Florida's Troubled Phosphate Companies: Can Bankruptcy Law Be Used to Relieve Their Obligation to Reclaim the Land?

Mary Jane Angelo

University of Florida Levin College of Law, angelo@law.ufl.edu

Follow this and additional works at: https://scholarship.law.ufl.edu/facultypub

Part of the Bankruptcy Law Commons, and the Environmental Law Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.
FLORIDA'S TROUBLED PHOSPHATE COMPANIES: CAN BANKRUPTCY LAW BE USED TO RELIEVE THEIR OBLIGATION TO RECLAIM THE LAND?

I. INTRODUCTION ................................................. 283

II. THE DEVELOPMENT OF THE PROBLEM ....................... 285
   A. Florida’s Phosphate Reclamation Laws ................. 285
   B. The United States Bankruptcy Code ...................... 286
   C. The Conflict ............................................. 288

III. RECENT DEVELOPMENTS ....................................... 290
   A. Dischargeability ......................................... 290
   B. The Automatic Stay Provision ............................ 293
   C. Abandonment .............................................. 296
   D. Summary .................................................. 299

IV. POSSIBLE SOLUTIONS .......................................... 300
   A. Dischargeability ......................................... 300
      1. Judicial solutions ...................................... 300
      2. Statutory solutions ..................................... 301
         a. Superlien and superpriority statutes ............ 301
         b. Other statutory solutions .......................... 304
      3. Recommended Solution .................................. 306
   B. Automatic Stay ........................................... 307
   C. Abandonment .............................................. 308

IV. CONCLUSION .................................................. 308

The conflict that brings us here arises when the earth is disturbed and the environment in which we live is threatened. . . . On the one hand are the corporations who mine phosphate reserves in Florida — their intentions are based on the argument that an ever-shrinking agrarian base in America must have fertilizer to remain effective and productive. On the other hand are the individuals and groups who oppose that mining and their argument is based upon the contention that such mining is too destructive of a unique and very fragile ecosystem.¹

I. INTRODUCTION

By the year 2000, phosphate companies will have mined over 160,000 acres of Florida land.² At the present rate, only one third of that land will be reclamation or in the reclamation process — leaving over 100,000 acres stripped of all vegetation and natural contours and posing potential health and envi-

¹. Keynote address by Cecil Andrus, Florida Defenders of the Environment & Environmental Service Center, Phosphate Mining in Florida: Assembly Statement (Nov. 27-29, 1984).

283
To complicate the scenario, current financial woes of Florida's phosphate industry are forcing several companies into bankruptcy court. Many fear these bankrupt companies will breach their obligation to reclaim mined lands.

This note will analyze whether Florida's financially burdened phosphate industry can employ bankruptcy law to escape its obligation to reclaim lands. Although courts have not specifically addressed the issue, bankruptcy case law

3. See generally Phosphate Mining in Florida: A Sourcebook, 91-107 (comp. by Florida Defenders of the Environment & Environmental Service Center 1984) [hereinafter cited as Phosphate Sourcebook]. In phosphate mining, the extraction and removal of matrix changes the surface geology. The strata of the soil above the matrix is rearranged and the natural surface contours are altered. Without reclamation the mined land is left in a pattern of alternating water filled mine cuts and spoil piles subject to erosion and poor water quality. Id. at 91-92.

Mining can also substantially alter hydrology by disrupting wetlands and streams. Effluent discharge into unmined streams can cause scouring of these streams. Phosphate mining also impacts groundwater by lowering the level of water in the surficial aquifer. Id. at 91-93.

Mining operations also cause the release of air pollutants. Phosphate mining involves the use of a crusher/grinder which releases particulate matter into the atmosphere. In addition, rock dryers, which process several hundred tons of rock per hour and are fired by natural gas or fuel oil, contribute fine particulate matter and sulfur dioxide to the air. Phosphate reserves contain radioactive materials including uranium and its decay products. Mining causes the release of gaseous and particulate radionuclides to the air. Radioactive materials may also be released into water. Release of radiation causes a serious health risk to workers and the general public. Id. at 93-95.

Mining also creates waste products such as slime and sand tailing which can negatively impact surface water quality. Id. at 95. Additionally, it may take 50 years for clay to settle out of slime ponds. Personal communication, Dr. Mark Brown, University of Florida Center for Wetlands (March 11, 1986). Slime ponds can significantly alter the hydrologic characteristics of the surficial aquifer. Phosphate Sourcebook, supra, at 96. Another by-product of phosphate mining is phosphogypsum, a compound similar to asbestos. Id. at 106. This compound accumulates in stacks at the mining site. Although studies show it is not toxic, it does lower water quality. Furthermore, the United States Environmental Protection Agency recently declared it will re-examine the effect of radioactive emissions from phosphogypsum piles. Id.

Phosphate mining operations also have serious effects on biological communities. These effects include permanently displacing certain plant communities, changing up to 30% of uplands and wetlands into aquatic habitat, degrading habitat quality, diminishing diversity and reducing local populations of ecologically significant species. Mining may also affect ecosystem function on adjacent land. Id. at 99. Finally, phosphate mining greatly reduces the aesthetic value of the mined land. Id. at 103.

4. The Florida Phosphate Industry in Transition, Phosphorous and Potassium, Nov.-Dec. 1985, at 25, 27 [hereinafter cited as Florida Phosphate Industry]. Two companies, Gardinier and Beker, have filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Id. Several other companies have reported financial losses on their mining operations in 1985, and prospects for 1986 do not look good. Id. The three main causes of Florida's phosphate industry's financial problems are foreign competition, the financial problems of farmers in the United States and the strength of the United States' dollar. Telephone interview with Elin Oak, Public Relations, Florida Phosphate Council (Jan. 20, 1986). Because of the decline in United States phosphate rock exports and domestic fertilizer consumption since 1975, Florida's phosphate industry cannot survive in domestic sales or in foreign competition. Florida Phosphate Industry, supra, at 26. The biggest foreign competitors are countries with government-subsidized industries and little environmental regulation such as Morocco, Tunisia and Algeria. Id.

5. Telephone interview with Helen Hood, Florida Defenders of the Environment (Jan. 20, 1986); see also Gainesville Sun, Jan. 9, 1986, at 3C, col. 1.
relating to the obligation of hazardous waste cleanup indicates how courts will likely treat the obligation to reclaim mined lands. This note will evaluate legal commentators’ proposed resolutions and comparable legislation of other states. This note concludes by proposing legislation to ensure compliance with Florida phosphate reclamation obligations.

II. THE DEVELOPMENT OF THE PROBLEM

A. Florida’s Phosphate Reclamation Laws

For seventy years, Florida has been a world leader in the production of phosphate rock.6 The harmful environmental impact of strip mining phosphate rock worsened as mining depleted phosphate reserves.7 In 1975, Florida passed legislation requiring phosphate companies to reclaim lands mined after July 1, 1975.8 The 1975 Act authorized refunds for the reclamation of lands mined prior to July 1, 1975 and established a fund to reclaim pre-July, 1975 lands.9 This fund derives its income from a tax on the gross value of phosphate at the point of severance.10

Pursuant to the 1975 Act, the Florida Department of Natural Resources promulgated rules governing the reclamation of these lands.11 These rules impose

---

6. PHOSPHATE SOURCEBOOK, supra, note 3, at iii.
7. Id.
8. Act of May 29, 1975, ch. 75-40, § 3, 1975 Fla. Laws 69, 70 (codified at Fla. Stat. § 211.32). Section 211.32(1)(a) provides:
   Each taxpayer shall institute and complete a reclamation and restoration program upon each site of severance subject to the taxes imposed by this part, in accordance with criteria adopted by the Department of Natural Resources, which shall include the following standards:
   1. Control of the physical and chemical quality of the water draining from the area of operation;
   2. Soil stabilization, including contouring and vegetation;
   3. Elimination of health and safety hazards;
   4. Conservation and preservation of remaining natural resources; and
   5. Time schedule for the completion of the program and the various phases thereof. . . . The mandatory obligation . . . under this paragraph shall not apply to acres disturbed by the severance of solid minerals before July 1, 1975.
10. Fla. Stat. §§ 211.3105(3)-(4) (1985) (explaining tax rate). Chapter 211 allocates the tax as follows: 50% goes to the Conservation and Recreation Lands Trust Fund; 30% goes to the General Revenue Fund of the state; 10% goes to the Nonmandatory Land Reclamation Trust Fund for reclamation and acquisition of unreclaimed lands not subject to mandatory reclamation; 5% goes to the Phosphate Research Trust Fund to carry out the purposes of Chapter 378, and 5% goes to pay counties in proportion to the number of tons of phosphate rock produced within the county. Id. § 211.3105(1).
(1) The intent of these rules is to assure that:
minimum standards on reclamation programs for the control of the quality of water draining from the land, the stabilization of the soil, the elimination of health and safety hazards, and the conservation and preservation of natural resources remaining on the land. These rules also establish a time schedule for the program's completion. In 1980, the Department amended the rules to require mining companies to file conceptual reclamation plans for each mine and restore wetlands and drainage patterns.

Land reclamation costs represent a substantial financial burden for the phosphate industry. With the exception of wetlands mining, however, the costs do not deter prospective operators. The total cost of compliance with Florida's environmental legislation, of which reclamation is one element, is between ten and fifteen percent of overall operating costs. Foreign competition from countries with government supported industries and current financial problems of American farmers have created severe financial hardships for the phosphate industry. These external factors have forced several corporations into bankruptcy.

B. The United States Bankruptcy Code

The purposes of the federal Bankruptcy Code are to distribute the assets of the bankrupt's estate among creditors and to allow the debtor a fresh start. Businesses file for bankruptcy primarily to be discharged from all prior debts. Discharge for a commercial debtor may occur under either a Chapter 7

(a) Florida's lands, waters and wetlands . . . are reclaimed and restored . . .
(b) Criteria are established so that mined areas are returned to useful purposes in an expeditious fashion.
(c) The natural resources of the state are protected and, where mining inevitably disrupts certain areas, those areas will be returned to healthful, safe, aesthetic, and useful purposes.

Id. 16C-16.011(1)(a)-(c).
12. Id. 16C-16.051.
13. Id. 16C-16.051(12).
14. FLA. ADMIN. CODE 16C-16.041 establishes the minimum requirements of the conceptual plan.
15. FLA. ADMIN. CODE 16C-16.051(5) sets out the requirements for wetlands restoration. FLA. ADMIN. CODE 16C-16.051(7) establishes the standards for restoring drainage patterns.
17. Id. at 26-27.
18. Id.
19. See supra note 4 and accompanying text.
21. See, e.g., Kokoszka v. Belford, 417 U.S. 642, 645-46 (1977); see also Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (bankruptcy law gives the debtor a fresh start "unhampered by the pressure and discouragement of pre-existing debt").
liquidation or a Chapter 11 reorganization. Under Chapter 11, a business can reorganize its financial affairs and continue as a going concern.

The Code defines "debt" as "liability on a claim," and such debts are subject to discharge. While creditors claiming debts can share in the bankrupt estate, the estate's assets are generally insufficient to pay all creditors.

The Code establishes a priority system for creditors' recovery. First in line are secured creditors, whose claims are satisfied from the property subject to lien. Estate assets are then used to pay off administrative expenses, including the costs of bankruptcy proceedings, the cost of operating the business during the pendency of the bankruptcy, and other necessary costs of preserving the estate. Remaining funds are applied to unsecured claims such as wages. The Code accords taxes the least priority and completely precludes non-tax debts to the government. Estate assets are usually depleted before satisfaction of these government debts.

24. Id. § 1141.
25. See, e.g., In re Winshall Settlor's Trust, 758 F.2d 1136 (6th Cir. 1985).
26. 11 U.S.C. § 101(11) (1982). A claim can be either a right to payment or a right to an equitable remedy for breach of performance, regardless of whether that right has been reduced to a judgment. Id. § 101(4).
27. See id. §§ 1141 (discharge of debts under reorganization plans), 727 (discharge in liquidation), 1328(b) (discharge of debts of individuals in rehabilitation plans) (1982 & Supp. III 1985).
28. Id. §§ 506-507.
29. Id. § 506.
(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . .
(b) To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.
Id.
30. Id. § 507(a)(1) (1982).
32. Id. § 507(a)(7) (Supp. III 1985).
Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for —
(A) a tax on or measured by income or gross receipts . . . ;
(B) a property tax . . . ;
(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;
(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection . . . ;
(E) an excise tax . . . ;
(F) a customs duty arising out of the importation of merchandise . . . ;
(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.
Id.
33. Cf. supra note 32 (allowed government debts are taxes, duties, and related penalties).
34. See Drabkin, Moorman & Kirsch, supra note 22, at 10,171-72.
In addition to discharging debts, the Code protects the bankruptcy estate by establishing an automatic stay provision and an abandonment of burdensome property provision. The automatic stay provision freezes most claims against the debtor during the bankruptcy proceedings. The stay provision provides immediate temporary relief from creditors’ demands and preserves the estate’s assets for orderly and equitable distribution under the Code. Exceptions from the stay provision include an allowance for the government to commence or continue legal proceedings against the debtor and a provision allowing actions to enforce non-money judgments the government obtains.

The Code’s abandonment provision permits the trustee or receiver to abandon property that is burdensome or inconsequential to the estate. Abandoned property usually reverts back to the debtor, and lienors can proceed against such property outside of bankruptcy court. Abandonment facilitates collection and orderly distribution, which would otherwise be hindered by retaining burdensome or low-value property.

C. The Conflict

On one hand, mandatory land reclamation ensures that mining-disrupted areas are returned to a healthy, safe, aesthetic and useful condition. Courts that discharge phosphate companies’ reclamation obligations will thwart the goals of reclamation laws. On the other hand, the Bankruptcy Code operates to give debtors a fresh start and provide maximum satisfaction to creditors. If bankrupt phosphate companies deplete assets to meet reclamation costs, innocent creditors may be unable to recover against the bankrupt companies’ estates. Important policies of state environmental law and federal bankruptcy law are in direct conflict.

Many legal commentators have recently addressed the growing use of bankruptcy to escape the burdens of hazardous waste cleanup under state and federal law. Although the conflict between hazardous waste cleanup and bankruptcy resembles the land reclamation bankruptcy conflict, several important distinctions exist. First, because hazardous waste cleanup usually follows a spill or

---

36. Id. § 554(a) (Supp. III 1985).
38. Id.
40. Id. § 362(b)(5).
41. Id. § 554 (Supp. III 1985).
43. See, e.g., Drabkin, Moorman & Kirsch, supra note 22, at 10,172.
leak of hazardous substance, the costs are often unexpected. A land reclamation plan, alternatively, is a prerequisite to commencing mining operations in Florida. Each mining corporation knows approximate reclamation costs before mining begins. Second, hazardous waste cleanup costs can be exorbitant, often driving corporations into bankruptcy. In comparison, reclamation costs are relatively low.

Federal and state hazardous waste laws impose strict liability on parties involved in the generation, transportation, or disposal of hazardous substances. Numerous defendants are frequently available for hazardous waste facility litigation. Many courts interpret federal hazardous waste statutes to impose joint and several liability. If one potential defendant faces bankruptcy, the government may still obtain total recovery from other responsible parties. Even if all defendants are judgment proof, federal hazardous waste law establishes a fund to effectuate cleanup.

In phosphate mining, only one corporation is generally responsible for a

45. Comprehensive Environmental Response, Compensation and Liability Act, § 106, 42 U.S.C. § 9609 (1982) [hereinafter cited as CERCLA] (when the President demonstrates there may be an imminent and substantial endangerment to the public health or welfare or to the environment from an actual or threatened release of hazardous substances, he may require relief necessary to abate the danger or threat); CERCLA § 107, 42 U.S.C. § 9607 (persons covered by CERCLA include anyone involved in transporting, disposing of or treating hazardous wastes which are released or which threaten a release into the environment).

46. FLA. ADMIN. CODE 16C-16. The Department of Natural Resources regulations adopted pursuant to Chapter 211 of the Florida Statutes require the operator of each mine subject to the severance tax to submit a conceptual plan six months prior to beginning mining operations. These plans must provide sufficient information to allow long-range planning of reclamation activities. See id. 16C-16.041.


48. See Drabkin, Moorman & Kirsch, supra note 22, at 10,169. The authors point out environmental cleanup obligations created by CERCLA may have no relation to the size of the organization. Therefore, small companies may be faced with outrageous cleanup costs. When a company faces environmental obligations grossly out of proportion to size of business or unanticipated, it has no choice but to file for bankruptcy. Id.

49. See supra text accompanying notes 17-18.


51. See, e.g., Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1139 (E.D. Pa. 1982) (potential defendants under CERCLA included the chemical company that generated the toxic wastes, two independent companies that hauled and disposed of the waste and the city that owned and operated the dump).


division of mined land.54 The Florida reclamation statute precludes joint and several liability. If courts apply bankruptcy law to discharge mining corporations from their reclamation obligations, the State of Florida must reclaim the land. Although the statute does establish a fund for reclamation, it is limited to lands mined prior to the 1975 mandatory reclamation law.55

III. RECENT DEVELOPMENTS

A. Dischargeability

In 1985, the United States Supreme Court first addressed the conflict between bankruptcy and hazardous waste law. The issue in Ohio v. Kovacs56 was whether an obligation to clean-up hazardous waste is a dischargeable debt under the Bankruptcy Code.57 The State of Ohio sued the principal owner and executive director of a hazardous waste disposal facility for violations of state common law.58 The defendant entered a stipulation requiring him and other defendants to remove waste from the disposal site. The stipulation enjoined defendants from continuing to pollute the air and water and ordered them to pay $75,000 to the state for damages to wildlife.59 After the defendants failed to comply with the stipulation, the state court appointed a receiver to repossess defendant's assets and initiate the hazardous waste cleanup.60 Kovacs filed for bankruptcy under Chapter 11 of the Code.61

The state sought a declaration that Kovacs' obligation to remove the waste was not dischargeable in bankruptcy.62 The bankruptcy court held the obligation was dischargeable because it was a "claim" under the Code.63 The district court and court of appeals affirmed.64 The Supreme Court affirmed the lower courts' decision allowing the discharge of the obligation.65 The Court agreed with the Sixth Circuit that the cleanup obligation had been converted to a money judgment.66 The Court emphasized the state court's appointment of a receiver had disabled Kovacs' ability to remove waste from the site.67 The Court concluded the state sought an obligation that was dischargeable under the Code.68

54. Phosphate Sourcebook, supra note 3, at 25 (currently 12 phosphate companies are independently mining in Florida).
55. See supra notes 9-10 and accompanying text.
57. Id. at 707.
58. Id.
59. Id.
60. Id.
61. Id. Kovacs later converted the petition to a liquidation in bankruptcy under Chapter 7 of the Code. Id. at 707 n.1.
62. Id. at 707.
65. 105 S. Ct. at 712.
66. Id. at 709-11.
67. Id.
68. Id.
Although Kovacs will influence future cases, the unique and complicated circumstances may limit its application. The Kovacs Court maintained its decision did not protect the debtor from criminal prosecution, discharge an obligation to pay a fine or penalty, or excuse the site owner from complying with environmental laws. The Court expressly declined to address the legal consequences had a receiver not been appointed.

Nevertheless, a recent Florida case applied Kovacs where a receiver was not appointed. In United States v. Robinson, the United States brought an action to force a debtor to restore a salt marsh. Robinson had violated provisions of the Rivers and Harbors Act and the Clean Water Act by placing fill material on the marsh, destroying the marsh vegetation, and placing a concrete patio and a trailer on the filled area without a permit. The district court entered judgment against the defendant and ordered Robinson to remove the fill, replant the area with marsh plants, and remove the patio and trailer.

After refusing to comply, Robinson filed for protection under Chapter 7 of the Bankruptcy Code. Reasoning the district court's order to restore the marsh was not a 'claim' under the Code, the United States argued the item was not dischargeable. Relying on Kovacs, the bankruptcy court held Robinson's obligation could be reduced to a monetary debt and was dischargeable under the Code. The court refused to accept the government's argument that Kovacs was distinguishable inasmuch as the court-appointed receivership in Kovacs precluded the defendant from effectuating the clean-up through his own labor. The court noted the government neither barred Robinson from the site nor rendered him less able to perform the restoration. The defendant could still not perform the obligation through his own labor and without expense to the estate. Even if Robinson

---

69. Kovacs was an individual, not a corporation as in most hazardous waste cleanup cases. See Baird & Jackson, supra note 44, at 1208-12 (discussing differences between corporations and individuals in bankruptcy).

70. 105 S. Ct. at 711; see also In re Daugherty, 25 Bankr. 158, 160-62 (Bankr. E.D. Tenn. 1982) (holding a judgment for a civil penalty for violations of Tennessee Mineral Surface Mining Law was excepted from the debtor's discharge under the Bankruptcy Code).

71. 105 S. Ct. at 711.


73. Id. at 137.


76. 46 Bankr. at 137.

77. Id.

78. Id.

79. Id. at 137-38.

80. Id. at 138. The United States argued that it sought a remedial action, rather than a claim, which cannot be affected by a discharge. Id.

81. Id. at 138-39.

82. Id. at 139.

83. Id.

84. Id. The court stated: We have concluded that extension of Kovacs will allow greater fidelity to the principles expressed by the Supreme Court as we understand them, than would finding the factual
could acquire the expertise and equipment to remove the fill and restore the marsh, he would have to purchase the plant stock necessary for the restoration. Compliance with the court's order would therefore be a monetary cost to the bankrupt estate. The Robinson case suggests courts will extend Kovacs to any case where the debtors cannot comply with the order without spending money. A court would likely treat a debtor/phosphate company's obligation to reclaim lands as a dischargeable debt under the Bankruptcy Code.

Once an obligation becomes subject to discharge a court must position the debt within the Code's priority system. If courts regard obligations to comply with environmental laws as non-tax debts to the government, the items will not have priority under the Code. Federal and state environmental agencies would rarely recover their hazardous waste cleanup costs because the bankrupt estate's assets would be consumed by higher priority creditors. The United States Environmental Protection Agency and several state agencies have attempted to secure judicially-established priorities for hazardous waste cleanup claims. Environmental debts falling within the Code's administrative priority section will be paid first after all secured creditors are paid. After paying secured creditors, however, the estate frequently lacks assets to pay administrative expenses. These agencies have asserted that environmental cleanup costs constitute a "superlien" under Code section 506(c). The superlien provision allows the trustee to recover from secured assets. Case law provides little support for either of the agencies' assertion.

An isolated decision supporting the treatment of hazardous waste cleanup as an administrative expense is In re T.P. Long Chemical, Inc. In Long, the United States Environmental Protection Agency (EPA) sought reimbursement from the bankrupt estate for costs incurred in removing hazardous waste from the estate's property. The bankruptcy court ruled that the EPA was entitled

---

85. Id.
86. Id.
87. See Drabkin, Moorman & Kirsch, supra note 22, at 10,171-72 (describing Code's priority system).
88. Id. at 10,172-73.
89. Id. at 10,177 (EPA has argued that hazardous waste cleanup costs should take first priority among the unsecured creditors as administrative expenses) (citing Memorandum from Courtney M. Price, Assistant Administrator for Solid Waste and Emergency Response, EPA, Guidance Regarding CERCLA Enforcement Against Bankrupt Parties (May 24, 1984)).
90. See Drabkin, Moorman & Kirsch, supra note 22, at 10,177.
91. Id.
92. Id.
93. Id.
95. Id. at 280.
BANKRUPTCY USED TO RELIEVE OBLIGATION TO RECLAIM LAND

1986]

...to partial reimbursement as a first priority administrative expense. The court premised its decision on the Bankruptcy Code’s classification of actual necessary costs of estate preservation as administrative expenses. The court rejected EPA’s claim that cleanup costs constituted a superlien under Code section 506. For EPA to recover from another creditor’s secured interest, the court stated that the secured creditor must receive a benefit from the removal action.

In contrast, a bankruptcy court in the earlier case of In re Berg Chemical Co. granted superlien status to hazardous waste cleanup costs. In Berg, New York City agreed to apply city funds to hazardous waste cleanup in exchange for first priority in the Berg Chemical Company’s bankruptcy proceedings. The court found the cleanup would improve the prospects for the sale of the land and that the secured creditors were adequately protected. Since this order was entered by agreement of the parties, its application to future cases is unclear.

B. The Automatic Stay Provision

An important issue arising from the bankruptcy/environmental law conflict is whether government actions to compel compliance with environmental laws are subject to the Code’s automatic stay provision. The stay provision precludes enforcement of money judgment proceedings but allows government actions for injunctions, enforcement of injunctions and entry of money judgments to proceed. The Code’s legislative history indicates Congress intended to ex-

96. Id. at 287.
97. Id. The court stated the cost incurred by the EPA in cleaning up the site was an actual necessary cost of preserving the state. Id.
98. Id. at 288-89.
99. Id.
100. No. 82-B12052(HB) (Bankr. S.D.N.Y. July 9, 1984) (emergency order).
101. Id.
102. Id.
103. Id.
104. Id.
106. Section 362 provides:
   (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of —
      (1) the commencement or continuation ..., of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
      (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
   ...
   (b) The filing of a petition under section 301, 302, or 303 of this title ... does not operate as a stay —
   ...
   (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power;
cept governmental actions to protect the public health and safety from the automatic stay provision, but not to except government actions directed solely at protecting the government’s pecuniary interests. The automatic stay provision gives the debtor temporary relief from creditors’ demands and protects estate assets for orderly distribution. The legislative history specifically excepts actions to prevent or stop violation of environmental protection laws.

If a state or federal environmental agency brings an action under the exception provision, courts consistently allow the action to proceed, even if a money judgment is sought. A conflict arises where the enforcement of an earlier judgment is based on police or regulatory powers. The issue in these cases is whether the order sought to be enforced is an injunction or a money judgment. In Kovacs the state of Ohio filed suit in state court to force Kovacs to disclose his current employment status and income, seeking to apply part of his postpetition earnings to the receiver’s cleanup actions. The Sixth Circuit held the suit was subject to the automatic stay provision, inasmuch as the state sought a money judgment. The court indicated any injunction requiring the expenditure of funds is subject to the automatic stay provision as a money judgment. Although the Supreme Court’s decision that Kovacs’ obligation had been discharged vacated the Sixth Circuit’s holding, the Supreme

---

107. See H.R. Rep. No. 595, 95th Cong., 2d Sess. 343, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 6299 (where a governmental unit is suing a debtor to enforce police or regulatory powers, the action is not stayed).

108. See Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267, 271 (3d Cir. 1984) ("The general policy behind this section [362] is to grant complete, immediate, albeit temporary relief to the debtor from creditors, and also to prevent dissipation of the debtor's assets before orderly distribution to creditors can be effected."); see also H.R. Rep. No. 595, 95th Cong., 2d Sess. 340, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6296-97 (discussing protection that automatic stay gives debtor and creditor).


Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

110. See In re Canarico Quarries, Inc., 466 F. Supp. 1333 (D.P.R. 1979) (court refused to stay an action by a state environmental agency to bring quarry operations into compliance with state and federal environmental laws even though compliance would cost money); Illinois v. Electrical Utils. Co., 41 Bankr. 874 (Bankr. N.D. Ill. 1984) (court allowed first instance judgment enforcing government police power to proceed regardless of whether the requested relief would cost money).

111. 681 F.2d 454 (6th Cir. 1982), vacated and remanded for consideration of mootness, 459 U.S. 1167 (1983), dismissed as moot, 755 F.2d 484 (6th Cir. 1985).

112. Id. at 456.

113. Id.

114. See id.
Court’s opinion suggested the Sixth Circuit’s approach may be valid. The Supreme Court concluded the receivership effectively converted the cleanup into an obligation to pay money.115

At least one district court relied on the Sixth Circuit’s Kovacs opinion to stay an action brought by the United States against the Johns-Manville Corporation to enforce a hazardous substance clean-up.116 In Johns-Manville, the United States and the state of New Hampshire sought to enforce an injunction against continued asbestos waste disposal and have Johns-Manville ordered to cleanup the site.117 Already facing approximately 16,000 products liability claims and an uncertain number of potential future claims, Johns-Manville filed for bankruptcy under Chapter 11.118 The bankruptcy court issued a broad restraining order staying all actions against the corporation.119 The United States and New Hampshire contended their actions were excepted from the stay.120 Reasoning that part of the relief sought required the expenditure of substantial funds, the district court affirmed the bankruptcy court’s decision to stay the United States and New Hampshire actions.121 Enforcement of the order would constitute an enforcement of a money judgment, which is not within the stay provision’s exceptions.122

Other cases employ a different approach to injunctions requiring the expenditure of money. In Penn Terra Ltd. v. Department of Environmental Resources,123 the state of Pennsylvania sued an operator of coal surface mines to force compliance with state environmental laws.124 The Third Circuit followed United States v. Price125 and found the state action subject to the stay’s exception, because it sought an equitable injunction to prevent future harm to the environment.126 The court refused to undermine the stay provision exception by classifying all orders that required some expenditure as money judgments.127

This split leaves unclear how courts will address actions brought by the State of Florida to force debtors to comply with reclamation laws. The legislative

117. Id. at 20,310-11.
120. Id.
121. Id. at 20,312.
122. Id. at 20,311-12 (emphasizing that the government could have cleaned up the site and then proceeded against the debtor for reimbursement).
123. 733 F.2d 267 (3d Cir. 1984).
124. Id. at 269-70.
125. 688 F.2d 204 (3d Cir. 1982). The Price court focused on the nature of the injury to determine whether the traditional remedy for such a judgment was monetary or injunctive. Id. at 213. The court noted that courts traditionally award money damages as compensation for past injury, whereas equitable injunctions are granted to protect against future harm. Id. at 211-14. Therefore, just because injunctive relief requires the expenditure of money does not mean that it is a money judgment under the Code. Id. at 212.
126. Penn Terra, 733 F.2d at 278.
127. Id. at 277-78.
history suggests such actions should be excepted inasmuch as they protect public health and safety rather than the government's pecuniary interests. The Ko\v{a}acs appellate decision and Johns-Manville indicate that some courts may treat actions to compel reclamation as money judgments subject to the stay provision. Reclaiming mined land undoubtedly requires monetary expenditures. Under the Penn Terra approach, however, actions compelling compliance with state mining reclamation laws will not be stayed during the pendency of the bankruptcy proceedings.

C. Abandonment

The Supreme Court first addressed abandonment in early 1986. In Midatlantic National Bank v. New Jersey Department of Environmental Protection, a waste processing facility violated its operating permit by accepting oil contaminated with carcinogenic PCBs. While the New Jersey Department of Environmental Protection (NJDER) and the facility owner were negotiating the owner's obligation to cleanup the site, the owner filed a petition in bankruptcy under Chapter 11. The action was converted to a Chapter 7 liquidation proceeding. The NJDER immediately issued an administrative order requiring the owners to cease operations, close the facility, and cleanup all hazardous materials. An investigation of the owner New York facility revealed they had accepted and stored large quantities of PCB-contaminated oil in deteriorating and leaky containers. Since the mortgages on the facility's real property exceeded the property's value, the estimated cost of disposing of the waste oil rendered the property burdensome to the estate. Unable to sell the New York property, the facility owner's trustee notified the New York bankruptcy court that he intended to abandon the property. In separate actions involving the

128. See supra notes 107-09 and accompanying text.
129. See supra notes 111-22 and accompanying text.
130. See supra notes 123-27 and accompanying text.
132. Id. at 757 (Quanta had over 400,000 gallons of contaminated oil stored at its New Jersey site).
133. Id.
134. Id.
135. Id.
136. Id. at 758 (Quanta had over 70,000 gallons of contaminated oil stored at its New York site).
137. Id.
138. Id. Under section 554 of the Bankruptcy Code, the trustee may abandon property burdensome to the estate:
   (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
   (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate or that is of inconsequential value and benefit to the estate. . . .
   (d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.
11 U.S.C. § 554 (Supp. III 1985). None of the parties to the bankruptcy proceeding disputed that
New York and New Jersey facilities, the state agencies argued abandonment violated state law requiring that oil contaminated with PCBs be stored and disposed of in compliance with state regulations. The state agencies further argued abandonment posed a threat to public health and safety in that leaking oil tanks created a risk of spillage into the Hudson River. The agencies contended the estate possessed sufficient funds to cleanup the site.

Both bankruptcy courts authorized the trustee abandonment of the properties. In two separate opinions the Third Circuit Court of Appeals reversed, holding the bankruptcy trustee had no right to abandon estate property where abandonment contravened state public health and safety laws. Consolidating the New York and New Jersey cases, the Supreme Court, in a five to four decision, affirmed the appellate court’s holding. The Court stated that Congress neither intended the abandonment provision to preempt all state and local laws nor provided the trustee carte blanche to ignore nonbankruptcy law. By codifying the judicially developed rule of abandonment, Congress presumably included the doctrine limiting the abandonment power to protect legitimate state and federal interests. Stressing the importance of protecting the environment

the site was burdensome within the meaning of section 554. Midatlantic, 106 S. Ct. at 758. The trustee later gave notice he intended to abandon the New Jersey site as well. Id.

141. Midatlantic, 106 S. Ct. at 758-59.
142. Id. at 758; see also In re Quanta Resources Corp., 739 F.2d 927, 928 (3d Cir. 1984), aff’d, 106 S. Ct. 755 (1986).
144. Midatlantic, 106 S. Ct. at 758. The bankruptcy court did not require the trustee to take even minor steps to reduce the imminent danger of the hazardous wastes. Furthermore, the abandonment at both sites aggravated the danger by removing security measures that prevented public entry, vandalism, and fire. Id. at 755 n.3.
145. Id. at 759; see also In re Quanta Resources Corp., 739 F.2d 927, 928-29 (3d Cir. 1984) (New Jersey litigation), aff’d, 106 S. Ct. 755 (1986); In re Quanta Resources Corp., 739 F.2d 912, 921-23 (3d Cir. 1984) (New York litigation), aff’d, 106 S. Ct. 755 (1986).
147. Id. at 759-60.
148. Id. at 760. The Court reasoned:

Where the Bankruptcy Code has conferred special powers upon the trustee and where there was no common-law limitation on that power, Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety. One cannot assume that Congress, having placed those limitations upon other aspects of trustees’ operations, intended to discard a well-established judicial restriction on the abandonment power.

Id. (citation omitted).
149. Id. at 760-62. The court noted that prior to the 1978 revisions of the Bankruptcy Code, the trustee’s abandonment power was limited by a judicially created doctrine intended to protect legitimate state or federal interests. Id. at 758. In holding that Congress intended this judicially created limitation on abandonment to be included in section 554, the Court relied on the pre-1978 case of Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952). The Ottenheimer court held that a bankruptcy trustee could not abandon several barges when the abandonment would have obstructed navigable waters in violation of federal law. 198 F.2d at 290. The court reasoned that the aban-
against toxic pollution, the Court held a trustee may not abandon property in contravention of state statutes or regulations reasonably designed to protect the public health or safety from identified hazards.150 The four dissenters argued Congress' failure to expressly provide for an exception to the abandonment provision implied no such exception exists.151 The dissenters recommended a more limited exception proscribing abandonment only where it created an emergency.152

Midatlantic prohibits courts from allowing abandonment of hazardous waste facilities posing health and safety threats. The applicability of Midatlantic to other situations is unclear. A trustee of a bankrupt phosphate mining company, for example, may determine the unrestored mined land is inconsequential or burdensome to the estate especially given the costs associated with reclamation.153 While health and safety hazards accompany phosphate mining, reclamation laws are directed towards restoring lands to a more natural and useful state.154 Hazardous waste cleanups, like that in Midatlantic, alternatively operate to protect the public from the dangers of exposure to hazardous materials.155 A court will

---

150. 106 S. Ct. 762-63.
151. Id. at 763. Justice Rehnquist wrote the dissent, and Chief Justice Burger and Justices White and O'Connor joined the dissent. The dissent stated:
I remain unconvinced by the Court's arguments supporting state power to bar abandonment. The principal and only independent ground offered — that Congress codified "well-recognized restrictions of a trustee's abandonment power" — is particularly unpersuasive. It rests on a misreading of three pre-Code cases, the elevation of that misreading into a "well-recognized" exception to the abandonment power, and the unsupported assertion that Congress must have meant to codify the exception (or something like it).

152. Id. at 767. The dissent concluded:
I likewise would not exclude the possibility that there may be a far narrower condition on the abandonment power than that announced by the Court today, such as where abandonment by the trustee itself might create a genuine emergency that the trustee would be uniquely able to guard against. The United States in its brief as amicus curiae suggests, for example, that there are limits on the authority of a trustee to abandon dynamite sitting on a furnace in the basement of a schoolhouse.

153. The Midatlantic Court stated the abandonment power should not preempt legitimate state laws designed to protect public health or safety from an identified hazard. Id. at 762.
154. See Fla. Admin. Code 16C-16.011(c) (intent of mine reclamation regulations is to restore lands to healthful, safe, aesthetic and useful state).
155. See CERCLA § 106(a), 42 U.S.C. § 9606(a) (1982) (providing for abatement actions when there may be an imminent and substantial endangerment to the public health or welfare of the environment).
likely demonstrate greater willingness to allow abandonment of burdensome mined lands than burdensome hazardous waste facilities.

If a court permits the trustee of the bankrupt phosphate company to abandon valueless land, the land reverts back to the debtor-corporation,
\footnote{156. See Drabkin, Moorman & Kirsch, supra note 22, at 10,172.} separating the unreclaimed land from the assets of the bankrupt estate.\footnote{157. Id.} With all assets under the trustee’s control, the debtor cannot effectuate the restoration. Absent state intervention, the mined land will remain unreclaimed.

D. Summary

An inability to produce uniform law arises from the continuing conflict between the environmental protection of public health and welfare, the economic interests that the Bankruptcy Code protects, and the interest of avoiding unnecessary government expenditure. Kovacs’ treatment of environmental obligations as dischargeable debts protects the interests of debtors and creditors but forces environmental agencies to finance cleanups and reclamations. Although courts could confine Kovacs to instances where the appointment of a receiver precludes the debtor from undertaking restoration, recent cases suggest Kovacs has greater applicability.\footnote{158. Kovacs does not assign a priority to environmental obligations. Courts have been reluctant to accord administrative expense or superpriority status to environmental obligations.} A bankrupt estate will generally be exhausted before it can finance environmental cleanup costs. While ensuring that secured and unsecured creditors obtain maximum satisfaction, this approach allows debtors to evade the costs of environmental cleanups at the government’s expense.

Case law governing the automatic stay provision is likewise confusing.\footnote{159. Id.} Some jurisdictions treat government actions to enforce injunctions as money judgments subject to the stay provision because the bankrupt estate must outlay funds to comply with the injunctions.\footnote{160. Id.} This gives the debtor temporary relief and preserves the estate’s assets for the Code’s orderly distribution scheme. This approach contravenes the Code’s explicit provision that government actions to enforce injunctions are not subject to the stay.\footnote{161. Id.} Observing that all injunctions require some monetary outlay,\footnote{162. Id.} some courts protect the interests of the government by refusing to stay the actions.\footnote{163. See supra text accompanying notes 123-27.}

The Midatlantic decision demonstrates courts will not allow abandonment of hazardous waste facilities posing a risk to health and safety.\footnote{164. Whether courts will similarly treat the abandonment of other environmental hazards is unclear.}
The problems associated with the phosphate reclamation/bankruptcy conflict merit a judicial or statutory resolution.

IV. Possible Solutions

A. Dischargeability

1. Judicial Solutions

To accommodate the competing interests between phosphate reclamation and bankruptcy, states could pay the costs of reclaiming the bankrupt companies’ land and then recover from the bankrupt estate’s assets as either administrative expenses or a Code superpriority. While this approach ensures the reclamation of mined land and maximum reimbursement to the state, problems remain. First, the state must raise money to finance the restoration before it may bring an action for compensation in bankruptcy court. If the state lacks adequate financing, reclamation may never occur.

Second, the estate’s assets, which would otherwise be allocated to innocent creditors under the Code, are instead employed to defray reclamation costs. Innocent creditors suffer. Superpriority status may also require unsecured creditors to obtain security, making it increasingly difficult for the already financially troubled phosphate industry to obtain financing.

Third, if courts treat environmental obligations as first priority administrative expenses, normal administrative claimants may not recover anything due to extensive reclamation costs. Secured creditors, administrative claimants and unsecured creditors would all have to protect their interests by other means. Acknowledging these concerns, recent cases suggest courts will not likely treat reclamation costs as administrative expenses or Code superpriorities.

Some commentators suggest courts could resolve the hazardous waste law/bankruptcy conflict by balancing economic interests against public health and safety interests. One possible model is the “balancing-of-the-equities” approach the Supreme Court adopted in a recent conflict between the Bankruptcy Code and federal labor relations law. Under a balancing approach, a court must first identify the interests of the debtor, the government, the creditors and the public. After characterizing these interests as either economic or public

166. See supra text accompanying notes 89-93.
167. Florida has a fund to pay only for reclamation of pre-July 1975 mined lands. See supra notes 9-10 and accompanying text.
168. See Drabkin, Moorman & Kirsch, supra note 22, at 10,177.
169. Id.
170. Id.
171. Id.
172. See supra text accompanying notes 87-104.
173. See Note, supra note 37, at 1063.
174. See NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984) (holding that a Chapter 11 debtor may reject a labor union contract as burdensome to the estate only if a careful scrutiny reveals that the equities balance in favor of rejecting the contract); see also Note, supra note 37, at 1063-65.
175. See Note, supra note 37, at 1065.
health and safety, the court determines the qualitative differences between the
types of hardship to each party. The court would then evaluate the quanti-
tative degree of hardship that each party would experience when his interests
were subordinated. This evaluation focuses on the magnitude of both the risk
that environmental hazard presents to the public and the government’s economic
loss, according extra weight to protecting the public health and safety. Courts
would also assess the good or bad faith of the parties.

The balancing approach requires a comprehensive analysis of the various
parties' interests. Because the proposed considerations are vague and amorph-
sous, courts will encounter difficulty in attempting to uniformly address com-
plcated circumstances and important interests. Inherent in the environmental
law/bankruptcy conflict are interests such as “aesthetics” and “environmental
quality,” which cannot be easily reduced to quantitative terms. Accordingly,
many commentators advocate direct federal or state legislation to resolve the
conflict.

2. Statutory Solutions

a. Superlien and superpriority statutes

Several states recently enacted statutes giving state environmental law claim-
ants priority in bankruptcy proceedings. These “superlien” or “superpriority”

---

176. Id.
177. Id. at 1074.
178. Id. (courts should look at such factors as form, amount and toxicity of substance present, the population at risk, the potential for contamination of drinking water, the danger of fire or explosion and the danger of human, animal or food chain exposure to highly toxic substances in calculating the magnitude of risk).
179. Id. at 1084-85 (federal policy of hazardous waste law and bankruptcy law substantially subordinates economic interests to public health and safety interests).
180. Id. at 1076. For example, if a debtor acted in bad faith in filing for bankruptcy or in violating environmental laws, or if the government acted in bad faith in attempting to avoid its cleanup responsibility, their interests would carry little weight. Id. at 1078-80. Courts should also consider whether the debtor has adhered to legal duties and whether the debtor was motivated solely to evade environmental obligations in determining bad faith. Id. at 1078. In determining the government’s bad faith, courts should look to the motive of the government and to whether the government attempted to characterize its solely economic interests as an exercise of police and regulatory power. Id. at 1079-80.
182. See, e.g., Paige, supra note 44, at 379 (suggesting that Congress, not the courts, should determine whether the goals of Bankruptcy should be preempted by environmental interests).
provisions apply to both secured and unsecured claims. Congress has considered a similar bill giving priority to claimants under federal hazardous waste statutes. Problems associated with these statutory solutions include insufficient notice to creditors, negative effects on conveyances of real property, and preemption.

Massachusetts has the most comprehensive superpriority statute as part of its comprehensive state superfund act. Under the Massachusetts superpriority statute, a debt constitutes a lien on all property owned by parties liable under the Act when notice of a claim is recorded or filed. Any lien recorded, registered, or filed under that section has priority over prior encumbrances recorded, registered, or filed. The Act excepts real property devoted to single or multifamily housing. The lien presumably has priority over all mortgages, including those granted before the claim was filed. Absent this priority position, legislators reason prior mortgagees would be unjustly enriched by foreclosing on property which the state cleaned up.

The New Jersey superlien statute accords government expenditures made pursuant to the Act a first priority claim and lien. Like the Massachusetts

---

185. See, e.g., Schwenke & Lockett, supra note 44, at 3.

Any liability to the commonwealth under this chapter shall constitute a debt to the commonwealth. Any such debt, together with interest thereon . . . shall constitute a lien on all property owned by persons liable under this chapter when a statement of claim naming such persons is recorded or filed. . . . Any lien recorded, registered or filed pursuant to this section shall have priority over any encumbrance theretofore recorded, registered or filed with respect to any site, other than real property the greater part of which is devoted to single or multifamily housing. . . .

Id.
187. Id.
188. Id.

189. Id. As originally enacted, the superlien affected all real and personal property of the liable party. Schwenke & Lockett, supra note 44, at 3. As a result, in 1983, the Federal Home Loan Mortgage Corporation pulled out of the condominium and apartment secondary mortgage market in Massachusetts. Id. The corporation then threatened to pull out of the single family mortgage market unless the provision was amended. Id. Additionally, the original statute provided the state with a ninety-day filing period after the occurrences of cleanup costs. Id. This left a ninety-day gap during which a prospective purchaser of the property would not be able to detect the lien through normal examination. Id. Therefore, the Act was revised to exempt single or multifamily housing and to eliminate the ninety-day gap. Id.

190. See Schwenke & Lockett, supra note 44, at 3.
191. Id.

Any expenditures made by the administrator pursuant to this act shall constitute a first priority claim and lien paramount to all other claims and liens upon the revenue and all real and personal property of the discharger, whether or not the discharger is insolvent. All liens . . . shall be filed with the clerk or register of deeds and mortgages of the county wherein the affected property is located, . . . and shall immediately attach to, and become binding upon all the property, whether real or personal, of the party against whom the lien is filed. . . .

Id.
Act, a claim must be recorded to be effective. Unlike the Massachusetts provision, the New Jersey statute covers all real and personal property of the discharger. If the environmental cleanup costs exceed the contaminated property’s value, the state can recover from the discharger’s other property.

Congress has considered provisions similar to state superlien statutes. In 1983, New Jersey Congressman Florio introduced a bill to amend federal hazardous waste law. The bill granted absolute priority to secured and unsecured claims under the Act. The bill did not state whether the government lien took priority over liens or encumbrances, leaving unclear whether the bill creates a superlien or simply a superpriority interest of lower priority than secured claims. Because the bill did not require notice filing, prospective purchasers would confront title inspection problems.

Statutory superlien or superpriority status for environmental agencies ensures that environmental obligations of bankrupt corporations are satisfied. Creditors would exercise more caution due to their lower Code priority relative to environmental agencies. Superlien status for environmental agencies would ensure that creditors extend credit only to mining operators capable of fulfilling their reclamation responsibilities. A superlien statute would also ensure the governmental agency securing the reclamation or clean-up is reimbursed. Despite these benefits, statutes confront serious obstacles. A court may find them preempted by federal bankruptcy law. A court could also determine that enforcement of a superlien for environmental obligations constitutes an unconstitutional deprivation of contract. Problems accompanying judicially-created superpriority status also impede remedial statutes.

For these statutes to operate, the state must first establish a fund to reclaim or clean-up property of bankrupt companies. Money recovered through superlien power would be placed in the fund for future restorations. Florida lacks a fund

195. Id.
197. H.R. 2767, 98th Cong., 1st Sess. (1983). The bill as introduced would add a section 116 to CERCLA. The bill would provide:
   (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 a 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.
198. See Drabkin, Moorman & Kirsch, supra note 22, at 10,179; see also N.H. Rev. Stat. Ann. § 147-B:10 (Supp. 1985). The New Hampshire statute creates the same problem as H.R. 2767. The New Hampshire superlien “shall take precedence over all other claims,” Id. § 147-B:10 III. The use of the term “claims” instead of the terms “liens” or “encumbrances” leaves unclear whether the superlien takes precedence over secured claims.
199. See Drabkin, Moorman & Kirsch, supra note 22, at 10,179.
200. See Schwenke & Lockett, supra note 44, at 3.
201. Id.
202. See supra text accompanying notes 167-72.
for mandatory land reclamation. Superlien or superpriority statutes would require creditors to find new ways to protect their interests and might impose a negative effect on the financially burdened phosphate industry.

b. Other statutory solutions

The Florida Legislature recently passed the Phosphate Land Reclamation Act, a partial solution to the phosphate reclamation/bankruptcy conflict. The Act functions to expedite reclamation and ensure the availability of funds to cover reclamation costs. The Act requires that a schedule be established to ensure prompt and efficient land reclamation. The schedule sets a reclamation rate based on the rate of mining. Companies failing to comply with the schedule must demonstrate financial responsibility through the use of either liens, surety bonds, letters of credit, cash deposits, or land donation. If a mine operator defaults, the Department of Natural Resources enforces the reclamation obligation through either civil actions for injunctive relief and damages or civil penalties up to $5,000 per violation. Penalties collected are deposited to the

---

203. See supra text accompanying notes 9-10.
204. See supra notes 167-72 and accompanying text.
206. Id. § 378.202(1).
207. Id. § 378.209.
208. Id. During the first five years of mining, no reclamation is required and any reclamation which is completed is credited forward. During the second five-year block, 15% of the acres mined during the first five-year block must be reclaimed. During the third five-year block, 60% of the acreage mined in the second block must be reclaimed. During the fourth five-year block, 75% of the acreage mined in the third block must be reclaimed. Reclamation during all subsequent five-year blocks must be at a rate equivalent to one acre reclaimed for each acre mined in the previous block. Id.
209. Id. The statute requires the unencumbered value of the property on which a lien is posted to be comparable to the cost of reclamation. However, no formal appraisal of the property is required. Id. § 378.208(2)(a). Land donations, based on a ratio of one acre donated to cover the responsibility for ten or more acres of mined land, must be acceptable to the state. Id. § 378.208(2)(d). Land donations do not relieve the operator of the obligation to reclaim the land. Id. Surety bonds, letters of credit and cash deposits or trust funds payable to the state will be adjusted annually for inflation, or will be in an amount based on projected reclamation costs at the time the security is posted. Id. §§ 378.208(2)(b)-(c) & (e). Furthermore, an operator may use a combination of the financial assurance methods. Id. § 378.208(2)(f). The security, other than the land donation, will be released upon completion of reclamation of the delinquent acres. Id.
210. The type of security posted is at the option of the operator and covers the number of acres for which the operator has not met the reclamation schedule plus the number of acres that the operator must reclaim in the current five-year period. Id. § 378.208(2)(f). The amount of financial assurance required will not exceed $4,000 per acre, adjusted annually for inflation. Id. § 378.208(4). The amount and type of reclamation involved, the probable cost of proper reclamation, inflation rates and changes in mining operations will enter into the determination of the amount of financial responsibility required.
211. The operator who defaults suddenly after complying with the schedule is subject to enforcement actions. The defaulting operator who has not complied with the schedule has posted security for a portion of the reclamation and is also subject to enforcement actions. Id. § 378.211. The penalty for a minor or technical violation cannot exceed $100 per violation. For a major
Phosphate Research Trust Fund.\textsuperscript{211}

The Phosphate Land Reclamation Act specifically addresses the concern that financially troubled phosphate companies will breach their obligation to reclaim the land. The Act is not without flaw. First, only operators failing to meet the reclamation schedule must show financial responsibility.\textsuperscript{212} The Act should require all mine operators to give the state a mortgage before mining begins and before the Department of Natural Resources approves their reclamation program.\textsuperscript{213} If an operator then fails to meet the mandatory reclamation schedule, the Act would require him to post a surety bond, a letter of credit, a donation of land, or a cash deposit. This pre-approval mortgage requirement better ensures that operators meet their reclamation responsibilities.

The Act is further weakened by the deletion of an important provision from the original proposed legislation.\textsuperscript{214} This provision created a mandatory reclamation trust fund covering a mine operator’s bankruptcy where enforcement remedies and previously posted assets are insufficient to complete the reclamation.\textsuperscript{215} The provision established the trust fund with $5,000,000 from the Phosphate Research Trust Fund and a 1.25\% reallocation of the research fund severance tax.\textsuperscript{216} The proposed section also required the Department of Natural Resources to take judicial action to recover trust fund money expended for reclamation activities.\textsuperscript{217} Awards or penalties paid to the department as a result of such action would reimburse the trust fund for its expenditures.\textsuperscript{218}

A mandatory reclamation trust fund covers at least two scenarios. When an operator has met the reclamation schedule but goes bankrupt, private assets may be unavailable to finance the reclamation. After higher priority creditors are satisfied, the state would be forced to finance the reclamation. A second situation exists when an operator the state has required to demonstrate financial responsibility has insufficient assets to complete the reclamation. Again, the state may bear the financial burden of completion costs.

A mandatory reclamation trust fund is needed to ensure money is available to effectuate reclamation when mining operators go bankrupt. Despite these goals, the trust fund provision in the original proposal was insufficient in that it failed to provide a mechanism to reimburse the trust fund for expenditures. If financial problems force many phosphate companies into bankruptcy, the trust fund could become depleted. As Florida phosphate deposits are exhausted

\begin{itemize}
  \item violation in which the operator has not been subject to a penalty in the previous five-year period, the penalty cannot exceed $1000 per violation. The penalty for other major violations cannot exceed $5000. \textit{Id.} \sect{378.211}(2).
  \item \textit{Id.} \sect{378.211} (5).
  \item \textit{Id.} \sect{378.208}.
  \item \textit{Id.} \sect{378.211}(5).
  \item \textit{Id.}; \textit{see also supra} notes 9-10 and accompanying text.
  \item Florida Bureau of Mine Reclamation, \textit{supra} note 214.
  \item \textit{Id.}
  \item \textit{Id.; see also supra} notes 9-10 and accompanying text.
  \item Florida Bureau of Mine Reclamation, \textit{supra} note 214.
  \item \textit{Id.}
\end{itemize}
and less phosphate is mined, less money is allocated from the severance tax. Mine operators who can no longer realize profits may face bankruptcy and fail to reclaim land. A mechanism is needed to ensure both the reimbursement for prior reclamation costs and the availability of funds for future reclamation.

3. Recommended solution

Florida must adopt new legislation to ensure phosphate mine operators meet their statutory obligation to reclaim mined lands. The statute should protect public health and safety and avoid unnecessary state expenditures, while protecting the interests of debtors and creditors. The legislature designated the Phosphate Land Reclamation Act to ensure phosphate companies meet their reclamation obligations. The Act fails to establish a fund to finance land reclamation for bankrupt phosphate companies. The proposed mandatory reclamation trust fund provision was likewise deficient inasmuch as it lacked a mechanism by which state agencies could recover reclamation costs from bankrupt phosphate companies. The best legislative solution to Florida’s phosphate reclamation/bankruptcy dilemma is a combination of the Phosphate Land Reclamation Act, a mandatory reclamation trust fund, and state superlien legislation.

The recommended legislation would include the Act’s reclamation schedule, the requirement of a showing of financial responsibility by companies failing to meet the schedule, and the civil penalties provision. In addition to the mandatory reclamation trust fund, the legislation would require all mine operators to give the state a mortgage prior to Department of Natural Resources’ approval of their reclamation plan. The legislation would include a superlien provision giving the state priority vis-à-vis other creditors in bankruptcy proceedings. Money recovered through the superlien would reimburse the trust fund. This legislation would ensure that mined lands are reclaimed without the use of state resources. The legislature should carefully draft the superlien provision, giving the lien priority over any prior encumbrance or recorded lien. The statute must clearly state whether it creates a lien on all of the debtor’s property or merely the property involved in the environmental violation. Since unreclaimed land may not be worth as much as reclamation costs, the statute should create a lien on all of the debtor’s property. The lien should not apply to property used for single or multifamily housing. The provision should also require that the state record the lien to give notice to prospective purchasers.

219. See Florida Phosphate Industry, supra note 4, at 26 (phosphate that can be mined with low production costs is becoming exhausted and the remaining deposits are expected to cost two to three times more because they are of a lower grade and contain more impurities).
220. See supra text accompanying notes 205-11.
221. See supra text accompanying notes 214-18.
222. See supra text accompanying notes 200-02.
223. See supra text accompanying note 198.
224. See supra text accompanying notes 189 & 194-95.
225. See supra text accompanying note 189.
226. See supra text accompanying note 199.
The combination of the Phosphate Land Reclamation Act, a mandatory reclamation trust fund, and a superlien provision best ensures that Florida’s financially burdened phosphate industry retains its statutory obligation to reclaim the land. This solution may provide more protection to environmental and governmental interests than to the economic interests of debtor and creditors. Congress never intended bankruptcy law to preempt public health and safety interests.\textsuperscript{227} This legislation will resolve uncertainties and aid debtors and creditors in planning their future activities.

\section*{B. Automatic Stay}

In deciding whether a government action to compel compliance with an environmental obligation is subject to the Code’s automatic stay provision, a court can use several approaches. The first approach was articulated in \textit{Johns-Manville}.\textsuperscript{228} \textit{Johns-Manville} provides the debtor with temporary relief and preserves the estate’s assets for allocation under the Code’s priority system.\textsuperscript{229} However, \textit{Johns-Manville} frustrates Congress’ intention to provide an exception to the stay provision for government actions to enforce injunctions.\textsuperscript{230} Wide use of the \textit{Johns-Manville} approach would make this exception meaningless.\textsuperscript{231}

Under the approach enunciated in \textit{Penn Terra},\textsuperscript{232} a court focuses on the nature of the injury to determine whether the traditional remedy was monetary or injunctive.\textsuperscript{233} While this approach is more consistent with the exceptions to the stay, it may be inappropriate. If compliance with the obligation is so costly that it depletes the bankrupt estate, innocent creditors would not recover any of the estate’s assets.

The third and best solution is the balancing-of-the-equities approach.\textsuperscript{234} By balancing the interests and the good or bad faith actions of the parties, the court can determine whether a stay is appropriate. Under Code section 362(d), the court has the discretion to lift any stay for cause.\textsuperscript{235} Courts have lifted stays when the debtor did not file in good faith and when the stayed action did not concern the Code’s goal of preserving the estate’s assets.\textsuperscript{236} A balancing test to determine whether a government action should be stayed or not is consistent with the balancing approach courts use in lifting stays of non-government actions.

\textsuperscript{227} See \textit{Penn Terra Ltd. v. Department of Envtl. Resources}, 733 F.2d 267, 272-273 (3d Cir. 1984) (federal preemption of state police and regulatory powers will only be inferred where Congress has made its intent to preempt clear).


\textsuperscript{229} See supra text accompanying note 108.

\textsuperscript{230} See supra text accompanying notes 106-07.

\textsuperscript{231} See supra text accompanying note 127.

\textsuperscript{232} \textit{Penn Terra Ltd. v. Department of Envtl. Resources}, 733 F.2d 267 (3d Cir. 1984); see supra text accompanying notes 123-27.

\textsuperscript{233} See supra text accompanying notes 123-27.

\textsuperscript{234} See supra text accompanying notes 173-80.

\textsuperscript{235} See Note, supra note 37, at 1043 n.25.

\textsuperscript{236} Id.
G. Abandonment

After Midatlantic courts will not allow abandonment of hazardous waste facilities.\textsuperscript{237} Whether courts will apply the same approach to the abandonment of phosphate mines is unclear. Courts should balance whether the interests of phosphate reclamation laws in protecting public health and safety outweigh the economic interests the Bankruptcy Code protects.\textsuperscript{238} If a court determines an unreclaimed mine is burdensome to the estate but does not create a great risk to public health and safety, the trustee could abandon the property. If public health and safety interests coupled with the interests in preventing unnecessary government expenditure outweigh the burden to the estate, the trustee could not abandon the property.

V. Conclusion

Confusion and conflict has pervaded the overlap of environmental and bankruptcy law. After Kovacs and its successors courts will probably treat environmental obligations as dischargeable debts under the Bankruptcy Code. Courts are reluctant to give Code priority to governmental agencies seeking compensation for environmental cleanups. The bankrupt estate’s assets will usually be depleted before non-tax government obligations are satisfied. While bankrupt companies are discharged from their environmental obligations, governmental agencies bear the financial burden of cleanups. Furthermore, it is unclear how courts will treat the Code’s automatic stay and abandonment provisions with respect to cleanup or reclamation actions.

To ensure statutory mine reclamation obligations are met, Florida must enact new legislation. In addition to mandatory reclamation schedules, requirements for showing of financial responsibility, and authority for assessment of civil penalties included in the Phosphate Land Reclamation Act, the legislation should establish a fund to bear the costs of reclamation and include a superlien provision. Absent such legislation, many of Florida’s phosphate mines will never be restored to their natural ecological function.

Mary Jane Angelo

\textsuperscript{237} See supra text accompanying notes 146-50.
\textsuperscript{238} See supra text accompanying notes 173-80.