

EPA And DEQ Agreement Protects Lenders From RCRA Corrective Action Liability

One of the most controversial environmental law issues of the 1990s was whether a lender could foreclose on contaminated property without becoming strictly liable to remediate hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). In 1996, Congress resolved the issue in favor of lenders by enacting the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act. As far as liability under Part 201 is concerned, the Michigan legislature resolved the issue in favor of lenders by including exemptions for secured lenders, and provisions that allow a lender to protect itself by performing a baseline environmental assessment (BEA) before foreclosing. However, none of those amendments protects a lender who forecloses on contaminated property from liability to perform “corrective action” under the federal Resource Conservation and Recovery Act (RCRA) or under Part 111 of the Natural Resource and Environmental Protection Act (NREPA). Property developers and lenders are understandably reluctant to acquire or take a security interest in property that is subject to corrective action liability. There are about 240 such properties in Michigan.

The Michigan Department of Environmental Quality (MDEQ) and the Chicago office of the United States Environmental Protection Agency (Region 5) have announced a “pilot project” by which they intend to encourage lenders to make loans secured by properties located in Michigan that are subject to corrective action under RCRA and Part 111. In September, 2001, MDEQ and EPA Region 5 entered into a Memorandum of Understanding that states how they intend to exercise their enforcement discretion regarding the potential liability of lenders under RCRA and Part 111. MDEQ states that it will not assert that a lending institution that forecloses

on a property subject to corrective action under Part 111 is liable for corrective action, provided the lender meets the following criteria.

First, the lender must provide a loan to a person that is operating or redeveloping a property that is either (a) permitted as a hazardous waste treatment, storage, or disposal facility under Section 3005(c) of RCRA, or is licensed as such under § 324.11123 of NREPA; or (b) holds “interim status” under Section 3005(e) of RCRA and has obtained authorization to continue operations under § 324.11123(v) of NREPA.

Second, the lender must notify MDEQ of the loan within ninety days after closing documents for the loan have been executed. The notification must state that the lender intends to participate in the program established by the MOU, and must agree to participate in the process for evaluating the effectiveness of the program.

Third, at all times before foreclosure, the lender must neither operate the facility nor participate in the management of the facility, as those terms are defined in the CERCLA and in Part 201 of NREPA.

Fourth, if and when the lender forecloses, and until the lender resells the property, no one may conduct any activities at the facility that are regulated under RCRA or Part 111, or that involves “significant hazardous substances use” as defined in MDEQ’s “due care” rules issued under Part 201 of NREPA.

Fifth, the lender must take necessary measures to protect health and the environment, including: properly managing any waste that may be present on-site at the time of foreclosure; preventing exacerbation of any existing contamination; mitigating unacceptable exposures to hazardous substances; mitigating fire and explosion hazards; and taking reasonable precautions against foreseeable acts of third-parties. In general, a foreclosing lender is not required to

remediate off-site groundwater contamination. Finally, the lender must make a clear and continuing effort to resell the property as required by the CERCLA lender liability rule.

MDEQ's commitment not to assert corrective action liability against qualifying lenders applies only to loans that take place within three years after the execution of the MOU (*i.e.* loans that are closed by September 27, 2004). MDEQ's commitment extends to any subsequent holder of the lender's security interest, but apparently does not apply to any party who purchases the property at foreclosure sale. MDEQ's commitment extends for a period of 30 years after the lender notifies MDEQ of the loan. MDEQ makes no commitment not to take enforcement action after the 30 year period has expired, although by then some potential enforcement actions may be barred by an applicable statute of limitations.

EPA Region 5 states in the MOU that it intends not to take enforcement action under its corrective action authorities against a lender that qualifies for the program, unless one of the following occurs: a) Region 5 determines that the site may pose an imminent and substantial endangerment to public health or the environment; b) at the time of the loan, the site is subject to an existing EPA order or permit for corrective action; or c) at the time of the loan the site is on, or proposed for, the National Priorities List (NPL) under CERCLA, or is under review at USEPA Headquarters for possible listing on the NPL.

After the three-year pilot project is over, MDEQ and Region 5 will evaluate whether the program achieved its stated purposes of returning idle or underused industrial and commercial properties to productive use, and avoiding the creation of new brownfield sites in Michigan.

The MOU states that it is not intended to prevent any site-specific agreements between a person who is subject to corrective action, and MDEQ or Region 5. This statement suggests that Region 5 and MDEQ may be willing to enter into a site-specific covenant not to sue or a

prospective purchaser agreement relating to a RCRA corrective action facility if doing so will encourage productive use of, or redevelopment of, a facility.

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