NOTES

A PRAGMATIC SOLUTION TO A COMPLEX DILEMMA:

A FUNDAMENTAL APPROACH TO RESOLVING THE CONFLICT

BETWEEN CERCLA AND THE BANKRUPTCY CODE

The conflict between the Bankruptcy Code FN1 (the "Code") and the Comprehensive Environmental Response, Compensation, and Liability Act FN2 ("CERCLA") is well known. FN3 Through CERCLA, Congress made clear that polluters were liable for remediation of contaminated property but failed to address the recovery of response costs when a polluter seeks the protection of bankruptcy. FN4 Congress's apparent unwillingness to resolve this conflict FN5 has forced courts to determine how environmental claims should be addressed within bankruptcy. FN6 The courts have held that EPA claims for cleanup costs are unsecured FN7 and are subject to the Code's hierarchal treatment of unsecured claims. FN8 In some circumstances, however, an EPA claim may be secured by filing a lien against the contaminated property. FN9 This lien is junior to any prior liens and will be considered only after senior claims have been satisfied. Thus, the courts' treatment of an EPA secured claim is not dissimilar to that of an unsecured claim. FN10

Critics contend the courts' treatment of environmental claims allows the potentially responsible party ("PRP") FN11 to avoid environmental liability. **FN12** Avoidance may occur in a variety of ways including abandonment of property, discharge of debt, and prioritization of EPA claims. FN13 When the PRP avoids liability, the EPA's chances of recovering remediation expenses are greatly reduced. FN14 Consequently, the most fundamental issue remains unresolved: "Who should pay for the cleanup?"

Initially, Congress responded to this question outside the bankruptcy context, expressing CERCLA's general policy that the "polluter must pay." FN15 To that end, CERCLA empowered the Environmental Protection Agency FN16 (the "EPA") to order the PRP to clean up the property or alternatively, to remediate the property itself and recover incurred costs from the PRP. FN17 After it became apparent that practical difficulties existed regarding the recovery of the high costs of cleanup, Congress softened the effects of CERCLA by passing the Superfund Amendment & Reauthorization Act of 1986 ("SARA"). FN18 SARA made considerable progress toward a more equitable allocation of cleanup costs by permitting settlement negotiations between the EPA and the PRP, FN19 and by allowing the PRP to seek contribution from other PRPs. FN20 The amendment, however, did not increase recovery of response costs. Thus, the EPA continues to pay for a majority of the remediation expenses.

Presently, CERCLA places liability on any party that may be associated with the contamination. FN21 By looking only to PRPs, Congress has failed to consider parties related to the PRP who receive a direct financial benefit from the EPA's remediation efforts but do not contribute to the cost of cleanup (the "Affected Creditor"). FN22 As a result, even without considering the avoidance issues in bankruptcy, the EPA's recovery efforts are limited, and the EPA remains the primary payor of remediation expenses.

This Note suggests that Congress should reconsider the allocation of environmental response costs in order to maximize recovery and minimize the conflict between the Code and CERCLA. The goal should be to provide consistent treatment of all relevant parties regardless of any interaction with the Code. A two− part prospective approach involving the reallocation of environmental liability within and without bankruptcy is proposed in this Note.

Part I begins by examining CERCLA's present treatment of environmental liability outside bankruptcy. It discusses how the Affected Creditor receives a windfall at the expense of the EPA and proposes an amendment to CERCLA whereby the cost of cleanup would be spread among PRPs and Affected Creditors. **FN23** This Part explains how the allocation would be implemented through a notice and negotiation provision allowing the PRPs, Affected Creditors and the EPA to negotiate their share of cleanup costs. In addition, an amendment to the Internal Revenue Code (the "IRC") is recommended to enhance the EPA's negotiating strength through the use of tax credits. This Part discusses how the use of tax credits and a corresponding reduction in basis would promote the uniform treatment of the PRP/debtor and the Affected Creditors both within and without bankruptcy.

Part II of the Note addresses environmental liability within bankruptcy. This Part examines the conflicting policies of the Code and CERCLA and proposes a new provision to section 506 of the Code allowing the EPA to recover from the Affected Creditor the reasonable costs and expenses incurred in remediating the contaminated property. Part II also recommends an amendment to section 507 of the Code establishing the priority of EPA claims above all other unsecured claims. This Part explains how the prioritization of EPA claims would maximize recovery and provide for a more harmonious interaction between the Code and CERCLA. The Note concludes in Part III with two hypotheticals illustrating the application of the amendments discussed in Part I and Part II.

I. ADDRESSING ENVIRONMENTAL CLEANUP OUTSIDE BANKRUPTCY

Presently, CERCLA gives the EPA the right to cleanup a contaminated site FN24 or, in the alternative, to seek an injunction forcing the PRP to remediate the property and bring it into compliance with CERCLA requirements. FN25 Although placing the duty of cleanup on the PRP is preferable, the toxicity of a site may force the EPA to act immediately. By so doing, the full cost of the remediation is initially borne by the EPA. The EPA may then bring suit against the PRP for the cost of cleanup, FN26 and the PRP may seek contribution from other PRPs. FN27 As a result, the EPA must incur sizable litigation expenses in order to recover its response costs. FN28 Even if the EPA prevails, the high cost of cleanup may force the PRP into bankruptcy, consequently reducing the EPA's chances of recovery. FN29

The EPA's hard work in monitoring the site, assessing the damage and arranging the remediation of the property rewards a party that has not contributed to the cleanup: the Affected Creditor. FN30 Environmental contamination often reduces the value of property, at times devaluing it completely. FN31 As a result of the reduction in value, a secured creditor's lien on contaminated property may become undersecured. In such case, the lien is secured to the extent the collateral has any value. FN32 The remediation of the property substantially restores the value of the property and correspondingly, the value of the Affected Creditor's lien. This benefit to the Affected Creditor comes at the expense of the EPA, FN33 which presently does not require the Affected Creditor to contribute to the cost of cleanup.

A. Proposed CERCLA Amendment "Notice and Negotiation"

This Note proposes an amendment to CERCLA that would require the EPA to notify any Affected Creditors, *as well as* the PRPs, of the EPA's intention to cleanup the contaminated property. FN34 The purpose of this notification would be to promote negotiation among the PRPs, Affected Creditors and the EPA in order to determine the allocation of cleanup costs prior to their accrual, FN35 and to establish the amount of the Affected Creditor's lien after remediation of the contaminated property. Negotiations would begin with the premise that the PRP is liable for the entire cost of cleanup. Through negotiation, the PRP could reduce its liability by agreeing, for example, to a shorter payment schedule with the EPA. FN36

As a second part to these negotiations, the Affected Creditor would partially guarantee the PRP's environmental liability in exchange for a negotiated benefit. FN37 In the event the PRP defaults because of bankruptcy, the Affected Creditor would partially subordinate a portion of its claim to the EPA. FN38 Since the secured claim has been affected by the contamination of the collateral, and would otherwise be undersecured, the secured creditor would have an incentive to contribute to the payment of response costs in order to better its position. FN39

Negotiations would result in one of three possible scenarios for the Affected Creditor. The Affected Creditor could: (1) agree to guarantee a portion of the debtor's environmental liability for a negotiated benefit; FN40 (2) refuse to guarantee any portion of the EPA claim but agree to abandon its lien; FN41 or (3) refuse to guarantee any portion of debtor's liability and refuse to release its lien. FN42

The first scenario illustrates the Affected Creditor's incentive to negotiate both the extent of the guarantee and the resultant benefit. The second scenario may appeal to an Affected Creditor with a severely undersecured claim who is primarily interested in avoiding any form of liability. The third scenario represents an Affected Creditor who refuses to cooperate or effect any sort of agreement. Under this last scenario, the PRP is solely liable for response costs. In the event the PRP is unable to pay these expenses, bankruptcy is inevitable. At this point, the Affected Creditor would

lose its negotiating power and would then be subject to liability pursuant to the proposed amendment to section 506 of the Code as discussed in Part II. FN43

B. Proposed Tax Amendment

To strengthen the EPA's negotiating position, this Note suggests an amendment to the IRC enabling the EPA to distribute tax credits FN44 to the Affected Creditor in exchange for a partial subordination of that creditor's claim. FN45 These credits would allow the Affected Creditor to retain a portion of the appreciated value of its secured lien. The negotiation process would determine the extent of the benefit to the Affected Creditor. FN46

The negotiation of tax credit benefits is only the beginning. Amendments to the IRC would be necessary to establish the procedures for realizing the allocated credits. These amendments should balance the interests of CERCLA, the PRP/debtor and the Affected Creditor by providing, for instance, eligibility requirements and restrictions for the use of tax credits. FN47 It is recommended that tax credit restrictions, such as annual distributions and transferability, be structured as benefits providing irrevocable options determining the future use of the tax credits. The choice of options would allow the Affected Creditor to weigh the restrictions against the benefits and then to select the option that best meets its individual needs. This Note provides an example of two options: one, maximizing the return to the Affected Creditor, the second, reducing the Affected Creditor's tax liability.

The first option is tailored for the creditor who is primarily interested in maximizing the cash return on its claim. This option would apportion the use of the tax credits over a specified time period and would require that the credits be used in the year allocated. FN48 The time frame could be determined either by a fixed year schedule FN49 or pursuant to a ratable timetable based on total distributed credits. FN50 While this option would limit the annual credit available to any individual or corporation, FN51 it would permit the creditor to sell excess tax credits, FN52 thus converting tax credits into cash. FN53 Through the sale, the Affected Creditor could avoid loss of credits due to annual credit limitations. These credits could be sold either directly, to an individual taxpayer, or indirectly, to an investment company for distribution to other taxpayers. FN54

Although tax credit legislation has been criticized for providing tax shelters, this option would not result in lost revenue to the government. FN55 A provision could be added to the IRC, clearly defining proceeds, from both the direct and indirect sale of tax credits, as gross income. FN56 Thus, sale of tax credits would produce *taxable* income and result in revenue to the Government. FN57

A second option could be structured to appeal to creditors seeking to reduce their tax liability. This option would make tax credits available for the exclusive use of the Affected Creditor. Unlike the first option, annual credit limitations would not be fixed, rather, the limitations would fluctuate according to a percentage cap based on the creditor's net income. FN58 Under this option, the Affected Creditor maximizes its tax benefit by using a greater amount of credit as its tax liability increases. This option would not provide a time frame for the use of the tax credits. The credits would be placed in a suspension account extending their availability into the indefinite future. In consideration of the indefinite time allowance, the creditor should be subject to restrictions on the sale and transfer of tax credits to any third party. **FN59** Ultimately, these options would yield a benefit to the Affected Creditor that would not have been available without the EPA's remediation efforts.

While these options consider IRC goals of raising revenue and advancing certain social policies, FN60 they do not lose sight of the CERCLA policy holding the PRP liable for remediation costs. FN61 In furtherance of CERCLA's aims, the debtor should be required to reduce its basis in the remediated property by the amount of distributed tax credits. FN62 Due to the reduced basis, upon sale or transfer of the property the debtor would be liable for taxes on a greater amount of recognized gain. FN63 Furthermore, the amendment could provide a surplus tax on gain where basis has been reduced pursuant to the proposed notice and negotiation amendment to CERCLA or the proposed amendment to section 506 of the Code discussed in Part II.A. of this Note. FN64 The amendment could also provide that the revenue generated from these sources be returned to the Superfund. FN65 The inclusion of these monies in the Superfund would supplement federal allocations and would enable the EPA to address CERCLA goals more effectively.

In sum, the proposed tax amendment would provide creditors with a larger settlement than would have been available to them absent the cleanup and would allow them to elect the form in which the credits would be recognized. The creditors could choose to focus either on reduction of their tax liability or on increasing their taxable income. Furthermore, the combination of debtor liability, reduced basis, and surplus tax on gains would promote CERCLA policy and generate more revenue for the Superfund.

II. ENVIRONMENTAL LIABILITY WITHIN BANKRUPTCY

The conflict is clear from the goals of the respective statutes, FN66 CERCLA seeks to hold the PRP fully liable for the environmental damage, FN67 while the Code's "fresh start" policy promotes the debtor's economic recovery. FN68 These goals result in contradictory treatment of the debtor. While CERCLA imposes the financial burden of cleanup on the PRP/debtor, the Code relieves the debtor of most unsecured liabilities after distribution of the estate assets. FN69 Some scholars have argued that the fresh start policy of the Code allows a PRP to avoid liability through an "environmental loophole." FN70 Courts have been forced to address the various arguments arising from the conflict between the Code and CERCLA FN71 and several have commented that a congressional response is necessary to determine the appropriate treatment of environmental liability in bankruptcy. FN72 The amendment suggested in Part I would likely address many of the issues that currently exist when environmental liability claims are present in bankruptcy, as such, the conflict would already have been minimized. Therefore, amendments to the Code are necessary only to the extent they enforce in bankruptcy the provisions of CERCLA.

A. Proposed Amendments to the Bankruptcy Code

The principle that expenses incurred in administering property of the estate should be equally borne by benefitting creditors is present in section 506(c) of the Code. FN73 Section 506(c) provides the one exception to the Code's uniform treatment of secured claims. FN74 This section allows the Trustee to recover from the benefitting secured creditor the "reasonable, necessary [postpetition] costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." FN75 The primary reason for this section is to prevent the secured creditor from receiving a windfall at the expense of the administrator.

While section 506(c) appears applicable to bankruptcy cases involving cleanup costs, many courts have held that the plain meaning of this section only gives standing to the trustee or debtor−in−possession. FN76 Despite these holdings, some courts have held that under certain conditions third parties may seek recovery. FN77 This interpretation conflicts with the doctrine of legal construction stating that if the language of the statute is clear and unambiguous, no further inquiry is necessary and the court should enforce the statute accordingly. FN78 Therefore, the precedent established by the Court in construing the plain language of the Code suggests that any attempt by the EPA to use section 506(c) to reassign some of the cleanup expenses to holders of secured claims would prove to be unreliable and potentially costly. FN79

The impetus of the proposed amendment to section 506 is to prevent the Affected Creditor from receiving a windfall at the expense of the remediating party. FN80 Therefore, the amendment to section 506 should contain provisions addressing both prepetition and postpetition claims. FN81 The amendment should include a provision supporting the proposed amendment discussed in Part I of this Note. FN82 Recognizing agreements entered into pursuant to the "notice and negotiation" provisions of CERCLA, the provision would subordinate the negotiated portion of the Affected Creditor's claim. FN83

The proposed amendment to section 506 should also contain a section modeled on section 506(c) but providing modifications to support the proposed CERCLA amendment and balance the interests of the parties. This section should contain a formula allowing the Affected Creditor to retain a portion of the anticipated appreciation in the value of the property. FN84 This benefit would partially mitigate the devaluation of the Affected Creditor's claim. FN85 Thus, the Affected Creditor's total distribution would be equal to the amount of its secured claim prior to cleanup plus the benefit calculated by this section. As a result of this amendment, the EPA would recover a portion of its cleanup expenses and the Affected Creditor would receive a portion of its windfall. **FN86**

To minimize the conflict between the Code and CERCLA, this Note also recommends an amendment to section 507 of the Code establishing a new priority level. FN87 Generally, environmental claims are classified as general unsecured claims. FN88 Since the hierarchical treatment of claims under the Code prevents distributions to any lower−tiered claims unless and until all higher−tiered claims have been satisfied, FN89 EPA response costs are paid only after the first three categories of claims have been paid. EPA response costs claims, however, may be elevated to administrative expense status when expended to prevent imminent harm. FN90 Although courts disagree as to the appropriate priority level for CERCLA claims, FN91 the unsecured status of these claims makes recovery unlikely. FN92 Therefore, even though CERCLA currently allows the EPA to attach a lien to debtor's assets in order to secure compensation for cleanup costs, FN93 the lien attaches subject to the rights and interests of secured creditors, and the EPA recovers only to the extent assets are available after satisfaction of prior secured claims. FN96

In order to promote a more efficient administration of the Code or to protect an involuntary creditor, section 507 establishes a special hierarchical treatment for certain unsecured claims. FN97 This Note recommends an amendment to section 507 providing similar special treatment for EPA response cost claims. FN96 This level would take priority over all other unsecured claims **FN97** and would be subject only to secured creditors. FN98 Although the distribution of tax credits would reduce the amount recovered by the government, the proposed amendments to the IRC discussed in Part I are intended to minimize this effect. FN99

B. *Related Amendments to the Code and to CERCLA*

Additional amendments are necessary to clearly define the treatment of CERCLA claims. Section 523 of the Code should be amended to address the portion of the EPA claim that remains unsatisfied. This Note suggests that Congress should consider the primary goals of CERCLA and the Code when determining the amount to be excepted from discharge. A balance should be sought between the Code's fresh start policy and CERCLA's policy of holding the PRP liable for cleanup costs.

An amendment to CERCLA is also necessary to define the extent of environmental liability under bankruptcy. An amendment to section 9607 of CERCLA FN100 should correspond to section 523 of the Code, limiting recoverable cleanup costs. FN101 While duplicative, this amendment would demonstrate the commitment of each statute to provide a resolution to the conflict.

This proposal seeks to balance the competing interests of the debtor, the Affected Creditor and the EPA. Bankruptcy policy has traditionally favored debtor reorganization over immediate liquidation. FN102 Accordingly, this proposal provides the debtor with an opportunity to reorganize and continue business operations. The debtor would benefit from a reduction in environmental obligations, FN103 and from the ability to retain the remediated property. FN104 The aim is to provide benefits to the debtor according to bankruptcy principles tempered by CERCLA policy. FN105 Thus, upon sale or transfer of the property, the debtor is obligated to pay taxes on any recognized gain. FN106 These taxes further reduce the costs incurred by the EPA

in remediating the contaminated property. The interests of the Affected Creditor should also be considered in this balance. It is suggested that providing a tax credit benefit for the Affected Creditor would induce cooperation in remediation efforts.

III. HYPOTHETICAL APPLICATIONS

This Part illustrates the application of the proposed amendments both within and without bankruptcy. The first hypothetical ("Outside Bankruptcy") outlines a situation where anticipated cleanup costs are greater than the Affected Creditor's lien of $10 million and the contamination has reduced the value of the property to $1 million. The Affected Creditor is undersecured by $9 million. Under these circumstances, it is unlikely that the Affected Creditor would voluntarily remediate the property since the cost of cleanup greatly exceeds the value of its lien. Therefore, this creditor is likely to want to negotiate with the EPA and contribute to the cleanup of the property to better its position.

Under present law, the Affected Creditor is not required to contribute to the cleanup but is benefitted from the remediation of the property. If the collateral is restored and the Affected Creditor ultimately recovers the full amount

of its lien, it realizes a windfall of $9,000,000. This proposal provides a more equitable result for all parties by allowing the Affected Creditor to retain a percentage of the windfall. Assuming that the Affected Creditor negotiated a 25% benefit and the PRP failed to make payments to the EPA, the Affected Creditor would realize an additional $2,250,000 in tax credits. The debtor would then be required to reduce the basis of the remediated property by the same amount. Lastly, the EPA would recover a net amount of $10,200,000 of its $12,000,000 cleanup cost. Table 1 displays these results.

TABLE 1

Outside Bankruptcy*

Party Amount of Lien Expected Value

of Remediated

Property Net Benefit/

Adjusted Basis Under

CERCLA Amendment FN107

Affected

Creditor Secured $ 1.0M

Unsecured $ 9.0M

Total $10.0M

$15.0M Cash $ 1.0M

Credits $ 2.25M FN108

Net Benefit $ 3.25M

EPA Cleanup

Costs $12.0M Cash$12.0M

Credits −$ 2.25M FN109

Net Benefit $ 9.75M

Debtor Orig. Basis $ 5.0M

Tax Credits − $ 2.25M

Adj. Basis $ 2.75M

* Anticipated Remediation Costs = $12,000,000

Value of Contaminated Property = $1,000,000

The second hypothetical ("Within Bankruptcy") examines the effect of the proposal when notice and negotiation has not yet occurred and the EPA's remediation will benefit the estate overall. This hypothetical uses the same figures as the Outside Bankruptcy hypothetical but considers the default benefit calculation suggested in the proposed amendment to section 506.

Under current law, neither the EPA nor the unsecured creditors would recover under this situation. The Affected Creditor would recover only to the extent of its secured claim. Despite the undersecured status of the Affected Creditor, the proposed amendments would allow him to retain a portion of the anticipated windfall in tax credits and the EPA would recover its cleanup costs, to the extent funds were available, according to the proposed amendments to sections 506 and 507. While the EPA is unable to recover the full amount of their claim, this scenario suggests that a portion could be deemed nondischargeable. As in the Outside Bankruptcy hypothetical, the reorganizing debtor would be able to retain the property but would be required to reduce the basis in the property by the amount of distributed tax credits. Table 2 displays the results of this hypothetical.

TABLE 2

WITHIN BANKRUPTCY*

Party Lien Amount Present Distribution Distribution under Proposal

Total Assets

$18.5M Total Assets

$27.5M FN110

Creditor A

Affected Creditor Secured $ 1.0M

Unsecured $ 9.0M $ 1.0M Cash$1.0 M

Credit $1.35M

Net Benefit $2.35M

Creditor B

Secured Creditor $10.0M $10.0M Cash $10.0M

Creditor C

Secured Creditor $ 7.5M $ 7.5M Cash $7.5M

Creditor D

Unsecured Creditors $ 5.0M $ 0.00 $0.00

EPA

Unsecured $11.0M $ 0.00 Cash $7.65M

Credit $1.35M

Total $6.3 M

PRP/Debtor Orig. Basis $5.0 M

Credits $1.35M

Adj. Basis $3.65M

* Anticipated Remediation Expenses = $12,000,000.00

Expected Value of Remediated Property = $15,000,000.00

IV. CONCLUSION

The issue of accountability goes to the heart of the controversy between CERCLA and the Bankruptcy Code. CERCLA policy states that the "polluter must pay" while the Bankruptcy Code seeks to protect the reorganizing debtor. Competing interests and high cleanup costs often compel a financially troubled PRP to avoid environmental liability by seeking the protection of the bankruptcy laws.

This Note contends that the conflict between the Code and CERCLA may not even exist were the problems adequately addressed outside of bankruptcy. By establishing uniform treatment of environmental claims within and without bankruptcy, the debtor's incentive to file for bankruptcy is neutralized. Additionally, by encouraging Congress to broaden the allocation of cleanup costs to include creditors deriving a benefit from the remediation of the property, the motivation to avoid CERCLA liability would be minimized. Once the problem is effectively addressed outside bankruptcy, the Code would only need minor amendments to ensure consistent treatment of environmental liability.

The suggested amendments to the Code and CERCLA harmonize the policies of both statutes without unnecessarily sacrificing the more important policies of either one. Secured creditors would be able to negotiate the portion of windfall they would be allowed to retain. Debtors would be able to discharge a portion of their CERCLA liability and would be afforded the opportunity to reorganize despite the enormous cost of environmental cleanup. The Government would recoup a portion of expended cleanup costs, raise revenue, and further socially−beneficial goals. Finally, the public would enjoy the collateral benefit − a cleaner environment.

This Note is not intended to resolve every nuance of the conflict between CERCLA and the Code. Rather, it is intended to draw attention to the root of the problem, the ambiguous treatment of environmental liability both within and without bankruptcy. It suggests that the policies of the statutes may not be as starkly opposed as previously thought and compromise would allow the Code and CERCLA to reach their goals more effectively. Ultimately, by approaching the problem from a more fundamental level, the conflict between CERCLA and the Code would be resolved.

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Footnotes

FN1 11 U.S.C. §§ 101−1330 (1994).

FN2 42 U.S.C. §§ 9601−9675 (1994).

FN3 Various scholars have commented on, and proposed solutions to the conflict. *See e.g.*, David H. Topol, *Hazardous Waste and Bankruptcy: Confronting the Unasked Questions*, 13 VA. ENVTL. L.J. 185, 223−30 (1994) (proposing changes to Code and CERCLA to shift cleanup costs to creditors); Kathryn R. Heidt, *The Changing*

Paradigm of Debt, 72 WASH. U. L.Q. 1055, 1064 (1994) [hereinafter *Changing Paradigm*] (suggesting amendment of Code necessary to address environmental obligations); Richard S. Farmer, Note, *Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard*, 19 J. CORP. L. 769, 805 (1994) (proposing establishment of duty on parent corporation to assess environmental dangers of subsidiary activity); Joseph S. Maniscalco, Note, *At the Crossroads of Environmental Laws and the Bankruptcy Code: Abandonment and Trustee Personal Liability*, 23 HOFSTRA L. REV. 879, 902−09 (1995) (discussing whether trustee should be liable for cleanup); Susan J. Zook, Note, *Superiority Status: The Solution to the Collection of CERCLA Response Costs*, 46 WASH. U. J. URB. & CONTEMP. L. 291, 314 (1994) (proposing superpriority status for EPA within and without bankruptcy). Some scholars disagree as to whether a resolution should come from the legislature or from the judiciary. *Compare* Kathryn R. Heidt, *Products Liability, Mass Torts and Environmental Obligations in Bankruptcy: Suggestions for Reform*, 3 AM. BANKR. INST. L. REV. 117, 148−49 (1995) [hereinafter *Suggestions for Reform*] (indicating any shift in priority should be expressly provided in Code); *with* John R. Bevis, Note, In re *Jensen*: *Demonstrating the Need for Supreme Court Resolution of the Conflict Between CERCLA and the Bankruptcy Code*, 9 J. LAND USE & ENVTL. L. 179, 197−98 (1993) (suggesting resolution of conflict must come from Supreme Court).

FN4 *See* 42 U.S.C. § 9607(a)(4)(A)−(D) (1994) (identifying individuals potentially liable for remediation costs incurred under CERCLA).

FN5 Over the past 16 years, the only substantive amendment to CERCLA occurred in 1986 but it did not harmonize the interaction between the Code and CERCLA. Superfund Amendment & Reauthorization Act of 1986, Pub. L. No. 99−499, 100 Stat. 1613 (amending various provisions of 42 U.S.C. §§ 9601−9675). *See* Howard H. Schweber, *Cleaning Up the System: The Need for Federal Preemption of Third− Party Contribution Claims Under CERCLA*, 12 TEMP. ENVTL. L. & TECH. J. 187, 211 (1993) (commenting on Congress's unwillingness to direct spread of cleanup costs to public in 1986 amendments).

FN6 *See* Midlantic Nat'l Bank v. N.J., Dep't of Envtl. Protection, 474 U.S. 494, 507 (1986) (holding debtor may not abandon contaminated property in violation of state laws protecting public health); Ohio v. Kovacs, 469 U.S. 274, 285 (1985) (holding that state agency claim for cleanup costs is dischargeable); United States EPA v. Sequa Corp. (*In re* Bell Petroleum Servs., Inc.), 3 F.3d 889, 901−02 (5th Cir. 1993) (finding joint and several responsibility appropriate under CERCLA unless potentially liable party can prove amount of harm is divisible); CMC Heartland Partners v. Union Pac. R.R. (*In re* Chicago, Milwaukee, St. Paul & Pac. R.R.), 3 F.3d 200, 206−07 (7th Cir. 1993) (denying indemnification to purchaser of debtor's property where such purchaser had constructive knowledge of contamination prior to claims' bar date); *see also* Juniper Dev. Group v. Kahn *(In re* Hemingway Transp., Inc.), 993 F.2d 915, 921 (1st Cir. 1993) (noting that responsible parties under CERCLA include past and present owners or operators of contaminated site); United States v. LTV Steel Co. (*In re* Chateaugay Corp.), 944 F.2d 997, 1009−10 (2d Cir. 1991) (entitling cleanup expenditures to administrative priority); Hill v. East Asiatic Co. Ltd. (*In re* Bergsoe Metal Corp.) 910 F.2d 668, 671 (9th Cir. 1990) (holding owner of recycling plant not liable for cleanup costs where deed held pursuant to loan transaction); Burlington N. R.R. v. Dant & Russell, Inc. (*In re* Dant & Russell, Inc.), 853 F.2d 700, 708 (9th Cir. 1988) (interpreting *Ohio v. Kovacs* as holding that environmental claim is generally unsecured claim); Lancaster v. Tennessee (*In re* Wall Tube & Metal Prod. Co.), 831 F.2d 118, 123 (6th Cir. 1987) (allowing administrative expense claim where state response costs were recoverable under federal law).

FN7 Some courts have held that unsecured cleanup costs are entitled to priority as administrative expense claims. *In re* Chateaugay, 944 F.2d at 1009; *In re* Wall Tube & Metal, 831 F.2d at 123; *In re* Stevens, 68 B.R. 774, 783 (D. Me. 1987). Other courts maintain that environmental claims are merely general unsecured claims. *In re* Dant & Russell, 853 F.2d at 709; *In re* Hemingway, 993 F.2d at 503; Southern Ry. v. Johnson Bronze Co., 758 F.2d 137, 141 (3d Cir. 1985).

FN8 Presently there are five basic categories: (1) secured claims; (2) administrative expenses; (3) priority claims; (4) general unsecured claims; and (5) equity interests. *See* 11 U.S.C. § 503(b) (1994) (defining what claims qualify for administrative expense priority); § 506 (identifying secured claims); § 507(a)(1) (establishing priority of administrative expense claims over all other unsecured claims); § 507(a)(2)−(a)(9) (listing claims to be accorded special treatment); § 101(5) (defining broad scope of "claim" under the Code); § 101(16) (defining equity security interest); *see also id.* §§ 726 & 1129 (requiring that all distributions from bankruptcy estate conform to this hierarchy).

FN9 42 U.S.C. § 9607(l)(1) (1994).

FN10 A mortgagee holding a lien on property will be paid prior to any junior lien or unsecured claim. Where contamination significantly devalues property, the majority of estate assets are used to satisfy secured claims, leaving little or nothing for junior and unsecured claims. Heidt, *Suggestions for Reform, supra* note 3 at 148 n.181 (commenting CERCLA lien provision largely ineffective as it fails to give EPA priority over pre−existing liens).

FN11 Although CERCLA limits reference of the term "PRP" to § 9604, the term is commonly used to refer to the four types of individuals liable under CERCLA. *See* 42 U.S.C. §§ 9607(a)(1)−(4) (1994) (identifying parties connected with release of contaminants: the owners and operators of facilities, any person who contracted for disposal of hazardous waste, and any person involved in transportation of hazardous waste).

FN12 *See* California Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925, 930 (9th Cir. 1993) (noting that basing discharge of CERCLA liability on time of release of hazardous substance may frustrate CERCLA's goals); John C. Ryland, *When Policies Collide: The Conflict Between the Bankruptcy Code and CERCLA*, 24 MEM. ST. U. L. REV. 739, 749 (1994) (arguing that special treatment of environmental claims frustrates Code's fresh start and equitable distribution policy); Denise M. Schuh, Comment, *The Cents of It: Dischargeability and Environmental Claims Under the Bankruptcy Code*, 14 N. ILL. U. L. REV. 191, 200 (1993) (discussing how government's cleanup efforts are frustrated by increasing number of PRP bankruptcy filings); Jill T. Losch, Comment, *Bankruptcy v. Environmental Obligations: Clash of the Titans*, 52 LA. L. REV. 137, 173 (1991) (noting that reconciliation has resulted in frustration of both Code and CERCLA policies).

FN13 This Note primarily focuses on the prioritization of EPA claims.

FN14 Once in bankruptcy, the EPA's claim will generally be categorized as a general unsecured claim. Ohio v. Kovacs, 469 U.S. 274, 283 (1985). Such claims generally receive little to no distribution from the debtor's estate. *See* Julian R. Franks & Walter N. Torous, *An Empirical Investigation of U.S. Firms in Reorganization*, 44 J. FIN. 747, 755 (1989) (noting that distribution issued to holders of unsecured claims are commonly only a fraction of the value of those claims); Mary Lou Hopun, Comment, *To Expense or To Capitalize? The Impact of Federal Income Tax Treatment of Environmental Cleanup Costs under CERCLA*, 19 U. DAYTON L. REV 679, 713−14 (1994) (remarking that unsecured creditors in bankruptcy recover few assets in distribution due to § 507 priorities); John W. Ames et al., *Revisiting the Pecking Order for Environmental Claims*, AM. BANKR. INST. J. July/Aug. 1994, at 8 (noting that limited assets and priority positions in bankruptcy give unsecured creditors little chance of recovery).

FN15 *See* 42 U.S.C. § 9607(a) (1994) (identifying parties potentially responsible for cleanup cost); Julia A. Solo, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285, 307 (1995) (explaining focus of CERCLA liability: to clean up contaminated sites and hold polluter accountable); Losch, *supra* note 12, at 138 (stating that CERCLA promotes attributing cleanup costs to PRP). Courts have interpreted CERCLA as imposing strict liability on all PRPs. *See* United States v. Monsanto, Co., 858 F.2d 160, 168 (4th Cir. 1988) (concurring with majority of courts interpreting CERCLA's § 107(a) as imposing strict liability), *cert. denied*, 490 U.S. 1106 (1989); United States v. Chateaugay Corp. (*In re* Chateaugay Corp.), 112 B.R. 513, 518 (S.D.N.Y. 1990) (stating that it is unnecessary to prove that PRP caused hazardous pollution), *aff'd*, 944 F.2d 997 (2d Cir. 1991). CERCLA provides joint and several liability among PRPs. 42 U.S.C. § 9607(a)(4)(A) (1994). A single PRP may be held liable for the entire cost of a CERCLA action, regardless of how many PRPs were involved. *See, e.g.*, O'Neil v. Picillo, 883 F.2d 176, 178−79 (1st Cir. 1989) (adopting general tort rule in determining CERCLA liability, i.e., damages are apportioned only if defendant can demonstrate that harm is divisible), *cert. denied*, 493 U.S. 1071 (1990).

FN16 *See* 42 U.S.C. § 9615 (1994) (authorizing President to delegate and assign CERCLA's duties and powers). The courts have recognized the validity of the President's assignment of CERCLA's powers to the EPA as giving it both enforcement authority and federal funding for the purpose of cleaning up any hazardous waste site that poses a serious threat to the public safety. *See* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) (noting that EPA has been charged with authority to carry out goals of CERCLA under presidential mandate).

FN17 *See* 42 U.S.C. § 9604(a)(1) (authorizing EPA to take any response action necessary to protect public health or the environment); § 9607(a)(4)(A)−(D) (1994) (holding PRP liable for all remediation costs incurred under CERCLA).

FN18 Pub. L. No. 99−499, 100 Stat. 1613 (1986) (amending various sections of 42 U.S.C. §§ 9601−9675).

FN19 42 U.S.C. § 9622 (1994). *See* United States v. Bay Area Battery, 895 F. Supp. 1524, 1530 (N.D. Fla. 1995) (noting potential benefits available to creditors, debtors and government through CERCLA's settlement provision); James K. McBain, Note, *Environmental Impediments to Bankruptcy Reorganizations*, 68 IND. L.J. 233, 253 (1992) (discussing utilization of CERCLA's settlement provision in bankruptcy proceedings to resolve dispute over cleanup obligations).

FN20 42 U.S.C. § 9613(f) (1994). *See* United States v. Colorado & E. Ry., 50 F.3d 1530, 1538 (10th Cir. 1995) (allowing one PRP to seek contribution from another PRP); Bethlehem Iron Works, Inc. v. Lewis Indus., Inc., 891 F. Supp. 221, 223 (E.D. Pa. 1995) (concluding that PRPs voluntarily incurring cleanup costs may bring private action against other PRPs). *See generally* Ellen J. Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 ECOLOGY L.Q. 365, 374−75 (1987) (explaining procedural aspects of CERCLA's contribution provision).

FN21 *See* 42 U.S.C. § 9607(a) (1994) (identifying parties potentially responsible for cleanup cost); *see also supra* note 15 (explaining CERCLA policy to hold PRPs strictly liable).

FN22 "Affected Creditor" refers to the undersecured creditor benefitting from EPA's efforts in cleaning up the property securing the creditor's loan to the debtor. *See* Karynne G. Popper & Alison N. Zirn, *The Bottomless Pit: The Struggle to Achieve Judicial Consistency in the Application of CERCLA in Bankruptcy Proceedings*, 16TH ANNUAL CURRENT DEVELOPMENTS IN BANKRUPTCY AND REORGANIZATION, No. A4− 4453, 253, WESTLAW *62 (April−May 1994) (proposing amendment to Code allowing EPA to obtain portion of secured creditor's proceeds from sale of remediated property so as to prevent unjust enrichment); *see also infra* note 30 and accompanying text (explaining how Affected Creditors benefit from EPA remediation of contaminated property).

FN23 While, at first blush, this proposition may seem somewhat unjust, an increasing amount of commentators are questioning the "innocence" of these creditors. *See* Topol, *supra* note 3, at 220 (analyzing assumption that creditors should not bear costs of cleanup because they are wholly innocent parties); J. Ricky Arriola, Note, *The Life and Times of a CERCLA Claim in Bankruptcy: An Examination of Hazardous Waste Liability in Bankruptcy Proceedings*, 67 ST. JOHN'S L. REV. 55, 63 (1993) (examining possibility of greater involvement of PRP's creditors in allocation of environmental liability).

FN24 42 U.S.C. § 9607(a) (1994); *see* United States v. Witco Corp., 865 F. Supp. 245, 247 (E.D. Pa. 1994) (stating CERCLA enables EPA to respond efficiently and promptly to toxic spills); Employers Ins. of Wausau v. Clinton, 848 F. Supp. 1359, 1365 (N.D. Ill. 1994) (noting that CERCLA provides EPA with authority to take direct response action to clean up hazardous waste site).

FN25 42 U.S.C. § 9606(a) (1994). Before a CERCLA injunction may be granted by a court, the action in question must be determined to pose "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance." *Id.*

FN26 *See id.* § 9607(a)(4)(A) (outlining costs and damages recoverable under CERCLA); New York v. SCA Servs. Inc., 785 F. Supp. 1154, 1156−57 (S.D.N.Y. 1992) (construing CERCLA as holding any and all PRPs liable for response costs); *see also* Cose v. Getty Oil Co., 4 F.3d 700, 708 (9th Cir. 1993) (outlining four elements that establish prima facie case subjecting party to CERCLA liability); H.R. Rep. No. 253, 99th Cong., 2d Sess. 15 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 3038 (stating purpose of CERCLA is to provide quick cleanup of hazardous substances and then hold PRPs liable for costs).

FN27 *See* 42 U.S.C. § 9613(f)(1) (1994) (allowing any PRP to seek contribution from any other PRP); United Technologies Corp. v. Browning−Ferris Indus., Inc., 33 F.3d 96, 98 (1st Cir. 1994) (noting CERCLA allows PRP to initiate action against other PRPs to recover pro rata share of cleanup expenses), *cert. denied*, 115 S. Ct. 1176 (1995).

FN28 A tremendous amount of financial resources have been consumed by the litigation of these issues, yet the conflict between the two statutes has yet to be firmly resolved. The limited resources allocated for the cleanup of hazardous waste sites continues to be spent on somewhat repetitive litigation. *CERCLA Reform: Hearings on CERCLA Before the Subcomm. on Commerce, Trade & Hazardous Materials of the House Comm. on Commerce*, 104th Cong., 1st Sess. WESTLAW *12 (1995) (testifying that one of Department of Justice's greatest concerns is over high legal costs involved in resolving Superfund liability); *see also Supreme Court Cases Top Long List of Environmental Litigation in 1995*, BNA NAT'L ENVTL. DAILY, Jan. 26, 1995, at 3 (noting CERCLA litigation will dominate federal court dockets in 1995); Max Baucus, *Superfund Reform*, CONGRESSIONAL PRESS RELEASES July 22, 1994, at 1 (summarizing senate chairman's environment's conclusion that Superfund is deeply troubled due to diversion of scarce resources for complex litigation); Steven T. Miano & Madeleine H. Cozine, *Will CERCLA Careen Toward Reauthorization?*, THE LEGAL INTELLIGENCER June 28, 1994, at 11 (noting criticism of CERCLA due to its encourage of excessive and costly litigation). "I'd like to use that Superfund to clean up pollution for a change and not just to pay lawyers." President Clinton, address to U.S. Congress (February 17, 1993), *reprinted in* N.Y. TIMES, February 18, 1993, at A20.

FN29 *See supra* notes 7−10 (explaining why EPA recovery efforts are hindered by Code).

FN30 *See In re* Better−Brite Plating, Inc. 105 B.R. 912, 917−18 (Bankr. E.D. Wis. 1989) (stating where EPA does not recover for remediation efforts but secured creditor receives appreciated value of property, such benefit is an unfair windfall); Kathryn R. Heidt, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY [[paragraph]] 7.08[2][b], at 7−50 (1993 & Supp. 1994) [hereinafter ENVIRONMENTAL OBLIGATIONS](noting that government's cleanup of contaminated property directly increases value of land).

FN31 *See generally* Lorraine Lewandrowski, *Toxic Blackacre: Appraisal Techniques & Current Trends in Valuation*, 5 ALB. L. J. SCI. & TECH. 55, 74 (1994) (examining drastic impact of environmental pollution on value of land); *see also* One Wheeler Rd. Assocs. v. Foxboro Co., 843 F. Supp. 792, 794−95 (D. Mass. 1994) (stating that CERCLA does not provide private cause of action to recover economic harm resulting from diminution in value of property); Timothy J. Muldowney & Kendall W. Harrison, *Stigma Damages: Property Damage and the Fear of Risk*, 62 DEF. COUNS. J. 525, 526 (1995) (discussing decrease in market value due to stigma that attaches when public fears property is contaminated); Bonnie H. Keen, Comment, *Tax Assessment of Contaminated Property: Tax Breaks for Polluters?*, 19 B.C. ENVTL. AFF. L. REV. 885, 887 (1992) (indicating that buyers of contaminated property may pay a lower price than they would for a similar "clean" property).

FN32 Some states have adopted a "one action rule" permitting lenders to sue either on note or on unpaid debt. *See, e.g.*, CAL. CODE CIV. PROC. § 726(a) (West 1996); IDAHO CODE ANN. § 6−101 (Michie 1990 & Supp. 1993); NEV. REV. STAT. § 40.430 (Michie 1996); UTAH CODE ANN. § 78−37−1 (Michie 1992); *see also* FDIC v. Shoop, 2 F.3d 948, 950 (9th Cir. 1993) (discussing "one action rule). A nonrecourse lender may only sue on the note or foreclose on the property. When the value of the collateral has decreased, lender will only be able to recover to the extent of the value of the collateral. MICHAEL T. MADISON & ROBERT M. ZINMAN, MODERN REAL ESTATE FINANCING: A TRANSACTIONAL APPROACH 311 (1991) (explaining upon default nonrecourse lender may only look to value of property).

FN33 *Supra* note 30.

FN34 Presently, the EPA keeps track of hazardous waste sites and the resultant PRPs under the National Priorities List ("NPL"). 42 U.S.C. § 9605(a)(8) (1994). Under article 9 of the Uniform Commercial Code, a secured creditor must record his lien in order to protect his interest. U.C.C. § 9−302(1) (1994). Similarly, it is suggested that the EPA utilize the state clerk's offices to locate parties in interest.

FN35 Under SARA, the role of negotiations in CERCLA determining liability has grown in prominence. *See* McBain *supra* note 19, at 254 (exploring past and future use of CERCLA's settlement provision). In essence, the proposed amendment would expand and modify the scope of CERCLA's settlement provision. 42 U.S.C. § 9622 (1994). This proposal is in conformance with bankruptcy policy. Traditionally, negotiations have played a vital role under the Bankruptcy Code. "Courts, debtors and creditors should approach reorganization in ways that discourage litigation and promote negotiation." *In re* Jones, 32 B.R. 951, 953 (Bankr. D. Utah 1983). "Chapter 11 emphasizes loss allocation through negotiation that occurs in a framework of legal rules." Raymond T. Nimmer, *Negotiated Bankruptcy Reorganization Plans: Absolute Priority and New Value Contributions*, 36 EMORY L.J. 1009, 1011−12 (1987).

FN36 Edward A. Morse, Note, *Mediation in Debtor−Creditor Relationships*, 20 U. MICH. J.L. REF. 587, 595−96 (1987) (noting that an undersecured creditor has greater incentive to pursue restructured agreement); *see generally* MADISON & ZINMAN, *supra* note 32, at ch. 10 (discussing advantages of workout agreements).

FN37 The benefit would be in the form of tax credits. *See infra* part I.B. (discussing use of tax credits in amending of CERCLA and Code).

FN38 Following cleanup, the Affected Creditor's lien may no longer be undersecured, thus, the Affected Creditor would be able to recover in full. To prevent the Affected Creditor from realizing a windfall, the negotiated agreement would provide the Affected Creditor with a tax credit benefit in exchange for partial subordination of its lien. Therefore, the Affected Creditor would recover the precleanup value of its lien and the negotiated tax credits and the EPA would then step in to collect the appreciated portion of the Affected Creditor's lien.

FN39 The value of an undersecured creditor's lien increases in direct proportion to the appreciation in the value of the property. Morse, *supra* note 36, at 596; *see supra* notes 30−33 and accompanying text (describing how creditor's claim can be detrimentally affected by environmental pollution and how role EPA plays can reestablish true value of lien). While the Affected Creditor would not receive the full value of his lien, he would be allowed to enjoy a portion of the windfall resulting from the EPA's remediation efforts. *See* Table 1 *infra* part III (illustrating type of benefit secured creditor could expect to receive).

FN40 This alternative would allow the creditor to negotiate the retained benefit from the appreciated value of his collateral. *See* Table 1, *infra* part III.

FN41 By abandoning its lien, an increased amount of assets would be available for distribution. Note that although the lender would be exempt from liability resulting from his status as an Affected Creditor, he may still be subject to future liability as a PRP. *See* Kelly S. Hunter, Note, *Defining the Scope of Lender Liability After* Kelly v. EPA*: Who Will Have Safe Harbor?*, 16 ENERGY L.J. 159, 162 (1995) (examining problem caused by the vague scope of the lender liability provisions under CERCLA); Christopher J. Nowicki, *A Step Back from* Chevron*? An Analysis of* Kelly v. EPA, 9 ADMIN L.J. AM. U. 221, 221 (1995) (reviewing judicial history of EPA's attempt to define scope of CERCLA lender liability).

FN42 In this scenario, if the PRP subsequently filed for bankruptcy, the proposed default provision to § 506 would govern the outcome of the scenario and the affected creditor would receive the minimum benefit. *See infra* part II (explaining recovery formula of § 506).

FN43 *Infra* part II. Although some may contend holding a reluctant Affected Creditor liable is equivalent to a taking, a review of relevant case law suggests otherwise. *See* City of New York v. Quanta Resources Corp. (*In re* Quanta Resources Corp.), 739 F.2d 912, 922 (3d Cir. 1984) (stating enforcement of environmental protection laws not taking, rather permissible exercise of state regulatory power to promote public good); Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 488 (1987) (stating takings more readily found when physical invasion occurs rather than interferences arises from public program adjusting economic burden for public good); Armstrong v. United States, 364 U.S. 40, 49 (1960) (stating that government may adjust economic interests for public good). Causing economic harm is not considered a taking when the government does not interfere with the reasonable expectations of the claimant. Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978); *see* Kissel Co. v. City of Malibu, 854

F. Supp. 1476, 1495 (1994) (stating compensation not required where government merely regulates use of property).

FN44 3 Fed. Tax Svs. (CCH) § A:19.00 (1995) (defining tax credits); *see also* Richard A. Westin, *Understanding Environmental Taxes*, 46 TAX LAW. 327, 344 (1993) (comparing tax credits to deductions and stating that credits are preferable because they do not fluctuate based on other criteria). While the tax credits would provide a benefit to the Affected Creditor, thus increasing the support for remediation, the cost of the tax credits must be borne by the taxpayers. This Note contends that the onus of such a burden is minimal for the resulting benefit, a cleaner environment. While tax credits shift payment of cleanup costs from the EPA to the public, this proposal reduces the burden by providing for greater recovery of remediation expenses.

FN45 Subordination would enable the EPA to recover a portion of expended costs.

FN46 This Note suggests the establishment of a minimum and maximum tax credit benefit. Calculating a minimum benefit based on, for example, a percentage share of the appreciated value of the collateral, would promote good faith negotiation. A minimum that is set too low would remove the Affected Creditor's incentive to negotiate. *See* Nancy E. Shurtz, *Promoting Alcohol Fuels Production: Tax Expenditures? Direct Expenditures? No Expenditures?*, 36 SW. L.J. 597, 604 (1982) (explaining how tax credits were used to encourage production of gasohol & alcohol); Scott A. Tschirgi, *Aiming the Tax Code at Distressed Areas: An Examination and Analysis of Current Enterprise Zone Proposals*, 43 FLA. L. REV. 991, 1006 (1991) (discussing purpose of employment tax credit to encourage businesses to hire residents of enterprise zones). Correspondingly, a maximum that is set too high would increase the burden on the public and frustrate the purpose of the proposed amendments.

FN47 This proposal could be structured similar to the Environmental Remediation Tax Credit bill introduced by Representative Mel Reynolds for the development of urban brownfields. As in the Reynolds' bill credit eligibility could be based on a number of factors including classification of the property as NPL property, and reduction in basis of the remediated property proportional to the disbursed credits. *See* H.R. 2340, 103d Cong., 1st Sess. (1993) (Environmental Remediation Tax Credit bill introduced by Mel Reynolds on June 8, 1993); *see also* Julia A. Solo, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285, 321 (1995) (discussing Environmental Remediation Tax Credit bill). In light of CERCLA's strong policy that party contributing to pollution should be held liable for all costs, credits should not be available to any party causing or participating in the contamination of the property. *See* H.R. 2340. Under some circumstances, distribution of credits to heirs or transferees should also be prohibited. *Infra* note 62.

FN48 Credits that are not used in the year they are allocated would be forfeited. Sale of credits avoids this problem.

FN49 *See, e.g.*, I.R.C. § 42(e)(4)(B) (1994) (providing ten year credit period for low−income housing tax credits).

FN50 A sliding scale or other similar formula should take into account the administrative concerns of the IRS and the practical concerns of the creditor.

FN51 Separate yearly maximums should be established for individuals and for corporations. The maximum for corporations should be somewhat higher than for individuals.

FN52 Excess credits refers to the total yearly credit allocated to the creditor minus the yearly maximum available for that creditor (excess credits = total yearly credit allocated − yearly maximum for creditor).

FN53 *See supra* note 48 (explaining how sale of tax credits avoids forfeiture).

FN54 *See generally* Jeanne L. Peterson, *The Low−Income Housing Tax Credit*, 73 Mich. B.J. 1154, 1157−58 (1994) (explaining sale of tax credits through syndication). This option is likely to appeal to a lender that needs to realize additional income rather than reduce its tax liability.

FN55 *See* Kathleen O. Lier, *The Evolution in Tax Shelter Litigation: The Tax Court Closes the Door on Generic Tax Shelters, But a Window Remains Open with Respect to the Additions to Tax and the Increased Interest Under I.R.C.*

§ 6621(c), 36 LOY. L. REV. 275, 275 (1990) (stating that amount of tax shelter cases have burdened court docket and resulted in substantial revenue loss).

FN56 The sale of tax credits would result in revenue to the Government as well as the Affected Creditor. Proceeds from sale of credits should be classified as gross income, as defined in IRC § 61 (1994).

FN57 An indirect sale should be classified as two sales; the initial sale to the investment company and the subsequent sale to the taxpayer.

FN58 A 3% cap, for example, would result in a yearly maximum allotment of tax credits equal to approximately 10% of the total tax liability. This percentage would be the maximum aggregate credit available per individual/corporation for any tax year.

FN59 The amendment would establish a yearly maximum sale/transfer amount. Transfers in excess of this amount would be subject to a surtax.

FN60 *See* Richard A. Westin & Sanford E. Gaines, *The Relationship of Federal Income Taxes to Toxic Wastes: A Selective Study*, 16 B.C. ENVTL. AFF. L. REV. 753, 760 (1989) (remarking that purpose of Code is raising revenue); *see also* Donna D. Adler, *The Internal Revenue Code, The Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 860 (1993) (discussing "tax expenditure analysis" which categorizes the income tax system into two parts: revenue raising, and effectuating social and economic goals); Amy C. Christian, *Designing a Carbon Tax: The Introduction of the Carbon−Burned Tax (CBT)*, 10 UCLA J. ENVTL. L. & POL'Y 221, 224−225 (1992) (asserting that even a tax system designed only for revenue raising will promote certain social behavior); Kurt Hartmann, Comment, *The Market for Corporate Confusion: Federal Attempts to Regulate the Market for Corporate Control Through the Federal Tax Code*, 6 DEPAUL BUS. L.J. 159, 159 (1993) (stating that tax policy has developed into more than just revenue raising procedures).

FN61 *Supra* note 15.

FN62 The PRP's basis would not be reduced below zero. *See* I.R.C. § 42(d)(5)(B) (1994) (requiring basis to be reduced by amount of tax credits received); Mark A. Frankel, *Federal Taxation of Corporate Reorganizations*, 66 AM. BANKR. L.J. 55, 61 (1992) (reducing adjusted basis of property to a maximum of zero). In addition, where basis in property has been reduced pursuant to this amendment, a subsequent recipient would not take a stepped−up basis in the property. *See, e.g.*, I.R.C. § 1014 (1994) (basis in property acquired from decedent is adjusted to the fair market value at time of death or within six months therefrom). Instead, the recipient should take a transferred basis. *See, e.g.*, I.R.C. § 1041 (1994) (basis of transferee becomes the adjusted basis of transferor). Although this may infringe on public policy in that area, consider that without this amended provision the property would probably have been disposed of to satisfy the claims of the other creditors, or abandoned as worthless. As such, there would not have been a property to inherit, and the heirs would have received nothing.

FN63 I.R.C. § 61(a)(3) (1994); Treas. Reg. § 1.61−6 (1960). Furthermore, a reduction in basis, would reduce some of the PRP's tax benefits. The amount of depreciation that a PRP could take on improvements to the remediated property would be reduced.

FN64 *See* Hartmann, *supra* note 60, at 200 n.2 (explaining that by "imposing special taxes" the IRC discourages undesirable behavior). This surplus tax does not violate the equal protection clause. The amendment is an economic legislation and as such only requires a rational basis. U.S. CONST. amend. V, § 1; Federal Communications Comm'n v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 568 (4th ed. 1991).

FN65 *See* 42 U.S.C. § 9611 (1994) (creating a multi−billion dollar Hazardous Substance Trust Fund ("Superfund") in order to allow the EPA to clean up property and then pursue PRPs for compensation); I.R.C. § 59(A) (1994), 42 U.S.C. § 9507(b)(1) (1994) (funding money for Superfund through surtax on corporations with taxable incomes over $2 million dollars); I.R.C. §§ 4611(a), 4611(c)(2), 4611, 4671 (1994) (providing additional Superfund monies through

taxes on chemical and petroleum manufacturers and buyers). *See generally* Nina J. Crimm, *A Tax Proposal to Promote Pharmacologic Research, to Encourage Conventional Prescription Drug Innovation and Improvement, and to Reduce Product Liability Claims*, 29 WAKE FOREST L. REV. 1007, 1082 (1994) (proposing earmarking of monies received from non−prevailing party for infusion into superfund).

FN66 *See supra*, note 12 (discussing how interaction of Code and CERCLA frustrate their respective goals) *See generally* Michael A. Bloom, *Bankruptcy's Fresh Start vs. Environmental Cleanup: Statutory Schizophrenia*, 6 VILL. ENVTL. L.J. 107 (1995) (examining pertinent case law on treatment of environmental obligations in bankruptcy in an attempt to clarify confusion between CERCLA and Code); John P. Berkery, *The Dischargeability of CERCLA Cleanup Costs Incurred After Bankruptcy*, 9 BANKR. DEV. J. 417 (1992) (examining whether debtor released from liability for cleanup costs incurred by EPA after closing of proceeding for cleanup of pollution that occurred prior to debtor's filing).

FN67 *See supra* note 15 and accompanying text (describing PRP's liability under CERCLA).

FN68 The fresh start policy protects the debtor from overreaching creditors and provides the honest debtor with a discharge from many of his prepetition debts and obligations. *See* Grogan v. Garner, 498 U.S. 279, 286 (1991) (acknowledging central purpose of Code is to provide means for insolvent debtor to reorder life and begin anew); Local Loan Co. v. Hunt, 242 U.S. 234, 244 (1934) (stating primary purpose of bankruptcy is to relieve honest debtor and give him a fresh start); Williams v. United States Fidelity & Guar. Co., 236 U.S. 549, 554 (1915) (stating purpose of Bankruptcy Act is to relieve honest debtor from oppressive debt allowing a start free from obligations of economic misfortune); H.R. Rep. No. 595, 95th Cong., 2d Sess. 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6296, 6297 (stating that debtor receives a "fresh start" when relieved of financial obligations); 3 COLLIER ON BANKRUPTCY [[paragraph]] 524.01[1] (Lawrence P. King ed., 15th ed. 1995) (describing general effect of discharge); Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start"*, 45 HASTINGS L.J. 175, 175 (1994) (defining fresh start as "financial rebirth"); Thomas H. Jackson, *The Fresh Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1396−97 (1985) (analyzing Code's fresh start policy). *See generally* Suzanne E. Doherty, *The Interplay between Bankruptcy and Divorce: Which Former Spouse Deserves The Fresh Start?*, 99 COM. L.J. 192, 227 (1994) (discussing purpose of fresh start).

FN69 The debtor is granted a discharge after the remaining nonexempt assets of the bankruptcy estate have been allocated among the miscellaneous creditors in satisfaction of their claims. 11 U.S.C. § 1141 (1994) (granting discharge from most prior debts and obligations upon the court's confirmation of a chapter 11 plan); *Id.* § 726 (involving liquidation of an individual debtor's nonexempt assets, distributing proceeds of liquidation to all of debtor's debts and obligations). Once liquidation is completed, the individual is granted a discharge from most of his past debts and obligations. *Id. See generally*, John P. Berkery, *The Treatment of Environmental Matters in Bankruptcy Cases*, 11 BANKR. DEV. J. 85, 85 (1994) (providing a comprehensive explanation of chapter 11 and chapter 7 proceedings involving environmental liability).

FN70 *See, e.g.*, Debra L. Baker, *Bankruptcy The Last Environmental Loophole?*, 34 S. TEX. L. REV. 379, 387 (1993) (commenting that allowing violator to escape environmental liability through discharge of debt provides environmental loophole in Code).

FN71 There are four main issues. First, the appropriate priority status of environmental claims. 11 U.S.C. 507(a) (1994); *see* Juniper Dev. Group v. Kahn (*In re* Hemingway Transp., Inc.), 993 F.2d 915 (1st Cir. 1992) (reviewing judicial utilization of administrative expense provision and affirming categorization of postpetition transaction as administrative expenses); Daniel Klerman, Comment, *Earth First? CERCLA Reimbursement Claims And Bankruptcy*, 58 U. CHI. L. REV. 795, 798 (1991) (arguing against treatment of CERCLA claims as administrative expenses); Joseph P. Cistulli, Comment, *Striking a Balance Between Competing Policies: The Administrative Claim as an Alternative to Enforce State Clean−Up Orders in Bankruptcy Proceedings*, 16 B.C. ENVTL. AFF. L. REV. 581, 607 (1989) (concluding that environmental liabilities are justifiably categorized as administrative expenses under Code). The second issue involves the applicability of the automatic stay provision. 11 U.S.C. § 362 (1994); *see* Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267, 274 (3d Cir. 1984) (holding state order requiring debtor to clean up hazardous waste was not a violation of the automatic stay provision); Stanley M. Spracker & James D.

Barnette, *The Treatment of Environmental Matters in Bankruptcy Cases*, 11 BANKR. DEV. J. 85, 114−17 (1994/95) (analyzing judicial interpretation and application of automatic stay to environmental liability). Thirdly, the abandonment of contaminated property is at issue. 11 U.S.C. § 554(a)−(b) (1994); *see* Midlantic Nat'l Bank v. New Jersey, Dep't of Envtl. Protection, 474 U.S. 494, 502 (1986) (holding that debtor cannot abandon contaminated property in violation of state law designed to protect public safety); Ohio v. Kovacs, 469 U.S. 274, 285 (1985) (holding cleanup injunction equivalent of money judgment); *In re* Heldor Indus., Inc., 131 B.R. 578, 587 (Bankr. D. N.J. 1991), *appeal dismissed, motion to vacate denied,* 139 B.R. 290 (D. N.J. 1992) (construing Midlantic as disallowing abandonment only when doing so would pose a serious danger to public safety), *rev'd and vacated*, New Jersey, Dep't of Envtl. Protection & Energy v. Heldor Indus., 989 F.2d 702 (3d Cir. 1993); Arriola, *supra* note 23, at 71−74 (analyzing judicial treatment of abandonment of contaminated property under § 554). Lastly, the dischargeability of environmental claims. 11 U.S.C. § 523(a), 524(a)(2) (1994); *see* Chateaugay Corp. v. LTV Corp., 944 F.2d 997, 1005 (2d Cir. 1991) (holding environmental claims arise when creditor could have reasonably anticipated them); Jensen v. Bank of Am. (*In re* Jensen), 114 B.R. 700 (Bankr. E.D. Cal. 1990), *rev'd*, 127 B.R. 27, 32 (9th Cir. 1991) (reversing decision that environmental claim does not arise until actual cleanup costs are incurred).

FN72 *See Chateaugay*, 944 F.2d at 1002 (noting it is Congress's job to resolve conflicts between CERCLA and Code, not the courts); Joslyn Mfg. Co. v. T. L. James & Co., 893 F.2d 80, 83 (5th Cir. 1990) (commenting that if Congress wanted to extend CERCLA liability, they would have expressly done so); Burlington N. R.R. v. Dant & Russell, Inc. (*In re* Dant & Russell), 853 F.2d 700, 709 (9th Cir. 1988) (stating that when considering proper categorization of claims, courts are not free to formulate own policies but must follow lead of Congress); Revere Copper & Brass Inc. v. Acushnet Co., 172 B.R. 192, 197 (Bankr. S.D.N.Y. 1994) (stating that when treatment of environmental claim arises in bankruptcy it is court's job to enforce law and Congress's job to determine policy); *In re* Torwico Elecs., Inc., 131 B.R. 561, 577 (Bankr. D.N.J. 1991) (noting that only Congress can determine treatment of environmental obligations in bankruptcy); *see also* McBain, *supra* note 19, at 251 (analyzing conflict between Code and CERCLA, concluding Congress must provide courts with guidance in this area).

FN73 *See In re* Visual Indus., 57 F.3d 321, 325 (3d Cir. 1995) (concluding that section 506(c) is based on equitable common law rule); *In re* Scopetta−Senra Partnership III, 129 B.R. 700,701 (Bankr. S.D. Fla. 1991) (noting that section 506(c) is an equitable one designed to prevent secured creditors from receiving a windfall at expense of trustee); 3 COLLIER *supra* note 68, at [[paragraph]] 506.06 (noting that section 506(c) was codification of equitable principle); Justin T. Toth, *Rehabilitating Bankruptcy Code Section 506(c): Should Third Party Claimants Have Independent Standing?*, 16 W. NEW ENG. L. REV. 1, 5 (1994) (describing some of the equitable theories for assessing costs against a secured creditor).

FN74 *In re* Trim−X, Inc., 695 F.2d 296, 301 (7th Cir. 1982) (commenting that § 506(c) is exception to general rule exempting secured creditors from liability for administrative costs); *In re* T.P. Long Chem., Inc., 45 B.R. 278, 287 (Bankr. N.D. Ohio 1985) (stating that § 506 is exception to traditional rule that secured creditors not liable for administrative costs of bankruptcy estate); Toth, *supra* note 73 (noting § 506(c) only section allowing claimant to step outside statutory priority scheme of Code).

FN75 11 U.S.C. § 506(c) (1994). *See In re* Summit Ventures, Inc., 135 B.R. 478, 483 (Bankr. D. Vt. 1991) (noting that before trustee may recover costs under § 506(c), must first establish that costs were relatively necessary for preservation of collateral and resulted in direct benefit to holder of secured claim); *In re* New England Carpet Co., 28 B.R. 766, 772 (Bankr. D. Vt. 1983) (stating that § 506(c) limits recovery to costs reasonable, necessary & incurred in preservation or disposal of estate to extent of direct benefit to holder of secured claim); 3 COLLIER *supra* note 68, at [[paragraph]] 506.06 (discussing factors necessary for recovery under § 506(c)).

FN76 Courts are split as to whether section 506(c) limits standing to debtor−in−possession and the trustee. Some argue that the plain meaning of § 506(c) limits standing. Ford Motor Credit Co. v. Reynolds & Reynolds Co. (*In re* JKJ Chevrolet), 26 F.3d 481, 484 (4th Cir. 1994) (holding that language of section 506(c) expressly limits standing to trustee and debtors−in−possession); *In re* Oakland Care Ctr., Inc., 142 B.R. 791, 796 (Bankr. E.D. Mich. 1992); Boyd v. Dock's Corner Assocs. (*In re* Great N. Forest Prods., Inc.), 135 B.R. 46, 72 (Bankr. W.D. Mich. 1991); *In re* Dakota Lay'd Eggs, 68 B.R. 975 (Bankr. D.N.D. 1987). Other courts support a more flexible version of section 506(c). *In re* Visual Indus. Inc., 57 F.3d 321, 324 (3d Cir. 1995) (listing requirements needed for third party standing); *In re* The

Gibson Group, 66 F.3d 1436, 1447 (6th Cir. 1995) (listing elements that must be proven before a third party will be granted derivative standing under section 506(c)); North Country Jeep & Renault Inc. v. General Elec. Capital Corp. (*In re* Palomar Truck Corp.), 951 F.2d 229, 232 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 71 (1992); *In re* Parque Forestal, Inc., 949 F.2d 504 (1st Cir. 1991); *In re* Mechanical Maintenance, Inc., 128 B.R. 382 (E.D. Pa. 1991); Shaw v. Travellers (*In re* Grant Assocs.), 154 B.R. 836 (Bankr. S.D.N.Y. 1993). *See infra* note 78 (discussing Supreme Court's plain meaning approach to Code).

FN77 *See In re* Parque Forestal, Inc., 949 F.2d 504, 511 (1st Cir. 1991) (allowing third party to recover expenses from secured creditor under 506(c)); *In re* McKeesport Steel Castings Co., 799 F.2d 91, 94 (3d Cir. 1986) (permitting third party standing when creditor has colorable claim and trustee has refused to act); *In re* Isaac Cohen Clothing Corp., 39 B.R. 199, 201 (Bankr. S.D.N.Y. 1984) (same). *But see In re* Interstate Motor Freight Sys. IMFS, Inc., 71 B.R. 741, 746 (Bankr. W.D. Mich. 1987) (holding § 506(c) to apply only to trustee or debtor in possession); *In re* Fabian, 46 B.R. 139, 141 (Bankr. E.D. Pa. 1985) (same); *In re* Codesco, Inc., 18 B.R. 225, 230 (Bankr. S.D.N.Y. 1982) (same).

FN78 United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (according plain meaning to § 506(b) of Code). *Accord*, Burlington N. R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987); United States v. Mansfield Tire & Rubber Co. (*In re* Mansfield Tire & Rubber Co.), 942 F.2d 1055, 1058 (6th Cir. 1991). *See* Kathryn R. Heidt, *Undermining Bankruptcy Law and Policy:* Torwico Electronics v. New Jersey Department of Environmental Protection, 56 U. PITT. L. REV. 627, 636 (1995) [hereinafter *Undermining Bankruptcy*] (noting Supreme Court's "plain meaning" approach to Code); Scott F. Norberg, *Classification of Claims Under Chapter 11 of the Bankruptcy Code: The Fallacy of Interest Based Classification*, 69 AM. BANKR. L.J. 119, 125 n.27 (1995) (citing cases illustrating Supreme Court's commitment to plain meaning interpretation of Code); Joseph A. Gazinski, *Policy Problems and "Plain Meaning:" an Examination of Some Recent Decisions under 11 U.S.C. § 525(a)*, AMER. BANKR. INST. J., Feb. 15, 1996, at 10 (noting Supreme Court trend to focus on language of statute).

FN79 Third party standing in section 506(c) has not been addressed by the Supreme Court. Given the Court's trend toward a plain meaning interpretation of the Code, it is unlikely that third party standing would be extended. *See supra* note 78. Therefore, the cost of litigating this interpretation would be high and the chances of a successful result would be bleak. Furthermore, the "reasonable, necessary costs" phrase contained in section 506(c) is subject to various interpretations. The leeway contained in this ambiguous phrase also leaves the door open to lengthy and costly litigation, especially when significant amounts of money are involved. *See* Toth, *supra* note 73 at 2 (noting courts' struggle to define scope of "reasonable, necessary costs" of § 506(c)).

FN80 *See* Toth, *supra* note 73, at 2−8 (using hypothetical to illustrate policy of preventing windfalls under § 506(c)); *see also supra* notes 22−23 and accompanying text (citing to discussion on whether secured creditors should be allowed to retain windfall).

FN81 The proposed amendment to § 506 would be *solely* applicable to the treatment of environmental claims. The main justification for special treatment of CERCLA claims would be to promote the recovery of EPA claims. As the provision is not based on administration of estate, there is little justification for allowing Affected Creditor to reap windfall from EPA's efforts conducted prior to PRP's filing, especially if creditor's refusal to negotiate allocation of liability was contributing factor to PRP's filing. *See supra* notes 31−33 (discussing that benefit to secured creditor should not be at EPA expense).

FN82 Part I discusses treatment of environmental claims outside bankruptcy. It broadens CERCLA's allocation of cleanup costs to include the Affected Creditor. *See supra* Part I. Through the proposed notice and negotiation provisions of CERCLA, the Affected Creditor would have agreed to subordinate a portion of the claim should the PRP/debtor file bankruptcy. *Supra* Part I.A.

FN83 *Supra* part I.

FN84 This formula could provide for a minimum percentage benefit to the Affected Creditor. *Supra* note 46.

FN85 In bankruptcy, the Affected Creditor's secured claim would be greatly reduced due to the environmental contamination. In recognition of creditor's claim in relation to the PRP/debtor's culpability, the Code would enable the Affected Creditor to file a claim after remediation of property is complete. At that time, the Affected Creditor would receive a minimum percentage benefit of the windfall. Topol *supra* note 3, at 215−21 (exploring alternative methods for increasing creditor participation in environmental safety).

FN86 *See* hypothetical applications in Part III. The Affected Creditor pays a percentage less than the full amount of the benefit received. *See infra* hypothetical Tables 1 & 2. The windfall is calculated through a snap−shot approach. Present distributions are compared to the anticipated value of post−cleanup distributions. Other Code provisions have utilized a similar approach. *See* 11 U.S.C. § 547(c)(5) (1994) (validating floating lien on inventory and accounts receivable through use of "snapshot" test); *see also* H.R. Rep No. 595, 95th Cong., 1st Sess. 374 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6331; S. Rep. No. 989, 95th Cong., 2d Sess. 88 (1978) (same). The two "snapshots" would allow the EPA to determine the extent of the benefit received by the secured creditor.

FN87 *See* 11 U.S.C. § 507 (1994) (establishing priorities for unsecured claims).

FN88 *Supra* note 7.

FN89 *Supra* note 8.

FN90 *See* Juniper Dev. Group v. Kahn (*In re* Hemingway Transp. Inc.), 126 B.R. 656, 659 (D. Mass. 1991) (affirming categorization of postpetition transaction as administrative expenses), *aff'd*, 954 F.2d 1 (1st Cir. 1992), *aff'd in part, vacated and remanded*, 993 F.2d 915 (1st Cir. 1992); *In re* Virginia Builders, Inc., 153 B.R. 729, 736 (Bankr. E.D. Va. 1993) (explaining circumstances when actual costs incurred entitled to administrative expense priority); *In re* N.P. Min. Co., 124 B.R. 846, 855 (Bankr. N.D. Ala. 1990) (considering cleanup costs administrative expenses within meaning of § 507(a)(1)); 3b COLLIER *supra* note 68, at [[paragraph]] 503.04 (noting that remediation expenses may be classified administrative expenses if actual and necessary to preserve estate). *But see In re* McCrory Corp., 188 B.R. 763, 765 (Bankr. S.D.N.Y. 1995) (holding that prepetition claims for cleanup costs properly classified as general unsecured claims).

FN91 *Supra* notes 6 & 7.

FN92 *See* Julian R. Franks & Walter N. Torous, *An Empirical Investigation of U.S. Firms in Reorganization*, 44 J. FIN. 747, 755 (1989) (noting that distributions issued to holders of unsecured claims are commonly only a fraction of the value of those claims).

FN93 42 U.S.C. 9607(l)(1) (1994).

FN94 *Supra* note 10.

FN95 11 U.S.C. § 507(a)(1)−(9) (1994) (providing specific listing of unsecured claims to be accorded special treatment).

FN96 Section 506(c) expenses are paid as administrative expenses (following payment of the secured creditors). 11 U.S.C. § 507(a)(1) (1994). The proposed amendment to 507 would grant the EPA priority over administrative expenses.

FN97 *See supra* note 8 (identifying five classes of claims, of which secured claims have greatest priority). Section 506(c) expenses are paid as administrative expenses (following payment of the secured creditors). 11 U.S.C. § 507(a)(1) (1994). The new priority level proposed to section 507 would classify EPA response cost claims as environmental priority payments (following payment of the secured creditors but preceding distribution of administrative expense claims). The combined application of the proposed amendments to § 506 and § 507 would yield greater recovery for the EPA.

FN98 *See id.* § 725 (stating rule that secured claims will be disposed of prior to final distribution to holders of unsecured claims).

FN99 *See supra* notes 57−65 and accompanying text (discussing alternative funds of revenue that would be generated from the IRC amendment).

FN100 42 U.S.C. § 9607(a) (1994) (outlining costs and damages recoverable under CERCLA).

FN101 *Id.*

FN102 Frankel, *supra* note 62, at 56 (indicating interest in economic stability supports reorganization over liquidation); McBain, *supra* note 19, at 234 (1992) (explaining how bankruptcy provides equality of distribution and an opportunity to reorganize); *see also* Bostwick v. United States, 521 F.2d 741, 744 (8th Cir. 1975) (recognizing that primary policy of Bankruptcy Act is debtor rehabilitation); *In re* Major Dynamics, Inc., 14 B.R. 969, 970 (Bankr. S.D. Cal. 1981) (noting Code's policy favoring debtor's rehabilitation).

FN103 The remaining balance of the EPA's remedial costs not recoverable under the CERCLA and IRC amendment would be subsequently discharged under the Code. *See supra* Part I (discussing the maximum portion of CERCLA claim recoverable by the EPA under proposed amendments).

FN104 In accordance with the IRC amendments, the debtor's basis in the property would be reduced. *Supra* note 62.

FN105 *See* Gary E. Claar, *The Case For Bankruptcy Priority For Environmental Cleanup Claims*, 18 WM. MITCHELL L. REV. 29, 33−34 n.20 (1992) (noting that authority stipulates that bankruptcy may not ignore environmental obligations). *But see* Solo, *supra* note 47, at 323 (stating that EPA does not support benefits for polluter).

FN106 I.R.C. § 61(a)(3); Treas. Reg. § 1.61−6 (1960).

FN107 This column includes the effect of the proposed amendments to the IRC.

FN108 This amount represents the Affected Creditor's share of the windfall. [9,000,000 x 25%].

FN109 The tax credit benefit to the Affected Creditor is subtracted to reflect the net recovery.

FN110 Total assets includes appreciation in remediated property.