

An aerial photograph of a brownfield site, showing a large area of land covered in debris, including piles of wood, metal, and other waste. Several excavators and trucks are visible, indicating ongoing demolition or cleanup work. The site is bordered by a chain-link fence in the background.

Private Financing For Your Brownfields Site

Guidance to Encourage Lender Participation in Brownfields Redevelopment

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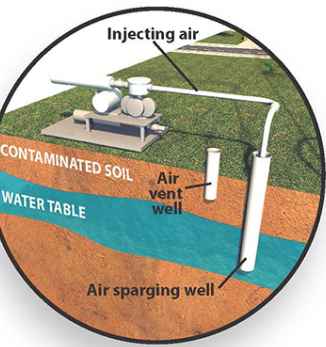
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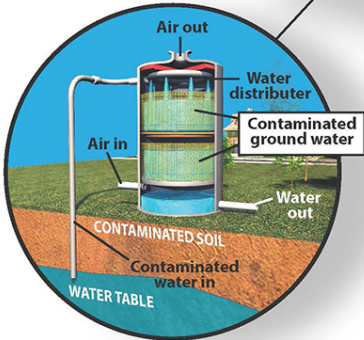
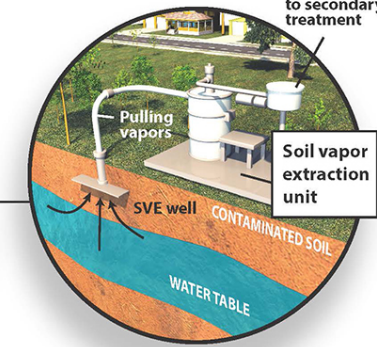
Lender Environmental Liabilities

5 ways scientists can pull contaminants out of the ground

Air sparging, involves injecting air into the soil or groundwater, causing the contaminants to evaporate into a gas.



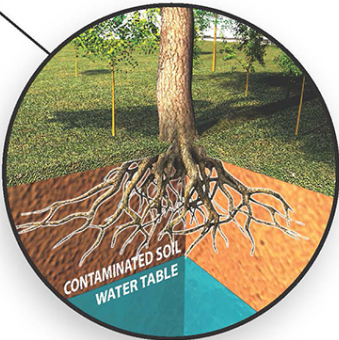
The soil vapor extraction method applies a vacuum to soil to collect contaminated vapors



Air stripping is a method in which contaminated groundwater is collected and filtered through a machine called an air stripper.



Enhanced biodegradation
Certain microorganisms in the soil feed on contaminants through a naturally occurring process called biodegradation.



Phytoremediation
Trees and other deep-rooted plants absorb contaminants in soil

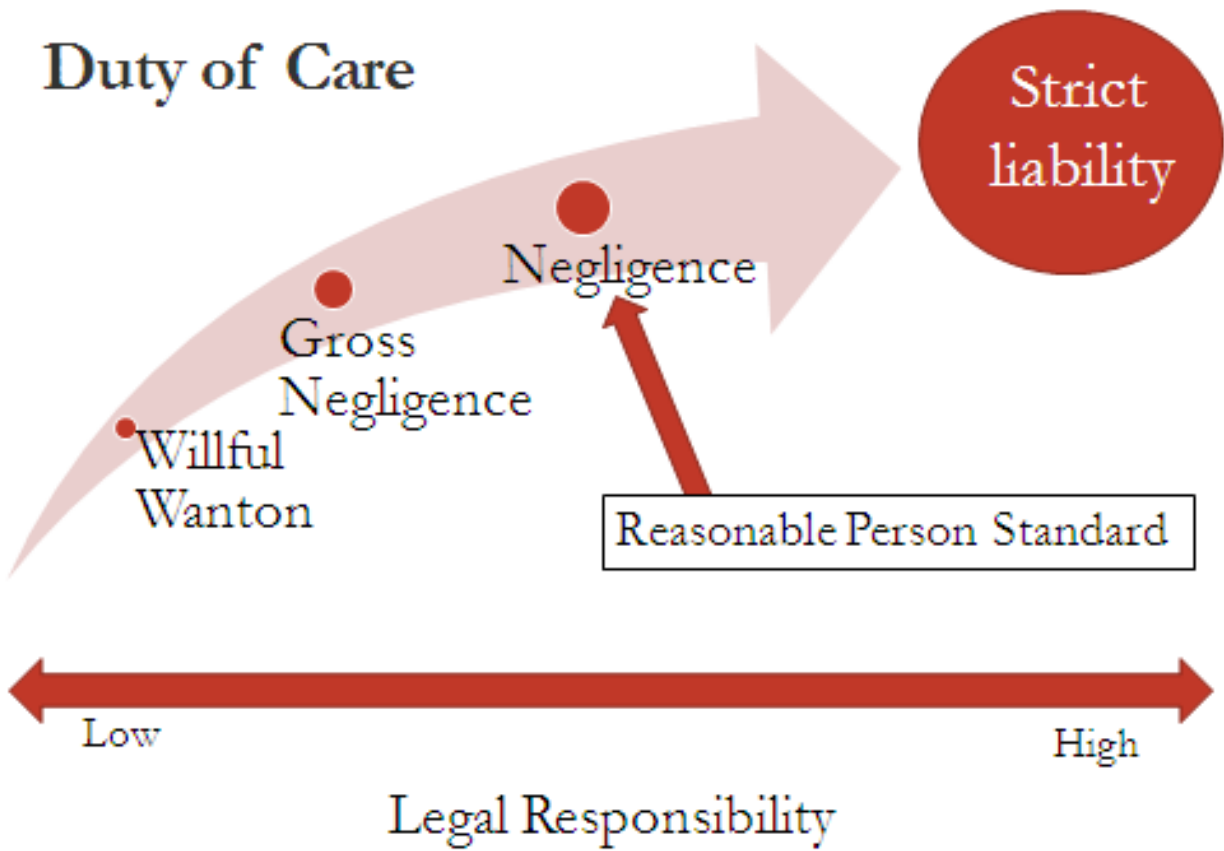
Federal law prioritizes cleanup. Whoever owns contaminated property must pay to clean it up, then seek contribution toward those costs from other responsible parties.

Liability Basics & Overview

- Federal and State law create **strict liability** regimes for owners of contaminated property.
- These laws reflect a “clean up first” approach; potentially liable parties must sort out fault later and reimburse each other.
- Owners of contaminated property can be required to pay to clean the property up, **even if those owners didn’t cause the contamination or do anything wrong.**
- Lenders qualify for “**safe harbors**” provided by federal law.

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Strict liability also applies to ultrahazardous or abnormally dangerous activities, to keeping wild animals in captivity, and to defective products.

What is Strict Liability?

- Strict liability means that a defendant is liable for harm resulting from his or her actions ***whether or not the harm resulted from the defendant's breach of a duty.***
- In other words, no amount of precaution or care functions as a defense. No matter how careful the defendant was, or what precautions the defendant took, he or she will be liable for the harm resulting from his or her actions.
- The policy behind strict liability is to strongly encourage maximum safety and care, and to prioritize results over fault or blame.

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Under CERCLA, the owner of contaminated property is liable to pay for cleaning it up, unless the owner qualifies for a defense against liability or an exemption from liability.

Federal Law: CERCLA

- The ***Comprehensive Environmental Response, Compensation, and Liability Act of 1980*** is the primary driver of environmental liability related to real property.
- CERCLA makes the “***owner***” of “***any site or area where a hazardous substance has . . . come to be located***” liable for costs and damages associated with cleanup. 42 U.S.C. § 9607(a).
- This has implications for lenders holding a security interest in or mortgage on such a property:
 - (1) Does holding the mortgage subject lenders to “owner” liability?
 - (2) If a lender forecloses on such a property, does that expose it to “owner” liability?
 - (3) What liabilities will borrowers be exposed to?
 - (4) What effect does this have on collateral property value?

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The defenses will apply to buyers of land, while the security interest exemption will apply to those who lend on the property.

Three Key CERCLA Defenses (And 1 Exemption)

- CERCLA creates 3 primary defenses for Owners:
 - (1) The **Innocent Purchaser** Defense. 42 U.S.C. § 9607(b)(3).
 - (2) The **Bona Fide Prospective Purchaser** Defense. 42 U.S.C. § 9607(r).
 - (3) The **Contiguous Property Owner** Defense. 42 U.S.C. § 9607(q).
- Borrowers should be cautious to preserve these defenses.
- CERCLA also creates a special **Security Interest Exemption** for lenders, which has been the subject of extensive litigation.
- Lenders must take care to preserve the exemption by understanding what actions toward their borrowers might expose them to liability.

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Prospective purchasers conduct AAI through ASTM Phase I Environmental Site Assessments.

Defenses for Borrowers & Buyers:

The Innocent Purchaser Defense

- An owner is not liable if both (i) the contamination was created before acquisition, and (ii) the owner exercises due care in dealing with the contamination and preventing foreseeable incidents.
- To preserve this defense, the buyer also must not **know or have reason to know** the property is contaminated at the time they acquire it.
- A buyer does not **know or have reason to know** the property is contaminated if the buyer conducted **all appropriate inquiries** into the site’s environmental history before purchase and found no environmental conditions.
- A buyer conducts **all appropriate inquiries** by conducting an **ASTM Phase I Environmental Site Assessment** during due diligence.

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Defenses for neighbors and those who purchase property with the purpose of cleaning up the property.

Defenses for Borrowers & Buyers: Contiguous Property Owner and Bona Fide Prospective Purchaser Defenses

- The **Contiguous Property Owner** Defense exempts owners whose property is contaminated solely by neighboring properties.
- The **Bona Fide Prospective Purchaser** Defense exempts purchasers who buy with knowledge of contamination and the intention of conducting cleanup.

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Lenders have a special federal liability shield and will not be liable as owners unless they “participate in management.”

A Defense for Lenders: The Security Interest Exemption

- CERCLA provides that an “owner or operator” does not include “*a person who, without participating in management of a vessel or facility, holds indicia of ownership primarily to protect its security interest in the vessel or facility.*”
- A great deal of critical litigation has focused on whether lenders holding security interests have “participated in management” of borrowers’ facilities.
- Does a lender forfeit the exemption by involving itself in its borrower’s financial decisions? By foreclosing on the facility? By failing to influence the borrower’s environmental practices even when it could have?

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IT'S ALL FUN AND GAMES



UNTIL THE REPO MAN SHOWS UP

In *Fleet Factors*, the lender was held to have “participated in management” due to its bare ability to influence the borrower’s environmental decisions.

A Scare for Lenders: The 1990 *Fleet Factors* Case (Superseded by Statute)

- In *Fleet Factors*, A lender held security interests in various assets of a cloth-printing facility.
- When the facility started to struggle, the lender, Fleet, stepped in to protect its interests by involving itself heavily in its borrower’s operations and decision-making.
- When the facility went bankrupt, Fleet took foreclosure actions to dispose of its collateral, leaving hazardous substances on the property.
- The 11th Circuit held that Fleet did not qualify for the secured creditor exemption if its “participation in management” of the facility included “*financial management . . . to a degree indicating a capacity to influence the corporation’s treatment of hazardous wastes.*”

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Congress amended CERCLA so that lenders can do more to protect their investments without incurring environmental liability, including by overseeing borrowers' operations to a certain extent.

Congress Steps In to Protect Lenders

- Dissatisfied with the holding in *Fleet Factors*, Congress revised CERCLA in 1996 to expand protections for lenders.
- Congress provided a series of **safe harbors** for lenders, including that Lenders don't "participate in management" just by having the ability to influence operations.
- "Participation in management" more clearly defined as:
 - While borrower is still in possession, exercising decisionmaking control over environmental compliance and hazardous substances.
 - Exercising control comparable to a facility manager (i) over day-to-day decisionmaking related to environmental compliance or (ii) over all operational functions, and not just financial or administrative functions.

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Some things Congress says a lender can do to protect its investment that don't in and of themselves expose it to environmental liability.

Congress Steps In to Provide **Safe Harbors** for Lenders

- Congress provided a list of things lenders can do without participating in management:
 - Requiring borrowers to comply with environmental laws;
 - Monitoring and enforcing terms of an extension of credit;
 - Inspecting the facility;
 - Requiring cleanup;
 - Providing advice or counseling to prevent collateral's diminution in value;
 - Restructuring or renegotiating terms of an extension of credit;
 - Conducting a response action.

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A lender may foreclose on property and dispose of that property in certain conventional ways without being exposed to environmental liability as result.

Congress Steps In to Facilitate Foreclosure

- Congress also provided protection for lenders who foreclose on contaminated property.
- If the foreclosing lender did not participate in management prior to foreclosure, a foreclosing lender is not liable as an owner or operator even though:
 - The lender sells, re-leases, or liquidates the facility, maintains business activities, winds up operations, or undertakes a response action, or takes any other measure to preserve, protect, or prepare the facility prior to sale or disposition
 - So long as the foreclosing lender seeks to divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

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**KEEP
CALM
&
FOLLOW
THE RULES**

The Big Picture

- Lenders may take conventional actions to protect their investments by becoming involved in a borrower’s operations, so long as they do not exercise too much control.
- Lenders may take conventional actions related to foreclosure and disposition of collateral, including continuing to operate the borrower’s business, so long as they seek to divest themselves of the facility in a commercially reasonable timeframe.
- The 1996 CERCLA amendments provide stronger protections for lenders by creating “brighter lines.” So long as lenders stay on the right side of the lines, they will not acquire CERCLA cleanup liability for their borrowers’ actions.
- Borrowers with potential environmental risks can comfort wary lenders.

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Fewer Express Protections for Lenders Under Florida Law

- Florida law provides for a similar strict cleanup liability regime to the one established by CERCLA. Fla. Stat. § 403.727(4)(a); Fla. Stat. § 376.308.
- In Florida, an “owner” is “one who is vested with ownership, dominion or legal or rightful title to any building, site, structure or equipment used to dispose of, store or treat hazardous waste.” *State v. Delgrasso*, 653 So.2d 459, 463 (Fla. 2d Dist. Ct. App. 1995).
- Florida has a security interest exemption only for sites contaminated by petroleum. Fla. Stat. § 376.308(3)(b).

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Other Protections: The Role of Environmental Insurance

- A variety of environmental insurance products are available to mitigate environmental risks, including RELP policies.

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