

## POLITICS &amp; POLICY

# S&L Bailout Faces a Costly New Complication In U.S. Hazardous-Waste Cleanup Requirement

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Federal efforts to bail out the savings and loan industry face new trouble from an unexpected source: the environmental cleanup law known as Superfund.

The law's cleanup requirements for hazardous waste could cost the federal Resolution Trust Corp., which is responsible for selling insolvent thrifts and their assets, hundreds of millions or even billions of dollars.

Superfund looms as a threat not only to the RTC but to healthy S&L's and other lenders as well. Already, some financial institutions, worried about potential liability, are tightening procedures for extending credit to companies with land holdings that might be contaminated.

The RTC estimates its real-estate portfolio will reach a value of about \$180 billion. Some of that property is believed to contain hazardous waste. Potential acquirers, or even the RTC, may get stuck with a huge bill.

## Time Bomb

"It's a ticking time bomb," says Richard K. Kneipper of Jones Day Reavis & Pogue, who heads the firm's financial-institutions group. "The bailout plan doesn't include an estimate for Superfund liabilities. And it doesn't take more than one dump site to create big numbers."

Congressional analysts have predicted the RTC will need at least an additional \$25 billion to \$30 billion to resolve the savings and loan crisis. Part of that is expected to come from the RTC's sale of thrifts and their assets to other institutions. "If we can't sell property because it's contaminated, we can't recover any costs," said Stephen Katsanos, a spokesman for the RTC. "Or we may have to spend funds first to clean up the properties."

The failed thrifts hold huge real-estate portfolios because they had accepted real estate as collateral for loans that went bad. When the thrifts took title to the property, they became potentially liable for huge environmental costs. Under the Superfund law, those who own or operate contaminated sites are responsible for cleaning them up. The Environmental Protection Agency has estimated cleaning a single site can cost up to \$100 million.

The problem for the RTC isn't just that it will have trouble finding buyers for such property. If the RTC itself takes title to any thrift assets through foreclosure on loans or other means, the agency might be required to foot the bill for the cleanup, lawyers for lenders say. The RTC might also be liable in its capacity as a conservator for assets that are transferred to new federally chartered thrifts before being sold. If the assets later turn out to be contaminated, the RTC's earlier control of them might make the agency liable under Superfund, these lawyers say.

is deemed to be participating in management. And when a federal court in Maryland ruled in 1986 that a bank that had foreclosed on property and held title for four years could be liable for its cleanup, lenders realized they needed additional ways to protect themselves.

## Refusing Credit

Fears of liability have prompted some lenders to refuse credit to high-risk industries such as manufacturing and to small businesses whose only assets are real estate, says Jack Campbell, manager of environmental programs for General Electric Corp.'s G.E. Capital Corp.

At G.E. Capital Corp., environmental audits must be performed at the borrower's expense before a loan is extended. "We all agree there should be a cleanup,"

**T**HE POTENTIAL liability of getting stuck with property containing hazardous waste is a "ticking time bomb," one official says.

he says. "The question is how it can be done without affecting economic growth."

The most recent court ruling on the issue has alarmed already skittish lenders even further. Twenty-eight Punxsutawney, Pa., residents sued the National Bank of the Commonwealth in Indiana, Pa., seeking funds to pay for personal injuries and the cleanup of toxic waste at two nearby electroplating plants. The residents alleged the bank was liable because it foreclosed on property owned by one of the plants and held title for eight months.

In September, federal Judge Barron P. McCune of Pittsburgh refused to dismiss the case, ruling that simply by taking title to the property—even for a short period of time—the bank no longer qualified for the exemption.

"This goes farther in holding a lender liable than any prior decision," says Bradley S. Tupi of Reed Smith Shaw & McClay, an attorney for the bank. "If this decision is followed by other courts, it will have a chilling effect on credit."

The case has also highlighted the growing threat of suits by private parties like the Punxsutawney residents. "Neighbors near a contaminated site are a potentially greater threat to lenders than the government. They can sue for cleanup costs as well as for their personal injuries," says Lawrence P. Schnapf of Lord Day & Lord,

Barrett Smith, who has written about lender liability.

Lenders are facing Superfund lawsuits on other fronts. Last April, 200 companies that produced toxic waste sued State Street Bank of Boston, alleging the bank's efforts to recover a loan from the company that operated the waste site made it liable for the entire cleanup bill. The suit is pending; the bank has denied any liability.

And last month the Michigan attorney general's office notified Manufacturers National Bank of Detroit it could be liable for a \$33 million cleanup under Superfund at sites owned by a company on whose board a bank representative sat. A bank spokeswoman said it couldn't respond to "unsubstantiated allegations."

"You're definitely going to see this happening in other states," says Stanley Pruss, an assistant Michigan attorney general. "Rather than have the public bear the burden of cleanup costs when the actors disappear, we have to look at other parties who had control. Banks can be one of them."

In the wake of these incidents, lenders have called for stronger congressional protection and guidelines. Lenders plan to testify at hearings this spring on a bill introduced by Rep. John J. LaFalce (D-NY) that would exclude them from liability if they foreclose on contaminated property to protect a security interest. Last month, U.S. Rep. Silvio O. Conte (R-Mass.) introduced a bill that would exempt federal agencies from Superfund liability if they take over contaminated sites through foreclosure, bankruptcy, tax delinquency or abandonment.

"There is no comfort in waiting for the case law to determine liability. This is an area where statutory clarification is needed rather than allowing the courts to interpret the law," says John Byrne, senior counsel of the American Banking Association, which is lobbying for the LaFalce bill.

Both EPA and the U.S. Justice Department concede that no uniform guidelines for lenders currently exist. But officials at both organizations say they are unlikely to support either bill. "We oppose piecemeal legislation," says Assistant Attorney General Richard B. Stewart.

One fear is that lenders will wait for the completion of government-funded cleanups before taking title to property, thereby reaping a windfall at the taxpayers' expense, says Glenn Unterberger, an associate enforcement counsel for waste at the EPA. "We're not ready to say we'll let lenders off the hook," says Mr. Unterberger. "We think it's appropriate to have lenders in the game as well."

### **Buyer Beware**

While the potential liability of the RTC is uncertain, the perils for potential acquirers of the real estate seem much clearer. Because the RTC has refused to provide indemnities for any litigation that arises concerning environmental hazards, "You could be betting your own institution if you end up buying a Superfund liability," says John C. Murphy, Jr., an attorney who has represented acquirers.

Mr. Katsanos, the RTC spokesman, said the agency is scrambling to identify which of the tens of thousands of properties it has acquired have environmental problems. The RTC lawyers are also attempting to determine what situations might trigger the agency's liability under Superfund, he said. "We're aware of the problems, but the RTC has no choice in taking over savings and loans," Mr. Katsanos said. "If there are Superfund liabilities we'll have to deal with that and the costs we incur will be shared by the taxpayers."

The Superfund threat to lenders extends beyond concerns about failed S&Ls—although it's not clear how far. Congress thought it had allayed many worries of lenders when it included a "secured-lender exemption" in the environmental statute in 1980. Under it, those who appear to be owners because they have a security interest but don't participate in the management of a facility are shielded from liability.

But the exemption leaves room for argument as to when a lender who forecloses