



Remediation and Redevelopment Program **September 2017**

Lenders and Representatives Environmental Liability Exemptions

IN SUMMARY Lenders and representatives may be eligible for environmental liability exemptions related to historic contamination at specific properties. Lenders must conduct environmental assessments that include elements identified in state statutes, and submit the assessments to DNR within strict timelines. Exempt or not, representatives and lenders must notify DNR of all known discharges of hazardous substances, old or new.

CONTENTS

Lender Eligibility	1
Exemption Conditions	2
Reporting a Discharge	3
Environmental Assessment	3
Non-Exempt Obligations	4
Maintenance and Monitoring	4
Federal Exemption	5
Representative Exemption	5
Definitions	6
Green Team Assistance	6

Environmental Liability Exemptions for Lenders and Representatives

Lenders are essential partners in many real estate development projects. To facilitate lender participation when projects involve land with confirmed or potential environmental contamination, state and federal laws offer conditional liability exemptions to lenders for lending-related activities associated with these properties. Representatives enjoy similar safeguards. This document outlines these environmental liability protections.

Wisconsin’s Hazardous Substance Discharge Law

Section 292.11, Wisconsin Statutes (Wis. Stat.) is the state Hazardous Substance Discharge Law (“Spill Law”). This law requires persons who cause, control or possess a hazardous substance discharge to restore the environment to the extent practicable and minimize harmful effects from the discharge.

Lenders can obtain an exemption from the Spill Law, and potentially other environmental laws, if they comply with the terms and conditions listed in Wis. Stat. § 292.21. This exemption is commonly referred to as the “lender liability exemption” to the Spill Law.

Lender Liability Exemption

In general, a lender that meets certain statutory conditions is eligible for a limited liability exemption under the Spill Law when:

- Engaging in lending activities;
- Acquiring title to, or possession or control of real property through enforcement of a security interest;
- Enforcing a security interest in personal property or fixtures; and/or
- Inspecting, assessing, and investigating environmental contamination prior to acquisition.

A lender is not eligible for a liability exemption when:

- A lender physically causes the discharge of a hazardous substance; or
- A lender engages in wrongful conduct that causes or exacerbates the discharge of a hazardous substance, or fails to meet other statutory criteria.

RELATED DOCS

DNR 4400-196 | Tracking form for environmental assessments

DNR 4400-237 | Request form for liability clarification letters

DNR-4400-225 | Form to report a non-emergency discharge

Lender Liability Exemption Conditions

In addition to meeting criteria for eligibility, a lender must meet several statutory conditions to obtain, and retain, a liability exemption in specific situations.

Exemption conditions for inspection of real property prior to acquisition:

- Inspection, investigation, and remediation of environmental contamination must occur before the date on which the lender acquires title to, or possession or control of, real property through enforcement of a security interest;
- A lender must notify DNR of any discharges of a hazardous substance identified as the result of environmental inspection, assessment and investigative work; and
- If a lender conducts a site investigation or performs remedial action, the lender must do so in accordance with the NR 700 rule series.

Conditions for acquisition of real property through enforcement of a security interest:

- The lender, through action or inaction, does not intentionally or negligently cause a new discharge of a hazardous substance or exacerbate an existing discharge of a hazardous substance;
- The lender notifies DNR of any known discharge of a hazardous substance;
- The lender conducts an environmental assessment of the real property that complies with Wis. Stat. § 292.21(1)(c)(2), not more than 90 days after the date the lender acquires title to, or possession or control of, the real property;
- The lender files a complete copy of the environmental assessment with DNR within 180 days after the date the lender acquires title to, or possession or control of, the real property.
- For a hazardous substance released on or after the date on which the lender acquires title to, or possession or control of, the real property, the lender is not engaged in the operation of a business at the property, completion of work in progress or other actions associated with conducting the conclusion of the borrower's business;
- If the discharge of a hazardous substance occurs on or after the date on which the lender acquires title to, or possession or control of, the real property, the lender implements an emergency

- response action in response to the discharge;
- The lender agrees to allow DNR, any authorized representatives of DNR, any party that possessed or controlled the hazardous substance or caused the discharge of the hazardous substance and any consultant or contractor of such a party to enter the real property to take action to respond to the discharge;
- The lender agrees to avoid any interference with action undertaken to respond to the discharge and to avoid actions that worsen the discharge;
- The lender agrees to comply with any continuing obligations, including maintenance and monitoring requirements, that apply to the property; and
- The lender agrees to any other condition that DNR determines is reasonable and necessary to ensure that DNR, or another person, can adequately respond to the discharge.

When a lender acquires title to real property through a mortgage foreclosure process, DNR considers the acquisition date to be the day the judge signs the court order confirming the sheriff's sale. When a deed in lieu of foreclosure is used, DNR generally uses the date the deed is signed by the grantor as the acquisition date.

Conditions for enforcement of a security interest in personal property or fixtures:

- The lender notifies DNR and the borrower of any decision not to accept specific personal property or fixtures, not more than 30 days after entry onto the real property where the property is located;
- The lender provides DNR with a written general description of the personal property or fixtures, the location of the personal property or fixtures on the real property, and the location of the real property by street address, not more than 30 days after entry onto the real property where the personal property or fixtures are located;
- The lender, within its ability to do so, permits reasonable access to the personal property or fixtures to DNR or the borrower or others acting on the borrower's behalf; and
- The lender does not engage in the operation of a business at the location of the personal property or fixtures, nor completion of work in progress or other actions associated with conducting the conclusion of the borrower's business, except for actions that are undertaken to protect the property and are approved by DNR in writing.

DISCHARGE REPORTING IS ALWAYS REQUIRED

Lenders and representatives must report known discharges of hazardous substances to DNR in all situations. There is no exemption from reporting.

Reporting a Discharge

Submitting an environmental assessment to DNR does not constitute “immediate notice” of a hazardous substance discharge, as required by Wis. Stat. § 292.11(2). Everyone, including exempt lenders and representatives, must notify DNR immediately of any known discharge of a hazardous substance, whether that discharge is old or new. Wis. Admin. § NR 706, specifies reporting requirements.

- **To report a non-emergency discharge, use the DNR Notification for Hazardous Substance Discharge Form 4400-225.**
<http://dnr.wi.gov/files/pdf/forms/4400/4400-225.pdf>
- **In emergencies, call the 24-hour spill reporting hotline: 1-800-943-0003.**

Environmental Assessments

To obtain the lender liability exemption for real property acquisition, a lender must complete an environmental assessment, whether contamination is expected or not. **The elements of the assessment required for the lender liability exemption are different than ASTM Phase I and Phase II environmental assessments.**

The environmental assessment must be performed by a qualified environmental technician or consultant, and must include all elements identified in Wis. Stat. § 292.21(1)(c)(2), including:

- A visual inspection of the real property;
- A 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;
- A review of the ownership and use history of the real property, including a search of title records showing prior ownership of the real property for

a period of 80 years previous to the date of the visual inspection;

- A review of historic and recent aerial photographs of the real property, if available;
- A review of environmental licenses, permits or orders issued with respect to the real property;
- An evaluation of the results of any environmental sampling and analysis that was conducted;
- A review to determine if the real property is listed in any of the written compilations of sites or facilities considered to pose a threat to human health or the environment, including the National Priorities List under 42 USC 9605 (a) (8) (B); the U.S. Environmental Protection Agency’s information system for the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC 9601 to 9675, (CERCLIS); and DNR’s database of sites or facilities and other properties that are environmentally contaminated.
- The collection and analysis of representative samples of soil or other materials in the ground that are suspected of being contaminated based on observations made during a visual inspection of the real property or based on aerial photographs, or other information available to the lender, 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 shall identify contaminants in the soil or other materials in the ground and shall quantify concentrations. Alternatively, the assessment report should state that these concerns are not present.
- The collection and analysis of representative samples of unknown wastes or potentially hazardous substances found on the real property and the determination of concentrations of hazardous waste and hazardous substances found in tanks, drums, or other containers, or in piles or lagoons on the real property. Alternatively, add a statement that these concerns are not present.

If an environmental assessment is conducted more than one year before the date on which the lender acquires title to, or possession or control, of the real property, the exemption applies only if the lender does all of the following:

- Visually inspects the property in accordance with Wis. Stat. § 292.21(1)(c)(2), after the date on which the lender acquires title to, or possession

- or control of, the real property to verify the environmental assessment;
- Submits a complete copy of the environmental assessment and the results of the visual inspection to DNR not later than 90 days after the lender acquires title to, or possession or control of, the real property, and pays required NR 749 review fee;
- Receives notice from DNR that the environmental assessment is adequate or that DNR directs the lender to address any inadequacies in the environmental assessment; and
- Corrects, to the satisfaction of DNR, any inadequacies of an environmental assessment, and reimburses DNR for the cost to review the submitted materials.

Submitting Wis. Stat. § 292.21, Environmental Assessments to DNR

At a minimum, lenders should complete and submit DNR Form 4400-196, the Lender Liability Exemption Environmental Assessment Tracking form, when submitting an environmental assessment conducted to obtain the lender liability exemption under Wis. Stat. § 292.21. Form 4400-196 is available at: <http://dnr.wi.gov/files/PDF/forms/4400-196.pdf>. No fee is required and no review or clarification will be provided by DNR. The DNR will simply acknowledge receiving the environmental assessment and add it to the online BRRTS database, unless a written review is requested and the required fee is paid.

DNR Can Provide Liability Clarification Letters to Lenders and Others

The environmental lender liability exemption is statutorily available to a lender if all requirements and conditions of Wis. Stat. § 292.21, are fulfilled. It is generally not required that the environmental assessment be reviewed by DNR; however, lenders can pay a fee and voluntarily request DNR's review and clarification of liability before or after a property acquisition occurs.

Lenders that want DNR to review their liability situation must use Form 4400-237, <http://dnr.wi.gov/files/PDF/forms/4400/4400-237.pdf>, the Technical Assistance, Environmental Liability Clarification or Post-Closure Modification Request form. A copy of the environmental assessment and DNR form 4400-196 are also required. The only situation in which a lender is required to

obtain DNR review and approval of an environmental assessment is when the lender chooses to submit an assessment that was created more than one year before the property was acquired. In this case, a fee must be paid and DNR is required to review the old assessment, along with documentation of a more recent visual inspection of the property and any analysis of new sampling that occurs.

More information about DNR liability clarification letters is available at <http://dnr.wi.gov/topic/Brownfields/Liability.html>.

Non-Exempt Obligations Regarding Underground Storage Tanks

All lenders must comply with federal and state requirements for underground storage tanks (USTs), including Wis. Admin. § ATPC 93. There are no exemptions from these requirements. For example, if an abandoned UST exists, and there are no plans for its continued use, a lender that acquires a property through the enforcement of a security interest, and is exempt under Wis. Stat. § 292.21, must still comply with Wis. Admin. § ATPC 93 and remove the tank.

Direct questions to the Bureau of Weights and Measures at the Department of Agriculture, Trade and Consumer Protection (DATCP): (608) 224-4942, http://datcp.wi.gov/consumer/weights_and_measures/.

Maintenance and Monitoring Required at Certain Properties

Some properties have ongoing environmental responsibilities, or continuing obligations, associated with them after closure. These properties have been remediated, but some contamination remains and ongoing maintenance, monitoring or other activities are needed to maintain the protectiveness of remedial actions. Lenders that acquire property with continuing obligations are responsible for these ongoing responsibilities at the property, even if they are exempt under Wis. Stat. § 292.21, for other requirements in Wis. Stat. § 292.11.

The Lender Exemption is Not Unconditionally Transferable

The state environmental lender liability exemption, Wis. Stat. § 292.21, is not unconditionally transferable to other lenders or to subsequent property owners.

Federal CERCLA Liability Exemption for Lenders - Summary Information

Federal environmental laws contain liability exemptions for secured creditors. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes a security interest exemption which protects certain lenders from CERCLA liability. To determine what specific actions will satisfy the federal lender liability requirements under CERCLA, lenders are advised to contact the U.S. Environmental Protection Agency (EPA) directly. Additional information is available here: <http://www2.epa.gov/enforcement/fact-sheet-updated-questions-and-answers-cercla-lender-liability-exemption>.

Subtitle I of the Resource Conservation and Recovery Act (RCRA), contains regulatory requirements for petroleum USTs and exempts secured creditors from liability in certain situations. Contact EPA for details.

Representative Liability Exemption

Trusts, estates, and related entities are required to comply with the state Spills Law (Wis. Stat. § 292.11), and must notify DNR immediately of known hazardous substance discharges, whether historic or new.

Trusts, estates and other similar legal entities that cause, possess or control property that contains a hazardous substance discharges must take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

However, a representative of a trust, estate, or similar entity, who acquires title to, or possession or control of, real or personal property is not *personally* liable under the Spill Law for a discharge of a hazardous substance if all of the following circumstances apply:

- The representative acquires title to, or possession or control of, the real or personal property in the capacity of a representative.
- The representative, through action or inaction, does not knowingly, willfully or recklessly cause a discharge of a hazardous substance.
- The representative does not physically cause a discharge of a hazardous substance.
- The representative does not have a beneficial interest in a trust, estate or similar entity that owns,

ENVIRONMENTAL ASSESSMENTS

Environmental assessments must include all elements in Wis. Stat. § 292.21(1)(c)(2), and be filed with DNR per statutory deadlines, to obtain the lender liability exemption.

Wisconsin's lender environmental assessment is not the same as an ASTM Phase I / Phase II, or a NR 716 site investigation.

Consult the state statute to know what must be assessed at the property, and when the assessment report must be submitted to DNR, to obtain the liability exemption.

- possesses or controls the real or personal property.
- The representative does not knowingly, willfully or recklessly fail to notify DNR, in accordance with Wis. Stat. § 292.11(2), of the discharge of a hazardous substance.

The Spill Law liability exemption of *personal* liability for representatives does not apply if:

- A representative knew or should have known that the trust, estate or similar entity for which the representative is acting as a representative was established, or that assets were transferred to the trust, estate or similar entity, in order to avoid responsibility for a discharge of a hazardous substance.
- A representative fails to act in good faith to cause the trust, estate or similar entity for which the representative is acting as a representative to take the actions described in Wis. Stat. § 292.11(3), or to reimburse DNR under Wis. Stat. § 292.11(7)(b).

It is not a lack of good faith for a representative to resign as representative, to seek a court order directing the representative to act or refrain from acting or to challenge DNR by any legal means.

The representative liability exemption is not transferable to subsequent property owners, but new representatives can qualify for the exemption by complying with the conditions identified above.

Definitions

“**Lender**” means a bank, credit union, savings bank, savings and loan association, mortgage banker or similar financial institution, the primary business of which is to engage in lending activities, or an insurance company, pension fund, or government agency engaged in secured lending.

“**Lending activities**” means advancing funds or credit to and collecting funds from another person; entering into security agreements, including executing mortgages, liens, factoring agreements, accounts receivable financing arrangements, conditional sales, sale and leaseback arrangements and installment sales contracts; conducting inspections of or monitoring a borrower’s business and collateral; providing financial assistance; restructuring or renegotiating the terms of a loan obligation; requiring payment of additional interest; extending the payment period of a loan obligation; initiating foreclosure or other proceedings to enforce a security interest in property before obtaining title; requesting and obtaining the appointment of a receiver; and making decisions related to extending or refusing to extend credit.

“**Personal property**” means a type of property which, in its most general definition, can include any asset other than real estate. The distinguishing factor between personal property and real estate is that personal property is movable. That is, the asset is not fixed permanently to one location as with real property such as land or buildings. Examples of personal property include vehicles, furniture, boats, collectibles, etc.

“**Real property**” means any structure, fixture or improvement that is attached to, or regarded as part of, the land, as well as the land itself. Real property includes buildings, structures, rights and interests.

“**Representative**” means a person acting in the capacity of a conservator, guardian, court-appointed receiver, personal representative, testamentary trustee of a deceased person, trustee of a living trust, or fiduciary of real or personal property (Wis. Stat. § 292.01(16)).

“**Security interest**” means a legal claim on collateral that has been pledged, usually to obtain a loan. The borrower provides the lender with a security interest in certain assets that can be repossessed if the borrower stops making loan payments. The lender can then sell the repossessed collateral to pay off the loan.

GREEN TEAM ASSISTANCE

Contaminated land raises liability concerns, technical issues, and funding questions. The DNR can help local government officials, lenders, developers and others navigate these challenges.

The DNR’s “Green Team” meetings bring together important parties in the cleanup and redevelopment process to discuss issues, answer key questions, and help everyone better understand the project. Department staff are available to discuss liability protections, regulatory processes, and financial assistance opportunities for the investigation, remediation, and redevelopment of contaminated property.

Green Team meetings are an effective and efficient way to evaluate options, plan for, and work through a cleanup project. The DNR can be a valuable partner and is eager to provide the assistance you need.

Call DNR at 608-267-0543 to schedule a Green Team meeting for your cleanup and redevelopment project.

Regional DNR Contacts

Contact the brownfield specialist in your DNR regional office about lender and representative liability issues.
<http://dnr.wi.gov/topic/Brownfields/Contact.html>

Additional Information

For more information about environmental cleanups go to <http://dnr.wi.gov/topic/Brownfields/>