

Environmental Bankers Association



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Winter Conference

**Environmental
Bankers
Association** 

January 15 – 18, 2017

Tampa Marriott Waterside Hotel

Tampa, Florida

Waste Management – Minimizing Risk, Avoiding Liability, and Looking Beyond Landfilling

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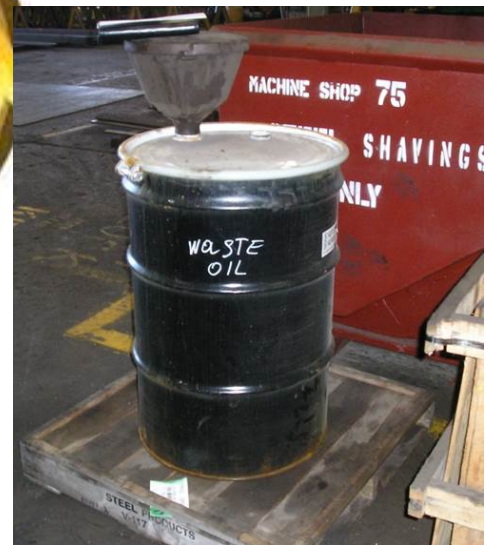
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Questions for Today

- Lenders:
 - What regulatory and legal mechanisms are in place to minimize risk and avoid liability in managing wastes and contamination?
 - What bank or transactional policies are available?
- Consultants:
 - How can we best serve clients – whether lenders directly, prospective purchasers, or existing landowners – in managing wastes?

Disclaimers & Assumptions

- I am not a lawyer.
- You are all familiar with RCRA, CERCLA, state environmental laws/regs.
- You are all familiar with the safe harbor provisions of Superfund.
- I am not a lawyer.

That being said,

- What are wastes and **solid wastes**?
 - Any discarded material...
 - Garbage, refuse, sludges,...(40 CFR 261)
 - 2015 DSW Final Rule¹
- What are **hazardous wastes**?
 - A **solid waste** that is a **listed** HW or is **characteristically** hazardous (40 CFR 261).

Of course there are **exclusions** (§ 261.4a)

- For example, domestic sewage, industrial wastewater, rad waste, spent wood preservatives,...
- Petroleum-contaminated media
- Household products
- Used oil filters
- Recycled scrap metal

RCRA Principles

- Defines solid waste and hazardous waste
- Cradle to grave
- Recordkeeping and reporting requirements
- Lenders not typically attached to RCRA
- **Contained-in** policies have helped move remediation projects along

CERCLA Potentially Responsibility Party (PRP)

- PRPs include:
 - Current **owner or operator (O/O)** of facility.
 - Previous O/O at time of release.
 - Parties who “**arranged for**” disposal or treatment of HW.
 - Parties who accept wastes for **transport** for disposal or treatment.

Lender Liability Exclusions

- RCRA “secured creditor protections” (40 CFR 280, 281)
- CERCLA “secured creditor exemption”²
- **Participation in Management** test
- **Arranger** liability minefield
- Bellweather cases: *U.S. v. Fleet Factors Corp.*, *New York v. HSBC*, et al

So How Should Lenders Handle...

- Existing wastes or contamination on-site?
- Investigation-derived waste (IDW)?
- Existing wastes or contamination during pre-foreclosure, workout, and post-foreclosure/REO?

Ideally: don't! In practice: carefully!

Lenders,

- Work with legal to stay within safe harbors.
- Develop internal ERM policies and lending manual (e.g., per FDIC guidance).
- Utilize “good” indemnity agreements, as well as warranties and covenants clauses.
- Utilize environmental insurance as a safety net.
- Work with consultants/contractors you know and trust.

AnyBank Waste Disposal Questionnaire

1. Generator (Site Owner/Operator) Information

Generator Name _____

Phone _____ Fax _____ Email _____

Generator Mailing Address _____

Generator Site Location _____

Generator EPA ID# _____

2. Agent / Responsible Party Information

Company _____

Phone _____ Fax _____ Email _____

Address _____

Contact Person _____

Phone _____ Cell _____

3. Waste Description

Describe waste _____

How was the waste generated _____

Attach Laboratory Analytical or Safety Data Sheet(s), as applicable

4. Waste Transport and Disposal Information

Waste Transporter _____

Phone _____ Cell _____

Disposal Facility _____

Phone _____ Cell _____

5. Signature

Name/Title _____

Company _____

Phone _____ Date _____

Consultants,

- Work with legal to avoid liability as a generator, arranger, or transporter.
- Know your market area and regional service providers.
- Help manage clients' risks and exposure to environmental liabilities.
- Balance traditional, proven approaches with newer innovative concepts.
- Lay out cost vs. benefit vs. exposure.

Recent Trends – EPA and States encouraging (and in some cases requiring):

- Waste Minimization
- Recycling
- Composting
- Green Initiatives
- Pollution Prevention Programs and Incentives

Lenders: encourage, require, or incentivize borrowers to adopt these practices!

| Disposal Method* (relative cost) | SW | HW | Special HW | Metal | Yard / Wood | Inert / C&D |
|--|----|----|---------------|-------|----------------|----------------|
| Landfill (\$) | X | X | X | X | X | X |
| Incineration (\$\$) | X | X | X | | X | |
| Resource Recovery / Recycling (\$-\$\$) | X | X | X | X | | X |
| Bio / Mixing / Composting (\$) | X | | | | X | |
| Plasma Gas (\$\$\$) | X | | | | | |

*Consider immediate and continuing liabilities assoc. with each disposal method.

In Summary:

- Federal and State laws and regs offer lenders safe harbors from environmental liability. Avoid the hot potato.
- Sound ERM policies and practices can help lenders avoid exposure during life of loan and afterwards.
- Consultants - Know your client and their risk tolerance. Walk in their shoes. Take steps to avoid attaching liability onto yourself however.

Questions?

Footnotes and References

¹ EPA 2015 DSW Rule

<https://www.epa.gov/hwgenerators/final-rule-2015-definition-solid-waste-dsw>

² EPA Fact Sheet, *CERCLA Lender Liability Exemption: Updated Questions and*

Answers <https://www.epa.gov/enforcement/fact-sheet-updated-questions-and-answers-cercla-lender-liability-exemption>