Remediation and Redevelopment Program

Issues & Trends Series 2015

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

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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.....
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

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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 BF
• 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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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

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

DNRRRRComments@wisconsin.gov

Thank you