

Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must provide copies of its filings to all other parties. If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) (see appendix 2).

The date for filing of timely motions to intervene in this proceeding has passed. Therefore, parties now seeking to file late interventions must show good cause, as required by Section 385.214(b)(3), why this time limitation should be waived. Environmental issues have been viewed as good cause for late intervention. You do not need intervenor status to have your scoping comments considered.

Additional information about the proposed project is available from Mr. Jeff Shenot, EA Project Manager, at (202) 219-0295.

Lois D. Cashell,  
*Secretary.*

[FR Doc. 95-30061 Filed 12-8-95; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. CP96-91-000]**

**Stingray Pipeline Company; Notice of Request Under Blanket Authorization**

December 5, 1995.

Take notice that on December 1, 1995, Stingray Pipeline Company (Stingray), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP96-91-000 a request pursuant to Sections 157.205 and 157.208(b) of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.208) for authorization to own and operate, by means of construction and acquisition, various facilities located offshore Louisiana, in order to give Stingray access to additional gas supplies and to expand operational flexibility, under Stingray's blanket certificate issued in Docket No. CP91-1505-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Stingray proposes to: (1) Acquire, own and operate dual 8-inch meter facilities and approximately 0.13 mile of 20-inch lateral that will be constructed by Midcon Exploration Company and Flex Trend Development Company (the Producers) on the construction platform being constructed by the Producers in Garden Banks Block 72, offshore Louisiana; (2) construct, own and operate 15.49 miles of 20-inch lateral

from the Garden Banks 72 production platform to Stingray's existing facilities in Vermilion Block 362, offshore Louisiana; (3) construct, own and operate a 20-inch subsea tap valve on the proposed 20-inch lateral in Vermilion Block 408 for future interconnects; and (4) construct, own and operate a 12-inch subsea tap valve on the proposed 20-inch lateral in Vermilion Block 385 for a future interconnect.

It is stated that construction of the 20-inch lateral and related facilities will allow Stingray to receive and transport up to 75 Mmcf of natural gas per day produced by the Producers at Garden Banks 72. It is asserted that the taps proposed in (3) and (4) above would allow Stingray additional opportunities for operational flexibility in acquiring volumes of gas that may become available in the future from other production sources in the Vermilion and Garden Banks areas. It is estimated that the cost of acquisition and construction would be approximately \$8.927 million.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,  
*Secretary.*

[FR Doc. 95-30013 Filed 12-8-95; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. ES96-10-001]**

**UtiliCorp United Inc.; Notice of Amended Application**

December 5, 1995.

Take notice that on December 1, 1995, UtiliCorp United Inc. (UtiliCorp) filed an amendment to its November 3, 1995, application in Docket No. ES96-10-000, under § 204 of the Federal Power Act. In the original filing, UtiliCorp seeks authorization to issue and sell up to and including \$7.3 million of Pollution Control Bonds (PCBs) which would be

secured by a letter of credit. In its amendment, UtiliCorp indicates that the original application inadvertently failed to specify a request for an authorization that would cover the full amount of the letter credit used to support the payment of principal and interest of the PCBs issuance, when due. In the amendment, UtiliCorp requests an authorization to enter into a letter of credit in the amount of \$7,502,300 to be issued in support of the payment of the principal of and interest on the PCBs.

Any person desiring to be heard of to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before December 13, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
*Secretary.*

[FR Doc. 95-30012 Filed 12-8-95; 8:45 am]  
BILLING CODE 6717-01-M

**ENVIRONMENTAL PROTECTION AGENCY**

**[FRL-5341-3]**

**CERCLA Enforcement Against Lenders and Government Entities That Acquire Property Involuntarily**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Announcement and publication of policy.

**SUMMARY:** This policy memorandum sets forth the Environmental Protection Agency ("EPA") and the Department of Justice's ("DOJ") policy regarding the government's enforcement of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") against lenders and against government entities that acquire property involuntarily. As an enforcement policy, EPA and DOJ intend to apply as guidance the provisions of the "Lender Liability Rule" promulgated in 1992, thereby endorsing the interpretations and rationales announced in the Rule. See

"Final Rule on Lender Liability Under CERCLA," 57 Fed. Reg. 18344 (April 29, 1992). This rule was vacated by the Circuit Court of Appeals for the District of Columbia in 1994.

The purpose of the memorandum is to provide guidance within EPA and DOJ on the exercise of enforcement discretion in determining whether particular lenders and government entities that acquire property involuntarily may be subject to CERCLA enforcement actions. The memorandum advises EPA and DOJ personnel to consult both the regulatory text of the Rule and the accompanying preamble language in exercising their enforcement discretion under CERCLA as to lenders and government entities that acquire property involuntarily.

**FOR FURTHER INFORMATION CONTACT:**

Laura Bulatao, Office of Site Remediation Enforcement, 401 M St. SW. (Mail Code 2273A), Washington, DC 20460 (202-564-6028), or the RCRA/Superfund Hotline at 800-424-9346 (in the Washington, DC area at 703-412-9810).

Note: The memorandum below has been altered from the original memorandum issued on September 22, 1995 to reflect updated information about obtaining additional copies and whom to contact for further information. No other changes were made to the text of the policy. The original memorandum issued on September 22, 1995 was not published in the Federal Register.

Dated: November 30, 1995.

Jerry Clifford,

Director, Office of Site Remediation Enforcement, U.S. Environmental Protection Agency.

Memorandum

**Subject:** Policy on CERCLA Enforcement Against Lenders and Government Entities That Acquire Property Involuntarily

**From:** Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency

Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice

**To:** Regional Administrators, Regions I-X, EPA, Regional Counsel, Regions I-X, EPA, Waste Management Division Directors, Region I-X, EPA, Chief, Environmental Enforcement Section, DOJ, Assistant Section Chiefs, Environmental Enforcement Section, DOJ

This memorandum sets forth the Environmental Protection Agency's ("EPA") and the Department of Justice's ("DOJ") policy regarding the

government's enforcement of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") against lenders and against government entities that acquire property involuntarily. As an enforcement policy, EPA and DOJ intend to apply as guidance the provisions of the "Lender Liability Rule" promulgated in 1992, thereby endorsing the interpretations and rationales announced in the Rule. See "Final Rule on Lender Liability Under CERCLA," 57 Fed. Reg. 18,344 (April 29, 1992).<sup>1</sup> (This rule has been vacated by a court, as described below in the "Background" section).

**ADDRESSES:** Additional copies of this policy statement can be ordered from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, VA 22161. Orders must reference NTIS accession number PB95-234498. For telephone orders or further information on placing an order, call NTIS at 703-487-4650 for regular service or 800-553-NTIS for rush service. For orders via email/Internet send to the following address: orders@ntis.fedworld.gov.

**FOR FURTHER INFORMATION CONTACT:**

Laura Bulatao, Office of Site Remediation Enforcement (Mail Code 2273A), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 (202-564-6028), or the RCRA/Superfund Hotline at 800-424-9346 (in the Washington, DC area at 703-412-9810).

I. Background

This policy guidance establishes EPA's and DOJ's position regarding possible enforcement actions against lenders and government entities who are associated with property that may be subject to a CERCLA response action. EPA and DOJ recognize CERCLA's unintended effects on lenders and government entities and the relative concern from these parties regarding the consequences of potential enforcement. In light of these concerns, lenders may refuse to lend money to an owner or developer of a contaminated or potentially contaminated property or they may hesitate in exercising their rights as secured parties if such loans are made. Additionally, government entities that involuntarily acquire property may be reluctant to perform

certain actions related to contaminated or potentially contaminated property.

The language of Section 101(20)(A) leaves lenders and other interested parties uncertain as to which types of actions—such as monitoring vessel or facility operations, requiring compliance with applicable laws, and refinancing or undertaking loan workouts—they may take to protect their security interests without risking EPA enforcement under CERCLA. Courts have not always agreed on when a lender's actions are "primarily to protect a security interest," and what degree of "participation in the management" of the property will forfeit the lender's eligibility for the exemption. This uncertainty was heightened by dicta in the *Fleet Factors*<sup>2</sup> 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.<sup>3</sup>

The lack of legislative history on and consistent court treatment of the CERCLA Section 101(20)(A) security interest exemption prompted EPA to address potential lender liability for cleanup costs at CERCLA sites in the Lender Liability Rule, which was promulgated in April 1992.

Regarding the exemption for government entities, neither the legislative history of CERCLA Sections 101(20)(D) and 101(35)(A) nor the case law provide sufficient explanation of when a property acquisition or transfer is considered involuntary. Thus, in the Rule, EPA also clarified the language of these sections, describing when a government entity was exempted from CERCLA enforcement as an owner or operator or was protected from third party actions.

However, in *Kelley v. EPA*,<sup>4</sup> the Circuit Court of Appeals for the District of Columbia vacated the Rule on the ground that EPA lacked authority to issue the Rule as a binding regulation. Nevertheless, the *Kelley* decision did not preclude EPA and DOJ from following the provisions of the Rule as enforcement policy, and the agencies have generally done so.

II. Policy Statement

This memorandum reaffirms EPA's and DOJ's intentions to follow the

<sup>1</sup> This guidance does not address lender liability under any statutory or regulatory authority, rule, regulation, policy, or guidance, other than CERCLA. Specifically, this guidance does not cover lender liability determinations as they relate to the Resource Conservation and Recovery Act ("RCRA") and RCRA's Underground Storage Tank program.

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

<sup>3</sup> *Fleet*, 901 F.2d at 1557.

<sup>4</sup> 15 F.3d 1100 (D.C. Cir. 1994), reh. denied, 25 F.3d 1088 (D.C. Cir. 1994), cert. denied, *American Bankers Ass'n v. Kelly*, 115 S.Ct. 900 (1995).

provisions of the Lender Liability Rule as enforcement policy. EPA and DOJ endorse the interpretations and rationales announced in the Rule and its preamble. The purpose of this memorandum is to provide guidance within EPA and DOJ on the exercise of enforcement discretion in determining whether particular lenders and government entities that acquire property involuntarily may be subject to CERCLA enforcement actions. In making such determinations, EPA and DOJ personnel should consult both the regulatory text of the Rule and the accompanying preamble language in exercising their enforcement discretion under CERCLA as to lenders and government entities that acquire property involuntarily.<sup>5</sup>

After the promulgation of the Lender Liability Rule, but prior to its invalidation, several district and circuit courts adhered to the terms of the Rule or interpreted the statute in a manner consistent with the Rule.<sup>6</sup> Moreover, notwithstanding the Rule's invalidation in *Kelley*, since that decision several courts have also interpreted the statute in a way that is consistent with the Rule.<sup>7</sup> EPA and DOJ believe that this case law is further evidence of the reasonableness of the agencies' interpretation of the statute, as embodied formerly in the Rule and now in this policy statement.

### III. Use of This Policy

The policies and procedures established in this document and any internal procedures adopted for its implementation are intended solely as guidance for employees of EPA and DOJ. They do not constitute rulemaking and may not be relied on to create a right or benefit, substantive or procedural, enforceable at law, or in equity, by any person. EPA and DOJ reserve the right to act at variance with this guidance or its internal implementing procedures.

[FR Doc. 95-29842 Filed 12-8-95; 8:45 am]

**BILLING CODE 6560-50-P**

<sup>5</sup> See 57 Fed. Reg. 18,344 (April 29, 1992) (text and preamble).

<sup>6</sup> See *Northeast Doran, Inc. v. Key Bank of Maine*, 15 F.3d 1 (1st Cir. 1994); *United States v. McLamb*, 5 F.3d 69 (4th Cir. 1993); *Waterville Indus., Inc. v. Finance Authority of Maine*, 984 F. 2d 549 (1st Cir. 1993); *United States v. Fleet Factors*, 901 F.2d 1150 (11th Cir. 1990), *on remand*, 821 F. Supp. 07 (S.D. Ga. 1993); *Kelley v. Tiscornia*, 810 F. Supp. 901 (W.D. Mich. 1993); *Grantors to the Silresim Site Trust v. State Street Bank & Trust Co.*, 23 ELR 20428 (D. Mass. Nov. 24, 1992).

<sup>7</sup> See *Z & Z Leasing, Inc. v. Graying Reel, Inc.*, 873 F.Supp. 51 (E.D. Mich. 1995); *Kemp Industries, Inc. v. Safety Light Corp.*, 857 F.Supp. 373 (D.N.J. 1994).

## FEDERAL COMMUNICATIONS COMMISSION

[IB Docket No. 95-118, FCC 95-286]

### Notice of Public Information Collections for Streamlining the International Section 214 Authorization Process and Tariff Requirements submitted to OMB for Review and Approval

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** On July 17, 1995, the Federal Communications Commission released a Notice of Proposed Rulemaking (NPRM) to streamline the international Section 214 authorization process and tariff requirements. This NPRM, published in the Federal Register on July 25, 1995, Volume 60, page 37989, contains proposed or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104-13. It has been submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed or modified information collections contained in this proceeding.

**DATES:** Written comments by the public on the proposed and/or modified information collections are due January 10, 1996. Written comments must be submitted by OMB on the proposed and/or modified information collections on or before February 9, 1996.

**ADDRESSES:** Submit all comments to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, NW., Washington, DC 20554, or via the Internet to [dconway@fcc.gov](mailto:dconway@fcc.gov), and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, NW., Washington, DC 20503 or via the Internet to [fain\\_t@al.eop.gov](mailto:fain_t@al.eop.gov).

**FOR FURTHER INFORMATION CONTACT:** For additional information concerning the information collections contained in this NPRM contact Dorothy Conway at 202-418-0217, or via the Internet at [dconway@fcc.gov](mailto:dconway@fcc.gov).

**SUPPLEMENTARY INFORMATION:** The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this NPRM. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall

have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**OMB Approval Number:** New Collection.

**Title:** Streamlining the International Section 214 Authorization Process and Tariff Requirements.

**Form No.:** N/A.

**Type of Review:** New collection.

**Respondents:** Business or other for-profit.

**Number of Respondents:** 431 per year.

**Estimated Time Per Response:** 8 hours.

**Total Annual Burden:** 3448 hours.

**Needs and Uses:** The NPRM proposes to streamline the international Section 214 authorization process and tariff requirements. The proposed rules would greatly reduce the regulatory burdens on applicants, authorized carriers, and the Commission. The NPRM proposes to reduce the need for carriers to file multiple applications by enabling a non-dominant carrier to obtain a global Section 214 authorization, which is not limited to specific carrier facilities, and by eliminating several regulatory requirements that require carriers to file multiple Section 214 applications. The global Section 214 authorization would allow carriers to provide international services on a facilities-basis to virtually all points in the world, using any licensed facility. This authorization would be subject to an exclusion list that the Commission would publish identifying countries or facilities for which there are restrictions. In regard to the regulatory requirements being removed, Section 63.01 is proposed to be amended to make it applicable only to applications for domestic Section 214 authority. A new rule is proposed that will detail the application requirements for international Section 214 authority, and include the provisions for filing a global Section 214 application. In addition, the proposed rule will enable resellers to provide international resale services via any authorized common carrier, except those affiliated with the reseller, without obtaining additional authority. Also, private line resale carriers would be able to resell interconnected private lines for switched services to all designated "equivalent" countries, without obtaining additional authority to serve each equivalent country. And, Section

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 /s/

**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  
Chief, Environmental Enforcement Section, DOJ  
Assistant Section Chiefs, Environmental Enforcement Section, DOJ

cc:

Linda Boornazian, OSRE  
Sandra Connors, OSRE  
Paul Connor, OSRE  
Ken Patterson, OSRE

Lori Boughton, OSRE  
Craig Hooks, FFEO  
Regina Langton, OCEPA  
Linda Garczynski, OSWER  
Steve Luftig, OERR  
Anna Virbick, OUST  
John Heffelfinger, OUST  
Peter Rosenberg, OECA  
Karen Brown, AO  
Earl Salo, OGC  
Joseph Freedman, OGC  
Bruce Gelber, DOJ  
Tom Mariani, DOJ  
Nina Mendelson, DOJ

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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). <sup>1</sup> (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 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.<sup>2</sup> 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.<sup>3</sup>

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 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.

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#### NOTES:

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).
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).