

Brownfields Study Group Lender Subgroup Meeting, May 4, 2016

Attendees:

Christopher H. Valcheff, True North Consultants, Inc.
Bruce A. Keyes, Foley & Lardner, LLP
Adam Gallagher, Dane County Treasurer
Jan Sheinson, BMO Harris Bank, NA
Mark A. Miller, Investors Community Bank
David Ruetz, GZA Environmental
Jason Scott, WEDC
Ronald J. Horan, Natural Resource Technology, Inc.
Steve Hansen, Associated Bank
Mark Thimke, Foley & Lardner, LLP
Jennifer Drury Buzacky, Whyte Hirschboeck Dudek S.C.
Michael Prager, DNR
Darsi Foss, DNR
Christine Haag, DNR
Julia Upfal, DFI
Chris Green, DFI
Cheryll Olson-Collins, DFI
Michael Johnson, Park Bank
Jon Turke, Wisconsin Bankers Association
Heather MacKinnon, Wisconsin Bankers Association

Minutes:

Mark Thimke welcomed attendees and provided background on the Brownfield Study Group (BSG) and the latest BSG report. He explained how past discussions about lender exemption issues had led to the recommendation on page 18 of the 2015 BSG report. There had been a discussion at a DNR Secretary's Roundtable about lender issues as well. The purpose of the subgroup is to reflect on whether, after 20 years, there are changes to existing law or policy that would help support lending. The BSG would want lenders to have the financial wherewithal to support brownfields redevelopment.

Attendees discussed the previous conversations that the Study Group had in 2014 about use of LLCs as a bank business practice, noting that there were concerns from those in the environmental field about use of LLCs to avoid cleanup responsibility.

DNR staff Molly Schmidt summarized the existing lender exemptions within the Spills Law and discussed DNR's role. She stated that the law includes four types of exemption situations: lending activities; pre-acquisition inspections of real property, real property acquisition through enforcement of a security interest, and acquisition of personal property or fixtures through enforcement of a security interest. DNR's role includes tracking and writing liability clarification letters when they are requested. Since 2013, DNR received about 55 requests for Environmental assessments (EAs) reviews along with letter for fee; 35 submissions of EAs without a fee request for a letter. DNR wrote about 58 liability clarification

letters for the lender exemption. Ten letters informed people that they did not qualify for the lender exemption. Some missed deadlines or didn't meet the definition of lenders because they were LLCs.

DNR received a higher number of requests following the 2009 economic collapse. DNR did not see any LLC requests until then and have not had many requests since writing the denials.

Attendees discussed how the environmental assessment required in lender law differed from a normal Phase I. The answer was that, for the exemption assessment, sometimes sampling is needed, along with testing contents of unknown containers, and an eighty-year title search. Some requirements for Phase I standards are not required under the lender law.

Consultants in attendance discussed how Phase I assessments were done frequently; however, 80-year histories were not frequently done and were more challenging and time-consuming. Attendees discussed the history of how the law was written.

Attendees discussed whether a lender would be at risk if they don't follow this statute to get the lender exemption. Darsi Foss provided a hypothetical situation in which a lender not getting the exemption may become the responsible party.

Attendees discussed the challenges and advantages to using the exemption: sometimes banks may not go the extra step to get the exemption. A bank could clean up the site and sell it. It could, however, have difficulty selling if environmental contamination exists and it can fail to qualify for exemption if it doesn't follow all requirements.

Attendees discussed whether a bank that puts a property in receivership would be responsible for reporting a spill found by a receiver. The answer is "yes." The lender and representative exemptions in Wis. Stat. § 292.21 do not exempt those persons from reporting. Banks that own sites are not totally off the hook for Spill Law responsibility. There may be hazardous waste, tank requirements, or other things.

Mark Thimke stated that the general questions for this Subgroup were: What are current lending practices? Are there places where the law no longer fits due to changes over the last two decades? He stated that the next meeting could facilitate learning more about current lending practices, including the use of ASTM Phase I requirements in comparison to the Wis. Stat. § 292.21 approach. He stated that the Subgroup's role was to make recommendations, and the BSG could decide whether to support or advance the recommendations. He asked whether the current definitions of lenders and lending activities were suitable.

Attendees discussed the rarity of discussions or questions about the exemption, and added that this subgroup would spur discussions at upcoming meetings.

Darsi Foss stated that DNR would like to better understand changes to practices and any issues that the subgroup discovers, especially LLC issues. Attendees requested further information regarding the definition of "lenders". There are 300 or so chartered banks in Wisconsin – what is included? Darsi Foss requested that a local government be part of the discussion, as some local governments (e.g., RDAs or CDAs) may meet the definition of lender.

Attendees discussed how lenders typically create LLCs. Lenders need Dept. of Financial Institution (DFI) permission from for LLC creation. Many times lenders were in a situation where a customer gives keys to a bank and walks away from a property. The FDIC doesn't like putting the capital of bank at risk, and prefers a shield for bank assets over impaired bank capital. Lenders that do not know conditions may be hesitant to take title. They use one LLC to own all property, but in some other cases banks have created single-property LLCs.

Mark Thimke asked the attendees what the next steps might be and whether they'd have further interest. The attendees discussed possible topics and suggested that people at the meeting send DNR any topics they think should be evaluated. The initial list of topics included:

- Receivership
- LLCs
- definitions of lenders
- assessments requirements
- What is the scope of the exemption, what are you exempt from? What does exemption provide?
- potential conflict between the provisions for fixtures and personal property vs real property (e.g., whether you can operate a business)
- outreach to lenders regarding the business case for use of the exemption

Attendees discussed whether lenders knew about the exemption, in light of the relative ease of doing a standard ASTM Phase I.

Darsi Foss stated that DNR will continue doing outreach to lenders, but needs the support of the lending community and associations to get the word out.

The attendees discussed entities that do work outs versus originators. Often lenders work with legal counsel if there is a bad loan. It was suggested that the Subgroup could reach out to them. When commercial property is collateral, it's the bank's job to think about the future in event of foreclosure. They should look at that as a normal part of the process.

The Subgroup outlined its next steps:

- Participants should send any additional topics to DNR that group should evaluate;
- DNR will send out email about next meeting; and
- Mark Thimke and Jennifer BuzECKy will talk about this at full Study Group meeting on May 1