EnviroINSIGHT

A Publication of Environmental Risk Innovations, LLC
Volume 2, No. 2

In This Issue

Environmental Risk Innovations, LLC
8604 Cliff Cameron Drive
Suite 152
Charlotte, North Carolina 28269

Phone: 866.913.9738
Fax: 704.593.1650
Web: www.eRiskInnovations.com
email: eri@eRiskInnovations.com

Environmental Risk Management Solutions

Environmental Policy Q&A

Should Our Bank Require a Reliance Letter for the Phase 1?

This is a common question for lenders who rely on environmental assessments originally prepared for borrowers or other third parties. The answer seems obvious: obtaining reliance letters provides direct legal recourse against a consultant if the consultant missed an environmental issue through negligence. Shouldn't a bank therefore require reliance letters for environmental assessments that are not prepared for the bank?

The requirement for reliance letters is not universal. Some banks make it a requirement for funding a loan while others do not even request the letters unless required by the SBA or other participants. While some lenders say they prefer obtaining a strong reliance letter, many do not make reliance letters part of their loan policy.

Banks that do not require reliance letters often do so after a preliminary benefit/cost analysis. A strong reliance letter from an insured consultant is always preferable. However, obtaining reliance letters with reasonable limitations can consume significant staff time and expense.

Consultants will often charge a fee for a reliance letter and include significant liability limitations. While smaller firms may be quicker to remove restrictive terms, larger firms will often be more conservative. In some cases, consultants may refuse to provide reliance, especially if the assessment report is dated.

Some banks have sought to address the issue of negotiating reliance letters by having counsel draft a standard reliance agreement which lenders can send to consultants for their signature. In practice, some firms will refuse to sign such agreements while others will include edits. While a standard reliance agreement can reduce some of the "back and forth" with consultants, they can still require senior staff time to negotiate and provide approval.

Reliance letters should not be confused with a guarantee of a property's condition. Even if a consultant performs a Phase I that exceeds the ASTM standard, environmental conditions may exist that were not identified by the consultant. In adddition, some environmental attorneys note that successfully suing a consultant can prove difficult for a bank. Among other challenges, a suit will often be brought long after the report was issued, and it may be difficult to prove that a consultant was negligent at the time the report was prepared.

How should a bank's environmental policy address reliance? Although FDIC guidelines on environmental policy are somewhat vague, banks are required to follow any policy they implement. Unless the bank is willing to reject an environmental assessment without reliance, a bank should consider the practical implications of a blanket reliance letter requirement before making a requirement part of the bank's loan policy.

For more information or questions on environmental policy development, please contact us at 866.913.9738. ■

Gas Station Loans

New Small Business Administration Requirements

The potential environmental risks associated with Gas Stations can be considerable. In order to identify and mitigate the risks, the U.S. Small Business Administration (SBA) has developed guidelines that loan applicants must follow during the application process.

To begin, the SBA requires that the Environmental Investigation Report for a Gas Station loan include a Phase I Environmental Site Assessment, a records search and analysis, and equipment testing. The Phase I report must be prepared by an Environmental Professional who holds a Professional Engineer or Professional Geologist license and has a minimum of three (3) years of relevant experience. Analysis of all relevant environmental records concerning the subject and adjoining properties must be included in the Environmental Investigation Report. Equipment testing must include tightness tests for all underground storage tanks and product lines, functioning tests of any vapor recovery and monitoring systems, and hydrostatic testing of all containment devices. The testing must occur within the 12-month period prior to submission of the Environmental Investigation Report and must be conducted by an independent contractor using a method that is accepted by the regulatory agency having jurisdiction.

If it is determined that the property is not contaminated, the lender must forward the Environmental Investigation Report to the SBA for their concurrence (except on PLP, SBA Express, Pilot Loan Program and PCLP Loans).

If the property is contaminated and the lender does not intend to decline the loan, an SBA Indemnification Agreement signed by the seller is required. A wavier from the SBA Environmental Committee can be sought under circumstances where an Indemnification Agreement is not practical. In addition to the Indemnification Agreement, the Environmental Policies and Procedures section of the SOP, "Approval and Disbursement of Loans when there is Contamination or Remediation" must be followed. The information submitted under this requirement includes documentation regarding the nature and extent of contamination; the method, status, costs and time-frame for remediating the site, Responsible Party designation and financial responsibility for the contamination; collateral value variables; and a determination of possible mitigating factors.

"SBA's Requirements Pertaining to Gas Station Loans" are found in Appendix 5 of SOP 50 10 5 (B), which has an effective date of October 1, 2009. For additional assistance addressing the SBA's new requirements, please contact us at 866.913.9738. ▪

Join us in Alexandria, VA for the 2010
Environmental Bankers Association Conference
Register @ www.EnviroBank.org

Looks Can Be Deceiving

Difficulties in Property Use Designation

Determining the property use is an important first step in determining the level of environmental due diligence necessary for a site. While most lenders know how the proposed collateral is being used, communicating this information accurately to the Risk Manager is crucial.

Terms such as "office, retail, warehouse, and industrial" are used as building classifications. However, it is possible that a building classified as a "warehouse" may only store non-hazardous materials, but it is also possible that manufacturing occurs within that same building. Indicating that a property is used as "office space" may be technically correct, but if there are any other operations occurring onsite, the proper level of environmental due diligence may not be fulfilled. Furthermore, a property that has the same construction throughout could have multiple tenants conducting various operations. In addition, properties classified as "retail strips" often contain onsite dry cleaners, which are considered High Risk business operations.

When communicating the property use and ultimately selecting a level of due diligence required, obtain as much detail as possible regarding site operations and communicate that information to the Risk Manager. Keep in mind that looks can be deceiving. ▪

Visit
Us
Online!

www.eRiskInnovations.com

Underground Storage Tanks

A Concern Just Beneath the Surface

Commerical loan officers have become increasingly familiar with the environmental complications associated with underground storage tanks (USTs).

USTs have been used to store petroleum products since the days of the first gas stations. The USTs in use prior to 1980 were typically made of steel, which corroded over time and usually released their contents to the subsurface. The overwhelming majority of these tanks were never monitored or regulated. As a result, these tanks were left in place long after their use had ended and/or they had leaked their contents without anyone ever knowing.

Today when an historic UST is encountered, state regulatory agencies require they be notified of the tank's presence and the tank be closed by removal. In some situations a tank may be closed in place. Closure requirements usually include sampling of surrounding soil and groundwater if it is encountered.

Since 1980, UST construction standards and technology have helped to minimize releases to the environment. Many USTs are now made of corrosion proof fiberglass, reinforced plastic, or protective coated steel.

With the introduction of "double-walled tanks," operators can monitor the gap between the inner and outer wall of the UST for vapor, groundwater and product. Computerized monitoring systems connected to the tanks and piping are utilized to continuously monitor and analyze for leaks. Automatic shutdown devices are employed to limit a release in the event of UST system failure.

A substantial amount of the USTs across the country have been registered with local fire departments and/or state regulatory agencies. This registry of USTs is routinely referenced when completing environmental due diligence. Most registered tanks are used for commercial or industrial purposes and contain petroleum products (gasoline, diesel, etc.) or other hazardous materials (solvents, adhesives, etc.). There are also many active USTs which are not registered. These tanks are typically small (less than 1,100 gallons) and/or used for non-commercial purposes (farm or residential). Many heating oil tanks are not registered. With the millions of USTs that are currently registered throughout the United States, the total number of tanks would likely be doubled if all the residential heating oil tanks, non-commercial USTs, and tanks smaller than 1,100-gallons were registered.

If these new tanks are registered, monitored, and made of innovative materials, why should due diligence have to be completed? Despite all the modern technology, leaks and spills can occur within the margin of error of these systems that, over a period of time, can cause significant environmental contamination to the soil and groundwater. Unfortunately, human error and negligence can also create or further exacerbate a problem resulting in release to the environment. Prudent lending practices and proper due diligence can minimize the potential of accepting collateral containing USTs with dated construction standards and/or negligent UST owners and operators.

To ensure that your environmental policy includes the due diligence of underground storage tanks, contact us at 866.913.9738. ▪

Property Owners Push Forward with Lawsuit

Ohio Homeowners Lose Benzene Case Against Chevron

The 10th Circuit District Court ruled that property owners failed to prove that contamination originating from a Chevron Oil Refinery has caused compensable damages to their impacted properties. The Judge's opinion reasoned that the claims were improperly presented and concluded "that the record fails to show that the hydrocarbon plume caused any damage to plaintiffs' property or interfered with their property rights or with the use and enjoyment of their properties" since "plaintiffs do not use the groundwater for any purpose and plaintiffs have not indicated that the plume has caused them to abandon any particularized and non-speculative plans."

Although the ruling was a setback for the Plaintiffs, they intend to appeal to the U.S. Court of Appeals for the Sixth Circuit to revisit the Judge's order granting the oil refinery's motion to exclude an expert's testimony and her denial of a motion seeking discovery-related sanctions against the petroleum giant. Since the Plaintiff's witness could not claim to be a soil vapor expert, his testimony stating, among other things, that in his opinion the hydrocarbon plume was the only source for the positive hydrocarbon soil vapors recorded in the town, was not admissible.

The plaintiffs also intend to challenge the Judge's order denying the plaintiffs' motion for a finding of spoliation and for sanctions. The motion stemmed from the plaintiffs' contention that, during discovery, the defendants claimed that they could not locate site assessments from 1994 that contained groundwater modeling data.

It will be interesting to monitor the Court's opinion if Plaintiffs are able to obtain the site assessment and groundwater modeling data from Chevron. The EnviroInsight will continue to monitor and report on this case in future editions. ▪

Environmental Risk Innovations, LLC
8604 Cliff Cameron Drive
Suite 152
Charlotte, North Carolina 28269

ABOUT US

ERI is the nation's premier environmental risk management consulting firm, specializing in risk management services for commercial lenders. ERI's environmental risk professionals all have extensive experience in the area of commercial lending. Our expertise in the evaluation of environmental risk uniquely qualifies us to assist lenders in the development of environmental policies, custom tailored to their risk tolerance and standard commercial lending practices.

ERI understands that due diligence and risk mitigation is just one small, but important element of real estate transactions. ERI is familiar with the critical deadlines that loan officers face and the challenge to close a transaction in a timely manner. Our professionals are experienced in supplying high quality, rapid response due diligence to meet these deadlines.

ERI prides itself on customer service and flexibility to match each customer's specific needs. Outsourcing environmental risk management services allows our clients to focus on their core competencies and primary business objectives surrounding the successful execution of commercial loans.

Contact Us Today! 866.913.9738

NEW & NOTEWORTHY

ERI's parent company (The EI Group, Inc.) recently became a member of the U.S. Green Building Council (USGBC)! As a member of the USGBC, we are committed to supporting sustainable practices that are environmentally responsible and profitable as we all strive to live and work in healthier environments. This edition of the **EnviroInsight** was printed on certified sustainable paper, allowing us to reduce our environmental output by:

- **One quarter ton of wood**: Two trees that supply enough oxygen annually for one adult human being!

- **350 gallons of water**: Enough to take 40 average showers!

- Enough **BTUs** of energy to power the average American household for one full week!

- **49 pounds of solid waste**:
Enough to fill three 16-gallon garbage cans!

Visit us on the Web!

www.eRiskInnovations.com