

# CHANGE REQUEST COVER SHEET

**Change Request Number:** 12-43

**Date Received:** 3/15/2012

**Title:** Minor modifications to AMS Real Property Guidance to clarify prior quarter updates

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**Name:** Charles Baldwin

**Phone:** 571-205-8427

**Policy OR Guidance:** Policy

**Section/Text Location Affected:** 1.1.3.1 : Environmental / Sustainability / Energy;

**Summary of Change:** Revisions to '1.1.3.1 : Environmental / Sustainability / Energy' include clarifying language to further explain updates to the AMS RP Policy Guidance relating to sustainability in the previous quarter (FY12 Q2).

**Reason for Change:** These updates were made to further clarify updates made in the prior quarter (FY12 Q2) to the AMS RP Guidance relating to sustainability.

**Development, Review, and/or Concurrence:** ALO-200, ALO-300, AGC-520, Environmental Support, WLSA, ELSA and CLSA

**Target Audience:** Real Estate Contracting Officers

**Potential Links within FAST for the Change:** N/A

**Briefing Planned:** No

**ASAG Responsibilities:** None

**Potential Links within FAST for the Change:** N/A

**Links for New/Modified Forms (or) Documents (LINK 1)** [null](#)

**Links for New/Modified Forms (or) Documents (LINK 2)** [null](#)

**Links for New/Modified Forms (or) Documents (LINK 3)** [null](#)

## SECTIONS EDITED:

Real Estate Guidance :

**Section 1.1.3.1 : Environmental / Sustainability / Energy** [\[Old Content\]](#)[\[New Content\]](#)

[\[RedLine Content\]](#)

## SECTIONS EDITED:

### **Section 1.1.3.1 : Environmental / Sustainability / Energy**

**Old Content:** Real Estate Guidance :

**Section 1.1.3.1 : Environmental / Sustainability / Energy**

#### 1.1.3.1 – Environmental/Sustainability/Energy

During the land acquisition process, Real Estate Contracting Officers (RECOs) are required to follow the requirements as set forth below in the following laws, executive orders, regulations, policies and orders:

1. Energy Policy Act (EPA) of 2005, Pub.L.No.109-58
2. Energy Independence and Security Act (EISA) of 2007, Pub.L.No.110-140
3. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
4. National Environmental Policy Act (NEPA)
5. FAA EDDA Order 1050.19B: “Environmental Due Diligence Audits in the Conduct of FAA Real Property Transactions” and any revisions thereto or subsequently published Orders pertaining to environmental compliance
6. Resource Conservation and Recovery Act (RCRA)
7. Executive Order 11988, Floodplain Management
8. Executive Order 11990, Protection of Wetlands

#### A. Environmental Due Diligence Audits (EDDA) Requirements

FAA real property transactions are subject to the requirements of FAA Order 1050.19B, Environmental Due Diligence Audits (EDDA) in the Conduct of FAA Real Property Transactions, in order to identify and minimize potential environmental liabilities associated with the condition of the property and past activities at the site. After the EDDA process, the determination of whether to waive the performance of an EDDA must be completed prior to the execution of contracts for the acquisition or disposal of real property per 1050.19B.

Off-airport land acquisitions of new sites, or that result in the expansion of an existing site, require an EDDA per 1050.19B. All on-airport leases or no-cost on-airport acquisitions that utilize the Memorandum of Agreement (MOA) template will use the Hazardous Substance Contamination clause, preferably the version included in the template, unless an EDDA is required pursuant to FAA Order 1050.19B. In accordance with FAA Order 1050.19B, any revisions to the Hazardous Substance Contamination clause must be reviewed by and concurred by the appropriate Regional Counsel’s office or the Office of the Assistant Chief Counsel for Acquisition and Commercial Law (AGC-500). Any revisions to the Hazardous Substance Contamination clause will not be approved if such revisions result in a provision that increases

FAA's potential environmental liability beyond that which can be proven to have resulted directly from FAA's use of the site and/or operation of equipment on site.

Question and Answers concerning FAA Order 1050.19B

Q 1: Is the RECO required to obtain a memorandum as stated in 1050.19B 1-9b(3) or an EDDA if the RECO is renewing a land lease?

A 1: Except as otherwise set forth in section 1050.19B 1-9b(3), the EDDA Order will be revised to provide that, if the transaction is simply the renewal of an existing land lease without changing any of the substantive terms and requirements thereof (e.g., staying in the same location and not moving the NAS equipment), the RECO will not be required to request an EDDA be conducted or to complete the memorandum.

The following represents the language to be revised in the FAA Order 1050.19B 1-9b(3):

B. EDDA Not Required. An EDDA will not be required for real estate transactions listed in the paragraphs below. For such transactions, a *memorandum*, referenced in Appendix B, must be included in the real property transaction file explaining the rationale for not conducting the EDDA and also indicating that coordination between the Organization Requesting the Transaction (ORT), technical reviewer (TR), and Legal Counsel occurred, and the action was approved. **Except as otherwise set forth in (3) Lease renewals, all other transactions require the memorandum.**

1. Real property transaction involving leasing of office space, and not otherwise required under paragraph 1-9.d.
2. Easements or right-of-way access agreements where the FAA is not performing any operations on the property in these agreements, and not otherwise required under paragraph 1-9.d.
3. Lease renewals.
4. Termination of leases for property that was leased but never used by the FAA.

Q 2: Are we required to use the "hazardous substance clause" in its entirety for an airport lease or MOA?

A 2: If the requirements imposed upon the Airport Sponsor by FAA conflict with that Sponsor's requirements under state law, and provided that any revisions to, or deletions from the clause which received the concurrence of the appropriate FAA Regional or Center Counsel or the Office of the Chief Counsel for Acquisition and Commercial Law (AGC-500), then the RECO has the authority to revise the Hazardous Substance Contamination clause found in the "Land On Airport Lease Template" (clause #21) and the "MOA". However, under no circumstances may the clause be revised to increase FAA's potential liability beyond that incurred as a direct result of FAA's actions installing, operating, and/or maintaining of the facility or equipment that FAA has placed on the demised premises. An example of an acceptable revision to the Hazardous Substance Contamination clause is set forth below:

HAZARDOUS SUBSTANCE CONTAMINATION (MAY-00): The Government agrees to remediate, at its sole cost, all hazardous substance contamination on the leased premises that is found to have occurred as a direct result of the installation, operation, and/or maintenance of the (type of facility) facility. The Lessor agrees to remediate at its sole cost, any and all other hazardous substance contamination found on the leased premises. ~~The Lessor also agrees to save and hold the Government harmless for any and all costs, liabilities and/or claims by third parties that arise out of hazardous contamination found on the leased premises not directly attributable to the installation, operation and/or maintenance of the (type of facility) facility.~~

## B. National Environmental Policy Act (NEPA) Requirements

In accordance with the requirements of FAA Order 1050.1E, Change 1, Policies and Procedures for Considering Environmental Impacts, before acquiring (by lease, purchase, or otherwise) any additional land (new sites or expanding existing sites), the FAA must comply with the requirements of the National Environmental Policy Act (NEPA) to the extent applicable to such acquisitions. The appropriate level of environmental review must be determined by the program office Environmental Specialist or the project designated Environmental Specialist.

The three levels of environmental review include:

- Categorical Exclusion (CATEX),
- Environmental Assessment (EA), or
- Environmental Impacts Statement (EIS).

In the absence of Extraordinary Circumstances (e.g., the presence of wetlands), most real property acquisition transactions can be categorically excluded by the program office from further environmental review. Chapter 3 of FAA Order 1050.1E, Change 1 provides information on CATEXs and the application of extraordinary circumstances. Specifically, paragraph 310 provides the list of categorical exclusions for FAA actions involving facility siting, construction and maintenance.

If there are extraordinary circumstances directly applicable to the site acquisition, and consequently, the action cannot be categorically excluded from further environmental review then the EA must be initiated by the Environmental Specialist. If the impacts are not significant the environmental review will end with a Finding of No Significant Impact (FONSI).

If any impact to the site attributable to FAA's acquisition or the proposed use of the site, is found to be significant and cannot be mitigated then an EIS must be initiated by program office. The EIS process ends in a Record of Decision.

The environmental review process must be complete before negotiating the acquisition of any new and additional land interests. The RECO must obtain written notification from the program office that all applicable NEPA requirements have been met, which would include all required EDDA documentation, prior to proceeding with the land acquisition including all required

EDDA documentation. The written notification and additional documentation must be placed in the real estate lease file. Once the RECO receives the written notification, the RECO can proceed with the real property transaction for any new or additional land acquisition. The office requesting the land acquisition is responsible for keeping the official documentation for the NEPA review. It is not necessary for the RECO to obtain copies of the CATEX, EA, FONSI, EIS or Record of Decision.

**New Content: Real Estate Guidance :**

**Section 1.1.3.1 : Environmental / Sustainability / Energy**

During the land acquisition process, Real Estate Contracting Officers (RECOs) are required to follow the requirements as set forth below in the following laws, executive orders, regulations, policies and orders:

1. Energy Policy Act (EPA) of 2005, Publ.L.No.109-58
2. Energy Independence and Security Act (EISA) of 2007, Pub.L.No.110-140
3. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
4. National Environmental Policy Act (NEPA)
5. FAA EDDA Order 1050.19B: “Environmental Due Diligence Audits in the Conduct of FAA Real Property Transactions” and any revisions thereto or subsequently published Orders pertaining to environmental compliance
6. Resource Conservation and Recovery Act (RCRA)
7. Executive Order 11988, Floodplain Management
8. Executive Order 11990, Protection of Wetlands

**A. Environmental Due Diligence Audits (EDDA) Requirements**

FAA real property transactions are subject to the requirements of FAA Order 1050.19B, Environmental Due Diligence Audits (EDDA) in the Conduct of FAA Real Property Transactions, in order to identify and minimize potential environmental liabilities associated with the condition of the property and past activities at the site. After the EDDA process, the determination of whether to waive the performance of an EDDA must be completed prior to the execution of contracts for the acquisition or disposal of real property per 1050.19B.

Off-airport land acquisitions of new sites, or that result in the expansion of an existing site, require an EDDA per 1050.19B. All on-airport leases or no-cost on-airport acquisitions that utilize the Memorandum of Agreement (MOA) template will use the Hazardous Substance Contamination clause, preferably the version included in the template, unless an EDDA is required pursuant to FAA Order 1050.19B. In accordance with FAA Order 1050.19B, any revisions to the Hazardous Substance Contamination clause must be reviewed by and concurred by the appropriate Regional Counsel’s office or the Office of the Assistant Chief Counsel for Acquisition and Commercial Law (AGC-500). Any revisions to the Hazardous Substance Contamination clause will not be approved if such revisions result in a provision that increases FAA’s potential environmental liability beyond that which can be proven to have resulted directly from FAA’s use of the site and/or operation of equipment on site.

## Question and Answers concerning FAA Order 1050.19B

Q 1: Is the RECO required to obtain a memorandum as stated in 1050.19B 1-9b(3) or an EDDA if the RECO is renewing a land lease?

A 1: At this time and until further notice, FAA Order 1050.19B 1-9b(3), the requirement for an EDDA order requirement remains in place. The EDDA order is in the process to be revised to amend this part of the order requirement. The RECO shall cite this section in their lease file when they are unable to obtain an "EDDA-not-required" memorandum.

Q 2: Are we required to use the "hazardous substance clause" in its entirety for an airport lease or MOA?

A 2: If the requirements imposed upon the Airport Sponsor by FAA conflict with that Sponsor's requirements under state law, and provided that any revisions to, or deletions from the clause which received the concurrence of the appropriate FAA Regional or Center Counsel or the Office of the Chief Counsel for Acquisition and Commercial Law (AGC-500), then the RECO has the authority to revise the Hazardous Substance Contamination clause found in the "Land On Airport Lease Template" (clause #21) and the "MOA". However, under no circumstances may the clause be revised to increase FAA's potential liability beyond that incurred as a direct result of FAA's actions installing, operating, and/or maintaining of the facility or equipment that FAA has placed on the demised premises. An example of an acceptable revision to the Hazardous Substance Contamination clause is set forth below:

**HAZARDOUS SUBSTANCE CONTAMINATION (MAY-00):** The Government agrees to remediate, at its sole cost, all hazardous substance contamination on the leased premises that is found to have occurred as a direct result of the installation, operation, and/or maintenance of the (type of facility) facility. The Lessor agrees to remediate at its sole cost, any and all other hazardous substance contamination found on the leased premises. ~~The Lessor also agrees to save and hold the Government harmless for any and all costs, liabilities and/or claims by third parties that arise out of hazardous contamination found on the leased premises not directly attributable to the installation, operation and/or maintenance of the (type of facility) facility.~~

### B. National Environmental Policy Act (NEPA) Requirements

In accordance with the requirements of FAA Order 1050.1E, Change 1, Policies and Procedures for Considering Environmental Impacts, before acquiring (by lease, purchase, or otherwise) any additional land (new sites or expanding existing sites), the FAA must comply with the requirements of the National Environmental Policy Act (NEPA) to the extent applicable to such acquisitions. The appropriate level of environmental review must be determined by the program office Environmental Specialist or the project designated Environmental Specialist.

The three levels of environmental review include:

- Categorical Exclusion (CATEX),

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In the absence of Extraordinary Circumstances (e.g., the presence of wetlands), most real property acquisition transactions can be categorically excluded by the program office from further environmental review. Chapter 3 of FAA Order 1050.1E, Change 1 provides information on CATEXs and the application of extraordinary circumstances. Specifically, paragraph 310 provides the list of categorical exclusions for FAA actions involving facility siting, construction and maintenance.

If there are extraordinary circumstances directly applicable to the site acquisition, and consequently, the action cannot be categorically excluded from further environmental review then the EA must be initiated by the Environmental Specialist. If the impacts are not significant the environmental review will end with a Finding of No Significant Impact (FONSI).

If any impact to the site attributable to FAA's acquisition or the proposed use of the site, is found to be significant and cannot be mitigated then an EIS must be initiated by program office. The EIS process ends in a Record of Decision.

The environmental review process must be complete before negotiating the acquisition of any new and additional land interests. The RECO must obtain written notification from the program office that all applicable NEPA requirements have been met, which would include all required EDDA documentation, prior to proceeding with the land acquisition including all required EDDA documentation. The written notification and additional documentation must be placed in the real estate lease file. Once the RECO receives the written notification, the RECO can proceed with the real property transaction for any new or additional land acquisition. The office requesting the land acquisition is responsible for keeping the official documentation for the NEPA review. It is not necessary for the RECO to obtain copies of the CATEX, EA, FONSI, EIS or Record of Decision.

**Red Line Content:** Real Estate Guidance :

#### **Section 1.1.3.1 : Environmental / Sustainability / Energy**

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~~under paragraph 1-9.d. Lease renewals. Termination of leases for property that was leased but never used by the~~required" FAA memorandum.

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