

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT (EXCERPT)
Act 451 of 1994

324.20101a Participation in management of facility by lender; “workout” defined.

Sec. 20101a.

(1) For purposes of this part, a lender holding a security interest in a facility participates in the management of the facility if that lender engages in acts of facility management that constitute actual participation in the management or operational affairs of a facility and that exceed the mere capacity to influence, or ability to influence, or the unexercised right to control facility operations. A lender holding a security interest is participating in the management of a facility, while the borrower is still in possession of the facility encumbered by the security interest, if the lender holding a security interest does any of the following:

(a) Exercises decision making control over the borrower's environmental compliance.

(b) Undertakes responsibility for the borrower's hazardous substance handling or disposal practices.

(c) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decision making of the enterprise with respect to either or both of the following:

(i) Environmental compliance.

(ii) All, or substantially all, of the operational aspects of the enterprise other than environmental compliance. As used in this subparagraph, "operational aspects of the enterprise" includes functions such as that of facility or plant manager, operations manager, chief operating officer, or chief executive officer. Operational aspects of the enterprise do not include the financial or administrative aspects of the enterprise such as that of credit manager, accounts payable or receivable manager, personnel manager, controller, chief financial officer, or similar functions.

(2) For purposes of this part, the following do not constitute participation in the management of a facility by a lender holding a security interest in the facility:

(a) The mere capacity to influence, or ability to influence, or the unexercised right to control facility operations.

(b) An act or omission prior to the time that indicia of ownership are held primarily to protect a security interest.

(c) Undertaking or requiring an environmental inspection of the facility in which indicia of ownership are to be held, or requiring a prospective borrower to undertake response activities at a facility or to comply or come into compliance, whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest, with any applicable law, rule, or regulation.

(d) Actions that are consistent with holding ownership indicia primarily to protect a security interest. The authority of the lender holding a security interest to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations, or promises from the borrower. Loan policing and workout activities cover and include all activities up to foreclosure and its equivalents.

(e) Engaging in policing activities prior to foreclosure if the lender holding a security interest does not by such actions participate in the management of the facility as described in subsection (1)(a) to (c). Permissible actions include, but are not limited to, requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental and other laws, rules, and regulations during the term of the security interest; and securing or exercising authority to monitor or inspect the facility in which indicia of ownership are maintained, including on-site inspections, or the borrower's business or financial condition, during the term of the security interest. A lender holding a security interest that engages in workout activities prior to foreclosure and its equivalents will remain within the exemption if the lender holding a security interest does not by such action participate in the management of the facility.

(3) As used in this section, "workout" refers to those actions by which a lender holding a security interest, at any time prior to foreclosure or its equivalent, seeks to prevent, cure, or mitigate a default by the borrower or obligor or to preserve, or prevent the diminution of, the value of the security. Workout activities include, but are not limited to, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; and providing specific or general financial or other advice, suggestions, counseling, or guidance.

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