

**RESOURCES**

## **Attention Lenders: Should You Include Environmental Indemnity Provision in the Deed of Trust or in a Separate Document?**

### **Attention Lenders: Regarding deeds of trust covering real property located in North Carolina, should you include an environmental indemnity provision in the deed of trust or in a separate document?**

Most lenders include an environmental indemnity provision in either the deed of trust or in a separate environmental indemnification agreement. Some lenders use both. If a lender includes an environmental indemnity provision in the deed of trust, then the lender should include language providing that any costs, fees, charges, and damages incurred by the lender as a result of the borrower's failing to comply with the environmental indemnity requirements and obligations set forth in the deed of trust (i) are part of the indebtedness evidenced by the loan documents and secured by the deed of trust and (ii) constitutes a default under the deed of trust so that the lender may initiate a foreclosure proceeding as a result of such failure.

Similarly, if the lender requires the execution of a separate environmental indemnification agreement rather than including the environmental indemnity provisions in the deed of trust, then the lender should (i) cross-default the environmental indemnification agreement with the remaining loan documents and (ii) provide in the deed of trust that any costs, fees, charges, and damages incurred by the lender as a result of the borrower's failing to comply with the environmental indemnity requirements and obligations set forth in the separate environmental indemnification agreement are part of the indebtedness evidenced by the loan documents and secured by the deed of trust and that such failure constitutes a default under the deed of trust so that the lender can initiate a foreclosure proceeding.

Regardless of whether the lender includes an environmental indemnification provision in the deed of trust or the lender requires the borrower to execute a separate environmental indemnification agreement, the lender should include language in the relevant document noting that the representations, warranties, and obligations with regard to the environmental indemnification obligations shall survive the foreclosure and cancellation or satisfaction of the deed of trust.

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