

**Remediation and  
Redevelopment Program**

**Issues & Trends Series  
2015**

May 6, 2015 12:00 p.m. – 1:00 p.m.  
Conference Call

Dial: 1-855-947-8255  
Passcode: 6612 745#



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 **Speaker** 

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**Keeping Lenders Out of  
Trouble at Contaminated  
Properties...and...**



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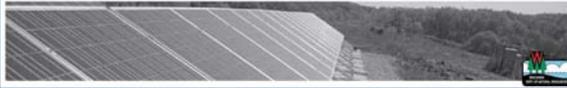
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**...Keeping LGUs Out of  
Trouble at Contaminated  
Properties Owned by  
Lenders!!!**



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**OUTLINE**

1. Lenders and Contaminated Properties 
2. Lenders and LGUs at Contaminated Properties



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**Lenders and Contaminated Properties**

1. Introduction
2. S. 292.21, Stats. Lender Responsibilities & Exemptions
3. Mistakes & Missed Opportunities



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**Lenders and Contaminated Properties**

4. Suggestions for Attorneys & Consultants

5. Conclusions and Q & A



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**INTRODUCTION:**  
**Economic Impacts of Great Recession (2007-2009)**

- Increases in bankruptcies, receiverships, plant closings, reduced development
- Many lenders forced into dealing with contaminated properties



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**Lender Liability Exemption**

- In the past, lenders could be held responsible if they took title
- Laws changed (1995) to protect lenders and to encourage lending
- Section 292.21 contains liability exemptions for lenders and representatives



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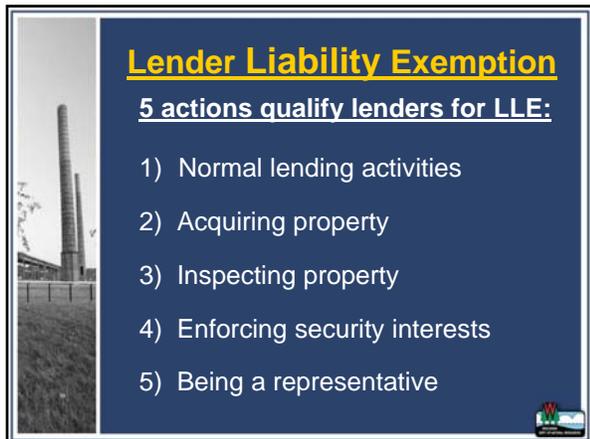
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**Lender Liability Exemption**

**5 actions qualify lenders for LLE:**

- 1) Normal lending activities
- 2) Acquiring property
- 3) Inspecting property
- 4) Enforcing security interests
- 5) Being a representative

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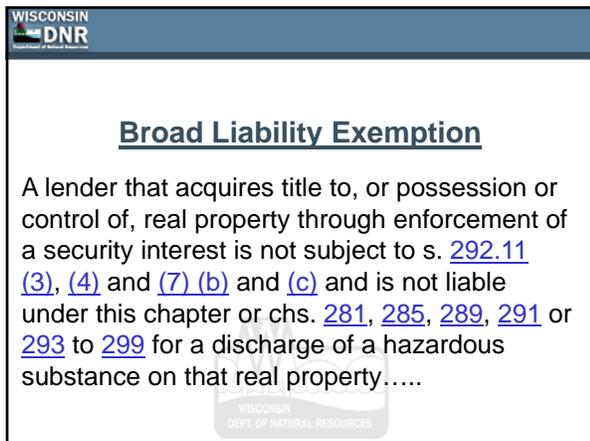
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**Broad Liability Exemption**

A lender that acquires title to, or possession or control of, real property through enforcement of a security interest is not subject to s. [292.11 \(3\)](#), [\(4\)](#) and [\(7\) \(b\)](#) and [\(c\)](#) and is not liable under this chapter or chs. [281](#), [285](#), [289](#), [291](#) or [293](#) to [299](#) for a discharge of a hazardous substance on that real property.....

WISCONSIN DEPT. OF NATURAL RESOURCES

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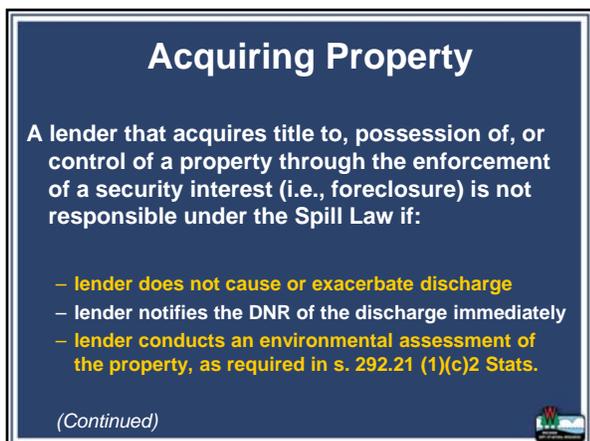
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**Acquiring Property**

A lender that acquires title to, possession of, or control of a property through the enforcement of a security interest (i.e., foreclosure) is not responsible under the Spill Law if:

- lender does not cause or exacerbate discharge
- lender notifies the DNR of the discharge immediately
- lender conducts an environmental assessment of the property, as required in s. 292.21 (1)(c)2 Stats.

(Continued)

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### Acquiring Property (cont.)

- If a discharge occurs on or after the date of acquisition, the lender is not operating a business on the property.
- **The lender conducts an emergency response action in response to any discharge that occurs on or after the date the lender acquires title to the property.**



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### Lender Foreclosure – Env. Site Assessment

- Know client's objectives
- s. 292.21(1)(c) – Assessment details
- Different than ASTM or AAI Phase 1
- Consultant - follow ALL requirements
- Conduct within 90 days of taking title
- Submit to DNR within 180 days of title



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Department of Natural Resources

### Security Interest in Personal Property and Fixtures

1. W/i 30 days notify of personal property not accepted.
2. W/i 30 days describe personal property, location, and location of the real property.
3. Permit reasonable access to the personal property.
4. Don't engage in actions except approved by department.



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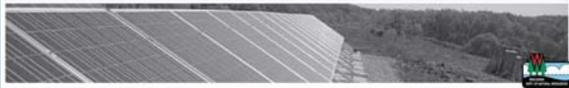
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## Being a Representative

- Could be receiver, or represent a trust, estate or similar entity.
- A representative **IS NOT PERSONALLY** responsible under the spill law, if conditions are met.
- If company is in Receivership, receiver **IS NOT PERSONALLY** liable, but RP and new owner would be.
- Representative could become liable if statutory conditions are not met.



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## Lender Liability - The Bottom Line...

- Lender can be comfortable lending money for industries and cleanups.
- Lenders can avoid environmental liability, if they follow statutes.
- Liability Clarification Letters can help.
- Consultants need to lead lender clients in the right directions, as Env. Experts.



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## GOOD NEWS / bad news for Consultants



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**The GOOD NEWS...**

...Lenders rely on their consultants and attorneys.



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**the bad news...**

...consultants and attorneys are **making mistakes** and **missing opportunities**.



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**Mistakes & Missed Opportunities**

- Failure to recognize liability exemption
- Become RP with greater liability and cost
- Miss time frames for EA
- Miss required contents of EA



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### Mistakes & Missed Opportunities

(continued)

- Potential re-sale problems
- Unaware of / distrust DNR resources
- Lending / foreclosure separate depts.
- Reliance on external consultants – little in-house expertise



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### What to do if borrower defaults?

- Factors to consider before foreclosing:
  - Loan amount
  - Value of property
  - Estimate cleanup cost
  - Would environmental unknowns make it hard to sell property?
  - What are continuing obligations and how do they impact use and value of property?
  - Are there imminent issues (i.e. active remedial system, leaking drums, etc.)?



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### Conclusions

- Proactively lead Lender clients
- Environmental Risk Management
- Anticipate cost estimates needed
- Call DNR for help
- Questions???

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### Lenders and LGUs at Contaminated Properties

- Interests “Collide” at BFs
- Opposite Positions
- Benefits Don’t Align
- Hard to Create “Win – Win”



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### Lenders and LGUs at Contaminated Properties

- Acquisition Intents
- Different Perspectives and Goals
- Negotiation Positions
- What Constitutes a Success?



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### Acquisition Intents

- Lenders – Don’t want properties
  - Don’t want \$\$\$ loss
- LGUs – Want properties
  - Don’t want to pay \$\$\$



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### Different Perspectives and Goals

- Lenders – Expect to sell property
  - Don't want to invest \$\$\$
  - Don't have liability
- LGUs – Expect clean-up costs
  - Want grant / loan \$\$\$
  - Won't accept liability



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### Negotiation Positions

- Lenders – Financial Business
  - No Env. Problems
- LGUs – “We didn't cause it...”
  - Expect others' cooperation



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### What Constitutes a Success?

- Lenders – a sale
  - constrain loss
- LGUs – cheap acquisition cost
  - env. liability exemptions
  - funding sources



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### Other Considerations

(Not Exclusive to Lenders)

- Objectives of ESAs
- Values of Properties
- Use of LLCs to hold properties
- Demo / Salvage Ordinances
- Receiverships
- Liens vs. Foreclosures




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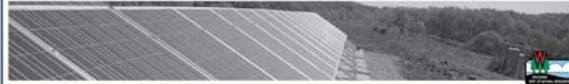
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### Conclusions

- Lender – LGU Relations may be complex
- **Environmental Risk Management**
- Call DNR & legal services for help
- **Questions???**

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## Remediation and Redevelopment Program

June 3, 2015 at 12:00 p.m. via Lync

### Vapor Intrusion & Continuing Obligations Applied at Closure

Audio from today's presentation and information about this and future *Issues & Trends Series* can be found on the RR Program Training Webpage at: [dnr.wi.gov/topic/Brownfields/Training.html](http://dnr.wi.gov/topic/Brownfields/Training.html)

Questions / Comments / Suggestions regarding the *Issues & Trends Series* can be submitted to:

[DNRRRComments@wisconsin.gov](mailto:DNRRRComments@wisconsin.gov)

*Thank you*

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