

North Carolina Environmental Agency Agrees That Banks and Other Lenders Have No Liability for Underground Storage Tanks – But...!

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Special Bulletin

You are a bank or other lender (collectively referred to herein as "Banks") and are contemplating foreclosing on a property containing underground storage tanks ("USTs"). Generally speaking, liability for leaking USTs falls on the tank owner and operator. If you foreclose and take title to the property, will you become the legal owner of the tanks and forever be liable for site remediation until all federal and state cleanup requirements are met?

A consultant recently trumpeted "yes!" in its marketing material. When challenged by us, the consultant referred to an opinion given by the North Carolina Department of Environment and Natural Resources ("DENR") that Banks are, indeed, liable for leaking USTs once they foreclose on the property where the tanks are located.

After Ward and Smith, P.A. brought this issue to the attention of DENR, DENR revisited its opinion and now has agreed that Banks, in fact, enjoy a lender liability exemption ("Lender Exemption") from UST liability under state law. The Lender Exemption applies to Banks that find it necessary to take title to contaminated property in order to protect their security interests.

Under the Lender Exemption, which was enacted into federal law in 1995 but not incorporated into North Carolina law until 2008, Banks are not considered "owners" or "operators" of the USTs, provided they do not participate in the daily operation and management of the USTs.

Thus, the Lender Exemption allows Banks to engage in certain, but not all, UST activities following foreclosure without triggering liability. Allowable activities include temporary or permanent closure of the UST; continued operation and maintenance of corrosion protection measures; system testing; system upgrading or replacement; reporting of suspected releases; and site assessments, among others. The key is that the Bank must not be involved in the daily operation and management of the UST system (e.g., using the UST to store, use, or distribute gasoline, diesel, or other fuels) and must act in a commercially reasonable fashion in an effort to sell the property.

It is important to note, however, that, while Banks themselves may be exempt, a third-party purchaser of UST-contaminated property at a Bank's foreclosure sale, or a purchaser from a Bank after the Bank has purchased UST-affected property at the Bank's foreclosure sale, are not exempt from UST liability once they buy the property. Accordingly, the presence of UST contamination may "chill" bids at foreclosure, make the affected property difficult to sell, or adversely affect its potential sales price when the Bank markets it.

Thorough due diligence prior to foreclosure and careful management of the property after foreclosure are important to ensure that foreclosing Banks do not trigger UST liability inadvertently.

So, now you have the answer: Banks, indeed, are exempt from UST liability, provided they do not participate in the regular operation and management of the USTs or UST systems. But the specter of liability for third parties may affect a Bank's decisions regarding foreclosure.

If you are a Bank or any other type of lender and your collateral consists of real property containing a UST, our environmental and creditors' rights attorneys are available to assist you in evaluating the risks and benefits of foreclosure.

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For further information regarding the issues described above, please contact Frank H. Sheffield, Jr.

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