

# Managing Arkansas Environmental Issues in the Lending/Foreclosure Process: September 26th Arkansas Bankers Association Presentation



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I undertook a presentation at the September 26th Arkansas Bankers Association Mega Conference (“Conference”) in Little Rock, Arkansas titled:

*Managing Arkansas Environmental Issues in the Lending/Foreclosure Process (“Presentation”)*

The *Presentation* addressed transactional environmental issues from a financial institution’s perspective.

The various aspects of a bank’s lending operations were considered, such as:

- Loan underwriting
- Loan documentation
- Loan modification/renewals
- Loan monitoring/supervision
- Distressed assets and restructuring workouts, foreclosure, and bankruptcy

The relevance of environmental issues to financial institutions were stated to include:

- Bank Direct Liability
- Potential Impact on the Value of Collateral
- Borrower Ability to Repay the Loan

The *Presentation* considered ways to address and manage environmental liabilities:

- Common Transactional Environmental Issues
- Relevant Federal/Arkansas Environmental Programs
- Managing Risk through Loan Documents, Environmental Assessments and Other Measures
- Loan Document Language Issues
- Environmental Assessments
- Statutory Exemptions/Trust Fund

Key points reviewed in considering the role of environmental issues in commercial transactions (including lending) included:

- Materiality will obviously vary from deal to deal
- Perception of issue as material is as important as reality (examples – mold or asbestos)

- Trap to be avoided is reducing efforts to address environmental issues based on lower value of facility or property
- Party must make that choice being fully advised of risks
- Bank's role in attempting to minimize environmental risks associated with the collateral can benefit borrower

Borrower/bank issues in addressing environmental transaction issues were noted to include:

- The measures a party will undertake to address an environmental issue in a transactional context will obviously depend on:
  - Type of transaction (lease, buy/sell/financing, asset v. stock, etc.)
  - Party represented (buyer, seller, lessor, lessee, borrower, secured creditor, investor, etc.)
  - Type and materiality of the environmental issue in the context of the transaction
  - Relative leverage of the party
  - Tools reasonably (cost-effective?) available to allocate responsibility and/or quantify issue
  - Party's appetite for risk? (is there an understanding that compliance and/or agency blessing does not necessarily mean that in the appropriate scenario third party lawsuits or impacts on future bank financing might be an issue?)

A positive development over the last 20 years is the fact that many environmental issues that were formerly deemed "deal breakers" or unquantifiable are now routinely addressed in the same manner as other transactional tasks such as title searches, appraisals, etc. The reasons for this development arguably includes:

- Familiarity;
- Improved ability to quantify environmental issues;
- Experience;
- Revised or clarified liability principles;
- Improved assessment techniques;
- Easier access to government records;
- Standardized assessment;
- Efforts by the federal and state agencies to reduce, to the extent possible, the environmental regulatory/liability impediments to financing and/or acquiring/leasing existing facilities ("brownfields" programs); and
- Governmental trust funds

The *Presentation* also addressed:

- Environmental Assessments
- Factual sources of environmental liabilities and responsibilities (including examples)
- Managing risks through environmental assessments
- Noting the types
- Difference from appraisals
- Rationale for environmental assessments
- Description of ASTM Phase I standard
- What an environmental assessment does not necessarily accomplish
- The role (and potential risks) of No Further Action letters
- Application to off-site issues
- Items not covered by an ASTM (or non-scope) environmental assessment (i.e., mold, wetlands, asbestos, lead-based paint, etc.)
- Vapor intrusion
- Role in foreclosure
- Role of the bank in managing the assessment process
- Warranties/Covenants (key issues)

- The failure to tailor language
- When does compliance warranty fall short? (example – asbestos)
- Notification requirements
- Managing the Loan/Collateral
- Underground Storage Tank Issues (including a discussion of the Arkansas Petroleum Storage Tank Trust Fund and its role in the lending process)
- CERCLA/Superfund Liability (including a discussion of the Secured Creditor Exemption)
- Environmental Insurance
- Brownfields

A copy of the [Presentation](#) slides can be found here.