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FEDERAL SUPERLIEN: AN ALTERNATIVE TO LENDER LIABILITY UNDER CERCLA

The Comprehensive Environmental Response, Cost and Liability Act of 1980 ("CERCLA")¹ was enacted in response to growing environmental hazards caused by improper waste disposal.² CER-

¹ The Comprehensive Environmental Cost and Liability Act of 1980, Pub. L. No. 95-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601 *et seq.* (1988)).

CERCLA was designed to remedy inadequate laws and widespread use of unsafe disposal methods which presented a substantial danger to the environment and major health risk to humanity. See H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120. The four major goals for the government as outlined in the legislation are: 1) to create an inventory of the country's hazardous waste sites, 2) prioritize the inventory based on the relative danger of each site, 3) contain the dangerous releases from these sites, and 4) to establish a funding program to clean up all the hazardous waste sites. *Id.* at 6119.

Congress sought to expedite and create a better control of hazardous waste clean-up as well as to ensure that responsible parties bear the costs of clean-up. See *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1488 (10th Cir. 1990) (CERCLA designed to facilitate waste clean-up through response mechanisms); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 90-91 (1st Cir. 1990) (two goals of CERCLA: to give government immediate tools for prompt and effective response to national problems arising from hazardous waste disposal, and ensure that guilty parties bear costs and responsibility for problems caused) (citing *United States v. Reilly Tar and Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)); *Exxon Corp. v. Hunt*, 475 U.S. 355, 359-60 (1986) (purpose of CERCLA was to facilitate clean-up of hazardous waste sites); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890 (9th Cir. 1986) (CERCLA enacted to provide comprehensive response to problem of hazardous substance release). See also King, *Lender Liability For Cleanup Costs*, 18 ENVTL. L. 241, 253 (1988) ("Committee Reports suggest that Congress intended CERCLA to fill gaps . . . particularly with respect to inactive, abandoned, or unauthorized hazardous waste sites"). See generally Note, *Superfund Settlements: The Failed Promise Of The 1986 Amendments*, 74 VA. L. REV. 123, 123-36 (1986) (discussing CERCLA process of cleanup, enforcement); Comment, *The Liability of Financial Institutions For Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139, 145-50 (background of CERCLA structure).

Several courts have analyzed CERCLA's legislative history. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080-81 (1st Cir. 1986) (overview of legislative history), *rev'd on other grounds*, 889 F.2d 1146 (1st Cir. 1989); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1068-79 (D. Colo. 1985) (brief synopsis of CERCLA history). See also King, *supra* at 253 (history and purpose of CERCLA).

² See, e.g., H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120. The Oversight Subcommittee of the Committee on Interstate and Foreign Commerce investigated twelve hazardous waste sites which unequivocally demonstrated the great "magnitude of the [environmental] problem and the inadequacy of the existing law." *Id.* The subcommittee investigated the Hooker Chemical site (Love Canal) in Niagara Falls which contained approximately 352 million pounds of indus-

CLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),³ authorizes the Environmental Protection Agency ("EPA")⁴ to investigate potentially hazardous waste sites and direct the "owners or operators"⁵ to clean-

trial chemical wastes. *Id.* at 6121. Another site in New Jersey contained over 40,000 barrels of hazardous wastes and at least 100 pounds of powerful explosives. *Id.* Liquid wastes were discharged into trenches and pits and contaminated the nearby water supply. *Id.* The subcommittee found that the improper disposal methods presented "major health hazards." *Id.* at 6122. At Love Canal, 230 families were eventually forced to evacuate due to unsafe conditions. *Id.* at 6121. Data showed an increased rate of birth defects and miscarriages for Love Canal residents. *Id.* Radiation exposure was estimated to have increased the rate of lung cancer by 35% at a Florida site. *Id.* See also Silverman, *Love Canal: A Retrospective*, [Current Developments] 20 Env't Rep. (BNA) No. 20, Part II at 835 (Sept. 15, 1989) [hereinafter *Love Canal*] (history and impact of Love Canal site, changed environmentalist movement, likely led to passage of CERCLA); 2 G. BLANCHARD, *LENDER LIABILITY: LAW, PRACTICE AND PREVENTION* § 15:07, 16 (1989) (abandoned sites such as Love Canal were particular concern to Congress when enacting CERCLA). See generally *United States v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 549 (W.D.N.Y. 1988) (background and history of Love Canal).

Current reports show that the amount of industrial wastes is massive. See Comment; *supra* note 1, at 140 (EPA estimates American industries annually generate approximately 266 million metric tons of hazardous waste).

³ Pub. L. No. 99-499, § 101 *et seq.*, 100 Stat. 1613 (1986). CERCLA originally appropriated 1.6 billion dollars to the Hazardous Waste Response Trust Fund (Trust Fund) which was financed by an excise tax on chemical and petroleum products and general revenues. See Pub. L. No. 96-510, 94 Stat. 2797, 2801 (repealed by Pub. L. No. 99-499, 100 Stat. 1613, 1774 (codified at 42 U.S.C. § 9601 *et seq.* (1988))). See also H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 2 reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6151 (explanation of 1980 excise tax). In 1986, Congress amended the Trust Fund by the Superfund Revenue Act of 1986, which increased the fund to 8.6 billion dollars financed in part by an excise tax on crude oil and feedstock chemicals. See Pub. L. No. 99-499, 100 Stat. 1613, 1773 (1988) (breakdown of environmental taxing scheme).

SARA authorizes the EPA to initiate response actions as well as to choose from numerous settlement options. See *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) (SARA authorizes variety of settlements for EPA, e.g., consent decrees requiring Potentially Responsible Parties (PRPs) to finance part of cleanup and/or to initiate response actions themselves). See generally Note, *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1465, 1477 (1986) (party should bear cost for which it is legally responsible).

⁴ See 40 C.F.R. § 1.3 (1990). The purpose and function of the EPA was to coordinate effective "governmental action to assure the protection of the environment by abating and controlling pollution on a systematic basis." *Id.* See also *United States v. Maryland Bank & Trust*, 632 F. Supp. 573, 576 (D. Md. 1986) (EPA is delegated primary responsibility for clean-up, response action) (citing Exec. Order No. 12,316, 3 C.F.R. 168 (1982)).

⁵ See 42 U.S.C. § 9601(20)(A) (1988). The section states in pertinent part: "[t]he term 'owner or operator' means . . . (ii) . . . any person owning or operating such facility, and (iii) . . . any person who owned, operated or otherwise controlled activities at [an onshore or offshore] facility immediately [before such hazardous release]." *Id.* The definition was expanded to include common carriers, and independent contractors who transport such hazardous substances. See *id.* at § 9601(20)(B).

Application of this section has been troublesome at times. See *In re T.P. Long Chem.*

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up the sites.⁶ The funding for the clean-up of such sites is provided for in the Hazardous Substance Response Fund ("Superfund")⁷ which is designed to facilitate prompt response action.⁸ Although Superfund presupposed that clean-up expenses would be recovered from Potentially Responsible Parties ("PRP's"),⁹ actual receipts have been far less than projected EPA estimates.¹⁰ The ability to recover clean-up costs has been increased by recent court decisions which have expanded liability to lenders.¹¹ This expansion, however, has created great uncertainty

Co., 45 Bankr. 278, 283 (Bankr. N.D. Ohio 1985) (definition of owner, operator not helpful); *Maryland Bank*, 632 F. Supp. at 578. Structure of section defining owner or operator, "like so much of this hastily patched together compromise act, is not a model of statutory clarity." *Id.* See also *infra* note 11 (discussion of uncertainty in CERCLA language).

⁶ See 42 U.S.C. §§ 9604, 9606, 9607 (1988). These sections authorize the EPA to order a clean-up prior to bringing suit. *Id.* See also *Southern Pines Assocs. v. United States*, 912 F.2d 713, 716 (4th Cir. 1990). The provision for pre-enforcement administrative action in CERCLA was indicative of congressional intent to allow the EPA to respond quickly to environmental problems without first becoming entangled in litigation. *Id.* 715. See generally *infra* note 8 (discussion of cases which support premise that Congress intended quick response by enactment of CERCLA).

⁷ See 42 U.S.C. §§ 9611, 9612 (1988). The Superfund was used to pay government response costs incurred as a result of carrying out the National Contingency Plan. 42 U.S.C. at § 9611(a)(1),(2) (1988). Government claims which have not been satisfied within 60 days after presentation to the owner or operator of the facility may be recovered by suing that party; after unsuccessful attempt, the government may seek payment from Superfund itself. 42 U.S.C. at § 9612(a). See also H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6134. See generally King, *supra* note 1, at 254-55 (heart of CERCLA is Superfund).

⁸ See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (Congress intended government to have immediate resources for prompt, effective response to hazardous waste disposal), *rev'd on other grounds*, 889 F.2d 1146 (1st Cir. 1989); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982) (key CERCLA objective is to facilitate prompt clean-up by financing federal and private responses).

Some legislators believed the fund was inadequate. See H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6139. "[S]o-called 'superfund' . . . is far too small to make a reasonable start on correcting this enormous environmental problem." *Id.* at 6149 (comments of Sen. Gore). Clean-up cost to national economy not even hinted by Superfund's authorized monies. *Id.* at 6149 (dissenting views of Reps. Stockman and Loeffler).

⁹ See 42 U.S.C. § 9607(l) (1988). This section provides a federal lien for all damages and costs for which a person is liable under CERCLA. *Id.* The lien is imposed upon all real property of such person which are subject to or affected by a removal or remedial action. *Id.* at § 9607(l)(1)(A), (B). It remains effective until liability is satisfied or the statute of limitations provided in section 9613 expires. *Id.* at § 9607(l)(2). The lien is "subject to the rights of any purchaser, holder of a security interest, or judgement lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed." *Id.*

¹⁰ See *infra* notes 83 to 91 and accompanying text (estimates and projections discussed).

¹¹ See McMahon, *Lender's Perspective on Hazardous Waste and Similar Liabilities*, 18 *Env'tl.*

as to the environmental liability of lending institutions.¹²

This Note will briefly discuss the history and purpose of CERCLA. It will analyze relevant court decisions which have addressed lender liability under CERCLA and suggest that potential liability has been unreasonably expanded. It will then examine the EPA draft proposal which seeks to limit lender liability under CERCLA. This Note will further suggest that while the draft proposal clarifies some of the areas left uncertain by the courts, it fails to provide a long range solution to prevent the depletion of the Superfund. Finally, this Note will suggest that a legislatively enacted federal "superlien" is needed to preserve the goals and policies of CERCLA as well as to provide a uniform and manage-

L. Rep. (Env'tl. L. Inst.) 10,368 (1988). Government agencies have declared their intent to hold different parties liable. *Id.* at 10,369. It appears evident that if the lender is the only deep pocket, it will be sued. *Id.*

Congress intended that CERCLA provisions be interpreted broadly. *See* 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1362-63 (9th Cir. 1990) (CERCLA given broad interpretation to accomplish remedial goals); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 25-26 (1st Cir. 1990) (as remedial statute CERCLA must be construed liberally to avoid frustration of beneficial purpose); *Dedham Water Co.*, 805 F.2d at 1081 (remedial statute to protect public health and environment and should be liberally construed to avoid frustration of purpose), *rev'd on other grounds*, 889 F.2d 1146 (1st Cir. 1989); *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) (remedial intent of CERCLA necessitates broad statutory construction to avoid frustration of purpose). *Cf.* *United States v. Conservation Chem. Co.*, 619 F. Supp 162, 199 (W.D. Mo. 1985) (Resource Conservation Response Act (RCRA) given broad power to grant necessary relief ensuring complete protection of public health and environment).

Courts have been given further latitude in interpreting CERCLA due to the uncertainty of its language and legislative history. *See* *Artesian Water Co. v. Government of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) "CERCLA is not a paradigm of clarity or precision. *Id.* It has been criticized frequently for unartful drafting and numerous ambiguities *Id.* Problems of interpretation have arisen from the Act's use of inadequately defined terms, a difficulty particularly apparent in the response costs area." *Id.*; *Mottolo*, 605 F. Supp. at 902 (CERCLA gained notoriety for "vaguely drafted provisions" and "indefinite, if not contradictory, legislative history."); *Stepan Chem.*, 544 F. Supp. at 1142 (statute vague and legislative history indefinite).

Uncertainty in CERCLA has led to increased litigation. *See* Comment, *SARA Slams The Door: The Effect of Superfund Amendments On Foreclosure Mortgagees*, 34 WAYNE L. REV. 223, 223 (1987). "With the advent of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Congress paved the way for foreclosing mortgagee liability for hazardous waste clean-up costs, thus creating a breeding ground for litigation." *Id.* (footnote omitted).

¹² *See supra* notes 26 to 67 and accompanying text (cases illustrating problems lenders encounter); Comment, *Superfund-Your Friendly Hometown Lender? The Liability of Financial Institutions under the Comprehensive Environmental Response, Compensation and Liability Act*, 24 LAND & WATER L. REV. 493, 508-9 (1989) (imposing liability on lenders will increase lending costs and may preclude lending to certain industries); King, *supra* note 1, at 264-75. (overview and discussion of business and legal risks).

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able system of liability and reimbursement.

I. A NATIONAL PRIORITY

As early as 1899, Congress enacted legislation limiting disposal of refuse material.¹³ Since that time numerous environmental laws have declared a national policy to safeguard human health and the environment.¹⁴ In 1980, Congress enacted CERCLA¹⁵ with the goal of eliminating unsafe hazardous waste sites through a sys-

¹³ See Rivers and Harbors Act of 1899, ch. 425, § 13, 30 Stat. 1121, 1152 (codified at 33 U.S.C. § 407 (1988)) (forbade disposing of refuse matter of any kind into navigable waters).

¹⁴ See The Clean Air Act, Pub. L. No. 159, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401-7642 (1988)). The Clean Air Act declared a congressional policy "to preserve and protect the primary responsibilities and rights of the States and local government in controlling air pollution." *Id.* The Act gave the Surgeon General authority to monitor and conduct investigations as well as to offer solutions to various pollution problems. *Id.* The Act appropriated up to \$5 million to carry out these policies, to conduct research and training, and award state and local grants to pollution control agencies and institutions. *Id.* at 322-23. The Act was significantly revised and expanded by Pub. L. No. 95-95, 91 Stat. 685 (1977).

The National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4370(a) (1988)), declared a national policy to encourage harmony between humanity and the environment and to encourage elimination of damages to the environment. *Id.* at § 4321.

The Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155, as amended by the Clean Water Act (codified generally to 33 U.S.C. § 1251 *et seq.* (1988)) had the goal of restoring and maintaining the physical, chemical and biological integrity of national waters. *Id.* at § 1251(a). The Act declared a national policy to prohibit deadly discharges of toxic pollutants, assure adequate statewide pollution control, and announced a national goal to eliminate toxic discharge by 1985. *Id.* at § 1251(a)(1), (3), (5). See *Southern Pines Assocs. v. United States*, 912 F.2d 713, 715 (4th Cir. 1990) (objective of Clean Water Act is to restore and maintain integrity of nation's waters).

The Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795, (codified as amended at 42 U.S.C. § 6901 (1988)), was enacted with the goal of promoting the protection of the environment and human health as well as to encourage conservation of natural resources. *Id.* Congressional findings stated that economic growth and the higher standard of living have increased industrial production, resulting in "a rising tide of scrap and waste materials." *Id.* The congressional findings with respect to the environment and health stated that hazardous wastes presented "special dangers to health." *Id.* RCRA enacted a complete regulatory scheme for hazardous wastes. See H.R. REP. No. 1016, 96th Cong., 2d Sess. pt.1, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120 (RCRA enacted complete regulatory scheme for hazardous sites); *United States v. Aceto Agricultural Chems. Corp.*, 872 F.2d 1373, 1376-77 (8th Cir. 1989) (Act attempted to deal with general disposal of wastes, to provide "cradle to grave regulatory regime"). See generally K. FORTUNA & D. LENNETT, HAZARDOUS WASTE REGULATION: THE NEW ERA 9-10 (1987) (describing regulatory scheme).

¹⁵ The Comprehensive Environmental Resource, Compensation and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (as amended by Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 9601- 9675 (1988)). See *supra* notes 1 and 2 and accompanying text (discussion of policies and purposes of CERCLA).

tematic funding program.¹⁶

Under CERCLA, a responsible party is liable¹⁷ for the cost of removal,¹⁸ remedial actions,¹⁹ and injury to natural resources.²⁰

¹⁶ See 26 U.S.C. §§ 4611-12, §§ 4661-62 (1989). Revenues for Superfund are derived primarily from the taxes on petrochemicals of crude oil received at United States refineries or imported into the United States. *Id.*

¹⁷ See 42 U.S.C. § 9607 (1988) (discussing various aspects of CERCLA liability); *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988) (agrees with overwhelming body of precedent that § 9607(a) establishes strict liability), *cert. denied*, 490 U.S. 1106 (1989); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316-17 (9th Cir. 1986) ("Congress imposed strict but not absolute liability under CERCLA") (citing *New York v. Shore Realty Co.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986) (most courts have imposed strict, joint and several liability), *cert. denied*, 484 U.S. 848 (1988) (dictum); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 191, 198-99 (D.C. Mo. 1985) (joint and several liability applies to CERCLA); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1401 (D.N.H. 1985) (same); *United States v. Chem. Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983) (illegal discharger is jointly and severally liable). See generally Marzulla & Kappel, *Lender Liability Under the Comprehensive Environmental Response, Compensation and Liability Act*, 41 S.C.L. REV. 705, 706-710 (1990) (theory of CERCLA liability); Comment, *supra* note 1 (discussing aspects of liability). Cf. *Love Canal*, *supra* note 2, at 835 (joint and several liability produces extremely high standard of care in corporate community).

¹⁸ See 42 U.S.C. § 9601(23) (1982). Removal is the first step taken when contamination is discovered; it includes physical removal and disposal of hazardous waste as well as plans for, and implementation of, measures to prevent further contamination or possible injury to persons in danger. *Id.*

¹⁹ See 42 U.S.C. § 9601(24) (1982). Remedial actions include permanent storage and recycling of hazardous wastes. *Id.*

²⁰ See 42 U.S.C. §§ 9607(a)(4)(A), (B) (1988). Cf. *J.V. Peters & Co. v. Administrator, E.P.A.*, 767 F.2d 263, 266 (6th Cir. 1985) (right to recover limited by costs consistent with national contingency plan); *Shore Realty Corp.*, 759 F.2d at 1042 (2d Cir. 1985) (responsible parties liable in damages for injury, destruction or loss of natural resources, including cost assessing such damages).

The defenses to liability are set forth in 42 U.S.C. § 9607(b) (1988):

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:

- (a) an act of God; (b) an act of war; (c) 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 substance concerned, . . . and (b) he took precautions against foreseeable acts or omissions of any such third party . . .

Id. Section 9607(b), known as the "innocent landowner defense" has limited application. See Schwenke, *An Overview of Issues of Landowner and Lender Liabilities*, 18 *Env'tl. L. Rep.* (Env'tl L. Inst.) 10,361, 10,362 (1988). Under present laws, anyone who had "any contact whatsoever" may be liable, and "almost no one can qualify as an 'innocent landowner' or an 'innocent lender,' unless and until they have gone through a complete environmental audit or assessment of their loan security or project." *Id.* at 10,362 (emphasis in original). Pre-

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Liability extends to four classes of potentially responsible parties: 1) current owners or operators of hazardous waste sites, 2) parties who had owned or operated the site at the time the disposal occurred, 3) generators of hazardous waste who arranged for treatment or disposal of their waste at their site, and 4) transporters of hazardous waste to a site from which there is a release or threatened release.²¹ Expressly exempt from the definition of "owner or operator" is someone who, without participating in the management of a facility, holds indicia of ownership in such facility primarily to protect its security interest.²²

II. COURTS EXTEND LIABILITY TO LENDERS

The "security exemption" has been a source of controversy for lenders seeking to protect their security interest by foreclosing on collateral and taking title to contaminated property.²³ CERCLA's ambiguity²⁴ on this issue has allowed courts to interpret CERCLA's provisions broadly, extending liability to lenders who have never participated in the management of the facilities which actually produced the hazardous waste.²⁵

sumably the innocent landowner defense would require at minimum "an actual, on-site inspection as well as an inquiry of prior site operators and owners, and a review of all the available public or governmental records with respect to any prior reports or threats of contamination at that site," and may require in many instances, "an actual environmental audit." *Id.* at 10,363. Benefits of the "innocent landowner" defense are more illusory than real. *Id.* (citing Betz & Spracker, *Landowner Liability Under CERCLA: New Obligations For Sellers and Buyers*, 1987 CHEM. WASTE LITIG. REP. 705, 706 (1987)).

²¹ See 42 U.S.C. § 9607(a) (1988). See generally Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 BUS. LAW. 1133, 1135-37 (1986) (discussing potential liability under CERCLA).

²² See 42 U.S.C. § 9601(20)(A) (1988). The statutory definition of "owner or operator" under CERCLA provides that "in the case of an on-shore facility, any person owning or operating such facility . . . such term does not include a person, who, without participating in the management in the facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." *Id.* (emphasis added).

²³ See *infra* notes 26-67 and accompanying text (discussion of cases addressing CERCLA security exemption for foreclosing lenders).

²⁴ See *Artesian Water Co. v. Government of New Castle County*, 851 F.2d 643, 648 (9d Cir. 1988) (CERCLA criticized for inartful drafting, numerous ambiguities, and interpretation due to inadequately defined terms, particularly in response costs area).

²⁵ Cf. *United States v. South Carolina Recycling & Disposal, Inc.*, 21 Env't Rep. Cas. (BNA) 1577, 1584 (D.S.C. 1984) (extended liability to lessee who sublet portion of property to corporation which engaged in waste disposal); *United States v. Carolawn Co.*, 21 Env't Rep. Cas. (BNA) 2124, 2128 (D.S.C. 1984) (denied motion for summary judgment to dismiss by company who held title to hazardous waste site for less than hour).

*In re T.P. Long Chemical Co.*²⁶ was the first case to decide a lender liability issue under CERCLA. In *Long*, BancOhio held a security interest in the personal property of T.P. Long Chemical Company ("Long").²⁷ Long went into bankruptcy²⁸ and the property was sold at auction.²⁹ After investigation, the EPA determined that the Long facility was contaminated and initiated a Superfund clean-up.³⁰ Although the court granted the clean-up costs priority over unsecured creditors, no priority was given over secured creditors, and as a result estate funds were insufficient to reimburse the EPA for the cost of the clean-up.³¹ Thereafter, the

²⁶ 45 Bankr. 278 (Bankr. N.D. Ohio 1985).

²⁷ *Id.* at 280. BancOhio held a perfected security interest in the accounts receivable, equipment, fixtures, inventory and other items including drums containing hazardous waste which were buried at the Long site. *Id.* at 280-81.

²⁸ *Id.* at 280. See 11 U.S.C. §§ 541, 726 (1988). Under Chapter 7 the debtors property becomes part of the debtor's estate and is liquidated for distribution to creditors. *Id.*

Bankruptcy issues arise frequently in the context of CERCLA liability, specifically where a trustee attempts to abandon hazardous waste property pursuant to his enumerated power under 11 U.S.C. § 554(a) (1988). See, e.g., *Midlantic v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 507 (1986) (state law not preempted by Bankruptcy Code; holding trustee may not abandon property in contravention of state law designed to safeguard public); *In re Peerless Plating*, 70 Bankr. 943, 946, 947 n.1 (Bankr. W.D. Mich 1987) (strict reading of *Midlantic* requires compliance with state environmental law despite conflict with bankruptcy code); *In re Mowbray Eng'g Co.*, 67 Bankr. 34, 35 (N.D. Ala. 1986) (trustee must yield to government interest in health). See also *Progress of the Superfund*, *infra* note 86 (CERCLA recoupment effected by bankruptcies). See generally *Statistical Abstracts*, *supra* note 87 (current statistics of bankruptcy filings). For a general discussion of the impact of environmental law on various bankruptcy proceedings, see Klein, *Hazardous Waste Liability and the Bankruptcy Code*, 10 HARV. ENVTL. L. REV. 533, 533-36 (1986); Drabkin, Moorman & Kirsch, *Bankruptcy and the Cleanup of Hazardous Waste: Caveat Creditor*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,341 (1985).

²⁹ *Long*, 45 Bankr. at 281. The bankruptcy trustee conducted the auction and all property was sold, except for drums buried at the site. *Id.* Since the drums were part of Long's property they were subject to BancOhio's security interest. *Id.* at 287.

³⁰ *Id.* at 280. The EPA discovered approximately 90 drums buried on the Long facility, as well as a tank which had leaked sulfur monochloride, a hazardous substance as defined by § 101(14) of CERCLA, 42 U.S.C. § 9601(14). *Id.*

³¹ See *Long*, 45 Bankr. at 286. The Bankruptcy Code gives administrative expenses first priority over all unsecured claims. 11 U.S.C. § 507(a) (1) (1988).

Courts have given EPA costs "administrative expense" status with priority over unsecured creditors. See, e.g., *In re Smith Douglass, Inc.*, 856 F.2d 12, 17 (4th Cir. 1988); *In re Peerless Plating Inc.*, 70 Bankr. 943, 948 (Bankr. W.D. Mich 1987) (implicit duty on trustee to unencumber assets of estate).

Courts have been reluctant to allow the "administrative expense" status of clean-up costs to have priority over a secured claim. See, e.g., *Smith Douglass*, 856 F.2d at 17 (allowed abandonment of fertilizer plant partly because entirety of estate's assets were encumbered); *In re Better-Brite Plating Inc.*, 105 Bankr. 912, 917 (Bankr. E.D. Wis. 1989) (trustee not required to pay clean-up because all assets were encumbered). See also *Ohio v. Kovacs*, 469 U.S. 274, 286 (1985). "[A] state protects its interests in the enforcement of its environmen-

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EPA sought recovery of those costs from BancOhio.³² The court refused to extend liability to BancOhio, stating that it did not benefit from the clean-up of the site.³³ The court further noted in dicta that even if BancOhio had foreclosed on the property it would not be liable as an "owner" because it would be acting merely to preserve its security interest.³⁴

In *United States v. Mirabile*,³⁵ the court directly addressed the issue of whether a secured lender was liable under CERCLA when it foreclosed on a contaminated security interest. In *Mirabile*, American Bank & Trust ("ABT") and Mellon Bank ("Mellon") extended loans to Turco Coatings Company ("Turco").³⁶ Turco experienced financial difficulties which resulted in ABT's foreclosure on the real estate.³⁷ Subsequently, ABT submitted the highest bid at a sheriff's sale and promptly assigned the real estate to the Mirabiles.³⁸ Shortly after the Mirabiles took possession, the Pennsylvania Department of Environmental Resources ordered the removal of hazardous waste from the property.³⁹ Ultimately, the EPA cleaned the site⁴⁰ and sued the Mirabiles for reimbursement.⁴¹ The Mirabiles then joined ABT and Mellon as third party defendants.⁴² Granting summary judgment in favor of ABT, the court reasoned that ABT had only acted to protect its security

tal laws by giving clean-up judgments the status of statutory liens or secured claims." *Id.* (O'Connor, J., concurring).

³² *Id.* at 286.

³³ *Id.* at 288. The court found that there was no benefit to BancOhio because the collateral was sold before the EPA began its clean-up. *Id.*

³⁴ *Id.* at 289. The court held that any indicia of ownership by BancOhio could be attributed to protecting its security interest. *Id.* Additionally, "it is undisputed that BancOhio has not participated in the management of the Long facility." *Id.* at 288-89. See *supra* note 5 (definition of "owner or operator").

³⁵ 15 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985).

³⁶ *United States v. Mirabile*, 15 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,994, 20,995.

³⁷ *Id.* at 20,996. Turco filed a petition for Chapter 11 bankruptcy in 1980. *Id.* The business continued to fail and when the court dismissed the bankruptcy, ABT foreclosed. *Id.*

³⁸ *Id.* During the interim period before ATB assigned the bid to the Mirabiles they had taken certain actions with respect to the property including securing the property from vandals and inquiring into the cost of disposing the drums of waste. *Id.* at 20,995.

³⁹ *Id.* at 20,994.

⁴⁰ *Mirabile*, 15 *Envtl. L. Rep.* at 20,994. The cost was \$250,000. *Id.*

⁴¹ *Id.* See *supra* note 5 (text of § 9601).

⁴² *Id.* at 20,995. The Mirabiles claimed that the banks had assisted the previous owner in creating the hazardous condition. *Id.* at 20,996.

interest and had not participated in the management of the site.⁴⁸ The court stated that "before a secured creditor . . . may be held liable it must at minimum participate in the day to day operational aspects of the sites."⁴⁴

The holding in *Mirabile* was the judicial highwater mark for the protection of secured lenders from environmental liability. In *United States v. Maryland Bank & Trust*,⁴⁵ any broad application of the "day to day" participation standard used in *Mirabile* was specifically rejected.⁴⁶ In *Maryland Bank*, Maryland Bank & Trust ("MBT") financed Mark McLeod's purchase of a farm and secured a mortgage on the property.⁴⁷ One year later, McLeod failed to make his mortgage payments and MBT foreclosed on the property and became the record owner.⁴⁸ The EPA later investigated and cleaned the site at a cost of \$551,713.52.⁴⁹

The government sought to hold MBT liable for the clean-up costs as an "owner or operator" of the property.⁵⁰ MBT's main defense was that it had foreclosed on the property merely to protect its security interest and was therefore within the security exemption.⁵¹ Holding against MBT, the court stated that in order to qualify for the security exemption, the security interest must exist at the time of the clean-up; in this case the court reasoned that MBT's security interest ripened into full title when it bought the property at the foreclosure sale and was therefore not eligible for

⁴⁴ *Id.* at 20,996. The court stated that the management of a waste disposal facility meant "participation in operation, production or waste disposal activities . . . [but not merely] . . . financial ability to control waste disposal practices of the sort possessed by the secured creditors in this case." *Id.* at 20,995.

⁴⁵ *Id.* at 20,996. The court expressed sympathy with the argument for holding lenders liable but stated "the consideration of such policy matters and the decisions as to the imposition of such liability, however, lies with Congress." *Id.*

The court denied Mellon's motion for summary judgment because there was a question about the extent of the activities of Mellon's agents in the operation of Turco, including the monitoring of receivables, handling of cash accounts and general "day to day" involvement. *Id.* at 20,997.

⁴⁶ 632 F. Supp. 573 (D. Md. 1986).

⁴⁷ *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 575 (D. Md. 1986).

⁴⁸ *Id.* at 575.

⁴⁹ *Id.*

⁵⁰ *Id.* at 576.

⁵¹ *Id.* at 577.

⁵¹ *Maryland Bank*, 632 F. Supp. at 577. See *supra* note 10 (text of § 9601(20)(a)).

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the exemption.⁵³ To exempt MBT from liability would have left the government to pay for the clean-up, while it would have allowed the bank to later benefit from the enhanced property value after the clean-up.⁵³ Although not factually identical, the *Maryland Bank* and *Mirabile* decisions illustrate the uncertain position of lending institutions in similar situations.

A recent case in the Eleventh Circuit has been a source of great concern in financial circles.⁵⁴ In *United States v. Fleet Factors*,⁵⁵ the Fleet Factoring Corporation ("Fleet") entered into a loan agreement with Swainsboro Print Works ("SPW") whereby Fleet made a loan to SPW in return for the assignment of SPW's accounts receivable and a security interest in the facility and all of the property.⁵⁶ When SPW went bankrupt, Fleet foreclosed on its security interest and immediately contracted with another company to hold an auction selling the property "as is" and "in place."⁵⁷ Thereafter, the EPA inspected the facility, found 700 drums of hazardous toxic waste and declared it a Superfund site.

⁵³ *Maryland Bank*, 632 F. Supp. at 577. The court believed that the language of section 9601(20) (a) which states that an owner or operator does not include a person who, "without participating in management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility," is intended only to protect mortgagees in common law states which require that mortgagees hold the title to property while the mortgage is outstanding. *Id.* at 579.

It is this reading of the statute which led the court to expressly reject any broad application of the holding announced in *Mirabile*. See generally Schwenke, *supra* note 20, at 10,364. "It has been suggested that, in the absence of clear regulations to the contrary, the Justice Department will not aggressively impose liability on a lender who forecloses and takes immediate steps to dispose of the property . . . [this] seems to me to be inconsistent with the literal wording of CERCLA . . ." *Id.*

⁵⁴ *Maryland Bank*, 632 F. Supp. at 580. The court was also apparently influenced by the extended period of time that MBT held onto the property. *Id.* at 579. See King, *supra* note 1, at 273 (court influenced by length MBT held title to contaminated land). Cf. Comment, *supra* note 12, at 508. "Although MBT did not expressly say so it may have found compelling policy considerations in favor of the deterrent effect of imposing liability on lending institutions." *Id.*

⁵⁵ See [Current Developments] 21 Env't Rep. (BNA) No. 6 at 307. Commentor Thomas Greco of the American Banking Association stated that "[t]he *Fleet Factors* decision is 'really troublesome and a greater indicator of why there has to be a legislative solution.'" *Id.* A Pittsburgh attorney representing secured creditors commented, "[a] major problem with the decision is that there is no bright line law, no specific guidelines for lenders . . . the court's test . . . is inherently speculative and difficult to administer and guarantees lengthy litigation." *Id.*

⁵⁶ 901 F.2d 1550 (11th Cir. 1990).

⁵⁷ *United States v. Fleet Factors*, 901 F.2d 1550, 1552 (11th Cir. 1990).

⁵⁸ *Id.* at 1552.

The government sought reimbursement for clean-up costs from SPW and Fleet.⁶⁸ The principal issue was whether Fleet had "participated in management sufficiently to incur liability."⁶⁹ The lower court refused to grant Fleet summary judgment.⁶⁰ Upholding the denial of summary judgment, the circuit court stated in dicta that "a secured lender will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose."⁶¹

The protective posture of the courts regarding secured lenders in both *Long* and *Mirabile* was less apparent in *Maryland Bank* and non-existent in *Fleet Factors*. Lender liability issues often arise when the traditional "owner or operator" is insolvent or unavailable; to grant broad protection to lenders is often times a *de facto* admission that Superfund will not be reimbursed.⁶² *Fleet Factors* appears to require lender policing of hazardous waste sites.⁶³ The court rationalized that increased potential liability for lenders would in turn expand lender safety and control measures on borrowers, thereby reducing environmental risks.⁶⁴ It is suggested, however, that the *Fleet Factors* court failed to consider that creditors concerned with potential liability would be encouraged to distance themselves from management activities.⁶⁵ Under the broad

⁶⁸ *Id.* at 1553.

⁶⁹ *Id.* at 1556.

⁶⁰ *Id.* at 1552. The question of whether or not the refusal to grant summary judgment was proper went up to the United States Court of Appeals on interlocutory appeal. *Id.*

⁶¹ *Fleet Factors*, 901 F.2d at 1558.

⁶² See *infra* notes 81-89 and accompanying text (discussion of superfund recoupment).

⁶³ See [Current Developments] 21 *Env't Rep. (BNA)* No. 6 at 307 (June 8, 1990). Associate general counsel of the American Banking Association, Thomas J. Greco, in response to the *Fleet Factors* decision stated, "the decision transforms lenders into environmental police and puts a responsibility of the banking industry Congress never intended . . ." *Id.*

⁶⁴ *Fleet Factors*, at 1558-59. The court stated that a creditor's awareness of potential CERCLA liability will encourage the monitoring of debtor's hazardous waste treatment, and the insistence of compliance to acceptable waste treatment standards as a prerequisite to continued and future financing. *Id.*

There is a strong argument that there are practical social reasons for not letting lenders escape liability. See Malloy, *Equity Participation and Lender Liability Under CERCLA*, 15 *COLUM. J. ENVTL. L.* 63, 80 (1987). Lenders hold a unique position of control over the exchange of funds and are able to use this position to further the goals of CERCLA. *Id.* The lender can also diversify and spread the risk of these transactions. *Id.*

⁶⁵ See generally Church, *Lender Liability for Hazardous Waste: An Economic Analysis*, 59 *U. COLO. L. REV.* 659, 676-77 (1988). Due to the large liability costs of CERCLA and the

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language of *Fleet Factors*, any attempt by a lender to force its borrowers to comply with environmental safety laws could "support the inference" that they had control over the environmental waste policies and expose the lender to extensive liability.⁶⁶ It is submitted that the extension of liability in *Fleet Factors* goes too far in the search for a deep pocket.⁶⁷

The Environmental Protection Agency has drafted proposed regulations which address these issues.⁶⁸ The next section of this Note will briefly discuss the portions of the EPA draft which are relevant to lender liability and suggest that the proposed regulations fail to address how Superfund will remain operational in the wake of increasing clean-up costs and lack of reimbursement.

unstable condition of many banks today, lender liability may have a significant negative impact by increasing the risk of bank failures. *Id.*

⁶⁶ *Fleet Factors*, 901 F.2d at 1558-59.

⁶⁷ See Adler, [Spotlight Report] *Liberal Rulings Extend Cleanup Liability*, Business Insurance, Oct. 8, 1990 at 27. "[Fleet Factors], according to attorneys greatly expand[s] liability for cleanups . . . indicat[ing] that courts are reading the statute broadly in an effort to find responsible parties for pollution cleanups A liberal construction seems to be the paramount concern of the courts." *Id.* "There seems to be a willingness by federal judges to express aggressive theories" however courts may be going too far in promoting the goals of CERCLA. *Id.*; [Current Developments] 21 Env't. Rep. (BNA) No. 20 at 907 (Sept. 14, 1990) (Fleet Factors decisions tags lenders as deep pockets, to fund cleanup costs).

⁶⁸ See EPA Draft Proposal Defining Lender Liability Issues under the Secured Creditor Exemption of CERCLA, Env't. Rep. (BNA) No. 21, at 1162 (Sept. 14, 1990) [hereinafter *Draft Proposal*].

The Ninth Circuit has ruled on the issue of lender liability since *Fleet Factors*. See *In re Bergsoe*, 910 F.2d 668 (9th Cir. 1990). In *Bergsoe*, the Bergsoe Metal Company built a lead recycling plant and financed it by giving a mortgage and a promissory note in exchange for building capital from the Port of St. Helens (Port) and a bank. *Id.* at 669. The plant had financial difficulty and went into bankruptcy. *Id.* at 670. By that time the Oregon Department of Environmental Quality determined that the site was contaminated. *Id.* The bank and bankruptcy trustee sued the owners of Bergsoe for the money owed and also sought to have a declaration that the owners were liable for CERCLA clean-up costs. *Id.* Bergsoe counter-claimed alleging that the bank and Port were liable for clean-up costs. *Id.* In granting summary judgment for Port, the court refused to rule on how much involvement was needed to bring a lender into potential liability, but did state that "there must be some actual management of the facility before a secured creditor will fall outside the [secured creditor] exception." *Id.* at 672.

Several bills were introduced in Congress in response to the *Fleet* decision. See, e.g., H.R. 2787, 101st Cong., 2d Sess. (1989) (Congressman Weldon's proposal defines appropriate level of due diligence that banks exercise in assessing site); S. 2827, 101st Cong., 2d Sess. (1990) (Senator Garn's proposal endeavors to protect FDIC by exempting secured lenders).

III. EPA DRAFT RULES

The EPA draft proposal of September 14, 1990,⁶⁹ was introduced as an effort to relieve the uncertainty in the financial community over the interpretation of the term "secured creditor."⁷⁰

The proposed rules permit a secured creditor wide latitude in protecting its secured interests.⁷¹ It does so by defining three key terms of CERCLA section 101(20)(a)(4): 1) "indicia of ownership," 2) "primarily to protect a security interest," and 3) "participating in management of a facility."⁷²

The draft defines "indicia of ownership" within the meaning of section 101(20)(a) as "those interests in real or personal property held as security or collateral for a loan including the real or personal property acquired in the course of protecting the security interest."⁷³ An example given by the EPA was "a mortgage, deed of trust, or legal title obtained pursuant to a foreclosure"⁷⁴

The draft rules define "participation in the management facility" sufficient to bring a lender outside the protection of the exemption as "actual operational participation," a standard higher than that of mere potential influence.⁷⁵ The drafters recognized that the distinction between protecting a security interest and actual operational participation is a very fact-sensitive area; thus the proposed draft gives specific protection to lender's actions which are beneficial to the environment.⁷⁶

In defining "primarily to protect a security interest," the proposed rules recognize the needs of commercial lenders to protect their investments and therefore, permit policing the loan by inspecting and auditing the collateral, both before and during the loan period.⁷⁷ Additionally, the rules permit a secured lender to

⁶⁹ *Draft Proposal*, *supra* note 68, at 1162.

⁷⁰ *Id.*

⁷¹ *Id.* at 1163.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Draft Proposal*, *supra* note 68, at 1163.

⁷⁵ *Id.* at 1165. This definition is an explicit denial of the language used in *Fleet Factors*. See *supra* note 61 (*Fleet Factors* definition).

⁷⁶ *Id.*

⁷⁷ *Id.* at 1164. Included under policing the loan are environmental audits, clean-ups, and assurances from borrowers. *Id.*

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foreclose on property as a means of protecting its security interest, but require the lender to wind-up operations and sell the collateral at the earliest possible time.⁷⁸

The proposed rules give the lender a six month post-foreclosure grace period in which it is presumed to be holding the property to protect a security interest; thereafter the presumption is overcome.⁷⁹ The EPA draft goes on to state that if an EPA clean-up occurs at a time when a secured lender is holding indicia of title, and the clean-up enhances the value of the property, the EPA may resort to "equitable reimbursement under applicable principles of law" for the value of the enhancement.⁸⁰ The EPA draft settles many of the questions created by the courts. It rejects the narrow reading of the security exemption espoused in *Maryland Bank* and is nearer to accepting the "day to day involvement" criteria introduced in *Mirabile*, affording more latitude for lenders.⁸¹ It is submitted, however, that by insulating the lender with this protection, the draft proposal quells the fears of lending institutions but fails to address the fiscal survival of Superfund.⁸²

IV. THE ROAD AHEAD: THE FUTURE OF SUPERFUND

When Congress enacted SARA in 1986, it increased Superfund to \$8.5 billion, providing "badly needed funds" for removal actions.⁸³ In addition to the increased funds, Superfund specifically gave clean-up costs a federal lien status with priority over all unsecured claims.⁸⁴ The lien functioned to replenish and maintain

⁷⁸ *Id.* at 1165. Winding up operations are "those actions necessary to close down a facility's operations in full compliance with all applicable laws and regulations, secure the site, and otherwise protect the value of the foreclosed assets for subsequent liquidation." *Id.* at 1167.

⁷⁹ *Draft Proposal, supra* note 68, at 1165.

⁸⁰ *Id.*

⁸¹ *See supra* notes 35-53 and accompanying text (discussion of *Mirabile* and *Maryland Bank*).

⁸² *Cf.* [Current Developments] 21 *Env't. Rep. (BNA) No. 20* at 907 (Sept. 14, 1990). "Legislative reform is preferable to the administrative solution proposed by the EPA because 'rule-making can't change what the statute says.'" *Id.*

⁸³ *See Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613, 1642 (1986) (codified in scattered sections of 10, 26 and 42 U.S.C. (1988)).*

⁸⁴ *See supra* note 9 (discussion of federal lien).

the existence of the fund.⁸⁵ Initially, the EPA expected to recoup about seventy percent of its initial outlay over the duration of the fund, for a total of about \$470 million.⁸⁶ Today the projected figure has dropped to below fifty percent, for a total of \$358 million,⁸⁷ indicating that the fund is far from self-sustaining.⁸⁸

The limited recoupment results are sharply contrasted by the growing mass of hazardous waste sites. In 1979, the EPA estimated that as many as 30,000 to 50,000 hazardous waste sites existed, of which 1,200 to 2,000 presented a serious public health risk.⁸⁹ In 1988, the General Accounting Office (GAO) estimated that 425,380 potential hazardous waste sites existed, of which 130,000 were highly likely to present a serious public health

⁸⁵ See *id.*

⁸⁶ See *Progress of the Superfund Program: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Energy and Commerce, 100th Cong., 2d Sess. 169 at 5 (1988) [hereinafter *Progress of Superfund*]* (memorandum from Hon. J. D. Dingell, Chairman of the Subcomm. on Oversight and Investigations). In 1986, EPA projected that it would recover seventy percent of its expenditures from responsible parties. *Id.* at 11. Between the years 1980 through 1988 (date of hearing report), the EPA has recovered only \$72.1 million of their projected \$470 million total recoupment estimate. *Id.*

⁸⁷ See *id.* A factor effecting recoupment is the solvency of the responsible parties. See *Progress of Superfund, supra* note 86, at 11 (Dingell memorandum). Recoupment efforts have been lower than projected because of "orphan sites or bankrupt or non viable parties." *Id.*; Bureau of the Census, *Statistical Abstract of the U.S.: 1990* 532 (110th ed.). In 1981, 47,415 petitions for bankruptcies were filed by businesses and 360,329 were filed by individuals. *Id.* By 1988, 68,501 were filed by businesses and 526,066 were filed by individuals. *Id.* at 532. The total amount pending in 1988 was 815,497. *Id.* at 532.

⁸⁸ See *Progress of Superfund, supra* note 86, at 69 (testimony of Thomas P. Grumbly, President of Clean Sites, Inc., a non-profit corporation formed at EPA's request). In his testimony, Mr. Grumbly states:

the EPA cannot continue implementing the law as it has . . . and expect that it will accomplish the goals [projected for] . . . 1986 . . . Congress wanted major remedial progress on the 951 sites currently on the National Priority List. Practically all of the authors foresaw that the \$8.5 billion authoriz[ation] . . . would not be enough to deal with all of these sites. Significant cost recovery, and private party cleanup would be necessary to achieve the goals.

Id. See also *Superfund Progress, supra* note 86, at 101 (statement of William A. Wallace). A concern relating to the current enforcement mechanism is that there is no incentive for parties to come forward. *Id.* "Clearly there is not enough money here to clean these sites if we do not have PRP's paying their appropriate and fair share." *Id.* The Agency has to be serious about cost recovery and bring suits even if it doesn't win every one. *Id.*

⁸⁹ H.R. REP. No. 1016 (Part I & II), 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120. See Atkeson, Goldberg, Elrod & Connors, *An Annotated Legislative History of The Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,363, 10,389 & n.146 (Dec. 1986) (in 1984 estimated sites tracked by Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS), listed approximately 23,000 sites).

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threat.⁹⁰ The approximate costs for an investigation and clean-up of a serious waste site has also increased to about 30 to 50 million dollars.⁹¹ Based on these statistics, the fiscal integrity of Superfund and CERCLA is questionable.

V. SUPERLIEN

It is submitted that a legislatively enacted federal superlien⁹² statute is needed to establish a uniform system of clean-up cost reimbursement.⁹³ Presently, EPA claims are subordinate to all se-

⁹⁰ See [Current Developments] Env't Rep. (BNA) No. 18 at 2043 (Jan. 22, 1988). The General Accounting Office (GAO) estimated in a January 14, 1988 report that 425,380 potential Superfund sites existed. *Id.* Although some of the sites may only require minimal cleanup efforts, the GAO stated that 130,340 were highly likely to be truly hazardous. *Id.* A spokeswoman for the Environmental Protection Agency stated that most of those sites were either already regulated under other distinct environmental laws or would eventually be regulated. *Id.* However, she added that it was unquestionable that those sites could, in the future, become Superfund sites. *Id.*

⁹¹ The massive costs of hazardous cleanup was underestimated in early EPA projections. See *supra* note 81 (outline of EPA estimates in 1980 and 1986). Cf. *Bankruptcy Law Daily* (Oct. 12, 1990) (WESTLAW, Bankruptcy library, BNA-BLD file). "EPA's James M. Strock, assistant administrator for enforcement and compliance monitoring, estimated a total of \$60 billion would be spent this decade on about 2000 CERCLA clean-ups costing 29 million each" *Id.*

⁹² A super-priority lien was sponsored by Senator Florio but died in committee. See H.R. 2767, 98th Cong. 1st Sess. (1983); H.R. 7172 97th Cong., 2nd Sess. (1982). The bill as introduced would have added a section 116 to CERCLA which would have provided:

(a) Any claim of the United States, a State, or a political subdivision of a State for the costs of removal or remedial action taken under section 104 of this Act for which the debtor is liable under section 107 of this Act, and any claim of the United States for any relief or fine for which a debtor is liable under section 106 of this Act, shall have priority over all other classes of claims against such debtor, without regard to whether such claims are secured.

Id. See also Note, *Cleaning-Up In Bankruptcy: Curbing the Abuse of the Federal Bankruptcy Code by Industrial Polluters*, 85 COLUM. L. REV. 870, 890 (1985) (discusses use of bankruptcy to avoid pollution liability). Cf. 2 BLANCHARD, LENDER LIABILITY, LAW PRACTICE AND PREVENTION § 15:41, 76 (courts have rejected environmental agency's request for super-priority lien).

⁹³ See Florio, [Foreword] 6 STAN. ENVTL. L.J. 2 (1986-87). Former United States Representative from New Jersey, James Florio, has been a leading environmentalist in Congress, having authored the original Superfund legislation in addition to other hazardous disposal legislation. *Id.* He served as Subcommittee Chairman of the House Energy and Commerce Committee and has been instrumental in many areas in addition to the environment, such as trade, transportation insurance and consumer protection. *Id.* As commentary in his article, he stated:

It is not enough to simply urge safer disposal techniques for hazardous wastes. Federal laws must set out clear goals and methods to accomplish those goals and at the same time establish conditions that provide incentives to achieve safer disposal. Market conditions and our legal liability system must be used to make safer disposal the

cured creditors.⁹⁴ A federal superlien would give the EPA claim for clean-up cost reimbursement first priority over all other encumbrances on the property.⁹⁵

Several states have enacted superlien statutes⁹⁶ which have withstood constitutional challenge.⁹⁷ While state superliens have been

preferred economic opinion.

Id. at 8. See also *infra* notes 99-100 and accompanying text (discussing effects of superlien legislation on insurance, commerce and business).

⁹⁴ See *supra* note 31 (discussion of bankruptcy priorities).

⁹⁵ See *infra* note 96 (state superliens analogous to proposed federal superlien). But see Sward, *Resolving Conflicts Between Bankruptcy Law and the State Police Power*, 1987 WIS. L. REV. 403 (author suggests that state environmental regulation violations should have third priority among unsecured bankruptcy claims).

⁹⁶ See ARK. STAT. ANN. § 8-7-417 (1988). The Arkansas lien was originally subordinate to a tax lien, but the 1988 amendment deleted the sentence which read, "and shall have priority second only to the lien of real estate taxes upon such property." *Id.*

The superlien in Connecticut provides a prospective superlien. CONN. GEN. STAT. ANN. § 22a-452(a),(c) (West 1985 & West Supp. 1990). The lien provision includes an exception for exclusively residential estates. *Id.* Additionally, the statute provides a second exemption:

[A] mortgagee who acquires title to real estate by virtue of a foreclosure or tender of deed in lieu of foreclosure, shall not be liable for any assessment, fine or other costs . . . beyond the value of such real estate provided such spill occurred prior to the acquisition of title

Id. § 22a-452(b). See also King, *supra* note 1, at 279-89 (overview and comparison of state superliens); Smith, *Environmental Considerations in Project Financing*, 297 Pract. L. Inst. 795 (1987) (discussing various aspects of state superlien provisions).

Massachusetts has a similar superlien statute to Arkansas. See MASS. ANN. LAWS ch. 21E, § 13 (Law Co-op. 1988). The Massachusetts statute gives the government priority over any previously recorded encumbrance other than real property, the greater part of which is devoted to single or multi-family housing. *Id.*

New Hampshire's statute provides the state with a lien upon all business revenue, real and personal property with priority over all other encumbrances except residential property. N.H. REV. STAT. ANN. § 147-B:10-b (1990). The lien is effective upon notice. *Id.* 147-B:10b (I),(III) (a) (b).

The first state to implement such a superlien statute was New Jersey. See N.J. STAT. ANN. § 58:10-23.11f(f) (West 1990). The New Jersey statute was the first statute to be enacted, and was proposed before CERCLA became law. *Id.* The statute provides a lien priority for government expenditures over all other liens previously filed on the property with the waste except residential units of six or less. *Id.*

⁹⁷ The Constitution states "No State shall . . . pass any . . . law impairing the obligation of contracts" U.S. CONST. art. I § 10 cl. The argument against superlien statutes is that they place a heavy burden on real estate transactions. See *Simon v. Oldmans Township*, 203 N.J. Super 365, 373, 497 A.2d 204, 209 (1985). In *Simon*, the court, fearing the effect that the New Jersey Spill Act, a retroactive superlien, would have on transactions involving real estate, stated that "[the New Jersey Spill Act] while highly commendable in its intent is, with respect to land titles, a hibernating time bomb." *Id.* at 373, 497 A.2d at 209.

In *Energy Reserves Group Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983), the Supreme Court has established a three part analysis for determining whether retroactive legislation has violated the contracts clause: 1) whether the law has operated as

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upheld as valid exercises of state police power, a power not

a substantial impairment of a contractual relationship, 2) if the law constitutes such an impairment, the court determines if the government was justified by a "significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem, and 3) if such a purpose is found, the court determines "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose underlying [the law's] adoption.'" See *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983). See also *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3d Cir. 1987) (upholding *Energy Reserves* three-part test), cert. denied, 484 U.S. 963 (1987). It is submitted that to the extent that superlien statutes impair contracting parties, the statute relies on and is prompted by significant and legitimate state interests. States have traditionally exercised their police power to protect their citizens from the dangers associated with hazardous wastes. See, e.g., *Kessler v. Tarrats*, 194 N.J. Super. 136, 145-46, 476 A.2d 331-32 (1984) (state exercise of police power).

Retroactivity of statutes have been challenged on constitutional grounds and upheld. See *Schalk v. Reilly*, 900 F.2d 1091, 1096 (7th Cir. 1990) (acknowledging retroactive application of CERCLA), cert. denied, 111 S. Ct. 509 (1990); *United States v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 556 (W.D.N.Y. 1988) (CERCLA found retroactive based upon its legislative history); *United States v. Rohm & Haas Co.*, 669 F. Supp. 672, 676-77 (D.N.J. 1987) (applying SARA judicial review provisions retroactively); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1075 (D. Colo. 1985) (upholding retroactivity); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934) (upheld constitutionality of retroactive state moratorium statute which adversely effected mortgage holders).

State superlien statutes with retroactive effects have also been upheld. See *Kessler*, 194 N.J. Super. at 142-49, 476 A.2d at 229-30 (1984). The *Kessler* court upheld a prior decision which stated that the legislature intended the New Jersey Spill Act to have retroactive effect, but that the retroactivity did not render the statute unconstitutional. *Id.* at 142-44, 476 A.2d at 329-30 (citing *State Dep't of Env'tl Protection v. Ventron Corp.*, 94 N.J. 473, 498-99, 468 A.2d 150, 163 (1983)).

Superlien statutes have also been challenged as violative of the Takings Clause and upheld. See *Kessler*, 194 N.J. Super. at 147, 476 A.2d at 132. The Takings Clause prohibits the "taking of private property for public use without just compensation." U.S. CONST. amend. V. See also *National Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 89 (1969). "The Just Compensation Clause 'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole.'" *Id.* (quoting *Armstrong v. United States*, 364 U.S. 40 (1960)). See generally *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945) (fifth amendment redistributes economic losses caused by public improvements so they fall among public); Peterson, *Recent Developments in Takings Jurisprudences Land Use Regulatory "Takings": Revisited: The New Supreme Court Approaches*, 39 HAST. L.J. 335, 339 (1988) (just compensation clause intended to promote balanced fairness and justice to public and property owners). There are three takings factors: 1) the regulation's economic impact on claimant; 2) extent of the regulation's interference with distinct investment backed expectations; and 3) the nature of the government action. See *Pennsylvania Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). See also Comment, *A Blow For Land-Use Planning? — The Takings Issue Reexamined*, 49 OHIO STATE L.J. 1107, 1108-1111 (discussion of "takings tests" used by courts). In relation to an exercise of the police power, "[p]roperty may be regulated to a certain extent under the police power, if the regulation goes too far, it will be a 'taking' for which compensation must be paid." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922). See *American Savings and Loan Ass'n v. County of Marin*, 653 F.2d 364, 368 (9th Cir. 1981) (regulation may be "so onerous" as to constitute

granted to the federal government,⁹⁸ it is submitted that a federal superlien would be a valid exercise of the power granted to Congress under the Constitution's Commerce Clause.⁹⁹

The commerce power of the federal government extends to persons or things in interstate commerce, the safeguarding of the instrumentalities of interstate commerce, and activities affecting interstate commerce.¹⁰⁰ The parties primarily involved in the production and disposal of hazardous waste are an integral part of interstate commerce,¹⁰¹ and it is suggested that their activities, particularly in those areas that effect the environment, are clearly within the purview of the Commerce Clause.¹⁰²

Presently, only a limited number of states have enacted super-taking which constitutionally requires compensation) (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

In *Kessler*, the court stated that the state's clean-up action actually enhanced the value of the property. See *Kessler*, 194 N.J. Super. at 147, 476 A.2d at 392. Focusing on the state's exercise of its police powers, the court stated that restrictions on land use through the exercise of government police powers was constitutional and required no compensation. *Id.* at 145-46, 476 A.2d at 331-32 (citing *American Dredging Co. v. State*, 161 N.J. Super. 504, 507, 391 A.2d 1265 (Ch.Div. 1978), *aff'd*, 169 N.J. Super. 18, 404 A.2d 42 (1978)). In addition, the *Kessler* court stated that a property or a facility which creates a "public health menace" is unquestionably within the legitimate exercise of the state police powers. *Id.* at 146-47, 476 A.2d at 392.

⁹⁸ See *Grambling & Earl, Cleaning Up After Federal and State Pollution Programs: Local Government Hazardous Waste Regulation*, XVII STETSON L. REV. 639 (1988) (local governments have used inherent police power in environmental clean-up areas, power not available to federal government); JUDSON, *THE LAW OF INTERSTATE COMMERCE AND ITS FEDERAL REGULATION* § 5 (2d. ed. 1912). "The federal government . . . though sovereign within its sphere of enumerated powers, has not what has been termed inherent sovereignty, nor has it any general police powers . . ." *Id.*

⁹⁹ U.S. CONST. art. I, § 8, cl. 3. The provision states in relevant part: "Congress shall have the Power to . . . regulate Commerce with foreign nations and among the several States . . ." *Id.* See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2284 (1989). The Court explained "[i]t would be difficult to overstate the breadth and depth of the commerce power." *Id.* But see Note, *Superfund Amendments and Reauthorization Act of 1986: Limiting Judicial Review to the Administrative Record in Cost Recovery Actions by the EPA*, 74 CORNELL L. REV. 1152, 1153 (1989) (author suggests EPA already violates due process rights of PRP's by limiting judicial review of EPA's remedy to administrative record in cost recovery actions).

¹⁰⁰ *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 278 (1981).

¹⁰¹ See Lyons, *Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?*, 6 STAN. ENVTL. L.J. 271, 283-84 (1986-87). The defendants in hazardous waste cases are "the key industries of the American postwar industrial economy, petroleum refining, pesticide production, plastics manufacturing, electronics production, and mining." *Id.*

¹⁰² See *Union Gas*, 109 S. Ct. at 2284-85. In relation to an earlier decision, the Court stated that "the Commerce Clause . . . ensures that we often must look to the Federal government for environmental solutions." *Id.*

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liens.¹⁰³ States which require strict enforcement of environmental laws risk losing business to "pollution haven" states which have less stringent environmental safety standards.¹⁰⁴ In *Hodel v. Virginia Surface Mining and Reclamation Association*,¹⁰⁵ the Supreme Court of the United States upheld the validity of the Surface Mining Control and Reclamation Act,¹⁰⁶ limiting the extent of surface mining on farmland.¹⁰⁷ Basing the power to regulate this activity on the Commerce Clause, the Court relied on a congressional finding that national "'surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers . . . in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders.'" ¹⁰⁸ The Court found it essential for courts to defer to congressional findings that a regulated activity involves interstate commerce.¹⁰⁹ If this finding has any rational basis, the only remaining question for the court is whether the means chosen are reasonably adapted to the end permitted by the Constitution.¹¹⁰

In enacting CERCLA, Congress has already recognized the need for a federal response to hazardous waste disposal.¹¹¹ Given the financial uncertainty of the present Superfund Act,¹¹² it is sug-

¹⁰³ See *supra* note 96 (list of states with superlien legislation).

¹⁰⁴ See *Union Gas*, 109 S. Ct. at 2284. "The general problem of environmental harm is often not susceptible to a local solution." *Id.*; *Illinois v. Milwaukee*, 406 U.S. 91, 107 (1972) (Supreme Court acknowledged power of federal courts to create federal commonlaw of nuisance.). See generally Hirschhorn, *Emerging Options In Waste Reduction and Treatment: A Market Incentive Approach*, in *BEYOND DUMPING: NEW STRATEGIES FOR CONTROLLING TOXIC CONTAMINATION* 129 (B. Piasecki ed. 1984). The author suggests a federal waste fee system which would avoid the specter of pollution havens and "achieve equity, economic consistency and equal public protection nation-wide." *Id.* at 133-34.

¹⁰⁵ 452 U.S. 264 (1981).

¹⁰⁶ 30 U.S.C.A. § 1201ff, 91 Stat. 447.

¹⁰⁷ *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 275-83 (1981).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1962)). The findings of Congress included the fact that "many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, residential, recreational, agricultural, and forestry purposes . . ." *Id.* at 277. For similar Congressional findings dealing with improper waste disposal see *supra* note 2.

¹¹⁰ *Id.*

¹¹¹ See *supra* note 1 (discussion of purpose and design of CERCLA).

¹¹² See *supra* notes 83-91 and accompanying text (discussion of CERCLA funding).

gested that a federal superlien would be a reasonable method of providing commercial uniformity and equity between the states while furthering the protection of the environment.

It is submitted that exposing lenders to the potential unlimited liability suggested in *Fleet Factors* is unreasonable. However, because lenders provide extensive financing for industrial activity,¹¹³ including that which ultimately causes hazardous waste releases, subordinating lender claims to those of the Environmental Protection Agency is neither irrational nor inequitable.¹¹⁴ It is suggested that limited lender liability would free lending institutions from the specter of immeasurable risk while providing incentive for environmentally conscious behavior.

CONCLUSION

Recent court decisions dealing with lender liability under CERCLA have brought into focus the need for a uniform law which not only allows lenders to operate in an environment where risks are commensurate with gain but also provides a realistic future for Superfund. It has been further suggested that while the current EPA draft proposal provides much needed clarification in the area of lender liability, it does not solve the long range funding problems that threaten the future of Superfund. The adoption of a federal superlien under the authority of the Commerce Clause would not only give top priority to hazardous waste clean-up costs,

¹¹³ See [In the Spotlight] 2 *Commercial Leasing: Law & Strategy*, No. 2 at 1 (July 1989). A recent study estimated \$ 3.5 trillion was invested capital in ownership of commercial buildings in the United States. *Id.* Of that investment, \$ 2.6 trillion was invested by corporations and \$ 700 billion by financial institutions. *Id.*

¹¹⁴ See generally Comment, *State "Superlien" Statutes: An Attempt To Resolve The Conflict Between The Bankruptcy Code and Environmental Law*, 59 *TEMPLE L.Q.* 981, 1009 (1986). "The policy reasons mandating that creditors . . . should foot the clean-up bill are more compelling than the policy of protecting the claims of secured creditors A creditor confronted by the possibility of losing his secured claim will hesitate to finance toxic waste sites that are not in compliance with environmental laws." *Id.* But see Note, *Cleaning-Up In Bankruptcy Code By Industrial Polluters*, 85 *COLUM. L. REV.* 870, 891 (1985). The federal "superpriority" is objected to because it would require repayment of environmental debts ahead of all claims, "and this would have a crushing economic impact on the affected industries." *Id.*

According to the Wall Street Journal "the legislation has raised an outcry from builders, bankers and insurers." See Lipman, *Unwitting Owners may Owe for Clean-up of Toxic Wastes*, *Wall St. J.*, Aug. 1, 1984 at 27, col.1.

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but would also provide for the financial security of Superfund without becoming overly burdensome to secured lenders.

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