UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE

JUNE 30, 1997

MEMORANDUM

SUBJECT: Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities

FROM: Barry Breen, Director
Office of Site Remediation Enforcement

TO: Addressees listed below

This memorandum transmits the policy of the U.S. Environmental Protection Agency (EPA) for interpreting the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that address (1) lenders and (2) government entities that acquire property involuntarily. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (the "Asset Conservation Act") amends the secured creditor exemptions under CERCLA and Subtitle I of the Resource Conservation and Recovery Act (RCRA). The Asset Conservation Act also validates the portion of EPA's "CERCLA Lender Liability Rule" that addresses involuntary acquisitions by government entities.

The attached policy clarifies the circumstances in which EPA intends to apply as guidance the provisions of the CERCLA Lender Liability Rule and its preamble in interpreting CERCLA's amended secured creditor exemption. The document also reminds its readers of the effects of the portion of the CERCLA Lender Liability Rule and the sections of the preamble that address involuntary acquisitions by government entities.

If you have any questions about this policy, please contact Laura Bulatao at (202) 564-6028.

Attachment

Addressees:

Regional Counsels, Regions I - X, EPA
Director, Office of Site Remediation and Restoration, Region I, EPA
Director, Emergency and Remedial Response Division, Region II, EPA
Director, Hazardous Waste Management Division, Regions III and IX, EPA
Director, Waste Management Division, Region IV, EPA
Director, Superfund Division, Regions V, VI, and VII, EPA
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII, EPA
Director, Environmental Cleanup Office, Region X, EPA
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Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities

I. Introduction

This document sets forth the policy of the U.S. Environmental Protection Agency (EPA) for interpreting the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that address (1) lenders and (2) government entities that acquire property involuntarily. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act (the "Asset Conservation Act" or "Act"), 110 Stat. 3009-462 (1996), amends CERCLA's secured creditor exemption. Using language very similar to the language of EPA's "CERCLA Lender Liability Rule" (or "Rule"), the amendments define key terms and list activities that a lender may undertake without forfeiting the exemption. *See* "Final Rule on Lender Liability Under CERCLA," 57 Fed. Reg. 18344 (April 29, 1992).[1] (The portion of the Rule addressing lenders remains vacated by a court, as described in section II below.) In addition to amending CERCLA's secured creditor exemption, the Asset Conservation Act validates the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities. It also amends Section 9003(h)(9) of the Resource Conservation and Recovery Act (RCRA), which provides a secured creditor exemption pertaining to underground storage tanks (USTs).

Prepared in consultation with the U.S. Department of Justice (DOJ), this policy clarifies the circumstances in which EPA intends to apply as guidance the provisions of the CERCLA Lender Liability Rule and its preamble in interpreting CERCLA's amended secured creditor exemption. This document also reminds its readers of the effects of the portion of the CERCLA Lender Liability Rule and the sections of the preamble that address involuntary acquisitions by government entities.

II. Background

As enacted in 1980, Section 101(20)(A) of CERCLA exempted from the definition of "owner or operator" "a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." This language left lenders and other secured creditors uncertain as to which types of actions -- such as monitoring vessel or facility operations, requiring compliance with applicable

[1] Except to the extent that the CERCLA lender liability provisions apply to Subtitle I of the Resource Conservation and Recovery Act (RCRA) pursuant to the amended Section 9003(h)(9) of RCRA (see the end of section II below), this policy does not address lender liability under any statutory or regulatory authority, rule, regulation, policy, or guidance, other than CERCLA. Specifically, this policy does not modify the "UST Lender Liability Rule" issued by EPA on September 7, 1995 (40 CFR 280.200-280.230).

laws, and refinancing or undertaking other types of loan workouts -- these parties might take to protect their security interests without forfeiting CERCLA's secured creditor exemption. Courts did not always agree on when a lender's actions were "primarily to protect a security interest," and what degree of "participation in the management" of the property would forfeit the lender's eligibility for the exemption. This uncertainty was heightened by dicta in the Fleet Factors opinion, where the circuit court suggested that a lender participating in the management of a vessel or facility "to a degree indicating a capacity to influence the corporation's treatment of hazardous waste" could be considered liable under CERCLA.[2] The lack of legislative history on and inconsistent court treatment of the CERCLA § 101(20)(A) secured creditor exemption prompted EPA to address potential lender liability for cleanup costs at CERCLA sites in the CERCLA Lender Liability Rule, which was promulgated in April 1992.

Regarding the exemption for government entities that acquire property involuntarily and the "third-party" defense potentially available to those entities, neither the legislative history of CERCLA §§ 101(20)(D) and 101(35)(A) nor the case law provided sufficient explanation of when a property acquisition or transfer is considered involuntary. Thus, in the Rule, EPA also clarified the language of these sections by providing examples of involuntary acquisitions by government entities.

However, in Kelley v. EPA, the U.S. Court of Appeals for the District of Columbia Circuit vacated the Rule on the ground that EPA lacked authority to issue the Rule as a binding regulation.[3] Nevertheless, the Kelley decision did not preclude EPA and DOJ from following the provisions of the Rule as enforcement policy.

Consequently, in 1995, EPA and DOJ issued their *Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily* ("1995 Enforcement Policy"). That document explained that as an enforcement policy, EPA and DOJ intended to apply as guidance the provisions of the CERCLA Lender Liability Rule and the accompanying preamble, thereby endorsing the interpretations and rationales announced in the Rule and preamble.

Partly in response to lenders' concerns that the 1995 Enforcement Policy did not apply to contribution actions brought by third parties attempting to recover their CERCLA response costs from lenders, Congress enacted the Asset Conservation Act. Section 2502 of the Act amends CERCLA's secured creditor exemption. Using language very similar to the language of the CERCLA Lender Liability Rule, the new CERCLA § 101(20)(E)-(G) elaborates on the original

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[2] United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

[3] 15 F.3d 1100 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied*, American Bankers Ass'n v. Kelley, 115 S. Ct. 900 (1995).

exemption by defining key terms and listing activities that a lender may undertake without forfeiting the exemption. Additionally, Section 2504 of the Act validates the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities.

The Asset Conservation Act also addresses lender liability under Section 9003(h)(9) of RCRA. Section 2503 of the Act amends Section 9003(h)(9) of RCRA to protect holders of security interests both as owners and operators of USTs. It also amends Section 9003(h)(9) of RCRA to provide the following: the CERCLA lender provisions apply in determining a person's liability as an owner or operator of an UST; however, where those provisions are inconsistent with the "UST Lender Liability Rule" issued by EPA on September 7, 1995 (40 CFR 280.200-280.230), that rule will prevail.

As a result of the enactment of the Asset Conservation Act, EPA and DOJ have withdrawn their 1995 Enforcement Policy, and EPA is now issuing the policy statement below to provide guidance on interpreting CERCLA's lender and involuntary acquisition provisions.

III. Policy Statement

A. Lenders and Other Secured Creditors

In light of the substantial similarities between CERCLA's amended secured creditor exemption and the CERCLA Lender Liability Rule, where the Rule and its preamble provide additional clarification of the same or similar terms used in the secured creditor exemption, EPA intends to treat those portions of the Rule and preamble as guidance in interpreting the exemption. For example, when interpreting the term "primarily to protect a security interest," EPA may consult the portions of the CERCLA Lender Liability Rule that discuss that term. As another example, when determining whether a lender is seeking to divest itself of a foreclosed upon facility "at the earliest practicable, commercially reasonable time, on commercially reasonable terms," EPA may consult the portions of the Rule that describe how a lender may establish that it is undertaking to divest itself of the property "in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate" and that it is continuing to hold that property "primarily to protect a security interest."

B. Involuntary Acquisitions by Government Entities

As noted above, Section 2504 of the Asset Conservation Act validated the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities. 40 CFR 300.1105 is therefore legally applicable to the interpretation of CERCLA §§ 101(20)(D) and 101(35)(A), the provisions that address involuntary acquisitions by government entities. Similar to the preamble to any valid regulation, the preamble to the CERCLA Lender Liability Rule will be looked to as authoritative guidance on the meaning of the portion of the Rule

addressing involuntary acquisitions. For example, when interpreting the meaning of "involuntary acquisition or transfer," EPA will consult the following definition contained in the preamble:

> [A]ny acquisition or transfer in which the government's interest in, and ultimate ownership of, a specific asset exists only because the conduct of a non-governmental party -- as in the case of abandonment or escheat -- gives rise to a statutory or common law right to property on behalf of the government.

(57 Fed. Reg. 18372 (1992)).

IV. Use of This Policy

This document is intended solely as guidance for employees of the U.S. Environmental Protection Agency. It is not a rule and does not create any legal obligations. Whether and how EPA applies this policy in any given case will depend on the facts of the case.

For further information about this policy, please contact Laura Bulatao in EPA's Office of Site Remediation Enforcement at (202) 564-6028.