

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

August 30, 2010

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

Answer: This answer has been expanded from the answer that was first e-mailed on December 9, 2009 to include a discussion on operator status and on-going operations.

Foreclosures:

- When a lender forecloses on property that is a facility, they must do a BEA when they first become the owner or the operator if they want liability protection. The liability protection is also contingent upon disclosure of the BEA information to subsequent purchaser or transferee of the property. The lender also has due care obligations under Section 7a when they become the owner or operator of a facility.
- We have indicated that the 45 day clock required for conducting a BEA in Section 20126(1)(c) and the on-set of due care obligations in Section 20107a start on the earlier of the date on which:
 - the lender acquires title, is in possession, and has control of the property; or,
 - the lender becomes an operator of the property.

This allows for those situations where a lender may have court ordered title but does not actually have possession or control of the property because the party occupying the 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, we generally rely on the lender or their lawyers to tell us when the time-clock starts within these parameters.

- If there is on-going lease at a property that the lender is foreclosing upon, the BEA must address the hazardous substance use of the lessee. [Rule 903(5)] Example: If the lender is foreclosing on the owner, but there is legal lessee that will continue to operate, the lender must consider the hazardous substance use of the lessee in the lender's BEA to determine the appropriate BEA category and means to distinguish a new release from existing contamination.
- A lender may become an operator before having title-possession-control of the property if they cease acting solely in a fiduciary manner and start participating in the management or operation of the facility/property. The definition of an operator is in Section 20101(y). Sections 20101a and 20101b discuss lenders participating in management or in a fiduciary manner. 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 not 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.

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- Lenders conducting a lawful marshalling or liquidation of personal property if it does not contribute to the environmental contamination have an exemption from liability. [Sec 20126(4)(b)] This may differ from managing hazardous substances at the property. Example: Arranging for the disposal of gasoline in a UST while liquidating or marshalling would be exempt. Continuing to sell gasoline from that UST at a gas station would not be exempt.
- Lenders who have not participated in the management of a facility who conduct response activities in response to a release or threat of release prior to foreclosure have an exemption from liability for costs or damages as a result of those activities, unless costs or damages are a result of gross negligence, reckless, willful, or wanton misconduct. [Sec 20126(5)]

Receivership:

- The situation where a property is placed into receivership rather than proceeding through bankruptcy or foreclosure has come up more recently. The lender can ask the court 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 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 would need a BEA and would have due care obligations.