

PREPARING BROWNFIELDS FOR FINANCING

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PREPARING BROWNFIELDS FOR FINANCING

I. Quantifying the Risks

- Due Diligence

II. Minimizing the Risks

- CERCLA Defenses
- State Voluntary Cleanup Programs

III. Shifting the Risk

- Contract Language
- Insurance

QUANTIFY THE RISK: DUE DILIGENCE ISSUES

- A. Borrower's accurate assessment of risks and costs is lender's main concern
- B. Conduct adequate diligence
 - 1. Scope of Contamination
 - 2. Presence of Sensitive Receptors
 - 3. Scope of Remediation
 - 4. Timing of Remediation and Regulatory Approvals
- C. Lender's Confidence in Borrower's Environmental Experts is Key

MINIMIZE THE RISK: KEY DEFENSES

- A. Defenses to CERCLA Cleanup Liability:
 - Secured Creditor Exemption
 - Third Party Defense
 - Innocent Landowner Defense
 - Bona Fide Prospective Purchaser Exemption

- B. Lender Liability Bars Under State Law, e.g., Col. Rev. Stat. § 13-20-703 (2).

MINIMIZE THE RISK: STATE VOLUNTARY CLEANUP PROGRAMS

- A. State Voluntary Cleanup Laws help define the limits of Borrower's Cleanup Liability
- B. State Voluntary Cleanups can trigger EPA Enforcement Bar Under CERCLA

SHIFT THE RISK: CONTRACT LANGUAGE

Purchase Contract May Shift Liability to Seller for

- A. Known, undisclosed conditions
- B. Unknown conditions
- C. A portion of cleanup costs

INSURANCE

- A. Use to Fill Gaps, Particularly for Borrower's Tort Liability
- B. Standard Limitations
 - Term
 - Deductible
 - Exclusions
 - Additional Insured
- C. Use a Knowledgeable Broker and Involve Counsel

CONCLUSIONS

- A. Quantify, Minimize and Shift Risk
- B. Involve Experienced Environmental Team
- C. Involve Lender Early in the Process

MORE ON BROWNFIELDS FINANCING...

- BANK FINANCING
- GRANTS AND PUBLIC FINANCING
- ROLE OF INSURANCE