

GUIDELINES FOR AN ENVIRONMENTAL RISK PROGRAM

The potential adverse effect of environmental contamination on the value of real property and the potential for liability under various environmental laws are important factors in evaluating real estate transactions and making loans secured by real estate. Thus, institutions should maintain an environmental risk program in order to evaluate the potential adverse effect of environmental contamination on the value of real property and the potential environmental liability associated with the real property. As part of the institution's overall decision-making process, the environmental risk program should establish procedures for identifying and evaluating potential environmental concerns associated with lending practices and other actions relating to real property.

The board of directors should review and approve the program and designate a senior officer knowledgeable in environmental matters responsible for program implementation. The environmental risk program should be commensurate with the institution's operations. That is, institutions that have a heavier concentration of loans to higher risk industries or localities of known contamination may require a more elaborate and sophisticated environmental risk program than institutions that lend more to lower-risk industries or localities. For example, loans collateralized by 1- to 4-family residences normally have less exposure to environmental liability than loans to finance industrial properties.

ELEMENTS OF AN ENVIRONMENTAL RISK PROGRAM

The environmental risk program should provide for staff training, set environmental policy guidelines and procedures, require an environmental review or analysis during the application process, include loan documentation standards, and establish appropriate environmental risk assessment safeguards in loan workout situations and foreclosures.

Training

The environmental risk program should incorporate training sufficient to ensure that the environmental risk program is implemented and followed within the institution, and the appropriate personnel have the knowledge and experience to determine and evaluate potential environmental concerns that might affect the institution. Whenever the complexity of the environmental issue is beyond the expertise of the institution's staff, the institution should consult legal counsel, environmental consultants, or other qualified experts.

Policies

When appropriate, loan policies, manuals and written procedures should address environmental issues pertinent to the institution's specific lending activities. For example, the lending manual may identify the types of environmental risks associated with industries and real estate in the institution's trade area, provide guidelines for conducting an analysis of potential environmental liability, and describe procedures for the resolution of potential environmental concerns. Procedures for the resolution of environmental concerns might also be developed for credit monitoring, loan workout situations, and foreclosures.

Environmental Risk Analysis

Prior to making a loan, an initial environmental risk analysis needs to be conducted during the application process. An appropriate analysis may allow the institution to avoid loans that result in substantial losses or liability and provide the institution with information to minimize potential environmental liability on loans that are made. Much of the needed information may be gathered by the account officer when interviewing the loan applicant concerning his or her business activities. In addition, the loan application might be designed to request relevant environmental information, such as the present and past uses of the property and the occurrence of any contacts by Federal, state or local governmental agencies about environmental matters. It may be necessary for the loan officer or other representative of an institution to visit the site to evaluate whether there is obvious visual evidence of environmental concerns.

Structured Environmental Risk Assessment

Whenever the application, interview, or visitation indicates a possible environmental concern, a more detailed structured investigation by a qualified individual may be necessary. This assessment may include surveying prior owners of the property, researching past uses of the property, inspecting the site and contiguous parcels, and reviewing company records for past use or disposal of hazardous materials. A review of public records and contact with Federal and state environmental protection agencies may help determine whether the borrower has been cited for violations concerning environmental laws or if the property has been identified on Federal and state lists of real property with significant environmental contamination. The institution's policies and procedures should reflect adequate consideration of the Environmental Protection Agency's (EPA) "All Appropriate Inquiry Rule."

EPA All Appropriate Inquiry Rule – In January 2002, the Congress amended the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to establish, among other things, additional protections from cleanup liability for a new owner of a property. The bona fide prospective purchaser provision establishes that a person may purchase property with the knowledge that the property is contaminated without being held potentially liable for the cleanup of contamination at the property. The new owner must meet certain statutory requirements to qualify as a bona fide prospective purchaser and, prior to the date of acquiring the property, undertake "all appropriate inquiries" into the prior ownership and uses of the property.

In November 2005, the EPA promulgated its "Standards and Practices for All Appropriate Inquiries" final rule (EPA All Appropriate Inquiry Rule) which establishes the standards and practices that are necessary to meet the requirements for an "all appropriate inquiry" into the prior ownership and uses of a property. The All Appropriate Inquiry Rule will become effective on November 1, 2006.

An environmental evaluation of the property that meets the standards and practices of the EPA All Appropriate Inquiry Rule will provide the borrower with added protection from CERCLA cleanup liability, provided the borrower meets the requirements to be a bona fide purchaser and other statutory requirements. This protection, however, is limited to CERCLA and does not apply to the Resource Compensation and Recovery Act (RCRA), including liability associated with underground storage tanks, and other Federal

environmental statutes, and, depending on state law, state environmental statutes. In addition, such an environmental evaluation may provide a more detailed assessment of the property than an evaluation that does not conform to the EPA All Appropriate Inquiry Rule.

As part of its environmental risk analysis of any particular extension of credit, a lender should evaluate whether it is appropriate or necessary to require the borrower to perform an environmental evaluation that meets the standards and practices of the EPA All Appropriate Inquiry Rule. This decision involves judgment and may be made on a case-by-case basis considering the risk characteristics of the transaction, the type of property, and the environmental information gained during an initial environmental risk analysis. If indications of environmental concern are known or discovered during the loan application process, an institution may decide to require the borrower to perform an environmental evaluation that meets the requirements of the EPA All Appropriate Inquiry Rule.

The decision to require the borrower to perform a property assessment that meets the requirements of the EPA All Appropriate Inquiry Rule should be made in the context of the institution's overall environmental risk program. An environmental risk program should be designed to ensure that the institution makes an informed judgment about potential environmental risk and considers such risks in its overall consideration of risks associated with the extension of credit. In addition, an institution's environmental risk program may be tailored to the lending practices of the institution. Thus, an institution should make its decision concerning when and under what circumstances to require a borrower to perform an environmental property assessment based on its own environmental risk program as tailored to the needs of the lending practices of the institution. Individuals involved in administering an institution's environmental risk program should become familiar with these statutory elements. One source for information concerning the EPA All Appropriate Rule is the EPA website at <http://www.epa.gov/brownfields/regneg.htm>.

Monitoring

The environmental risk assessment should continue during the life of the loan by monitoring the borrower and the real property collateral for potential environmental concerns. The institution should be aware of changes in the business activities of the borrower that result in a significant increased risk of environmental liability associated with the real property collateral. If there is a potential for environmental contamination to adversely affect the value of the collateral, the institution might exercise its rights under the loan to require the borrower to resolve the environmental condition and take those actions that are reasonably necessary to protect the value of the real property.

Loan Documentation

Loan documents should include language to safeguard the institution against potential environmental losses and liabilities. Such language might require that the borrower comply with environmental laws, disclose information about the environmental status of the real property

collateral and grant the institution the right to acquire additional information about potential hazardous contamination by inspecting the collateral for environmental concerns. The loan documents might also provide that the institution has the right to call the loan, refuse to extend funds under a line of credit, or foreclose if the hazardous contamination is discovered in the real property collateral. The loan documents might also call for an indemnity of the institution by the borrower and guarantors for environmental liability associated with the real property collateral.

Involvement in the Borrower's Operations

Under CERCLA and many state environmental cleanup statutes, an institution may have an exemption from environmental liability as the holder of a security interest in real property collateral. In monitoring a loan for potential environmental concerns, and resolving those environmental situations as necessary, an institution should evaluate whether its actions may constitute "participating in the management" of the business located on the real property collateral within the meaning of CERCLA. If its actions are considered to be participation in the management, the institution may lose its exemption from liability under CERCLA or similar state statutes.

Foreclosure

A lender's exposure to environmental liability may increase significantly if it takes title to real property held as collateral. An institution should evaluate the potential costs and liability for environmental contamination in conjunction with an assessment of the value of the collateral in reaching a decision to take title to the property by foreclosure or other means. Based on the type of property involved, a lender should consider including as part of this evaluation of potential environmental costs and liability an assessment of the property that meets the requirements of the EPA All Appropriate Inquiry Rule.

SUPERVISORY POLICY

Examiners will review an institution's environmental risk program as part of the examination of its lending and investment activities. When analyzing individual credits, examiners will review the institution's compliance with its own environmental risk program. Failure to establish or comply with an appropriate environmental program will be criticized and corrective action required.