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LIMITING LENDER LIABILITY UNDER CERCLA BY ADMINISTRATIVE RULE

BY FRONA M. POWELL*

I. INTRODUCTION

The question of whether banks or other lending institutions holding a security interest in contaminated property should be liable for the costs of cleaning up a site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) has evolved into one of the toughest policy battles in the history of the Act. Recent court decisions holding lenders liable as "owners or operators" of contaminated property under CERCLA have created uncertainty in the lending community about what activities may expose them to liability.

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2. See, e.g., Marianne LaVelle, A Question of Waste Liability, NAT'L L. J., Sept. 3, 1990, at 3 (calling the issue a "clash between two of the toughest and most costly domestic problems of the 1990s").

As a result, banks and other lending institutions are increasingly reluctant to make loans in areas of possible hazardous waste contamination. Some fear that potential liability for environmental clean-up costs far exceeding the amount of the original loan will cause banks to stop making loans to businesses in areas where there is any suspicion of hazardous waste contamination. This not only prevents financing of environmental clean-ups, it also creates a credit crunch that is particularly devastating for small banks that finance small businesses. Lenders argue that rendering small banks insolvent by imposing environmental clean-up costs upon them means that the taxpayer has to absorb the cost because many lending institutions subject to CERCLA liability are federally insured. Consequently, imposing liability on lenders for environmental clean-up of contaminated property may undermine the stability of the financial industry in general, especially in light of the $500 billion savings and loan crisis.


5. Id. Companies using hazardous materials in their processes such as dry cleaners, electric platers, metal finishers, and wood product manufacturers may have trouble using their property as collateral for this reason. Toman, supra note 4.

6. See Should Government Agencies and Private Lending Institutions be Forced to Pay Enormous Sums to Clean up Environmental Contamination That They Did Not Cause? Hearings Before the Committee on Banking, Housing, and Urban Affairs, U. S. Senate, 102d Cong., 1st Sess. (June 12, 1991) (testimony by Edward W. Kelley, Jr., Board of Governors, Federal Reserve, Washington, D.C.). Mr. Kelley stated that:

Lender liability presents a threat to the ability of these organizations to carry out the missions assigned to them by Congress. The Federal Reserve Banks fulfill important functions in providing adjustment credit and acting as a lender of last resort for depository institutions. In acting as lender of last resort, a Federal Reserve Bank may advance funds to a depository institution collateralized by the institution's loans, which may in turn be secured by real property. Should the institution fail, the FDIC, as receiver, would likely acquire the loans from the Reserve Bank and would be left holding the loans.

Id.

7. LaVelle, supra note 2, at 3. The Resolution Trust Corporation which is responsible for liquidating the assets of failed savings and loan associations and the Federal Deposit Insurance Corporation have supported increasing their protection under CERCLA. The FDIC has identified approximately 238 assets held by the agency for liquidation with a total book value of approximately $338 million as having potentially serious hazardous waste problems. EPA Opposes Push to Amend CERCLA to Bolster Protection for Lenders, Toxics L. Rep. (BNA) No. 46, at 1488 (Apr. 24, 1991).
The battle is shaping up as lenders and government agencies\(^8\) actively lobby Congress for an amendment to CERCLA that would protect lenders from liability under the Act in the event they foreclose on contaminated property or act to protect their security interest in contaminated property.\(^9\) Fearing liability for clean-up costs on properties they hold for liquidation, government entities like the Resolution Trust Corporation, which is responsible for liquidating the assets of failed savings and loan associations, and the Federal Deposit Insurance Corporation have gone on record as supporting changes in the law.\(^10\)

Environmental groups strongly oppose such legislative changes and argue that imposing liability upon lenders under Superfund is appropriate because the lender can protect its interest by exercising due diligence, and because CERCLA liability under such circumstances creates incentives for lenders to discover and ultimately prevent toxic contamination.\(^11\) Opponents of change fear that amending the Act to protect lenders will create a legal loophole in the law that will ultimately permit polluters to escape liability while dumping their responsibility on taxpayers.\(^12\) These opponents maintain that the law should encourage rather than discourage the banking industry to investigate and make a good faith effort to carefully assess environmental risks.\(^13\) Environmental groups also claim that lenders have overstated the actual risk of their potential liability under the law.\(^14\)

While the debate surrounding legislative proposals to limit lender liability by amending CERCLA continues, in June, 1991, the Environmental Protection Agency (EPA) proposed a regulation clarifying the scope of the "security interest" exemption in CERCLA as it applies to financial institu-

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8. Increased lender liability under CERCLA not only affects lenders, but also affects other sectors of the economy such as businesses, farmers, and homeowners. *Resolution Trust Corp., FDIC Seek Limits To Superfund Liability in CERCLA Amendment*, Toxics L. Rep. (BNA) No. 9, at 324 (Aug. 1, 1990).

9. See infra notes 164-74.

10. *EPA Opposes Push to Amend CERCLA to Bolster Protection for Lenders*, supra note 7, at 1488.


12. Id.


14. In testimony before the Senate Environment and Public Works Subcommittee on Superfund, Ocean, and Water Protection, Raymond Ludwiszewski, acting assistant administrator for enforcement at the EPA, said the EPA has never named FDIC or RTC as potentially responsible parties at any Superfund site and only eight of 18,392 formal notices of potential liability under the Superfund law have gone to private lenders. *EPA Opposes Push to Amend CERCLA to Bolster Protection for Lenders*, supra note 7, at 1488; see also supra note 13.
tions and other persons holding a security interest in Superfund property. Noting that recent court cases have raised questions within the lending community about which actions by a security holder would be considered “participating in a facility’s management,” thus voiding the exemption, the proposed rule defines the meaning of this and other elements in statutes pertaining to the liability of privately owned financial institutions and governmental receivers, conservators, loan guarantors, and other lending or governmental entities holding indicia of ownership as a security interest in contaminated facilities.

This article examines the issue of lender liability under CERCLA and will focus on judicial interpretation of the security interest exemption in section 101(20)A of CERCLA and will explore the questions whether administrative rule-making is an appropriate means to achieve clarification of statutory language utilized in that section. Section II examines the current status of lender liability under CERCLA by reviewing the relevant statutory provisions and judicial decisions interpreting those provisions. Section III addresses the recent rule proposed by the EPA to clarify the language of the Act, and considers general legislative proposals to amend the Act. Section IV analyzes administrative rule-making by the EPA as opposed to a legislative or judicial interpretation of the Act as a means of limiting lender liability under CERCLA. Section V concludes that the fundamental policy decisions underlying CERCLA are at issue in this debate, and that a legislative rather than an administrative response to the question of lender liability under CERCLA is most desirable.

II. ANALYSIS OF LENDER LIABILITY UNDER CURRENT STATUTORY AND CASE LAW

A. Lender Liability Under CERCLA—The Statutory Scheme

Numerous federal and state statutes address various aspects of hazardous waste liability. However, there is no uniform statutory scheme addressing the problem of toxic pollution. The most important legislation

15. EPA National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability under CERCLA, 56 Fed. Reg. 28,798 (1991) (to be codified at 40 C.F.R. pt. 300(L). Since this article was written the EPA has come out with the new regulations. EPA National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (1992) (to be codified at 40 C.F.R. pt. 300).

16. Id. In addition, the rule defines the meaning of certain statutory elements in CERCLA that pertain to the liability of governmental entities that involuntarily acquire ownership or possession of contaminated facilities. Id.

17. Important federal statutes addressing the toxics problem include: the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-179 (1988); the Clean Air Act, 33
affecting the liability of lenders holding a security interest in real property contaminated by toxic substances is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as "Superfund." By enacting CERCLA in 1980, Congress specifically intended to address the problem of leaking hazardous waste disposal sites. The 1980 Act created a $1.6 billion fund to enable the government to clean-up contaminated sites throughout the nation. In 1986, Congress authorized an additional $8.5 billion to address the increasing number of potential sites.

To prompt clean-up of hazardous waste sites, CERCLA authorizes the Environmental Protection Agency to order private parties to abate a condition that poses an "imminent and substantial endangerment" to public health, to public welfare, or to the environment. In the alternative, CERCLA authorizes the EPA to undertake "removal" or "remedial" actions in response to the release of hazardous substances at contaminated sites. The EPA may clean up a contaminated site using funds from the national trust fund (or Supenfund) and may seek recovery for its costs from persons who are responsible for the hazardous substance releases at the site.


19. Id.
22. CERCLA establishes an information-gathering and analysis system for identifying and developing priorities for response actions at hazardous waste sites and directs the Administrator of the Environmental Protection Agency to issue regulations designating substances which may present "substantial danger" to the public health or welfare if released into the environment. 42 U.S.C. § 9601(14) (1988).
23. Section 9604 authorizes the President to provide for such actions consistent with the National Contingency Plan referred to in section 9605 of the Act. Removal actions are emergency responses while remedial actions are designed to provide a long-term solution. Response actions may be carried out by the federal government or through cooperative agreement with the states. 42 U.S.C. § 9604 (1988).
Section 107(a) of CERCLA designates four classes of persons (called "potentially responsible parties" or PRPs) who may be liable for such response costs:

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 contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, 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 sites 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, shall be liable . . . .

Liability under section 107(a) is "joint and several," and any PRP under this section may be held strictly liable for the entire cost of clean-up.

The question of "owner" or "operator" liability under CERCLA centers upon the meaning of the terms as used in the Act. The statutory definition of the terms gives little guidance to courts interpreting the language of this section, and courts have broadly construed the definition of "owner" or "operator" in order to effectuate the remedial goals of the Act. In some cases, courts have defined the terms "owner" or "operator" to include lenders who have loaned money for the purchase of contaminated property or acquired the property through foreclosure.

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LIMITING LENDER LIABILITY

Much of the controversy surrounding the question of lender liability under CERCLA has focused on the meaning of the "secured creditor" (or "security interest") exemption set out in section 101(20)(A) of the Act. This section expressly excludes from the term "owner or operator" "a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."\(^{30}\) Judicial decisions interpreting key statutory language in this section have not been uniform, and courts have not established clear standards for predicting liability under the section.\(^{31}\) With liability for clean-up costs often exceeding the loan by hundreds of thousands of dollars, many fear that the uncertainty in the law will deter lenders from lending money to businesses where there is any suspicion of hazardous waste contamination.\(^{32}\) These concerns have prompted the EPA to address the issue of lender liability through administrative rule-making, and have prompted Congress to consider amending the law to further clarify the exemption.\(^{33}\)

The debate centers upon the extent to which a lender can be involved in overseeing a site's operation without losing the security interest exemption and becoming potentially liable under CERCLA.\(^{34}\) There is no language in the Act which elaborates on the meaning of "participating in the management" and there is little legislative history.\(^{35}\) Another issue of particular

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32. Tom, supra note 3, at 927; see also 136 Cong. Rec. E1023, supra note 4.
33. While a lender may attempt to decrease its exposure to CERCLA liability by avoiding any appearance of involvement in the activities surrounding management of the site (so that it cannot be said to be "participating in the management of the site" for purposes of this section), the lack of inquiry into potential environmental liabilities of real property offered as security at the time of making the loan may deprive the lender of an innocent landowner defense under 42 U.S.C. § 9607(b) of the Act. This section provides that an owner of contaminated property has a defense to liability under CERCLA if it can demonstrate that, prior to acquiring the property, it took affirmative steps to determine whether there were any environmental problems on the property. The Act states that the buyer "must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." 42 U.S.C. § 9601(35)(B) (1988). It would appear that the policies underlying this section and the "security interest" exemption may conflict—or at the least that a lender may be "whip-sawed" between the obligation to exercise due diligence and yet avoid actively participating in the management of the facility, even in order to minimize contamination at the site. For a general discussion of the due diligence requirement as it applies to lenders, see Kunzman, supra note 3, at 543-44.
33. See infra notes 131-33.
34. The proposed rule and amendments also clarify the effect of foreclosure on a lender's security interest upon it's liability as owner of the property under the Act. See infra notes 150-55.
35. Congress did not actually pass CERCLA until the close of the Ninety-Sixth Congress when the Act was hurriedly enacted. The ambiguity of the Act and lack of legislative history
concern to lenders is whether foreclosure of the security interest will expose them to liability as owners within the chain of title. Conflicting decisions on whether foreclosure constitutes taking ownership under section 9607(a) have left lenders increasingly unsettled about the legal effects of taking such action.36

B. Judicial Interpretation of the Security Interest Exemption Under Section 101(20)(A):

1. United States v. Mirabile

The first case addressing the scope of the "secured creditor" exemption under section 9607(b)(3) was United States v. Mirabile.37 In that case, a federal district court first interpreted the secured creditor exemption in CERCLA to mean that secured creditors, including one creditor who had foreclosed on the site, could only be liable for response costs at a hazardous waste site if the creditors exercised control over the "day-to-day" operation of the site.38 The court found that the participation in management, which is critical for purposes of the exemption, is "participation in the operational, production, or waste disposal activities." Mere financial ability to control waste disposal practices of the sort possessed by the secured creditors in the case was an insufficient basis for the imposition of liability.39

The contaminated site at issue in Mirabile was the "Turco" site which was located in Phoenixville, Pennsylvania. The United States brought a civil action to recover costs of removing hazardous waste from the property against, among others, the present owners of the site, Anna and Thomas Mirabile.40 American Bank and Trust Company (ABT), the Mellon Bank, and the Small Business Association (SBA) were each involved in financing the operations of Turco Coatings, Inc. which operated a paint manufacturing business at the site when the hazardous contamination occurred.41 After Turco filed a petition in bankruptcy and ceased operations at the site, ABT foreclosed on the site and was the highest bidder at the sheriff's sale in

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38. Id.
39. Id. at 20,995.
40. Id. at 20,994.
41. Id.
August, 1981. In December, ABT assigned its bid to the Mirabiles, who accepted a sheriff's deed to the property.\textsuperscript{42}

The Mirabiles joined ABT and Mellon Bank as third-party defendants in the action brought against them by the United States. ABT and Mellon filed a counterclaim against the SBA, alleging that it was involved in creating the conditions at the site. Mellon, ABT, and the SBA then filed motions for summary judgment, arguing that a secured creditor's exercise of financial control over a debtor should not bring the creditor within the scope of CERCLA liability.\textsuperscript{43}

The court first examined the statutory definition of "owner or operator" under the Act and focused on the language exempting 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."\textsuperscript{44} The court interpreted this language as plainly suggesting that a creditor may not be liable for clean-up costs under the Act if the creditor does not become "overly entangled in the affairs of the actual owner or operator of a facility."\textsuperscript{45} While active participation in the day-to-day corporate affairs could result in liability, the court noted that the real difficulty is determining the actual point at which participation in the affairs of the corporation by the creditors becomes "participating in the management" of the facility.\textsuperscript{46} The court believed that a distinction between a creditor's participation in the financial operations, as opposed to operational production, or waste disposal activities of the corporation was critical in making this determination.\textsuperscript{47}

\textsuperscript{42} Id. In the period between the sheriff's sale and the assignment of the bid, ABT secured the building against vandalism by boarding up windows and changing locks, made inquiries as to the approximate cost of disposal of various drums located on the property, and, through its loan officer, visited the property on various occasions to show it to prospective purchasers. Id.

\textsuperscript{43} Id.

\textsuperscript{44} Id. (emphasis supplied). The court noted: "Were it not for the underscored exemption from liability, the definition would be a hopeless tautology." Id.

\textsuperscript{45} Id.


\textsuperscript{47} The Mirabile court supported this distinction by noting that the exemption from liability is afforded to secured creditors who do not participate in the management of a facility. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,994 (emphasis supplied). "Facility" is defined in 42 U.S.C. § 9601(9) as:
The court believed that ABT's involvement with the site presented the most compelling case for granting its summary judgment motion because its actions with respect to the foreclosure were plainly undertaken in an effort to protect its security interest in the property and did not constitute participation in the day-to-day operations of the plant. 48 According to the court, ABT merely foreclosed on the property after all operations had ceased and, thereafter, took prudent and routine steps to secure the property against further depreciation. 49 The court also granted the SBA's motion for summary judgment because it never actually participated in the management of Turco. 50 However, the court denied Mellon Bank's motion because its motion presented a "cloudier situation." 51 The court found that there was a genuine issue of fact as to whether Mellon Bank, through its predecessor, Girard Bank, engaged in the sort of participation in management that would bring it within the scope of CERCLA liability.

*Mirabile* is an important case not only because it is the first case in which a court interpreted the secured creditor exemption in CERCLA, 52 but also because it suggested for the first time that a distinction between operational and financial involvement by the creditor is critical in determining whether the creditor "participated in the management" of the facility for purposes of the secured creditor's exemption. The *Mirabile* court did not consider the fact that one lender, ABT, had foreclosed on the property and obtained equitable title to the property to be a critical factor in deter-

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48. *Id.* at 20,995.
49. *Id.* at 20,996.
50. *Id.* at 20,997.
51. *Id.*
52. There is an earlier bankruptcy case discussing this issue. In *In re T. P. Long Chem., Inc.*, 45 B.R. 278, 288 (Bankr. N.D. Ohio 1985), the bankruptcy court stated, in dictum, that even if a creditor had repossessed its collateral pursuant to its security agreement, it would not be an owner or operator under CERCLA.
mining whether that lender was entitled to assert the secured creditor exemption. The court concluded that “mere financial ability to control waste disposal practices was insufficient for the imposition of liability.”

2. United States v. Maryland Bank & Trust Company

In 1986, a United States district court in Maryland issued an opinion that increased the anxiety of a lending community already concerned that CERCLA presented a new and substantial risk to those institutions. In United States v. Maryland Bank & Trust Co., the Maryland Bank & Trust Company (MB&T) had formerly held a mortgage on a parcel of land contaminated with hazardous wastes. When the owners defaulted on the loan, MB&T purchased the property in 1981 at the foreclosure sale with a bid of $381,500, and continued to have record title to the property at the time the EPA brought a clean-up action in 1983. When the EPA demanded payment of the clean-up costs of $551,713.50 from MB&T, and the bank failed to respond, the Agency brought an action to compel payment.

The question before the court on the parties' motion for summary judgment was whether MB&T was an “owner and operator” of the site within the meaning of sections 9607(a)(1) and 9601(20)(A). In making its

53. The Mirabile court does not address the language in the secured creditor's exemption that states the exemption only applies to a person who “holds indicia of ownership primarily to protect his security interest in the vessel or facility.” 42 U.S.C. § 9601(20)(A) (1988) (emphasis supplied). Neither the SBA nor Mellon Bank in the case had foreclosed on its security interest in the site. Unless the court believed that holding a security interest without foreclosing on that interest could constitute an “indicia of ownership,” the opinion suggests that the court may have interpreted the language “participating in the management” of a facility as essentially equivalent to being an “operator” for purposes of CERCLA liability. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,992.

54. Id. at 20,995.

55. Lending institutions rarely considered environmental risks in evaluating loan applications, but this changed following the 1985 Mirabile decision. Corash & Behrendt, supra note 3, at 863-64.


57. The property, a 117 acre farm located near the town of California, Maryland, was owned by the McLeods, who operated a trash and garbage business on the site. During 1972 or 1973, the McLeods permitted dumping of hazardous wastes, including organics and heavy metals, on the site. Id. at 575.

58. Id. at 575-76.

59. Id. at 576. In addition, MB&T raised an affirmative defense under § 107(b)(3), the so-called “third-party defense,” which permits a party to avoid liability if it can prove that the release of a hazardous substance was caused solely by:

an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant, . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous
determination, the court first examined the provision in section 9607(a) that imposes liability upon "the owner and operator" of a facility. Notwithstanding the conjunctive language "and" in the subsection, the court held that a party did not have to be both an owner and operator to incur liability under that subsection. Because it was undisputed that MB&T had been the owner of the facility since May, 1982, the court held that it could be liable as an "owner" under the section.

The court then turned to the question of whether the statutory exemption in section 9601(20)(A) (the "secured creditor" exemption) applied in this case. MB&T argued that it qualified for the exemption because it acquired ownership of the site through foreclosure on its security interest in the property. The court, however, disagreed and stated that the exemption "covers only those persons who, at the time of the clean-up, hold indicia of ownership to protect a then-held security interest in the land." According to the court, MB&T only held indicia of ownership during the life of the mortgage. The court held that "[t]he exclusion does not apply to former mortgagees currently holding title after purchasing the property.

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Id. at 581. The United State's motion for summary judgment was denied since the court concluded that genuine issues of material fact remained. Id.

60. Id.
61. Id. at 577. The court made this determination based on the policy underlying CERCLA. The court's examination of the legislative history, however sparse, convinced it to interpret the language of the subsection broadly. Id. at 578. The court credited the ambiguity in the statutory language to be a result of a "hastily conceived compromise statute . . . since members of Congress might well have had no time to dot all the 'i's or cross all the 't's." Id.

62. The court agreed with the decision in New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985), in which that court stated that "[s]ection 9607(a)(1) [107(a)(1)] unequivocally imposes strict liability on the current owner of a facility from which there is a release or a threat of release, without regard to causation." Shore Realty, 759 F.2d at 1044 (cited with approval in Maryland Bank & Trust, 632 F. Supp. at 578).

63. Maryland Bank & Trust, 632 F. Supp. at 579.
64. Id. The court based this conclusion on the verb tense of the exclusionary language "holds indicia of ownership." Id.
65. Id. Under the law of Maryland and twelve other states, the lender actually holds title to the property while the mortgage is in force. Id. For a discussion of the different legal theories through which a lender holds a security interest in the property, see Note, Cleaning up the Debris after Fleet Factors: Lender Liability and CERCLA's Security Interest Exemption, supra note 3, at 1258-63.
at a foreclosure sale, at least when as here, the former mortgagee has held title for nearly four years, and a full year before the EPA clean-up."

The Maryland Bank court based its decision not only on a statutory interpretation of the language used in the exemption, but also upon legislative history and the policy of the Act. According to the court, if the bank were to escape liability in such cases, the federal government would bear the cost of cleaning up the site and the lender-owner would benefit from the clean-up by the increased value of the rehabilitated property. The court believed that lenders could protect themselves by investigating and discovering potential problems in their secured properties.

The Maryland Bank court attempted to reconcile its decision with the holding in United States v. Mirabile. In Mirabile, according to the Maryland Bank court, the mortgagee's purchase of land at the foreclosure was "plainly undertaken in an effort to protect its security interest in the property." Further, "that holding pertained to a situation in which the mortgagee-turned-owner properly assigned the property." To the extent the Mirabile decision conflicted with its decision in this case, the Maryland Bank court "respectfully disagreed" with that decision.

The decision in Maryland Bank significantly increased the potential liability of lenders who foreclosed on contaminated property. Moreover, the Maryland Bank court's inability to completely reconcile its decision with Mirabile contributed to the confusion underlying the interpretation of lender liability under CERCLA. The lack of legislative history of CERCLA, the ambiguity inherent in the language used in sections 9607 and 9601 of the Act, and the conflicting judgments as to the policies underlying the Act, combined to create an atmosphere of uncertainty in an already worried financial community.

66. Maryland Bank & Trust Co., 632 F.Supp. at 579. The court fails to explain why the timing of the EPA clean-up should be significant in determining whether a foreclosing lender should be liable under this section.

67. "At the foreclosure sale, the mortgagee could acquire the property cheaply. All other prospective purchasers would be faced with potential CERCLA liability, and would shy away from the sale." Id. at 580.

68. Id.


71. Id.

72. Id.

73. The Maryland Bank decision may be limited to its facts because the court suggested that a lender might assert the exemption if it "purchased the property at foreclosure sale and then promptly resold it..." Id. at 579 n.5. One writer has suggested that this dictum conflicts with the logic of the decision, and the court did not indicate how long a lender could hold title before...

In Guidice v. BFG Electroplating and Mfg., another federal district court added to the fears of the lending community by holding that the secured creditor exemption did not apply for the period when a foreclosing bank was the record owner of contaminated property. In Guidice, the court divided the question of the lender's liability as a potentially responsible defendant into two time frames: (1) the period prior to the bank's foreclosure and purchase of the property and; (2) the period of the bank's ownership. As to the first period of time, the court adopted the Mirabile test which exempted a mortgagee from CERCLA liability so long as the mortgagee did not participate in the managerial and operational aspects of the facility. As to the latter period of time, the court noted that Mirabile and Maryland Bank diverged on the question of whether the security interest exemption applied to a secured creditor who purchased its security interest at a foreclosure sale. The Guidice court then adopted the rationale of the court in Maryland Bank, interpreting that holding to mean that whenever a mortgagee becomes an owner of the property, the security interest exemption is lost.

The Guidice court based its ruling not only on the policy considerations underlying the decision in Maryland Bank, but also on the failure of Congress to amend the statute in 1986 to exclude such lenders from liability. According to one writer, Guidice fulfilled the "dire predictions" of commercial lenders who had become acutely aware of the expanding ambit of CERCLA liability.

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reselling it without incurring liability. Note, Cleaning up the Debris after Fleet Factors, Lender Liability and CERCLA's Security Interest Exemption, supra note 3, at 1255 n.47.
75. Id. at 563.
76. Id.
77. Id.
78. The Guidice court interpreted Mirabile to mean that exemption from CERCLA liability applied as long as a lender limited its activities to the financial aspects of management, and foreclosures and repurchase (presumably under the particular facts of that case) were "natural consequences in protection of a security interest." Id. at 563.
79. Id.
80. The Guidice court noted the Maryland Bank court's concern that exemption of the bank would permit the bank to enjoy a windfall by the increased value of the improved land. Id.
81. According to the court, the Act was amended to protect state and local governments that acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or similar means. "That Congress did not simultaneously amend the statute to exclude from liability lenders who acquire property through foreclosure might indicate that Congress intended to hold them liable as owners." Id.

In May, 1990, the questions regarding the secured creditor exemption first reached a federal appellate court. The Eleventh Circuit’s decision in *United States v. Fleet Factors Corp. (Fleet)*, 83 stunned the lending community and has become the focus of an intensified effort to change the law in order to clarify the secured creditor exemption and to protect commercial lenders. 84

In *Fleet*, Fleet had entered into a “factoring” agreement with Swainsboro Print Works (SPW), a cloth printing facility. 85 As collateral for Fleet’s agreement to advance funds, Fleet had obtained a security interest in SPW’s textile facility and its equipment, inventory, and fixtures. 86 In August 1979, SPW filed for bankruptcy under Chapter 11, and the factoring agreement continued with court approval. In February 1981, SPW ceased operations and began to liquidate its inventory. In December 1981, SPW was adjudicated bankrupt under Chapter 7. 87

In May 1982, Fleet foreclosed its security interest in some of SPW’s inventory and equipment, and contracted with an industrial liquidator to auction off the collateral. In August 1982, Fleet contracted with Nix Riggers to remove the unsold equipment from the premises. 88 Subsequently, on January 20, 1984, the EPA found toxic contamination at the site and incurred clean-up costs of nearly $400,000. 89 In July 1987, the facility was conveyed to Emanuel County, Georgia, at a foreclosure sale to recover state and county taxes. 90

The government sued the principal officers and stockholders of SPW and Fleet to recover its cost for cleaning up the site. 91 Both the government and Fleet filed a motion for summary judgment on the question of whether Fleet could be liable for the EPA’s response costs at the site. 92

83. 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991).
84. In response to the decision in *Maryland Bank*, Representative LaFalce of New York introduced H.R. 2085, 101st Cong., 1st Sess. (1990), which would permit commercial lending institutions to foreclose on their security without subjecting themselves to CERCLA liability. *Tupi*, supra note 79, at 847 n.35.
85. *Fleet Factors*, 901 F.2d at 1552.
86. *Id.*
87. *Id.*
88. *Id.* at 1553.
89. The EPA found 700 fifty-five gallon drums containing toxic chemicals and forty-four truckloads of material containing asbestos at the site. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
strict court denied both motions and certified the issues for interlocutory appeal.93

On appeal, the government argued that Fleet was liable either as a present owner and operator of the facility, or as the owner or operator of the facility at the time the wastes were disposed.94 The court first addressed the question of whether Fleet could be liable as the present owner or operator of the facility, and concluded that it could not. The court noted that at the date litigation commenced, the owner of the facility was Emanuel County, Georgia. The statute provided that in the event a state or local government acquired the property due to foreclosure, its owner or operator is deemed to be "any person who owned, operated or otherwise controlled activities at such facility immediately beforehand."95 Because Fleet never foreclosed on its security interest in the facility, it neither owned, operated, nor controlled the site prior to the county's acquisition. Thus, Fleet was not liable under this section.96

The court then turned to the question of whether Fleet could be liable under CERCLA section 9607(a)(2), which imposes liability on "any person who at the time of disposal . . . owned or operated any . . . facility at which such hazardous substances were disposed . . . ."97 To make that determination, the court discussed the scope of the security interest exemption.

The parties did not dispute the fact that Fleet held "indicia of ownership." Fleet held a deed of trust to the facility to protect its security interest in the facility.98 The critical issue was whether Fleet "participated in management" sufficiently to incur liability under the provision.

Fleet argued that the Mirabile distinction should apply and that secured creditors should be permitted to provide financial assistance without risking CERCLA liability so long as they did not participate in the day-to-day management of the business. This test was adopted by the district court

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93. The district court rejected the government's claim that Fleet could be liable as a present owner of the facility, but found a sufficient issue of fact as to whether Fleet was an owner or operator of the facility at the time the wastes were disposed of at the site. Id. at 1554.

94. That is, either under 42 U.S.C. § 9607(a)(1) or § 9706(a)(2). Fleet Factors, 901 F.2d at 1554.

in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, [its owner or operator is] any person who owned, operated or otherwise controlled activities at such facility immediately beforehand.

Fleet Factors, 901 F.2d at 1555.

96. Id.

97. Id. (quoting 42 U.S.C. § 9607(a)(2) (1988)).

98. Id. at 1556.
LIMITING LENDER LIABILITY

Although the appellate court agreed with the district court's resolution of the summary judgment motion, the court disagreed with the district court's construction of the statutory exemption. The appellate court then adopted a new standard, holding that a secured creditor may incur liability under section 9706(a)(2) without being an operator by "participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."

The court expressly rejected the Mirabile test, stating that: "It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable . . . . Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste." The court, however, indicated that a secured creditor could monitor the debtor's business and become involved in "occasional and discrete financial decisions relating to the protection of its security interest" without losing the exemption. The issue, according to the court, was not whether the creditor's activity was taken to protect its security interest, but the nature and extent of the creditor's involvement with the facility.

The court of appeals in Fleet based its decision on what it perceived to be the "overwhelmingly remedial" goal of the CERCLA statutory scheme, and the position that ambiguous statutory terms should be construed to favor liability. The court also said the district court's construction of the exemption, that a secured creditor must be involved in the operations of a facility in order to incur liability as "participating in the management," would essentially require a secured creditor to be an "operator" in order to

99. This test had been adopted by the lower court:
Applying this standard, the trial judge concluded that from the inception of Fleet's relationship with SPW in 1976 to June 22, 1982, when Baldwin entered the facility, Fleet's activity did not rise to the level of participation in management sufficient to impose CERCLA liability. The court, however, determined that the facts alleged by the government with respect to Fleet's involvement after Baldwin entered the facility was sufficient to preclude the granting of summary judgment in favor of Fleet on this issue. Id. at 1557.

100. Id.

101. Id. at 1557-58. The court stated: "We, therefore, specifically reject the formulation of the secured creditor exemption suggested by the district court in Mirabile." Id. at 1558.

102. Id.

103. Id. at 1560.

incur liability.\textsuperscript{105} This construction, according to the court, essentially rendered the exemption meaningless because such individuals would already be liable as operators. "Had Congress intended to absolve secured creditors from ownership liability, it would have done so."\textsuperscript{106} In addition, the court determined that the terms "operator" and "participating in the management of a facility" are not congruent.\textsuperscript{107}

The court also justified its decision on general public policy grounds. Theoretically, the ruling would encourage potential creditors to investigate the waste treatment systems and policies of potential debtors, and encourage creditors to monitor the hazardous waste treatment systems and policies of their debtors. The court disputed those who might challenge the ruling as creating disincentives for lenders to lend money to businesses with potential hazardous waste problems, saying such concerns were unfounded.\textsuperscript{108} Applying its new test to the facts of the case, the court agreed with the district court and found that the government alleged sufficient facts to hold Fleet liable under section 9607(a)(2).\textsuperscript{109}

The reaction by lenders and many commentators to the decision in Fleet was swift and negative. The decision was criticized for misconstruing the statutory language of the exemption\textsuperscript{110} and for creating a new standard of liability for lenders—a standard that holds lenders to a higher standard than non-lenders.\textsuperscript{111} According to critics, if Congress intended to enact the exemption to protect lenders who, under some state laws, actually hold indicia of ownership for the limited purpose of protecting a security interest,\textsuperscript{112} Fleet inverted the exception to create a new class of PRPs. As a result, the court established a new, independent, and substantive basis for CERCLA liability.\textsuperscript{113}

The decision in Fleet has also been criticized for misinterpreting the policy effects of the rule. Some read the opinion as "extend[ing] potential Superfund liability not only to secured lenders who have participated in the management of the facility, . . . but also to lenders who merely have the

\begin{itemize}
  \item \textsuperscript{105} Id.
  \item \textsuperscript{106} Fleet Factors, 901 F.2d at 1557.
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id. at 1558.
  \item \textsuperscript{109} Id. at 1559.
  \item \textsuperscript{110} Several commentators have disputed the court's interpretation of the "indicia of ownership" rule. See, e.g., Anhang, supra note 3; Note, Cleaning up the Debris After Fleet Factors: Under Liability and CERCLA's Security Interest Exemption, supra note 3.
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Madden, supra note 3, at 155.
\end{itemize}
capacity to influence a facility’s hazardous waste disposal practices. As a result, rather than encouraging participation by the lending community in remediating environmental problems, the result may be the opposite. It is suggested, that lenders will studiously avoid investigating andremedying such hazardous waste problems in an attempt to avoid participating in the kind of management upon which the court premised liability.

Many are troubled by the ambiguity of the Fleet test. Although prior decisions appeared to permit creditors to offer general financial advice, protect the site, and assist the mortgagor in obtaining additional financing, the court’s ruling raised fears that even those limited activities could lead to liability. The vagueness of the test is compounded by the element of conjecture. For example, the question: “Have I involved myself in management to the extent that I could influence hazardous waste decisions?” is filled with uncertainty and the court does not suggest how an inference of “capacity to influence” may be established.

Not all view the decision in Fleet as a radical departure from earlier case law. Fear that the decision established an overly broad standard of “management participation” may be unwarranted. The standard of liability under the rule still requires evidence that the security holder actually participated in the financial management to a degree indicating its capacity to influence the treatment of hazardous waste. Mere capacity of a lender to influence the debtor, without more, is insufficient for imposing liability under the Fleet decision.

Perhaps the Fleet decision will affirm that a lender cannot be liable as an owner or operator unless it actually becomes involved in the operations in some way. Some suggest that if this happens, the case will produce further litigation as courts address, on a case-by-case basis, the specific actions

115. Zinnecker, supra note 3, at 1470.
116. See David J. Freeman, Recent Case Law May Expand Lenders’ Risks Under Superfund, NAT’L L.J., Sept. 17, 1990, at 18 (noting that a “capacity to influence” test may well make all secured creditors vulnerable on the grounds of some inherent power to affect their borrower’s behavior. If so, the exception would swallow the rule.”). Id. at 19.
117. Madden, supra note 3, at 156.
119. The court said: “Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation’s treatment of hazardous wastes.” Fleet Factors, 901 F.2d at 1557 (emphasis added); see generally Anhang, supra note 3, at 245.
120. Fogarty, supra note 118, at 10,243.
by lenders that may give rise to "actual participation" in the management of a facility, which would trigger CERCLA liability.\textsuperscript{121}

5. \textit{In re Bergsoe Metal Corp.}

The Ninth Circuit recently addressed the question of lender liability and the scope of the secured creditor exemption in \textit{In re Bergsoe Metal Corp.}\textsuperscript{122} The Ninth Circuit held that the Port of St. Helens, a municipal corporation empowered to issue revenue bonds to promote industrial development, was not liable as an owner or operator for environmental clean-up costs incurred at a lead recycling facility financed by the Port. The court agreed that the Port owned the Bergsoe recycling plant because the deed to the property was in the name of the Port.\textsuperscript{123} The court, however, agreed with the Port that it was not a CERCLA owner because it fell within the security interest exception.\textsuperscript{124}

According to the court, holding "paper title" to the plant alone did not make the Port an owner of the facility.\textsuperscript{125} Under the security interest exception, the reason why the lender holds such "indicia of ownership" is the relevant inquiry.\textsuperscript{126} Furthermore, the court added that it was clear from the statute that whatever the precise parameters of "participation", there must be some actual management before a secured creditor will fall outside the exception. Because it found that the Port did not actually participate in the management of the plant or exercise any control over Bergsoe once the financing arrangements were complete, the court held that the Port could not be liable as an owner.\textsuperscript{127}

The decision in \textit{Bergsoe} should give solace to lenders who fear that \textit{Fleet} has expanded the scope of lender liability beyond the requirement of actual participation in management. Citing \textit{Fleet} as authority for its holding, the Ninth Circuit held that a creditor must, as a threshold matter, exercise actual management authority before it can be liable for action or inaction resulting in the discharge of hazardous wastes.\textsuperscript{128} Although the court was unwilling to establish the parameters of "participation in management" as used in the security interest exemption, it did suggest that some input by the

\begin{thebibliography}{9}
\bibitem{121} Madden, \textit{supra} note 3, at 157.
\bibitem{122} 910 F.2d 668 (9th Cir. 1990).
\bibitem{123} Id. at 671.
\bibitem{124} In this case, according to the court, the Port's only involvement was to give its approval to the project and to issue bonds that served as a financing vehicle. \textit{Id.}
\bibitem{125} Id.
\bibitem{126} Id. at 672.
\bibitem{127} Id. at 673.
\bibitem{128} Id. at 673 n.3.
\end{thebibliography}
lender, at least at the planning stages of a project, did not amount to management. The court said:

Were this sufficient to remove a creditor from the security interest exception, the exception would cease to have any meaning. Creditors do not give their money blindly, particularly the large sums of money needed to build industrial facilities. Lenders normally extend credit only after gathering a great deal of information about the proposed project, and only when they have some degree of confidence that the project will be successful.129

III. Administrative and Legislative Proposals to Clarify the Secured Creditor Exemption Under CERCLA

As the foregoing discussion demonstrates, courts have had difficulty in developing a precise rule that would provide lenders any degree of certainty about what activities they may undertake without incurring CERCLA liability. Concerns are that the EPA and the courts, in a search for deep pockets to pay for Superfund clean-ups, have expanded superfund liability far beyond what Congress intended.130 Such concerns have prompted some members of Congress to introduce bills in the House and Senate to clarify and, in some cases, expand the secured creditor exemption for lenders under federal environmental law.131

In response to those concerns and pressure from government agencies, on June 5, 1991, the EPA announced a regulation clarifying the scope of the exemption from clean-up liability for financial institutions and other persons who hold security interests in property under the Superfund law.132 In order to "specif[y] when lenders cross the line from their typical 'credi-

129. Id. at 672. For the same reason, a lender who retains the right to inspect the premises, to reenter, and to take possession upon foreclosure would not amount to actual participation in management because nearly all secured creditors have such rights. Id.


131. In 1990, Rep. John J. LaFalce, a New York Democrat who represents the Love Canal district and is chairperson of the Small Business Committee, introduced legislation (H.R. 4494), backed by 229 cosponsors that would overturn recent court rulings; Republican Jack Garn of Utah also introduced a similar bill (S. 2319) in the Senate. In 1991, Rep. LaFalce introduced a bill that refined his previous effort (H.R. 4494), to essentially codify the revised draft of the EPA rule. Senator Garn’s bill (S. 651) would limit the liability of an insured depository institution under any federal law to the actual benefit conferred on the institution by a response action. For a recent analysis of these various bills, see Bradley S. Tupi & William R. Nicholson, Legislation to Restore CERCLA’s Security Interest Exemption—Which Bill Should Lenders Support?, Toxics L. Rep. (BNA) No. 5, at 161 (July 3, 1991); see generally infra notes 164-74 and accompanying text.

tor' status and become liable because they have participated in the management of the facility,"\textsuperscript{133} the proposed rule purports to clarify the meaning of certain statutory elements in CERCLA that pertain to the liability of both privately-owned financial institutions and governmental entities.

\textbf{A. The EPA Proposed Rule Limiting Lender Liability Under CERCLA}

1. Rule-Making in General

The Administrative Procedure Act (APA), originally adopted in 1948,\textsuperscript{134} establishes the basic framework for administrative rule-making.\textsuperscript{135} An administrative "rule" is defined by the APA as follows: "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency..."\textsuperscript{136}

Most agency rule-making is "informal rule-making" under the APA. Informal rule-making (or "notice and comment" rule-making) under the APA requires the agency to publish a notice of the proposed rule in the Federal Register, give interested persons an opportunity to comment, provide a concise general statement of the basis and purpose for the final rule, and publish the final rule not less than 30 days before its effective date.\textsuperscript{137} The EPA has published a notice of its proposed rule interpreting lender liability under CERCLA and has provided an opportunity for comment as required by the APA.\textsuperscript{138} Because the EPA proposed the rule as an amendment to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) under CERLCA, specific provisions of CERCLA will apply to any judicial review of the regulation.\textsuperscript{139}

\textsuperscript{133} Statement of Raymond B. Ludwiszewski, Acting Assistant Administrator for Enforcement, United States Environmental Protection Agency, Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, (June 12, 1991).
\textsuperscript{135} Although the APA continues to be central to rule-making, Congress has enacted a variety of specific regulatory statutes mandating rule-making procedures that supplement or supersede the APA's provisions, and judicial decisions have refined rule-making procedures. See A G\textsuperscript{U}D\textsuperscript{E}E TO FEDERAL AGENCY RULE-MAKING, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (2d ed. 1991).
\textsuperscript{139} CERCLA provides that review of any regulation promulgated under the Act may only be had upon application by any interested person in the Circuit Court of Appeals of the United
In announcing the proposed rule, the EPA recognized that the revision of the NCP raised important issues. As a result, the EPA expressly reserved the right to revise the proposed rule following the comment period. Prior to the promulgation of a final rule, however, the EPA stated its intention to utilize the rule as guidance for implementing sections 9601(20)(A) and 9601(35)(A)(ii) under the Act.

Those concerned that the proposed rule goes too far to protect lenders from liability for clean-up costs will almost certainly challenge the rule by questioning the EPA's authority for issuing the rule. The EPA's proposed rule on lender liability will be given weight by a reviewing court so long as it is not "arbitrary" or "capricious." The APA distinguishes between "substantive rules" (legislative rules which have the force and effect of law), "interpretative rules" (rules which advise the public of the agency's construction of the statutes and rules which it administers), and "general statements of policy" (statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power). The distinctions not only affect procedural requirements for adoption of the rule, but they are also significant because agencies need statutorily delegated authority to adopt a legislative rule.
However, an agency may issue interpretive rules without a delegation of rule-making authority.146 The question, whether interpretive rules, which do not have the "force of law," are entitled to the same degree of judicial deference as legislative rules, has not been completely resolved.147 However, some recent cases indicate that the distinction for purposes of the standard of deference to be applied by the courts upon judicial review is not significant.148

2. Significant Issues Under Section 9601(20)(A) Addressed by EPA'S Proposed Lender Liability Rule

The EPA's recent proposal attempts to clarify some of the questions raised by recent court decisions interpreting the security interest exemption. In order to clarify the exemption and provide some guidance for lenders, the EPA lists a range of activities that a private or governmental lending institution holding a security interest in a facility may undertake without being considered a participant in the facility's management. The rule also defines the meaning of certain statutory requirements pertaining to the liability of governmental entities that involuntarily acquire ownership of contaminated facilities.149 This topic has been of great concern to many officials in light of the recent savings and loan financial crisis.

146. A GUIDE TO FEDERAL AGENCY RULE-MAKING, supra note 135, at 62-63. Authority to issue interpretive rules may either be specifically delegated or derived from general rule-making authority. Id.

147. Rules have been held to be legislative rules if they fill a statutory gap, create an exemption from a general standard of conduct, establish a new regulatory structure, or complete an incomplete statutory design. Id. at 62. The proposed EPA rule appears to fall within this definition.

148. Id. at 63. "Some courts have interpreted the Supreme Court's decision in Chevron U.S.A. v. Natural Resources Defense Council, 647 U.S. 837 (1984), as giving interpretive rules the same degree of deference as legislative rules. If a proposed rule or statement will have a substantial impact on the public, regardless of whether it is characterized as an "interpretive" or "legislative" rule, the Administrative Conference recommends the use of the "notice-and-comment" procedure that the EPA followed in Chevron. Id. at 69.

149. Under CERCLA, a governmental lending entity, receiver, or conservator involuntarily acquiring a contaminated facility may be entitled to assert the "innocent landowner defense" under sections 9601(35)(A)(ii) and 9607(b)(3). The proposed rule provides protection for governmental entities, like the RTC and FDIC, by including in the definition of "involuntary transfer" entities that acquire property under statutes requiring them to acquire such property, provided other elements of the innocent landowner defense are met. See EPA National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability under CERCLA, supra note 132, at 28,809 (to be codified at 40 C.F.R. § 300.1105).
As proposed, the EPA rule defines "indicia of ownership" as "evidence of interests in real or personal property held as security for a loan or other obligation, including full title to real or personal property acquired incident to foreclosure and its equivalents." The rule further defines the holder of a security interest as including "any successor-in-interest, including a subsequent purchaser on the secondary market, loan guarantor or insurer . . .." The EPA rule rejects the court's analysis of the exemption in United States v. Maryland Bank and Trust Company and Guidice v. BFG Electroplating and Manufacturing Co. Inc. (holding that the exclusion does not apply to a mortgagee that purchases the property at a foreclosure sale), and expressly permits a security holder to "foreclose, sell, liquidate, wind-up operations, or retain and continue functioning the enterprise in order to protect the value of the asset . . . without incurring liability under CERCLA section 107(a)(1)."

The rule also defines the phrase "participation in management" as "actual participation" in management, an interpretation consistent with the Ninth Circuit's recent interpretation of that phrase in Bergsoe. The rule

150. The proposed rule has gone through several revisions to date. Just before its June 5th release, the EPA changed significantly to de-emphasize the duty of lenders to conduct environmental audits on the property. 12 Inside E.P.A., No. 24, at 3 (June 14, 1991).

151. 56 Fed. Reg. 28,808 (June 24, 1991) (to be codified at 40 C.F.R. § 300.100(a)).

152. Id.

153. Id.

154. United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986). The Maryland Bank court held that the exclusion does not apply to former mortgagees "currently holding title after purchasing the property at a foreclosure sale, at least when, as here, the former mortgagee has held title for nearly four years, and a full year before the EPA clean-up." Id. at 579. See supra notes 55-73 and accompanying text.


156. 56 Fed. Reg. 28,809 at § 300.1100(b)(1)(iii) includes the following definition of "indicia of ownership":

Full legal title acquired through foreclosure, purchase at foreclosure sale, acquisition or assignment of title in lieu of foreclosure, acquisition of a right to title, or other agreement in settlement of the loan obligation, or any other formal or informal manner by which the security holder temporarily acquires, for subsequent disposition, possession of the borrower's collateral, and are necessary incidents to protection of the security interest.

Section 300.1100(b)(1)(ii) sets out circumstances under which the security holder may lose the exemption for failing to take reasonable steps to dispose of the property following foreclosure. The June 5th proposal abandoned a requirement in earlier drafts of the rule that the lender must resell foreclosed property within 18 months in order to prove it is not holding the property as part of its investment portfolio.
addresses concerns raised by the court’s decision in *Fleet* by specifically excluding from the definition “the mere capacity, or ability to influence, or the unexercised right to control facility operations.” The rule then attempts to distinguish between permissible activities and those that would constitute actual participation in management for purposes of the exemption, utilizing the “day-to-day” control test first articulated by the court in *United States v. Mirabile*. Although the rule specifically permits a lender to undertake an environmental inspection of the property at the inception of the loan, it does not require an inspection in order for the lender to qualify for the exemption. The rule contains a list of actions that a lender may undertake in order to police the loan, as well as permissible “work out” activities undertaken to prevent default.

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157. *See supra* notes 83-121 and accompanying text.

158. 56 Fed. Reg. 28,809 (June 24, 1991) (to be codified at 40 C.F.R. § 300.1100 (c)(1)).

159. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985), discussed *supra* notes 37-54 and accompanying text. Section 300.1100(c)(1) of the proposed rule provides that:

A security holder is considered to be participating in management if, while the borrower is still in possession, the security holder is either: (i) exercising decision-making control over the borrower’s environmental compliance, such that the security holder has undertaken responsibility for the borrower’s waste disposal or hazardous substance handling practices which results in a release or threatened release; or (ii) exercising control at a management level encompassing the borrower’s environmental compliance responsibilities, comparable to that of a manager of the borrower’s enterprise, such that the security holder has assumed or manifested responsibility for the management of the enterprise by establishing, implementing, or maintaining the policies and procedures encompassing the day-to-day environmental compliance decision-making of the enterprise.

56 Fed. Reg. 28,809 (June 24, 1991) (to be codified at 40 C.F.R. § 300.1100(c)(1)).

160. Whether the rule should impose an affirmative duty requiring lenders to undertake environmental audits of property suspected of contamination is a hotly debated policy question. See 12 Inside EPA, No. 24, at 3 (June 14, 1991).

161. Under § 300.1100(c)(2)(ii):

Such actions include, but are not limited to, a requirement that the borrower clean up the vessel or facility prior to or during the term of the security interest; a requirement of assurance of the borrower’s compliance with applicable federal, state, and local environmental and other rules and regulations during the life of the loan or security interest; securing authority for the holder of the security interest to periodically or regularly monitor or inspect the vessel or facility in which the security holder possesses indicia of ownership (including site inspections) or the borrower’s business or financial condition; or other requirements or conditions reasonably necessary for the security holder to adequately police the loan or security interest, or to comply with legal requirements. Such requirements may be contained in contractual documents or other relevant documents specifying requirements for financial, environmental, and other warranties, covenants, and representations or promises from the borrower.

56 Fed. Reg. 28,809, (June 24, 1991) (to be codified at 40 C.F.R. § 300.1100(c)(a)(ii)).

162. Section 300.1100(c)(2)(iii) provides, in part: “Work out activities include, but are not limited to, restructuring or renegotiation of the terms of the loan or other obligation, payment of additional interest, extension of the payment period, specific or general financial advice, sugges-
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Members of the lending community have applauded the EPA's efforts to define activities that do not constitute participation in the management of a facility for purposes of the security interest exemption. However, many believe that the EPA rule will not adequately shield lenders from liability. Consequently, most continue to urge clarification of the issue through legislation.

B. Legislative Proposals to Amend CERCLA to Limit Lender Liability

In response to concerns raised by lenders, various legislative proposals protecting lenders from liability under current environmental law have been introduced in Congress. Initial versions of H.R. 1450, sponsored by Congressman John LaFalce, would amend CERCLA and RCRA to limit the liability of fiduciaries, lending institutions, and others. To accomplish this, the proposal further defined the terms "indicia of ownership," "participating in the management of a vessel or facility," and "primarily to protect his or her security interest" in language similar to that of the proposed EPA rule. H.R. 1450 also specifically provides that "actions taken by a person to foreclose, sell, or otherwise cause the transfer of the . . . facility . . . shall not be deemed "participating in the management" of the facility." Senate bill 651, sponsored by Senator Garn, would amend the Federal Deposit Insurance Act to limit the liability of an insured depository institution whenever federal law imposes strict liability for the release, or threatened release, of a hazardous substance to the actual benefit conferred on the institution, counseling, guidance, or other actions reasonably necessary to protect the security interest." Id. at § 300.1100(c)(2)(iii).

163. There are questions whether the EPA's proposal goes far enough to protect government agencies like the RTC and FDIC. Supporters of amending the law point out that legislation is necessary to exempt lenders from liability when they act as fiduciaries or trustees. The EPA rule does not expressly apply to lender liability under RCRA. See lawmakers say Legislation Still Necessary To Shield Innocent Parties from Liability, Env't. Rep. (BNA), No. 22, at 333 (June 14, 1991).


166. 1991 H.R. 1450 (Mar. 18, 1991)—Version 1. The bill also provides that a lender who causes or exacerbates a release shall be liable for the cost of such response.
tion by the response action. The initial version of the bill also specifically provided that lenders would not be liable under federal law "based solely on the fact that the institution or lender has the unexercised capacity to influence operations" at or on the property.

As may be expected, representatives of the financial community, like the Mortgage Bankers Association of America and the American Bankers Association, support congressional action on the issue, while many environmental groups oppose changes in the law. The EPA has initially gone on record as opposing changes in the law, characterizing claims that recent court decisions have undermined congressional intent to exempt creditors as "overreactions," and arguing that its lender liability regulations will be sufficient to protect lenders without further amendments to the law.

Sponsors of legislative proposals designed to protect lenders from liability for response actions incurred at hazardous waste sites have characterized their bills as "clarifications" of the law, and as a restoration of original congressional intent. The proposed EPA rule also maintains that its pur-

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167. 137 Cong. Rec. S3191, S3279 (daily ed. Mar. 13, 1991) (bill reprinted). The liability limit would apply to property acquired through foreclosure and would exclude insured depository institutions or lenders from liability based solely on the unexercised capacity to influence operations at or on the property.

168. 1991 S. 651 (Mar. 15, 1991)—Version 1. Under the Garn Bill, the limitation of liability would not apply to a person that causes or contributes to the release or who, following the acquisition of property through foreclosure, fails to take reasonable steps to prevent the continued release. The bill also contains a provision limiting the liability of governmental entities that acquire contaminated property, and extends that immunity to the first subsequent purchaser of property from a Federal banking or lending agency, subject to specified conditions.


170. See Testimony of Andrew Buschbaum, Esq., for the U.S. Public Interest Research Group Before the Subcommittee on Superfund, Ocean and Water Protection (Apr. 11, 1991). Buschbaum stated:

the facts establish that there is no liability crisis for lenders under CERCLA. . . . The proposals to provide additional special exemptions to lenders purport to solve a problem that does not exist. Worse, they would undermine and in some cases dismantle the existing system, with enormous damages to the environment and to taxpayers.

171. EPA Opposes Push to Amend CERCLA to Bolster Protection for Lenders, supra note 7, at 1488.

172. Testimony of Raymond B. Ludwiszewski, acting assistant administrator for enforcement at the EPA before a Senate panel April 11, 1991. Env't. Rep. (BNA) No. 21, at 2253 (Apr. 19, 1991), stating that agency regulations should, at a minimum, "ensure that innocent federal lending agencies and private holders of security interests are provided the broadest protection reasonably allowable." Id.

173. Senator Garn had some harsh words for the U.S. Court of Appeals' holding in Fleet Factors stating at a recent hearing before the Senate Banking Committee: "We should not even need to be here today, except for some damned fool courts that can't read plain English." Daily Rep. for Exec. (BNA) No. 114, at A-19 (June 13, 1991).
pose is to clarify the security interest exemption. Clearly, these proposals from Congress and the EPA involve substantive policy decisions by the legislative and executive branches of government about the proper scope of lender liability under current environmental law. As such, it is important to ask whether an administrative or legislative response to that question is more appropriate in today's climate of deregulation.174

IV. THE EPA PROPOSED RULE ON LENDER LIABILITY: POLICY-MAKING THROUGH STATUTORY INTERPRETATION

A. Chevron and Judicial Deference to Agency Rule-Making

This century has witnessed an enormous increase in the number of federal regulatory agencies.175 With the adoption of statutes that establish ambitious schemes for resolving substantial and complicated problems, like that of environmental contamination, Congress has placed a vast amount of power in the hands of federal agencies.176 Challenges to agency decision-making frequently include allegations that agency action has exceeded the agency's legal authority, thus testing the boundaries and limitations of that power.177 Challenges to the EPA rule interpreting lender liability under CERCLA will likely ask the courts to determine whether the agency exceeded its statutory authority in issuing the interpretive rule.178

The question of how much deference courts should give to the agency's interpretation of its own governing statutes is a legal question that raises fundamental questions about the appropriate relationship among the agency, Congress, and the courts in a democratic society. Determining what the law means has always been considered an essential judicial function. However, when a court interprets imprecise, ambiguous, or conflicting statutory language, it is ultimately making a policy decision.179 The


175. By 1989, the number of federal regulatory agencies had grown to over eighty. See generally Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 465 n.57 (1989).

176. Id.

177. A GUIDE TO FEDERAL AGENCY RULE-MAKING, supra note 135, at 335.

178. Id. at 335 n.53.

degree of judicial deference to agency interpretation involves a question of substantial importance because it is fundamentally concerned with the allocation of power—who should resolve important policy issues left unresolved by the legislative body?

In 1984, the United States Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*,180 addressed the degree of deference to be accorded administrative agencies in interpreting statutory language in their governing statutes. The Court upheld EPA regulations that interpreted the term “stationary source” in the Clean Air Act to permit states to treat all pollution-emitting devices within an industrial grouping as within a single “bubble.”181 In reversing the court of appeals and upholding the agency’s interpretation of the statute, the Court announced a two-pronged test for reviewing agency statutory interpretations. Justice Stevens, writing for the majority, stated:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.182

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181. The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. § 7401) required states that had not achieved the national air quality standards established by the EPA to establish a permit program regulating “new or modified major stationary sources” of air pollution. The EPA promulgated regulations to implement the permit requirement that allowed a state to adopt a plant-wide definition of stationary source. *Chevron*, 467 U.S. at 840.
182. *Chevron*, 467 U.S. at 842-43. The question presented in the case was whether the EPA’s decision to allow states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single “bubble” was based on a reasonable construction of the statutory term “stationary source.” The court of appeals had set aside the regulations, stating that the “bubble” concept was “mandatory” in programs designed merely to maintain existing air quality, but held that it was inappropriate in programs enacted to improve air quality. *Id.* at 841. The U.S. Supreme Court, in reversing that judgment, stated: “The basic legal error of the court of appeals was to adopt a staticjudicial definition of the term ‘stationary source’ when it had decided that Congress itself had not commanded that definition.” *Id.* at 842.
Under the *Chevron* test, courts remain the final authority on issues of statutory construction because they must reject any administrative construction that is contrary to clear congressional intent. However, if the statute is silent or ambiguous, the courts must defer to administrative interpretations of the statute. The problem is that statutory language is frequently unclear, and Congress frequently leaves a vast majority of policy issues, intentionally or unintentionally, for some other governmental institution to resolve. Consequently, the process of statutory interpretation almost inevitably involves matters of substantial importance.

The *Chevron* test has been criticized as misconceiving the function of the judiciary and as threatening the separation of powers. The question of who will control agencies’ exercise of that interpretive power is clearly part of the larger question of who should control administrative policymaking. By deferring to agency decision-making, rather than exercising its independent judgment, courts increase agency power. Some view the decision to grant an administrative agency the power to interpret law a move that fundamentally alters constitutional ground rules.

Those defending the Supreme Court’s decision in *Chevron* argue that a court’s “creative statutory interpretation” is not appropriate in administrative law because agencies, not courts, are best equipped to resolve policy questions under statutes that grant the agency its legal power. The Supreme Court took this position in *Chevron*, in part, because it believed that the agency administering the legislation should be able to re-evaluate the wisdom of its policy on a continuing basis. According to the Supreme Court, “[j]udges are not experts in the field, and are not part of either political branch of the Government[sic].” Thus, it was “entirely appropriate” for the executive branch to make such policy choices and to “resolv[e] the competing interests which Congress itself either inadvertently did not re-

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183. *Id.* at 843 n.9.  
184. The Court said: “We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations . . . .” *Id.* at 844.  
186. Farina, *supra* note 175, at 466.  
187. *Id.* at 502.  
188. *Id.* at 467.  
189. Pierce, *supra* note 179, at 307; see also Anthony, *supra* note 179 (noting that *Chevron* has been lauded as beneficial because it offers simplicity and convenience to the agency and courts, and protects agency and administration against undue judicial intrusion). Such interpretations should be permitted so long as they are not arbitrary or unreasonable.  
190. *Chevron*, 467 U.S. at 836-64.  
191. *Id.* at 865.
solve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."  

In response to concerns that the Court in Chevron conceded too much authority to administrative agencies, subsequent judicial decisions have emphasized that courts have final authority under the Chevron test to determine issues of statutory construction by retaining the authority to first determine congressional intent. In INS v. Cardoza-Fonseca, the Supreme Court suggested that the applicability of the Chevron test depended upon the kind of question involved. It distinguished questions of "pure statutory construction for the courts to decide" from those involving a "question of interpretation that arises in each case in which the agency is required to apply [a legal standard] to a particular set of facts." In the former case, according to the Supreme Court, courts need not defer to agency opinions, but may employ traditional tools of interpretation to discover Congressional intent as to the meaning of the statute.  

Under traditional canons of statutory construction, a court should first examine the text of a statute in order to ascertain legislative intent. The "ordinary meaning" of a word used in the statute is powerful evidence of congressional intent and, in some cases, of the unreasonableness of an administrative agency's interpretation. The legislative history of an act is also relevant in determining congressional intent, including, in some cases, the legislative mood at the time of an acts passage. Other statutory construction techniques may be utilized where appropriate. Statutes should, for example, be construed to avoid illogical or unreasonable results. Congressional action or inaction on the issue may also be relevant in deter-

192. Id. at 865-66.
194. Cardoza-Fonseca, 480 U.S. at 421.
195. Id. at 466; see also Brock, 816 F.2d at 764.
196. Cardoza-Fonseca, 480 U.S. at 454. Justice Scalia's concurring opinion in Cardoza-Fonseca asserts that the majority:
   badly misinterprets Chevron, and indulged in a "superfluous discussion as the occasion to express controversial, and I believe erroneous, views on the meaning of . . . Chevron. This Court has consistently interpreted Chevron—which has been an extremely important and frequently cited opinion, not only in this Court but in the Courts of Appeals—as holding that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent.

Id.
197. A court may be bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used. Cardoza-Fonseca, 480 U.S. at 449.
198. Brock, 816 F.2d at 765.
199. Id. at 765-66.
200. Id. at 766.
mining whether Congress in any way "ratified" an agency's interpretation of the statutory language.\(^{201}\)

After utilizing traditional tools of statutory construction, if the court finds that the agency's interpretation of statutory language is contrary to clear legislative intent, the court must reject the agency's construction under the *Chevron* test.\(^{202}\) The degree of deference a court should accord the agency interpretation of statutory language, therefore, depends upon the court's initial interpretation of legislative intent.\(^{203}\) The *Chevron* test grants the courts substantial discretion in reviewing an agency's interpretation of statutory language because, in order to determine legislative intent, courts must first interpret the statutory language, the legislative history, and the purpose of the statute. The question before the court is not simply what Congress intended, but what does the court think Congress intended. As a result, overseeing agency interpretation of statutory language remains an essential judicial function under the *Chevron* deference test.

**B. The EPA "Lender Liability" Rule and the Chevron Test**

In order to determine the legislative intent underlying section 9601(20)(A) of CERCLA (the "security interest" exemption), the courts, applying traditional techniques of statutory interpretation, should first look to the statutory language to determine whether that intent is expressed in the "plain meaning" of the words.

The EPA rule defines "indicia of ownership" in the security interest exemption as "including full title to real or personal property acquired incident to foreclosure and its equivalents."\(^{204}\) Under this interpretation of "indicia of ownership," a lender may acquire full legal title to the property through foreclosure and still be entitled to assert the exemption.\(^{205}\) Although case law appears to diverge on this question, in at least two cases, courts have interpreted the security interest exemption as not applying

\(^{201}\) *Id.* at 767.

\(^{202}\) One writer has identified four reasons why Congress might enact legislation requiring further interpretation by the agency or the courts: (1) Congress may intend that the implementing agency will resolve the question; (2) it may recognize that the statute will require interpretation and assume the courts will resolve the question; (3) it may unwittingly create an interpretive question by failing to express itself clearly; or (4) it may have no intent at all regarding the question. *See* Farina, *supra* note 175, at 468-69.

\(^{203}\) *See, e.g.*, Brock, 816 F.2d at 761.


\(^{205}\) *Id.* at § 300.1100(b)(1). The rule, however, provides that the lender will lose the exemption if it fails within twelve months following foreclosure to list the property and begin advertising the property for sale. *Id.*
where the lender was record owner of the property. In *United States v. Maryland Bank & Trust*, the Maryland District Court determined that the exemption covered only those persons who, at the time of the clean-up, held indicia of ownership and not full title. The court reached that conclusion in part by examining the language of the exemption. The court believed that the verb tense used in the exemption ("holds" indicia of ownership) was critical because the language suggested that the security interest must exist at the time of the clean-up. Because the mortgage (a security interest) held by the lender terminated at the time of the foreclosure sale, the *Maryland Bank & Trust* court found that the lender's interest had ripened into full title.

The *Guidice v. BFG Electroplating and Manufacturing Co., Inc.* court also utilized traditional techniques of statutory interpretation and concluded that the exemption did not apply to record owners of contaminated property. It reasoned that the purpose of the security exemption was to protect secured lenders in common-law states where the mortgagee holds legal title to the mortgaged realty until satisfaction of the underlying loan obligation. The court stated that the 1986 amendments to CERCLA also supported a narrow reading of the exemption. According to the court, because Congress did not amend CERLCA to exclude lenders from liability who acquired property through foreclosure, but did amend the statute to protect state and local governments, Congress must have intended to hold lenders liable as owners. A court reviewing the EPA's interpretation of this section's statutory language may also find that the plain meaning of the language and the history of the section indicates that Congress intended to protect secured lenders in common-law states where a mortgagee holds legal title to the mortgaged realty rather than to provide an exemption for a lender who takes title to the property through foreclosure. Under that interpretation of congressional intent, the exemption is inapplicable to institutions purchasing the property at a foreclosure sale, and thus, the EPA's interpretation of

209. *Id.*
211. The *Guidice* court relied on the reasoning in *Maryland Bank & Trust*. *Id.* at 563.
212. *Id.*
213. *Id.*
“indicia of ownership” in the exemption conflicts with clear legislative intent.214

The EPA’s interpretation of this phrase, however, may not be unreasonable or inconsistent with congressional intent under the Ninth Circuit’s broader interpretation of the phrase “indicia of ownership” in Bergsoe.215 In that case, the court found that holding paper title to property is not, alone, an indicia of ownership for purposes of CERCLA. The important question, according to the court, is why the owner holds such indicia of ownership.216 The Bergsoe court said that the Port of St. Helens, a municipal corporation that had issued revenue bonds to promote industrial development at the site, had received warranty deeds to the site as part of a transaction whose sole purpose was to provide financing.217 The court interpreted the phrase “indicia of ownership” to include taking actual title to property in circumstances where a financing entity held title primarily to ensure that the debtor would meet its financial obligations. Under this interpretation, the court found that the Port was not liable as an “owner” under section 9607(a)(1) or (2) of CERCLA.218

The EPA’s proposed lender liability rule also defines “participation in management” in the security interest exemption. The proposed rule limits the phrase to actual participation in management. Thus, the rule rejects the Eleventh Circuit interpretation of that phrase in Fleet219 and adopts the Mirabile220 court’s interpretation. Did Congress intend to include capacity or ability to influence facility operations in that phrase? The Fleet court determined that it did based upon its interpretation of congressional intent evidenced by the “plain language” of the exemption itself.221 The Fleet court reasoned that individuals and entities involved in the operations of a facility are already liable under CERCLA as operators under the express language of section 9607(a)(2). If Congress intended to absolve secured creditors from ownership liability, it would have done so. The court reasoned that the phrase “participating in the management” and the term “op-

215. 910 F.2d 668 (9th Cir. 1990), amended by 937 F.2d 1369 (9th Cir. 1991) (en banc).
216. Id. at 671.
217. Id.
218. Id.
221. Fleet Factors, 901 F.2d at 1557. The court stated: “The district court’s broad interpretation of the exemption would essentially require a secured creditor to be involved in the operations of a facility in order to incur liability. This construction ignores the plain language of the exemption and essentially renders it meaningless.” Id.
erator,” although similar, are not congruent, and that “participating in the management” must mean something different. It concluded that “participating in the management” for purposes of the exemption means “participating in the financial management of a facility to a degree indicating a capacity to influence the corporation’s treatment of hazardous wastes.”

In reviewing the EPA’s interpretation of the “security interest” exemption under CERCLA, principles of statutory construction give the courts substantial discretion in determining the congressional intent underlying the exemption. Conflicting judicial interpretations of that statute’s meaning suggests that the task of ascertaining congressional intent is not simple, nor is it a simple application of static principles. Inherent in the question of whether an agency’s interpretation of a statute is permissible is the question of who should establish policy under the statute and what should that policy be.

According an agency deference by permitting it to change or “clarify” prior interpretation of the law may serve the public interest by giving the agency the flexibility to determine, in light of current administrative goals and policies, an important issue like the limits of lender liability under CERCLA. However, there is little evidence that silence or lack of clarity in a statute indicates that Congress deliberately intended to delegate the power to interpret the law to the agency. Deference to an agency determination of the scope of the security interest exemption essentially concedes to the agency the interpretive power to determine policy through law-making. Ultimately, the issue of limiting liability under CERCLA for those who neither caused nor contributed to hazardous waste contamination is an issue that goes beyond lender liability. It raises fundamental questions about CERCLA’s strict liability scheme and the future course of our national environmental policy. For this reason, Congress, rather than the administrative agency, should ultimately determine the scope of lender liability under current environmental statutes.

V. CONCLUSION: LENDER LIABILITY, STRICT LIABILITY, AND ENVIRONMENTAL POLICY

Much of the criticism leveled at the courts’ expansive interpretation of lender liability under CERCLA reflects a dissatisfaction with the Act’s gen-

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222. Id.
223. Pierce, supra note 179, at 313. Others have suggested that the prospect that regulatory statutes will routinely be amended or even repealed by interpretation should at least give us pause. Farina, supra note 175, at 500.
224. Farina, supra note 175, at 470.
eral environmental policy. Lenders complain that the law encourages plaintiffs to sue rich defendants and fosters the view that lenders are "deep-pocket" targets for liability.\textsuperscript{225} Banks complain they may be liable even though they may have done everything they could have to protect themselves.\textsuperscript{226} The general debate about whether Congress should protect lenders from Superfund liability raises questions about CERCLA's entire strict-liability scheme.\textsuperscript{227}

CERCLA was designed to clean up sites contaminated by hazardous wastes—it was not designed to be fair.\textsuperscript{228} Today, however, the entire legislative scheme established by CERCLA is coming under increasing attack precisely because of concerns that it does not fairly apportion the massive costs of cleaning up the nation's hazardous waste sites.\textsuperscript{229} Recently, powerful interest groups have squared-off against CERCLA's strict liability scheme.\textsuperscript{230} Large industries have begun a campaign to "spread the CERCLA pain" by filing third-party Superfund lawsuits against smaller businesses and other waste-makers, seeking help in bearing the costs of cleaning contaminated sites.\textsuperscript{231} As liability under CERCLA reaches beyond major industries to small businesses, municipal governments, and perhaps even individual citizens, efforts to "reform" the law to protect those entities are likely to increase.\textsuperscript{232}

It is probably true that potential liability under Superfund gives lenders an incentive to act as "environmental police" by encouraging lenders to develop an environmental risk policy and to determine, at the time property changes hands, that sound environmental practices are in place.\textsuperscript{233} It is also true that after \textit{Fleet}, some lenders will be more wary in granting loans to

\begin{itemize}
\item \textsuperscript{225} United States Banker, May, 1990, at 8.
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{See} Leifer & Musiker, \textit{Cleaning up Superfund: 10 Changes to Make During Reauthorization}, Env. Rep. (BNA) No. 20, at 915 n.19 (Sept. 14, 1990) (citing, among other things, the issue of the passive intervening landowner liability: "It is unclear under CERCLA whether the intervening landowner, who did not contribute to the hazardous substance release, is liable for response costs."). \textit{Id.}
\item \textsuperscript{228} \textit{Id.} at 59.
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id.} at 36.
\item \textsuperscript{232} Arguments over who is responsible for a waste site containing household trash are likely to increase concerns about CERCLA's liability scheme. As an industry spokesman pointed out: "If you drop a copper penny into a wastebasket, you're a PRP." \textit{Id.}
\item \textsuperscript{233} \textit{Id.} at 39. \textit{Phase I audits (consisting of a site visit and review of the history of site activities) are commonly conducted for loan transactions. After Fleet Factors, the scope of such audits will probably increase. Hollan}, \textit{The Evolving Issue of Lender Liability}, ENV. NEWS REP., Fall, 1990, at 3.
\end{itemize}
businesses if contamination at the site is discovered during the audit process.\textsuperscript{234} Congress must balance these concerns in determining the proper scope of lender liability under \textit{CERCLA}. Determining the proper scope of lender liability is inextricably entwined with broader economic and environmental policy decisions. Exempting one segment of the business community from clean-up costs under \textit{CERCLA} means that someone else will have to pay those costs. In some cases, entities with only peripheral involvement in the cause of contamination may be liable.

In determining whether to limit the liability of lenders and other financial institutions under \textit{CERCLA}, Congress must not only consider the concerns of lenders, it should consider the question of lender liability in the larger context of re-examining the policies underlying the creation of the Superfund program. Superfund is the biggest and most costly environmental program in the nation.\textsuperscript{235} Some maintain that the strict, joint and several liability provisions of \textit{CERCLA} have serious economic impact by encouraging litigation that results in huge transaction costs and ultimately delays clean-up of contaminated sites.\textsuperscript{236} By encouraging litigation, the law may ultimately discourage clean-up of contaminated sites by delaying response actions and by diverting resources from prevention and clean-up to liability management.\textsuperscript{237}

The issue of lender liability is part of the larger question of how to apportion the environmental clean-up costs of hazardous waste sites. Ultimately, Congress must reauthorize Superfund in a manner consistent with the larger policy issues involved. It would be most appropriate that Congress, when reauthorizing Superfund, consider the scope of lender liability under \textit{CERCLA} because this issue is inextricably bound to the policy questions of application of strict liability principles in the environmental law context.\textsuperscript{238} The courts may find that the EPA's proposed rule is a permissible interpretation of ambiguous statutory language contained in the law. Ultimately, however, it is the responsibility of the legislative body to clarify the scope of lender liability under \textit{CERCLA}. In the final analysis, Con-
gress, not the administrative agency or the courts, should establish the limits of lender liability for cleaning up contaminated sites under Superfund. Congress should establish these limits through a re-examination of the environmental policy under the Act.