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Environmental Due Diligence -- Keeping Up With What is New

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Abstract. A brief overview of environmental concerns affecting mortgage lenders with a focus on selected hot topics and practical considerations, including due diligence, statutory defenses protecting secured creditors, and the rising concern regarding PFAS.

Environmental programs pose a number of different concerns to mortgage lenders. These concerns involve both direct liability – imposed upon the lender – and indirect liability – impacting the economics of the loan. This paper provides an overview of potential environmental liabilities, followed by a discussion of due diligence issues and selected recent developments of which lenders and their borrowers should be aware.

I. Overview of Environmental Law

Environmental liabilities created by environmental statutes and the common law take a number of forms. They include costs of compliance, such as capital and operating expenses for required pollution control equipment and the time and expense for acquiring necessary permits, and costs of non-compliance*, i.e.,* administrative, civil, and criminal sanctions, which include fines, injunctive relief, (*e.g.*, to compel compliance or prohibit non-compliant operations), and, for criminal violations, imprisonment. Environmental liabilities also include costs of investigation and remediation and natural resource damages under Superfund and state analogs, in particular which often are substantial. Under the common law, liabilities include those arising from toxic tort, for damages to people, and from property damage as well as those attributable to contract claims involving contaminated property. Environmental laws may also result in land use restrictions that may affect the ability to use property for a particular purpose.

A. Regulatory Programs

Environmental laws regulate business activities because of their effects or potential effects on the environment or on human health via the environment. Federal environmental statutes generally fall into three categories: (i) statutes addressing wastes and their disposition; (ii) statutes addressing the use of raw materials and the manufacture, importation, and distribution of products; and (iii) statutes addressing the conservation of natural resources.

The first category of environmental programs deals with wastes and their disposition. These so-called pollution statutes include the Clean Water Act ("CWA"),[1] the Clean Air Act ("CAA"),[2] the Resource Conservation and Recovery Act ("RCRA"),[3] the Comprehensive

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[*] This paper is based upon the paper "Environmental Update: Diligence and Other Issues" by Jeff Civins and Mary Simmons Mendoza, presented at 48th Annual William W. Gibson, Jr. Mortgage Lending Institute (2014).

[1] 33 U.S.C. § 1251 et seq.
[2] 42 U.S.C. § 7401 et seq.

Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"),[4] and the Underground Injection Control ("UIC") Program of the Safe Drinking Water Act ("SDWA").[5] Each of these statutes is administered by the United States Environmental Protection Agency ("EPA") and, with the exception of CERCLA, may be delegated to state environmental agencies.

The second category of environmental statutes deals with the use of raw materials and the manufacture, importation, and distribution of products. Statutes falling into this category include the Toxic Substances Control Act ("TSCA"),[6] the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"),[7] the Emergency Planning and Community Right-to-Know Act ("EPCRA") of Superfund, as amended by the Superfund Amendments and Reauthorization Act ("SARA"),[8] and the SDWA as it relates to drinking water regulation.[9]

The third category of environmental statutes deals with the conservation of natural resources. These statutes may require review and possibly mitigation of effects of proposed activities based on their potential impact on the environment or various segments of it, including animals and plants. Examples include the National Environmental Policy Act ("NEPA"),[10] the Endangered Species Act,[11] the Wild and Scenic Rivers Act,[12] and the National Historic Preservation Act.[13]

Environmental statutes generally prescribe standards of conduct. The federal pollution statutes, for example, provide for the establishment of technology-based limits on pollutant-emitting activities and for further ratcheting down of those limits if necessary to protect the environment. They also prescribe administrative requirements, such as permitting, monitoring, recordkeeping, and the reporting of routine and emergency releases.

Certain environmental statutes can result in restrictions on land use. For example, section 404 of the CWA requires permitting as a prerequisite to the placement of dredged or fill materials in waters of the United States, and the ESA, may prohibit development that adversely affects endangered species. Other programs may indirectly restrict land use. Under the CAA, for example, certain types of construction of new sources of air contaminants may be restricted or made more difficult based on the air quality of the region in which the property is located. Similarly, under the CWA, discharges into watercourses may be restricted because of water quality limitations, which affect the uses available for property with wastewater discharge needs.

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[3] 42 U.S.C. § 6901 et seq.
[4] 42 U.S.C. § 9601 et seq.
[5] 42 U.S.C. § 300h et seq.
[6] 15 U.S.C. § 2601 et seq.
[7] 7 U.S.C. § 136 et seq.
[8] 42 U.S.C.§ 11001 et seq.
[9] 42 U.S.C. § 300f et seq.
[10] 42 U.S.C.§ 4321 et seq.
[11] 16 U.S.C.§ 1531 et seq.
[12] 16 U.S.C.§ 1271 et seq.
[13] 16 U.S.C § 470 et seq.

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