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EPA ISSUES POLICY STATEMENT ON SUPERFUND LENDER LIABILITY

by
Richard M. Kuntz

In 1992, the Environmental Protection Agency (EPA), following conflicting federal court rulings on the degree to which lending institutions that foreclose on contaminated property could be held liable under the draconian enforcement mechanisms of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Superfund statute, issued a lender liability rule, 57 Fed. Reg. 18344 (Apr. 29, 1992). The rule specified the circumstances under which lenders, protecting their security interests, could enjoy the safe harbor that CERCLA provides to shield lenders from being designated as "owners" or "operators." The impact of EPA's 1992 rule was to substantially expand the safe harbor, and not cast CERCLA's liability net so wide as to capture those lenders that merely had the "capacity to influence" operations at a waste site.

This rule could have provided the lending community a sense of certainty on the level of risk they undertake when making loans on potentially contaminated but otherwise valuable property. The rule was followed by several federal courts, but in 1994, the U.S. Court of Appeals for the District of Columbia Circuit invalidated the rule, holding that EPA lacked statutory authority to restrict by regulation private rights of action under CERCLA. *Kelly v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), *cert. denied*, 111 S. Ct. 752 (1995).

While *Kelly* restricted EPA from regulating private party and state action under CERCLA, the agency and the Department of Justice (DOJ) have apparently concluded that the holding did not prevent the federal government from exercising its own CERCLA enforcement discretion in selecting those entities which it could designate as "potentially responsible parties" or sue under CERCLA. Thus, on December 11, 1995, EPA and DOJ issued to the public its joint "**Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily,** 60 Fed. Reg. 63517 (Dec. 11, 1995). The policy basically reinstitutes the 1992 lender liability rule's guidance to EPA regional offices and U.S. Attorneys. EPA, by issuing a memorandum rather than reinstituting formal rulemaking, has avoided the necessity of responding to public comments on the issue. It would be incorrect, however, to characterize the action as a full reimposition of the lender liability *rule*, because the policy only guides the **agency's** choice of enforcement targets, and does **not** impair the rights of private parties or state governments as CERCLA plaintiffs. As indicated, however, courts tended to follow the substance of the EPA rule before it was invalidated, and thus the rule, as well as its limitations (*e.g.*, the rule's lack of a shelter provision transferring immunity enjoyed by lenders to subsequent purchasers), may well continue to be a guide for private parties, and of persuasive authority upon courts.

The Memorandum applies only to CERCLA, and does not apply to Resource Conservation and Recovery Act (RCRA) hazardous waste or underground tank liability. EPA did recently issue a rule, similar to the rule invalidated in *Kelly*, governing underground tank liability, 65 Fed. Reg. 46691 (Sept. 7, 1995), but has yet to issue a rule or policy regarding hazardous waste lender liability under RCRA.

Richard M. Kuntz is Senior Environmental Attorney with the Chicago Law Offices of James T. J. Keating, P.C.