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I. INTRODUCTION

In recent years, environmental waste issues have come to the forefront of the government's and the public's attention. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in an attempt to clean up the environment. CERCLA imposes cleanup liability on lenders. CERCLA lender liability may reach $50 million. CERCLA is an attempt to organize and supplement the chaotic and ineffective hazardous substance cleanup laws. The underlying policy of CERCLA...

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3. Quentel, supra note 2, at 145 (noting that the federal government asserts liability against lenders that extend credit to the owner and operator of a hazardous waste site and later foreclose on the site).

4. Scott Wilsdon, Comment, When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup, 38 HASTINGS L.J. 1261, 1269 (1987). Responsible parties incur liability for all removal and remedial costs plus interest charges. 42 U.S.C. § 9607(a)(1987). See infra notes 23-24 and accompanying text for a discussion of remedial and removal costs. Removal costs are the costs affiliated with minimizing pollution damage. § 9601(23). Remedial costs are the costs necessary to permanently dispose of hazardous waste. § 9601(24). However, no statutory limit exists when the release, or threatened release, of hazardous waste results from willful misconduct or the failure to cooperate in a cleanup effort. Wilsdon, supra, at 1270. Additionally, responsible parties incur liability for damaging natural resources. § 9607(a)(4)(C) (1987). This liability may reach $50 million. 42 U.S.C. § 9607(a)(4)(C) (1987). Furthermore, the United States Environmental Protection Agency ("EPA") orders a responsible party to terminate its hazardous waste activity, a court may order additional penalties for a violation of this abatement order. § 9607(a)-(b). The court may order a penalty of either $25,000 per abatement order violation or a fine of up to $25,000 per day for failing to comply with the abatement order. Id. Thus, a responsible party's CERCLA liability can range from $25,000 to $50 million depending upon the degree of the damage and the extent of the party's cooperation with the EPA. Id.

5. FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984). CERCLA applies fundamentally to cleanup measures and leaking, inactive, or abandoned waste sites. Id. It exists to provide an emergency response to address hazardous waste spills. Id.
places ultimate responsibility for hazardous waste cleanup upon “generators, transporters, and past and present hazardous waste site owners and operators.”\textsuperscript{6} In furtherance of this policy, CERCLA includes expansive liability provisions with few affirmative defenses.\textsuperscript{7} In a series of recent decisions, courts have extended CERCLA liability to lenders in addition to generators, transporters, owners and operators.\textsuperscript{8} As a result of this expansion, lenders with mere contractual connections to hazardous waste sites are now vulnerable to liability.\textsuperscript{9}

Congress enacted CERCLA to expand the protective environmental legislation concerning hazardous waste\textsuperscript{10} beyond the regulatory and management authority granted in an earlier act.\textsuperscript{11} Under

\textsuperscript{6} Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074, 1081 (1st Cir. 1986). CERCLA liability is placed upon the party that profited from the manufacture or use of the hazardous substances. Note, Developments in the Law: Toxic Waste Litigation, 99 HARV. L. REV. 1458, 1542 (1986).

\textsuperscript{7} Quentel, supra note 2, at 159 (listing of four broad groups of responsible parties susceptible to CERCLA liability).


\textsuperscript{10} This comment uses the terms “hazardous substance” and “hazardous waste” to mean “hazardous substance” as defined in CERCLA. See 42 U.S.C. § 9601(14) (1987).

The term “hazardous substance” means:

\ldots (B) any element, compound, mixture, solution, or substance \ldots which proposed \ldots when released into the environment may present substantial danger to the public health or welfare or the environment (C) any hazardous waste having the characteristics identified under \ldots the Solid Waste Disposal Act \ldots (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act, (E) any hazardous air pollutant listed under \ldots the Clean Air Act \ldots (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action.

\textit{Id.} Additionally, the EPA is empowered to label a substance “hazardous” if the substance “may present a substantial danger to the public health or welfare or the environment.” § 9602(a). See also Quentel, supra note 2, at 139 n.1.

CERCLA, the federal government has the remedial authority to cleanup hazardous waste sites.\(^{12}\) Because of the pressure to pass CERCLA, Congress failed to produce CERCLA legislative history and failed to resolve sensitive liability issues.\(^{13}\) Therefore, Con-

(1982)). RCRA is a regulatory statute governing the management of hazardous waste from generation to disposal. King, supra note 1, at 243.


RCRA classifies "hazardous waste generation" as "the act or process of producing hazardous waste." 42 U.S.C. § 6903(6) (1987). Therefore, a generator includes "any person, whose act or process produces waste identified or listed as hazardous or whose act first causes hazardous waste to become subject to regulation." §§ 6921(d), 6922. Any generator that produces more than one hundred kilograms of hazardous waste per month must comply with the RCRA regulations. King, supra note 1, at 247. Additionally, under RCRA a generator is also required to obtain a storage permit from the EPA to store hazardous waste for a period greater than ninety days. Id.


In addition, RCRA governs owners and operators of TSD facilities. Id. A person is an owner if he owns all or part of a facility. 40 C.F.R. § 260.10 (1991). A person is an operator if he is responsible for the overall operation of a facility. Id. RCRA imposes detailed regulations upon owners and operators concerning: (1) the compilation of records of all hazardous waste treated, stored or disposed; (2) the treatment, storage and disposal of hazardous waste in compliance with the EPA's methods, techniques, and practices; (3) the location, design and construction of TSD facilities; (4) the implementation of plans to minimize unanticipated damage from hazardous waste; (5) the qualification standards for ownership, operation, employee training, and security; and (6) the compliance with all permit requirements. King, supra note 1, at 248.

RCRA contains harsh penalties for failing to adhere to its regulations. Id. Civil penalties shall not exceed $25,000 per day for compliance violations. 42 U.S.C. § 6928(a)(3) (1987). Criminal sanctions include a maximum of two years imprisonment or a $50,000 fine that may be imposed for intentional violations. § 6928(d). Additionally, RCRA authorizes both temporary and permanent injunctive relief to either compel compliance or close a business with repeated violations. King, supra note 1, at 249. Further analysis of RCRA is beyond the scope of this comment. For additional information, see Kovacs & Klucsik, supra, at 205.

12. King, supra note 1, at 253 (giving remedial power granted by CERCLA to the federal government).

13. Wilsdon, supra note 4, at 1263 n.17. In United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984), the Missouri court labelled CERCLA as "a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions." For example, CERCLA does not define whether liability is joint and several or whether a defendant has...
gress saddled the judiciary with the responsibility of shaping CERCLA's application. As a consequence, the courts have inconsistently applied CERCLA to lenders, holding them liable for hazardous waste cleanup costs.

This comment will examine proposals offered by Congress and the Environmental Protection Agency ("EPA") that attempt to define lender activity, protect a lender's security interest, and maintain CERCLA's remedial environmental purpose. Section II will provide an overview of CERCLA's provisions and amendments.

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a right to contribution. Wilsdon, supra note 4, at 1264 n.18. Senator Randolph, the sponsor of CERCLA, stated:

It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tort-feasors will be determined under common or previous statutory law.

126 CONG. REC. 30,932 (1980).

The 96th Congress hastily approved CERCLA on December 11, 1980, in reaction to the increasing environmental problem created by hazardous sites and spills. State of New York v. Shore Realty Corp., 759 F.2d 1032, 1037 (2d Cir. 1985). President Carter signed CERCLA into law (December 11, 1980), at the "eleventh hour," just prior to the inauguration of the Reagan Administration. Id.

A bipartisan committee of senators introduced the bill that became CERCLA and the Senate passed the bill in lieu of pending measures on the subject. Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 COLUM. J. ENVTL. L. 1, 1 (1980). On December 3, 1980, the House of Representatives considered and passed CERCLA after little "debate, under a suspension of the rules, [and] in a situation which allowed for no amendments." Id. Additionally, Congress failed to issue a report on the enacted CERCLA. Id. Therefore, the courts are unable to utilize legislative history to interpret the terms of the statute. Wilsdon, supra note 4, at 1253 n.17.

CERCLA addresses the startling increase of hazardous waste in the United States. Roslyn Tom, Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA, 98 YALE L.J. 925, 925 (1989). As of 1988, the United States General Accounting Office ("GAO") located as many as 425,380 potential hazardous waste sites. 18 Env't Rep. (BNA) 2043 (Jan. 22, 1988). The GAO estimated the cleanup costs would exceed $22 billion. Id. The GAO report is contrasted by a 1984 projection that stated the cost of cleaning the 1800 most threatening sites would require an expenditure of $23 billion. EPA OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EXTENT OF THE HAZARDOUS WASTE RELEASE PROBLEM AND FUTURE FUNDING NEEDS CERCLA 301 (A)(1)(C) STUDY, FINAL REPORT 1,1 (Dec. 1984). In 1984, the EPA estimated that the average expenditure to cleanup a hazardous waste site was in excess of $12 million. Amendment to National Oil and Hazardous Substances Contingency Plan: The National Priorities List, 49 Fed. Reg. 40,320, 40,325 (1985). Additionally, in 1985, the Congressional Office of Technology Assessment estimated that an expenditure of $100 billion would be required to clean the 10,000 existing hazardous waste sites and that the cleanup effort would require 50 years to accomplish. CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, SUPERFUND STRATEGY 3 (1985).

14. Wilsdon, supra note 4, at 1264 n.18 (resolving CERCLA issues not resolved by Congress is a judiciary function).

15. See infra notes 196-97 and accompanying text for a discussion of the inconsistent application of liability.
Section III will survey the court decisions that have addressed and expanded CERCLA lender liability. Section IV will introduce three proposals that attempt to define the scope of CERCLA lender liability. Finally, section V will evaluate the recent EPA proposal and discuss the feasibility of implementing this proposal.

II. THE HISTORICAL BACKGROUND OF CERCLA

CERCLA provides the authority for the government to cleanup hazardous waste. As enacted by Congress, CERCLA enforcement power belonged to the President. In 1981, President Reagan delegated this authority to the EPA. Pursuant to CERCLA, the EPA has two methods to accomplish hazardous waste cleanup. First, the EPA may order the responsible parties to undertake the necessary remedial cleanup measures, provided the responsible parties possess the capacity to perform this task. Alternatively, the EPA may take immediate action to cleanup hazardous waste and subsequently sue the responsible parties for the cleanup costs. CERCLA established a Hazardous Substances Response Trust Fund.

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16. Quentel, supra note 2, at 149 (noting that CERCLA grants cleanup authority to government).
17. Wilsdon, supra note 4, at 1284 (CERCLA enforcement authority delegated to the President). 42 U.S.C. § 9604 (1987) provides:

(a)(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act... to remove or arrange for the removal of... or take any other response measure... which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility... the President may allow such person to carry out the action.

Therefore, initially the President controlled CERCLA hazardous waste cleanup enforcement authority. Id.


The Administrator of the Environmental Protection Agency is authorized to promulgate rules and regulations specifying, with respect to... (A) the location, title, or condition of a facility, and (B) the identity, characteristics, quantity, origin, or condition (including containerization and previous treatment) of any hazardous substances contained or deposited in a facility.

19. See supra notes 17-18 and accompanying text for a discussion of the delegation of CERCLA enforcement authority.


21. In addition to the actual remedial costs, the EPA may recover "on-site and off-site investigations of the hazardous condition, lab fees, engineer's fees, consultant's fees, court costs, and charges for the time of government personnel." King, supra note 1, at 255 n.64.
("Superfund")\(^{22}\) to finance the removal\(^{23}\) and remedial\(^{24}\) response\(^{25}\) costs incurred during hazardous waste removal. Prior to expending Superfund assets, the EPA must identify hazardous waste sites across the United States and rank these sites on a National Priorities List ("NPL") according to the threat the sites pose to the public and environment.\(^{26}\) Next, the EPA must comply with the National Contingency Plan ("NCP") that regulates hazardous waste cleanup.\(^{27}\)

22. 42 U.S.C. § 9631 (1982) (Superfund funding). "There is established... a trust fund to be known as the 'Hazardous Substance Response Trust Fund'... consisting of such amounts as may be appropriated or transferred... as provided in this section." Id. In 1980, $1.6 billion was appropriated to Superfund, composed of 87.5% from taxes on crude oil, imported petroleum products, and some hazardous chemicals and 12.5% from general revenue appropriations. Quentel, supra note 2, at 149 n.43.

23. A removal action is a short term response undertaken to minimize the pollution damage. Quentel, supra note 2, at 148 n.40. 42 U.S.C. § 9601(23) (1987) provides: "'remove' or 'removal'... means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of: [1] the threat of release of hazardous substances into the environment... [2] to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material... [3] to prevent, minimize, or mitigate damage to the public health or welfare or to the environment.

24. A remedial action is a long range response action designed to be a permanent containment or disposal of the hazardous waste. State of New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985). 42 U.S.C. § 9601(24) (1987) provides: "'remedy' or 'remedial action'... means those actions consistent with permanent remedy... so that the [hazardous substance does not migrate to cause substantial danger to present or future public health."


26. Wilsdon, supra note 4, at 1265. To list a site on the National Priorities List ("NPL"), the EPA must: (1) evaluate the site; (2) identify the type and amount of the hazardous waste; (3) estimate the potential threat to the public and the environment; and (4) record the most appropriate response. Quentel, supra note 2, at 147 n.32. The evaluation consists of collecting information and the records of the hazardous waste site, conducting an on-site inspection to sample the soil, air, and water surrounding the site, and placing the site in the appropriate NPL slot. Id.

27. Shore Realty Corp., 759 F.2d at 1041. Congress established the National Contingency Plan ("NCP") in 1968 to enable the Federal Water Pollution Control Act ("Clean Water Act"), to federally coordinate oil spill cleanup. Quentel, supra note 2, at 149 n.42. The NCP outlines the discovery, investigation, and response methods for hazardous waste cleanup. Id. Additionally, it is not a requirement for a company to be listed on the NPL to incur liability for response costs. Shore Realty Corp., 759 F.2d at 1045-46. The Shore Court held that even though the EPA is required to publish the NPL, "inclusion on the NPL is not a requirement for the State to recover its response costs." Id. Therefore, it is only necessary for a company to be listed on the NPL before the EPA can use Superfund assets to cover response costs. Id. Obtaining NPL status is not a prerequisite to CERCLA liability. Id.
To establish a *prima facie* case of CERCLA liability and recover Superfund outlays, the EPA must establish four facts in addition to complying with the NCP. The EPA must establish that: (1) the site is a "facility"; (2) a hazardous substance release occurred; (3) the EPA incurred response costs; and (4) the defendant is the responsible party. The defendant's liability as a responsible party is generally the only element at issue. Four groups of defendants are potentially liable for response costs under CERCLA: (1) current owners and operators of waste facilities; (2) owners and operators at the time of waste disposal; (3) generators of hazardous waste; and (4) transporters of hazardous waste. Only after the

9675 (1987)). SARA increased the amount of Superfund and toughened NCP standards. Quentel, *supra* note 2, at 148 n.43. SARA included provisions for an additional $8.5 billion appropriation to Superfund. *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986*, 16 ENVTL. L. REP. (Envtl. L. Inst.) 10,363, 10,363-64 (Dec. 1986). This increased funding is the result of a $2.7 billion tax on imported and domestic petroleum products, a $1.3 billion tax on chemical feedstocks and imported chemical derivatives, and a $2.5 billion "environmental tax" assessed to corporations with an annual income in excess of $2 million. 17 Env'N Rep. (BNA) No. 26, at 955 (Oct. 24, 1986). Additional funds were provided by $1.25 billion in general revenues, $300 million in projected interest on the money in Superfund and $300 million in projected recovery of costs at hazardous waste sites. *Id.* at 956. In addition, SARA accelerated the use of Superfund money to cleanup hazardous waste, expanded the EPA's power to reach responsible parties, and gave incentives for private parties to become involved in cleanup activities. *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986, supra*, at 10,363-64.


To recover its response costs, the government must prove that: (1) the site is a "facility"; (2) a release or threatened release of any hazardous substance from the site has occurred; (3) the release or threatened release has caused the federal government to incur response costs; and (4) the defendant is one of the persons designated as a party liable for the costs. CERCLA defines facility to include: "any building, structure, installation, equipment, pipe, or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or . . . any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." § 9601(9).

The EPA has a poor record of recovering Superfund response expenditures. OFFICE OF THE INSPECTOR GENERAL, ENVIRONMENTAL PROTECTION AGENCY, CONSOLIDATED REPORT ON EPA'S COST RECOVERY ACTIONS AGAINST POTENTIALLY RESPONSIBLE PARTIES 1, 1 (1986). As of 1985, the EPA apportioned $1.3 billion of Superfund and had only successfully negotiated 84 cost recoveries (totaling $14 million). *Id.* The cost to recovery ratio barely exceeds one percent. *Id.*

30. Wilsdon, *supra* note 4, at 1265 (stating that the only element at issue concerns whether defendant is a responsible party).


42 U.S.C. § 9607(a) (1987) creates four classes of defendants liable under CERCLA:
EPA ranks the site on the NPL, complies with the NCP, and establishes the requisite facts may it recover Superfund response costs.\textsuperscript{32} The EPA cannot recover Superfund expenditures if it fails to execute the above procedure.\textsuperscript{33}

However, CERCLA’s provisions do not include an explicit standard of liability, nor is the act itself supported by any relevant legis-

(1) the owner and operator of a vessel or a facility; (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of; (3) any person who by contact, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances ... at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or site selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

(emphasis added).

To perpetuate the goals of CERCLA, courts interpret the phrase “owner and operator” to mean the person owning or operating the facility at the time the EPA initiates a lawsuit. United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 (11th Cir. 1990), reh'g denied, 911 F.2d 742 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991). In order to incur CERCLA liability under § 9607(a)(1), it is necessary for the defendant to be an owner or an operator of the facility. \textit{Id.} He does not need to be both the owner and operator of the facility. \textit{Id.} Thus, although the “owner and operator” language of § 9607(a)(1) is in the conjunctive, the Eleventh Circuit Court of Appeals in \textit{Fleet Factors} construed the language in the disjunctive (owners or operators) pursuant to interpretations of other federal decisions. \textit{Id.} See Guidice v. BFG Electroplating and Mfg. Co., 732 F. Supp. 556, 561 (W.D. Pa. 1989) (interpreting § 9607(a)(1) in the disjunctive); Artesian Water Co. v. Government of New Castle County, 659 F. Supp. 1269, 1280 (D. Del. 1987) (construing in the disjunctive), aff’d, 851 F.2d 643 (3d Cir. 1988); Maryland Bank & Trust Co., 632 F. Supp. at 578 (interpreting statute in disjunctive). The \textit{Fleet Factors} Court “perceive[d] no rational explanation, other than careless statutory drafting, for imposing liability upon ‘owners or operators’ under one section [§ 9607(a)(2)] but holding ‘owners and operators’ liable under another section [§ 9607(a)(1)].” \textit{Fleet Factors}, 901 F.2d at 1554 n.3. The \textit{Fleet Factors} Court’s disjunctive construction is further supported because § 9601(20)(A), CERCLA’s definitional section, only uses the phrase “owner or operator.” \textit{Id.} Thus, an owner or operator may incur CERCLA liability. \textit{Id.}

In order to encounter CERCLA liability under § 9607(a)(3), the defendant must do more than just sell a product that contains hazardous waste. Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990). Evidence must exist that the defendant’s transaction included an arrangement for the “disposal” of hazardous waste. \textit{Id.} However, it is not necessary for the defendant to make specific decisions “as to how, when, and by whom a hazardous substance is to be disposed” to incur CERCLA liability. \textit{Id.} at 1318. Defendants encounter CERCLA liability when they are the party responsible for “arranging” for the disposal of the hazardous substance. \textit{Id.} Therefore, upon establishing all four facts against any of the four groups of defendants, the EPA is entitled to replenish Superfund. \textit{Id.} at 1317.

32. Wilsdon, supra note 4, at 1265 (recovery requirements for Superfund outlays).

33. Wilsdon, supra note 4, at 1265 (no EPA recovery for failing to execute the procedure).
lative history. Thus, the task of fashioning CERCLA's liability policy fell to the courts. The courts interpreted CERCLA's provisions to impose strict liability. Some courts have gone beyond strict liability and found CERCLA liability without requiring a causal link between the defendant's acts and the creation of hazardous waste. Additionally, most judicial interpretations of CERCLA hold that the statute allows joint and several liability among responsible parties. Therefore, each responsible party is poten-


35. Prior to the enacted version, CERCLA contained provisions detailing strict liability. Wilson, supra note 4, at 1267. The sparse legislative history suggests that the strict liability provisions were removed as a last minute Congressional compromise in order to pass CERCLA.QUESTEL, supra note 2, at 153. See supra note 8 and accompanying text for a discussion of the deleted provisions and the judicial development of CERCLA.


37. State of New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985). The court in Shore Realty held that § 9607(a) imposes strict liability upon the current owner of a facility for a release of hazardous substances without regard to causation. Id. The Shore Realty Court distinguished between the imposition of strict liability without allowing a causation defense and the imposition of strict liability which recognizes such a defense. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF Torts § 79, at 517 (1971). The Shore Realty Court prohibited the use of the lack of causation as an affirmative defense. Shore Realty, 759 F.2d at 1044. In addition, the court found support for its strict liability holding in the statutory construction of CERCLA. Id. The Shore Realty Court reasoned that requiring causation as a prerequisite to § 9607(a) liability would make the affirmative defenses under § 9607(b) "superfluous" because each affirmative defense carves out a defense based on causation. Id. Therefore, the court held, if CERCLA liability depended upon causation, "the current owner of a site could avoid liability merely by having purchased the site after the chemical dumping had ceased." Id. at 1045. Thus, pursuant to Shore Realty, the current owner of real property containing hazardous materials is liable for removal and remedial costs even if the owner did not own the site at the time of the disposal nor cause the waste to be disposed. Wilson, supra note 4, at 1268.

38. Wilson, supra note 4, at 1270. "A liability is said to be joint and several when the creditor may demand payment or sue one or more of the parties to
tially liable for a site's entire cleanup cost, regardless of the extent of its actual conduct. A responsible party found jointly and severally liable is able to seek indemnification from other responsible parties. However, a responsible defendant's contribution remedy is limited if the defendant knowingly and willfully participated in an illegal dumping of a hazardous substance. Thus, the judiciary's interpretation of CERCLA's provisions allows for the imposition of both strict liability and joint and several liability.


39. Chem-Dyne Corp., 572 F. Supp. at 811. In Chem-Dyne, the court reasoned that joint and several liability is "particularly appropriate" in cleanup disputes. Id. Frequently wastes are mixed and the responsible parties disagree over which party is liable for the more significant health hazard. Id. In Chem-Dyne, 289 parties were responsible for creating 608,000 pounds of hazardous waste. Id.


42. Wilsdon, supra note 4, at 1270 (courts enforcing CERCLA impose both strict and joint and several liability).

43. Quentel, supra note 2, at 156 (CERCLA affirmative defenses). 42 U.S.C. § 9107(b) (1987) states:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by: (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent...
demonstrate that the release of a hazardous substance was caused by an act of God, a war, or a noncontractually related third party. CERCLA defendants most frequently attempt to escape liability by using the third party affirmative defense rather than the act of God or war defenses. However, courts seldom accept this defense. To successfully claim the third party defense, a defendant must prove that: (1) no contractual relationship existed with the third party; and (2) the defendant exercised due diligence toward the hazardous substance and took precautions against acts or omissions of the third party. Defendants usually fail to persuade the court that they exercised due diligence related to the existing hazardous waste and, thus, fail to escape CERCLA liability.

In addition to the affirmative defenses, CERCLA contains a se-
The security interest exemption excuses a creditor who retains ownership rights in a hazardous waste site from liability, in an attempt to protect its security interest. Targeted lenders frequently allege the security interest exemption. However, this exemption penalizes a creditor that participates in the management of the site. Yet, Congress did not define the parameters of lender activity which constitutes impermissible "participation in the management" of a site. Thus, the courts must determine the type of lender activity that constitutes management and, therefore, triggers CERCLA liability.

Lenders maintain that CERCLA's security interest exemption language totally insulates them from liability. To date, the courts have failed to develop a precise standard of CERCLA lender liability. Recent judicial decisions expanded CERCLA liability to encompass lenders with less involvement in borrower management. Thus, the level of involvement a lender may safely sustain without experiencing CERCLA liability remains unsettled.

49. A security interest is defined as "a form of an interest in property which provides that the property may be sold on default in order to satisfy the obligation for which the security interest is given." BLACK'S LAW DICTIONARY 1357 (6th ed. 1990).
50. Section 9601(20)(A) states, "[the] term [owner or operator] does not include 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." 42 U.S.C. § 9601(20)(A)(1987).
52. Tom, supra note 13, at 927 (lenders defending CERCLA liability commonly claim the security interest exemption).
53. Mirabile, 15 Envtl. L. Rep. at 20,996 (security interest not available to a lender that participates in facility management).
54. Margaret Murphy, The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities, 41 BUS. LAW 1133, 1142 (1986) (Congress failed to enumerate impermissible lender management participation).
55. Tom, supra note 13, at 927 (courts determine the level of participation that constitutes management and security interest protection).
56. Murphy, supra note 54, at 1138-45 (1986). See supra note 9 and cases cited therein for examples of lenders' claims under the security interest exemption.
57. Tom, supra note 13, at 927 (courts have not set standards for CERCLA lender liability).
58. Quentel, supra note 2, at 160 (courts expand CERCLA lender liability).
59. Tom, supra note 13, at 927. The difference between a broad and a narrow judicial interpretation of lender "participation in the management" within the security interest exemption correlates to different external behavior for lenders. Id. at 928. A narrow judicial interpretation will encourage lenders to monitor waste sites. Id. A narrow interpretation benefits both banks and the public because the banks, less afraid of CERCLA liability, are more willing to negotiate workouts to recover loans and prevent small waste problems from causing more damage to the environment. Id. Conversely, a broad interpretation of "participation in the management" will discourage banks from loaning...
III. JUDICIAL INTERPRETATION OF LENDER LIABILITY

Historically, courts have failed to consistently resolve CERCLA lender liability questions. An examination of the various judicial interpretations of lender liability is necessary to understand the present status of CERCLA's security interest exemption. The financial structure of the transaction in each case is not the issue. The critical factor is the activity of the lender. The present judicial interpretation of CERCLA's security interest exemption evolved from the following five principal cases.

The first case to consider lender liability for CERCLA cleanup costs was In re T.P. Long Chemical, Inc.\(^6\) In Long, the EPA sought to recover response costs from a bankrupt estate\(^6\) and BancOhio National Bank, a secured creditor of that estate.\(^6\) BancOhio held a perfected security interest\(^3\) in the accounts receivable, equipment, inventory and personal property of the debtor.\(^6\) The bankruptcy trustee\(^6\) auctioned all the personal property in the debtor's estate except ninety drums of hazardous waste buried at the rear of the property.\(^6\) Since the unencumbered assets of the bankrupt estate were insufficient to pay the response costs, the EPA sought to re-

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61. A bankrupt estate "is comprised of all the legal and equitable interests in property of debtors as of filing of bankruptcy petition." BLACK'S LAW DICTIONARY 147 (6th ed. 1990).

62. Long, 45 Bankr. at 281. Mr. T.P. Long owned the corporate stock of the debtor. Id. at 280. The debtor filed for reorganization under Chapter 11 of the Bankruptcy Code and the court ordered the debtor into Chapter 7 proceeding of the Bankruptcy Code. Id.

63. A perfected security interest is "the process whereby a security interest is protected, as far as the law permits, against competing claims to the collateral, which usually requires the secured party to give public notice of the interest as by filing in a government office." BLACK'S LAW DICTIONARY 1137 (6th ed. 1990).

64. Long, 45 Bankr. at 280 (BancOhio held perfected security interest).

65. A bankruptcy trustee is a "[p]erson appointed by [the] Bankruptcy Court to take charge of [the] debtor estate, to collect assets, to bring suit on debtor's claims, to defend actions against it, and otherwise administer debtor's estate." BLACK'S LAW DICTIONARY 147 (6th ed. 1990).

66. In re T.P. Long Chem., Inc., 45 Bankr. 278, 280 (Bankr. N.D. Ohio 1985). Only Mr. Long, the property owner, knew of the existence of the drums. Id. at 281. BancOhio's perfected security interest included the drums. Id. The EPA discovered that the drums contained hazardous substances and warranted immediate cleanup activity. Id. The EPA requested that the bankruptcy trustee undertake remedial cleanup action. Id. However, the trustee refused. Id. Therefore, the EPA initiated cleanup activities at the T.P. Long Chemical site. Id.
cover the Superfund cleanup expenditures from BancOhio.\textsuperscript{67}

The \textit{Long} Court held that BancOhio was not liable under CERCLA as an "owner or operator" of the hazardous facility.\textsuperscript{68} Rather, BancOhio repossessed the collateral.\textsuperscript{69} The court reasoned that reposition of collateral property is a logical action taken by a lender to protect its financial stake when a borrower defaults.\textsuperscript{70} Therefore, the security interest exemption applied because "[t]he only possible indicia of ownership that can be attributed to BancOhio is that which is primarily to protect its security interest."\textsuperscript{71} Thus, the \textit{Long} Court determined that reposition did not constitute "participation in management" under the security interest exemption.\textsuperscript{72} However, it did not determine whether a lender's reposition triggered liability as an "owner or operator" under CERCLA.\textsuperscript{73}

In the next lender liability case, \textit{United States v. Mirabile},\textsuperscript{74} the district court addressed the two untouched issues in \textit{Long}.\textsuperscript{75} The \textit{Mirabile} Court considered: (1) whether a lender that forecloses on, and takes title to, its mortgaged property is an "owner or operator" for purposes of CERCLA liability;\textsuperscript{76} and, (2) under what circumstances a lender incurs CERCLA liability stemming from involve-

\begin{itemize}
  \item \textsuperscript{67} \textit{Id}. at 287. The EPA encountered $37,859.35 in CERCLA response costs. \textit{Id}.
  \item \textsuperscript{68} \textit{Id}. at 288. The \textit{Long} Court stated in dictum, that "even if BancOhio repossessed its collateral [the drums] . . . it would not be an 'owner or operator' as defined under CERCLA." \textit{Id}. BancOhio did not foreclose on its perfected security interest. \textit{Id}. However, foreclosure would not have led to BancOhio's CERCLA liability because the loan was secured by the debtor's personal property and not the real property where the wastes were buried. \textit{Wilsdon, supra} note 4, at 1275. Therefore, the drums, BancOhio's personal property, did not constitute a facility. \textit{Id}. CERCLA imposes liability for the owner or operator of a facility. \textit{Id}.
  \item \textsuperscript{69} \textit{Id}. at 288 (bank repossessed security).
  \item \textsuperscript{70} \textit{Id}. (foreclosure is a logical lender action to protect security interest).
  \item \textsuperscript{71} \textit{Id}. at 289. Considering only the participation in the management of the T.P. Long Chemical site, the court found BancOhio's involvement insufficient to trigger CERCLA liability. \textit{Id}. at 288.
  \item \textsuperscript{72} \textit{Id}. (foreclosure did not draw CERCLA liability).
  \item \textsuperscript{73} \textit{Id}. (narrow CERCLA issue addressed by court).
  \item \textsuperscript{75} \textit{Mirabile, 15 Envtl. L. Rep.} at 20,994 (court addressed open issues from \textit{Long}).
  \item \textsuperscript{76} Courts, addressing lender liability under CERCLA, approach the issue from one of two angles. First, a court may consider whether the lender is an "owner or operator" subject to CERCLA liability. \textit{See supra} note 31 and accompanying text for a discussion of the four parties liable for CERCLA cleanup costs. Second, a court may consider whether the lender's actions constitute participation in the management of the facility or whether the lender remained exempt because it was only protecting its security interest. \textit{See supra} notes 49-59 and accompanying text for a discussion of CERCLA's security interest exemption from liability.
\end{itemize}
ment in its borrower’s hazardous waste activities. In *Mirabile*, the
court determined that a lender who forecloses and acquires title to
secured property is not an “owner or operator” under CERCLA.

recovery action against the current site owners. *Id.* In order to remove 550
drums of hazardous waste from the *Mirabile*’s property, the EPA spent
$249,792.52. *Id.* The *Mirabile* property formerly housed a paint manufacturing
business. *Id.* During the 1970’s, Arthur C. Mangels Industries, Inc.
(“Mangels”) owned and operated the paint manufacturing facility. *Id.* Turco
Coatings, Inc. (“Turco”) later purchased Mangels Industries. *Id.* Mangels’ and
Turco’s paint manufacturing process produced the hazardous waste discovered
by the EPA. *Id.* Prompted by Turco’s Chapter 11 petition, the *Mirabiles*
obtained the property pursuant to a foreclosure action. *Id.* Since two banks
loaned money to the prior owners, the *Mirabiles* joined both the American
Bank and Trust Company (“American Bank”) and Mellon Bank National Asso-
ciation (“Mellon Bank”). *Id.* The *Mirabile* Court examined whether either the
American Bank or Mellon Bank incurred CERCLA lender liability.

American Bank loaned Mangels money that was secured by a mortgage on
the paint manufacturing site. *Id.* at 20,996. Reacting to Turco’s bankruptcy pe-
tition, American Bank began a foreclosure action. *Id.* Since American Bank
pledged the highest bid at the sheriff’s sale, it obtained title to the property. *Id.*
Prior to assigning the property to the *Mirabiles*, American Bank visited the
property several times in an attempt to sell it to perspective purchasers. *Id.* All
of American Bank’s site visits took place after Turco’s paint manufacturing ter-
minated. *Id.* American Bank assigned the property to the *Mirabiles* within
four months of obtaining title at the foreclosure sale. *Id.*

In addition, Mellon Bank was closely involved in the activities at the site.
*Id.* Mellon Bank loaned Turco money secured by Turco’s inventory and assets.
*Id.* Mellon Bank became involved in Turco’s operations once Turco encoun-
tered financial difficulties. *Id.* Mellon Bank placed one loan officer on Turco’s
Advisory Board which was created to oversee operations. *Id.* Mellon Bank as-
signed a second loan officer to monitor Turco’s financial health. *Id.* Mellon
Bank’s involvement with Turco increased to include weekly site visits and ad-
dvice to Turco on manufacturing, personnel and sales issues. *Id.* Mellon Bank
acquired Turco’s inventory once Turco ceased manufacturing. *Id.*

Even though American Bank foreclosed on the property, it denied CER-
CLA liability and moved for summary judgment. *Id.* at 20,995. American Bank
presented two arguments to support this summary judgment motion. *Id.* First,
American Bank asserted that it was not a CERCLA owner because it lacked
legal title to the property. *Id.* at 20,996. Pursuant to Pennsylvania law, foreclo-
sure only grants equitable, not legal, title. *Id.* Equitable title is the beneficial
interest of one person that equity regards as the real owner, although legal title
is vested in another. BLACK’S LAW DICTIONARY 1486 (6th ed. 1990). Legal title
is complete and perfect title regarding ownership and possession. *Id.* Second,
American Bank contended that the act of foreclosure is a step taken to protect a
security interest and, therefore, exempt under CERCLA. *Mirabile*, 15 Envtl. L.
Rep. at 20,996. The *Mirabile* Court held that “actions with respect to foreclo-
sure were plainly undertaken . . . to protect [the bank’s] security interest.” *Id.*
The court determined that the CERCLA security interest exemption applied
regardless of whether the defendant held legal or equitable title acquired from
a foreclosure. *Id.* The court stated, “before a secured creditor such as [Ameri-
can Bank] may be held liable, it must, at a minimum, ‘participate in the day-to-
day operational aspects of the site.”’ *Id.* at 20,995 (emphasis added). Financial
involvement is not sufficient to justify liability. *Id.* The *Mirabile* Court found
that foreclosure constituted a “prudent” and “routine” act towards the protec-
tion of a security interest. *Id.* at 20,996.

78. *Id.* (foreclosing lender not a CERCLA owner or operator).
However, this conclusion was subject to two limitations. First, the lender must restrict foreclosure actions to those designed to protect its security interest.\(^7\) Second, the lender must avoid becoming "overly entangled" in the borrower's waste production.\(^8\) In \textit{Mirabile}, the lender's involvement with the borrower exceeded a simple foreclosure action.\(^9\) However, the \textit{Mirabile} Court determined that a further factual investigation was necessary prior to imposing CERCLA liability.\(^10\) Therefore, pursuant to \textit{Mirabile}, a foreclosing lender absolutely avoids CERCLA liability, whereas a lender that continues its involvement with a facility could incur CERCLA liability.\(^11\) Unfortunately, the \textit{Mirabile} Court dodged the judicial opportunity to define the amount of lender involvement necessary to trigger CERCLA.\(^12\) After \textit{Mirabile}, the circumstances of continued involvement that lead to lender liability remain uncertain.\(^13\)

Contrary to \textit{Mirabile}, \textit{United States v. Maryland Bank & Trust Company}\(^14\) held that a secured lender who obtains title to property, pursuant to a foreclosure sale, is not protected under the security interest exemption.\(^15\) In \textit{Maryland Bank}, the lender refused to remove the hazardous waste present on its secured property.\(^16\) The EPA removed the waste and sued Maryland Bank to recover the response costs.\(^17\) Maryland Bank moved for summary judgment.

\(^7\) \textit{Id.} The court failed to express which foreclosure actions might trigger CERCLA liability. \textit{Id.} However, the court suggested that a lender may incur liability by allowing waste producing operations to continue. \textit{Id.}

\(^8\) \textit{Id.} Regardless of whether a loan is secured by real or personal property, the security interest exemption offers the lender no protection when the lender participates in the borrower's management. \textit{Id.}

\(^9\) \textit{Id.} See supra note 77 and accompanying text discussing Mellon Bank's activities with Turco.

\(^10\) \textit{Id.} at 20,998. Concerning American Bank, the \textit{Mirabile} Court distinguished between the participation in the day-to-day management and those acts designed to protect a security interest. \textit{Id.} at 20,996. However, given an application opportunity, the \textit{Mirabile} Court refused to determine whether Mellon Bank participated in the Turco management or whether the acts were designed to protect a security interest. \textit{Id.} Mellon Bank negotiated a settlement with the EPA prior to the trial. Wilson, supra note 4, at 1279.

\(^11\) \textit{Mirabile}, 15 Envtl. L. Rep. at 20,998 (lender avoids CERCLA liability if involvement with the borrower is minimal after foreclosure).

\(^12\) \textit{Id.} at 20,996 (court declined to decide Mellon Bank's liability).

\(^13\) Wilson, supra note 4, at 1279 (lender liability after \textit{Mirabile} remains undefined).


\(^15\) \textit{Id.} at 579-80 (foreclosing lender incurred CERCLA liability).

\(^16\) \textit{Id.} at 575 (Maryland Bank refused to cleanup waste).

\(^17\) \textit{Id.} Up until 1980, Mr. and Mrs. Herschel McLeod, Sr. owned property that contained a trash and garbage business. \textit{Id.} Maryland Bank provided operating capital to the McLeods. \textit{Id.} In 1980, Maryland Bank loaned Mark McLeod $335,000 to purchase the McLeod property. \textit{Id.} Prompted by Mark's failure to maintain payments, Maryland Bank purchased the property for
under the security interest exemption. However, the Maryland Bank Court found the bank was not entitled to use the security interest exemption because its security interest terminated at the foreclosure sale and "ripened" into a full title. The Maryland Bank Court neglected to consider the lender's participation in the borrower's management but instead focused on the lender's possession of the property subsequent to foreclosure. The court concluded that, at the time of cleanup, Maryland Bank was the owner of the property and liable under CERCLA for the EPA's response costs. Thus, the Maryland Bank Court held that the security interest exemption does not apply to a lender currently holding title to property after a purchase at a foreclosure sale.

$381,500 at a foreclosure sale. Id. Maryland Bank maintained ownership until trial four years later. Id. Over a year after the foreclosure sale, the EPA discovered hazardous waste on the property. Id. The EPA requested Maryland Bank to remove the hazardous waste, but the bank failed to comply. Id. The EPA responded and removed 237 drums of hazardous waste and 1180 tons of polluted soil, incurring a cost of $551,713.50. Id. at 575-76. Since Maryland Bank refused to pay the EPA, the EPA initiated this action to recover the response costs. Id. at 576.

90. Id. at 579. Maryland Bank made two other arguments to support its motion. Id. at 576-78. First, Maryland Bank alleged that current owners of hazardous waste sites only incur CERCLA liability if they also operate the site. Id. at 577. In spite of the conjunctive nature of "owner and operator" in § 9607(a)(1), the Maryland Bank Court interpreted the phrase to mean owner or operator. Id. at 577. See supra note 31 and accompanying text for a discussion of the conjunctive versus disjunctive interpretation of CERCLA liability under § 9607(a)(1). Second, Maryland Bank attempted to use a third party affirmative defense to avoid CERCLA liability. Maryland Bank, 632 F. Supp. at 581. The Maryland Bank Court remanded this issue for a further factual finding. Id.

91. Id. at 579. In Maryland Bank, the court found that the bank purchased the property at the foreclosure sale to protect an investment, not a security interest. Id. The indicia of ownership of a security interest exists only as long as the mortgage continues. Id. Upon the foreclosure purchase, the mortgage and the security interest terminated. Id.

However, the Maryland Bank Court found that the security interest exemption only protected lenders that held the indicia of ownership to protect the security interest at the time of the cleanup. Id. The Maryland Bank Court stated "the verb tense of the exclusionary language is critical." Id. The security interest exemption uses the present tense of the verb to "hold" stating that liability does not include a person "who . . . holds indicia of ownership primarily to protect his security interest." 42 U.S.C. § 9601(20)(A)(1987). The person attempting to use the exemption must possess only the security interest at the time of cleanup. Maryland Bank, 632 F. Supp. at 579.

92. Id. (court focused only upon lender's possession of security after foreclosure).

93. Id. (Maryland Bank liable because it owned the property at the time of cleanup).

94. Id. The fact that Maryland Bank held title to the property pursuant to the foreclosure sale for four years heavily swayed the Maryland Bank Court's holding. The Maryland Bank Court stated, "because [Maryland Bank] has held the property for such an extended period of time, [we] need not consider . . . whether a secured party which purchased the property at a foreclosure sale and then promptly resold it would be precluded from asserting the . . . exemp-
After the Maryland Bank and Mirabile decisions, CERCLA liability status for foreclosing lenders appeared uncertain. The judicial decisions indicated that lenders holding polluted property for four months (Mirabile) escaped liability,\textsuperscript{95} while lenders holding the property for four years (Maryland Bank) incurred liability.\textsuperscript{96} Neither the Mirabile nor the Maryland Bank Courts offered a solution for a lender holding polluted property longer than four months but less than four years. However, this unresolved issue was overshadowed by later decisions.

After Maryland Bank, the emphasis of judicial CERCLA liability analysis shifted from an examination of a lender's foreclosure of secured assets to an examination of a lender's level of participation in the management of the borrower's facility.\textsuperscript{97} In United States \textit{v. Fleet Factors Corp.},\textsuperscript{98} the United States attempted to place responsibility\textsuperscript{99} for EPA response costs\textsuperscript{100} at the Swainsboro Print Works.
("SPW") on the lender, Fleet Factors. The United States alleged that Fleet Factors was either a present "owner and operator" of the facility or the "owner and operator" of the facility at the time of disposal. Fleet Factors moved for summary judgment, contending that its participation in SPW management was not sufficient to incur CERCLA liability.

The Fleet Factors Court rejected the Mirabile decision. Instead, the court formulated an interpretation of CERCLA liability that imposed liability on a lender when it "participat[ed] in the financial management of [a] facility to a degree indicating [its] capacity to influence the corporation's treatment of hazardous waste."
However, the Fleet Factors Court failed to enumerate the parameters of a lender's capacity to influence a corporation's policies. Therefore, lenders lacked guidelines to define the extent of participation necessary to incur CERCLA liability.

The Fleet Factors Court justified its expansive interpretation of lender liability as consistent with the “overwhelming remedial” goal of CERCLA. Furthermore, the Fleet Factors Court found that its holding gave lenders latitude in dealing with borrowers. The court's holding advocates a lender's monitoring of the debtor's business and its participation in “occasional” and “discrete” financial decisions concerned with the protection of its security interest.

increased significantly once SPW terminated operations. Id. at 1559. Fleet Factor's set SPW's price for excess inventory, compelled SPW to receive approval prior to delivering goods to customers, controlled which customers received finished goods, decided which employees to lay off, supervised the facility office administrator, processed the employee tax forms, and contracted with Baldwin to dispose of SPW's equipment and fixtures. Id. The court found that Fleet Factors actively asserted control over the disposal of the hazardous waste at the facility by forbidding SPW from selling chemically filled drums to buyers. Id. Thus, inferring Fleet Factor's capacity to influence SPW's waste was not necessary. Id.

Fleet Factors is unlike any previous environmental case. Weiner, Environmental Liability Expanded for Lenders and Other Businesses, Hopkins & Sutter, July 1990, at 1. Fleet Factors is a decision about power and authority rather than conduct. The lender does not have to become involved in a borrower's operation to become liable for the environmental conditions caused by the borrower. Id. The lender must merely have the ability, power or authority to do so. Id. The Fleet Factors Court did not define “capacity to influence.” Fleet Factors, 901 F.2d at 1557. To incur CERCLA liability, a lender does not need to reach the extreme of participating in the day-to-day operations. Id. Even though participation in the day-to-day operations in not necessary to encounter CERCLA liability, participation to that degree will certainly lead to CERCLA liability. Id. Additionally, it is not necessary for the lender to expressly participate in facility management decisions concerning hazardous waste. Id. at 1559. One glimmer of hope for lenders remains in the fact that this decision is binding authority only in the Eleventh Circuit, which consists of the federal courts in Alabama, Georgia and Florida. O'Brien, Fleet Factors Decision Suggests Lower Threshold for Liability; Will Have Impact on Secured Lending, 55 BNA's Banking Rep. 104, 106 (1990). Additionally, practical circumstances could also affect the strength of the holding. Id. at 106. Fleet Factors was decided by a quorum instead of the full appellate court panel. Id. When the case was pending, one of the regular appellate judges died and did not participate in the decision. Id. Of the two remaining judges, one judge was a senior district court judge sitting by designation. Id. Therefore, of the three judges who heard the Fleet Factors oral argument, only one judge participating in the holding was a regular appeals court judge. Id.

106. Fleet Factors, 901 F.2d at 1557 (actions that constitute capacity to influence waste decisions).

107. Id. Fleet Factors found that courts must construe “ambiguous statutory terms” such as “participating in the management” to favor lender liability to accomplish the purpose of placing CERCLA cleanup responsibility upon the party responsible for the waste. Id.

108. Id. at 1558 (court suggested lenders can deal with borrower without drawing liability).
est. However, *Fleet Factors* failed to define the amount of monitoring or involvement in financial decisions that can create the potential to affect hazardous waste decisions and thereby trigger CERCLA liability. Therefore, pursuant to *Fleet Factors*, lenders are unaware of the impact of their actions and whether these activities may draw CERCLA liability.

After *Fleet Factors*, the Ninth Circuit Court of Appeals also attempted to interpret CERCLA's "participating in the management" provision. In *In re Bergsoe Metal Corp.*, the court again neglected to define the parameters of "participation." *Bergsoe* merely set the minimum amount of lender activity with a waste facility necessary to draw CERCLA liability. The *Bergsoe* Court agreed with the Pennsylvania district court in *Mirabile*. *Bergsoe* found that CERCLA only exempts owners that hold an indicia of

109. *Id.* However, the court holds "what is relevant is the nature and extent of the creditor's involvement with the facility, not its motive." *Id.* at 1560. This implies that if the lender genuinely acts towards protecting the security interest, but somehow gets too involved with the facility, the lender is still liable. *Id.* The *Fleet Factors* Court gave no weight to the concern that a stringent liability standard would provide a disincentive for lenders to involve themselves with borrowers that have potential hazardous waste problems. *Id.* Instead, the court maintained that this potential for liability should encourage lenders to thoroughly investigate the waste treatment systems and policies of their borrowers, and to reflect any increased risk of liability in the terms of the loan. *Id.*

110. *Id.* at 1558 (court fails to define degree of monitoring or financial involvement permitted before CERCLA liability attaches).

111. *Id.* at 1557 (actions that constitute capacity to influence waste decisions).

112. *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990). Bergsoe Metal Corporation specialized in lead recycling. *Bergsoe*, 910 F.2d at 669. The East Asiatic Company, Ltd., East Asiatic Company, Inc. and Heidelberg Eastern, Inc. (collectively labelled "EAC") own all the Bergsoe Metal Corporation's stock. *Id.* Another party to the litigation is the Port of St. Helens ("Port"), a municipal corporation organized under Oregon law to issue revenue bonds to promote industrial development in St. Helens, Oregon. *Id.* Through a myriad of transactions, the United States National Bank of Oregon ("Bank") completed the financing for Bergsoe's recycling operations. *Id.* at 670. The primary financial device consisted of revenue bonds, issued by the Port, held in trust for the bondholders of the Bank. *Id.* The bond sale revenues went to Bergsoe who was obligated to pay the money owed on the bonds to the Bank. *Id.* The Bergsoe financial package consisted of two transactions. *Id.* First, Bergsoe conveyed a warranty deed to the Port for the property and the recycling plant. *Id.* The second transaction consisted of two mortgage and trust indentures between the Port and the Bank. *Id.*

113. *Id.* at 668.

114. *Id.* at 672 (court failed to define management participation).

115. *Id.* (court set minimum of amount of lender activity that triggers liability).

116. *Id.* at 671 (*Bergsoe* agreed with *Mirabile* that protection of security property does not qualify as participation with management).

117. *Id.* at 670-71. Bergsoe found that the Port owned the Bergsoe plant because the deed for the plant and the property was in the Port's name. *Id.* at 671. The fact that the Port held title to the plant did not conclusively lead to CERCLA liability. *Id.* The court had to determine the reason for the Port's ownership. *Id.*
ownership to protect their security interest and do not participate in the facility management. In addition, the Bergsoe Court determined that a creditor who exercises actual management authority over a facility is liable under CERCLA. The court defined actual management as the lender making operational decisions at the facility. Therefore, under Bergsoe, a lender remains exempt from CERCLA liability so long as the lender does not participate in the facility management. Although Bergsoe held that some lender management participation must occur for the lender to incur CERCLA liability, the court failed to define what level of management participation draws lender liability.

At the present time the status of CERCLA lender liability remains undefined. Lenders lack the guidance necessary to direct their actions and to evade liability. After Bergsoe, lenders are aware that some management participation is necessary to incur liability. However, the exact amount of participation required to

118. Id. To determine if the security interest exemption affords relief to the lender, a court must determine the reason the lender holds an indicia of ownership. Id. The Bergsoe Court concluded that the only reason the Port had a security interest in the plant and property was to ensure that Bergsoe met its lease and bond obligations. Id. The Port held title to the property. Id. However, it held title to guarantee that Bergsoe covered the Port’s own debt under the bonds. Id. The Port divorced itself from the Bergsoe operation once the Bank financed the plant. Id. The Port’s only action was to approve the project and issue bonds to facilitate the financing. Id. The leases gave Bergsoe the following indicia of ownership: (1) the responsibility to pay property taxes; (2) the responsibility to purchase insurance; and (3) the risk of loss for destruction or damage to the property. Id.

119. Id. at 672. Since Bergsoe found that the Port possessed only a security interest in the property, the remaining issue was whether the Port sufficiently participated with the Bergsoe management to draw liability. Id. at 671. Bergsoe examined the court’s holding in Fleet Factors that addressed management participation and CERCLA liability. Id. at 672. However, the Bergsoe Court refused to engage in lender participation line drawing and to define the activities that exempt and expose a lender to liability. Id. Additionally, the Bergsoe Court refused to rule upon the validity of the Fleet Factors holding. Id. The Bergsoe Court held that “whatever the precise parameters of ‘participation,’ there must be some actual management of the facility before a secured creditor will fall outside the exemption.” Id. at 671 (emphasis added). However, it perceived its interpretation of CERCLA’s minimum level of management participation as consistent with Fleet Factors. Id. at 672 n.3.

120. Id. at 672 (actual management equals making operational decisions at the site).

121. Id. Bergsoe held that Port did not draw CERCLA liability because Port refrained from actual participation in the management of Bergsoe. Id. Additionally, Bergsoe concluded, management does not encompass a secured creditor negotiating for rights to protect the investment. Id. The judicial focus evaluating “participating in management” is not what rights that the creditor possessed but instead what rights the creditor exercises. Id. at 673.

122. Id. at 672 (court failed to define minimum level of lender management participation that triggers CERCLA liability).

123. Id. (established some level of lender management participation necessary to incur CERCLA liability).
trigger liability is unknown.\textsuperscript{124} Pursuant to \textit{Fleet Factors}, both the capacity to affect waste decisions and strict financial involvement may trigger CERCLA liability.\textsuperscript{125} However, \textit{Fleet Factors} did not define either the level of capacity or the extent of financial involvement necessary to incur liability.\textsuperscript{126} Additionally, \textit{Maryland Bank} found a lender that held title to a foreclosed property for four years liable under CERCLA.\textsuperscript{127} But, \textit{Maryland Bank} failed to define the minimum length of time that a lender could hold title to a foreclosed property without incurring CERCLA liability.\textsuperscript{128} Lenders lack judicial guidance regarding CERCLA liability.\textsuperscript{129} This lack of guidance penalizes a lender because the courts' focus have been on what level of actions a lender has taken, not on whether those actions were undertaken responsibly.\textsuperscript{130} As a consequence, everyday lenders confront real-life decisions without any reliable standards that define the extent of future liability.\textsuperscript{131}

\section*{IV. Proposals to Define Lender Liability}

In response to \textit{Fleet Factors} and \textit{Bergsoe}, legislative and administrative agencies advanced proposals to define the parameters of CERCLA lender liability. First, Representative John J. LaFalce of New York introduced House Bill 4494 to limit lender liability in foreclosure actions.\textsuperscript{132} Second, Senator Jake Garn of Utah intro-

\begin{itemize}
\item \textsuperscript{124} \textit{Id.} (no level of participation defined that draws liability).
\item \textsuperscript{125} United States v. \textit{Fleet Factors}, 901 F.2d 1550, 1553 (11th Cir. 1990) (both management capacity and financial involvement may trigger CERCLA liability), \textit{cert. denied}, 111 S. Ct. 752 (1991). Under the "capacity to influence" and "inference that it could affect hazardous waste disposal" standards, a lender, without being labelled an owner or operator, can find itself liable under CERCLA if it would have exercised control over a borrower's activities regarding hazardous waste treatment but failed to do so. Joseph Forte & O. Ochman, \textit{An Update on Environmental Liability}, \textsc{Prob. \\& Prop.}, Jan. - Feb. 1991, at 23. At the same time, a lender that exercises control over its borrower's activities regarding hazardous waste treatment runs the risk of losing its secured creditor statutory exemption. \textit{Id.} at 24. Additionally, \textit{Fleet Factors} perpetuates the doubt initiated in \textit{Maryland Bank} of whether a lender can seize or foreclose on its collateral without incurring CERCLA liability.

\item \textsuperscript{126} \textit{Fleet Factors}, 901 F.2d at 1553 (amount of management capacity or financial involvement necessary to receive CERCLA liability not expressed).
\item \textsuperscript{127} United States v. \textit{Maryland Bank \\& Trust Co.}, 632 F. Supp. 573, 579-80 (D. Md. 1986) (holding title to foreclosed property containing waste draws CERCLA liability).
\item \textsuperscript{128} \textit{Id.} (court failed to define length of time necessary to hold title to foreclosed polluted property before liability occurs).
\item \textsuperscript{129} David Freeman, \textit{Recent Case Law May Expand Lenders' Risks Under Superfund; Environmental Risks May Grow for Lenders}, \textsc{Nat. Law J.}, Sept. 17, 1990, at 18 (lenders incur liability because the do not know how to act).
\item \textsuperscript{130} \textit{Id.} (lenders lack judicial guidance concerning liability).
\item \textsuperscript{131} \textit{Id.} (lenders forced to make lending decisions without knowing CERCLA liability ramifications).
\item \textsuperscript{132} H.R. 4494, 101st Cong., 1st Sess. (1990) (amendment to CERCLA introduced in House of Representatives).
\end{itemize}
duced Senate Bill 2827 to create sweeping strict liability exemptions for lenders related to any hazardous waste release, storage, or disposal. Third, the EPA proposed a draft rule to the White House Office of Management and Budget on September 14, 1990. The EPA proposal defined the secured creditor exemption in a manner that permitted a broad range of lender activity when conducted primarily to protect a lender’s security interest. The EPA proposal also perpetuates the remedial environmental goals of CERCLA.

Each of these three proposals address the current uncertain standard of CERCLA liability from a different avenue and through a different mechanism.

Representative LaFalce’s bill, H.R. 4494, attempts to directly amend CERCLA. H.R. 4494’s definition of “owner or operator” excludes a “designated lending institution” that acquires control of a facility pursuant to the terms of a security agreement or a release from liability. H.R. 4494’s definition also excludes both corporate and individual fiduciaries that acquire title through trust or estate terms, and indenture trustees that obtain title pursuant to a default. Instead of defining standards to promote responsible lender action, H.R. 4494 seeks to totally exclude lenders as a potentially liable class of “owners or operators.” Since Congress failed

135. Id. (draft defines lender activities exempt from CERCLA liability).
136. H.R. 4494 (direct amendment to CERCLA).
137. H.R. 4494, § 1. H.R. 4494 defines a “designated lending institution” to include the following: (1) any depository institution; (2) any leasing company; (3) any institution in the Farm Credit System; (4) any trust company; and (5) any other person which is a bona fide lending institution which made real estate loans in an aggregate amount of $1,000,000 to 25 or more borrowers. Using this broad definition, Representative LaFalce intended to exempt from CERCLA liability all organized lending entities engaged in any form of real estate financing. Id.
138. H.R. 4494, § 1. The H.R. 4494 liability exemption covers “[A] designated lending institution which acquires ownership or control of the facility pursuant to the terms of a security interest held by the person in that facility.” H.R. 4494 § 1 amends 42 U.S.C.A. § 9601(20)(D) (1987). H.R. 4494. Section 9601 defines an “owner or operator” as a responsible party for response costs. H.R. 4494, § 1. However, H.R. 4494 excludes any lender that acquires title to a polluted property through a foreclosure action or lease security interest term. Id.
139. An indenture is a written agreement that authorizes the issuance of bonds and debentures, states the form of the bond, the amount of the issue, the maturity date, the interest rate, the description of the pledged assets and other terms. BLACK’S LAW DICTIONARY 770 (6th ed. 1990).
140. H.R. 4494, § 1 (1990) (amendment expands liability exemption to include corporate and individual fiduciaries and indenture trustees).
141. Rick Eyerdam, Lenders Would Escape Liability for Environment Under Rule, S. FLA. BUS. J., Oct. 8, 1990, at 1. H.R. 4494 proposes “blanket immunity” allowing lenders to foreclose on property and to conduct loan work-
to enact H.R. 4494 prior to the conclusion of the 101st Congress, the bill expired. H.R. 4494 will remain dead until a representative reintroduces the bill in the 102d Congress.

Senator Garn’s proposal, S. 2827, minimizes CERCLA lender liability by amending the Federal Deposit Insurance Act (“FDIA”) to protect insured depository institutions from hazardous waste liability. The FDIA amendment proposes that federally insured banks be excused from liability under any law that decrees strict liability for the release of hazardous waste. The FDIA amendment fails to directly refer to CERCLA. However, it indirectly incorporates CERCLA liability since CERCLA imposes strict liability upon owners and operators of hazardous waste sites. Lenders that cause or possess actual knowledge of a release of hazardous waste are not exempted under this amendment. Unfortunately, outs without triggering CERCLA liability. The proposed redefinition of the term "owner or operator" frustrates the purpose of CERCLA which is to foster responsible environmental waste cleanup behavior and to insure the government receives reimbursement for EPA response costs expenditures.

142. H.R. 4494, § 1. (bill not passed before end of 101st session). Every bill introduced in Congress is subject to the two-year deadline of the congressional session. WALTER OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 19 (Congressional Quarterly Press 3d ed., 1989). The 101st session of Congress began at noon on January 3, 1989, and expired at noon on January 3, 1991. Id. Once a bill is introduced, both the House and the Senate must pass the bill within the two-year session in order for the bill to become law. Id. If either the House or the Senate fails to pass the bill before the end of the session the bill automatically dies and must be reintroduced in a new session of Congress. Id.

143. See id. Since the House failed to pass H.R. 4494 before January 3,1991, H.R. 4494 died and must be introduced in a future session. Id.


145. Id. S. 2827 provides:

No insured depository institution or mortgage lender shall be liable under any law imposing strict liability for the release, threatened release, storage or disposal of a hazardous substance or similar material from property: (1) acquired through foreclosure; (2) held in a fiduciary capacity; or (3) held, controlled or managed pursuant to the terms of an extension of credit.

Id.

This exemption covers both federally insured depository institutions and mortgage lenders. Id. The term “mortgage lender” includes any person whose business is to extend credit secured by real property. Id. All transactions in which a depository institution and mortgage lender acquire property by purchase at a sale “under judgment or decree, power of sale, from a trustee,” pursuant to an extension of credit, are included in the exemption. Id. Additionally, the exemption includes lease transactions that are equivalent to a secured loan. Id.

146. Id. (FDIA amendment does not refer to CERCLA).

147. Id. CERCLA imposes strict liability on responsible parties found to own or operate a site containing hazardous waste. State of New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985). See supra notes 32-37 and accompanying text for a discussion of strict liability under CERCLA.

148. S. 2827, 101st Cong., 2d Sess. § 35(c) (1990). The FDIA amendment exemption excludes the following groups of lenders:
the FDIA amendment includes the same defect as Representative LaFalce's bill. The FDIA amendment frustrates CERCLA's remedial environmental purpose through the creation of a lender loophole. This loophole allows lenders to ignore any environmental responsibilities. Similar to LaFalce's bill, the Senate neglected to pass Senator Garn's proposal before the 101st session ended. Therefore, Garn's bill remains dead.

Since both the House and Senate bills suffered congressional death, the EPA proposal remains the only viable proposal to define CERCLA lender liability. The EPA proposal seeks to reconcile a lender's need to manage funds with the EPA's duty to cleanup waste sites and recover expended Superfund assets. The exemption shall not apply to any person: (1) that has caused the release or the threatened release or disposal of a hazardous substance or similar material...that gives rise to removal, remedial, or similar action; (2) with actual knowledge that a hazardous substance or similar material is used, stored or located [and] ... failed to take all reasonable actions necessary to prevent the release or disposal of such substance; (3) that has benefited from the removal, remedial or other response action, but only to the extent of the actual benefit conferred by such action on that person.

Therefore, lenders to a particular site remain liable under CERCLA if they: (1) possessed knowledge about hazardous waste; (2) stood to gain from the removal of the waste; or, (3) caused the release of the hazardous waste. The FDIA amendment exemption deters lenders from performing environmental due diligence or monitoring the borrower's manufacturing practices. Eyerdam, supra note 141, at 1. A lender is potentially liable for the CERCLA cleanup if it discovers information regarding the borrower's hazardous waste practices. If a lender does not inquire, it does not risk CERCLA liability. Likewise, if a lender does not get involved with the borrower's facility to a degree to cause the release of a hazardous substance, a lender remains protected by the FDIA liability exemption. Therefore, if a lender does not ask or does not participate in the production, a lender is not liable for CERCLA cleanup costs. This lender inaction does not curtail hazardous waste practices or assist the government in recovering CERCLA response costs. Therefore, pursuant to the FDIA amendment, lenders may undermine CERCLA's environmental purpose.

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Adding Certainty to CERCLA Lender Liability

The EPA's approach is to give lenders a clear indication of the actions that trigger liability under CERCLA. In pursuit of clarity, the EPA proposal attempts to clearly define the following terms of the security interest exemption: "(1) indicia of ownership; (2) primarily to protect a security interest; and (3) participating in the management of a . . . facility." A clear definition of these terms provides guidelines necessary to maintain CERCLA's purpose while simultaneously encouraging responsible lender activity.

First, the EPA proposal defines "indicia of ownership" as interests "in real or personal property held as a security or collateral for a loan, including the real or personal property acquired in the course of protecting the security interest." This definition only extends to lenders' rights designed to assure the borrower's repayment. Thus, under the security interest exemption, a lenders' "ownership" is measured by the extent the facility or collateral represents the borrower's guarantee for the unpaid obligation. The "ownership" is not in the facility itself. Therefore, the exempt "indicia of ownership" is the interest the lender holds to guarantee further expressed that the issue of how the secured creditor exemption is interpreted created a great deal of uncertainty in the financial and lending communities. This uncertainty came as a result of what Strock labelled as dicta in Fleet Factors. The EPA draft proposal labelled the secured creditor exemption a "shield" from CERCLA liability. The exemption is not a loan guarantee for lending institutions to "shift to Superfund the cost of poor loan decisions." The EPA proposal listed examples of indicia that are representative, but not exhaustive, of the interpretation of "indicia of ownership." These examples include: mortgages; deeds of trust; legal titles obtained through foreclosure; or assignments, liens, pledges, or other rights to or encumbrances against the facility that is furnished by the borrower as a security for the loan. To qualify for the exemption, the mortgage, lien or encumbrance must be the intended security for the loan. No other interest in the nature of an investment qualifies for the security interest exemption.

The operative language of the security interest exemption states that the term "owner or operator . . . does not include a person, who without participating in the management of the vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. § 9601(20)(A) (1987). The EPA proposal promotes CERCLA and responsible lender activity.

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The EPA draft proposal labelled the secured creditor exemption a "shield" from CERCLA liability. The exemption is not a loan guarantee for lending institutions to "shift to Superfund the cost of poor loan decisions."
Second, the EPA proposal defines acts “primarily to protect the security interest” as necessary and required acts undertaken to protect the property interest created as security for the loan.\textsuperscript{164} The EPA proposal allows a lender to employ three types of protective actions to protect its security interest: (1) inquiry requirements at the making of the loan; (2) monitoring requirements during the life of the loan; and, (3) loan workout and foreclosure activities.\textsuperscript{165} The EPA proposal recognizes CERCLA’s environmental purpose by dictating that the lender, seeking shelter from CERCLA liability, undertakes affirmative obligations toward the property prior to making the loan.\textsuperscript{166} Therefore, to avoid CERCLA liability, a lender must perform an environmental audit\textsuperscript{167} to ascertain the condition

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\item \textsuperscript{163} Id. (interest insures loan repayment).
\item \textsuperscript{164} Id. at 5. The secured creditor exemption does not apply to ownership in property for investment purposes because the purpose of holding the property is not the assurance of repayment. Id. Additionally, the secured creditor exemption has no application when the lender acts as a trustee, manager or any other non-lending capacity toward the property or business. Id.
\item \textsuperscript{165} Id. (liability avoiding loan protection acts divided into three time frames).
\item \textsuperscript{166} Id. at 6. CERCLA’s broad remedial goal requires that a lender, intent on avoiding CERCLA liability, act consistently with CERCLA’s purpose. Id. The lender must do so to qualify for the secured creditor exemption. Id. Lenders comply with CERCLA’s purpose when they inspect and audit the environmental condition of the collateral securing the loan. Id. A lender fails to qualify for the security interest exemption by neglecting to conduct an environmental audit. Id.
\item \textsuperscript{167} The environmental audit is a flexible mechanism structured to accomplish management needs. LAWRENCE HARRISON, THE McGRAW-HILL ENVIRONMENTAL AUDITING HANDBOOK, A GUIDE TO CORPORATE AND ENVIRONMENTAL RISK MANAGEMENT §§ 1-12 to 1-13 (1984). In its simplest form, the environmental audit analyzes a company’s present compliance with federal, state, and local environmental regulation. Id. To determine regulatory compliance, an environmental audit checks whether the company obtained all the required environmental permits, made all required reports accurately and promptly, and disposed all hazardous waste properly. Id. at 1-13. An environmental audit can be much more specific. Id. An environmental audit can encompass the following: an analysis of samples in different laboratories; a determination of whether inside and contractor laboratories provide an accurate analysis of the wastes; an examination of past hazardous waste disposal practices that may present future environmental liabilities; and a consideration of future control requirements to determine whether adequate environmental provisions exist in the corporate budget. Id. An environmental audit aids early recognition and identification of possible hazardous waste problems. Kenneth R. Myers & Thomas J. McCaffery, The Goals and Techniques of Environmental Audits, 30 PRAC. LAW. 41, 42 (1984). An environmental audit will provide both notice of hazardous waste problems and information concerning the costs of remediating the problems discovered. Id. at 47. An environmental auditor must possess scientific and engineering expertise as well as a legal background to interpret the regulatory standards. Id. The two primary forms of an environmental audit are the traditional audit and the mass balance environmental audit. Id. The traditional audit evaluates implementation programs by examining environmental control systems and the materials that enter those systems. Id. To perform a traditional audit, the audit team evaluates the facility’s waste management program
\end{itemize}
Adding Certainty to CERCLA Lender Liability

of the property before granting a loan. During the life of the

by following waste streams from generation to disposal. In addition to evaluating the facility’s waste process, the traditional audit includes monitoring the air and water treatment programs. The weakness of the traditional audit is that it will not determine whether the facility’s control system is immune from future environmental liability. A mass balance environmental audit may be required to predict future environmental liability.

A mass balance environmental audit tracks materials and byproducts from the time these materials enter the facility, through processing and storage, to final dispositional. This form of an environmental audit includes a thorough review of the facility’s purchasing, processing, transportation and sales functions in addition to the normal analysis of treatment, storage and disposal activities. Corporations use the mass balance environmental audit primarily to detect future problems at an early stage. Therefore, an environmental audit organizes environmental data to assess compliance, estimates the cost of future environmental compliance, and predicts future exposure to environmental liability.

Regardless of whether the traditional or mass balance environmental audit is performed, the audit must contain additional elements to reduce future CERCLA liability. The audit must identify potential problem areas of waste treatment. After the original audit, the audit staff will schedule future facility visits at irregular intervals with minimal advance notice to insure the staff observes a realistic performance of the facility. Additionally, the audit staff installs a “tickler” system to assure that permits are routinely renewed before they expire and that all important permit conditions remain satisfied. Finally, the auditors explain the environmental regulations to the plant managers and supervisors to assist in future compliance. The proposed environmental audit rectifies past disclosure inadequacies while aiding the facility in achieving compliance and defending against future liability claims.

Regardless of whether the traditional or mass balance environmental audit is performed, the audit must contain additional elements to reduce future CERCLA liability. The audit must identify potential problem areas of waste treatment. After the original audit, the audit staff will schedule future facility visits at irregular intervals with minimal advance notice to insure the staff observes a realistic performance of the facility. Additionally, the audit staff installs a “tickler” system to assure that permits are routinely renewed before they expire and that all important permit conditions remain satisfied. Finally, the auditors explain the environmental regulations to the plant managers and supervisors to assist in future compliance. The proposed environmental audit rectifies past disclosure inadequacies while aiding the facility in achieving compliance and defending against future liability claims. The EPA also recommends that loan agreements contain lender imposed requirements for financial, environmental and other warranties from the borrower as conditions for the loan. While the EPA proposal requires lenders to undertake affirmative action consistent with CERCLA, a lender is not required to guarantee or insure the environmental safety at a facility. However, the inclusion of environmental warranties or covenants in the loan agreement are not considered to be evidence of a lender acting as an insurer or guarantor. Therefore, liability cannot be premised on the existence of such terms, or upon the lender’s actions to ensure that the facility is managed in an environmentally sound manner.

Even though the EPA proposal advocates indemnity agreements and contracting away environmental liability to the borrower, it remains uncertain how the courts will treat this language in a loan agreement. See United States v. Conservation Chem. Co., 653 F. Supp. 152, 239 (W.D. Mo. 1986). In Conservation, the district court acknowledged the ability of contractual agreements to modify the allocation of liability between the borrower and the lender. The court held that CERCLA does not prohibit indemnification agreements but neither does CERCLA encourage or authorize indemnification agreements. The Conservation Court interpreted 42 U.S.C.A § 9607(a). Section 9607(a) provides:

No indemnification, hold harmless or similar agreement or conveyance shall be effective to transfer from... any person who may be liable for a release or threat of release... to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless or indemnify a party to such agreement for any liability under this section.
loan, the EPA proposal directs the lender to regularly monitor the property and to obtain assurance of the borrower's compliance with environmental law.\textsuperscript{169} Finally, if the debtor incurs financial difficulties, the EPA proposal establishes guidelines for a loan workout\textsuperscript{170} and foreclosure.\textsuperscript{171} Both the loan workout and foreclosure qualify as acts designed to protect the lender's security interest.\textsuperscript{172}

Generally, lender loan workout activities do not violate the clause "primarily to protect the security interest" when the borrower remains the ultimate decision maker for the operational management of the facility.\textsuperscript{173} However, when a lender must foreclose on the property, its acquisition must be necessary to ensure the satisfaction of the borrower's debt obligation.\textsuperscript{174} In addition, the acquisition must remain within the EPA's definition of acting to protect the security interest.\textsuperscript{175} A foreclosure must proceed to terminate the borrower's operation and prepare the property for a subsequent sale.\textsuperscript{176} Moreover, to remain within the security interest

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\item The Conservation Court found that § 9607(a) did not prohibit indemnification agreements. \textit{Id.} However, the court failed to determine whether an indemnity agreement would be upheld. \textit{Id.} at 240. It remains uncertain how future courts will view indemnity agreements between lenders and borrowers. \textit{Id.}
\item 169. EPA DRAFT PROPOSAL, \textit{supra} note 155, at 6. In addition to obtaining the borrower's assurance of compliance with federal, state, and local environmental laws, a lender must conduct site inspections of the collateral to remain qualified for the security interest exemption. \textit{Id.}
\item 170. A "loan workout" is an agreement between the debtor and the creditor to restructure or refinance nonperforming or overdue loans. BLACK'S LAW DICTIONARY 1606 (6th ed. 1990). Loan workout activities are lender actions to protect and preserve their security interest by assisting the debtor in an effort to prevent default of the loan or the diminution of the value of the collateral. EPA DRAFT PROPOSAL, \textit{supra} note 155, at 7.
\item 171. EPA DRAFT PROPOSAL, \textit{supra} note 155, at 7 (proposal establishes guidelines for foreclosures and workouts).
\item 172. \textit{Id.} A lender's actions during a workout, foreclosure or liquidation must consider and address any hazardous substances known to be present at the facility and must not cause or contribute to a release of hazardous substances. \textit{Id.}
\item 173. \textit{Id.} The EPA proposal allows the following loan workout activities: (1) restructuring or renegotiating the terms of the loan obligation; (2) payment of additional interest; and (3) extension of the payment period or forbearance. \textit{Id.} The above listed activities are representative, but do not exhaust the allowed workout activities. \textit{Id.}
\item 174. \textit{Id.} (foreclosure must be necessary to guarantee repayment to remain exempt).
\item 175. \textit{Id.} A lender's temporary acquisition must be reasonably necessary to assure the satisfaction or performance of the loan. \textit{Id.} The lender's action in outbidding or refusing bids from parties offering fair consideration for the property evidences that the property is no longer being held "primarily to protect the security interest." \textit{Id.}
\item 176. \textit{Id.} Winding up the operations entails the necessary actions to terminate the facility's operations, to secure the site and to otherwise protect the value of the foreclosed assets for liquidation. \textit{Id.}
\end{itemize}
exemption, a lender must be divested of the property within six months of foreclosure.\textsuperscript{177} Therefore, when the lender must foreclose, only methodical and affirmative actions toward collateral divestment insulate the lender from liability.\textsuperscript{178}

Finally, the EPA defined lender activity that constitutes "participation in the management of a facility" as any activity that precludes the lender from using the security interest exemption to escape CERCLA liability.\textsuperscript{179} The EPA considers the lender a management participant when it divests the borrower of decision making control over operational procedures while the borrower remains in possession of the facility.\textsuperscript{180} "Participation in the management of a facility" means the lender's actual exercise of management control.\textsuperscript{181} The EPA expressly excluded from its definition the mere capacity to control or to influence a facility's operations.\textsuperscript{182} Therefore, direct or actual participation in the management of a site is required before a lender is precluded from using the security interest exemption to avoid CERCLA liability.\textsuperscript{183} When the borrower continues to make operational decisions, a lender is generally not a participant in management.\textsuperscript{184}

V. A BALANCED SOLUTION: THE EPA PROPOSAL

The EPA proposal defining the security interest exemption is the best approach to remedy the inconsistent judicial treatment of lender liability under CERCLA for three reasons. First, the EPA proposal advances CERCLA's purpose of protecting the environment from damage caused by improper waste practices. Second, the

\textsuperscript{177} Id. A presumption exists that a lender remains within the protection of the security interest exception when it divests from the foreclosed property within six months. Id. If a lender remains vested with the foreclosed property beyond six months, the burden shifts to the lender to demonstrate that it continues to hold the property primarily to protect the security interest. Id.

\textsuperscript{178} Id. (affirmative action toward divestment protects the lender from CERCLA liability).

\textsuperscript{179} Id. at 8 (EPA defines participation in management precluding lender use of the security interest exemption).

\textsuperscript{180} Id. The EPA defines "participating in the management of the facility" as the lender's divestment of the borrower from the operational decision making process toward the facility. Id. If a lender divests the borrower from the decision making process, the lender is no longer protected by the security interest exemption. Id.

\textsuperscript{181} Id. (actual management required to preclude the use of the security interest exemption and incur CERCLA liability).

\textsuperscript{182} Id. The EPA proposal directly overrules the holding in Fleet Factors. Id. To incur liability, a lender must directly participate in management. Id. The mere ability to effect hazardous waste treatment will not expose a lender to CERCLA liability. Id.

\textsuperscript{183} Id. (participation required to preclude utilization of the security interest exemption).

\textsuperscript{184} Id. (protecting security interest is not management participation).
EPA proposal addresses the judicial concerns illustrated in past cases regarding CERCLA lender liability, while simultaneously outlining responsible lender behavior to avoid liability. Third, the judiciary must defer to the EPA's interpretation of lender liability embodied in the EPA proposal.

First, the EPA proposal advances CERCLA's purpose to protect our health and the environment from the damage caused by improper waste practices.\(^\text{185}\) CERCLA furthers the ultimate purpose of safeguarding the environment by holding corporations responsible for environmental damage and massive cleanup costs.\(^\text{186}\) This purpose serves to deter other corporations from releasing hazardous substances.\(^\text{187}\) The EPA proposal also adds another deterrence weapon to CERCLA.\(^\text{188}\) The proposal requires lenders to perform environmental audits prior to the loan and to perform site inspections during the life of the loan.\(^\text{189}\) The audit and the inspections are monitoring devices designed to detect, address, and prevent the release of hazardous waste before it damages the environment.\(^\text{190}\) Thus, the EPA proposal motivates the lender to discover and address site waste production since the lender incurs liability if the EPA finds waste at the site.\(^\text{191}\) The cost of the environmental audit and site inspections is much less than the cost of

\(^{185.}\) Id. at 5 (CERCLA purpose remains fending for health and environment).

\(^{186.}\) Florida Power & Light v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990) (CERCLA purpose is to recover response costs from responsible corporations).

\(^{187.}\) Note, Developments in the Law: Toxic Waste Litigation, 99 HArv. L. Rev. 1458, 1539 (1986). The deterrence theory works under the assumption that if waste generators must pay CERCLA cleanup costs, other corporations will avoid waste production to avert CERCLA liability. Id. at 1540.

\(^{188.}\) EPA Draft Proposal, supra note 155, at 6 (EPA proposal adds deterrence weapon added to CERCLA).

\(^{189.}\) Id. To remain eligible to utilize the security interest exemption, a lender must conduct an environmental audit and inspect a facility prior to executing a loan. Id. If a lender fails to perform the proper environmental diligence, the security interest exemption is not available as a defense to CERLA liability. Id.

\(^{190.}\) Id. A lender remains liable under CERCLA for the borrower's release of hazardous waste when the lender performs an environmental audit, discovers the borrower's operation releases hazardous waste, fails to require the borrower to remedy the hazardous release, and executes the loan. Id. When the lender ignores the discovery of hazardous waste, the lender loses the right to use the security interest exemption. Id.

\(^{191.}\) Id. A lender also possesses an affirmative obligation to continue to inspect the borrower's site during the life of the loan. Id. When the lender discovers the facility is releasing hazardous waste during the life of the loan and fails to initiate any remedial action, the lender loses the right use the security interest exemption. Id. The risk of losing eligibility for the security interest exemption motivates a lender to act toward safeguarding against the release of hazardous waste. Id.
CERCLA liability.\textsuperscript{192} Therefore, these audits prevent waste release and avert environmental pollution, as well as further CERCLA's purpose.\textsuperscript{193}

Second, the EPA proposal addresses past judicial concerns regarding CERCLA lender liability while simultaneously defining responsible lender action that prevents CERCLA liability.\textsuperscript{194} Lenders utilized the security interest exemption to avoid EPA claims to recover CERCLA response costs.\textsuperscript{195} Historically, the courts inconsistently interpreted the meaning of the security interest exemption and failed to establish a standard for its application.\textsuperscript{196} To date, lender liability cases focused on whether a lender foreclosed on the secured property, whether the lender acquired ti-

\textsuperscript{192} Id. The cost of CERCLA liability can exceed $50 million. Id. However, the cost of an environmental audit rarely exceeds $1 million. Id.

\textsuperscript{193} Note, supra note 187, at 1541 (preventing hazardous waste releases reduces pollution problems and advances CERCLA policy).

\textsuperscript{194} EPA DRAFT PROPOSAL, supra note 155, at 4. The EPA proposal seeks to balance a lender's need for certainty against the EPA's duty to cleanup waste sites and recover Superfund expenditures in cleansing the sites. Id.


In Bergsoe Metal Corp., the Port responded to the CERCLA liability allegation claiming protection under the security interest exemption. In re Bergsoe Metal Corp., 910 F.2d 668, 671 (9th Cir. 1990). See supra notes 112-24 and accompany text for a discussion of Bergsoe.

\textsuperscript{196} In dictum, the Long Court said that foreclosure does not give rise to CERCLA liability because it is a logical action taken by a lender to protect its financial position when a borrower defaults. In re T.P. Long Chemical, Inc., 45 Bankr. 278, 288 (Bankr. N.D. Ohio 1985). In Mirabile, the court held that if the lender forecloses on property to protect a security interest and avoids becoming "overly entangled" in the borrower's waste production, that foreclosure fails to trigger CERCLA liability. Mirabile, 15 Envtl. L. Rep. at 20,996. The Maryland Bank Court held that the security interest exemption does not avoid CERCLA liability when a lender holds title to the property after purchasing the security property at a foreclosure sale. Maryland Bank, 632 F. Supp. at 579. The Fleet Factors Court held that if the lender "participat[es] in the financial management of the facility to a degree indicating a capacity to influence the corporation's treatment of hazardous waste," the security interest exemption fails to protect the lender from CERCLA liability. Fleet Factors, 901 F.2d at 1557. The Bergsoe Court held that before the security interest exemption ceases to prevent CERCLA liability, the court must find that the lender participated in the actual management of the facility. Bergsoe, 910 F.2d at 673.
tle to the security, and to what degree the lender participated in the management of the facility.\textsuperscript{197}

The EPA proposal designs a new standard that is easy for lenders to follow.\textsuperscript{198} It establishes both foreclosure procedures and the level of allowable management participation that triggers CERCLA liability.\textsuperscript{199} Upon foreclosure, the EPA proposal allows a lender to acquire title to the collateral and still receive the protection of the security interest exemption.\textsuperscript{200} The EPA proposal requires that the foreclosure be reasonably necessary to assure the performance of the loan obligation.\textsuperscript{201} The EPA proposal further requires that the lender progress toward the termination of the facility and the sale of the property.\textsuperscript{202} Finally, the EPA directs the lender to divest itself of the property within six months of the foreclosure in order to avoid liability.\textsuperscript{203}

\textsuperscript{197} The \textit{Long} Court dictum addressed lender foreclosure. \textit{Long}, 45 Bankr. at 288. The \textit{Mirabile} Court ruled on the lenders foreclosure and assignment of the security. \textit{Mirabile}, 15 Envtl. L. Rep. at 20,996. The \textit{Maryland Bank} Court found the lenders purchase of the secured property at a foreclosure sale triggered CERCLA liability. \textit{Maryland Bank}, 632 F. Supp. at 579. The \textit{Fleet Factors} Court ruled on the extent of the lender's participation in the management of the facility. \textit{Fleet Factors}, 901 F.2d at 1557. Finally, the \textit{Bergsoe} Court addressed the degree the lender participated in the management of the facility. \textit{Bergsoe}, 910 F.2d at 673.

\textsuperscript{198} \textit{EPA DRAFT PROPOSAL}, supra note 155, at 3 (the EPA proposal defines CERCLA exempt lender action).

\textsuperscript{199} \textit{id.} (the EPA proposal defines the degree of tolerable lender participation in facility management and the effect of foreclosure on the security interest exemption).

\textsuperscript{200} \textit{id.} at 7 (the lender remains protected by the security interest exemption pursuant to acquiring title to the security from a foreclosure sale).

\textsuperscript{201} \textit{id.} When a lender either refuses or outbids parties offering fair consideration for the collateral, it no longer is acting in a manner reasonably necessary to assure the performance of the loan obligation. \textit{id.} Therefore, the lender is no longer protected against CERCLA liability. \textit{id.}

\textsuperscript{202} \textit{id.} A lender may not acquire title to the collateral and passively hold this title for an extended period of time. \textit{id.} The lender must actively strive towards the termination of operation and the resale of the property to remain protected by the security interest exemption. \textit{id.} Evidence that a lender is seeking to divest itself expeditiously of the asset includes, but is not limited to, advertising or auctioning the facility for sale, listing the property with a realtor or sales agent, or other actions reasonably demonstrating or manifesting an intent to sell or otherwise divest itself of the asset. \textit{id.}

\textsuperscript{203} \textit{id.} When the lender remains vested with title to the security for a period in excess of six months, the burden shifts to the lender to establish that it is still necessary to hold that title to assure the performance of the obligation, taking all relevant facts and circumstances into account. \textit{id.} If the EPA proposal was followed in the \textit{Mirabile} decision, the lender's foreclosure would still receive the security interest protection because the lender assigned the title within four months of acquiring the title. \textit{See United States v. Mirabile}, 15 Envtl. L. Rep. (Envtl. L. Instl.) 20,994, 20,996 (E.D. Pa. Sept. 4, 1985). If the EPA proposal were imposed upon the \textit{Maryland Bank} decision, the lender would have the burden of proof to explain why it was necessary to retain the title for four years subsequent to the foreclosure. \textit{See United States v. Maryland Bank & Trust Co.}, 632 F. Supp. 573, 579 (D. Md. 1896).
Additionally, the EPA proposal addresses the remaining judicial inconsistencies regarding the level of lender participation that triggers CERCLA liability. The EPA proposal considers a lender a management participant when it actually participates in the operational management of the facility. In addition, a lender must divest the borrower of decision making control. Pursuant to the EPA proposal, a lender remains protected by the security interest exemption when it makes a management decision primarily to protect the security of its loan.

In addition to resolving judicial concerns over CERCLA lender liability, the EPA proposal defines a path of responsible action that lenders may follow to avoid liability. The EPA proposal defines permissible lender activity, promotes environmental protection, and outlines the parameters of actions that lead to and avert CERCLA liability. In order to avoid CERCLA liability and enhance early detection of waste problems, a lender must conduct an environmental audit or inspection of the property prior to extending the credit. Under the EPA proposal, once the lender extends credit, it may police both the environmental condition of the property and the financial condition of the borrower without triggering CERCLA liability. Additionally, the EPA proposal allows the lender

204. EPA DRAFT PROPOSAL, supra note 155, at 8 (proposal defines management participation).
205. Id. (lender must make operational decisions to trigger CERCLA liability).
206. Id. The EPA proposal directly overrules the Fleet Factors holding because actual management participation is required. Id. Under the EPA proposal, the Fleet Factors language concerning the mere capacity to control or influence a facility’s operation, would be insufficient to attack the security interest exemption. United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), cert denied 111 S. Ct. 752 (1991). It is necessary for the lender to usurp the borrower’s operational control to dismiss the protection of the security interest exemption. EPA DRAFT PROPOSAL, supra note 155, at 8.
207. EPA DRAFT PROPOSAL, supra note 155, at 8. Infrequent management participation or participation designed to protect the security interest does not destroy the lender’s security interest exemption. Id.
208. Id. at 4 (addresses judicial concerns and establishes liability certainty).
209. Id. (defines lender action that avoids CERCLA liability).
210. Id. at 6. CERCLA’s broad remedial goal of protecting public health and the environment from the hazards of improper waste practices requires that a lender seeking shelter from liability act consistently with the statute’s purpose. Id. A lender must undertake certain affirmative actions at the time of the loan with respect to the collateral. Id. In order to act consistently with CERCLA, a lender must conduct a formal inspection of the property or an environmental audit. Id. When the environmental audit detects hazardous waste, the waste must be removed prior to the execution of the loan. Id. Failure to remove the waste will prevent a lender from utilizing the security interest exemption. Id.
211. Id. at 4. Since the EPA proposal expressly allows lenders to monitor borrowers, it becomes apparent that financial and environmental investigations will not subject the lender to CERCLA liability for “participation in the management of the facility.” Id. at 8. Additionally, by promoting continued environmental investigations during the life of the loan, the EPA proposal overtly
to participate in management decisions to protect the collateral during the loan period as long as the lender does not divest the borrower of operational management control. Therefore, the EPA proposal erases lender liability uncertainty by establishing definitive lender activity before, during, and after the loan term.

Third, the judiciary must defer to the EPA's interpretation of lender liability embodied in the EPA proposal. Ultimately, the judiciary is the final authority of statutory construction and interpretation. However, when confronted with a issue of statutory

rejects the Fleet Factors standard of liability. See United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991). The mere capacity to control or influence the facility's treatment of hazardous waste is not sufficient under the EPA proposal to incur liability. EPA DRAFT PROPOSAL, supra note 155, at 8. Lenders may conduct environmental inquiries with the assurance of not encountering CERCLA liability. Id. However, when a lender discovers hazardous waste at a facility during the life of the loan, it must compel the borrower to address the waste problem. Id. Lenders are not liable as insurers against the production of environmental waste; however, a lender must act responsibly towards the problem and not ignore it. Id.

212. EPA DRAFT PROPOSAL, supra note 155, at 8. The EPA proposal gives a lender wide latitude to participate in management decisions designed to protect the secured property. Id. A lender can participate to the level necessary to protect its collateral without fear of incurring CERCLA liability. Id. Again, the EPA proposal rejects the dispersion created by the Fleet Factors decision. Id. The EPA proposal requires that a lender actually participate in the management of a facility and usurp the borrower's control before liability is imposed. Id. Potential managerial capacity does not trigger CERCLA liability under the EPA proposal. See supra notes 164-69 and accompanying text for additional information concerning the EPA proposal's treatment of management participation.

213. Id. (lender must divest borrower's management of site to draw CERCLA liability).

214. Id. at 7. The EPA proposal assures a lender that, if divestment occurs within six months of foreclosure, the lender will not incur CERCLA liability as an "owner" of the facility. Id. Even if the economy or other factors preclude the lender's divestment within six months, the lender may avoid CERCLA liability by demonstrating to the court that it remains necessary to hold the property to protect its security interest. Id. See supra notes 161-63 and accompanying text for additional information on foreclosure under the EPA proposal.

215. Id. at 3. The EPA proposal gives lenders a choice of actions. A lender may: (1) follow the directions of the EPA proposal and avoid CERCLA lender liability; or (2) refuse to follow the EPA guidelines and risk CERCLA liability. Id.


To the extent necessary to [a] decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and
construction, the United States Supreme Court defers to the interpretation advanced by the agency charged with the administration of the statute.\textsuperscript{217} The EPA possesses the regulatory authority to enforce CERCLA pursuant to President Reagan's order given in 1981.\textsuperscript{218} Therefore, since the EPA is the agency charged with administering CERCLA, the courts will accord the EPA's construction of CERCLA lender liability great weight.\textsuperscript{219}

Additionally, the courts must give the EPA proposal heightened judicial deference for two reasons. First, an enforcement agency's statutory interpretation receives greater judicial deference when the statute is designed to protect public health.\textsuperscript{220} A fundamental statutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings and conclusions found to be (A) arbitrary . . . an abuse of discretion or otherwise not in accordance with law; (B) contrary to the constitutional right; (C) in excess of statutory jurisdiction.


217. Udall v. Tallman, 380 U.S. 1, 16 (1965). In Udall, the Supreme Court considered the amount of deference accorded the Secretary of the Interior's interpretation of a provision of the Mineral Leasing Act. Udall, 380 U.S. at 4. The Court found the Secretary's interpretation of the Act deserved great deference because the Secretary possessed the responsibility for its enforcement. Id. at 16. The Court affirmed the Secretary's interpretation of the Act. Id. at 23. See also Federal Election Comm'n, 454 U.S. at 32 (deference given to Federal Election Commission's interpretation of Federal Election Campaign Act of 1971 due to Commission's enforcement authority); Doe v. Department of Transp., Fed. Aviation Admin., 412 F.2d 674, 678 (8th Cir. 1969) (agency charged with administration of Federal Aviation Act shall not be overruled except for weighty reasons).

To pass judicial scrutiny, the agency interpretation must be a reasonable construction, although it is not necessary that the interpretation be the only reasonable interpretation of the statute. Udall, 380 U.S. at 16. See also Federal Election Comm'n, 454 U.S. at 32. The EPA proposal reasonably constructs CERCLA because the proposal promotes CERCLA's purpose and motivates lenders to act responsibly towards environmental waste releases to avoid CERCLA liability. EPA DRAFT PROPOSAL, supra note 155, at 5. See supra notes 185-93 and accompanying text for a discussion of how the EPA proposal propels CERCLA's goals and motivates lenders to take on environmental responsibility to avoid CERCLA liability.


219. See Udall, 380 U.S. at 16. Courts will affirm reasonable constructions of statutes made by agencies responsible for enforcing these statutes. Id.

220. Certified Color Mfr. Ass'n v. Mathews, 543 F.2d 284, 294 (D.C. Cir. 1976). Certified Color involved an action to challenge a ruling by the Commissioner of Food and Drug Administration which terminated approval for the color additive FD&C Red No. 2. Id. at 286. The Commissioner banned the color additive because the additive endangered public health. Id. The Certified Color Court
The mental purpose of CERCLA is to protect the public health against the harmful effects of hazardous waste. Second, agency statutory constructions receive heightened deference when legislative history fails to clarify the provisions at issue. Both CERCLA and its legislative history fail to define the parameters of either the security interest exemption or lender liability. The courts must, therefore, give the EPA proposal deference because the EPA enforces and the proposal defines the security interest exemption. In addition, the judicial deference must be heightened since no CERCLA legislative history exists and the statute protects health and the environment.

VI. CONCLUSION

For the past ten years lenders have executed loan agreements, uncertain about future CERCLA liability because Congress neglected to define the parameters of CERCLA's security interest exemption. Judicial interpretations cast further dispersion on the parameters of this exemption. For the first time, the EPA proposal increased the normal level of deference given to agency interpretations. The court affirmed the agency's construction and held that agency interpretations of statutes deserve increased deference when the statute protects public health.


222. Philadelphia Television Broadcasting Co. v. Federal Communications Comm'n, 359 F.2d 282, 284 (D.C. Cir. 1966). In Philadelphia Television, the appellants, community antenna television operators, challenged the Federal Communications Commission's ("FCC") interpretation of the Communications Act. Philadelphia Television, 359 F.2d at 283. The FCC interpreted the Communications Act's definition of a "common carrier" in a manner that precluded the appellant's claim. Congress neglected to define the term "common carrier" when it passed the Communications Act in 1934. The Philadelphia Television Court affirmed the FCC's construction and held that "deference [given] to the agency's interpretation of its governing statute is reinforced where, as here, the legislative history is silent, or at best unhelpful, with respect to the point in question." Id. See also Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 35 (1981) (when legislative history is silent, agency construction is given great judicial deference).


The EPA proposal interpreting CERCLA marks the first attempt toward definitively outlining the exemption for lender liability. Lender Liability, supra note 134, at 2224. The EPA proposal defines lender liability and the security interest exemption for the first time. Therefore, since the legislature failed to provide insight addressing CERCLA lender liability, the courts should adopt the EPA's construction. See Philadelphia Television, 359 F.2d at 284 (absent legislative history and interpretation, agency statutory construction given great judicial deference).
resolves lender liability questions not addressed by both Congress and the judiciary. Consistent with CERCLA's purpose, the EPA proposal enumerates lender procedures that both reduce environmental waste and protect cautious lenders against CERCLA liability. In addition, future courts must grant the EPA proposal great deference. This comment strongly advocates the EPA proposal as a resolution to fill CERCLA's definitional gaps and to guide both the courts and lenders.

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