

SBA Environmental Policies and Procedures

SOP 50 10 5(A), effective 3/1/09



Overview

- Types of Environmental Investigations
- Revisions to Reliance Letter Template
- Choosing the Appropriate Environmental Investigation
- Approval and Disbursement with Contamination
- Special Purpose Facilities
- Revisions to Gas Station Loans Section

Documents that Comprise SBA Environmental Policy

- - Environmental Policies and Procedures
 - 7(a) Loans: Pages 184-191 of SOP 50 10 5(A)
 - 504 Loans: Pages 279-286 of SOP 50 10 5(A)
- - Definitions (Appendix 2)
- - Reliance Letter Template (Appendix 3)
- - List of NAICS Codes of Environmentally Sensitive Industries (Appendix 4)
- - Gas Station Requirements (Appendix 5)
- - SBA Indemnification Agreement (Appendix 6)

When Required

- SBA requires an Environmental Investigation of all *commercial* Property that will serve as collateral for an SBA loan
 - Environmental Investigations are no longer limited to “Primary” Collateral
 - Environmental Investigations are not required for residential real estate collateral

Tiered Approach to Environmental Investigations

- The type and depth of the Environmental Investigation to be performed varies with the risks of Contamination
 - SOP 50-10 5(A) provides the minimum standards for Environmental Investigations
 - Prudent lending practices may dictate additional Environmental Investigations or safeguards



Tiered Approach to Environmental Investigations (Cont.)

- Five types of Environmental Investigations are recognized by the SBA, each representing a higher level of environmental due diligence:
 1. Environmental Questionnaire (EQ)
 2. Environmental Questionnaire & Records Search with Risk Assessment
 3. Transaction Screen
 4. Phase I Environmental Site Assessment
 5. Phase II Environmental Site Assessment

Environmental Questionnaire

- Lenders use their own EQ, however they must include the minimum areas of inquiry in the definition of “Environmental Questionnaire” on page 318 of the SOP
- The EQ must be completed or reviewed by the Lender
- The lender must make at least one site visit to the Property
- The person completing the EQ must make a good faith effort to interview the current owner or operator of the Property
- The current owner (which may be the seller) or the operator of the site must sign the EQ. **Note:** If the current owner or operator of the site will not sign the EQ, an EQ cannot be used. Lender must, at a minimum, obtain a Transaction Screen.

Environmental Questionnaire & Records Search with Risk Assessment

- An Environmental Questionnaire
&
- Records Search with Risk Assessment for the Property and Adjoining Properties which includes:
 - A search of government databases (those databases identified in 40 C.F.R. § 312.26 for an AAI-compliant Phase I Environmental Site Assessment)
 - A search of the historical records (per AAI). Note:
 - The choice of historical records to be reviewed is at the discretion of the Environmental Professional
 - Historical records may include, but are not limited to, aerial photographs, city and reverse directories, fire insurance maps, building department records, and land records

Records Search with Risk Assessment (Cont.)

A “risk assessment” by an Environmental Professional based on the results of the records search as to whether the Property is:

- Elevated Risk or High Risk for Contamination

Or

- Low Risk for Contamination

➤ If the risk assessment comes back as either Elevated Risk or High Risk, a Phase I Environmental Site Assessment is required

Records Search with Risk Assessment (Cont.)

- The Records Search with Risk Assessment must identify by name the EP that performed the risk assessment
- This report does not need to be addressed to the SBA
- This report does not need to be accompanied by a Reliance Letter

Transaction Screen

- Must comply with ASTM E1528-06 and will include:
 - An interview with the owner or operator of the Property
 - A site visit to the Property
 - **An Environmental Professional must conduct or supervise the site reconnaissance**
 - Completion of an EQ
 - Review of the Records Search
 - Conclusion by Environmental Professional
 - Must be completed within one year prior to submission to SBA

Phase I

- Must be “AAI” compliant (i.e., prepared in accordance with EPA’s regulations for “All Appropriate Inquiries” – An SBA requirement since November 2006)
- A Phase I prepared pursuant to ASTM E1527-05 is “AAI” compliant
- The Environmental Professional must conclude that either: (1) the risk of Contamination at the Property is minimal and no further investigation is warranted, or (2) the risk is sufficient to warrant additional investigation. (The EP is not required to use this exact phrase but rather may use words to this effect).

Shelf Life of Phase I

- Per EPA, the clock starts on date of acquisition
 - 180 days prior = report valid
 - 1 year prior—EP must conduct or update these components to within 180 days:
 - Interviews
 - Search for environmental cleanup liens
 - Review of government records
 - Site visit
 - Declaration/signature by EP
 - More than 1 year prior, every AAI step must be conducted or updated to reflect current conditions and property-specific information

Phase II

- Performed by Environmental Professional
 - Sampling for contamination in soil and/or groundwater
 - Report stating:
 - Whether Contamination quantities exceed reportable/actionable levels
 - Whether Remediation is necessary
 - An estimate of Remediation costs
 - Any projected completion date for Remediation
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Reliance Letter

- All Transaction Screens, Phase I and Phase II reports must be accompanied by the SBA's template Reliance Letter that appears in Appendix 3 of SOP 50 10 5(A). The Reliance Letter may not be modified in any respect.
- The Reliance Letter must be addressed to the Lender and to SBA
- Evidence of the Environmental Professional's Errors & Omissions Liability Insurance with minimum coverage of \$1 million per claim (or occurrence) must be attached to the Reliance Letter. (Lender and SBA do not have to be named insureds or loss payees).
- Lender or SBA may provide Borrower with a copy of the Environmental Investigation *for informational purposes only*

Choosing the Appropriate Environmental Investigation

- NAICS Codes – Lenders first determine the NAICS codes for the property's *current and known prior uses* and compare them to the list of NAICS codes of environmentally sensitive industries in Appendix 4. If there is a match, then the environmental investigation must begin with a Phase I.

Exception:

1. If the property is multi-unit building, lenders may begin with a Records Search with Risk Assessment

If no NAICS Code match....

- Loans up to \$150,000 – The investigation may begin with an Environmental Questionnaire (EQ). If the EQ reveals that contamination is unlikely, this is sufficient.
- Loans over \$150,000 – The investigation must, at a minimum, begin with an Environmental Questionnaire and a “Records Search with Risk Assessment.” (RSRA)
- Properties identified on the RSRA as “**Elevated Risk**” or “**High Risk**” require a Phase I. Properties identified as “**Low Risk**” are cleared, provided the Environmental Questionnaire is also clean (if not, a TSA is an option).

NAICS Codes Match – Special Rule if Current Use is as a Gasoline Station

If there is a NAICS code match is to a gas station (NAICS Code 447 – Gasoline stations with or without convenience stores), lenders must comply with “Requirements Pertaining to Gas Station Loans” in Appendix 5 – more on this later

Approval & Disbursement in the Presence of Contamination or Remediation

- SBA Lenders must consider the nature and extent of the remediation as well as collateral value when determining whether to approve the loan and disburse in the presence of contamination and ongoing remediation. Lenders may not disburse unless relying upon one or more mitigating factors

Mitigating Factors

➤ 1. Indemnification

- Lender must perform an analysis of the financial resources of the proposed indemnitor and conclude that sufficient resources exist to complete remediation;
- The template SBA Indemnification Agreement in Appendix 6 must be utilized

The SBA Environmental Indemnification Agreement

➤ The SBA Environmental Indemnification Agreement

- Cannot be modified, except for formatting and completing blank lines, signature blocks and notary acknowledgments
- Must be executed by the Borrower and, for an EPC/OC loan, the Operating Company
- Must have a copy of the Environmental Investigation Report attached

The SBA Environmental Indemnification Agreement (Cont.)

- All lenders (except when submitting requests through PLP, SBA Express and the Pilot Loan Programs) must submit the finalized SBA Environmental Indemnification Agreement to SBA for review and approval prior to funding the loan.
- For 504 loans, this includes PCLP CDCs. Submission must be made no less than 2 weeks *prior* to the CDC's Loan Closing Package cutoff date of the District Counsel where the loan will be sent for closing.
- A Memorandum of the SBA Environmental Indemnification Agreement, once approved, must be recorded in the applicable land records.

Mitigating Factors (Cont.)

- 2. Completed Remediation – If government entity has affirmed in writing that active remediation is complete but additional monitoring is required, approval or disbursement may occur if:
 - Monitoring Results for first year obtained;
 - Environmental Profession affirms that there is no unacceptable increase in contamination;
 - Property owner is in compliance with any continuing obligations imposed by the governmental entity.

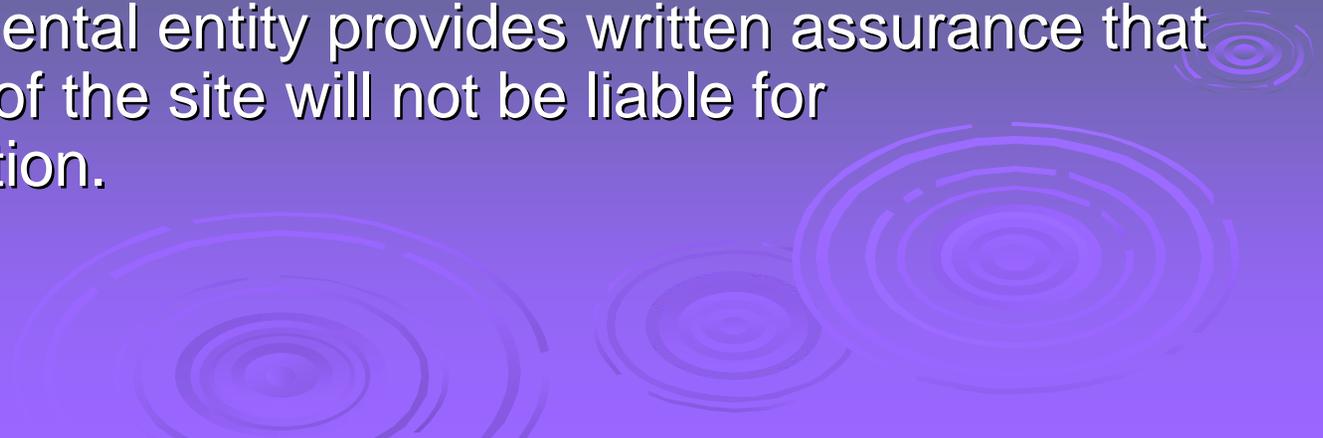
Mitigating Factors (Cont.)

- 3. “No Further Action” – If a lender obtains a “no further action letter” or “closure letter” from a governmental stating that no further remediation or monitoring is required.
- 4. “Minimal Remediation” – If the extent of contamination and cost of remediation is minimal in relation to the value of the Property and/or the resources of the person responsible for remediation, and remediation is projected to be completed within one year.

Mitigating Factors (Cont.)

- 5. Clean-up Funds – If there is evidence from a governmental entity that the borrower or the property has been approved by a fund to pay for or reimburse remediation costs, and the amount allocated is sufficient to cover remediation. The Lender must also address the financial capability of the fund.
- 6. Escrow Account – If an escrow account is established which equals a minimum of **150%** of the total estimated cost of the remediation, which escrow account is controlled by the 7(a) lender or first mortgage holder on a 504 loan.

Mitigating Factors (Cont.)

- 7. Groundwater Contamination Originating from Another Site – If the contamination has not caused significant damage to the collateral value or marketability of the property, provided:
 - Remediation is being performed pursuant to an approved Remediation Action Plan; *or*
 - The state has laws that an owner of the site will not be responsible for off-site contamination; *or*
 - A governmental entity provides written assurance that the owner of the site will not be liable for contamination.
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Mitigating Factors (Cont.)

- 8. Additional or Substitute Collateral – If additional or substitute collateral is being pledged, or an additional equity contribution is being made, sufficient to overcome the potential loss due to Contamination, then approval or disbursement may be considered.



Mitigating Factors (Cont.)

9. “Other Factor(s)” – Lender or SBA may rely upon factors other than those outlined above, including but not limited to adequate environmental insurance, bonds, agreements from the Governmental Entity not to sue present and future property owners, Engineering Controls, Institutional Controls or Restrictive Covenants in land records.

*****Note: Use of Other Factors alone requires approval from the SBA Environmental Committee for all lenders, *including PLP lenders and PCLP CDCs******

Special Use Facilities

- Prudent lending practices dictate that specific environmental assessments must be performed for certain special use facilities
 - Property constructed prior to 1978 and used for daycare, child care, nursery schools and residential care facilities must undergo a lead risk assessment for lead-based paint and lead in the drinking water, and any risk of lead exposure must be sufficiently minimized

Special Use Facilities (Cont.)

- On-site dry cleaners which may have utilized tetrachloroethylene (PCE) and trichloroethylene (TCE)
 - Any dry cleaner in operation for more than 5 years must undergo a Phase II
- Gas Stations – See Appendix 5
- Asbestos surveys, radon, lead risk and/or other assessments should be conducted if warranted by the circumstances or recommended by the Environmental Professional

Gas Station Loans

➤ Former Environmental Investigation Requirements:

- Stations Less than 1 year old – If no prior use NAICS code match, EQ or EQ & Records Search with Risk Assessment if loan amount over \$150,000
- Stations 1 to 5 years old – Phase I
- Stations More than 5 years old – Phase II

➤ New Environmental Investigation Requirements:

- Apply only to current use as a gas station
- Investigation always begins with a Phase I
- no automatic Phase II requirement (unless recommended in Phase I)
- Indemnification Agreement not required if site is clean

Gas Station Loans (Cont.)

- Environmental Investigation results:
 - Property is not contaminated – Submit results to the SBA.
 - Property is contaminated – Lender may either decline the loan or follow the requirements set forth for approval and disbursement of loans when there is contamination and remediation at the property *provided that at a minimum, the SBA Indemnification Agreement must always be obtained and signed by the seller.*

Gas Station Equipment Testing

- In addition to the required Environmental Investigation, all USTs, lines and related equipment must be tested within 12 months prior to loan closing by an independent contractor using a methodology acceptable to the Governmental Entity with UST oversight



Gas Station Equipment Testing (Cont.)

- Testing must include:
 - Tightness tests of all USTs and lines
 - Functional testing of any vapor recovery (Stage 2) systems and monitoring systems
 - Hydrostatic testing of all containment devices
- All leaking or other defective equipment must be replaced or repaired prior to disbursement
 - Any provision in the purchase and sale agreement that allows the seller to avoid repair (e.g., credit towards the purchase price or a lump sum payment) is not acceptable

Gas Station Loans (Cont.)

- Eligibility issues pertaining to gas station loans that previously appeared in Appendix 5 have been moved to the Chapter 2 (“Eligibility”) of SOP 50 10 5(A).

Waiver and Release of Right of Indemnification by SBA or Lender

- An oil company or other Person with a right to indemnification by subsequent owners of a gas station Property must execute either the SBA Environmental Indemnification Agreement or, alternatively, a waiver and release of all rights (including any right of indemnification) and claims against SBA and Lender related to Contamination at the Property if SBA or Lender acquires title to the Property

Appeals Process

- The SBA has a new appeals process in the event of an adverse environmental determination.
- Lenders who believe that a decision rendered by an SBA field counsel or the SBA's environmental engineer is inconsistent with the revised SOP may appeal the decision to an environmental committee by sending a copy of the decision, supporting documentation and an explanation of how the determination is inconsistent to EnvironmentalAppeals@sba.gov

Appeal Process (Cont.)

- Environmental appeals are reviewed by the SBA Environmental Committee comprised of 4 attorneys appointed by the Associate General Counsel for Litigation
- The SBA Environmental Committee may consult with SBA's Environmental Engineers or another Environmental Professional
- The Associate General Counsel for Litigation has authority to overrule decisions rendered by the SBA Environmental Committee

Environmental Document Submittals to SLPC

- The addresses on the CDC Checklist and the environmental documents must match the address on the loan authorization.
- The CDC Checklist must be signed by the CDC.
- CDC Comments must be included on the CDC Checklist.
- The correct NAICS code must be included on the CDC Checklist.
- The CDC Checklist must be included for all environmental document submittals.
- Past and present use of the property must be provided on all environmental document submittals.
- Submit any previous environmental assessments.

Environmental Document Submittals to SLPC

- The SBA Reliance Letter must have the same date as the TSA, Phase 1 Assessment or Phase 2 Assessment.
- The SBA Reliance Letter and Certificate of Professional Liability Insurance must accompany the TSA, Phase 1 Assessment or Phase 2 Assessment.
- Submit proof that all USTs, lines and related equipment have been tested and passed inspection within 12 months prior to loan closing.
- Submit proof that drinking water meets the state's drinking water standards if a well is the source of drinking water for the property.

Questions or Concerns

Send to Environmental Review Committee

EnvironmentalAppeals@sba.gov

