Lenders are important partners for most economic development projects. But their role is especially important in the challenging redevelopment of brownfields. Brownfields are abandoned, idle or underused commercial or industrial properties, where the expansion or redevelopment is hindered by real or perceived contamination.

In order to encourage the redevelopment of brownfields and take away concerns about liability burdens, Wisconsin’s Spill law contains an exemption for lenders and representatives who meet the conditions described in state law. This fact sheet describes those state liability protections for lenders and representatives, as well as those available from federal environmental laws.

Examples of situations where this fact sheet could be helpful:

“A client seeks a loan to purchase an older industrial property. If environmental contamination is found on the land and the client cannot repay the loan, will our lending institution be held liable for an environmental cleanup in the event of foreclosure? These concerns may cause us to refuse this loan.”

“Our client owns an industrial property, and has asked our law firm to be the executor of his will. Could our firm or one of our attorneys be held personally liable for cleaning up any environmental problems found on the property, even though we are just the executors of the will?”

“We hold the first mortgage on a tax delinquent property and the business has declared bankruptcy. If we foreclose and take title to the property, what should we do to qualify for the lender liability exemption?”
What is the Hazardous Substance Discharge Law?

The Hazardous Substance Discharge Law, also known as the Spill Law, s. 292.11, Wis. Stats., requires that persons who “possess,” “cause,” or “control” a hazardous substance discharge take necessary actions to restore the environment to the extent practicable and minimize harmful effects from the discharge. Certain liability exemptions are available for persons who meet the provisions in state statutes. Exemptions that affect lenders and representatives are found in s. 292.21, Wis. Stats.

Who is a “Lender”?

Groups or individuals whose primary business is to engage in lending activities are considered to be lenders and include the following:

- banks;
- credit unions;
- savings banks;
- savings and loan associations; and
- mortgage bankers.

The three following entities engaged in secured lending are also included:

- insurance companies;
- pension fund; and
- government agencies.

Who is a "Representative"?

A "representative" is a person acting in the capacity of a:

- conservator;
- guardian;
- court-appointed receiver;
- personal representative;
- executor;
- administrator;
- testamentary trustee of a deceased person;
- trustee of a living trust; or
- fiduciary of real or personal property.

What is the difference between “real property” and “personal property”?

Real property is defined as land and that which is affixed to it (buildings, trees, etc.).

Personal property is generally all property other than real estate.

When Can a Lender Be Released From Liability Under State Law?

Lenders can be released from liability under the Spill Law and other state environmental laws regarding a discharge of a hazardous substance, provided they meet one of four situations. Each
situation has conditions and requirements that need to be met, in order for lenders not to “possess, control or cause” a hazardous substance discharge.

These four situations are: normal lending, acquiring property through foreclosure, inspecting property, and enforcing a security interest in personal property and fixtures.

1. Normal Lending

A lender who engages solely in lending activities is not considered to possess, control or be a causer of a hazardous substance discharge, unless:

- the lender physically causes a discharge of a hazardous substance; or
- the lender's tortious conduct causes a discharge or makes an existing discharge worse.

2. Acquiring Property

A lender who acquires title to, possession of, or control of real property through the enforcement of a security interest (i.e., foreclosure) is not liable under the state Spill law or other state laws for a hazardous substance discharge on the property if the conditions in s. 292.21, Wis. Stats., are met, including the following.

- The lender does not intentionally or negligently cause a discharge or exacerbate an existing discharge.
- The lender immediately notifies the DNR of any known discharge, as required by ch. NR 706, Wis. Admin. Code, and s. 292.11, Wis. Stats. [Note: A submittal of an environmental assessment does not satisfy immediate notification requirements]
- The lender conducts an environmental assessment of the property as defined in s. 292.21 (1)(c)2, Wis. Stats. Please note that this assessment must be completed not more than 90 days after the date the lender acquires title to, possession of, or control of the property. The environmental assessment report must be filed with the DNR not more than 180 days after the date the lender acquired title to, possession of, or control of the property; the assessment requirements are described in more detail on pages 6 and 7.
- The lender is not managing or operating a business on the property and is not conducting the conclusion of the borrower’s business.
- The lender conducts an emergency response action in response to any discharge that occurs on or after the date the lender acquires title to, possession of, or control of the property.
- The lender agrees to allow the DNR, the responsible party, or both, access to the property to take response actions and agrees to avoid interference with actions taken to respond to the discharge.

3. Inspecting Property

A lender who inspects property for compliance with environmental laws, conducts an environmental assessment, conducts an environmental investigation, or performs cleanup actions...
is not considered to possess, control or cause a hazardous substance discharge if the following conditions are met.

- The inspecting activities occur before the date the lender acquires title, possession of, or control of the property through enforcement of a security interest.
- The DNR is immediately notified of any identified discharges as a result of inspecting activities.
- Any investigation or cleanup conducted by the lender is done in accordance with DNR rules.
- The lender does not physically cause a discharge.
- The lender does not cause a new discharge or exacerbate an existing discharge through tortious conduct.

4. Enforcing a Security Interest in Personal Property and Fixtures

A lender who enforces a security interest in personal property or fixtures (e.g. large equipment) at a particular location, but is not acquiring title to, possession of, or control of the real property at that location, is not considered to possess, control or cause a hazardous substance discharge if the following conditions are met.

- The lender notifies the DNR and the borrower of any decision not to accept specific personal property or fixtures within 30 days after the lender enters the property.
- The lender provides written notice to the DNR of the location of the real property and the personal property or fixtures and a description of the personal property or fixtures within 30 days after entering the property.
- The lender permits reasonable access to the personal property or fixtures to the DNR or the borrower.
- The lender does not engage in the operation of a business, nor has any involvement with the business of the borrower on the property where the personal property is located, except for actions that are undertaken to protect the property and are approved by the DNR in writing.

For the most part, the liability exemptions described above are self implementing and do not require Department of Natural Resources (DNR) review or approval. The two exceptions that require DNR involvement are:

1. if the lender asks for a liability clarification letter by submitting a fee, and
2. if the lender chooses to submit an environmental assessment that is more than one year old, a review fee is required.

Both requests are submitted to DNR using the Technical Assistance and Environmental Liability Clarification Request (Form 4400-237). More information is also available on the RR Program’s Liability webpage.
When Can a Representative Be Released From Liability Under State Law?

A representative who acquires title to, possession of, or control of property is not personally liable for a hazardous substance discharge if the following conditions are met.

- The representative does not knowingly, willfully, recklessly or physically cause a discharge.
- The representative acquires title to, possession of, or control of property in the capacity of a representative.
- The representative does not have a beneficial interest in a trust, estate or entity that owns, possesses or controls the property.
- The representative does not knowingly, willfully or recklessly fail to notify the DNR of a discharge.

As part of their duties as a conservation guardian, court appointed receiver or trustee, the receiver must insure that the estate or trust still complies with the Spill Law, although the representative is not personally liable.

A representative would be considered to be liable for a hazardous substance discharge if:

- the representative knew or should have known that the trust, estate or similar entity for which the representative is acting was established, or assets were transferred to the trust, estate, or similar entity, in order to avoid responsibility for a discharge; or
- a representative did not act in good faith to cause the trust, estate or similar entity to take the necessary environmental actions, or to reimburse DNR for actions taken by the DNR under s. 292.11(7)(b), Wis. Stats.

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**Reporting a Discharge**

Lenders who inspect or acquire property are required to immediately notify the DNR of all discharges of hazardous substances that adversely impact, or threaten to adversely impact public health, welfare or the environment. (Note: Submitting an environmental assessment is not equivalent to "immediate notification.") NR 706, the spill notification rule, specifies the details of the reporting requirements.

- To report a non-emergency discharges, use the [Notification For Hazardous Substance Discharge (Non-Emergency Only) Form (Form 4400-225)].
- For emergency situations, call the 24-hour spill reporting hotline: 1-800-943-0003.
Environmental Assessments Needed for Acquiring Real Property

If a lender acquires real property and wants to qualify for the liability exemption, the lender must conduct an environmental assessment that complies with the conditions listed in s. 292.21(1)(c)2, Wis. Stats. (Note: These requirements come from state law and are not related to due diligence requirements that may be found in other technical standards (e.g. ASTM) for conducting environmental assessments or due diligence.)

The environmental assessment should be conducted within one year prior to and not more than 90 days following acquisition of title, possession of, or control of the property. The assessment must be filed with the DNR not more than 180 days after the date of acquiring the property.

If the assessment is not required to be reviewed by DNR, a lender has the option to request a site-specific lender liability clarification letter from DNR, which is available for a fee. See Question 8 on page 10 for more information about fees and DNR’s responses.

The lender may submit an environmental assessment that was conducted more than one year before the lender acquired the property. However, additional steps must be taken in this circumstance, including a visual inspection of the property after acquiring the property. A lender who chooses to submit an older assessment must submit it to the DNR not later than 90 days after the lender acquires the real property, along with the results of the visual inspection and a $700 review fee. DNR staff will then review both the old assessment and visual inspection update to determine if the assessment is adequate or whether any inadequacies need to be addressed.

To qualify for the liability exemption, the environmental assessment must include the following elements.

- Visual inspection of the real property.
- Visual inspection and description of the personal property located on the real property that may constitute a hazardous waste or hazardous substance or that has a significant risk of being discharged.
- Review of the ownership and use history of the real property, including a search of title records showing prior ownership of the property for a period of 80 years previous to the date of the visual inspection.
- Review of historic and recent aerial photographs of the real property.
- Review of the environmental files at agency offices, including licenses, permits or orders issued with respect to the real property.
- Evaluation of the results of any environmental sampling and analysis that has been conducted.
• Review to determine if the real property is included on certain lists of sites or facilities that may pose a threat to human health or the environment, such as US EPA’s CERCLIS Database or the National Priorities List (NPL).

• Collection and analysis of representative samples of soil or other materials in the ground that are suspected of being contaminated based on observations or aerial photographs, including stained or discolored soil or other materials in the ground and including soil or materials in the ground in areas with dead or distressed vegetation. The collection and analysis is intended to identify contaminants in the soil or other materials in the ground and shall quantify concentrations.

• Collection and analysis of representative samples of unknown wastes or potentially hazardous substances found on the property, and concentrations of hazardous waste and hazardous substances found in tanks, drums, or other containers, or in piles or lagoons on the real property. Labels or assumptions of contents are not sufficient to meet this requirement.

Lender Exemptions from Federal Liability

Federal environmental laws also contain liability exemptions for lenders. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (commonly known as Superfund), contains a security interest exemption which protects certain lenders under Superfund. Also, the Resource Conservation and Recovery Act (RCRA) Subtitle I, contains the regulatory requirements for petroleum underground storage tanks (USTs) and exempts certain lenders from liability.

Lender Protection from Federal Underground Storage Tank Laws

Subtitle I of RCRA contains a "security interest exemption" that provides secured creditors (i.e. lenders) an explicit statutory exemption from corrective action (cleanup) liability for releases from petroleum USTs. In addition, EPA issued a rule, the “Lender Liability Rule for Underground Storage Tanks,” that describes the specific conditions under which certain secured lenders may be exempted from RCRA Subtitle I regulatory requirements for discharges from petroleum underground storage tanks.

EPA hopes this rule will allow lenders to provide financing to gas station owners and operators and other small businesses with tanks on their property. The agency also hopes this rule will allow lenders to foreclose on a property with a federally regulated UST and qualify for the liability exemption. For more detailed information on the federal exemptions for lenders, please see the EPA’s Brownfields Liability webpage, which includes links to the applicable federal laws and the “Underground Storage Tank (UST) Lender Liability Rule.”

Lender Protection from Superfund Laws

Superfund also has a security interest liability exemption, which protects certain lenders from liability under CERCLA (Superfund). The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 amended CERCLA’s secured creditor exemption to clarify the situations in which lenders will and will not be protected from CERCLA liability.
To determine what specific actions would satisfy the federal lender liability requirements under CERCLA, lenders are advised to contact the EPA directly. The EPA should be able to provide you with guidance on whether your current and proposed actions concerning the Property are consistent with the federal CERCLA lender liability requirements. Visit the RR Program’s Environmental liability exemption for lenders and representatives webpage for EPA web links and contact information.

Frequently Asked Questions

Q1. What state environmental laws can “lenders” be granted liability exemptions from?

A lender is not subject to the Hazardous Spill Discharge Law (s. 292.11(3), (4) or (7)(b) or (c), Wis. Stats.), for a discharge of a hazardous substance that occurred on the Property, before the lender takes title, possession of, or control of the Property through enforcement of a security interest in the Property. This also holds true for chapters 281 (Water and Sewage), 285 (Air Pollution), 289 (Solid Waste Facilities), 291 (Hazardous Waste Management), or 293 to 299 (Metallic Mining, Non-Metallic Mining, & General Environmental Provisions), Wis. Stats.

Q2. To qualify for the liability exemption, does a lender who acquires real property need to conduct any environmental activities?

Yes. First, they must immediately notify the DNR of any discharge of a hazardous substance by following the reporting requirements of ch. NR 706 for hazardous substance discharges that may be discovered (See “Reporting a Discharge” on page 5).

Second, if a lender takes title to or possession of, or control of real property, the lender must conduct an “environmental assessment,” as described in s. 292.21, Wis. Stats.

Q3. To qualify for the liability exemption, does a “representative” who acquires real property need to conduct any environmental activities?

Yes. First, they must immediately notify the DNR of any discharge of a hazardous substance by following the reporting requirements of ch. NR 706 for hazardous substance discharges that may be discovered (See “Reporting a Discharge” on page 5).

Additionally, a representative – acting in the capacity of a conservator, guardian, court-appointed receiver, trustee, or similar role as defined in s. 292.01 (16), Wis. Stats. – has responsibility to conduct actions required under s. 292.11, Wis. Stats. Part of this responsibility includes:

- s. 292.11 (2) – notifying the Department of a discharge;
- s. 292.11 (3) – responsibility to restore the environment following a discharge;
- s. 292.11 (4) – prevention of a discharge; and,
- any other provisions of this chapter.

Q4. What are my options for submitting the environmental assessment (EA) to DNR with regard to fees or requesting a review?

A lender may make two types of submittals to DNR. The submittal deadlines are defined by state law and summarized on page 6.
(1) The Lender Liability Exemption Environmental Assessment Tracking (Form 4400-196) is available on the RR website. No fee is required and no review or determination will be provided. The DNR will simply acknowledge receiving the submittal.

(2) The Technical Assistance and Environmental Liability Clarification Request (Form 4400-237) is available on the RR website. For a $700 fee, DNR will provide a site-specific liability clarification letter describing the provisions in the exemption, if the conditions in the law have been met.

This form and fee are also submitted if the original environmental assessment was conducted more than a year before the property was acquired. The visual inspection should be included as part of the submittal. DNR staff will review the assessment and respond in writing. Any identified deficiencies in the assessment will need to be corrected before the liability exemption is effective.

Q5. Do I need to conduct an environmental assessment and send that to the DNR if I believe the property is clean?

Yes. In order to qualify for the exemption – whether or not contamination is discovered – a lender must send the DNR an environmental assessment that meets all the requirements in s. 292.21(1)(c)2, Wis. Stats. It is important to keep track of the acquisition date, conduct an environmental assessment that conforms to the state law, and file the report with the DNR within the specified number of days after the lender acquires title, or possession or control of, the property.

Q6. How does an “environmental assessment” differ from a site investigation?

The purpose of an environmental assessment (EA) as outlined under s. 292.21, Wis. Stats., is to identify the possibility of contamination and then confirm its presence at a property. A s. 292.21, Wis. Stats., environmental assessment is not necessarily the same as an ASTM assessment. See “Environmental Assessments Needed for Acquiring Real Property” on pages 6 and 7 above for more specifics.

Site investigations are more detailed efforts to determine the nature, degree and extent of the environmental contamination on the site. For more information on site investigations, refer to ch. NR 716, Wis. Adm. Code.

Q7. Are lenders affected by the federal All Appropriate Inquiry (AAI) requirements? Are AAI requirements equivalent to those in s. 292.21, Wis. Stats.?

Beginning on January 11, 2002, the federal Brownfields Amendments of 2002 required the creation of standards for conducting environmental due diligence that is called All Appropriate Inquiry (AAI). Conducting the AAI helps persons who acquire contaminated property and meet the applicable requirements to protect themselves from federal Superfund (CERCLA) liability. The lender exemptions predate the All Appropriate Inquiry standards.

For more information, see the EPA AAI webpage. Also, AAI standards are not equivalent to the environmental assessment required by Wisconsin statutes. When contracting with environmental professionals for environmental assessment services at properties under foreclosure, lenders should specify that the final report must include the requirements in s. 292.21, Wis. Stats.

Q8. Is the lender and representative liability exemption transferable to others?
No. The lender liability exemption is not transferable to others who meet the state’s definition of a lender.

Q9. Can a lender conduct a voluntary cleanup of a property and receive an additional exemption from liability?

Yes. Anyone who voluntarily conducts an investigation and cleanup of a property may enter into the Voluntary Party Liability Exemption (VPLE) process in order to receive a Certificate of Completion. This exemption is transferrable to a new owner.

For more information on the Voluntary Party Liability Exemption see s. 292.15, Wis. Stats., and the fact sheet entitled Voluntary Party Liability Exemptions (RR-506), available on the RR Program website.

A lender may also choose to follow the standard requirements of investigation and closure, using the NR 700 Wis. Adm. Code series.

Q10. Can lenders who acquire property be exempt from liability if the discharge of a hazardous substance was from a federally regulated underground storage tank?

Yes. Since October 29, 1999, the lender liability exemption has included any discharges from those underground storage tanks that are large enough to be regulated under federal regulations. The requirements given in s. 292.21(1)(c), Wis. Stats., must be met to qualify for the exemption.

Q11. Does the representative exemption protect the financial interests of the trust, estate or other entity for whom the representative is acting?

No. The personal assets of the representative that are not a part of the trust, estate or other entity being represented are protected; they cannot be attached for investigation and cleanup costs. However, if the representative acts for a trust, estate or other entity that is a responsible party (i.e., has possession of, or control of a hazardous substance that is discharged to the environment or has caused a hazardous substance discharge), that entity remains responsible and may be required to investigate and cleanup the environmental contamination.

Q12. If I take title to a property and want to be protected under both state and federal laws, what must I do?

You must meet all the requirements of both federal and state laws to qualify for the lender liability exemption, whichever is more stringent.

For example, if the state requirement is that an environmental assessment must be conducted, but federal law does not require an assessment, the lender would need to conduct and file an assessment that meets all the requirements in s. 292.21(1)(c)2, Wis. Stats., to be protected under both state and federal law.

Q13. My consultant concludes that no sampling is necessary at the property I plan to foreclose on. When is it necessary to conduct sampling?

The minimum state requirements for an environmental assessment for a lender to qualify for a lender exemption are described on page 6. State law requires a lender to collect and analyze soil and
unknown wastes at a site in certain cases, as specified in ss. 292.21 (1)(c) 2.h. and 292.21(1)(c)2.i., Wis. Stats. It may be useful to work with your DNR project manager for guidance in determining if sampling is necessary, prior to finalizing and submitting a final environmental assessment.

Q14. Does a lender ever have to take actions at a site?

Yes. As outlined in s. 292.21(1)(c)1.f., Wis. Stats., in order to retain the lender liability exemption a lender must implement an emergency response action in response to a discharge of a hazardous substance that occurs after the lender acquires title to, possession of, or control of a property, or if a lender causes a discharge of a hazardous substance.

Regional DNR Brownfield Contacts

Questions about brownfields should be directed to the brownfield specialist in your local DNR regional office - http://dnr.wi.gov/topic/Brownfields/Contact.html.

For More Information

To find out more information about the Remediation and Redevelopment Program, please check out our web site at dnr.wi.gov/topic/brownfields/.

This document contains information about certain state statutes and administrative rules but does not necessarily include all of the details found in the statutes and rules. Readers should consult the actual language of the statutes and rules to answer specific questions. The Wisconsin Department of Natural Resources provides equal opportunity in its employment, programs, services, and functions under an Affirmative Action Plan. If you have any questions, please write to Equal Opportunity Office, Department of Interior, Washington, D.C. 20240. This publication is available in alternative format upon request. Please call 608-267-3543 for more information.