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

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

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

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

Dated: November 30, 1995.

Jerry Clifford,

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

Memorandum

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

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

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

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

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

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

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

I. Background

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

The language of Section 101(20)(A) leaves lenders and other interested parties uncertain as to which types of actions—such as monitoring vessel or facility operations, requiring compliance with applicable laws, and refinancing or undertaking loan workouts—they may take to protect their security interests without risking EPA enforcement under CERCLA. Courts have not always agreed on when a lender's actions are ''primarily to protect a security interest,'' and what degree of ''participation in the management'' of the property will forfeit the lender's eligibility for the exemption. This uncertainty was heightened by dicta in the *Fleet Factors*[2] opinion, where the circuit court suggested that a lender participating in the management of a vessel or facility ''to a degree indicating a capacity to influence the corporation's treatment of hazardous waste'' could be considered liable under CERCLA.[3]

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

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

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

II. Policy Statement

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

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

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

[3] *Fleet*, 901 F.2d at 1557.

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