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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

October 3, 1996

OFFICE OF  
ENFORCEMENT AND COMPLIANCE ASSURANCE

OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

**SUBJECT:** Recently Enacted Lender and Fiduciary Liability Amendments

**FROM:** Barry Breen, Director  
Office of Site Remediation Enforcement  
Office of Enforcement and Compliance Assurance

Joshua Bayison, Acting Director  
Office of Underground Storage Tanks  
Office of Solid Waste and Emergency Response

**TO:** Addressees listed below

As part of the Omnibus Consolidated Appropriations Bill for Fiscal Year 1997 signed by President Clinton on September 30, Congress enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (the "Act"). As you will see in the attached, the Act includes lender and fiduciary liability amendments to CERCLA, amendments to the secured creditor exemption set forth in Subtitle I of RCRA, and validation of the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities. The amendments made by the Act apply to all claims not finally adjudicated as of September 30, 1996, which include all cases that are in the process of being settled.

Presented below are highlights of the amendments. If you have any questions regarding the CERCLA provisions of the Act, please contact Laura Bulatao of the Office of Site Remediation Enforcement at (202) 564-6028 or Steve Rollin of the same office at (202) 564-5142. Questions about the RCRA provision may be directed to John Heffelfinger of the Office of Underground Storage Tanks at (703) 603-7157.

## Lender Liability under CERCLA

- The provision is generally based on the CERCLA Lender Liability Rule, but does not explicitly describe the steps a lender can take to avoid liability after foreclosure.
- Restates the original exemption: “owner or operator” does not include a person who, without participating in the management of a facility, holds indicia of ownership primarily to protect that person’s security interest in the facility.
- A lender “participates in management” if it:
  - ▶ Exercises decision-making control over environmental compliance related to the facility, such that the lender has undertaken responsibility for hazardous substance handling or disposal practices; or
  - ▶ Exercises control at a level comparable to that of a manager of the facility, such that the lender has assumed or manifested responsibility with respect to (1) day-to-day decisionmaking with respect to environmental compliance, or (2) all, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.
- The term “participate in management” does not include certain activities such as:
  - ▶ inspecting the facility;
  - ▶ requiring a response action or other lawful means to address a release or threatened release;
  - ▶ conducting a response action under Section 107(d)(1) or under the direction of an on-scene coordinator;
  - ▶ providing financial or other advice in an effort to prevent or cure default; and
  - ▶ restructuring or renegotiating the terms of the security interest;

provided the actions do not rise to the level of participating in management as defined in the subsection.
- After foreclosure, a lender who did not participate in management prior to foreclosure is not an “owner or operator” if it:
  - ▶ sells, re-leases (in the case of a lease finance transaction), or liquidates the facility;

- ▶ maintains business activities or winds up operations;
- ▶ undertakes a response action under Section 107(d)(1) or under the direction of an on-scene coordinator; or
- ▶ takes any other measure to preserve, protect, or prepare the facility for sale or disposition;

provided the lender seeks to divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms.

#### Fiduciary Liability under CERCLA

- For actions taken in a fiduciary capacity, liability under any CERCLA provision is limited to assets held in the fiduciary capacity. A fiduciary will not be liable in its personal capacity for certain actions such as:
  - ▶ undertaking or requiring another person to undertake any lawful means of addressing a hazardous substance;
  - ▶ enforcing environmental compliance terms of the fiduciary agreement; and
  - ▶ administering a facility that was contaminated before the fiduciary relationship began.
- The liability limitation and “safe harbor” described above do not limit the liability of a fiduciary whose negligence causes or contributes to a release or threatened release.
- The term “fiduciary” means a person acting for the benefit of another party as a bona fide trustee, executor, or administrator, among other things. It does not include a person who:
  - ▶ acts as a fiduciary with respect to a for-profit trust or other for-profit fiduciary estate, unless the trust or estate was created:
    - \* because of the incapacity of a natural person, or
    - \* as part of, or to facilitate, an estate plan; or
  - ▶ acquires ownership or control of a facility for the objective purpose of avoiding liability of that person or another person.

- Nothing in the fiduciary subsection applies to a person who:
  - acting in a beneficiary or non-fiduciary capacity, directly or indirectly benefits from the trust or fiduciary relationship; or
  - is a beneficiary and fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits exceeding customary or reasonable compensation.
- Nothing in the fiduciary subsection precludes a claim against the assets of the trust or estate administered by the fiduciary.

Lender Liability under Subtitle I of RCRA

- Subtitle I of RCRA is amended to protect holders of security interests both as owners and operators of underground storage tanks (USTs).
- The CERCLA lender and fiduciary 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 on September 7, 1995 (40 CFR 280.200-280.230), the rule will prevail.

Involuntary Acquisitions by Government Entities

- The portion of the CERCLA Lender Liability Rule addressing involuntary acquisitions (40 CFR 300.1105) is deemed to have been validly issued. References in that portion of the rule to 40 CFR 300.1100 (which addresses lenders) will be deemed to be references to CERCLA's lender and fiduciary provisions.
- Courts have jurisdiction to review any amendment to the portion of the rule addressing involuntary acquisitions, but not that portion itself.

Attachment

Addressees:

Regional Counsels, Regions I - X  
 Director, Office of Site Remediation and Restoration, Region I  
 Director, Emergency and Remedial Response Division, Region II  
 Director, Division of Enforcement and Compliance Assistance, Region II  
 Director, Hazardous Waste Management Division, Regions III, IX  
 Associate Division Director, Hazardous Waste Management Division, Office of RCRA Programs, Region III  
 Acting Director, Waste Management Division, Region IV

Director, Water Management Division, Region IV  
Director, Superfund Division, Regions V, VI, VII  
Director, Waste, Pesticides, and Toxics Division, Region V  
Director, Multimedia Planning and Permitting Division, Region VI  
Director, Air, RCRA, and Toxics Division, Region VII  
Deputy Director, Air, RCRA, and Toxics Division, Region VII  
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation,  
Region VIII  
Assistant Regional Administrator, Office of Pollution Prevention, State and Tribal  
Assistance, Region VIII  
Director, Environmental Cleanup Office, Region X  
Acting Director, Office of Water, Region X

cc: Steve Luftig, OERR  
Craig Hooks, FFEO  
Elaine Stanley, OC  
Earl Devaney, OCE  
Diana Love, NEIC  
Robert Van Heuvelen, ORE  
Earl Salo, OGC  
OSRE staff and managers  
Bruce Gelber, DOJ  
Nina Mendelson, DOJ

SEC. 2501. SHORT TITLE.

This subtitle may be cited as the "Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996".

SEC. 2502. CERCLA LENDER AND FIDUCIARY LIABILITY LIMITATIONS AMENDMENTS.

(a) In General.—Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) is amended by adding at the end the following:

“(n) Liability of Fiduciaries.—

“(1) In general.—The liability of a fiduciary under any provision of this Act for the release or threatened release of a hazardous substance at, from, or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity.

“(2) Exclusion.—Paragraph (1) does not apply to the extent that a person is liable under this Act independently of the person's ownership of a vessel or facility as a fiduciary or actions taken in a fiduciary capacity.

“(3) Limitation.—Paragraphs (1) and (4) do not limit the liability pertaining to a release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

“(4) Safe harbor.—A fiduciary shall not be liable in its personal capacity under this Act for—

“(A) undertaking or directing another person to undertake a response action under subsection (d)(1) or under the direction of an on scene coordinator designated under the National Contingency Plan;

“(B) undertaking or directing another person to undertake any other lawful means of addressing a hazardous substance in connection with the vessel or facility;

“(C) terminating the fiduciary relationship;

“(D) including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;

“(E) monitoring or undertaking 1 or more inspections of the vessel or facility;

“(F) providing financial or other advice or counseling to

other parties to the fiduciary relationship, including the settlor or beneficiary;

“(G) restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

“(H) administering, as a fiduciary, a vessel or facility that was contaminated before the fiduciary relationship began; or

“(I) declining to take any of the actions described in subparagraphs (B) through (H).

“(5) Definitions.—As used in this Act:

“(A) Fiduciary.—The term ‘fiduciary’—

“(i) means a person acting for the benefit of another party as a bona fide—

“(I) trustee;

“(II) executor;

“(III) administrator;

“(IV) custodian;

“(V) guardian of estates or guardian ad litem;

“(VI) receiver;

“(VII) conservator;

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“(VIII) committee of estates of incapacitated persons;

“(IX) personal representative;

“(X) trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender, or

“(XI) representative in any other capacity that the Administrator, after providing public notice, determines to be similar to the capacities described in subclauses (I) through (X); and

“(ii) does not include—

“(I) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other

fiduciary estate was created as part of, or to facilitate, 1 or more estate plans or because of the incapacity of a natural person; or

“(II) a person that acquires ownership or control of a vessel or facility with the objective purpose of avoiding liability of the person or of any other person.

“(B) Fiduciary capacity.—The term ‘fiduciary capacity’ means the capacity of a person in holding title to a vessel or facility, or otherwise having control of or an interest in the vessel or facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

“(6) Savings clause.—Nothing in this subsection—

“(A) affects the rights or immunities or other defenses that are available under this Act or other law that is applicable to a person subject to this subsection; or

“(B) creates any liability for a person or a private right of action against a fiduciary or any other person.

“(7) No effect on certain persons.—Nothing in this subsection applies to a person if the person—

“(A)(i) acts in a capacity other than that of a fiduciary or in a beneficiary capacity; and

“(ii) in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

“(B)(i) is a beneficiary and a fiduciary with respect to the same fiduciary estate; and

“(ii) as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

“(8) Limitation.—This subsection does not preclude a claim under this Act against—

“(A) the assets of the estate or trust administered by the fiduciary; or

“(B) a nonemployee agent or independent contractor retained by a fiduciary.”

(b) Definition of Owner or Operator.—Section 101(20) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(20)) is amended by adding at the end the following:

“(E) Exclusion of lenders not participants in management.—

“(i) Indicia of ownership to protect security.—The term ‘owner or operator’ does not include a person that is a

lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.

“(ii) Foreclosure.—The term ‘owner or operator’ does not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person—

“(I) forecloses on the vessel or facility; and

“(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a response action under section 107(d)(1) or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition,

if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

“(F) Participation in management.—For purposes of subparagraph (E)—

“(i) the term ‘participate in management’—

“(I) means actually participating in the management or operational affairs of a vessel or facility; and

“(II) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations;

“(ii) a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility shall be considered to participate in management only if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person—

“(I) exercises decisionmaking control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or

“(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility--

“(aa) for the overall management of the vessel or facility encompassing day-to-day decisionmaking with respect to environmental compliance; or

“(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance;

“(iii) the term ‘participate in management’ does not include performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility; and

“(iv) the term ‘participate in management’ does not include--

“(I) holding a security interest or abandoning or releasing a security interest;

“(II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

“(III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

“(IV) monitoring or undertaking 1 or more inspections of the vessel or facility;

“(V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

“(VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

“(VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit

or security interest, exercising forbearance;

“(VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

“(IX) conducting a response action under section 107(d) or under the direction of an on-scene coordinator appointed under the National Contingency Plan,

if the actions do not rise to the level of participating in management (within the meaning of clauses (i) and (ii)).

“(G) Other terms.—As used in this Act:

“(i) Extension of credit.—The term ‘extension of credit’ includes a lease finance transaction—

“(I) in which the lessor does not initially select the leased vessel or facility and does not during the lease term control the daily operations or maintenance of the vessel or facility; or

“(II) that conforms with regulations issued by the appropriate Federal banking agency or the appropriate State bank supervisor (as those terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) or with regulations issued by the National Credit Union Administration Board, as appropriate.

“(ii) Financial or administrative function.—The term ‘financial or administrative function’ includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

“(iii) Foreclosure; foreclose.—The terms ‘foreclosure’ and ‘foreclose’ mean, respectively, acquiring, and to acquire, a vessel or facility through—

“(I)(aa) purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;

“(bb) a deed in lieu of foreclosure, or similar conveyance from a trustee; or

“(cc) repossession,

if the vessel or facility was security for an extension of credit previously contracted;

“(II) conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or

“(III) any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a vessel or facility in order to protect the security interest of the person.

“(iv) Lender.—The term ‘lender’ means—

“(I) an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813));

“(II) an insured credit union (as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752));

“(III) a bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.);

“(IV) a leasing or trust company that is an affiliate of an insured depository institution;

“(V) any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;

“(VI) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or any other entity that in a bona fide manner buys or sells loans or interests in loans;

“(VII) a person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and

“(VIII) a person that provides title insurance and that acquires a vessel or facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

“(v) Operational function.—The term ‘operational function’ includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.

“(vi) Security interest.—The term ‘security interest’ includes a right under a mortgage, deed of trust, assignment,

judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person."

#### SEC. 2503. CONFORMING AMENDMENT.

Section 9003(h) of the Solid Waste Disposal Act (42 U.S.C. 6991b(h)) is amended by striking paragraph (9) and inserting the following:

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“(9) Definition of owner or operator.—

“(A) In general.—As used in this subtitle, the terms ‘owner’ and ‘operator’ do not include a person that, without participating in the management of an underground storage tank and otherwise not engaged in petroleum production, refining, or marketing, holds indicia of ownership primarily to protect the person's security interest.

“(B) Security interest holders.—The provisions regarding holders of security interests in subparagraphs (E) through (G) of section 101(20) and the provisions regarding fiduciaries at section 107(n) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 shall apply in determining a person's liability as an owner or operator of an underground storage tank for the purposes of this subtitle.

“(C) Effect on rule.—Nothing in subparagraph (B) shall be construed as modifying or affecting the final rule issued by the Administrator on September 7, 1995 (60 Fed. Reg. 46,692), or as limiting the authority of the Administrator to amend the final rule, in accordance with applicable law. The final rule in effect on the date of enactment of this subparagraph shall prevail over any inconsistent provision regarding holders of security interests in subparagraphs (E) through (G) of section 101(20) or any inconsistent provision regarding fiduciaries in section 107(n) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Any amendment to the final rule shall be consistent with the provisions regarding holders of security interests in subparagraphs (E) through (G) of section 101(20) and the provisions regarding fiduciaries in section 107(n) of the

Comprehensive Environmental Response, Compensation, and Liability Act of 1980. This subparagraph does not preclude judicial review of any amendment of the final rule made after the date of enactment of this subparagraph."

#### SEC. 2504. LENDER LIABILITY RULE.

(a) In General.—Effective on the date of enactment of this Act, the portion of the final rule issued by the Administrator of the Environmental Protection Agency on April 29, 1992 (57 Fed. Reg. 18,344), prescribing section 300.1105 of title 40, Code of Federal Regulations, shall be deemed to have been validly issued under authority of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) and to have been effective according to the terms of the final rule. No additional judicial proceedings shall be necessary or may be held with respect to such portion of the final rule. Any reference in that portion of the final rule to section 300.1100 of title 40, Code of Federal Regulations, shall be deemed to be a reference to the amendments made by this subtitle.

(b) Judicial Review.—Notwithstanding section 113(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9613(a)), no court shall have jurisdiction to review the portion of the final rule issued by the Administrator of the Environmental Protection Agency on April 29, 1992 (57 Fed. Reg. 18,344) that prescribed section 300.1105 of title 40, Code of Federal Regulations.

(c) Amendment.—No provision of this section shall be construed as limiting the authority of the President or a delegatee of the President to amend the portion of the final rule issued by the Administrator of the Environmental Protection Agency on April 29, 1992 (57 Fed. Reg. 18,344), prescribing section 300.1105 of title 40, Code of Federal Regulations, consistent with the amendments made by this subtitle and other applicable law.

(d) Judicial Review.—No provision of this section shall be construed as precluding judicial review of any amendment of section 300.1105 of title 40, Code of Federal Regulations, made after the date of enactment of this Act.

SEC. 2505. EFFECTIVE DATE.

The amendments made by this subtitle shall be applicable with respect to any claim that has not been finally adjudicated as of the date of enactment of this Act.