

§342-B. Liability of fiduciaries and lenders

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. The following must be considered in determining whether a secured lender is "acting diligently to sell or otherwise divest" or as "evidence of diligent efforts to sell or divest:"

- (1) Use of the property during the period;
- (2) Market conditions;
- (3) Marketability of the site; or
- (4) Legal constraints on the sale or divestment.

If the lender holds the property for longer than the 5-year period but meets the conditions in subsection 4, paragraph C, subparagraph (4) and the requirements enumerated in this paragraph, then liability is not imposed on the lender. [PL 1993, c. 355, §4 (NEW).]

B. "Assets of the estate or trust" means assets of the estate or trust of which the site is a part; assets that subsequent to knowledge of the release are placed by the fiduciary or the grantor in an estate or trust over which the fiduciary has control if the grantor is or was an owner or operator of the release site at the time of the transfer; and assets that are transferred by the fiduciary upon or subsequent to knowledge of the release for less than full and fair consideration, to the extent of the amount that the fair market value exceeded the consideration received by the estate or trust. [PL 1993, c. 355, §4 (NEW).]

C. "Participates in management" means, while the borrower is in possession of the facility, executing decision-making control over the borrower's management of oil or hazardous materials or exercising control over substantially all of the operational aspects of the borrower's enterprise, but does not include the following:

- (1) Conducting or requiring site assessments of the property;
- (2) Engaging in periodic or regular monitoring of the business;
- (3) Financing conditioned on compliance with environmental laws;
- (4) Providing general business or financial advice, excluding management of hazardous materials and oil;
- (5) Providing general advice with respect to site management;
- (6) Policing the security interest or loan;
- (7) Engaging in work-out activities prior to foreclosure; or
- (8) Participating in foreclosure proceedings. [PL 1993, c. 355, §4 (NEW).]

[PL 1993, c. 355, §4 (NEW).]

2. Exemption from liability. Subject to the provisions of this section, a person may not be deemed a responsible party and that person is not subject to department orders or other enforcement proceedings, liable or otherwise responsible under sections 568; 570; 1304, subsection 12; 1318-A; 1319-J; 1361 to 1367; and 1371 for discharges, releases or threats of releases of a hazardous substance, hazardous waste, hazardous matter, special waste, pollutant or contaminant or a petroleum product or by-product if that person is:

A. A fiduciary, as defined in section 1362, subsection 1-D, but that exclusion does not apply to an estate or trust of which the site is a part; or [PL 1993, c. 355, §4 (NEW).]

B. A lender, as defined in section 1362, subsection 1-B, who, without participating in management of a site, holds indicia of ownership primarily to protect a security interest in the site. [PL 1993, c. 355, §4 (NEW).]

[PL 1993, c. 355, §4 (NEW).]

3. Exclusion from exemption for fiduciaries. The exemption from liability provided by subsection 2 does not apply if:

A. The fiduciary causes, contributes to or exacerbates the discharge, release or threat of release; or [PL 1993, c. 355, §4 (NEW).]

B. After acquiring title to or commencing control or management of the site, the fiduciary does not:

(1) Notify the department within a reasonable time after obtaining knowledge of a release or threat of release;

(2) Provide reasonable access to the site to the department and its authorized representatives so that necessary response actions may be conducted; and

(3) Undertake reasonable steps to control access and prevent imminent threats to public health and the environment. [PL 1993, c. 355, §4 (NEW).]

[PL 1993, c. 355, §4 (NEW).]

4. Exclusion from exemption for lenders. The exemption from liability for lenders provided in subsection 2 does not apply if:

A. The secured lender causes, contributes to or exacerbates the discharge, release or threat of release; [PL 1993, c. 355, §4 (NEW).]

B. The secured lender participates in management of the site prior to acquiring ownership of the site; or [PL 1993, c. 355, §4 (NEW).]

C. After acquiring ownership of the site and upon obtaining knowledge of a release or threat of release, the secured lender does not:

(1) Notify the department within a reasonable time after obtaining knowledge of a release or threat of release;

(2) Provide reasonable access to the department and its authorized representatives so that necessary response actions may be conducted;

(3) Undertake reasonable steps to control access and prevent imminent threats to public health and the environment; and

(4) Act diligently to sell or otherwise divest the property within a limited time period of up to 5 years from the earlier of the lender's possession or ownership. There is a rebuttable presumption that the 2nd lender is acting diligently to sell or otherwise divest the property during the first 18 months after taking possession. The secured lender must demonstrate by a preponderance of the evidence diligent efforts to sell or divest the property during the next 42 months. [PL 1993, c. 355, §4 (NEW).]

When a lender has ownership or possession of a site pursuant to a security interest in the site, the term "owner" or "operator" means a person who owned or operated the site immediately prior to that secured lender obtaining ownership or possession of the site.

[PL 1993, c. 355, §4 (NEW).]

4-A. Exemption from liability for discharges during approved site investigation work. Notwithstanding subsection 3, paragraph A and subsection 4, paragraph A, a fiduciary or lender is exempt from liability under subsection 2 if the fiduciary or lender causes, contributes to or exacerbates

a discharge, release or threat of release while undertaking investigations in accordance with a voluntary response action plan approved by the commissioner under section 343-E.

[PL 2011, c. 206, §4 (NEW).]

5. Relationship to ground water fund claims. The exemption provided in subsection 2, paragraph B from liability under section 570 does not exempt lenders who apply to the Maine Ground and Surface Waters Clean-up and Response Fund for coverage pursuant to section 568-A from the obligation to pay the full amount of deductible determined by the commissioner.

[PL 2015, c. 319, §8 (AMD).]

6. Exempt person as party. Notwithstanding the exemption from liability provided by this section, a fiduciary may be named as a party in an administrative enforcement proceeding or civil action brought by the State pursuant to this Title for purposes of requiring the submission of information or documents relating to an uncontrolled hazardous substance site, for purposes of proceeding against the assets of the estate or trust for reimbursement, fines or penalties or for purposes of compelling the expenditure of assets of the estate or trust by the fiduciary to abate, clean up or mitigate threats or hazards posed by a discharge or release, or to comply with state environmental laws and regulations or the terms of a department order of enforcement proceeding. This subsection does not require the fiduciary to expend its own funds or to make the fiduciary personally liable for compliance pursuant to an order or enforcement proceeding except as provided in section 568, subsection 4, paragraph B or section 1365, subsection 6.

[RR 1993, c. 1, §111 (COR).]

SECTION HISTORY

RR 1993, c. 1, §111 (COR). PL 1993, c. 355, §4 (NEW). PL 2011, c. 206, §4 (AMD). PL 2015, c. 319, §8 (AMD).

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