

# 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#





# Speaker



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



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



# OUTLINE

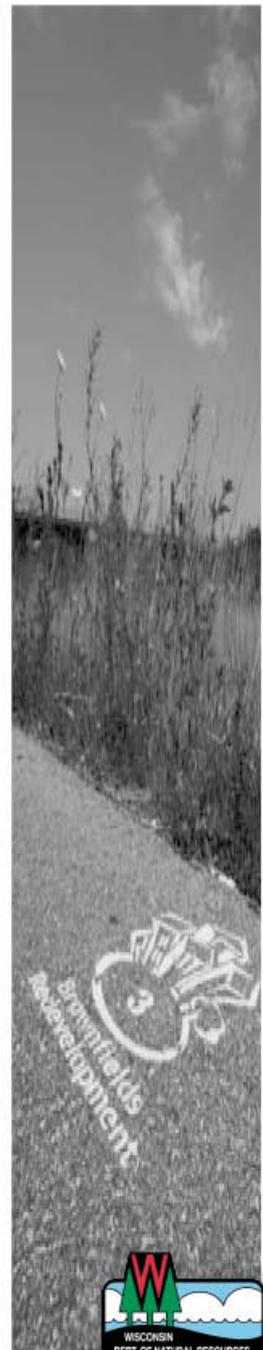
1. Lenders and Contaminated Properties



2. Lenders and LGUs at Contaminated Properties

# Lenders and Contaminated Properties

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



# Lenders and Contaminated Properties

## 4. Suggestions for Attorneys & Consultants

## 5. Conclusions and Q & A



# INTRODUCTION:

## Economic Impacts of Great Recession (2007-2009)

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



# 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**



# Lender Liability Exemption

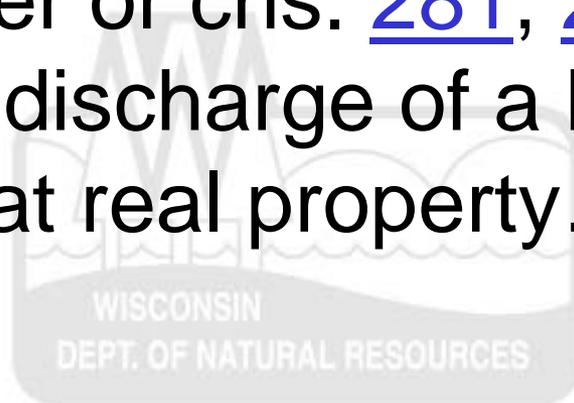
## 5 actions qualify lenders for LLE:

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



## 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.....



# 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)*



# 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.**

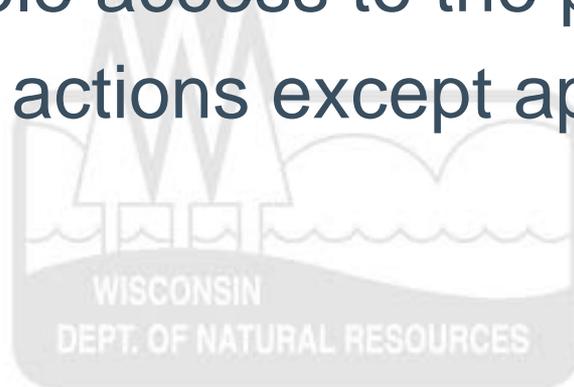


# Lender Foreclosure – Env. Site Assessment

- 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

# 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.



# 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.



# 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.



# GOOD NEWS / bad news for Consultants



## WDNR Remediation and Redevelopment Program

# The GOOD NEWS...

...Lenders rely on their  
consultants and attorneys.



# *the bad news...*

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





## 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

# 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



# 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.)?**

# Conclusions

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

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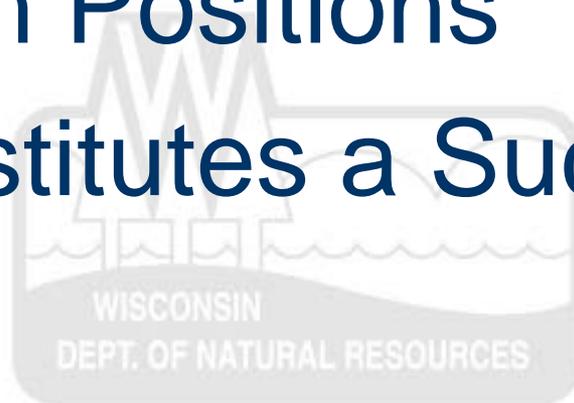
# Lenders and LGUs at Contaminated Properties

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



# Lenders and LGUs at Contaminated Properties

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



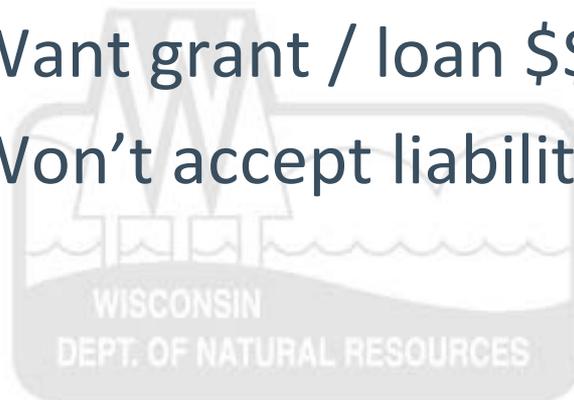
# Acquisition Intents

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



# 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





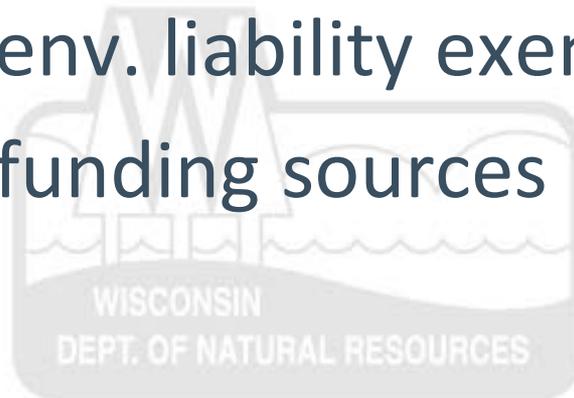
# Negotiation Positions

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



# What Constitutes a Success?

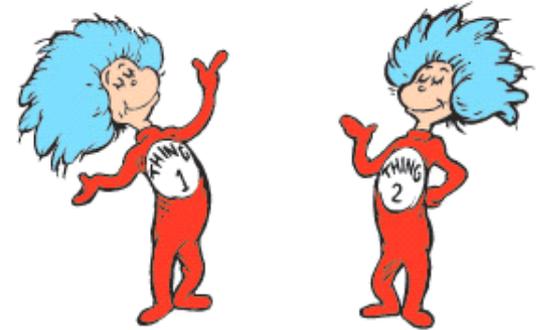
- Lenders – a sale
  - constrain loss
- LGUs – cheap acquisition cost
  - env. liability exemptions
  - funding sources



# 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



# 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:

**DNRRRRComments@wisconsin.gov**

*Thank you*