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LENDER LIABILITY FOR UNDERGROUND STORAGE TANKS

The Secured Creditor Exemption for Underground Petroleum Storage Tanks Permits Lenders To Provide Fiscal and Administrative Oversight, Undertake Environmental Compliance, and Engage in Traditional Workout Activities. Timely Foreclosure Proceedings Are Also Permitted, Provided There Is Compliance with Closure Requirements.

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The federal Environmental Protection Agency ("EPA") recently issued its lender liability regulation interpreting the scope of the secured creditor's exemption under the federal Resource Conservation and Recovery Act ("RCRA"). The regulation (the "RCRA Lender Liability Rule") identifies the RCRA regulatory obligations that may be imposed on creditors who hold security interests in underground storage tanks ("USTs") that are used to store petroleum products, or in real estate containing petroleum USTs both prior to and after foreclosing on the security interest. (The petroleum USTs and the real estate containing the USTs will be referred to hereafter as "UST Property").

The RCRA Lender Liability Rule becomes effective on December 6, 1995 (the "effective date") and will apply to creditors who are holding security interests in UST

Property on the effective date. Foreclosure proceedings that are underway at the time of the effective date will also be covered by the rule.

The RCRA Lender Liability Rule only applies to those petroleum USTs that are regulated under the federal RCRA program. The rule does not apply to USTs that are used to store hazardous substances or hazardous wastes. Other types of USTs that are not subject to the RCRA Lender Liability Rule include: farm and residential tanks smaller than 1100 gallons that are used to store motor fuels for non-commercial use; tanks used to store heating oil for on-site use; tanks stored on or above the floor of underground areas such as basements and tunnels; septic tanks; tanks used to collect stormwater; and flow-through process tanks.

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The lending and real estate community will probably be familiar with many aspects of the RCRA Lender Liability Rule because this rule is modeled after the lender liability rule that was adopted by EPA under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA").¹ However, the RCRA Lender Liability Rule has several important features that may require financial institutions to alter their foreclosure practices.

OVERVIEW

The RCRA UST program imposes a wide range of regulatory obligations on owners and operators of UST systems. The UST program applies to over 700,000 establishments, including gasoline stations, shopping centers, municipal and county facilities, airports, car rental agencies, trucking firms, heating oil companies, large apartment buildings, schools, and other commercial operations where fuel or heating oil is stored in large quantities.

The regulatory obligations imposed upon UST owners and operators include ensuring compliance with the UST technical standards;² reporting, investigating, and remediating releases of regulated substances from the USTs (known as "corrective actions"); maintaining financial assurances; and complying with closure procedures when USTs are taken out-of-service.³

The RCRA contains a secured creditor exception which provides that a secured creditor who has indicia of ownership in UST Property will not be responsible for complying with the UST requirements imposed on owners of

UST Property if (i) the indicia of ownership is held primarily to protect a security interest, (ii) the lender does not participate in the management of the UST Property, and (iii) the lender is not engaged in petroleum production, refining, and marketing.⁴

KEY DEFINITIONS

The RCRA Lender Liability Rule contains a number of critical definitions. The definitions are intended to be illustrative and are not intended to be limited to the examples provided by EPA.

Holder

Secured creditors who qualify for the RCRA regulatory exemption are referred to as "holders." The term includes not only the loan originator but also any successor-in-interest such as a subsequent purchaser of the security interest on the secondary market, a loan guarantor, and a surety. The term "holder" also includes any person who acts on behalf of or for the benefit of a holder, such as a court-appointed receiver.⁵

Lending institutions often assign assets of non-performing loans to subsidiaries who administer workouts, foreclose, or otherwise divest property. Under the RCRA Lender Liability Rule, a subsidiary who is assigned the loan as well as non-originating lenders who purchase portions of loan syndications will fall within the definition of holder.

Security Interest

The RCRA Lender Liability Rule defines a security interest as an interest in UST Property which is created or established for the purpose of securing a loan or other obligation. The term is intended to encompass a wide range of transactions that provide a holder with recourse

1. 42 U.S.C. 9601 et seq. The CERCLA lender liability rule was vacated by the court of appeals in *Kelley v. EPA*, 15 F.3d 1100 (DC Cir. 1994). The CERCLA lender liability rule now serves as an internal EPA guidance document.
2. The technical standards provide that USTs must be equipped with spill and overflow prevention devices, corrosion protection, and leak detection equipment. USTs that do not satisfy these requirements must be upgraded or replaced by 1998.
3. 40 C.F.R. 280

4. 42 U.S.C. 6991b(h)(9)
5. 40 C.F.R. 300.1100(a)(1).

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against the UST Property, and includes security interests arising out of consensual arrangements as well as those that result by operation of law. EPA provided a list of transactions that qualify as "security interests." They include mortgages, deeds of trusts, liens, title acquired pursuant to lease financing transactions, sale/leasebacks, conditional sales or installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing agreements, and consignments creating a security interest in the UST Property.⁶ Merely labeling a transaction as a security interest will not in itself bring the transaction within the exemption.

Indicia of Ownership

This phrase refers to evidence of an ownership interest in petroleum USTs or property containing petroleum USTs.⁷ These interests include mortgages, deeds of trusts, liens, surety bonds and guarantees of obligations, title held to lease financings where the lessor does not initially select the leased property, and legal or equitable ownership interests in UST Property acquired through foreclosure. The phrase may also apply to assignments, pledges, or other forms of encumbrances that are held primarily to protect a security interest.⁸ The EPA indicated that a creditor does not actually have to hold title or a security interest in order to maintain indicia or evidence of ownership in a petroleum UST or property containing the petroleum USTs.

The indicia of ownership must be held "primarily" to secure a loan or obligation although that does not necessarily have to be the sole reason for the transaction. Thus, a lender having a secondary reason for maintaining indicia of ownership (e.g., interest income, investment purpose) will not void the exemption.⁹ However, if the security interest is held primarily as an investment rather than to assure repayment of a loan or performance of some other obligation, the exemption will not apply.¹⁰

Participation in Management

A creditor who holds "indicia of ownership" in UST Property primarily to protect a security interest may lose its regulatory exemption and become subject to the requirements of the UST program if it participates in the management of the USTs. Under the RCRA Lender

Liability Rule, a holder will be deemed to participate in the management of a UST Property when the holder actually becomes involved in the management or control of the operation of the UST Property. The mere ability to influence or the existence of unexercised rights to control the operations of the USTs will not rise to the level of management participation.¹¹ However, following foreclosure, a lender will be considered to be operating the USTs if the creditor allows the USTs to continue to store petroleum in the USTs.¹²

Fair Consideration

The RCRA Lender Liability Rule defines "fair consideration" as the amount equal to or in excess of the outstanding principal owed to the holder immediately preceding the acquisition of full title or possession in the case of a lease financing transaction, plus any unpaid interest, rent, or penalties arising either before or after foreclosure. "Fair consideration" also includes all reasonable and necessary costs incurred by the holder during workout and foreclosure, including costs to prepare, preserve, and protect the UST Property for resale. These costs may also include environmental compliance and corrective action costs. These amounts may, of course, be set off by any amounts received by the holder in connection with a partial disposition of the collateral, and any amounts paid by the borrower or applied to the borrower's account following acquisition of full title or possession in the case of a lease financing. In the case of junior lienholders, fair consideration will be the value of all outstanding senior security interests plus the value owed to the junior creditor.¹³

The term "fair consideration" is intended to apply to all cash offers. Thus, lenders will not be required to accept a bid that contains unfavorable non-monetary terms, such as indemnification agreements or "bundled" sales, where the price for all the properties taken as a whole would be unacceptable.¹⁴

LIABILITY OF A LENDER AS AN OWNER OF USTs

Pre-loan Actions

The RCRA Lender Liability Rule provides that holders may require a pre-loan environmental investigation and cleanup, or provide financial advice or guidance to

6. 40 C.F.R. 280.200(d)

7. 40 C.F.R. 280.200(c)

8. *Id.*

9. *Id.*

10. 60 F.R. 46698 (Sept. 7, 1995)

11. 40 C.F.R. 280.210(a)(1)

12. 60 F.R. 46703 (Sept. 7, 1995)

13. 40 C.F.R. 280.210 (c)(ii)(A)

14. 60 F.R. 46701 (Sept. 7, 1995)

prospective borrowers, without losing their regulatory exemption.¹⁵ Moreover, a lender will not forfeit its exemption by knowingly taking a security interest in contaminated collateral.

Loan Administration

The RCRA Lender Liability Rule provides that holders may exercise prudent fiscal or administrative oversight of a borrower's operations without losing their regulatory exemption. The EPA listed examples of actions that fall within this category. Thus, a holder who acts as credit manager, accounts payable or receivable manager, personnel manager, controller, or chief financial officer would be considered as acting to protect its security interest and, therefore, would fall within the regulatory exemption.¹⁶

However, when the holder becomes entangled in the daily operations of its borrower, it will be considered to be participating in the management of the UST Property. The EPA indicated that a holder will be deemed to be exercising excessive control over its borrower and lose its regulatory exemption when the holder performs functions akin to a plant manager, operations manager, chief operating officer, or executive officer. A holder's actions will be analyzed on a case-by-case basis; merely terming actions to be "financial oversight" will not protect a holder if its involvement is operational in nature.

Under the RCRA Lender Liability Rule, holders may monitor borrower's environmental compliance, and may require that the borrower comply with applicable environmental laws, perform environmental audits, report releases of petroleum from USTs, or remedy contamination.¹⁷ The mere inclusion of environmental warranties or covenants will not cause the lender to lose its regulatory exemption. Holders may also require borrowers to comply with environmental requirements even where the loan documentation does not expressly grant the creditors such rights.¹⁸

Moreover, holders may undertake environmental actions themselves or even hire environmental contractors to perform the work without jeopardizing their regulatory exemption.¹⁹ For example, holders may upgrade or replace USTs to ensure that the USTs are in compliance

with the technical standards of the UST program, maintain or replace corrosion protection, install release detection equipment, report releases, take corrective actions, or undertake temporary or permanent closure of the USTs, without being considered participating in the management of the USTs so long as the actions are consistent with the RCRA UST program requirements.²⁰ It is important to note that a holder is not required to take these actions in order to qualify for the regulatory exemption as an "owner" of the USTs. However, there are some environmental actions discussed below that holders must take during post-foreclosure in order to obtain the "operator" regulatory exemption.

Workouts

When a borrower's business begins encountering problems, lenders typically increase their supervision of and involvement in the borrower's operations. The lender will often negotiate "workout" agreements that give the lender broad management powers over the business. Lenders have been concerned that such actions will be construed as participation in the management of a facility, thereby exposing the lenders to the regulatory jurisdiction of the RCRA.

The RCRA Lender Liability Rule provides that holders may engage in common workout practices without losing their regulatory exemption as long as the workout activities do not qualify as participating in the management of the UST Property. "Workout activities" are defined as actions that a holder may take prior to foreclosure to prevent, cure, or mitigate a default by the borrower or obligor, or to preserve or prevent the diminution of the value of the collateral.²¹

To assist holders, EPA included a non-exclusive list of permissible workout activities in the RCRA Lender Liability Rule. These actions include: restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial advice, or other advice, suggestions, counseling, or guidance; and exercising or enforcing any rights or remedies the holder is entitled to under law or under any loan document. Since this

15. 40 C.F.R. 280.210(b)(1)

16. 40 C.F.R. 280.210 (a)(2)

17. 60 F.R. 46699 (Sept. 7, 1995)

18. 40 C.F.R. 280.210 (b)(2)

19. 60 F.R. 46699 (Sept. 7, 1995)

20. 40 C.F.R. 280.210 (2)(i)(B)

21. 40 C.F.R. 280.210 (b)(2)(ii)

is a non-exclusive list, lenders will have to re-examine their workout practices to ensure that they do not violate the management participation test. However, it would appear that as long as the lender does not divest the borrower of its decision-making ability over the operations of the UST Property, or does not engage in such operational actions as storing or refilling the USTs with product, workout activities will not expose a lender to liability.²²

By linking workout activities to management participation, the EPA has added some uncertainty in the workout area. This requirement may be somewhat disappointing to the lending community, since there may be instances when a lender would want to divest a borrower of control over UST Property because the lender believes the borrower is incompetent or desires to direct operations without interference from the borrower. However, cases interpreting the nearly identical workout provision of the CERCLA Lender Liability Rule have broadly construed the definition of permissible workout activities.

Foreclosure

Holders face their greatest exposure to RCRA regulatory liability when they acquire equitable, legal, or marketable title to UST Property. Recognizing that foreclosure may often be a holder's only remedy in the case of a borrower's business failure, EPA will allow holders to foreclose on UST Property provided the holder acts diligently to acquire title and then seeks to sell, re-lease, or otherwise divest itself of the UST Property in a reasonably expeditious manner using commercially reasonable means.²³ A holder who complies with the foreclosure requirements of the RCRA Lender Liability Rule will be considered to be holding indicia of ownership primarily to protect a security interest.

Because a holder's regulatory exemption for foreclosure is judged by the timeliness of the holder's actions, EPA felt that it needed to identify a precise date when the foreclosure process could be deemed completed and the time-clock would begin to run.²⁴ The solution the EPA chose was to link foreclosure to the time that the holder could physically access the UST Property.

The rule itself does not list the kinds of foreclosure actions that qualify as a foreclosure process, although the preamble to the rule does provide a partial list.

Instead, the definition of foreclosure simply states that foreclosure means that the holder has obtained legal, marketable, or equitable title, and that the holder has gained access to the UST Property. EPA did provide examples of foreclosure actions that will fall within the regulatory exemption. These include the traditional forms of foreclosure, such as foreclosure judgment, foreclosure sale, purchase at a foreclosure sale, acquisition or assignment of title in lieu of foreclosure, acquisition of a right to possession or title, or other agreement in settlement of a loan obligation, or any other formal or informal manner by which the holder acquires title to or possession of the borrower's collateral for subsequent disposition in partial or full satisfaction of the underlying obligation.²⁵

The RCRA Lender Liability Rule contains a "bright-line" test that a holder may use to establish that it has been seeking to divest itself of the UST Property in an expeditious manner. Under this test, a holder must list or advertise the UST property for sale or disposition on a monthly basis in a suitable real estate publication or trade journal, or a newspaper of general circulation covering the area where the UST property is located within 12 months following foreclosure or the Effective Date (whichever date is later)²⁶ A holder who follows this "bright-line" test will automatically be able to avail itself of the regulatory exemption. However, a holder that chooses a different approach will have the burden of establishing that it held indicia of ownership primarily to protect its security interest and that it is not an owner for purposes of the UST regulatory program.²⁷

In addition, a holder may not reject, outbid, or fail to act upon a written offer of "fair consideration" for the UST Property within 90 days of receipt when the offer of fair consideration is received six months after foreclosure or the effective date of the rule, whichever is later.²⁸ A holder who outbids or refuses an offer of fair consideration will no longer be deemed to be holding "indicia of ownership primarily to protect a security interest" but will be considered an owner of the petroleum USTs or the property containing the USTs for purposes of the UST regulatory program.

22. *Id.* at 18357.

23. 40 C.F.R. 280.210 (c)(1)(i)

24. 60 F.R. 46701 (Sept. 7, 1995)

25. 60 F.R. 46701 (Sept. 7, 1995)

26. 40 C.F.R. 280.210(c)(2)(i). The rule defines a general circulation newspaper as one with a circulation over 10,000, or one suitable under any applicable federal, state, or local rules of court for publication required by court order or rules of civil procedure. *Id.*

27. 60 F.R. 46702 (Sept. 7, 1992)

28. 40 C.F.R. 280.210(c)(ii)(B)

LIABILITY OF A LENDER AS A UST OPERATOR

The RCRA secured creditor's exemption acts as an exclusion from the definition of an RCRA owner and does not expressly refer to operators. However, because the RCRA Lender Liability Rule allows holders to take certain actions that could transform the holder into an operator, EPA felt that it had to address the circumstances under which a holder can act like an operator but stay within the protection of the regulatory exclusion.

The EPA indicated that a person who exercises daily control or responsibility over USTs or property containing USTs will be considered an operator for purposes of complying with the UST program. Under the RCRA Lender Liability Rule, a person will be considered to be engaged in the daily operation of a UST merely by allowing the UST to store product.²⁹

Pre-foreclosure

Prior to foreclosure, the borrower is generally in control of the UST Property and is considered the operator of the UST. The RCRA Lender Liability Rule provides that during this phase of a loan, a holder may perform financial oversight of the borrower's operations, monitor environmental compliance, and even undertake voluntary environmental activities consistent with the requirements of the UST program without losing its regulatory exemption. However, if the holder becomes engaged in the daily operation of the USTs, it will be considered an operator who will be subject to the requirements of the UST program.³⁰

Post-Foreclosure

After foreclosure, a holder will not be considered an operator if there is someone, such as another lessee, who is willing to assume control of the UST Property and responsibility for complying with the requirements of the UST program.³¹ However, if the holder displaces the borrower during foreclosure and there is no one else to assume responsibility for the UST Property, the holder will be considered an operator of the USTs. Such a holder will not qualify for the regulatory exemption unless it complies with the temporary closure requirements of the UST program within 60 days of foreclosure, by the effective date (whichever date is later), or by another reasonable date approved by a state authority that has been delegated the authority to administer the UST program.³²

To comply with the RCRA temporary closure procedures under the RCRA Lender Liability Rule, holders will have to empty the USTs, leave vent lines open and functional, and cap and secure all other lines, pumps, manways, and ancillary equipment. In addition, holders will have to maintain corrosion protection and report any suspected releases from the USTs. If a holder simply allows product to be stored in a UST during the post-foreclosure period when the holder is trying to sell the property, the holder will be considered an operator for purposes of the RCRA UST program.

A holder may not be aware of all USTs that may be located on a property at the time of foreclosure because the UST may not have been registered by the borrower or because the UST may be buried under asphalt or a building. Thus, the RCRA Lender Liability Rule provides that holders can remain within the regulatory exemption if they empty and secure the previously unknown USTs within 60 days of discovery or by the effective date, whichever date is later, or if they comply with another time frame established by a delegated state agency.³³

Under the federal UST program, USTs that are temporarily out of service for 12 months or more must undergo permanent closure, which generally involves either removing the UST or filling it with inert material and then remediating any soil or groundwater contamination.³⁴ The RCRA Lender Liability Rule alters the permanent closure requirements for holders of USTs that are temporarily out of service. If a holder cannot dispose of the USTs or the property containing the USTs within 12 months, the holder must conduct an environmental site assessment ("ESA") if the USTs are not equipped with leak detection equipment.³⁵ Any release or contamination that is detected during the ESA must be reported to the appropriate agency although the holder will not be required to take corrective action.³⁶ The 12-month period begins to run from the effective date or the date the UST was emptied, whichever is later.

As long as the holder complies with the release reporting requirement and performs the ESA when required, the holder may keep the USTs in temporary closure until a subsequent purchaser acquires title to the USTs or the property containing the USTs.³⁷ The subsequent purchaser would then have the responsibility for determining whether to bring the USTs back into service or to perma-

29. 60 F.R. 46703 (Sept. 7, 1995)

30. 60 F.R. 46703 (Sept. 7, 1995)

31. 40 C.F.R. 280.230 (b)(1)

32. 40 C.F.R. 280.210 (b)(2)

33. 40 C.F.R. 280.230(b)(2)(ii)

34. 40 C.F.R. 280.71-.74

35. 40 C.F.R. 280.230 (b)(3)(ii)(C)

36. 60 F.R. 46705 (Sept. 7, 1995)

37. 40 C.F.R. 280.230 (b)(4)

nently close them. The EPA's rationale for this approach was that the removal of the USTs might hinder the marketability of the property. Moreover, EPA indicated that the holder was just a temporary custodian of the property and decisions about the use of the property should be made by a subsequent purchaser.³⁸

The EPA also suggested that the costs of performing the ESA could be passed on to the subsequent purchaser but also encouraged states to allow holders to seek reimbursement for the ESA costs from the state UST trust funds that have been set up to assist UST owners and operators with the costs of UST corrective actions.

ISSUES NOT COVERED

The RCRA Lender Liability Rule has certain limitations that will in turn limit its usefulness to the lending community.

Lender as Trustee or Fiduciary

One of the primary purposes of the RCRA Lender Liability Rule was to expand the availability of capital to UST owners. Because EPA believes that lenders acting in their capacity as trustees or fiduciaries are not involved in making UST-related loans, the RCRA Lender Liability Rule does not extend the regulatory exemption to a lender who may have title to UST Property when acting as a trustee or fiduciary.³⁹ The EPA said it believed that the liability of trustees is limited by the operation of trust law and that even where a trustee may be personally liable, it would be entitled to indemnification from the trust's assets.

EPA adopted the same position in the CERCLA Lender Liability Rule and its optimism proved unwarranted when a federal district court held in *City of Phoenix v. Garbage Services Co.*⁴⁰ that a trustee could be liable as a CERCLA owner merely by having bare title to the property contained in the estate. While that decision involved a different statute, the trustee relied upon a similarly worded secured creditor's exemption to no avail. Moreover, the notion of "owner" has the same meaning in the two statutes.

State Enforcement

The RCRA Lender Liability Rule only applies to the federal UST program so compliance with the rule only protects against federal enforcement. Since enforcement of the federal UST program has been delegated to most of the states, the rule will offer little protection to lenders until those delegated states enact their own counterparts to the federal UST rule.

Liability to Private Parties

Section 7002 of RCRA authorizes private parties to seek injunctive relief against any person who has "contributed to" the past or present handling, storage, or disposal of solid wastes that poses an imminent and substantial risk to human health and the environment.⁴¹ A federal appellate court ruled earlier this year that section 7002 allows private parties to seek monetary damages.⁴² Since the class of defendants who may be liable under section 7002 is not limited to owners or operators, a holder who qualifies for the regulatory exemption could still be subject to injunctive relief and perhaps monetary damages if the plaintiff can establish that the holder somehow "contributed" to the disposal of petroleum from USTs. Such a situation could arise where a holder unwittingly places leaking USTs into temporary closure and does not perform any corrective action, since the RCRA Lender Liability Rule does not require the holder to undertake such action. Should the contents of the UST continue to leak during the holder's ownership, or if the contamination worsens during this period of time, a plaintiff could argue that the holder has "contributed to" the harm.

In all likelihood, the RCRA Lender Liability Rule also will not affect the liability that lenders may face under common law. An example of the potential UST liability that lenders may face under common law was illustrated in *Hawkeye Land Co. v. Laurens State Bank*.⁴³ In that case, a defaulting borrower who had operated a bulk storage petroleum facility conveyed all of its interests to the leasehold improvements to the lender, which included both aboveground and underground storage tanks. The owner of the property sought injunctive relief ordering the lender to remove the storage tanks. The bank was subsequently found to be the owner of the storage tanks and the continued presence of deteriorating tanks was held to constitute a trespass. Therefore, the court ordered the removal of the tanks.

38. 60 F.R. 46705 (Sept. 7, 1995)

39. 60 F.R. 46709 (Sept. 7, 1995)

40. 816 F.Supp. 564, modified in part, 827 F.Supp. 600 (D. Ariz. 1993).

41. 42 U.S.C. 6972(a)(1)(B)

42. KFC Western Inc v. Meghriq, No. 92-56597, 1995 WL 81766 (9th Cir. March 1, 1995)

43. 480 N.W.2d 854 (Iowa 1992).

Eligibility for Reimbursement From State UST Trust Funds

Nearly all of the states have established UST trust funds that may be used to assist UST owners and operators with the costs of corrective action. These trust funds have proven to be a successful and cost-effective way for remediating UST contamination. The eligibility requirements for these state programs vary as well as the amount of funding or reimbursement. However, compliance with the requirements of the RCRA Lender Liability Rule does not assure that foreclosing creditors will be eligible for reimbursement from the state trust funds. Indeed, in some states, creditors who take advantage of the rule may not be eligible for reimbursement because they will not be considered "owners or operators" of the USTs. In the RCRA Lender Liability Rule, EPA did encourage those states that do not currently allow holders to be eligible for reimbursement to amend their UST programs to allow holders to participate in the trust fund programs, since this would expedite the return of the contaminated properties to productive use.⁴⁴

44. 50 F.R. 46708 (Sept. 7, 1995)

Petroleum Producers, Refiners, and Marketers

The RCRA Lender Liability Rule does not apply to entities involved in the producing, refining, or marketing of petroleum even where a marketer-creditor has indicia of ownership in USTs to secure credit extended to a customer who purchased petroleum products.⁴⁵ This prohibition will not apply when a holder allows fuel oil to be stored in a UST to provide heat to an on-site building.⁴⁶

Although the lending community applauded the rule, it will offer lenders only limited protection from liability for contamination caused by USTs. Indeed, lenders may decide that they may obtain a greater return on their security interests if the business is maintained as a going concern, and may choose to keep the USTs in service to store or dispense product. Under such circumstances, a lender will be considered an operator of the USTs and will not be able to take advantage of the protection offered by the RCRA Lender Liability Rule. ■

45. Id. at 46708

46. Id. at 46697