



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