Managing Lender Liability: A Historical Overview and Practice Commentary for Moving Forward

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> [T]he already wary banking industry [will be] even more reluctant to lend to many borrowers, not just those who present obvious environmental liability problems, and less willing to help troubled borrowers through difficult financial times. Inhibited financial transactions and modified lending practices will reduce the supply and increase the cost of capital for many borrowers. Old industrial property is likely to remain abandoned and unused for fear of environmental liability. Increased caution on lenders' part will probably result in more bankruptcies, since helping a borrower overcome financial difficulties will seldom be worth the risk of cleanup liability, considering the unpredictable scope of [environmental] damages.

This passage appears in a 1990 brief petitioning the Supreme Court for a writ of certiorari, seeking review of a now-infamous Eleventh Circuit decision, *United States v. Fleet Factors Corp.*[1] Certiorari was denied,[2] and the brief accurately forecasted the shock that resulted from the opinion rendered by the court in *Fleet Factors*. In that case, a financial institution was found liable for costs to clean up contaminated property it had held as collateral, based on the lender's mere capacity to influence its borrower's hazardous waste disposal practices and regardless of whether such capacity was actually exercised.[3]

Since *Fleet Factors* came down in 1990, the attitudes and practices of the real estate and finance communities have significantly evolved with regard to contaminated properties. The change has resulted from the efforts of the private sector, regulating bodies, and federal and state legislatures to avert the collapse of the market for

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[1] *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990).

[2] *Fleet Factors Corp. v. United States*, 111 S. Ct. 752 (1991).

[3] *United States v. Fleet Factors Corp.*, 821 F.Supp. 707 (S.D. Ga. 1993).

contaminated properties, or brownfields,[4] that had been feared in the aftermath of the Eleventh Circuit's decision. Today, regulatory incentives are aligned to encourage, rather than halt altogether, the redevelopment of brownfields, and environmental risk management has matured as a practice such that sophisticated lenders and borrowers are able to allocate and insure such risks to their satisfaction for even the most complex contaminated sites.

This article traces the legal evolution that has made today's brownfield redevelopment climate possible. The history of lender liability provides needed context for the latest developments in environmental risk management for contaminated site transactions: we discuss those developments as well, and endeavor to provide practice commentary for participants in today's market for contaminated real estate.

I. Historical Overview

CERCLA

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[5] in response to "the increasing environmental and health problems associated with inactive hazardous waste sites."[6] CERCLA, commonly known as the Superfund law, is the primary federal law imposing liability on private parties to ensure the remediation of contaminated properties. The statute was designed "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination."[7] Section 107(a) of CERCLA establishes strict liability for potentially responsible parties ("PRPs"),[8] a statutory term of art that includes current owners and operators of facilities, past owners or operators at the time of a release, and "arrangers" who planned for disposal of hazardous substances at the facility.[9] This liability is subject only to a few narrow defenses and exemptions.[10] Liability is, by default, joint and several, meaning that any PRP can be responsible for the payment of all cleanup costs.[11] As a result, under CERCLA and parallel state statutes, the owner or operator of contaminated property can be liable for indefinite remediation costs by virtue of its status as owner or

[4] Federal law defines a brownfield as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." 42 U.S.C. § 9601(39)(A).

[5] 42 U.S.C. §§ 9601–9675.

[6] *Nurad, Inc. v. William E. Hooper & Sons Co*., 966 F.2d 837, 841 (4th Cir.1992).

[7] *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009).

[8] 42 U.S.C. § 9607.

[9] *Id*. § 9601; *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir.1988).

[10] *See* 42 U.S.C. § 9607(b) (defenses); *id*. at § 9607(o)–(r) (exemptions).

[11] *See Monsanto*, 858 F.2d at 171–72.

operator of the property, even if the contamination pre-dated its ownership or operation. Remediation can be very expensive. It is not unheard of for remediation costs to far exceed the value of a property if it were clean.

Most states have enacted statutes similar to CERCLA to create liability for owners and operators of hazardous waste sites, providing a mechanism for the government, and in some cases private parties, to recover costs related to environmental cleanups.[12] Many of these state statutes also offer liability protection for lenders, parallel to the CERCLA safe harbor discussed further herein, which excludes from the definition of "owner or operator" lenders holding a security interest in a facility, as long as they follow certain rules.[13]

The state statutory provisions exempting lenders from liability generally track CERCLA language closely. California, for example, expressly adopts CERCLA's definition of a responsible party, "implicitly adopting CERCLA's security interest exemption to the definition of owner and operator."[14] New York, New Jersey and Texas statutes provide that parties merely holding a security interest in a site are not liable parties, as long as they do not participate in its management.[15] Of course, the application of state laws to a particular facility must be evaluated on a case-by-case basis.

Uncertainty and Fears of Liability

The story of *Fleet Factors* highlights the worst fears harbored by lenders when lending to environmentally sensitive businesses and where collateral property may be

[12] *See* 49 Am. Jur. Proof of Facts 3d 173, § 19 (updated 2025, originally published in 1998).

[13] *See* CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (excluding from the definition of owner or operator "a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility").

[14] *Id.* (citing Cal. Health & Safety Code § 25323.5 (repealed Jan. 1, 2024, and replaced by § 78145(a)(1)) ("'Responsible party' or 'liable person,' for the purposes of this chapter, means those persons described in Section 107(a) of the federal act [CERCLA]")).

[15] *See* N.Y. Envtl. Conserv. Law § 27-1323 (Lenders are not liable simply for holding "indicia of ownership primarily to protect the lender's security interest in the site or, if such lender did not participate in the management of such site prior to a foreclosure on such site"); Tex. Health & Safety Code § 361.702 ("[T]he term "owner or operator" does not include a person that is a lender that: (1) without participating in the management of a solid waste facility, holds a security interest in or with regard to the solid waste facility; or (2) did not participate in management of a solid waste facility before foreclosure, notwithstanding the fact that the person" forecloses on the facility and sells, releases, or liquidates said facility); N.J. Stat. § 58:10-23.11(g)(5) ("A person who maintains indicia of ownership of a vessel, facility, or underground storage tank facility primarily to protect a security interest in a vessel, facility, or underground storage tank facility and who does not participate in the management of the vessel or facility or underground storage tank facility is not deemed to be an owner or operator . . . .").

impacted by so-called "legacy contamination" from past operations at or near the subject property. Fleet Factors, a financial institution, held a security interest in a textile facility's inventory and equipment in the late 1980s, during which, "[i]n an overheated and often speculative economy, banks were often the only 'deep pockets' in sight from which litigious individuals, businesses, or government might seek to recoup losses."[16] When the company got into financial trouble, Fleet Factors provided extensive financial and business counseling to the company in an effort to preserve its solvency. These efforts proved unsuccessful. After the company filed for bankruptcy, Fleet Factors foreclosed on its security interest, sold much of the inventory and equipment through a liquidator, and retained a salvage company to remove unsold equipment from the site. Significantly, Fleet Factors' agents removed neither the over 700 fifty-five-gallon drums alleged to contain toxic chemicals, nor the 44 truckloads of asbestos-containing materials that were stored on the site. Ultimately, the United States Environmental Protection Agency ("EPA") spent nearly half a million dollars addressing the threat of an environmental release presented by the toxic materials that were left behind, and sued Fleet Factors for cost recovery.

The lender was found liable even though CERCLA contained a "safe harbor" that expressly shielded secured creditors from liability if they did not participate in management of a facility and held indicia of ownership primarily to protect their security interest.[17]

The appeals court could have decided the case on narrower grounds, as the facts suggested that, following foreclosure, Fleet Factors was an "operator" of the facility, exercising complete control over day-to-day operational decisions. Indeed, the lower court looked to the lender's degree of actual involvement in site management when assessing the lender's liability.[18] Instead, the appeals court rejected this narrower standard and embraced a more far-ranging theory of liability:

> A secured creditor may incur . . . liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor to actually involve itself in the day-to-day operations of the facility in order to be liable . . . . Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is

[16] Deborah Addis, *Comment: Tide May Be Turning to Banks in Lender Liability Lawsuits*, American Banker, May 25, 1993.

[17] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 101, 94 Stat. 2767 (1980) (prior to 1996 amendment).

[18] *United States v. Fleet Factors Corp.*, 724 F. Supp. 955, 960 (S.D. Ga. 1988) (interpreting CERCLA's safe harbor to exclude secured creditors from liability if they did not "participate in the day-to-day management of the [debtor] business or facility").

> sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.[19]

Following *Fleet Factors*, the banking sector experienced what can only be described as commercial panic – an understandable reaction, considering that the court's decision seemed to contemplate liability for thoughts rather than deeds. Observers at the time noted the troubling questions raised by the decision:

> Is a lender's power to respond to environmental threats on the borrower's property, even if never exercised, enough to make the lender liable for the government's response costs? What if the loan is going sour and the lender refuses a loan increase needed to address troublesome environmental conditions which are then exacerbated by the lack of funds to address them? What if the lender merely enforces loan provisions which require paydown of the loan, thereby passively diverting funds away from proper disposal of hazardous wastes? Is a lender worse off monitoring a borrower's environmental problems or keeping its distance from them?[20]

No clarification was provided by the Supreme Court, which denied review of the case in 1991.[21] Meanwhile, the banking sector was in dire need of clarity. Many banks announced that they would no longer lend to companies in certain environmentally sensitive businesses and refused to lend on many properties, casting a pall over economic development. One scholar noted that "a 1990 poll revealed that 43% of community banks had stopped making loans to certain categories of higher-risk businesses. A survey the next year discovered that 62.5% of banks had declined loan applicants because of the risk of liability" caused by known or potential environmental contamination.[22] Some banks even abandoned collateral properties rather than take on the potential risks of foreclosure.[23] Some observers during this period feared a more ominous domino effect:

> After *Fleet Factors*, and without the aid of administrative regulations, no counsel confidently can assuage the fears of a creditor with contaminated property as collateral.

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[19] *Fleet Factors,* 901 F.2d at 1557–58.

[20] Johnine J. Brown, *Fleet Factors Case Produces Gibberish*, 4 MERRILL'S ILLINOIS LEGAL TIMES 440, Aug. 1, 1990.

[21] 111 S. Ct. 752 (1991).

[22] Walsh, Brian C., *Seeding the Brownfields: A Proposed Statute Limiting Environmental Liability for Prospective Purchasers,* 34 HARV. J. ON LEGIS. 191, n. 53 (1997).

[23] John M. Ames et al., *Toxins-Are-Us, How Deep in Toxic Waste Are Secured Lenders under CERCLA, A Review of the Last Five Years,* 14-9 AM. BANKR. INST. J. (1995); Walsh, *supra* note 22, at n. 55.

> Unwilling to risk CERCLA liability, that creditor must refuse to pursue foreclosure and instead choose to abandon both the property and any chance that it might lend to similarly situated borrowers in the future. The ripple effect, however, does not stop there. Within the bankruptcy itself, estate assets suddenly become estate liabilities, insofar as the costs of cleanup often will dissuade even the most intrepid purchasers at auction. As a consequence, unsecured creditors lose even the little they might have otherwise foraged from the estate. While the debtor receives a "fresh start," the system receives neither the confidence nor sufficient law to function effectively.
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> Moreover, the entire value of a security interest depends on a creditor being capable of looking to the collateral for repayment in the event of default. This fact has been affirmed at common law, in the Uniform Commercial Code, and by the existence of the "secured lender" exemption itself. *Fleet* and its successors, in a very real sense, threaten to extinguish the viability of this principle. In essence, holding a security interest in real property has become an unwise risk — better to be unsecured and break even than to be secured and incur millions of dollars in clean-up costs.[24]

Some scholars found a name for lenders' aversion to financing the acquisition and development of former industrial properties: "greenlining" – a relative of "redlining," the insidious practice, in previous decades, of denying credit to potential homeowners in black neighborhoods.[25] The social and environmental impacts of this practice became a major policy concern in the 1990s. Urban manufacturers needing to relocate faced a lack of credit to move to existing industrial sites in the cities, and "environmentally risk-averse financing officers . . . recommend[ed] flight onto virgin land in a distant suburb."[26] The failure to put former industrial facilities back to productive use created sprawl outside of cities, blighted the inner-city landscape, and squandered opportunities to provide employment for inner-city residents, many of whom were racial minorities.[27]

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[24] Ames, *supra* note 23.

[25] James T. O'Reilly, *Environmental Racism, Site Cleanup and Inner-City Jobs: Indiana's Urban in-Fill Incentives*, 11 YALE J. ON REG. 43, 54 (1994).

[26] *Id.* at 55.

[27] *Id.*

Pursuit of a Safe Harbor

Local, state and federal authorities in the 1990s faced the prospect of urban cores overrun by vacant brownfields. States responded by enacting cleanup statutes similar to CERCLA, as well as voluntary cleanup programs that offered private parties relief from liability under the cleanup statutes in exchange for their remediation of contaminated properties.[28] By 1995, 21 states had established such voluntary cleanup programs.[29] At the national level, in 1995 EPA announced a "Brownfields Action Agenda" that included (i) funding voluntary brownfield cleanup programs at the state or local level, (ii) providing guidance on prospective purchaser agreements (under which EPA would covenant not to sue the purchaser of a brownfield), and (iii) announcing its interpretation of CERCLA's secured creditor exemption for enforcement purposes.[30]

EPA's 1995 announcement of its interpretation of the secured creditor exemption was a retreat from a broader effort to curtail the impact of the *Fleet Factors* decision. In 1992, with significant input from the banking community, it had adopted regulations commonly known as the Lender Liability Rule, which sought to define activity that a bank could safely engage in without attracting environmental liability. But in 1994, this rule was invalidated by the courts as being beyond EPA's authority.[31] EPA's response, in 1995, was to issue a memorandum jointly with the U.S. Department of Justice, announcing the agencies' shared intent to rely upon the Lender Liability Rule as guidance for enforcement actions. This statement provided some comfort to lenders, but only with respect to government enforcement actions. The guidance had no force of law with respect to private party litigation. In the face of this regulatory void, many banks voluntarily adopted the principles set forth in the Lender Liability Rule while simultaneously seeking curative legislation. Meanwhile, other federal appellate courts declined to adopt the *Fleet Factors* "capacity to influence" language when applying CERCLA's secured creditor exemption.[32]

While all branches of government explored the contours of CERCLA's secured creditor exemption, the private sector also developed ways to manage the risk of purchasing and financing environmentally sensitive properties. First, pollution liability insurance became more widely available and widely used in the 1990s. Indeed, the Fleet Financial Group (which had been involved in the *Fleet Factors* litigation) became the first bank to require its borrowers to obtain such policies, to protect against government

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[28] U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, STATE OF THE STATES ON BROWNFIELDS: PROGRAMS FOR CLEANUP AND REUSE OF CONTAMINATED SITES 2, at 13 (June 1995).

[29] *Id.*

[30] Walsh, *supra* note 22, at 205; Stephen M. Johnson, *The Brownfields Action Agenda: A Model for Future Federal/State Cooperation in the Quest for Environmental Justice*, 37 SANTA CLARA L. REV. 85, 108 (1996).

[31] *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994).

[32] *See*, *e.g., Northeast Doran Inc. v. Key Bank of Maine*, 15 F.3d 1, 2-3 (1st Cir. 1994); *In re Bergsoe Metal Corp.*, 910 F.2d 668, 672-73 (9th Cir. 1990).

cost recovery actions.[33] Additionally, throughout the 1990s, the real estate industry worked to establish clear standards for conducting the environmental investigations necessary to invoke CERCLA's innocent landowner defense, which protects landowners that exercise "due care" with respect to contamination caused by others.[34] Such investigations are critical to lenders' understanding of the environmental issues at a given property and of the potential legal risks of purchasing—or financing the purchase of—such property. The 1990s saw the growth of the environmental consulting industry to meet the demands of lenders, but neither lenders nor the government "exercise[d] any control in establishing qualifications or uniformity" for the consultants' work product.[35] In 1993, industry representatives, under the auspices of the American Society for Testing and Materials ("ASTM") created voluntary standards setting forth best practices for environmental investigation of commercial properties.[36] These standards, updated in 2000, 2005, 2013, and 2021, continue to set the bar for environmental diligence today.[37]

Meanwhile in Washington, Congress was grappling with the same challenge of preventing CERCLA from stifling real estate financing and brownfield redevelopment. Finally, in 1996, legislation essentially adopting EPA's Lender Liability rule was enacted. The new law, the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act ("Asset Conservation Act" or "ACA"), amended CERCLA to clarify its secured creditor exemption, setting forth specific activities a lender may take without incurring liability under CERCLA.[38] As in its previous version, the amended secured creditor language of CERCLA provides that a person holding indicia of ownership of property primarily to protect a security interest therein is excluded from liability under CERCLA so long as it does not "participate in the management" of the property.[39] The ACA also created a similar safe harbor in the Resource Conservation and Recovery Act ("RCRA") for lenders with a security interest in a property holding RCRA-regulated underground

[33] Stephen Klege, *Fleet's Liability Fight Keeps Breaking New Ground,* AMERICAN BANKER, Aug. 25, 1992.

[34] CERCLA §107(b)(3), 42 U.S.C. § 9607(b)(3); MANAGING ENVTL. RISK § 18:5 (2024).

[35] MANAGING ENVTL. RISK § 18:5 (2024).

[36] MANAGING ENVTL. RISK § 18:6 (2024).

[37] American Society for Testing and Materials ("ASTM") E1527-21 standard. EPA has formally adopted the ASTM E1527-21 standard as satisfying the All Appropriate Inquiries Rule standards and practices necessary for fulfilling the requirements of CERCLA § 101(35)(B) to obtain CERCLA liability protection. *See* 40 C.F.R. Part 312.

[38] Pub. L. 104-208, 110 Stat. 3009-462 (1996).

[39] CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A).

storage tanks ("USTs").[40] The scope of the RCRA safe harbor was designed to track the CERCLA safe harbor, but differs in some material respects.[41]

As amended, the secured creditor safe harbor expressly limits the ways in which lenders may be considered to be "participat[ing] in mangement" of the property to actual management of such property – thereby repudiating the *Fleet Factors* holding that rested upon the lender's theoretical capacity to manage the property.[42] It permits lenders to foreclose on contaminated property, maintain business activities, wind up operations, and preserve, protect or prepare the property for sale or other disposition without incurring CERCLA liability.[43]

The post-foreclosure safe harbor carries a significant caveat, however. Post-foreclosure activity is only protected if the lender "seeks to sell, re-lease . . . , or otherwise divest [itself] of the . . . facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements."[44] Although the statute lacks a specific definition of "the earliest practicable, commercially reasonable time," EPA guidance states that "EPA considers this test to be met if the lender, within 12 months of foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication."[45] Lenders are best advised, before rejecting an offer on a property in foreclosure, to be prepared to establish that the offer was commercially unreasonable, and be able to justify that decision with appropriate support and analysis if the decision is later called into question.

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[40] *See* Pub. L. 104-208, 110 Stat. 3009-462 (1996). RCRA defines an "underground storage tank" as a tank, or any network of tanks, including piping, more than 10% of which is underground. 42 U.S.C. § 6991(10). RCRA regulates most USTs containing any substance regulated under CERCLA. *Id.* § 6991(7).

RCRA also regulates USTs containing petroleum, which is not regulated under CERCLA. *See Id.* § 9601(14) (excluding petroleum from the definition of hazardous substance). In the event of a release from a petroleum UST, those considered to be owners or operators of the UST may be held strictly liable for the costs of cleanup. *Id.* § 6991b(h)(6) (providing that EPA is authorized to seek recovery of costs from owners or operators it incurs in the cleanup of a spill from a petroleum UST). Consequently, RCRA is the primary means by which an owner or operator may be held liable for petroleum contamination from a leaking UST.

[41] For example, to qualify for the safe harbor under RCRA, a lender must not engage in "petroleum production, refining, or marketing" in addition to the requirement that it not participate in the management of the property. 42 U.S.C. §§ 6991b(h)(9)(A)-(B).

[42] CERCLA § 101(20)(F), 42. U.S.C. § 9601(20)(F).

[43] CERCLA § 101(20)(F)(ii), 42 U.S.C. §9601(20)(F)(ii).

[44] *Id.*

[45] EPA OFFICE OF SITE REMEDIATION ENFORCEMENT, THE REVITALIZATION HANDBOOK: ADDRESSING LIABILITY CONCERNS AT CONTAMINATED LANDS (Aug. 2022), https://www.epa.gov/system/files/documents/2025-04/revitalization-handbook-final-2022_2.pdf (last accessed July 17, 2025).

By contrast, the RCRA safe harbor for properties containing petroleum USTs is more clear-cut. A lender must follow explicit instructions or lose its protection. Lenders must advertise the property for sale on a monthly basis, within 12 months of foreclosure.[46] Lenders may not outbid, reject or fail to act upon an offer of "fair consideration."[47] Lenders must empty all known petroleum USTs within 60 days of foreclosure, and any subsequently discovered petroleum USTs within 60 days of discovery.[48] These USTs must be either permanently closed in accordance with RCRA's closure procedures, or temporarily closed if the lender is willing to conduct certain monitoring activities.[49]

Congress acted again in 2002, by passing the Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Amendment"),[50] which amended CERCLA by authorizing federal grants to support state and local brownfield programs,[51] creating new limits to liability,[52] and directing EPA to create regulations specifying standards and practices for the investigation needed to invoke the Bona Fide Prospective Purchaser ("BFPP") and innocent landowner defenses.[53] EPA's resulting regulations provide that the relevant ASTM standards satisfy the requirements for such investigations.[54] The Brownfields Amendment encouraged the continued development of state brownfield cleanup programs, which exist in varied forms in all 50 states and the District of Columbia today.[55]

Thus, the steps taken by the private sector, federal and state environmental agencies, and federal and state legislatures since 1990 have served to encourage, rather than stifle, the redevelopment of brownfields. The Asset Conservation Act provided much-needed clarification of CERCLA's secured creditor exemption, dispelling the fear that ordinary activities associated with foreclosure could transform a lender into an "owner" or "operator" of a site with potential liability for contamination thereon. Moreover, the development of the ASTM standards for environmental investigations, and their subsequent endorsement by EPA as the standard for "all appropriate inquiries" ("AAI"), provided a critical tool for borrowers and lenders to assess potential risks of

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[46] 40 C.F.R. § 280.210(c)(2)(i).

[47] 40 C.F.R. § 280.210(c)(2)(ii)(B).

[48] 40 C.F.R. §§ 280.230(b)(2)(i)-(ii).

[49] 40 C.F.R. § 280.230(b)(3).

[50] Pub. L. 107-118, 115 Stat. 2356 (2002).

[51] CERCLA § 104(k), 42 U.S.C. § 9604(k).

[52] CERCLA §§ 107(o)–(r), 42 U.S.C. §§ 9607(o)–(r).

[53] CERCLA § 101(35), 42 U.S.C. § 9601(35).

[54] 40 C.F.R. § 312.11.

[55] EPA, STATE BROWNFIELDS AND VOLUNTARY RESPONSE PROGRAMS 2017, https://nepis.epa.gov/Exe/ZyPDF.cgi/P100TG1P.PDF?Dockey=P100TG1P.PDF (last accessed July 17, 2025)

liability, again reducing the uncertainty associated with a purchase of environmentally-impacted property. Finally, state brownfield programs, supported by federal grants, have further served to reduce the risk of environmental enforcement actions for entities that redevelop contaminated properties. Some states, notably New York State, have created brownfield programs that offer lucrative tax credit incentives to remediate and redevelop brownfield sites.[56]

Application of the Safe Harbor: Examples in Case Law

Court decisions issued since the enactment of the Asset Conservation Act indicate a lending climate that has stabilized and matured since the initial panic following the *Fleet Factors* decision. Case law pertaining to lender liability has been scant, indicating regulators' reluctance to enforce against lenders as well as lenders' preference to settle early rather than take any chances in court. The majority of reported cases have upheld lender claims that their activities have fallen within CERCLA's secured creditor exemption.

Two basic prongs must be met in order to qualify for exemption from CERCLA liability as a secured creditor: first, a person must qualify as a "lender" and second, the lender must not "participate in management."[57] The first prong requires the creditor to establish that it holds its security interest primarily to secure the repayment of money or other obligation of another person.[58] Qualifying security interests include "a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person."[59] Courts addressing this requirement have focused on determining why the entity

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[56] *See generally* N.Y. Tax Law § 21; NYU SCHACK INSTITUTE OF REAL ESTATE, NEW YORK STATE BROWNFIELD CLEANUP PROGRAM AND TAX CREDITS: ANALYSIS OF A THREE GENERATION PROGRAM (Oct. 2021), http://spsprod1.sps.nyu.edu/content/dam/sps/academics/departments/schack/urbanlab/NYCBP_Hersh_BCP_Study_FINAL_For_Printing_FINAL-ua.pdf (last accessed July 18, 2025); N.Y.C. BROWNFIELD PARTNERSHIP, INFOGRAPHIC ON NYS BROWNFIELD CLEANUP PROGRAM (BCP) (Jan. 24, 2022), https://nycbrownfieldpartnership.org/nycbp-industry-news/12309319 (last accessed July 18, 2025); BOUSQUET HOLSTEIN PLLC, THE ENVIRONMENTAL BENEFITS OF THE BROWNFIELD CLEANUP PROGRAM (BCP) (Apr. 2023), https://www.bhlawpllc.com/wp-content/uploads/2023/04/The-Environmental-Benefits-of-the-BCP-Program-1.pdf (last accessed July 18, 2025); PFM GRP. CONSULTING LLC, ECONOMIC IMPACT OF TAX INCENTIVE PROGRAMS: NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE 96–108 (Dec. 30, 2023), https://www.tax.ny.gov/pdf/research/economic-impact-of-tax-incentive-programs.pdf (last accessed July 18, 2025).

[57] CERCLA § 101(20)(F); 42 U.S.C. § 9601(20)(F).

[58] CERCLA §§ 101(20)(G)(ii), 101(20)(H)(iv); 42 U.S.C. §§ 9601(20)(G)(ii), 101(20)(H)(iv).

[59] CERCLA § 101(20)(H)(vi); 42 U.S.C. § 9601(20)(H)(vi).

holds indicia of ownership used as a security interest.[60] At least one court has ruled that a person who held title to a facility under a sale-leaseback arrangement was deemed to be holding a security interest in the property, even though the title-holder took deductions for depreciation of the facility.[61] Another court has declined to find that a corporation qualified for the secured creditor exemption, where the corporation had held title to a facility in had leased, and claimed the options to purchase contained in the lease effected a functional purchase.[62] Accordingly, lenders should be wary of the way in which non-traditional loan structures will be viewed.

The interpretation of "participating in management" is of greater interest to traditional lenders, who seek guidance on which activities are permissibly within the lender safe harbor and which fall beyond it. In *U.S. v. Pesses*,[63] the Western District of Pennsylvania held that a lender met the requirements of the CERCLA safe harbor when, pre-foreclosure, it did not participate in management of the facility and, following foreclosure, promptly listed the property with several real estate agents, entertained inquiries about the site from interested parties, leased part of the property with rental payments credited toward an outstanding loan balance, engaged an environmental consultant to test for hazardous substances, and, upon concluding it could not sell the property without engaging in a multi-million dollar cleanup, turned the keys of the property over to a bankruptcy trustee.

Similarly, in *Organic Chem. Site PRP Group v. Total Petroleum Inc.*,[64] the court held that the mere opportunity to participate in site management under a retained lease interest did not rise to the level of actual participation, which could defeat the secured creditor exemption. Total Petroleum, an oil and gas company, was found eligible for the secured creditor exemption because as a land contract vendor, it held legal title to the contaminated property only as a security interest to ensure payment on the land contract. The PRP Group argued that the retained lease interest gave Total the opportunity to participate in management of the OCI Site. However, the court held that CERCLA's safe harbor excludes only those parties who actually participate in management and not those who merely retain the capacity or unexercised right to control activities at the facility. "The critical question is not 'what rights [a defendant] had, but what it did.'"[65]

However, the clarification of the secured creditor exemption does not mean that the safe harbor has been enlarged indefinitely; lenders acting beyond the limits of the exemption still face liability under CERCLA. One case which ended in settlement illustrates a post-foreclosure fact pattern that could have otherwise resulted in a judgment against the lender. In April 2007, the State of New York sued HSBC Bank USA in federal

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[60] *See* Matthew H. Agrens & David S. Langer, *Lender Liability Under CERCLA*, 3 BLOOMBERG CORP. L. J. 482, 485 (2008) (citing *In re Bergsoe Metal Corp*., 910 F.2d 668, 671 (9th Cir. 1990), and *Monarch Tile, Inc. v. City of Florence*, 212 F.3d 1219 (11th Cir. 2000)).

[61] *Kemp Industries, Inc. v. Safety Light Corp*., 857 F. Supp. 373 (D.N.J. 1994).

[62] *Georgia-Pac. Consumer Prod. LP v. NCR Corp.*, 980 F. Supp. 2d 821, 839 (W.D. Mich. 2013).

[63] 1998 WL 937235, *17-20 (W.D. Pa. May 6, 1998).

[64] 58 F. Supp.2d 755, 761-63 (W.D. Mich. 1999).

[65] *Id*. at 762.

court. According to the complaint, after HSBC's borrower, Westwood Chemical Corporation, defaulted on its loan, the bank seized Westwood's operating funds and requested a plan for the orderly shutdown of its facility.[66] Westwood submitted a plan that included costs to properly dispose of waste at the site.[67] The lender allegedly refused to fund these waste disposal costs, and also refused to fund shipment of finished chemical products, which resulted in them being abandoned.[68] After the facility was shut down, hundreds of containers of hazardous waste and hazardous substances leaked after a winter freeze. The lender also allegedly failed to notify the state Department of Environmental Conservation ("DEC") of the threat posed by the abandonment of hazardous waste and hazardous substances at the site.[69]

DEC asserted that "HSBC's actions in taking control of Westwood's finances, in refusing to fund an orderly shutdown plan, in refusing to fund shipment of finished chemical products and the completion of work in progress, in retaining contractors to perform work at the Site, and in otherwise exercising control over the Site, directly and/or indirectly caused the abandonment, disposal, release and threat of release of hazardous waste and hazardous substances to the environment from the Site."[70] DEC further alleged that "HSBC ignored its legal obligation to exercise due care when exerting such authority and control over the Site," and "ignored its legal obligation to report the release or threat of release, or the spill and discharge of hazardous substances and hazardous waste to the environment to DEC and other local, State and federal officials."[71]

HSBC denied DEC's allegations (and may well have had valid defenses to the state's allegations), but resolved the matter in a consent decree that required reimbursement of the state for $115,680 in response and enforcement costs, and also included payment of a civil penalty in the amount of $850,000.[72] The settlement was executed by the parties prior to the commencement of the litigation, and the case was closed upon entry of the consent decree less than two months after the complaint was filed, indicating the intent of the parties to avoid extensive litigation through a settlement formalized in court.

Another recent case illustrates a degree of cooperation between EPA, local government, and the banking industry that would not have been possible in the absence of the post-*Fleet Factors* developments in law, policy, and practice. In 2012, EPA entered into a settlement with the Bank of India that provided for the reimbursement of the government for the costs of the cleanup of hazardous substances from the Buckbee-Mears

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[66] *New York v. HSBC Bank U.S.A., Nat'l Assn.*, No. 7:07-CV-03160 (S.D.N.Y.) (Complaint ¶ 29, Apr. 19, 2007).

[67] *Id.*

[68] *Id.* ¶¶ 30–34.

[69] *Id.* ¶¶ 39, 44.

[70] *Id.* ¶ 46.

[71] *Id.*

[72] *New York v. HSBC Bank U.S.A., Nat'l Assn.*, No. 7:07-CV-03160 (S.D.N.Y.) (Consent Decree May 25, 2007).

Superfund Site in Cortland, New York, as well as for the sale and reuse of the site.[73] The Bank had provided a mortgage for the purchase of the former Buckbee-Mears Co. facility, which had manufactured components of tube televisions and computer monitors.[74] The purchaser resumed manufacturing operations briefly, but ceased and abandoned the facility in 2005, less than a year after the purchase.[75] Local police discovered large quantities of hazardous substances at the site in 2006, and EPA subsequently ordered the purchaser to clean up the property.[76] Because the purchaser did not comply with EPA's order, EPA initiated an Emergency Response Action in 2007.[77]

After commencing a foreclosure action on its mortgage, the Bank executed a settlement agreement with EPA.[78] The Agreement recited the Bank's position that it had not participated in the management of the property and was thus protected from CERCLA liability by the statutory safe harbor.[79] In exchange for EPA's release of liens on the property and its covenant not to sue the Bank, the Bank agreed to sell the property—ideally in a foreclosure sale—and to pay a portion of the sale proceeds to EPA.[80] In connection with the larger vision for the site, EPA funded a study to clarify reuse opportunities for the property, and the City of Cortland secured grant funding from New York State to support revitalization of a larger regional area including a majority of the Buckbee-Mears site.[81] In February 2014, a local developer purchased the site in a foreclosure auction for $356,000, well below the assessed full-market value of $2.1 million.[82] The next stage of redevelopment for the site remains to be seen.

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[73] *Matter of Buckbee-Mears Co. Superfund Site*, EPA Docket No. CERCLA-02-2012-2017, Settlement Agreement (Aug. 2012); 77 Fed. Reg. 58989 (Sep. 25, 2012).

[74] *Id.*; U.S. EPA, RETURN TO USE INITIATIVE, BUCKBEE-MEARS CO. (Nov. 2014) ("EPA Buckbee-Mears Information Sheet"), https://semspub.epa.gov/work/02/363306.pdf (last accessed July 17, 2025).

[75] *Id*.

[76] Internal Memorandum of Mack Cook, City of Cortland Office of Administration and Finance, March 27, 2014.

[77] *Id.*

[78] Settlement Agreement, *supra* note 73.

[79] *Id.* ¶ 9.

[80] *Id.* ¶¶ 10, 32.

[81] EPA Buckbee-Mears Information sheet, *supra* note 74.

[82] *Id;* Steven Howe, *Buckbee Sale Set to Close Thursday*, CORTLAND STANDARD, March 4, 2014.

II. Practical Lessons

Staying Within the Safe Harbor

As can be seen from the allegations against HSBC, although CERCLA's safe harbor may appear clear and specific on its face, its proper application can be a challenge. Real-time assessment and reassessment of applicable requirements may be necessary during the course of a complicated loan workout or foreclosure. Below we examine specific conduct that may trigger lender liability in pre-foreclosure, loan workout, and post-foreclosure scenarios.

Pre-Foreclosure Activities

As discussed earlier, lenders that have financed the purchase or lease of a facility may avoid CERCLA liability for environmental contamination at the facility if they refrain from "participat[ing] in management" of the facility.[83] Lenders may attract CERCLA liability if they undertake "decision-making control" over and "responsibility for hazardous substance handling or disposal practices related to . . . the facility;"[84] or "exercise control at a level comparable" to that of a facility manager, such that the lender either "assume[s] or manifest[s] responsibility" for day-to-day environmental compliance of the facility; or "all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the . . . facility other than . . . environmental compliance."[85]

CERCLA's lender safe harbor provisions identify activities, including those associated with loan workouts, that are not considered to attract environmental liability, so long as they do not rise to the level of facility management or direct involvement of waste handling or disposal:

> **(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 [i.e., a cleanup] 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;

[83] CERCLA § 101(20)(F); 42 U.S.C. § 9601(20)(F).

[84] CERCLA § 101(20)(G)(ii)(I); 42 U.S.C. § 9601(20)(G)(ii)(I).

[85] CERCLA § 101(20)(G)(ii)(II); U.S.C. § 9601(20)(G)(ii)(II)

> **(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 9607(d) of this title [i.e., rendering assistance consistent with federal standards or oversight, to address a release of a hazardous substance that creates a danger to public health or the environment] or under the direction of an on-scene coordinator appointed under the National Contingency Plan[.][86]

Lenders may undertake analogous activities with respect to petroleum USTs under the RCRA safe harbor.[87]

In exercising the enumerated rights set forth in the law, lenders would be well advised to closely examine whether the totality of their actions could, at present or in the future, be seen as exercising actual decision-making control over environmental compliance or other operational functions. They should also be careful not to unwittingly cause or contribute to an environmental release, for example, when a facility is being decommissioned or prepared for sale. During loan workouts in particular, lenders may establish or maintain financial or administrative oversight over a borrower, but should avoid entanglement with facility operations.

During and After Foreclosure

CERCLA's safe harbor expressly permits lenders to foreclose on contaminated property, maintain business activities, wind up operations, and preserve, protect or prepare the property for sale or other disposition, so long as marketing efforts begin within 12 months of foreclosure.[88] The HSBC case discussed earlier highlights a key warning to

[86] CERCLA § 101(20)(G)(iv), 42 U.S.C. § 9601(20)(G)(iv).

[87] *See* 40 C.F.R. § 280.210(b)(1) (providing that a lender may undertake or require environmental investigation of the UST or UST system, require a prospective borrower to clean up contamination from the UST or UST system, or require the borrower to upgrade their UST or UST system as a condition of the loan, without losing the protection of the safe harbor).

[88] CERCLA § 101(20)(F)(ii), 42 U.S.C. § 9601(20)(F)(ii); EPA OFFICE OF SITE REMEDIATION ENFORCEMENT, THE REVITALIZATION HANDBOOK: ADDRESSING LIABILITY CONCERNS AT CONTAMINATED LANDS (Aug. 2022), *supra* note 45, at 22. RCRA mandates that a foreclosing lender take several specific actions with petroleum USTs on site to remain within the safe harbor, including requiring that a lender list the

lenders that foreclose on contaminated property: environmental professionals should be engaged to assure that the facility is being managed in compliance with CERCLA and other environmental laws, and in particular, environmental counsel should be consulted before any decision is made to withhold funds requested to address an imminent threat to public health or the environment caused by the shutdown of a borrower's facility—even if the loan documents confer the right to do so when the borrower is in default.

Assuring that Borrowers Follow Best Practices to Avoid and Manage Environmental Risks

CERCLA's safe harbor requires lenders to avoid "participating in the management" of a contaminated facility while also allowing broader oversight over the borrower's policies with regard to contaminated property. Such oversight extends not only to management of property already owned or leased by the borrower, but also to the borrower's behavior during a transaction to acquire property. Lenders financing brownfield redevelopment should satisfy themselves that borrowers follow best practices to avoid and/or manage environmental risks, from the initial transaction through the management of the property. Strategies for facing such risks include the following:

- *Lenders and borrowers/purchasers should conduct careful environmental diligence before financing a project*. Many environmental problems can be avoided if they are identified and remedied by the company either before financing is extended or during the life of the financing. A purchaser may be eligible for the BFPP defense under CERCLA if it, *inter alia,* conducts sufficient pre-closing diligence so as to meet EPA's AAI standard.[89] This defense requires the purported BFPP to establish eight criteria by a preponderance of the evidence:

    - The disposal of hazardous substances on the site occurred before the purchaser's acquisition of the site;
    - It has conducted "all appropriate inquiries" (as per ASTM) into the previous ownership and uses of the property;
    - It has provided all legally required notices regarding the release;
    - It has exercised "appropriate care" with respect to the hazardous substances found, meaning that "reasonable steps" have been taken to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance;
    - It has provided full cooperation, assistance and access to those conducting response actions;
    - It has complied with institutional and engineering controls applicable to the site and has not impeded the effectiveness of such controls;

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foreclosed property for sale within 12 months or lose the safe harbor's protection. 40 C.F.R. § 280.210(c).

[89] CERCLA §101(40), 42 U.S.C. § 9601(40); 40 C.F.R. Part 312 (regulations setting forth the "All Appropriate Inquiries" standard).

- It has complied with governmental requests for information and subpoenas;
- It is not already liable, affiliated with[90] a responsible party "(other than a contractual, corporate or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services)" or simply the reorganized entity of a responsible party.[91]

When financing redevelopment projects where developers claim to be eligible for BFPP protection, lenders should require recent environmental reports from their clients from respected third-party consulting firms, and should engage its own panel of consultants and/or environmental counsel to review the reports with an independent eye to verify that they meet the AAI standard. That diligence will typically scrutinize the full range of activities undertaken or contemplated by a company.

Lessees may be eligible for the BFPP defense, so long as they either independently meet the elements required under CERCLA § 101(40)(B)(i)-(viii); or obtain derivative protection by virtue of the owner's meeting of these requirements.[92]

- *Borrowers/purchasers should manage environmental issues*. The BFPP defense requires the purchaser to exercise "appropriate care" and take "reasonable steps" with respect to existing contamination at the site.[93] This requirement is site-specific, and while it is not "intend[ed] to create, as a

[90] EPA has acknowledged ambiguity in the term "affiliated with," but notes that "EPA believes that Congress intended the 'no affiliation' language to prevent a potentially responsible party from contracting away its CERCLA liability through a transaction to a family member or related corporate entity." U.S. EPA, ENFORCEMENT DISCRETION GUIDANCE REGARDING STATUTORY CRITERIA FOR THOSE WHO MAY QUALIFY AS CERCLA BONA FIDE PROSPECTIVE PURCHASERS, CONTIGUOUS PROPERTY OWNERS, OR INNOCENT LANDOWNERS ("COMMON ELEMENTS") 7 (July 29, 2019), https://www.epa.gov/sites/default/files/2019-08/documents/common-elements-guide-mem-2019.pdf (last accessed July 17, 2025).

[91] CERCLA §101(40)(B)(biii)(I), 42 U.S.C. § 9601(40)(B)(biii)(I).

[92] In 2018, Congress amended CERCLA's definition of a "bona fide prospective purchaser" to formalize the pathways available for tenants to obtain derivative protection from the BFPP status of the owner of the property. 42 U.S.C. § 9601(40)(A)(ii). These tenant protections were previously available only as a result of EPA's enforcement policies. *See* U.S. EPA, Office of Enforcement and Compliance Assurance, *Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision* (2012), https://www.epa.gov/sites/default/files/documents/tenants-bfpp-2012_0.pdf (last accessed July 17, 2025).

[93] CERCLA §101(40)(B)(iv), 42 U.S.C. § 9601(40)(B)(iv).

general matter, the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater)",[94] it requires taking "steps necessary to protect the public from a health or environmental threat."[95] In practice, such steps can encompass a range of responsibilities, including the following:

- Segregation, containment and/or disposal of hazardous substances stored in drums, vats, or other containers in accordance with applicable laws and regulations;[96]
- Maintaining or repairing a containment system designed to prevent contaminant migration;[97]
- Investigating suspected contamination that becomes apparent after the purchase of the property, including, potentially, invasive testing.[98]

On the other hand, an owner's inaction in the wake of the discovery of actual or suspected contamination at property will vitiate the BFPP defense. In one instance, a landowner did not qualify as a BFPP because it failed to fill areas of the site that were contaminated, thus permitting contamination to spread, and the landowner also failed to test structures and a debris pile on the site, until "too late to prevent possible releases."[99]

In light of the complications, both legal and technical, of establishing and maintaining a BFPP defense, it behooves a property owner to have a management system in place that will address that risk. This may include, as appropriate, the implementation of an environmental management system and purchase of environmental liability insurance. From the lender's perspective, implementation of such risk management tools by the borrower provides the lender with appropriate assurances that environmental issues are being properly handled by the company, without involving the lender directly or indirectly in the actual decisions made by its client's managers.

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[94] COMMON ELEMENTS, *supra* note 90, at 18.

[95] *New York v. Lashins Arcade Co.,* 91 F.3d 353, 361 (2d Cir. 1996). *Lashins* examined the "due care" requirement under CERCLA's innocent landowner defense; CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3); CERCLA § 101(35), 42 U.S.C. § 9601(35). The Fourth Circuit has held that "appropriate care" under the BFPP defense is as least as stringent as "due care" under the Innocent Landowner defense. *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 180 (4th Cir. 2013).

[96] COMMON ELEMENTS, *supra* note 90, at 6.

[97] *Id* at 5.

[98] *United States v. A & N Cleaners and Launderers, Inc*., 854 F. Supp. 229, 243-44 (1994). *But see Lashins Arcade*, *supra* note 95*,* at 361 (property owner had no obligation to investigate when, prior to its purchase of the property, DEC had already retained a consultant to conduct formal remedial investigation).

[99] *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F.Supp.2d 431, 500-01 (D. S.C. 2011); *aff'd* 714 F.3d (4th Cir. 2013).

- *Lenders should include appropriate environmental covenants and other protections in financing documents*. Financing documents may expressly require borrowers to demonstrate initially that they are in compliance with applicable environmental law, and to confirm such compliance on a periodic basis thereafter as a condition to additional funding. Financing documents also may require borrowers to report any environmental release and any actual or alleged violation of environmental law, whether or not such release or violation is legally required to be reported to the regulators. Environmental covenants also allow the lender to require the borrower, at its expense, to remedy environmental violations. These provisions help to demonstrate that the lender is not directly or indirectly causing any pollution, and, to the contrary, is taking steps to protect its security interest. In turn, the borrower should be sure to price these considerations before purchasing or agreeing to develop a contaminated property.

- *Borrowers/purchasers should engage with environmental regulators to clarify the risk of liability*. EPA has recognized that despite the self-implementing BFPP provisions in CERCLA, redevelopment of some impacted properties may be hindered by a developer's liability concerns posed by CERCLA cleanup requirements to identify, assess, and clean up waste. Depending on site-specific circumstances, the EPA may address a developer's concerns through a variety of mechanisms, including: (1) correspondence from EPA confirming the property's status and measures taken to date as consistent with BFPP status (commonly referred to as "comfort letters"); and (2) less frequently, site-specific settlement agreements, which include a covenant not to sue by the EPA and a recitation of a settling party's eligibility for statutory contribution protection in exchange for cleanup work performed (or funding provided) by the party at the site.

  In August 2019, EPA issued a revised policy on the issuance of comfort letters.[100] The "comfort" comes from an understanding of what EPA knows about the property, including the status of the property and the potential for or actual EPA involvement at the property. The policy provides four model letters intended to assist parties interested in acquiring impacted property for reuse and redevelopment: (1) Federal Superfund Interest Letter; (2) No Current Federal Superfund Interest Letter (indicating that the site is or was of interest to EPA); (3) No Previous Federal Superfund Interest Letter (indicating that EPA currently does not maintain a file on the site); (4) State Action Letter (indicating that the state is taking the lead on managing the site). The Superfund comfort letters are intended to address the most common inquiries that the EPA receives regarding impacted properties. The letters may also suggest property-specific reasonable steps a party may take with respect to

[100] U.S. EPA, 2019 POLICY ON THE ISSUANCE OF SUPERFUND COMFORT/STATUS LETTERS (August 21, 2019), https://www.epa.gov/sites/default/files/2019-08/documents/comfort-status-ltr-2019-mem_0.pdf (last accessed July 17, 2025).

any contamination to ensure protectiveness of human health and the environment and to achieve or maintain BFPP liability protections.[101]

- *Entering a state or local brownfield program that may provide liability protections.* Many state programs can assist developers interested in remediating brownfield sites and redeveloping them for productive use. These programs may provide technical assistance, regulatory guidance, liability protection, tax incentives, loans, as well as funding for environmental site assessments, job training and cleanup. Lenders and borrowers should refer to their state's brownfield program, or city voluntary cleanup program, to assess whether it provides a viable path to a liability release in exchange for site cleanup with regulatory oversight.

- *Lenders and borrowers/purchasers should consult with an environmental insurance broker to explore the applicability of insurance products to manage risk.* Environmental site liability coverage has become a widely used method of managing the risk of liability based upon site contamination; claims by EPA, state regulatory authorities and private parties can all be addressed by site liability coverage. Such policies typically exclude "known conditions" from coverage for first party cleanup obligations, but may have no such exclusion on third party claims, including those based on CERCLA cost-recovery, provided such claims do not exist at the time coverage is purchased. Mortgagee endorsements with so-called "step-up" provisions in the event of foreclosure, and additional insured status for lenders are commonplace options to protect lenders' interests on coverage purchased by a borrower.

By leveraging these strategies as appropriate, parties have been able to allocate and insure environmental risks of contaminated properties to their satisfaction for even the most complex sites. The developments in law and in practice reviewed in this article have enabled brownfields redevelopment to become a robust, productive, and often lucrative area of activity in today's economy.

[101] *Id.*