

# 4

## **Lender Liability Under Environmental Laws for Real Estate and Corporate Transactions**

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## I. [4.1] INTRODUCTION

As discussed throughout this handbook, environmental liability, particularly under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*, and the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795, is both broad and strict. Lenders, however, are in a unique position under CERCLA, RCRA, and related Illinois law. Unlike almost any other “person” broadly defined in CERCLA and RCRA, in certain circumstances, lenders can be exempt from liability. The key to avoiding liability, typically, is qualifying for a “secured creditor” exemption, which, typically, requires compliance with specific statutory and regulatory provisions. Despite these statutory and regulatory protections, however, lenders still can be found liable, still can be sued, and still are being sued for their activities with respect to their collateral. Thus, lenders must manage carefully for environmental risks. See Federal Deposit Insurance Corporation (FDIC), *Environmental Liability Updated Guidelines for an Environmental Risk Program*, FIL-98-2006 (Nov. 13, 2006), available at [www.fdic.gov/news/news/financial/2006/fil06098.html](http://www.fdic.gov/news/news/financial/2006/fil06098.html).

Lenders’ concerns about environmental liability stem not only from their potential direct liability, but also from the potential for impairment of their collateral or their borrowers’ ability to repay a loan due to environmental costs. While the multiple legal circumstances imposing such impairment and compliance costs are discussed throughout this handbook, lenders will be particularly interested in considering how a deal should be structured so they are best positioned to protect their interests. Thus, §§4.11 – 4.26 below focus on lender liability protections before financing begins, during the life of the loan, and during workout of problem loans.

## II. AVOIDING LIABILITY AS A LENDER UNDER THE ENVIRONMENTAL LAWS — SECURED CREDITOR EXEMPTIONS

### A. Lender Liability Exemption Under CERCLA

#### 1. [4.2] Initial Exemption

Unlike other defenses to CERCLA liability that Congress has created over the last 20 years, lenders who were secured creditors have had an exemption to CERCLA liability since the statute’s inception. As initially adopted in 1980, and continuing today, CERCLA establishes that “any person” is responsible for the costs of addressing “hazardous substances” if that person is either a current or former “owner or operator” of a “facility” from which a “release” of such substances has occurred. 42 U.S.C. §9607(a). These categories of liability were modified by CERCLA’s further definition of “owner or operator.” Specifically, Congress provided that a “person” would not be considered an “owner or operator” if, “without *participating in the management* of a vessel or facility, [a person] holds indicia of ownership primarily to protect his security interest in the vessel or facility.” [Emphasis added.] 42 U.S.C. §9601(20)(A). In contrast to liable parties who have a defense to CERCLA liability (42 U.S.C. §9607(b)), those with a security interest were defined out of CERCLA’s broad owner/operator liability scheme.

As initially interpreted by the courts, however, the secured creditor exemption did not provide the assurance that most lenders needed in order to understand and limit the risks of investment in real estate or other transactions that could be affected by environmental liabilities. From 1985 to the mid-1990s, courts issued conflicting opinions about the protection afforded lenders under CERCLA exemption. For example, in *United States v. Mirabile*, 15 Env'tl.L.Rep. 20994 (E.D.Pa. Sept. 4, 1985), the court held that a bank was entitled to an exemption from CERCLA liability when it foreclosed on and then sold its interest in contaminated real estate. Yet the following year, the court in *United States v. Maryland Bank & Trust Co.*, 632 F.Supp. 573, 579 (D.Md. 1986), held that once a lender foreclosed on a loan, it was no longer entitled to the exemption. See also *DuFrayne v. FTB Mortgage Services, Inc. (In re DuFrayne)*, 194 B.R. 354 (Bankr. E.D.Pa. 1996) (stating that creditors are insulated from liability until foreclosure); *Guidice v. BFG Electroplating & Manufacturing Co.*, 732 F.Supp. 556 (W.D.Pa. 1989) (finding that security exemption does not apply to protect bank after foreclosure); *Rockwell International Corp. v. IU International Corp.*, 702 F.Supp. 1384, 1390 (N.D.Ill. 1988) (finding that secured creditor exemption did not apply prior to foreclosure). But see *In re T.P. Long Chemical, Inc.*, 45 B.R. 278 (Bankr. N.D. Ohio 1985) (stating in dictum that had bank repossessed collateral pursuant to security agreement it would have been protected from liability by exemption); *Waterville Industries, Inc. v. Finance Authority of Maine*, 984 F.2d 549 (1st Cir. 1993) (allowing secured creditor to claim exemption when creditor holds deed in lieu of foreclosure as in sale-and-leaseback transaction); *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990) (upholding exemption for creditor who held title as security in sale-and-leaseback transaction).

## 2. [4.3] Fear of Fleet Factors

The secured creditor case that galvanized the lending community to demand clarification and limitation of liability was *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (*Fleet II*). Fleet Factors Corporation, a factoring company, had agreed to advance funds to Swainsboro Print Works against the assignment of the company's accounts receivable. Fleet also took a security interest in Swainsboro's textile facility, including its equipment, inventory, and fixtures. When Swainsboro later filed for bankruptcy, the factoring agreement continued with the bankruptcy court's approval. Eventually, Fleet stopped advancing funds but continued to collect on accounts receivable. In 1982, Fleet foreclosed on its security interest in some inventory and equipment and began to auction off that property. Fleet allegedly gave instructions to a contractor "to remove the unsold equipment [from the property and leave] the premises 'broom clean.'" 901 F.2d at 1553.

The United States Environmental Protection Agency (USEPA) undertook an extensive cleanup of contamination at the site and sued Fleet under CERCLA to recover its response costs. Fleet filed for summary judgment, relying on the secured creditor exemption. The trial court ruled that summary judgment was unavailable because there was an issue of fact as to whether Fleet's involvement constituted "participation in management" so as to void the secured creditor exemption. *United States v. Fleet Factors Corp.*, 724 F.Supp. 955, 960 (S.D.Ga. 1988) (*Fleet I*). On appeal, the Eleventh Circuit held that, as a matter of law, Fleet was not entitled to the secured creditor exemption because its involvement in Swainsboro's management "indicat[ed] a capacity to influence the corporation's treatment of hazardous wastes." [Emphasis added.] *Fleet II, supra*,

901 F.2d at 1557. Because almost all lenders maintain the capacity to influence a borrower's financial affairs and operating decisions, *Fleet Factors* led to a full-scale effort by the lending and business community to reverse the impact of the court's decision and provide clearer liability rules for lenders.

### 3. [4.4] USEPA's Lender Liability Rule

Unlike the USEPA's prior approach to any other group of CERCLA liable parties, after the decision in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (*Fleet II*), the USEPA attempted to define and limit the scope of CERCLA liability by issuing a lender liability rule. By regulation, the USEPA defined those activities that constitute "participating in management" for purposes of lender liability under CERCLA. 57 Fed.Reg. 18,344 (Apr. 29, 1992). However, this regulation was vacated when the court, in *Kelley v. EPA*, 15 F.3d 1100 (D.C.Cir. 1994), ruled that the USEPA's rulemaking authority did not empower it to issue a rule limiting statutory liability under CERCLA.

### 4. [4.5] Lender Liability Act of 1996 — More Security for the Secured Lender

After the USEPA rule was vacated by the court, in *Kelley v. EPA*, 15 F.3d 1100 (D.C.Cir. 1994), lenders, supported by many members of the business community and the USEPA, turned to Congress for help. Congress responded in 1996 by enacting the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (Lender Liability Act), Pub.L. No. 104-208, 110 Stat. 3009-462. The law, 42 U.S.C. §9601(20)(F)(i)(II), explicitly voids the "capacity to influence" portion of the courts decision in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (*Fleet II*), and, as part of its definition of "participate in management," essentially adopts the provisions of the USEPA's CERCLA lender liability rule, 42 U.S.C. §9601(20)(F).

The new provisions added by the Lender Liability Act regarding CERCLA's definition of "owner or operator" were directed expressly to lenders. 42 U.S.C. §§9601(20)(E) – 9601(20)(G). Like CERCLA's initial secured creditor language, the Lender Liability Act states that the term "owner or operator" does not include a "person" who does not participate in the management of a facility and who holds indicia of ownership solely to protect a security interest, but the Act specifies that "person" as defined in these provisions includes one "that is a lender." 42 U.S.C. §9601(20)(E)(i). Lenders are not considered owners or operators, even if they foreclose and then sell, re-lease, liquidate the facilities, maintain business activities, wind up operations, undertake a response action, or take any other measure to preserve, protect, or prepare a site for sale or other disposition, if the lender seeks to do these things "at the earliest practicable, commercially reasonable time, on commercially reasonable terms." 42 U.S.C. §9601(20)(E)(ii). The determination of what is "commercially reasonable" takes into account market conditions, as well as legal and regulatory requirements. 42 U.S.C. §9601(20)(E)(ii).

"Participate in management" is the most important term in the lender protection provisions. In general, the term "participate in management" "means actually participating in the management or operational affairs" of the site (42 U.S.C. §9601(20)(F)(i)(I)), and "does not

include merely having the capacity to influence . . . facility operations” (42 U.S.C. §9601(20)(F)(i)(II)). This provision expressly vacates the capacity to influence ruling in *Fleet Factors*. *Fleet Factors II*, *supra*, 901 F.2d at 1557. The Lender Liability Act then describes a lender’s “actual participation” before, during, and after the financing transaction, including after default and during workout:

First, the Lender Liability Act’s provisions include broad definitions of “lender” and “security interest.” The latter is defined to include any right securing another “nonaffiliated” person’s obligations. 42 U.S.C. §9601(20)(G)(vi). A “lender” is defined to include not only a traditional financial institution, but any person who extends credit, takes a security interest, guarantees credit against default, or provides title insurance. 42 U.S.C. §9601(20)(G)(iv.)

Second, a lender bears no liability for any action or omission prior to the time a security interest is taken. 42 U.S.C. §9601(20)(F)(iii). Thus, a lender’s due diligence activities cannot lead to liability as a CERCLA owner/operator.

Third, while the borrower is still in possession of the site, a lender is deemed to have participated in management only if the lender

**(I) exercises decision making control over the environmental compliance related to the vessel or facility, such that the [lender] has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or**

**(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the [lender] has assumed or manifested responsibility —**

**(aa) for the overall management of the vessel or facility encompassing day-to-day decision making with respect to environmental compliance; or**

**(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance. 42 U.S.C. §9601(20)(F)(ii).**

Congress was careful to distinguish lenders’ control over operational functions from their control over financial or administrative functions. *Id.* “The term ‘financial or administrative function’ includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.” 42 U.S.C. §9601(20)(G)(ii). In sum, if a lender exercises financial or administrative functions over a borrower’s operations, and if the lender does not assume responsibility for day-to-day environmental compliance, a lender cannot become an owner/operator during the term in which the borrower has possession of the collateral.

Finally, the Lender Liability Act provides a detailed list of activities, often called “safe harbors,” in which a lender can engage either during the term of the loan, at default, or during workout, regardless of whether the borrower is in possession of the site. These enumerated activities include

- (I) holding a security interest or abandoning or releasing a security interest;**
- (II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;**
- (III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;**
- (IV) monitoring or undertaking 1 or more inspections of the vessel or facility;**
- (V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;**
- (VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;**
- (VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;**
- (VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or**
- (IX) conducting a response action under Section 107(d) or under the direction of an on-scene coordinator appointed under the National Contingency Plan. 42 U.S.C. §9601(20)(F)(iv).**

All of the safe harbors, however, are qualified by the more overarching definition of “participation in management,” which requires “actual” participation in a site’s management or responsibility for environmental compliance or waste practices. 42 U.S.C. §§9601(20)(F)(i), 9601(20)(F)(ii). Therefore, even if a lender decided to condition a loan on the borrower’s ongoing environmental compliance, a lender should not extend its responsibility so far as to assume day-to-day responsibility for decisions ensuring that compliance.

Although the Lender Liability Act provides significant clarification and protection to lenders, they must still exercise caution to avoid undertaking activity that voids the exemption. Indeed, even after passage of the Lender Liability Act, a court reviewed Fleet’s actions again and found that the extensive involvement of the lenders’ agents in the mismanagement of hazardous materials on-site resulted in the loss of the protection provided by the lenders’ exemption under new lender liability rules. *United States v. Fleet Factors Corp.*, 821 F.Supp. 707, 720 (S.D.Ga. 1993) (*Fleet III*). Moreover, despite the additional protections for lenders afforded by the Lender Liability Act, lenders continue to be sued for response costs. *See, e.g., ITT Commercial Finance Corp. v. Harsco Corp.*, No. 91-CV-0793 (FJS), 2000 U.S. Dist. LEXIS 13376 (N.D.N.Y. Jan. 3, 2000). Thus, lenders should utilize a disciplined analysis of environmental risks and consider how they will manage those risks before making a decision to invest. See §§4.11 – 4.26 below.

**B. [4.6] Lenders' Protection Under the Illinois "Superfund" Law**

In 1983, Illinois enacted its own version of CERCLA as part of the Illinois Environmental Protection Act (Illinois Act), 415 ILCS 5/22.2, *et seq.* Liability is generally more limited under the Illinois Act because, based on decisions to date, only the state, and not private parties, can bring cost recovery claims. *See, e.g., Chrysler Realty Corp. v. Thomas Industries, Inc.*, 97 F.Supp.2d 877 (N.D.Ill. 2000); *NBD Bank v. Krueger Ringier, Inc.*, 292 Ill.App.3d 691, 686 N.E.2d 704, 226 Ill.Dec. 921 (1st Dist. 1997). *But see Lake County Forest Preserve District v. Ostro*, PCB 92-80, 1994 Ill. ENV LEXIS 484 (Mar. 31, 1994) (Pollution Control Board held that private plaintiffs may bring cost recovery actions under Illinois Act). Like CERCLA, the Illinois Act provides protection for lenders through its definition of "owner or operator." Rather than a secured creditor exemption, the Illinois Act provides that a "financial institution" is liable only under a limited set of circumstances. 415 ILCS 5/22.2(h)(2)(E). Under Illinois law, a "financial institution" is one defined as such under §2 of the Illinois Banking Act, 205 ILCS 5/2. Such an institution is liable only if, in the exercise of its security interest, it obtains possession of the site. The financial institution then must exercise "actual, direct, and continual or recurrent managerial control in the operation of the . . . facility that causes a release or substantial threat of a release of a hazardous substance." 415 ILCS 5/22.2(h)(2)(E). Thus, financial institutions are liable only if they caused the release or threatened release of the hazardous material. Although the definition of a lender is narrower under state law than under CERCLA, qualifying lenders under Illinois law will be exempt from owner/operator liability under Illinois law if they qualify for the lender liability exemption under CERCLA law.

Illinois Superfund law also differs from federal Superfund law in that it does not impose joint liability. Instead, it provides proportionate share liability. 415 ILCS 5/58.9. Under the proportionate share liability provision, the state may not bring an action requiring any person to refund costs or conduct remedial action "beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person's act or omission or beyond such person's proportionate degree of responsibility." 415 ILCS 5/58.9(a)(1). The state bears the burden of proof regarding the determination of the potentially liable parties' proportionate shares of liability. 35 Ill.Admin. Code §741.205.

**C. [4.7] Limited Secured Creditor Protection Under RCRA**

The second significant source of environmental liability for lenders is the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795, and its related state enforcement. As discussed Chapter 7 of this handbook, RCRA provides comprehensive regulation of the handling, storage, treatment, transport, and disposal of hazardous and nonhazardous waste, including petroleum-related materials. 42 U.S.C. §§6901 – 6992k. Most of these regulations are not likely to apply to lenders unless they operate the waste operations at a facility, an unlikely scenario, particularly given the intent of lenders to take advantage of CERCLA's lender liability exemption. However, two sources of liability under RCRA impose particular concern for lenders: (1) liability for leaking underground storage tanks (LUSTs) (42 U.S.C. §§6991a – 6991m); and (2) a citizen's suit for an "imminent and substantial endangerment" to public health or the environment (42 U.S.C. §6972).

## 1. [4.8] UST Regulation and Lender Liability Protections

In Subtitle I of the RCRA, Congress legislated the regulation of USTs. 42 U.S.C. §§6991a – 6991m. Congress authorized the USEPA to establish a comprehensive regulatory scheme for the maintenance and closure of USTs, financial assurance in the event of leaks and spills, and liability for corrective action. As in CERCLA, the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795, imposes broad liability on “owners” and “operators” of UST systems. *Id.*

Initially, RCRA exempted only secured creditors from the definition of an “UST owner.” Specifically, it provided that an UST owner did not include “a person that, without participating in the management of an underground storage tank and otherwise not engaged in petroleum production, refining, or marketing, holds indicia of ownership primarily to protect the person’s security interest.” 42 U.S.C. §6991b(h)(9)(A). The definition of an “operator” is broader and is defined as “any person in control of, or having responsibility for, the daily operation of the underground storage tank.” 42 U.S.C. §6991(3).

Reacting to a combination of the fear of CERCLA liability and the desire to avoid risk, lenders insisted on more protection for their interests. The USEPA noted that lenders’ concerns about potential liability “made a significant number of lenders reluctant to make loans to otherwise credit-worthy owners and operators of USTs.” 60 Fed.Reg. 46,692 (Sept. 7, 1995). The USEPA was particularly concerned that a credit squeeze would thwart the intent of Congress and the USEPA to obtain financing for upgrading and continuing financial assurance for UST systems. 60 Fed.Reg. 46,692 – 46,693. Thus, under its broad RCRA regulatory authority, the USEPA issued an UST secured creditor rule in 1995. 40 C.F.R. pts. 280, 281.

Under the UST secured creditor rule, which applies solely to petroleum UST systems, a person holding a security interest is exempt from compliance with UST regulatory requirements from the time credit is extended through foreclosure, loan workout, and disposition of assets. Like the USEPA’s CERCLA lender liability rule and foreshadowing the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (Lender Liability Act), Pub.L. No. 104-208, 110 Stat. 3009-462, the USEPA specified that “participation in management” means

**actual participation by the [lender] in the management or control of decision making related to operation of an UST or UST system. Participation in management does not include the mere capacity or ability to influence or the unexercised right to control UST or UST system operations.** 40 C.F.R. §280.210(a)(1).

The USEPA’s UST secured creditor rule provides that lenders that meet the criteria specified in the rule are not subject to the UST technical standards, corrective action requirements, or financial responsibility requirements. 40 C.F.R. §280.230(a). To meet the exemption’s requirements, lenders should avoid behaving as an “operator” of an UST. If a lender has control of, or responsibility for, a tank’s daily operations prior to foreclosure, the lender is considered an “operator” under §6991(4) of the RCRA, and is subject to the requirements of tank operators, including corrective action. If the acts rise to the level of “participation in management,” it may even void the secured creditor’s exemption, subjecting the lender to liability as an “owner” of a

tank. 42 U.S.C. §6991b(h)(9). Typically, however, the creditor will not engage in the day-to-day tank operations. A “holder of a security interest” (holder) may conduct activities related to financial and administrative obligations, environmental compliance activities, and activities to protect human health and the environment without incurring liability as an owner or operator of a tank. 60 Fed.Reg. 46,692, 46,703 (Sept. 7, 1995).

However, for purposes of securing performance on an obligation, a holder may need to take possession of an UST system, an UST facility, or a piece of property on which an UST or UST system is located. 60 Fed.Reg. at 46,701. The foreclosure process often involves the holder taking record title or deed to the UST, UST system, or the property to secure that obligation. *Id.* The act of foreclosure displaces the borrower, and necessarily involves the holder taking “control of . . . and responsibility for” the tank, possibly subjecting the holder to liability as an “operator” under the RCRA. 60 Fed.Reg. at 46,695.

The USEPA specifies the parameters of a holder’s ownership, operation, and other responsibilities following foreclosure on an UST site. 40 C.F.R. §280.230(a). First, the holder may avoid liability as an operator if another individual has control of or responsibility for the daily operation of the UST system and compliance with legal requirements. 40 C.F.R. §280.230(b)(1). For example, in some instances, the holder may arrange for a different person to operate the UST or UST system while the holder has possession of the UST, UST system, facility, or property on which the UST is located. 60 Fed.Reg. at 46,703. If an operator does not exist to bear responsibility for the UST or UST system, a holder still may avoid liability as an “operator” if the holder

- a. empties the USTs within 60 calendar days after foreclosure or discovery or within another reasonable time period specified by the implementing agency so that no more than 1 inch of residue (2.5 centimeters), or 0.3 percent by weight of the total capacity of the UST system, remains in the system;
- b. leaves vent lines open and functioning; and
- c. caps and secures all lines, pumps, manways, and ancillary equipment. 40 C.F.R. §280.230(b)(i).

After foreclosure, in addition to emptying and securing the UST or UST system, holders must also comply with the requirements for temporary or permanent closure to avoid being deemed an “operator” of the UST. 60 Fed.Reg. at 46,703. A holder who permanently closes its UST or UST system must comply with 40 C.F.R. §§280.71 through 280.74, except for the requirement to perform corrective actions if contamination is discovered. *Id.* If a holder chooses to temporarily close an UST, the holder must continue operating its corrosion protection system, report any known or suspected releases to the implementing agency, and conduct a site assessment, if appropriate. 40 C.F.R. §280.230(b). Failing to satisfy these post-foreclosure conditions could lead to status as an “operator,” which subjects the holder to all of the obligations of tank operators, including corrective action regulations. 60 Fed.Reg. at 46,703.

In the Lender Liability Act, described in §4.5 above, Congress addressed not only CERCLA liability, but also lenders' RCRA liability. Congress clarified that RCRA's secured creditor exemption applies to both "owners" and "operators" of USTs. 42 U.S.C. §6991b(h)(9). Moreover, Congress explicitly incorporated the CERCLA provisions defining "participation in management" that were added by the Lender Liability Act. 42 U.S.C. §6991b(h)(9)(B). Congress also specifically protected the USEPA's UST secured creditor rule, legislating that the USEPA's rule prevailed "over any inconsistent provision" in the CERCLA "participation in management" language. 42 U.S.C. §6991b(h)(9)(C). Thus, the RCRA lender liability rule still is in effect today and provides lenders with a comprehensive guide for avoiding and limiting liability when USTs are collateral or could impact a loan's collateral.

Lenders should note that the USEPA UST secured creditor rule applies only to regulations pertaining to petroleum UST systems under RCRA Subtitle I. If lenders' activities, particularly during foreclosure, violate other RCRA provisions, such as those in Subtitles C and D pertaining to hazardous waste management and state or regional solid waste plans, RCRA's liability may be imposed. Under Subtitle C of RCRA, an owner or operator of a hazardous waste treatment, storage, or disposal facility must comply with reporting, monitoring, and permit requirements. Subtitle D describes the requirements for solid waste disposal plans. Although lenders are not typically targets under RCRA's other provisions, a secured creditor's exemption like the one for petroleum USTs is not found elsewhere in the RCRA regulations. In part because lenders are still at risk for RCRA liability, lenders are well-advised to implement environmental risk programs, such as those required by the FDIC and described in §§4.11 – 4.26 below.

## 2. [4.9] Lenders' Liability for RCRA Citizen Suits

Another source of RCRA liability, different from other provisions in the statute that depend on regulatory compliance, is the language authorizing "citizen suits." 42 U.S.C. §6972. Any "person" is authorized to bring a lawsuit to obtain a court order to address contamination that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. §6972(a)(1)(B). Such a lawsuit may be brought "against any person . . . who *has contributed or who is contributing* to the past or present handling, storage, treatment, transportation, or disposal" of waste. [Emphasis added.] 42 U.S.C. §6972(a)(1)(B).

The RCRA citizen suit provisions do not contain any exemption from liability for secured creditors. Instead, lenders' principal defense to liability is likely to be the "contributing to" language of the statute. Although courts have broadly interpreted the phrase "contributing to," in general, there is recognition that there must be some "causal relationship" or "causal connection" between the contamination and the liable party. *See, e.g., Aurora National Bank*, 990 F.Supp. 1020 (N.D.Ill. 1998) (following *Zands v. Nelson*, 797 F.Supp. 805 (S.D.Ca. 1992), which stated there must be "causal relationship between a defendant and an imminent and substantial endangerment" to find that party "contributed to" contamination); *Triffler v. Hopf*, No. 92 C 7193, 1994 U.S. Dist. LEXIS 16158 at \*11 (N.D.Ill. Oct. 31, 1994) (requiring "some sort of causal connection" between disposal and PRP to find that party "contributed to" contamination). No reported court decisions have discussed what activities performed by lenders constitute "contributing to" waste activities. However, a lender's activities following foreclosure are more likely to result in a finding that the lender has "contributed to" the activities causing the contamination.

**D. [4.10] Limits to Lenders' RCRA Liability Under Illinois Law**

As is common throughout the country, states such as Illinois have received delegated authority to administer and enforce the RCRA UST program. As part of its delegated authority, Illinois adopted, by statute, the provisions of the USEPA's UST secured creditor rule. The Illinois version of RCRA secured creditor protection is titled "lender liability" and is found at 415 ILCS 5/57.12A. Unlike the more limited definition of "financial institution" in the Illinois version of CERCLA (205 ILCS 5/2), the RCRA provisions apply to a "holder" of a security interest, and the term "holder" is defined broadly to include all types of lenders, as well as guarantors and receivers. 415 ILCS 5/57.12A(b)(4).

As in the USEPA's UST secured creditor rule, Illinois law narrowly defines "participation in management" as it applies to a lender's activities prior to foreclosure. 415 ILCS 5/57.12A(c). Post-foreclosure, a lender does not lose its protected status if it proceeds to market the UST system or related property within 12 months. The lender also must be careful not to outbid, reject, or fail to act on any "written, bona fide, firm offer of fair consideration" to purchase the UST or UST system, received after six months following foreclosure. 415 ILCS 5/57.12A(c)(3)(A).

Illinois law also provides that a lender is not an UST "owner" for purposes of the corrective action provisions of RCRA. 415 ILCS 5/57.12A(d). Pre-foreclosure, the lender who has not actually participated in management cannot be held responsible for cleaning up a leaking UST. After foreclosure, the lender can limit its liability if it immediately (within 15 days) empties all USTs and otherwise secures the equipment, followed by a temporary or permanent closing of the UST pursuant to Illinois State Fire Marshal rules (available at [www.state.il.us/osfm/agencyrules/rules.htm](http://www.state.il.us/osfm/agencyrules/rules.htm)). 415 ILCS 5/57.12A(e). Moreover, undertaking these closure actions or taking any other action in order to comply with federal or state UST law, does not convert a lender into an UST "operator." Thus, lenders must evaluate carefully when and whether to foreclose on collateral that includes an UST. If foreclosure occurs, lenders should be prepared to close the tanks within 15 weeks after foreclosure and should plan to market the property for sale within 12 months.

**III. [4.11] PROTECTING LENDERS' COLLATERAL**

Although the exemptions discussed in §§4.2 – 4.10 above allow lenders to avoid or significantly limit their own liability as long as they do not actively participate in a facility's management, lenders have a second concern. Lenders can sustain financial loss when collateral value is impaired because of environmental conditions or if the borrower is unable to pay its debt because of the costs of environmental compliance or the penalties of environmental noncompliance. Although financial risk can never be eliminated in any transaction, a lender can take steps to minimize the risks of loss arising from environmental conditions. These steps begin with due diligence before the decision to invest and continue throughout the life of the loan, including possible default.

**A. [4.12] Due Diligence Before the Investment Decision — All Appropriate Inquiries**

When considering whether to make a financial investment, a lender should consider the risks of a borrower's operations under the environmental laws. Some issues for consideration should include the following:

1. Is the borrower's collateral or source of debt repayment subject to significant ongoing environmental regulation (*e.g.*, generation of significant quantities of hazardous waste or products)? If it is subject, has the cost of compliance been adequately factored into operating expenses?

2. Is the borrower's real estate, particularly if it is collateral for the loan, impaired or subject to a risk of impairment?

**1. [4.13] Need for Standardization and Protection**

Initially, CERCLA provided extremely limited protection from liability for any borrower who purchased property and became a "current owner" of that property. Lenders, therefore, knew that each real estate transaction was fraught with the risk that, due to historic activities at or near the property, their collateral could subject a borrower (and potentially the lender) to CERCLA liability. Lenders' concerns led to two significant developments in due diligence for real estate-based lending: (a) national standards for the conduct of real estate due diligence; and (b) statutory protections for those who engage in "all appropriate inquiries" prior to purchasing property.

In the most recent amendments to CERCLA, Congress provides protection from CERCLA liability to purchasers of property, under certain circumstances. A purchaser must perform appropriate due diligence in advance of the purchase to qualify for this protection from liability. See Chapters 1 and 5 of this handbook. As part of lenders' own due diligence, they will want to evaluate whether their borrowers conducted the necessary due diligence to qualify for this liability protection.

**2. [4.14] American Society for Testing and Materials Standard E1527**

In order to provide standardized guidelines for lenders and others, ASTM International (ASTM) (originally known as American Society for Testing and Materials) developed Standard E1527, *Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process*. See [www.astm.org](http://www.astm.org). This standard, first promulgated in 1997, provides step-by-step requirements for real estate due diligence. Due diligence includes a records search, property inspection, and interviews of property operators. Although ASTM Standard E1527 initially provided standardization, it could not protect purchasers (and their lenders) from CERCLA liability, even if it were followed to the letter. Thus, in its earlier versions, ASTM Standard E1527 was not uniformly followed throughout the lending industry.

**3. [4.15] Congress Protects Prospective Purchasers**

In 2002, Congress enacted the Brownfields Revitalization and Environmental Restoration Act of 2001 (Brownfields Act) (Title II of the Small Business Liability Relief and Brownfields

Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356, 2360 (2002)). In §222(b) of the Brownfields Act, Congress provided “bona fide prospective purchaser[s]” with an exemption from CERCLA liability. 42 U.S.C. §9607(r)(1). A bona fide prospective purchaser is a person (or a tenant of a person) who acquires ownership of a facility after January 11, 2002, and, by a preponderance of the evidence, establishes that

- a. all disposal of hazardous substances occurred prior to the person’s acquisition of the property (42 U.S.C. §9601(40)(A));
- b. the person made “all appropriate inquiries” into previous ownership and uses of the property/facility in accordance with “generally accepted good commercial and customary standards” (42 U.S.C. §9601(40)(B)(i));
- c. the person provided all legally required notices regarding the discovery or release of hazardous substances at the site (42 U.S.C. §9601(40)(C));
- d. appropriate care was exercised by the person with respect to hazardous substances at the facility through the taking of reasonable steps to “(i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance” (42 U.S.C. §9601(40)(D));
- e. the person fully cooperated, assisted, and provided “access to persons that are authorized to conduct response actions or natural resource restoration” at the facility (42 U.S.C. §9601(40)(E));
- f. the person complied with land use restriction and did “not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action” (42 U.S.C. §9601(40)(F));
- g. the person complied with requests for information or administrative subpoenas (42 U.S.C. §9601(40)(G));
- h. the person is not potentially liable, or affiliated with a potentially liable party either through a familial relationship, a contractual, corporate, or financial relationship, or through a reorganization of a potentially liable business entity, other than through the property purchase itself (42 U.S.C. §9601(40)(H)).

Purchasers who meet these requirements can purchase or lease contaminated property without liability for past contamination. 42 U.S.C. §9607(r)(1). However, if the United States conducts a cleanup at the property, the government will have a lien on the property for its unrecovered costs in the amount that the remediation or removal action increased the fair market value of the property. 42 U.S.C. §9607(r)(2).

As described above, crucial to qualifying for the bona fide prospective purchaser protection is conducting “all appropriate inquiries” into the condition of the site prior to the purchase or lease.

In the Brownfields Act, Congress specified the minimum for such inquiries, incorporated most of the provisions of ASTM Standard E1527, and required the USEPA to develop its own rule.

The Illinois Environmental Protection Act contains an exemption designed to protect those who purchase property after appropriate environmental audits. 415 ILCS 5/22.2(j).

#### **4. [4.16] USEPA's "All Appropriate Inquiries" Rule**

On November 1, 2006, USEPA's "all appropriate inquiries" (AAI) rule, 40 C.F.R. pt. 312, went into effect. Prior to the enactment of ASTM Standard E1527-05, ASTM Standard E1527-00 was the effective standard. Comparison of the final all appropriate inquiries standard and the ASTM E1527-00 standard can be found at [www.epa.gov/brownfields/aai/compare\\_astm.htm](http://www.epa.gov/brownfields/aai/compare_astm.htm). The USEPA has determined that ASTM Standard E1527-05 is fully compliant with its AAI rule. 40 C.F.R. §312.11. The AAI rule applies to any party who seeks protection from CERCLA liability as a bona fide prospective purchaser, an innocent landowner, or a contiguous property owner. 40 C.F.R. §312.1(b)(1). The AAI rule provides that certain due diligence activities must be undertaken by an "environmental professional." 40 C.F.R. §312.21. The rule defines "environmental professional" to mean someone who possesses the education, training, and experience necessary to exercise professional judgment regarding environmental conditions. 40 C.F.R. §312.10(b)(1). Qualification as an environmental professional requires at least (a) a certificate issued by a state or tribe and three years of relevant experience, (b) an undergraduate degree in science or engineering and five years of relevant experience, (c) a current professional engineer's or professional geologist's license or registration and three years of relevant experience, or (d) ten years of relevant work experience. 40 C.F.R. §312.10(b).

Meeting the expectations of the AAI rule requires that the environmental professional

- a. review historical sources of information and federal, state, tribal, and local government records (40 C.F.R. §§312.24, 312.26);
- b. conduct visual inspections of the facility and adjoining properties (40 C.F.R. §312.27);
- c. interview past and present owners, operators, and occupants (40 C.F.R. §312.23); and
- d. obtain commonly known or reasonably ascertainable information (40 C.F.R. §312.30).

Under the AAI rule, the prospective landowner must (a) search for environmental cleanup liens, (b) assess any specialized knowledge or experience of the prospective landowner (or grantee), (c) assess the relationship of the purchase price to the fair market value of the property without contamination, and (d) obtain commonly known or reasonably ascertainable information. 40 C.F.R. §312.22. The degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination will be considered when determining whether a person is a bona fide purchaser entitled to protection under the AAI rule. 40 C.F.R. §312.31.

Although purchasers (and their lenders) can rely on AAI rule due diligence conducted up to a year before property acquisition, if the past inquiry was performed more than 180 days prior, certain components must be updated. 40 C.F.R. §312.20(b). The aspects of the all appropriate inquiries investigation that must be updated within 180 days of the property acquisition are as follows:

- (i) **Interviews with past and present owners, operators, and occupants (see §312.23);**
- (ii) **Searches for recorded environmental cleanup liens (see §312.25);**
- (iii) **Reviews of federal, tribal, state, and local government records (see §312.26);**
- (iv) **Visual inspections of the facility and of adjoining properties (see §312.27); and**
- (v) **The declaration by the environmental professional (see §312.21(d)). 40 C.F.R. §312.20(c)(3).**

Thus, to minimize expenses and avoid reliance on outdated material, a purchaser should plan to conduct the inquiry no more than six months prior to the purchase date.

## **B. [4.17] Protections During the Life of the Loan**

Despite all a lender may do to conduct, and insist that its borrower conduct, appropriate due diligence before financing an acquisition or other transaction, these precautions do not address environmental noncompliance or the discovery of previously unknown or new environmental problems during the life of a loan. A lender has several options to mitigate these risks. Lenders may choose to use some or all of these options, depending on the lender's perceived risk of environmental issues in connection with the borrower's operations.

### **1. [4.18] Warranties, Covenants, and Continuing Obligations**

One of the most common approaches to managing environmental risks during the life of a loan is to require protective language as terms of the loan documentation. These terms may include the following:

- a. warranty that the borrower has conducted due diligence in conformance with the AAI rule;
- b. warranty that all information concerning the environmental condition of the subject property and all contiguous property has been disclosed to the lender, including all information found pursuant to the AAI rule;
- c. covenant to comply with all "environmental laws," with the latter term broadly defined;

- d. agreement to provide regular reports to the lender regarding environmental compliance, compliance costs, proof of continued financial assurance for USTs, and the status of any ongoing remediation project;
- e. agreement to inform the lender of a release of hazardous substances, petroleum, pesticides, and/or other toxic or dangerous materials such that liability to report or address the release is triggered under federal or state law;
- f. agreement to inform the lender of any notices of violations, fines, penalties, or costs asserted by a governmental authority or private party;
- g. covenant not to change the use of the property such that it would increase the risk of a release of a hazardous substance or petroleum or cause any significant change in environmental compliance obligations; and/or
- h. agreement that the loan may be called or a line of credit terminated if environmental noncompliance or contamination occurs.

The environmental warranties, covenants, and agreements in a loan agreement can be very lengthy, depending on the borrower's activities and the lender's appetite for risk. Although most lenders have boilerplate language to address these issues, changes in the law on both the federal and the local level and the unique risks every transaction poses caution that a lender should evaluate each loan or loan type to determine the appropriate protective language to include in the loan documents.

## **2. [4.19] Indemnities and Guarantees**

Because the borrower's covenants and agreements discussed in §4.18 above may need financial assurance, lenders often require the borrower, or another party with separate assets, to issue an environmental indemnity or guarantee of performance of environmental covenants, warranties, and continuing obligations. Although a party cannot use an indemnity to shield itself from CERCLA liability, a party liable for cleanup costs can affirmatively enforce the terms of a contractual indemnity agreement. 42 U.S.C. §9607(e). *See, e.g., Taracorp, Inc. v. NL Industries, Inc.*, 73 F.3d 738, 746 (7th Cir. 1996) (concluding that indemnity provision in parties' agreement obligates seller to indemnify purchaser for latter's CERCLA liability at site); *Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 342 – 343 (7th Cir. 1994) (indemnification agreement is valid but does not transfer liability). A guarantee or indemnity can address environmental conditions, environmental compliance, or both. The warranty language/guarantee also can insure against a breach of all of the borrower's covenants and performance obligations or it can insure against a narrower set of obligations, such as cleanup costs above a certain amount.

## **3. [4.20] Insurance**

In large part because of the secured creditor exemptions promulgated previously and the more recent protections for prospective purchasers, lenders are now more willing to consider financing that involves contaminated property or businesses with significant environmental risks. One

method lenders may consider using to limit the dollar impact of environmental risks is to require the borrower, or another party who may be involved in addressing the contamination (*e.g.*, the seller), to purchase an insurance policy that provides coverage for expenses above a certain specified amount or for unknown environmental conditions. A lender should consider the prudence of being named as an additional insured on such a policy, particularly to ensure that coverage can continue in the case of default and/or foreclosure. Insurance requirements should also be considered even if collateral is not involved in a cleanup at the time of initial financing. Particularly because most standard commercial general liability insurance policies have pollution exclusions, it may be appropriate to require borrowers to purchase environmental impairment coverage, which can cover a broad range of environmental risks. The legal risks of insurance for environmental conditions are complex and would require a separate chapter in any legal treatise. For purposes of this more limited discussion, however, lenders should carefully examine the terms of environmental insurance policies, including the scope of coverage, exclusions, disclosure obligations, and notice provisions.

### **C. [4.21] Precautions in the Event of Workout, Default, and Foreclosure**

Due to the secured creditor exemptions, discussed in §§4.2 – 4.10 above, a lender may become involved in a borrower’s financial or operational activities without subjecting itself to liability, particularly when the borrower is in financial distress. The terms of the statutory and regulatory exemptions, however, require that the lender pay careful attention to the scope of its involvement in its borrower’s day-to-day operations during these situations of financial distress.

Because a lender may wish to avoid being in the chain of title, the loan documents may contain provisions requiring the borrower or an indemnitor to take certain actions in the event of financial distress. For example, the loan documents may state that the lender, at its discretion, may require the borrower or indemnitor to conduct an investigation of the collateral in a manner consistent with the AAI rule or some other approach. A lender could also reserve the right to conduct its own investigation prior to deciding whether to foreclose on a property.

If the lender forecloses, it must be more vigilant about whether its activities will allow it to qualify for the secured creditor exemptions. Those exemptions may require that the lender take certain steps to protect against or limit contaminant releases, empty and close USTs, or other affirmative actions. Moreover, the lender should actively attempt to sell or otherwise dispose of the collateral and document its attempts to do so.

### **D. [4.22] Best Practice — Environmental Risk Program**

Although lenders have greater protections than many other members of the business community, no investment is environmentally risk free. A lender’s best practice is to have in place a process for ascertaining, evaluating, and managing environmental risks. Lenders insured by the FDIC, for example, are required to have an environmental risk program. There are eight key components in the FDIC’s guidelines for an effective environmental risk program: (1) training; (2) policies; (3) environmental risk analysis; (4) structured environmental risk assessment (including consideration of the all appropriate inquiries risk); (5) monitoring of borrower’s activities during the life of the loan; (6) loan documentation; (7) evaluation of

involvement in borrower's operations, particularly considering "participating in management" requirements; and (8) evaluation of foreclosure. See FDIC, *Environmental Liability Updated Guidelines for an Environmental Risk Program*, FIL-98-2006 (Nov. 13, 2006), available at [www.fdic.gov/news/news/financial/2006/fil06098.html](http://www.fdic.gov/news/news/financial/2006/fil06098.html). The FDIC expects that an insured institution's environmental risk program will be reviewed and approved by the board of directors and implemented by senior management. *Id.*

#### **E. [4.23] Cost Recovery — Potential Opportunity or Risk**

Despite a lender's or a borrower's best efforts, either or both may become involved in a situation involving cost recovery under CERCLA. For example, a foreclosing lender may wish to bring a claim against prior owners/operators at a site, or a borrower, as a current owner, may become the subject of a USEPA action to require a site cleanup. There are many different circumstances under which a lender or a borrower could become a plaintiff or a defendant in a private CERCLA cost recovery or government enforcement action. A more complete discussion of the law concerning CERCLA cost recovery litigation can be found in Chapter 9 of this handbook. The discussion in §§4.24 – 4.26 below provides a highlight of these issues, particularly so that lenders are aware that cost recovery litigation may be either a risk of loss or an option to mitigate environmental costs. As of 2007, there are two principal cost recovery mechanisms under CERCLA: §107(a), 42 U.S.C. §9607(a); and §113(f), 42 U.S.C. §9613(f).

##### **1. [4.24] Cost Recovery Under CERCLA §113(f)**

One cost recovery mechanism under CERCLA is §113(f), 42 U.S.C. §9613(f). Section 113(f) is a contribution action. Following the U.S. Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 160 L.Ed.2d 548, 125 S.Ct. 577 (2004), a private entity may only bring a §113(f) claim if that entity is or has been the defendant either in (a) a government enforcement action requiring site activity, or (b) a cost recovery suit under §107(a) (42 U.S.C. §9607(a)) brought either by the government or another person. Thus, for example, if a borrower does not wait for a USEPA enforcement action or other CERCLA claim, and instead decides to "voluntarily" remediate a site, the borrower cannot bring a contribution action under CERCLA §113(f) to recover costs from other parties who may be liable under the CERCLA's broad liability scheme, such as a former operator at the site. On the other hand, because of the *Cooper* decision, a different borrower who, for example, may be a former operator at a different site, cannot be a defendant to a CERCLA §113(f) action brought by another private party who has voluntarily remediated a site. Thus, the limitation to §113(f) cost recovery could be a detriment or a benefit, depending on the party's interest in recovering or paying response costs.

##### **2. [4.25] Cost Recovery CERCLA §107(a)**

A second cost recovery option available under CERCLA is pursuant to §107(a), 42 U.S.C. §9607(a). Under this provision, CERCLA describes those categories of persons (*e.g.*, current owner or former operator) who are liable for paying environmental response costs incurred by either the government or a private party. Section 107(a), arguably, does not clearly state that it authorizes a cause of action for cost recovery. However, in *United States v. Atlantic Research*

*Corp.*, 551 U.S. \_\_\_, 168 L.Ed.2d 28, 127 S.Ct. 2331 (2007), the U.S. Supreme Court unanimously held that a private party who is otherwise liable under §107(a), and who has undertaken a “voluntary” investigation and/or remediation, can use §107(a) as the legal basis for a cost recovery lawsuit against another liable party.

*Atlantic Research* came before the Court on appeal from the U.S. Court of Appeals for the Eighth Circuit. The case involved an action by Atlantic Research to recover costs it incurred during its voluntary cleanup of a site on which it had previously retrofitted rocket motors for the United States. Atlantic Research sued the United States under §107(a), claiming that the United States was a potentially responsible party (PRP) obligated to share in the costs of cleaning up the contamination resulting from retrofitting the rocket motors. In response, the United States argued that Atlantic Research was barred from bringing a §107(a) action because Atlantic Research was itself a PRP at the site. Rejecting the position of the United States, the Eighth Circuit held that Atlantic Research could recover its cleanup costs under §107(a).

The U.S. Supreme Court affirmed in a unanimous opinion written by Justice Thomas. The Court held in *Atlantic Research* that the “any other person” language in §107(a)(4)(B) means that any person other than the persons listed in §107(a)(4)(A), which includes the “United States, a State, or an Indian Tribe,” may bring an action under §107 for cost recovery. 127 S.Ct. at 2336. The Court also distinguished the types of remedies available under §§107 and 113, 42 U.S.C. §§9607, 9613. 127 S.Ct. at 2337 – 2338. Section 107(a) was deemed by the Court as the means for a party to recover cleanup costs incurred by that party for site cleanup. *Id.* The Court deemed §113(f) to be the means by which parties could obtain contribution, not after they had incurred cleanup costs, but after they had paid someone else to settle or reimburse that other person’s costs. *Id.* The critical distinction was whether the PRP had incurred costs to accomplish a cleanup.

The Supreme Court acknowledged in footnote 6 in *Atlantic Research, supra*, that there may be overlap between §107(a) claims and §113(f) claims. 127 S.Ct. at 2338 n.6. The Court declined to address how parties and courts should address that overlap. Following *Atlantic Research*, PRPs are likely to be more interested in pursuing §107(a) claims because of the opportunity to impose joint and several liability. Going forward, parties may be able to bring claims under both provisions of CERCLA to maximize the likelihood of obtaining the broadest possible remedy. PRPs and lenders alike should expect that the parties defending CERCLA suits will file motions to dismiss or for summary judgment, arguing that one or the other provision is an inappropriate basis for recovery. Judicial clarification on the scope of Superfund cost recovery claims and the overlap between them can be expected.

The lender’s ability to obtain cost recovery appears to remain unchanged after *Atlantic Research*. A lender who qualifies for the CERCLA lender liability exemption is not considered an owner or operator; thus, it is not a PRP with liability for expending response costs. A lender, even prior to *Atlantic Research*, could have asserted that it was in the position of an “innocent person” seeking cost recovery. An “innocent person” had, and still has, the ability to recover response costs under §107(a). *See, e.g., E.I. DuPont DeNemours & Co. v. United States*, 460 F.3d 515, 521 – 522, 524 (3d Cir. 2006) (discussing ability of “innocent parties” to recover response costs); *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286, 2301 – 2302 (11th Cir. 2002)

(holding that private parties may qualify as innocent parties enabling them to obtain recovery of costs); *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235 (7th Cir. 1997) (holding that claimant merited “innocent party” exception when it “did not pollute the site in any way”).

### 3. [4.26] Impact on the Illinois Site Remediation Program

The Illinois Site Investigation and Remedial Activities Program (SRP) provides remediation applicants (RAs) the opportunity to receive IEPA review for their remediation plan, technical assistance with the plan, and no further action determination. For more information about the Illinois EPA: Bureau of Land, see [www.epa.state.il.us/land](http://www.epa.state.il.us/land) for a link to SRP information. An RA can be any person seeking to perform investigative or remedial activities under this program, including the owner, operator, or any other person authorized by law or consent to act on behalf of or instead of the owner/operator. 415 ILCS 5/58.2. This definition is potentially broad enough to include a lender acting in lieu of an owner/operator of the site. The voluntary cleanup program is available at property “where there is a release, threatened release, or suspected release of hazardous substances, pesticides, or petroleum.” 415 ILCS 5/58.1(a)(1). Any person may proceed under this program, unless (a) the site is on the National Priorities List (Appendix B of 40 C.F.R. 300) under CERCLA, (b) the site is one for which a permit has been issued or that is subject to closure requirements by federal or Illinois law, (c) the site is subject to UST laws, or (d) investigation and remedial action at the site have been required by an order entered by a federal court or issued by the USEPA. 415 ILCS 5/58.1(a)(2).

Participants in the program can begin at various stages in the investigation or remediation process, but often start by submitting a remediation plan for review. The plan describes the nature of the site, the extent of contamination, and the proposed cleanup approach. The IEPA suggests that RAs work with an environmental consultant to ensure that the reports and plans required for compliance with the SRP are prepared and implemented properly. See IEPA, *Frequently Asked Questions About Brownfields Cleanup and Redevelopment*, available at [www.epa.state.il.us/land/brownfields/faq.html](http://www.epa.state.il.us/land/brownfields/faq.html). RAs acting under the SRP use the tiered approach to corrective action objectives (TACO) rules to develop their cleanup objectives, and those will vary depending on the proposed future use for the property. 35 Ill.Admin. Code §742.110. Determining which tier will guide the evaluation of the site depends, in part, on whether the property will be used for a residential, industrial/commercial, conservation, or agricultural purpose and the analysis used to support the remediation approach. *Id.* The technical evaluations and the remediation objectives selected by RAs depend on which of the three tiers is used.

After the remediation objectives and plan have been approved and the remediation has been successfully completed, RAs must submit a completion report that demonstrates that they followed the approved remediation plan. Once the IEPA has approved the adequacy of the remediation, it will issue a “No Further Remediation (NFR) Letter” that serves as assurance that the IEPA will take no further action regarding the property. 415 ILCS 5/58.10. Additionally, the NFR letter serves as evidence that the site does not present a significant risk to human health or the environment. 415 ILCS 5/58.10(a). The letter’s protections are transferable to subsequent owners of the property, as well as to lenders who hold a security interest in the property. 415 ILCS 58/5.10(d). Under a “memorandum of understanding” between the USEPA and the IEPA,

the USEPA recognizes that a site receiving an NFR letter typically will not be the subject of a federal enforcement action. See IEPA, *Site Remediation Program Overview*, available at [www.epa.state.il.us/land/site-remediation/overview.html](http://www.epa.state.il.us/land/site-remediation/overview.html).

To the extent that SRP costs are consistent with the NCP, they may be recoverable through a §107(a) cost recovery action. See *United States v. Atlantic Research Corp.*, 551 U.S. \_\_\_\_, 168 L.Ed.2d 28, 127 S.Ct. 2331, 2333 (2007).