



# How To Make The World Safe For Banks

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# Lender Liability

- ◆ CERCLA Secured Creditor Exemption
- ◆ RCRA (UST) Secured Creditor Exemption
- ◆ State Lender Liability Rules
- ◆ State Superlien Laws
- ◆ Common Law



# 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



# 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



# Risk-Based Cleanups

- ◆ Land Use Controls (LUCs)
- ◆ Lender Concerns
  - May prevent Highest and Best Use
  - Long-term maintenance
  - Funding Concerns
  - Some states require subordination