

Making the World Safe For Banks

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CERCLA Liability

- Strict, Joint and Retroactive Liability
- Four classes of Liable parties:
 - Past and Current Owners
 - Past and Current Operators
- Defenses
 - Third Party Defense (requires due care)
 - Bona Fide Prospective Purchaser, Contiguous Property Owner, Innocent Landowner
 - all appropriate inquiry
 - Post-acquisition “appropriate care”
 - Secured Creditor Exemption
 - Indicia of ownership without participating in management of facility
 - Foreclose but take commercially reasonable steps to sell property

Other Sources of Liability

- Resource Conservation and Recovery Act (RCRA)
 - (UST) Secured Creditor Exemption
- State Superfund and UST Laws
 - Many have secured creditor exemption
- State Superlien Laws
- Common Law
- Disclosure

Leading Sources of Environmental Contamination

- Historic dry cleaners
- Historic gas stations
- Historic manufactured gas plants
- Historic wood treatment
- Former bombing ranges
- Vapor intrusion from off-site sources

Know Your Bank and Loan Disposition

- Traditional Mortgage Lender
- Asset-Based Lender
- Loan Syndication
- Securitization
- Refinance vs. New Loan

Typical Bank Concerns

- Credit Risk-
 - Borrower Ability to Pay Loan
 - Value of Collateral
- Direct Liability
 - Cleanup costs
 - Toxic Torts
- Reputational Risk

Recent Relevant Regulatory Guidance

- SBA SOP 50-57 [<http://www.environmental-law.net/2013/02/new-sba-sop-50-57-may-establish-best-environmental-practices-for-foreclosures/>]
- OCC Revised CREL Handbook- [<http://www.environmental-law.net/2013/09/more-prominent-role-for-environmental-risk-management-in-revised-occ-handbook/>]

Lender Environmental Risk Management Program

■ Pre-Loan

- ESA Scope of work
- List of acceptable consultants
- Identify transactions requiring Phase I ESAs
- Reliance Language and Consultant Insurance
- Review Process of ESAs
- Commitment Letters

Risk Management Cont'd

- When is Phase II required
- Approval Process for Environmentally-Impaired Loans
- Escrows and Insurance
- Communication With Borrower
- Standard Loan Covenants and Indemnity

Risk Management Cont'd

- Loan Administration
 - Periodic Monitoring
 - Permissible Oversight
 - Disclosure for Securitization and Syndications
- Workouts and Foreclosure
 - Heightened risk
 - Reevaluate Environmental Issues
 - Review Federal and State Requirements
 - Security and Auctions

Bank SOW

- ASTM
- Non-ASTM Items
- Acceptable Consultants
- Reliance Language

Non-ASTM Issues

- Asbestos
- LIW
- LBP Disclosure
- Heating Oil Tanks
- Septic Fields/Dry Wells
- Mold

Loan Documentation

- Loan Covenants to Perform Cleanup
- Loan Guaranty
- Loan Indemnity
 - Free-standing
 - Survive Loan Payout

Other Risk Minimization Tools

- Regulatory Approval
 - NFA, VCA or PPA
 - Extend to lender and successors
 - Confirms landowner defenses
 - Contribution Protection
 - Release of Lien
 - On-going Obligations
 - Serves basis for cost estimate
- Know State Lender Liability Requirements
- Remedial Action Plan (RAP)
 - Quantifies Cleanup Costs
 - Shows Site Fully Characterized

Risk Minimization Tools, cont.

- Escrow or Holdback
- Brownfield Programs
- UST and Dry Cleaner Funds
 - eligibility
 - Covered costs (cleanup, PD,TP)
 - deductible
 - assignment of rights
- Indemnity
- Insurance
- Guaranteed Remediation Programs

Elements of Indemnity

- Address pre-existing known and unknown contamination
- On-Site and Off-site generator liability
- Current and former owned or operated locations
- Predecessors, former subsidiaries or business units
- Bodily Injury and Property Damage

Insurance

- Secured Creditor Insurance
- PLL or Cost Cap Insurance

Branch Office

- *White Swan Cleaner Superfund Site (BOA)*
- *In the Matter of Hamburg Mills Creek Superfund Site, Docket No. CERC-03-2013-004[<http://www.environmental-law.net/2012/10/pa-bank-agrees-to-reimburse-epa-for-removal-costs-at-owned-property>];*

Auction/Sale Disclosure Cases

- *Rhima v JPMorgan Chase Bank*, [
<http://www.environmental-law.net/2012/06/bank-not-liable-for-failing-to-disclose-environmental-issues-at-foreclosure-sale>]
- *Lusk v First Century Bank*, [
<http://www.environmental-law.net/2012/05/bank-not-liable-for-auction-sale-of-contaminated-property>]

Auction/Sale Cases Disclosure Cont'd

- *Ritschel v. Spencer Savings Bank, SLA*, [<http://www.environmental-law.net/2011/10/state-appeals-court-affirms-damage-award-against-bank-for-sale-of-contaminated-property>] [sale of former branch office property]
- *In re Southbridge Savings Bank*, [http://lschnapf.blogspot.com/2011_06_01_archive.html] [disclosure of oil tank spill]

Foreclosure on Contaminated Property

- *Forest Park National Bank & Trust v Ditchfield*, [<http://www.environmental-law.net/2012/07/foreclosing-lender-rcra-action-may-proceed>]
- *Buckbee-Mears Co. Superfund Site*, [<http://www.environmental-law.net/2012/09/bank-enters-into-settlement-with-epa-for-contaminated-ny-site>]
- In matter of Rehrig-United International Site- [<http://www.environmental-law.net/2013/02/bank-agrees-to-reimburse-epa-for-post-foreclosure-removal-action-costs/>]

Foreclosure Cont'd

- *In the Matter of Ultimate Industries Site, (f/k/a State of Ohio v Estate of Roberts)* [<http://www.environmental-law.net/2012/10/ohio-bank-to-partially-reimburse-epa-for-removal-costs-related-to-defunct-borrower-facility>]
- In re Marble Cliffs Crossing- [<http://www.environmental-law.net/2013/05/methane-gas-an-apartment-complex-and-a-bankruptcy-filing/>]

Trustee Properties

- In the Matter of Browning Lumber-
[<http://www.environmental-law.net/2012/09/trustee-bank-agrees-to-removal-action-settlement-with-epa/>]

Bank Subsidiary

- ***Tennessee v. Roane Holdings Ltd.***, 2011 U.S. Dist. LEXIS 143703 (E.D.TN 12/14/11) [<http://www.environmental-law.net/2012/03/acquisitions-bring-cercla-liability-to-banking-conglomerate>]
- ***Morgan Stanley Services Corp. v NJDEP***, 2011 N.J.Super. Unpub. LEXIS 182 (App. Div. 1/26/11)[<http://lschnapf.blogspot.com/2011/02/court-reverses-revocation-of-nfa-letter.html>]

Miscellaneous

- ***Alfieri v. Bertorelli***, 2011 Mich. App. LEXIS 1796 (Mich.Ct. App. 10/18/11)[<http://www.environmental-law.net/2011/11/state-court-reduces-damages-of-condo-purchaser-because-it-failed-to-conduct-environmental-investigation/>] [condo financing]
- ***Casale v Segal & Morel***, 2011 N.J. Super. Unpub. LEXIS 1228 (App. Div. 5/12/11) [defective radon system]
- ***Ridge Seneca Plaza v BP Products, et al***, 2011 U.S. Dist. LEXIS 47288 (W.D.N.Y. 5/2/11) [<http://www.environmental-law.net/2011/10/ny-case-illustrates-why-borrowers-should-not-simply-rely-on-lender-approval-of-phase-1>] [reliance on prior phase 1]