Managing Arkansas Environmental Issues in the Lending/Foreclosure Process

Arkansas Bankers Association

Mega Conference

October 9, 2019

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Arkansas Environmental Energy and Water Log Blog

Three combined posts every business day addressing federal/Arkansas legislation, regulation, administrative/judicial decisions and personnel transitions

- Slides from this presentation will be posted in a few days at:

https://www.mitchellwilliamslaw.com/blog

This presentation will address transactional environmental issues from a financial institution's perspective

We will look at how these issues affect the various aspects of a bank's lending operation, such as:

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

Relevance to the Bank?

- Bank Direct Liability
- Impact Value of the Collateral (Improved and Unimproved Properties)
- Borrower Ability to Repay the Loan

We will also consider ways to address and manage such liabilities, discussing:

- 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

Role of Environmental Issues in a Commercial Transaction (including lending)

- 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.

Practical Borrower/Bank Issues in Addressing Environmental Transactional Issues

- 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 (Banks can typically require borrowers to undertake an assessment if reasonable)
  - 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?)

Addressing Environmental Issues Today

- It is arguable that many environmental issues that were formerly deemed potential "deal breakers" or unquantifiable are now routinely addressed in the same manner as other transactional tasks such as title searches, appraisals, et.
- This is due, in part, to developments such as:
  - 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
- A number of tools and/or information unavailable 25 years ago have placed transactional players in a position to better identify, quantify, manage and resolve environmental issues.
- However – Some of these tools or routines can pose risks if there is not consideration of issues that may not be addressed or identified.

Factual Sources of Environmental Liabilities and Responsibilities

Environmental Conditions

- Environmental Conditions
  - Potential Contaminants/Structures
    - Historical Contamination
    - Asbestos
    - Lead Paint
    - Contaminated Soil/Groundwater
    - PCBs
    - Indoor Air Pollution
    - Tanks (Aboveground and Underground)
    - Mold
    - Lagoons, pits, ponds
  - Specially Protected Property or Biota
    - Endangered Species
    - Historic Sites
    - Wetlands
    - Floodplains
    - Sole Source Aquifer
    - Protected Watershed
  - Activities
    - Air Emissions
    - Water Discharges
    - Waste Management (historical releases and current management
    - Hazardous Materials Handling
    - 404/Wetlands
    - Endangered Species Act
    - Stormwater Discharges

Newer Issues

- Meth Labs
- Marijuana Cultivation Facilities
- Drinking Water Issues

Non-Traditional Issues (Examples Provided by AON)

Real Estate Development

- Residential sites purchased based on results of a clean Phase 1
- Developer marketing site to large retail outfit
- Due diligence on buyer's end showed elevated levels of zinc resulting from Mink hobby farm
- Anticipated Clean-up Costs - $1MM

Non-Traditional Issues (cont.) (Examples Provided by AON)

Agriculture/Fertilizer

- Agri-chemical & Fertilizer distributor was storing bulk 28% in a 400m ton lined silo
- Complete failure of the liner and total loss of product
- Product travelled down an adjacent railroad line into a tile drainage system under a cornfield and migrated 3 miles from Insured site
- Traced to a creek whereby the culverts leading out of the area were blocked
- Costs in excess of $1.5M to date

Non-Traditional Issues (cont.)

Commercial Real Estate Development

- Large commercial real estate development partially started
- Bank Foreclosure
- Clean Water Act NPDES Stormwater permit had either not been obtained or required controls put in place
- State environmental agency looks to bank to do so on an expedited basis

Specialty Areas - Example

Potential Environmental Exposures Impacting Agricultural Operations

- Faulty refrigeration units
- Natural resource damage
- Waste lagoons
- Vandalism
- Pesticide mixing (including crop dusting operations)
- Wetland issues
- Aboveground tank issues

Evolving Risks – An Example Arkansas Medical Marijuana Dispensaries/Cultivation Facilities

- Federal issues prevent loans/financing
- Possible change in the future?
- If so, understanding such facilities and associated issues may be important
- Complex/Expensive Facilities

Energy Issues

- Energy is consumed by cultivation activities and processes such as:
  - Intense lighting (10,000 watt grow lights)
  - High pressure sodium
  - Ceramic metal halide
  - Light emitting of diode
  - Continuous air conditions (climate control)
  - Intricate ventilation systems
  - Water pumps and purifiers
  - Heaters for drying and curing marijuana
  - Extraction equipment filters
  - State of the art security measures
  - CO2 injection
  - High powered compressors (extraction)

Energy Issues (cont.)

- A significant topic in states already allowing cultivation is the energy impact of cultivation.
- The Northwest Power and Conservation Council ("NPCC") states that regional demand from marijuana producers in Idaho, Montana, Oregon and Washington could reach almost 250 MW by 2035.
- 2000-3000 Kilowatt hours of energy per pound of product. (NPCC)
- The publication Utility Dive quotes Mr. Pete Rumsey, Executive Vice President of Business Development at Lighting Science, who states:

  > Cannabis is one of the most energy-intensive industries in the world. Statistics show that one percent of all electricity used in the United States today is used by indoor marijuana growers, to the tune of almost $6 billion annually.

- The same publication notes that growing four mature marijuana plants consume about as much power as running 29 refrigerators around the clock.
- Utilities are having to address major increases in loads in some areas.

Cultivation/Infused Product Facilities Components/Processes

- Extraction of active ingredients from plant materials
- Odor control equipment for producing/growing and or processing (type, quantity, make and model, flow rate); and
- Solvent usage information including Material Safety Data Sheet (MSDS) for each type
- Schematic drawing of HVAC System for facility indicating path of all air flowing through area where growing or processing occurs
- Spec sheets for each type and model of odor control device and fan
- Spec sheet for extraction device
- Solvents used to make extracts/concentrates (to extract oils)
- Residual solvents include butane, hexane, alcohol, and ethanol which are by-products of extraction

Wastewater

Infusion/Extraction/Production

- Relevant pollutants?
- Prevent gaseous solvents like carbon dioxide, propane or butane discharging into sewer system wastewater
- Solvents such as hexane, etc., maybe flammable
- Fats, oils, and grease from edible production
- High concentration or improper use of cleaning agents

Solid/Hazardous Wastes Generated

- Packaging waste
- Plants (including stalks, roots/soil) and unusable marijuana liquid concentrate or extract
- Solid concentrate or extract (used to extract plant oils)
- Examples:
  - Trim and solid plant material used to create an extract
  - Waste solvent
  - Laboratory waste
  - Extract that fails to meet quality testing
  - Used reactants
  - Residual pesticides/fertilizers
  - Cleaning solution
  - Lighting ballasts

Wastes Generated

- Some material may constitute RCRA Subtitle C hazardous waste.
  - Contact with certain listed hazardous wastes during oil extraction processes
  - By-products resulting from chemical treatment may sometimes become characteristic hazardous waste
  - Pressurized gas cylinders
  - Solvents
  - Mercury containing lamps
  - Out of date pesticides

Air

- Odors (release of VOCs) from cultivation/processing (odor control plans are required such as carbon filtration, etc.)
- Emission of volatile organic compounds associated with extractions and infusions
- Fermentation to produce C02 to accelerate plant growth (creating CO, nitrogenoxides, PM, S02 and VOCs)
- Natural Gas Fired Boilers/Emergency generators

Managing Risk

Environmental Assessments

- Two Types:
  - Environmental Assessments (catch-all for addressing varying types of issues and tailor to facility)
  - Phase I Environmental Assessment
- Frequent purpose: To satisfy All Appropriate Inquiry (AAI) and to provide access to the innocent landowner defense
- Overall purpose: Conditions/activities (including permits [or absence thereof]) that can affect value, impair borrower's ability to repay the loan, or pose liability concerns

Managing Risk (cont.)

How Appraisals and Environmental Assessments are Different for Lenders in Some Respects

- Appraisals are regulated
- Environmental is often considered discretionary
- Appropriate level of environmental due diligence can vary and may not be clear or dictated by government agencies (arguable exception is Superfund All Appropriate Inquiry)

Appraisals and Environmental Assessments are Similar for Lenders

- Borrowers and lenders do not necessary like or appreciate them
- They are considered commodities by the user
- Often seen as too costly
- Sometimes less than competent providers
- Report can differ based on who the user is
- Typically final requirement for loan approval

Nevertheless…

The appraiser's role?

- Environmental issues excluded?
- Eyes, ears and nose of the lender?
- Can they tell you what they see/smell and hear

Managing Risk (cont.)

Why an Environmental Assessment?

- To access the innocent landowners defense under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
- To assess environmental liability and cost issues
- To quantify the extent of contamination and determine costs before/after purchase for use in negotiations
- To identify existing or potential environmental hazards
- To identify whether or not a neighboring property has the potential to impact the subject property
- To determine if further investigation is required

Environmental Assessments (cont.)

- Environmental Assessment Work often Driven by Financial Institution Requirements (whether client likes it or not):
  - If client/buyer is required to pay for an assessment is it important to tailor work to relevant issues instead of using bank's cookie cutter assessment formula?
- Is there a logical system in place that tailors the scope of the assessment to relevant collateral issues?
  a. Example - Should storage tank trust fund eligibility for tanks be an add-on to Phase I for transaction in which convenience store will be collateral?
  b. Example - Should some type mold/water intrusion survey be included for collateral consisting of nursing homes that have many occupants with respiratory issues?
- ASTM Recognized Environmental Conditions ("REC")
  a. Note variability/discretion

  - Example – Underground storage tanks closed a month ago with closure accepted by agency.

  -USTs removed in early 80s with limited documentation

  -Example – Does a drain in an office building that formerly housed a chiropractic office constitute a REC? Film development in area of drain, etc.

Non-ASTM Items

- Cultural and Historic Resources
- Phase II
- Non Phase I Activities
- Asbestos containing
- materials (ACM) survey
- Indoor Air quality
- EHS compliance audit
- Lead-based paint survey
- Wetlands survey
- Endangered species
- Radon survey
- Floodplain survey
- Industrial Hygiene

□ Lead-Based Paint

□ Lead in Drinking Water

□ Utilities Assessment –quality and quantity (e.g., water, wastewater, power)

□ Local zoning/growth plans

□ Identification of potential restrictions on development and operations

□ Post-acquisition Integration

□ EHS Management Systems

□ Ongoing environmental costs

Example – ESA – Burrowing Beetles

Is adequate water legally and physically available?

Environmental Assessments (cont.)

- Example of non-scope issues might include:
  i. Bank financing commercial development on property that will require Corps 404 wetland permit to initiate construction.
  ii. Buyer of office buildings calculation of reconstruction/remodeling costs may vary materially on the amount of friable asbestos present.
  iii. Buyer/Lessor of multi-family apartment complex is attempting to budget for repairs that may be driven by water intrusion/mold issues.

ASTM Phase I ESA Standard

- Recognized Environmental Conditions (RECs):
  - Presence or likely presence of a hazardous substance or petroleum products,
  - Under conditions that indicate an existing release, a past release, or a material threat of a release, into structures on the property or into the ground, groundwater, or surface water.

  Does not include *de minimis* conditions that do not present a risk of harm to public health or environment and that would not be subject of an enforcement action.

Environmental Assessments (cont.)

- Relevant bank personnel should possess some level of competency with:
  - ASTM E-1527-05: Standard practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process (known as ESA)
  - ASTM E-1528-06: Standard Practice for environmental Site Assessments: Transaction Screen Process

Environmental Assessments (cont.)

- An Environmental assessment does not eliminate environmental risks.

Examples

- Borrower becomes insolvent because of costs incurred to comply with environmental cleanup
- Environmental lien attached to the bank's collateral significantly reducing the value of the collateral
- Even if the bank cannot be held liable for the cleanup, will the bank be able to sell the collateral before the environmental issues have been addressed
- Permitting or regulatory costs associated with operation
- Do not protect from environmental tort/property damage action (example – adjacent property owner action against convenience store UST owner that received NFA)

Environmental Assessments (Cont.)

Agency No Further Action Letters ("NFAs")

- Are not a determination property is "clean"
- NFAs do not always preclude further agency action (new conditions, based on incorrect facts)
- Is the NFA based on elimination or restriction of certain use that impairs the value of the property?

Environmental Assessments (cont.)
404/Wetlands
Permit issue – not contamination

- Wetlands-Mississippi: Corporation Pleads Guilty to Illegally Filling Protected Wetlands

The United States Department of Justice ("DOJ") obtained a guilty plea from Mississippi-based Hancock County Land, LLC to the unpermitted filling of wetlands near Bay St. Louis, Mississippi in violation of Section 404 of the Clean Water Act.

HCL agreed to pay a one million dollar fine and take remedial measures for two alleged felony violations of the Clean Water Act.

Environmental Assessments (cont.) 404/Wetlands

HCL is stated by DOJ to have admitted causing the unauthorized excavation and filling of wetlands on a 1,710 acre parcel of undeveloped property in Hancock County, west of the intersection of Route 03 of Interstate 10.

DOJ claimed when HCL purchased the property, it had been informed by a wetland expert that as much as 80% of its land was federally protected wetland connected by streams and Bayous to the Gulf of Mexico. The property could not be developed without a permit from the U.S. Army Corps of Engineers.

Environmental Assessments (cont.)
404/Wetlands

In spite of additional notice of the prohibition against filling and draining of wetlands without authorizations, HCL is stated to have principally, through an owner/general contractor, hired an excavation contractor to trench, drain and fill large portions of the property to lower the water table and destroy the wetland that would otherwise would have been an impediment to commercial development.

- 404/Wetlands Delineation not covered by Phase I and must be separately requested
- Subtle/obscure issues such as mitigation ratio can have a big cost swing on some project.

Environmental Assessments (Cont.)

Foreclosure

- Undertake prior to foreclosure in appropriate circumstances?
- Does lender have internal procedures that ensure an analysis of whether foreclosure should wait till some type of assessment is undertaken?
- Scope to the particular property
- Do issues have potential to delay the sale?
- Are there material issues that will need to be addressed?
- Are alternatives to foreclosure available such as:
  - Suing borrower on underlying note
  - facilitating sale of collateral by defaulting borrower to a third party

Environmental Assessments (cont.) Consultants

- Vendor Pool
  - Qualifications – Who is "qualified"?
    - Professional Credentials
    - Geographic competency
    - Property competency
    - Different expertise need for different facilities (air vs. water vs. tanks, etc.)
    - Expertise/competence varies
  - Database of appropriate service providers
  - Cost should not be sole driver of selection
  - Contract Issues
    - Clear scope of work
    - Address limitation of liability clause
    - Address bank reliance issue
    - Remove arbitration clause
    - Address confidentiality
    - Error and Omissions Insurance

Role of the Bank/Consultant
Auction of Property-Buyer Alleges Bank Liability (Lusk v. First Century Bank)

- Purchaser of a commercial property at a foreclosure auction determined property was contaminated from historical activities associated with rebuilding electrical motors.
- Notice of Trustee sale/advertising notice stated sale subject to environmental regulations
- Deed of Trust disclaimed warranty
- Winner purchaser performed minimal due diligence
- Purchaser subsequently received Superfund PRP notice from EPA

Auction of Property-Buyer Alleges Bank Liability (Lusk v. First Century Bank) (Cont.)

- Purchasers sued bank arguing reliance on bank/auctioneer assertion that property was clean
- Also argued bank was seller of real estate and had an affirmative duty to disclose latent defects/therefore fraud
- Virginia Court found foreclosure deed did not constitute such a relationship and therefore no duty of good faith and fair dealing
- Court rejected argument that a secured party at a foreclosure sale was under a duty to make affirmative representation about conditions (therefore bank cannot be negligent)

Loan Documents
Warranties Covenants - Key Issues

- The Failure to Tailor Language
- When does a "compliance" warranty fall short?
  - Ex-residual contamination (N.E. Arkansas)
  - Ex-Asbestos
  - EX-off-site waste
  - EX-mold
  - Change in use - modification
  - Expansion of process (NPDES, 404, Asbestos, etc.)
  - Access issues
  - Notification requirements (key issue with Trust Fund)

Managing the Loan/Collateral

- To the extent feasible, insist that borrowers or their tenants use appropriate environmental management practices to minimize risks to the collateral
- Verify through inspections, certification by borrower, review of documents submitted to agencies, etc.
- Are adequate provisions in place to require such activities, allow access, etc.?

Underground Storage Tank Issues

- Underground Storage Tanks ("USTs") are key components of many commercial and industrial facilities.
- Used individually or collectively to store hundreds or thousands of gallons of various chemicals and petroleum products below ground.
- Subsurface placement of this equipment better ensures the safe storage of these products prior to being transferred or dispensed.
- USTs will therefore continue to be installed and operated by businesses as part of commercial and industry infrastructure for the foreseeable future.

Underground Storage Tanks (cont.)

- Congress required the promulgation of regulations in the late 1980s requiring that petroleum USTs meet various registration, installation, design, leak detection, record keeping, and closure requirements.
- Leak prevention/detection requirements necessitate significant capital, operation and maintenance expenditures.
- Most states decided to play a role in the regulation of USTs after the promulgation of the initial federal regulations

Underground Storage Tank Issues (cont.)

- Arkansas enacted UST legislation in 1989.
- Arkansas legislation included:
  - adoption of the federal UST technical standards,
  - creation of a petroleum storage tank trust fund ("Trust Fund")
  - initiation of a contractor licensing program.
- Arkansas Department of Environmental Quality ("ADEQ") was assigned responsibility for operating these programs.

Arkansas Petroleum Storage Tank Trust Fund (Cont.)

- The Arkansas General Assembly in 1989 created the trust fund to help UST owners or operators meet these federal financial responsibility requirements.
- The Trust Fund provides for reimbursement to allowable, reasonable and necessary corrective action costs above a $7,500 deductible up to $1.5 million.
- The Trust Fund provides for reimbursement of third party damage claims above a $7,500 deductible up to $1 million

Addressing Lender Concerns/Storage Tank Trust Fund

- The Trust Fund has arguably provided lenders some comfort that there may be a source of funds to address potential contamination on mortgaged properties with USTs.

- The lender's interest is three-fold:
  - ensure the value of the mortgaged property is maintained
  - do not want to incur liability upon foreclosure
  - Enhance or preserve marketability of the property

Arkansas Storage Tank Trust Fund (Cont.)

- Use Competent consultants (i.e., know trust fund reimbursement procedures)

- Lender Concerns
  - Initial Eligibility Determination
  - Continuing Verification of Eligibility
  - Note Change in Arkansas aboveground storage tank laws

Underground Storage Tanks Assessment Issues

USTs That Have Been Previously Removed

- Existing tanks at a facility should not be the sole concern when acquiring facilities.
- This is especially important for USTs that were removed prior to the effective date of the UST regulations.
- Prior releases from such USTs may not have been addressed at the time of removal.
- The subsequent discovery of contamination will likely have to be remediated despite the absence of the UST.
- This could be a significant concern since the contamination may not be covered by the Trust Fund.

CERCLA Liability

- Strict, Joint and Retroactive Liability
- Classes of Liable Parties Relevant to Lender Liability
  - Past and Current Owners
  - Past and Current Operators
- Defenses
  - Third Party Defense (requires due care)
  - Bona Fide Prospective Purchaser, Contiguous Property Owner, Innocent Landowner
    - all appropriate inquiry
    - Post-acquisition “appropriate care”
  - Secured Creditor Exemption
    - Indicia of ownership without participating in management of facility
    - Foreclose but take commercially reasonable steps to sell property

Key Issues
CERCLA (Cont.)

- Exempting from the statutory definition of "owner or operator" a "lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect [its] security interest.
- Clarifies what a secured lender may do before and after foreclosure to avoid the liability-triggering act of "participating management."

CERCLA Secured Creditor Exemption (Cont.)

- Environmental Protection Agency ("EPA") Lender Liability Rule issued in 1992 and codified into law with the Asset Conservation, Lender Liability, and Deposit Insurance Act of 1996 defines acceptable bank actions without incurring liability for CERCLA
- The EPA Rule distinguishes between actions taken to protect a security interest and acts of ownership. It identifies four stages of lender involvement in a loan:
  - Inception
  - Monitoring
  - Workout
  - Foreclosure

Secured Lenders Protection

- Pre-Foreclosure – for secured lenders who do not participate in management, i.e., do not exercise
  - Decision-making control over environmental compliance, e.g., hazardous waste management
  - Overall operational management
- Post-Foreclosure – for secured lenders who hold property only to protect security interest, i.e., take steps consistent with safe harbor provisions and seek to sell, re-lease or otherwise divest themselves of assets at earliest practicable, commercially reasonable time, on commercially reasonable terms

CERCLA Secured Creditor Exemption (Cont.)

- Similar exemption found in Arkansas Superfund Statute
- Similar exemption not found in other federal and Arkansas environmental statutes
  - Examples such as Arkansas Solid Waste Management Act
  - Bank Special Asset Example
- Irrelevant to common law environmental property/tort law suits

CERCLA Secured Creditor Exemption (Cont.)

- To be held liable under CERCLA the bank must actively participate in management exercising decision making control over the borrower's environmental compliance or disposal activities or exercising executive or operational control over the borrower.

CERCLA Secured Creditor Exemption (Cont.)

- No decision making control or responsibility for hazardous substance handling or disposal practices

- By limiting direct involvement in environmental matters, a security lender may preserve this exemption.

CERCLA Secured Creditor Exemption (Cont.)

- Exemption will not apply if the property is hold for investment purposes.
- The lender must "seek to sell, re-lease (in the case of a lease finance transaction), or otherwise divest…, the facility or vessel at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

Use of Environmental Insurance

- Former Refinery/Large Apartment Complex
  - Large multi-family development in place for many years seeking refinancing
  - Lender was requiring affiliates of borrower to sign environmental indemnity (request resisted)
  - Compromise was procurement of targeted environmental insurance
  - Development built many years ago on site of closed refinery (but no to-date problems)
  - Similar example – valuable drug store with known TCE contamination
  - Lender specific policies available

Environmental Insurance Products

- Fixed Site “Pollution Liability”
- Contractors Pollution Liability (“CPL”) and Combined CPL/E&O Forms
- Blended Casualty Programs
- Remediation Stop Loss/Clean-up Cost Cap
- Lender Liability

Brownfields (Definition and Relevance to Development)

- Federal/State (MOA)
- Standards (EPA Region VI)
  - Why important? (South Arkansas example)
  - Related to use
  - Arguments regarding delineation of source, use, etc.
  - Covenant Not to Sue
  - Deed restriction (solution/drinking water?) (affect on values?)
  - Notice
  - Restrict use or utilize barrier
- Arkansas Program
  - Consent Order/Elective Site Cleanup Agreement to obtain State blessing
  - Voluntary investigation
  - Problems – Do you want to look? Do you understand/quantify risk (Garland County example)
  - Third Party Liability?

FDIC Focus

- FDIC focuses on process and consistency
- Ensures proper document management and records retention
- Documentation of due diligence
- Track changes to policy and consistent application of policy
- Banks must avoid “participating in management” of the business and thereby assuming liability under CERCLA