

Environmental Assessments and Foreclosure

Their Importance in a Foreclosure Action

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Problems That Arise with Properties



- * Commercial properties could have been used for chemical storage, auto repairs or dry cleaners
- * Residential properties may have storage tanks or issues with lead paint, asbestos and mold
- * Loan file should always be checked to determine if an AAI- or ASTM E 1527-05 complaint Phase I ESA ("Phase 1") was completed at the time that the original loan was made

Impact on the Bank

- * U.S. Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §9601 et seq., can cause the bank to become liable for cleanup costs for the property
- * The “Potentially Liable Parties” can vary from state to state with each state enacting their own legislation
- * Pennsylvania has the Hazardous Sites Cleanup Act (“HSCA”) 35 P.S. § 6020 et seq.
- * New Jersey has the New Jersey Site Remediation Reform Act (“SRRA”) N.J.S.A. 58:10C-1 et seq.
- * Liability can include not only that actual costs to clean the site and remediate the environmental issues but litigation against the prior owners to attempt to recover those costs

CERCLA

- * Pursuant to 42 U.S.C. § 9607(a) it imposes liability on any owner of property, or the owner or operator of such property at the time of the disposal of any hazardous substance, or anyone who contracts for the disposal or treatment on a piece of real property of hazardous substances owned by such person, for “all costs of removal or remedial action incurred by the United States Government or a State,” and for the “damages for injury to, destruction of, or loss of natural resources.”
- * The liability is strict liability with any and all owners being individually responsible for all costs with an ability to sue each other



Pennsylvania HSCA

- * Under Pa's HSCA, an owner or operator "shall not include a financial institution, an affiliate of a financial institution, a parent of a financial institution, nor a corporate instrumentality of the Federal Government, which acquired the site by foreclosure or by deed in lieu of foreclosure as a result of the enforcement of a mortgage or security interest held by such financial institution, parent of such financial institution, affiliate of such financial institution or a corporate instrumentality of the Federal Government before it had knowledge that the site was included on the National Priority List or corresponding State list and did not manage or control activities at the site which contributed to the release or threatened release of a hazardous substance." 35 P.S. § 6020.103

New Jersey Site Remediation Reform Act

- * "Person responsible for conducting the remediation" means (1) any person who executes or is otherwise subject to an oversight document to remediate a contaminated site, (2) the owner or operator of an industrial establishment subject to P.L.1983, c.330 (C.13:1K-6 et al.), for the remediation of a discharge, (3) the owner or operator of an underground storage tank subject to P.L.1986, c.102 (C.58:10A-21 et seq.), for the remediation of a discharge, (4) any other person who discharges a hazardous substance or is in any way responsible for a hazardous substance, pursuant to section 8 of P.L.1976, c.141 (C.58:10-23.11g), that was discharged at a contaminated site, or (5) any other person who is remediating a site.
- * In New Jersey the "Person responsible" has to hire a "Licensed site remediation professional" to oversee the cleanup who is licensed by the State of New Jersey.

Benefits to Having a Phase I

- Necessary for foreclosure to set up an innocent land owner defense
- May turn up additional issues on a property that the bank was not aware of



Innocent Landowner Defense

Liability

- * Under this section of CERCLA there is no liability if a person can establish by a preponderance of the evidence that the release of a hazardous substance and the damage resulting therefrom were caused solely by a third party with whom there was no contractual relationship, he exercised due care with respect to the hazardous substance concerned, and he took precautions against foreseeable acts caused by the third party and the consequences that could result from those acts.
§ 9607(b)(3)

All Appropriate Inquiries (AAI)

- * This is the process by which the innocent landowner has to show they took all steps including obtaining a Phase 1 to avail themselves to the defense
- * Questionnaire provided by the EPA to avoid liability requires AAI to be completed within 1 year of owner taking title with some requirements within 180 days of taking title

Protocols to Establish

- * Always check the loan file as soon as a loan is being looked at for foreclosure to determine if a Phase 1 was previously done
- * Always obtain a Phase I if the property is a commercial property or if there is any concern that there may be issues at the property
- * A Phase I can be obtained after a judgment in foreclosure has been obtained but before the property has been scheduled for sale
- * If the borrower has abandoned the property or will not cooperate to provide access, access can be requested by the law firm through a motion filed with the court
- * Some companies sell insurance to insure unforeseen environmental issues on a property and that may be of interest to the bank

What if...



- * Upon discovering a problem with a property it is time to sit down and determine if a Phase II is needed or if the action should not proceed
- * There are incentives in certain states for developers of contaminated properties

Phase II Assessments

- * Phase I – Recognized Environmental Condition (REC)
- * Phase II – More expensive and focus on the particular problem found
- * Should be conducted by a licensed and insured company with experience with Phase II assessments
- * These tests generally require access to the property to take samples and conduct other tests



Legal Considerations for a Phase II

Access to the property with or
without court intervention

Having the attorney enter into the
contract for the assessment to
protect attorney/client privilege

Confidentiality of the results

How We Can Help

- * Work with you when the case is first assigned to set up a time table for when the Phase I should be completed depending on which state the foreclosure was filed in
- * File the appropriate motions to get the access needed for the properties for inspections, to secure the properties and to conduct Phase I and/or Phase II assessments
- * Review the results of the Phase I/ Phase II assessment with you
- * Develop a strategy for handling environmental issues and establishing the steps taken to protect the bank from liability
- * Utilize our experiences to assist you with making decisions on how to effectively handle the bidding for the property going to sheriff sale

