as amended, FEMA has made available funds, through the State, for _____ [Applicant] _____ to use to acquire an interest in the property as defined in the attached Deed; and

WHEREAS, _____ [Applicant] _____ has agreed to pay consideration in the amount of \$_____ for an Open Space Easement on the property described in the attached Deed; and

WHEREAS, the Grantor, upon the grant of an easement for open space, will retain ownership of the underlying fee interest in the property, as well as control over all operations and activities performed on the property; and

WHEREAS, as a condition of the funding and the purchase FEMA, the State, and _____ [Applicant] _____ require that the Grantor provide certain indemnities concerning the condition of the property as it may be affected by environmental contaminants, as identified and defined by applicable federal, state and local laws and regulations (whether existing or as may hereafter be enacted or promulgated); and

WHEREAS, to induce the Grantee to enter into the above-described transaction, Grantor has agreed to enter into this agreement;

NOW THEREFORE, in consideration of the above-stated premises and for cash which Grantee is prepared to pay, the Grantor agrees as follows:

Grantor/Indemnitor agrees to indemnify and hold harmless Indemnitees from and against any and all liabilities, losses,

damages, suits, judgments, counsel fees, response costs, clean-up costs and other costs arising under any and all federal, state and local environmental laws or regulations, whether or not in existence at the time this document is executed, including but not limited to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675; the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6991; the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2671; the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136; the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, resulting from activities caused directly or indirectly by Indemnitor or any of its predecessors on the property effecting contamination or quality of groundwater, surface waters, soil or other environmental conditions on and off the property.

IN WITNESS THEREOF, the undersigned has caused this Agreement to be executed as of the date first written above.

[Property Owner(s)], Indemnitor

[Applicant], Indemnatee

[State Agency], Indemnatee

Federal Emergency Management Agency, Indemnatee