Q&A: BEAs, Due Care Lenders, Foreclosures, and Receiverships

Question:

How do the BEA requirements and time-frames apply to a lender that is foreclosing on real property that is contaminated, or when it is placed into receivership rather than going through bankruptcy or foreclosure? How do the due care requirements apply to these situations?

Background:

On May 1, 2012, Part 213, Leaking Underground Storage Tanks, was amended to provide remedies using processes and procedures separate and distinct from those established under Part 201, Environmental Remediation. Due to this separation, the liability provisions that incorporate baseline environmental assessments (BEA) and many other provisions that had previously been in Part 201, are now provided in Part 213. While the BEA provisions and liability protections are very similar, the reader should be aware of statutory differences in definitions that may affect the outcome.

Foreclosures:

Lenders, who foreclose on real property that is regulated under Parts 201 and 213, may become liable as an owner or operator unless they conduct a BEA within 45 days of foreclosure. (Section 20126(1)(c) of Part 201, Section 21323a(1)(b) of Part 213). The liability protection is contingent upon disclosure of the BEA to the DEQ and to a subsequent purchaser or transferee of the real property. Upon ownership or operation, lenders also have due care obligations with respect to the real property (Section 20107a of Part 201, Section 21304c of Part 213).

- The DEQ considers foreclosure to occur when:
  - the lender acquires title, is in possession, and has control of the property; or,
  - the lender becomes an operator of the property (i.e., has control of the property).

  These actions start the lender's 45 day timeframe in which the BEA may be conducted and establishes the date their due care obligations begin. This allows for those situations where a lender may have court-ordered title, but does not actually have possession or control of the real property because the party occupying the real property has a specified time period to redeem the property, or in some cases a party must be evicted before the lender can take possession. For BEA and due care purposes, the DEQ generally relies on the lender or their lawyers to tell us when the time-clock starts within these parameters.

- Part 201 has additional provisions and liability protections for lenders related to holding a security interest in property, personal liability, and control of property in a fiduciary capacity, if the lender does not participate in the management of the facility (Sections 20101a and 20101b of Part 201). Examples:
  - Helping a company run their business, making environmental compliance decisions for a company, conducting operational aspects of a company including functions such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer, does make the lender an operator.

  - If, the lender is taking measures primarily to preserve or protect their security interest in the property, or to prepare the property for sale or other disposition, then they would <u>not</u> be an operator. Routine maintenance to protect a structure or property such as mowing the lawn, fixing a leaking roof, paying the electric/heat bill, etc., would not be indicative of operator status. However, actions such as cleaning up the building by illegally disposing of hazardous substances would make them liable for those actions.

- Lenders conducting a lawful marshalling or liquidation of personal property that does not cause or contribute to the environmental contamination have an <u>exemption</u> from liability under Parts 201 and 213 [Section 20126(4)(b), Section 21323a(4)(a)]. This includes holding a sale of personal property on a portion of the property. Example:
  - Arranging for the disposal of gasoline in an underground storage tank (UST) while liquidating or marshalling would be exempt. Continuing to sell gasoline from that UST at a gas station would not be exempt.

- Lenders have an exemption to liability under Parts 201 and 213, for costs and damages as a result of cleanup actions taken in response to a release if they did not participate in the management of the property as provided in Part 213, or facility as provided in Part 201 (Section 20126(5) of Part 201, Section 21323a(5) of Part 213). The exemption does not apply to costs or damages that are a result of gross negligence, reckless, willful, or wanton misconduct.

<u>Receivership:</u>

- A lender can ask the court to place real property into receivership rather than proceeding through bankruptcy or foreclosure and to appoint a receiver.
  - Because it is a court appointed position, and the receiver can only act with the permission of the court, the receiver does not need to conduct a BEA nor do they have due care obligations.
  - The lender is not involved in the decision making on the real property nor do they receive title; therefore, they are not an owner or operator and they do not need to conduct a BEA, nor do they have due care obligations.

- If the property is sold or leased by the receiver, then the lessee or new owner and/or operator should consider conducting and submitting a BEA and would have due care obligations.