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CERCLA's Innocent Landowner Defense: The Rising Standard of Environmental Due Diligence for Real Estate Transactions

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I. INTRODUCTION

The anxiety that erupted when environmental contamination was discovered at Love Canal in 1979 continues to pervade the public's heightened environmental awareness. Congress quickly responded to the Love Canal disaster by enacting the Comprehensive Environmental Response, Compensation And Liability Act (CERCLA) in 1980. In passing CERCLA (commonly known as the Superfund Act), Congress envisioned two main goals: (1) to expedite the cleanup of abandoned hazardous waste sites, and (2) to insure that those responsible for creating the hazardous conditions would bear the costs of such cleanup.

With the enactment of CERCLA, Congress created an innovative scheme to finance the elimination of inactive hazardous waste sites across the nation. Though subjected to much commentary and some modification,
tion, the CERCLA regime has had a substantial impact on the conduct of purchasers of commercial real property. CERCLA imposes broad liability upon the current owner of the property for hazardous waste site cleanup costs incurred by the federal Government. The ability of innocent landowners to avoid this extensive and costly environmental liability is currently evolving into a rigorous standard of "environmental due diligence" for the purchaser of commercial real estate.

The Superfund Amendments and Reauthorization Act (SARA) of 1986 incorporated a narrow "innocent landowner defense" into CERCLA. The defense requires purchasers to make "all appropriate inquiry" into the environmental condition of a property before acquisition to avoid CERCLA liability. This emerging obligation of environmental inquiry is altering the structure of commercial real estate transactions in daily practice.

The scope of the inquiry requirement arising from the innocent landowner defense is not specified by CERCLA, nor have the few courts ruling directly upon this issue provided any definition of inquiry beyond the statutory standard of commercial reasonableness. The Guidance Memorandum, issued by the United States Environmental Protection

7. By the "CERCLA regime" I am referring to the original legislation of 1980 incorporated with SARA of 1986.
9. See infra notes 36-83 and accompanying text.
10. "Innocent landowners" include those persons, whether individual or corporate, who acquire property through various types of conveyances after hazardous wastes have been disposed of on or at the property and who did not participate in any way in the management, generation, transportation, or storage of such wastes at the property. See CERCLA, 42 U.S.C §§ 9601(35), 9607(b)(3).
11. See Bennett, Environmental Due Diligence: An Evolving National Standard, 52 Banking Rep. (BNA) 1369 (1989) ("While it is unreasonable to expect that any due diligence standard could protect against every possible environmental risk, it is becoming possible to set a benchmark standard."). See also Comment, The Environmental Due Diligence Defense And Contractual Protection Devices, 49 LA. L. REV. 1405 (1989).
14. Id. at § 9601(35)(B).
15. See infra notes 126-43 and accompanying text.
16. See infra notes 94-125 and accompanying text.
17. Guidance On Landowner Liability Under § 107(a)(1) and De Minimis Settlements Under
Agency (EPA) in 1988, concerns CERCLA settlement procedures for innocent landowners but fails to further clarify the uncertain obligation of purchasers to investigate the environmental condition of property acquisitions. In response to this uncertainty, a proposed Amendment to CERCLA clarifies the inquiry obligation beyond the vague reasonableness standard of CERCLA by mandating the performance of a professional environmental assessment for every commercial property acquisition.

This Comment discusses the emerging requirement of environmental due diligence in terms of establishing a new standard for real property transactions. Part II provides a brief explanation of the CERCLA liability regime. In Part III, the innocent landowner defense, including its interpretation by the courts, is evaluated as the source of environmental due diligence. The Comment then analyzes the proposed Amendment and EPA's Guidance Memorandum in terms of raising the standard of due diligence for all commercial property transactions.

This Comment proposes that the Amendment should be incorporated into CERCLA in order to provide legal certainty to the rising obligation of environmental due diligence. The innocent landowner defense and its concurrent responsibility of due diligence are mechanisms which generate environmental information essential to the CERCLA enforcement process and the efficient elimination of risks posed by abandoned hazardous waste sites. Statutory specification of environmental due diligence lowers the costs of the obligation, thereby facilitating its incorporation into every commercial real estate transaction. The proposed Amendment accomplishes this task and transforms environmental due diligence into a positive statutory duty which provides benefits to both the real estate industry and society.

II. STATUTORY BACKGROUND: CERCLA’S LIABILITY REGIME

Congress enacted CERCLA in 1980 to respond to public concern


18. See infra notes 169-70 and accompanying text.


20. See id. See also, infra notes 144-58 and accompanying text.

21. CERCLA expires in October 1991. In order to avoid the year-long reauthorization period of SARA, interested entities are “already preparing for a spirited battle over the form and substance of the Superfund program.” Leifer & Musiker, Cleaning Up Superfund: 10 Changes To Make During Reauthorization, 21 [Current Developments] Env’t Rep. (BNA) 915 (1490). Ironically, three of the ten recommendations made by these commentators involve innocent landowner liability. Id.
with health and environmental risks posed by inactive hazardous waste sites. Originally CERCLA created a 1.6 billion dollar trust fund, commonly referred to as the "Superfund," which continues to be funded by excise taxes on the chemical and petroleum industries. The Superfund is used to finance federal cleanup efforts. The 1986 SARA Amendments provided for a significant increase to the Superfund after the Government perceived the enormity of the cleanup task.

Under CERCLA the federal Government, acting through EPA, is empowered to respond immediately to hazardous substance sources which threaten the environment and public health without having to first determine liability. Liability for the response action's costs is then established after the Government has acted to remove the threat. Overall, CERCLA is a remedial rather than a regulatory statute whereby the "Government generally undertakes pollution abatement, and polluters pay for such abatement through tax and reimbursement liability." The entire CERCLA process—identification of sites requiring a response action, site analysis, cleanup of sites which individually possess unique technical problems, and recovery of expenditures from identifiable responsible parties—is extremely costly in terms of actual and transactional expenses. This situation reaches exigent proportions in light of

22. See Silverman, supra note 1, at 835.
25. CERCLA, 42 U.S.C. §§ 9604(a), 9607(a). While government response and recovery appears to be the traditional and most common method of responding to hazardous substances releases, CERCLA also provides for two alternative methods for recovery of CERCLA response costs. First, EPA can order the potentially responsible parties (PRPs) to clean up the site (42 U.S.C. § 9606(a)). Second, third parties can carry out the cleanup and recover their costs against responsible parties under a private cause of action (42 U.S.C. §§ 9607(a), 9612). See Aliff v. Joy, 914 F.2d. 39 (4th Cir. 1990); Reardon v. United States, 73 F. Supp. 558, 561 (D. Mass. 1990).
28. See Note, Superfund Settlements, supra note 4, at 124 (noting that the problem of uncontrolled hazardous waste sites is compounded by the tremendous technical problems in analysis and cleanup of each site).
29. In general, transaction costs can be defined as the "costs of reaching agreement with an-
Government analysts' estimations that approximately 1,500 to 10,000 sites with individual cleanup costs ranging from 10 to 100 billion dollars currently exist across the nation.  

**A. Elements of CERCLA Liability**

1. Identification of Potentially Responsible Parties. CERCLA § 107 provides for liability for the Government's "response costs" in the CERCLA context, the agreement among the PRPs concerning the allocation of cleanup costs may be reached voluntarily through settlement or involuntarily through adjudication. The transaction costs of "imposing liability on and allocating financial responsibility" among PRPs connected with the worst sites are enormous and were estimated to be 8 billion dollars, equivalent to the cost of cleaning up 400-450 sites, in 1985. In addition, these transaction costs result in high opportunity costs, i.e. "costs resulting from opportunities foregone when resources are allocated to one particular use instead of another." Specifically, the opportunity costs in this context are the foregone environmental uses of the funds to cleanup additional sites. Overall, the transaction and opportunity costs "arising from the CERCLA enforcement process warrant concern and scrutiny." Lyons, supra note 1, at 272-73.


30. Response costs include two types of activities under CERCLA: "removal" activities (short-term responses) and "remedial" activities (long-term responses) (42 U.S.C. § 9601(23), 9601(24)).

CERCLA, 42 U.S.C. § 9601(23) provides:

- "[R]emove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for.

Section 9601(24) provides:

- "[R]emedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs permanent relocation of residence and business and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be
among four potentially responsible parties (PRPs):

1. "the owner and operator of a vessel or facility";
2. "any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous wastes were disposed of";
3. generators of hazardous waste who arrange for the disposal or treatment of such waste; and
4. transporters of hazardous waste.

The liability provision of CERCLA pertinent to the innocent landowner is § 107(a)(1): the "owner" of a facility is liable for the costs of cleaning up the hazardous substances released at the property. "Owner" necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.


- Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section
- (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for
  - (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
  - (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
  - (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Id.

33. CERCLA defines an "owner" as: "(ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility." (42 U.S.C. § 9601(20)(A)(ii)).

34. CERCLA, 42 U.S.C. § 9601(9) defines a "facility" as:

- (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.
is defined broadly and circularly under CERCLA, however, the statute provides for a narrow exemption from liability where the ownership interest in the property is a security interest.

In the leading case of New York v. Shore Realty Corp., the Second Circuit broadly construed CERCLA § 107(a)(1) to cover current owners who neither owned the property at the time of hazardous waste disposal, nor caused the presence or release of such waste at the property. The court refused to limit the application of § 107(a)(1) only to persons who owned the property “at the time of disposal.” Instead, the court held that a current owner is liable for response costs under § 107(a)(1) without regard to her connection with the disposal of the hazardous substances at the property because CERCLA § 107(a)(1) “unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation.”

The Shore court supported its interpretation of “owner” based on CERCLA’s structure and legislative history. Interpreting § 107(1)(a) to include a causation requirement would have negated the affirmative defenses provided in § 107(b). Congress’ specific rejection of a causation requirement in § 107(a) further supported the court’s holding that current owners were liable “without reference to whether they caused or contributed to the release.” Thus, the court closed what could have become a “loophole in CERCLA’s coverage” by refusing to allow current landowners to claim an exemption from liability and thereby frustrate Government reimbursement of response costs where the other responsible parties are nonexistent or judgment-proof.

Courts ruling on the issue of owner liability under CERCLA

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35. "The CERCLA definition of 'owner', is not, however, coextensive with all possible uses of that term; it specifically excludes 'a person who without participating in the management of a facility, holds indicia of ownership primarily to protect his security interest in the facility." In re Bergsøe Metal Corp., 910 F.2d 926 (9th Cir. 1989). See, CERCLA, 42 U.S.C. § 9601(20)(A). Thus, secured creditors who do not participate in the management of the facility are exempted from CERCLA liability as nonowners. Id. See also, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990).

36. See United States v. Kayser-Roth Corp., Inc., 910 F.2d 24 (1st Cir. 1990). See also, supra notes 33 and 35 and accompanying text.
37. 759 F.2d 1032 (2d Cir. 1985).
38. Id. at 1043.
39. Id.
40. Id. at 1044.
41. Id. at 1044-45.
42. Id. at 1044.
43. Id.
44. Id. at 1045.
§ 107(1)(a) subsequent to *Shore* have unanimously accepted the Second Circuit’s interpretation of the statutory provision. In *Pennsylvania v. Union Gas Co.*, the Supreme Court’s dicta stated that “two general terms . . . describe those who may be liable under CERCLA . . .: ‘persons’ and ‘owners or operators.’” The Court ultimately held that Pennsylvania could be liable under CERCLA as an owner where the State owned easements at the site and hazardous substances were discovered during the State’s flood control activities. The Supreme Court followed CERCLA precedent in ruling that an entity is liable for CERCLA costs solely as the current owner without any involvement in the past disposal of hazardous waste at the site.

2. Application of the Strict Liability Standard. The liability imposed on a PRP under CERCLA is retroactive, strict, and joint and several. The Circuit Courts uniformly have rejected challenges to CERCLA based on the statute’s retroactive application. Application of the strict liability standard is based on the reference in CERCLA § 101(32) to § 311 of the Clean Water Act which provides for strict liability. In short, if an individual is a PRP under CERCLA § 107(a), she is responsible for cleanup costs regardless of any fault in connection with the disposal or improper storage of hazardous substances at the contaminated property.45


47. Id. at 2277.
48. Id. at 2277.
49. Id. at 2280.
52. CERCLA, 42 U.S.C. § 9601(32) provides: “[L]iable” or “liability” under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33.
54. See *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988) ("We agree with the
For purposes of CERCLA liability, no causation nexus is required between the PRP's conduct and the release of hazardous substances.\(^5\) In *Shore*, the corporate developer acquired the commercial property which was the subject of the litigation on October 13, 1983. Within the next three months, Shore's tenants added 90,000 gallons of hazardous chemicals to the site's storage tanks without the owner's authorization or knowledge until their eviction on January 5, 1984.\(^6\) The court held that the developer, as the owner of real property containing a hazardous waste site, is strictly liable under CERCLA § 107(a)(1) for the Government's response costs.\(^7\) According to the court, Congress' intention to hold PRPs strictly liable is manifested in CERCLA § 101(32)'s reference to such standard of liability under the Clean Water Act, 33 U.S.C. § 1321. Furthermore, strict liability appropriately governs CERCLA enforcement actions because CERCLA is a remedial, rather than a fault-based or regulatory statute.\(^8\)

Lenders who hold a mortgage on a property and later acquire title to the property through foreclosure also may be strictly liable as owners for CERCLA response costs.\(^9\) Lenders especially are confronted with serious liability in such scenarios. If contamination is discovered at the property prior to foreclosure, the lender must choose to either write off the loan for worthless collateral or pay for the Government's response costs as the owner of the foreclosed property.\(^10\) In contrast, the potential landowner has an opportunity to discover contamination prior to the purchase and may choose to forego the transaction completely.\(^11\)

Strict liability is an integral part of the CERCLA regime because the


\(^6\) Id. at 1039.

\(^7\) Id.

\(^8\) See id. at 1041, 1044.

\(^9\) See United States v. Maryland Bank and Trust Co., 632 F. Supp. 573 (D. Md. 1986) (Bank which formerly held mortgage on parcel of land, later purchased the land at a foreclosure sale and continued to own it was responsible for the cost of hazardous waste cleanup.).

\(^10\) In response to *Maryland Bank & Trust, supra* note 61, legislation was introduced in Congress by Representative John J. LaFalce (D. NY) which is "designed to insulate... lending institutions" and fiduciaries from inappropriate Superfund liability when they foreclose on property which turns out to be contaminated." 136 CONG. REC. E1023 (1990) (remarks of Rep. LaFalce); See H.R. 4494, 136 CONG. REC. E1023, E1024. For a discussion of lenders' responses to the threat of CERCLA liability, see, O'Brien, *News, Analysis, and Perspective*, 53 Banking Rep. (BNA) 169 (1989).

\(^11\) In addition, lenders' environmental liability exposure may be multiplied in the event that secondary mortgage purchasers require lenders to repurchase loans secured by environmentally contaminated real estate. 19 [Current Developments] Env't Rep. (BNA) 14 (1988).
courts have uniformly followed Shore's lead in this respect. Overall, the innocent landowner is responsible for cleanup costs recoverable under CERCLA even though the landowner has no connection with the past waste disposal activities at the property.

3. Imposition of Joint and Several Liability. CERCLA's extensive liability further threatens innocent landowners with enormous risks in property transactions because of judicial imposition of joint and several liability. As provided in the Restatement (Second) of Torts, joint and several liability is particularly appropriate to the Government's prosecution of a CERCLA reimbursement action because such liability ensures "complete cost recovery." At most sites, it is extremely difficult, if not impossible, to apportion the extent of each party's contribution to the environmental contamination. Under joint and several liability, the Government may lighten its prosecutorial burden by selecting a few deep pockets or easily identifiable parties, such as the current owner, from whom to seek recovery of response costs.

SARA did not change CERCLA's broad liability provisions but ex-

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62. See, e.g., Idaho v. Hanna Mining Co., 882 F.2d 392, 394 (9th Cir. 1989) ("CERCLA generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed.") (citing Shore); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989) ("CERCLA contemplates strict liability for landowners who, absent a defense under § 9607(b), are deemed responsible for some of the harm."); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988).

63. While the courts have stated that CERCLA's legislative history indicates that joint and several liability under § 311 of the Clean Water Act, 33 U.S.C. § 1321, governs CERCLA actions, CERCLA does not explicitly specify how courts should apportion costs in particular cases. See Leifer & Musiker, supra note 21.

64. RESTATEMENT (SECOND) OF TORTS § 433(A) (Defendants are jointly and severally liable when the harm is "indivisible."). A PRP in a CERCLA action may avoid joint and several liability by proving that the "harm is divisible and there is a reasonable basis for apportionment of damages." United States v. Chem-Dyne, 572 F. Supp. 802, 811 (D. Ohio 1983).

65. United States v. Monsanto Co., 858 F.2d 160, 174 (3rd Cir. 1988). The leading case concerning the majority view of joint and several liability under CERCLA is United States v. Chem-Dyne, 572 F. Supp. at 810 (D. Ohio 1983) ("Where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm."). See also O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989) ("It is now well settled that Congress intended that the federal courts develop a uniform approach governing the use of joint and several liability in CERCLA actions.").

66. See Note, Liabilities of the Innocent Current Owner, supra note 59, at 417. The task of apportionment becomes even more complicated when many generators have deposited hazardous substances at the property, several owners have exercised different levels of care or the hazardous substances have intermingled in one area.

67. Id. at 418. A minority of courts employ a more equitable apportionment of liability specified in the proposed "Gore Amendment" to CERCLA. For example, in United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984), the court in its discretion applied the equitable factors specified in the Gore Amendment, including the degree of care exercised by a PRP and the
plicitly allows for a right of contribution among the PRPs. The landowner thus may implead other parties into the Government's action to recover response costs. In resolving contribution claims, a court may allocate response costs among liable parties according to equitable factors which it determines are appropriate. Although a PRP cannot contract out of its liability with the federal Government, parties to a real estate transaction prospectively may provide for a right of contribution in structuring the transaction. For instance, in *Mardan Corp. v. CGC Music, Inc.*, the court dismissed the purchaser's action to recover CERCLA costs against the preceding landowner because the purchaser had signed a Settlement Agreement and Release with the seller. However, the contribution claim must rely on explicit language concerning the parties' environmental liabilities; an "as-is" clause in a contract of sale does not defeat the current landowner's claim against its predecessor for CERCLA costs.

### III. The Source of Environmental Due Diligence: CERCLA's Innocent Landowner Defense

In *Shore*, the Second Circuit stated that strict liability under CERCLA was "not absolute, but limited by certain defenses for causation." The third-party defense of CERCLA, which involves hazardous sub-

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70. *See Smith Land and Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 (3rd Cir. 1988) ("[U]nder CERCLA the doctrine of caveat emptor is not a defense to liability for contribution but may only be considered in mitigation of the amount due."); In re Sterling Steel Treating, Inc. 94 Bankr. 924 (E.D. Mi. 1988).*

71. *See Dubuc & Evans, supra note 68, at 10200-02.*

72. 804 F.2d 1454 (9th Cir. 1986).

73. *Id.* at 1454.


75. 759 F.2d 1032, 1042. *See, CERCLA 42 U.S.C. § 9607(b).*

76. CERCLA 42 U.S.C. § 9607(b)(3) provides:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:
stance releases caused solely by the acts or omissions of a third party, is a substitute for causation in other tort contexts. According to one commentator, the third-party defense completes what is merely a shift of the burden of proof of causation from the plaintiff to the defendant.88

The innocent landowner defense arises from the interplay of CERCLA § 107(b)(3), the third-party defense,7 and CERCLA § 101(35), the application of the defense to innocent landowners.80 These two provis-

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement rises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant established by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

77. Developments in the Law-Toxic Waste Litigation, 99 HARV. L. REV. 1458, 1544 (1986) (hereinafter Developments). See also New York v. Shore Realty Corp., 759 F.2d 1032, 1044 ("Interpreting § 9607(a) as including a causation requirement makes superfluous the affirmative defenses provided in § 9607(b), each of which carves out from liability an exception based on causation."); United States v. Monsanto, 858 F.2d 160, 170 (4th Cir. 1988) ("Section 107(b)(3) sets forth a limited affirmative defense based on the complete absence of causation."). For the related discussion of the difficulties of proof for the plaintiff in toxic tort litigation, see Gara, Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards, 12 HARV. ENVTL. L. REV. 265 (1988).

78. Developments, supra note 77, at 1544. See United States v. Monsanto Co., 858 F.2d 160, 169-70 (burden of disproving causation is placed on the defendant who "profited from the generation and inexpensive disposal of hazardous waste.").

79. 42 U.S.C. § 9607(b)(3); see supra note 76.

80. 42 U.S.C. § 9601(35) provides:

(3)(A) The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest. In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of § 9607(b)(3)(a) and (b) of this title.

(B) To establish that the defendant had no reason to know, as provided in clause (i)
sions establish an exemption from CERCLA liability for landowners who acquire a property after the disposal of hazardous wastes without any knowledge of its environmental contamination. To prove a lack of knowledge, the landowner must have made all appropriate inquiry into the environmental condition of the property before acquisition. In addition, the innocent landowner must fulfill the requirements of CERCLA's third-party defense: first, that the environmental contamination was caused solely by a third party's acts or omissions; and second, that the landowner exercised due care and took reasonable precautions against any foreseeable acts by the third party under all the circumstances. Overall, these factual proofs impose a substantial burden on the landowner who attempts to escape CERCLA liability by claiming the innocent landowner defense.

Through the enactment of the innocent landowner defense, Congress responded to public concern with the inequity of CERCLA's narrow third-party defense. Congress clarified § 107(b)(3) by defining the term "contractual relationship" for purposes of the newly created innocent landowner defense. Any instrument transferring title or possess-
sion of real property is a "contractual relationship" under CERCLA which ordinarily bars the use of the third-party defense. However, an innocent landowner may void her contractual relationship with the former owner if she proves that at the time of acquisition, she had "no reason to know" that hazardous substances were disposed of at the property because she had conducted a pre-acquisition inquiry consistent with "good commercial practice" which failed to reveal the presence of environmental contamination on the property.

While the real estate industry’s reactions to the innocent landowner defense have been frequent and vociferous, few courts have directly construed the defense. Generally two issues arise when defendants assert the defense: (1) the scope of the term "contractual relationship" under CERCLA § 101(35)(A); and (2) the scope of the constructive knowledge and all appropriate inquiry components of the defense.

Courts have liberally applied the broad definition of "contractual relationship" under the innocent landowner defense. In *Westwood Pharmaceuticals, Inc. v. National Fuel Gas,* the court held that a deed executed between the purchaser and the seller is a contractual relationship under CERCLA § 101(35)(A). However, the court allowed the seller to claim the third-party defense to prove that the purchaser’s acts which caused a release at the site were not undertaken "in connection with" the contractual relationship since the purchaser had engaged in new construction activities at the site. The court in *United States v. Pacific Hide & Fur Depot, Inc.* also held that a contractual relationship under CERCLA § 101(35)(A) was established where the individual deeded or other conveyance constituted a "contractual relationship" before SARA’s enactment, see Hitt, supra note 8, at 14-15.

87. See generally Hitt, supra note 8; Schwenke, supra note 8; Anderson, *Will The Meek Even Want The Earth?* 38 MERCER L. REV. 535 (1987).
90. *Id.* at 1286.
91. *Id. See also* CERCLA, 42 U.S.C. § 9607(b)(3).
fendants received interests in the property through a stock-transfer and quitclaim deed.\footnote{Id. at 1347-48. See also Washington v. Time Oil Co., 687 F. Supp. 529 (W.D. Wash. 1988) (contractual relationship exists between defendant and sublessee of defendant's subsidiary); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988) (contractual relationship applies to a lease).}

In contrast, the courts' interpretation of constructive knowledge and appropriate inquiry under the innocent landowner defense according to a standard of reasonableness does not provide certainty to efforts to comply with the defense. Moreover, this case-by-case approach results in disparate treatment of current landowners, thereby compounding the problem of uncertainty.

In United States v. Serafini,\footnote{706 F. Supp. 346. (M.D. Pa. 1988).} the Government brought a CERCLA action for recovery of response costs against the current owners of a previously contaminated landfill. The defendants had formed a partnership for commercial development purposes and in 1969 purchased the site at issue.\footnote{Id. at 348.} In 1983 EPA conducted an emergency removal at the site which contained approximately 1,141 fifty-five gallon drums scattered throughout the property.\footnote{Id. at 350-51.} The defendants in Serafini raised CERCLA's innocent landowner defense in opposition to the Government's motion for summary judgment.\footnote{Id. at 352.} Although the district court found that the Government established a prima facie case for liability under CERCLA, the court held that issues of fact remained whether the defendants had undertaken "all appropriate inquiry...consistent with good commercial or customary practice" as required by the statutory defense.\footnote{Id. at 353. But see the court's finding in Monsanto that the defendant site-owners' failure to conduct a visual site inspection in the mid-1970s was "wilful or negligent blindness." United States v. Monsanto Co., 858 F.2d 160, 169.}

The current landowners in Serafini admitted that at the time of acquisition of the site, they did not conduct an on-site inspection of the property. However, the landowners contended that they did not have any reason to do so according to the commercial practices at the time of acquisition in 1969.\footnote{Id. at 353.} The court was unable to find that the defendants' inaction was unreasonable because the Government had not presented any evidence to conclude that the defendants' failure to inspect the property or inquire into its previous environmental uses was inconsistent with good commercial or customary practices at the time of acquisition.\footnote{United States v. Serafini, 706 F. Supp. 346, 353, & n.8.
More significantly, the court did not agree with the Government’s contention that a property inspection by a potential landowner was a time-honored or explicit component of the “all appropriate inquiry” obligation demanded by the defense. Instead, the court construed the inquiry requirement as a flexible standard whose meaning is to evolve over time with commercial practices in the real estate industry.  

A more recent transaction than that involved in Serafini was the subject of In Re Sterling Steel Treating, Inc. In that case, the defendant purchased the site in 1987. Before acquisition, the defendant conducted an on-site visual inspection of the property, but failed to inspect a trailer located on the property. Hazardous wastes which had been stored in the trailer were discovered after the defendant’s acquisition of the site. As the current owner, the defendant removed the wastes with the approval of EPA. The defendant subsequently withheld a portion of the purchase price from the trustee in bankruptcy as reimbursement for clean up costs involving the property. In the adversary proceeding before the court, the defendant claimed exemption from CERCLA liability based on the innocent landowner defense.

The court in In Re Sterling-Steel Treating, Inc. ruled that when the defendant purchased the property, he did have reason to know that the property was contaminated with hazardous substances. The landowner failed to satisfy the requirement of lack of constructive knowledge because he had engaged in business dealings with his predecessors, and thus was aware of the “industrial uses” of the property. In addition, the defendant’s inquiry before acquisition was insufficient in the court’s view because the defendant had not attempted to inspect the trailer located on the property. Although the defendant could not claim the innocent landowner defense, the court applied equitable considerations to allocate the extent of the parties’ responsibilities for the removal costs. Ultimately, the court held that the response costs should be

101. Id. at 352-53.
102. 94 Bankr. 924 (E.D.Mi. 1989).
103. Id. at 926-27.
104. Id. at 927.
105. Id.
106. Id. at 929-30.
107. 94 Bankr. at 924.
108. Id. at 930.
109. Id.
110. Id.
111. Id. at 931.
borne equally by the current owner and the bankrupt's estate.\footnote{Id.}

The holding reached in \textit{Sterling Steel} \footnote{94 Bankr. 924.} can be contrasted with the result in a recent New York District Court decision. In \textit{International Clinical Laboratories, Inc. v. Stevens}, \footnote{1990 U.S. Dist. LEXIS 3685 (1990).} the court held that the current owner was entitled to the innocent landowner defense.\footnote{Id.} According to the court, the purchaser's on-site visual inspection of the property before acquisition reasonably failed to disclose the presence of hazardous waste at the site.\footnote{Id.} However, the purchaser continued to lease the property to the same tenant who manufactured computer tape heads and had disposed of hazardous wastes on the property.\footnote{Id.} While the tenant did not dispose of any wastes after the purchaser acquired the property, it is just as reasonable that the purchaser in \textit{International Clinical Laboratories} should have had the same suspicion of the presence of hazardous substances at the site based on its knowledge of the industrial uses of the property that the purchaser possessed in \textit{Sterling Steel}. In addition, the hazardous substances in both cases were not obviously detectible by a visual, on-site inspection of the respective properties.\footnote{Id.} Thus, the landowners were held to different standards of diligence in the two cases.

Current owners of commercial property acquired in arms-length transactions are held to a more rigorous standard of due diligence under the defense than innocent landowners who acquire such property in private transactions.\footnote{Id.} In \textit{United States v. Pacific Hide & Fur Depot}, \footnote{94 Bankr. 924.} the individual defendants acquired a property containing hazardous waste by

\footnote{See \textit{In re Sterling Steel}, 94 Bankr. 924 (hazardous wastes present in trailer located on property); \textit{Int'l Clinical Laboratories}, 1990 U.S. Dist. LEXIS 3685 (hazardous wastes present in groundwater at property).}

\footnote{See \textit{In re Sterling Steel}, 94 Bankr. 924, n.124.}

\footnote{716 F. Supp. 1341 (D. Idaho 1989).}
inheriting stock which was later redeemed for ownership interests.\textsuperscript{121} The court held that the defendants satisfied the innocent landowner defense. First, the current owners had proven their lack of constructive knowledge concerning the contamination based on their non-involvement with the property, the non-obviousness of the contamination, and their lack of specialized knowledge concerning the recycling operations at the property.\textsuperscript{122} Second, even though the defendants conducted no inquiry, such inaction was appropriate in this case because of the private inheritance nature of the transaction.\textsuperscript{123} The court further stated: "Congress recognized that each case would be different and must be analyzed on its facts."\textsuperscript{124}

Overall, the courts have construed a standard of reasonableness from the statutory language and applied such standard to the facts of each case to determine whether the landowner fulfilled the inquiry obligation of the innocent landowner defense. For current commercial transactions, the statutory language identifies the following factors, which implicitly include a visual inspection of the property, pertinent to the landowner's lack of constructive knowledge after "all appropriate inquiry" into the property:

For purposes of establishing the defendant had no reason to know [of environmental contamination] the court shall take into account:

- (1) any specialized knowledge or experience on the part of the defendant,
- (2) the relationship of the purchase price to the value of the property if uncontaminated,
- (3) commonly known or reasonably ascertainable information about the property,
- (4) the obviousness of the presence or likely presence of contamination at the property, and
- (5) the ability to detect such contamination by appropriate inspection.\textsuperscript{125}

A landowner who acquires property in an arms-length, commercial transaction bears a more rigorous obligation of inquiry than a landowner who inherits the property or acquires it by private means such as a gift. However, the precise scope of environmental due diligence for commercial transactions remains statutorily and judicially ambiguous.

\textsuperscript{121} Id. at 1344-45.
\textsuperscript{122} Id. at 1348.
\textsuperscript{123} Id. at 1348-49.
\textsuperscript{124} Id. at 1349. The court specified a "three-tier system" of obligation under the innocent landowner defense based on its legislative history. "Commercial transactions are held to the strictest standard; private transactions are given a little more leniency; and inheritances and bequests are treated the most leniently of these three situations." Id. at 1348.
\textsuperscript{125} CERCLA, 42 U.S.C. § 9601(35)(B).
In interpreting the innocent landowner defense, legal and real estate practitioners provide a wide-range of advice concerning the parameters of "all appropriate inquiry" to purchasers seeking exemption from liability. Some commentators argue merely that the purchaser should conduct a walk-through site inspection. Others counsel that the purchaser should conduct an "environmental due diligence audit" which includes: an on-site inspection, interviews of site personnel, examination of site documents and records, research into government records of the site and tours of adjacent operations, surrounding locale and terrain.

In short, CERCLA's requirement of reasonable inquiry is evolving in practice into a substantial but ill-defined obligation of "environmental due diligence."

As the real estate industry has hastened to comply with the defense's standard of innocence based on lack of knowledge after inquiry, two problems inherent in the CERCLA regime have been exposed. First, the problem of legal uncertainty, ubiquitous in environmental liability, pervades "all appropriate inquiry" because a purchaser of commercial property must define the obligation for every transaction. Second, a problem of practical irrelevance in claiming the defense occurs once the purchaser complies with the statute by conducting an environmental investigation which reveals the presence of hazardous substances at the site.

A. The Problem of Legal Uncertainty

The innocent landowner defense has generated widely discrepant views as to what efforts are sufficient to fulfill the obligation of inquiry into the property. The courts have not substantively defined this responsibility other than by finding an implied standard of reasonableness.

126. See generally Last, Superfund Liability Traps Affecting Developers and Lenders, 3 Nat. Res. & Env't. 10 (Fall 1988) (as the centerpiece of hazardous materials liability minimization there should be a sufficiently comprehensive site assessment); Anderson, supra note 99, at 539 (1987) ("at least a minimal inspection will normally be required to dispel an inference of studied indifference"); Hayes & Dinlun, Environmental Liability In Real Property Transactions, 23 U. Rich. L. R. 349, 368-69 (1989) (an appropriate environmental investigation includes an investigation review and a site inspection; if necessary a Phase II investigation including media sampling should be performed).

127. See Anderson, supra note 87.


129. See Abraham, supra note 1, for a discussion of the expansion of environmental liability in the 1980s and the uncertainty of such liability as its central feature.

130. See supra notes 126-28 and accompanying text.
in the statutory language.131

While the standard of environmental due diligence for the innocent landowner currently is uncertain, this uncertainty partly results from Congressional intent in enacting SARA. In the House floor debates, Representative Frank, the sponsor of the innocent landowner defense, stated that the buyer is under “some obligation to find out” whether environmental contamination exists at the site under the statute’s constructive knowledge requirement of a “diligent purchaser.”132 In addition, Representative Frank and other House members viewed the requirement that the purchaser’s investigation be consistent with good commercial practice as an evolving standard that would become more stringent as the public’s awareness of environmental hazards increases over time.133

If the environmental due diligence standard is one of reasonableness, its scope must be determined on a case-by-case basis. As a resource-intensive scheme, the imposing task of defining reasonableness in every case consumes social resources of time, energy and money.134 More importantly, such a task disrupts the lending and real estate markets by threatening entities with extensive liability in the midst of legal uncertainty.135 If the “specialized knowledge” of each defendant also is considered in the process of definition, commercial landowners will be held to different standards of environmental diligence based on their respective expertise and resources.136

At a minimum, environmental due diligence under CERCLA requires that a purchaser makes some type of pre-acquisition inquiry into the property’s condition to ascertain if hazardous substances are present at the site.137 If such an assessment is viewed analogously to liability

131. See supra notes 88-124 and accompanying text.
133. See Hitt, supra note 8, at 18-19. In its recently issued Guidance, EPA characterized “all appropriate inquiry” as a standard of reasonableness that would evolve over time with commercial practices. The EPA noted its agreement with the House Conference Committee on SARA that the “duty to inquire will be judged as of the time of acquisition; and that as public awareness of environmental hazards increases, the burden of inquiry will increase concomitantly.” Guidance, supra note 17, at 3504 (quoting Conference Report on SARA, H.R. 2005, 99th Cong., 2d Sess., p. 187). However, the legislative history concerning this issue is contradictory. See 131 Cong. Rec. H11157-68 (remarks of Rep. Breaux) (The innocent landowner defense was necessary to “really protect the landowner who has not done anything to put the waste” at the property.).
134. See Note, Superfund Settlements, supra note 4. These costs do not include opportunity costs, i.e., foregone environmental uses. See supra notes 28 and 29 and accompanying text.
135. See Abraham, supra note 1.
136. See Anderson, supra note 87, at 543-44; see also CERCLA, 42 U.S.C. § 9601(35)(B).
137. For detailed discussion of the components of the environmental audit as the appropriate method of evaluating environmental liabilities at acquisition, see Hitt, supra note 8, at 20-25.
insurance for the innocent landowner, the benefits of investigation (avoidance of CERCLA liability) may outweigh its costs (time and money needed to conduct the inquiry). Under the current scheme, the vague contours of "all appropriate inquiry" undermine the potential "insurance" benefits of the innocent landowner's investigation because exemption from liability cannot be assured when statutory compliance is uncertain. Thus, CERCLA's due diligence requirement reflects the various problems accompanying the expansion of environmental liability in the 1980s: uncertain liability, lack of insurability, and the potential discouragement of real estate transfer and development.

B. The Problem of Practical Irrelevance

If a purchaser of real property conducts an environmental assessment of the site, the presence of hazardous substances will most likely be revealed. If the purchaser then moves ahead with the acquisition, she cannot qualify for the innocent landowner defense because she has actual knowledge of environmental contamination at the property.

According to one commentator, the innocent landowner defense suggests that the only way to minimize liability in acquiring the contaminated land is to investigate, but not "thoroughly enough to gain actual knowledge of non-obvious hazardous substances." However, this type of investigation distorts the aim of CERCLA to promote the efficient identification and cleanup of inactive hazardous waste sites. Thus, if a landowner exercises due diligence in a pre-acquisition inquiry into the property, the protection from liability may be short-lived or even nonexistent. If Congressional intent was to provide an exemption from liability for innocent parties, in fact little protection is available regardless of the purchaser's efforts at environmental investigation. More importantly, the irrelevance of the innocent landowner defense in practice may discourage the performance of such investigation and encourage indemnification agreements, thereby eradicating the informational benefits that environmental investigation brings to the CERCLA process.

138. See Abraham, supra note 1, discussing the characteristics of the "new environmental liability" and its relationship to the insurance market.
139. Id. at 942-45.
140. Hitt, supra note 8, at 26.
141. Anderson, supra note 87, at 543.
142. Hitt, supra note 8, at 3.
143. Schwenke, supra note 8, at 10361.
IV. THE RISING STANDARD OF ENVIRONMENTAL DUE DILIGENCE: THE PROPOSED AMENDMENT TO THE INNOCENT LANDOWNER DEFENSE

Legislation concerning the innocent landowner defense currently is pending before Congress. Entitled "The Innocent Landowner Defense Amendment," the proposed bill amends CERCLA by clarifying the "all appropriate inquiry" standard. The Innocent Landowner Defense Amendment (hereinafter "the Amendment") creates a rebuttable presumption that an innocent purchaser who follows the specified guidelines of the Amendment has satisfied the requirements of the CERCLA defense, and is thus exempt from liability. The scope of the pre-acquisition investigation set out in the Amendment, while based on CERCLA's innocent landowner defense, extends far beyond the reasonable inquiry and visual inspection components of the statutory defense. The Amendment requires all purchasers to conduct a "Phase I" property investigation that includes:

1. A Chain of Title review, including a review of deeds, leases, easements and documents of record, and a review of historical data such as maps and aerial photographs to identify prior ownership and uses which represent a potential threat of contamination of the property;
2. A review of reasonably ascertainable public information, including government records to identify regulated hazardous waste sites and recorded hazardous site conditions reported by federal, state and local agencies;
3. A site inspection and assessment by an environmental engineer, coordinated with the foregoing information search, to investigate observable site conditions which indicate the presence or likely presence of contamination on the property.

147. H.R. 2787, 101st Cong., 1st Sess., § (2)(1989) provides in full:

SEC. 2. AMENDMENTS TO SUPERFUND PERTAINING TO INNOCENT LANDOWNER DEFENSE.

Section 101(35) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601 et seq.) is amended by redesignating subparagraphs (C) and (D) as subparagraphs (D) and (E), respectively and inserting after subparagraph (B), the following:

(C) (i) A defendant who has acquired real property shall have established a rebuttal presumption that he has made all appropriate inquiry within the meaning of subparagraph (B) if he establishes that, immediately prior to or at the item [sic] of acquisition, he obtained a Phase I Environmental Audit of the real property which meets the requirements of this subparagraph.

(ii) For purposes of this subparagraph, the term 'environmental professional' means
In short, the Amendment mandates an environmental investigation which imposes a substantial and specific obligation of due diligence upon innocent landowners. The Amendment requires every purchaser involved in a commercial real estate transaction to hire a professional env-

an individual, or an entity managed or controlled by such individual, who, through academic training, occupational experience and reputation (such as engineers, environmental consultants and attorneys), can objectively conduct one or more aspects of a Phase I Environmental Audit. For purposes of this subparagraph, the term 'Phase I Environmental Audit' means an investigation of the real property, conducted by environmental professionals, to determine or discover the obviousness of the presence or likely presence of a release or threatened release of hazardous substances on the real property and which consists of a review of each of the following sources of information:

(I) Recorded chain of title documents regarding the real property, including all deeds, easements, leases, restrictions, and covenants for a period of 50 years.

(II) Aerial photographs which may reflect prior uses of the real property and which are reasonably obtainable through State or local government agencies.

(III) Determination of the existence of recorded environmental cleanup liens against the real property which have arisen pursuant to Federal, State, and local statutes.

(IV) Reasonably obtainable Federal, State, and local government records of sites or facilities where there has been a release of hazardous substances and which are likely to cause or contribute to a release or threatened release of hazardous substances on the real property, including investigation reports for such sites or facilities; reasonably obtainable Federal, State, and local government environmental records of activities likely to cause or contribute to a release or a threatened release of hazardous substances on the real property, including landfill and other disposal location records, underground storage tank records, hazardous waste handler and generator records and spill reporting records, and such other reasonably obtainable Federal, State, and local government environmental records which report incidents or activities which are likely to cause or contribute to a release or threatened release of hazardous substances on the real property. In order to be deemed 'reasonably obtainable' within the meaning of this subclause, a copy or reasonable facsimile of the record must be obtainable from the government agency by request.

(V) A visual site inspection of the real property and all facilities and improvements on the real property, and a visual inspection of immediately adjacent properties from the real property, including an investigation of any chemical use, storage, treatment and disposal practices on the property.

(iii) No presumption shall arise under clause (i) unless the defendant has maintained a compilation of the information reviewed in the course of the Phase I Environmental Audit.

(iv) Notwithstanding any other provision of this paragraph, if the Phase I Environmental Audit discloses the presence or likely presence of a release or threatened release of hazardous substances on the real property to be acquired, no presumption shall arise under clause (i) with respect to such release or threatened release unless the defendant has taken reasonable steps, in accordance with current technology available, existing regulations, and generally acceptable engineering practices, as may be necessary to confirm the absence of such release or threatened release.

Id.
environmental consultant to conduct a fairly comprehensive inquiry into the past and present environmental condition of the site.148 Furthermore, if the "Phase I" investigation discloses the presence or likely presence of hazardous substances at the property, the Amendment appears to mandate a "Phase II" audit involving soil and water testing.149

The Amendment's "Phase I" environmental audit may have already become incorporated into current real estate practice. Although it is difficult to estimate how many entities currently conduct a comprehensive site assessment before purchasing property, practice manuals indicate that this type of environmental investigation is widely sought by purchasers and lenders concerned with avoiding CERCLA's broad liability.150 According to its sponsor, the Amendment provides a "narrow exemption from strict liability to innocent landowners as an incentive for them to investigate the environmental condition of real property prior to acquisition."151 The aim of the Amendment is to facilitate the two main goals of CERCLA — to efficiently clean up inactive hazardous waste sites and insure that those responsible for the contamination pay for such cleanup.152 The proposed legislation promotes the efficient cleanup of hazardous wastes by requiring purchasers to generate necessary information concerning the conditions of properties across the nation.153 In addition, such essential information concerning the past and present uses of the property aids in the identification of parties responsible for the site's hazardous condition. Overall, the Amendment not only promotes the goals of CERCLA in clarifying the innocent landowner defense, but also creates a positive statutory duty of environmental due diligence.

The Amendment also provides legal certainty which fulfills an insurance purpose and facilitates real estate transfer and development. Parties to a transaction who possess certainty regarding their respective liabil-

148. H.R. 2787, 101st Cong., 1st Sess., § 2 (1989). The environmental audit, as the basis of environmental due diligence, generally is defined as a process of data collection and site visits conducted pursuant to a contractual relationship that enables a buyer to assess the environmental condition of the land, physical assets, and operations being purchased, so that the buyer can manage or avoid the risks of environmental liability presented by the acquisition. Demester, supra note 128, at 10211. See generally Mays, A Practical Guide to Environmental Due Diligence in Real Estate Transactions (1989) (unpublished manuscript).


150. Most practitioners counsel purchasers to take investigatory steps similar to those specified by the Amendment's Phase I audit. See, e.g., Demester, supra note 128; Mays, supra note 148; Hitt, supra note 8; Hayes & Dinlun, supra note 126.


152. Id.

153. Id.
ties are able to quantify and allocate the risks in structuring the transac-
tion. In the typically debt-heavy structure of commercial real estate 
acquisitions, many transactions are forced to fold if environmental 
problems possessing uncertain risks arise before the transaction closes. The current absence of established standards upsets environmentally 
risky transactions in which the only recourse for a purchaser is either to 
abandon the transaction, thereby undermining productivity, or to enter 
into costly and protracted litigation which further consumes social 
resources.

The enactment of the Amendment considerably narrows the issues 
with respect to the defense's inquiry requirement while preserving the 
incentive to avoid CERCLA liability. More importantly, the Amend-
ment facilitates the goals of CERCLA and promotes real estate develop-
ment by providing legal certainty to the transaction. In specifying the 
due diligence obligation, the Amendment also allows the innocent land-
owner to use the defense as a type of private insurance against environ-
mental liability. Overall, the Amendment alleviates the inherent 
CERCLA problem of legal uncertainty. Although the rebuttable pre-
sumption does not apply if the audit indicates a possibility of contamina-
tion at the property, the Amendment requires the landowner to confirm 
the absence of such contamination by further investigation. While this 
requirement does not resolve the problem of practical irrelevance once 
hazardous wastes are discovered at the property, the landowner must 
investigate thoroughly enough to confirm the presence or absence of con-
tamination at the site. Thus, by mandating thorough investigations, the 
Amendment transforms the statutory defense into a substantial positive 
duty of environmental due diligence for every transaction.

154. See Abraham, supra note 1, at 945-60, discussing the quantification of risks by insurers as a 
form of "surrogate regulation" in the environmental field." Id. at 954.
155. See Mays, supra note 148. An explicit requirement in the proposed Amendment for a 
Phase II resource-testing audit when the Phase I audit discloses the likely presence of hazardous 
wastes would provide even greater certainty notwithstanding increased costs to the purchaser desir-
ous of escaping CERCLA liability.
156. See supra notes 131-40 and accompanying text.
157. See supra notes 141-44 and accompanying text.
158. This result does not appear to negate claims that the landowner's inquiry was negligent in 
some way; however, the burden of proof of such claim would be placed on the Government or 
another private party because the landowner who complies with the Amendment's requirements has 
a rebuttable presumption of appropriate inquiry. See H.R. 2787 101st Cong., 1st Sess., § (2)(C)(i) 
(1989).
V. THE RISING STANDARD OF ENVIRONMENTAL DUE DILIGENCE: 
EPA'S SETTLEMENT POLICY

EPA's "Guidance On Landowner Liability And De Minimis Settle-
ments," (Guidance) was issued on June 6, 1989.159 Like the Amend-
ment, the Guidance implicitly establishes the due diligence standard as
an obligation accompanying all real estate transactions.160 According to
EPA, the Guidance is designed to enable the Government to offer liabil-
ity settlements to those landowners who qualify for the innocent land-
owner defense, but who do not want to risk a trial on the issue or incur 
litigation costs.161 Settlements minimally require access to the site and
assurances of due care from the innocent landowner, but may also in-
volve a cash payment in some circumstances.162 A de minimis settlement
allows a PRP meeting certain requirements to resolve liability as quickly
as possible, thereby reducing its costs and freeing the Government to use
its resources for cleanup and the pursuit of other PRPs.163

The Guidance delineates EPA's viewpoint concerning the connec-
tion between the innocent landowner defense and CERCLA's de minimis
landowner provision.164 For innocent landowners, the Government will
only entertain a de minimis settlement proposal pursuant to CERCLA

159. Guidance, supra note 17.
160. Id. at 3505.
161. Id.
162. Id. at 3505-3506.
163. Id.
164. SARA, 42 U.S.C. 9622(g), provides that de minimis contributors are liable for response
costs, but such persons are entitled to favorable settlement treatment. See Leifer & Musiker, supra
note 21. CERCLA § 112(g), specifically provides:
(g) De minimis settlements
(1) Expedited final settlement
Whenever practicable and in the public interest, as determined by the Presi-
dent, the President shall as promptly as possible reach a final settlement with a
potentially responsible party in an administrative or civil action under section
9606 or 9607 of this title if such settlement involves only a minor portion of the
response costs at the facility concerned and, in the judgment of the President,
the conditions in either of the following subparagraph (A) or (B) are met:
(A) Both of the following are minimal in comparison to other hazardous sub-
stances at the facility:
(i) The amount of the hazardous substances contributed by that party to
the facility.
(ii) The toxic or other hazardous effects of the substances contributed by
that party to the facility.
(B) The potentially responsible party—
(i) is the owner of the real property on or in which the facility is located;
(ii) did not conduct or permit the generation, transportation, storage, treat-
ment, or disposal of any hazardous substance at the facility; and
§ 122(g)(1)(B) based upon the defense's requirement that the landowner has made "all appropriate inquiry" into the property before acquisition.\textsuperscript{165} Before settling as \textit{de minimis} contributor, the current owner must prove to the Government's satisfaction that her investigation into the property fulfilled the requirements of the innocent landowner defense.\textsuperscript{166} Thus, EPA's approach is to read together the innocent landowner defense and the \textit{de minimis} provision of CERCLA.\textsuperscript{167}

The Guidance's critical omission is its failure to address the question of what constitutes "all appropriate inquiry" according to EPA.\textsuperscript{168} Instead, the Guidance merely reiterates the courts' interpretation of diligent inquiry as "what is reasonable under all of the circumstances."\textsuperscript{169} Despite this failing, EPA's Guidance does assure the pervasiveness of environmental due diligence in real estate transactions by incorporating the obligation into the CERCLA settlement process. The landowner bears the "burden of coming forward with information establishing his eligibility for a \textit{de minimis} settlement" as an innocent landowner.\textsuperscript{170} The information to be generated by the landowner parallels the environmental inquiry to be conducted by purchasers under the Amendment: the landowner must demonstrate her lack of actual or constructive knowledge of the environmental contamination at the time of acquisition based on information regarding the environmental condition and previous uses of the property. While the Amendment specifies the innocent landowner's obligation of due diligence more clearly,\textsuperscript{171} EPA's Guidance also forecasts a rising standard of environmental due diligence for the landowner involved in CERCLA settlements.

\textsuperscript{165} Guidance, supra note 17, at 3503.
\textsuperscript{166} See id. at 3505-06.
\textsuperscript{167} See O'Brien, supra note 60 (criticizing the EPA's approach as a strained interpretation of the two statutory provisions). See also Leifer & Musiker, supra note 21, (suggesting that § 122(g)(1)(B) should be eliminated because it is redundant in light of the innocent landowner defense).
\textsuperscript{168} See Schwenke, supra note 8, at 1036.
\textsuperscript{169} Guidance, supra, note 17, at 3505.
\textsuperscript{170} Id.
\textsuperscript{171} See supra notes 144-58 and accompanying text.
VI. JUSTIFICATIONS FOR THE ENVIRONMENTAL DUE DILIGENCE STANDARD

The issue of whether the obligation of environmental due diligence for innocent landowners is fair or efficient is a policy debate concerning who ultimately bears responsibility for the cost of cleaning up industrial society's hazardous residues. CERCLA's goals of prompt cleanup of sites, recovery of government costs from responsible parties and protection of public health and the environment currently are accomplished through a legal liability regime. CERCLA attempts to allocate the social costs of inactive hazardous waste sites to responsible parties, i.e., those who have profited in the past from unsafe disposal practices. In 1986 SARA effected a broader-based private apportionment of the costs of Government response and remediation activities than that originally enacted through the Superfund tax. Under the present scheme, CERCLA's joint and several strict liability reaches even innocent purchasers who bear no responsibility for the creation or maintenance of hazardous conditions on real property.

The innocent landowner defense and its concurrent rising duty of environmental due diligence are inextricably tied to the CERCLA liability regime. This inflexible and expansive enforcement scheme currently creates enormous transaction and opportunity costs for dispute resolution by relying on the judicial system to define the legal parameters of due diligence. As an integral component of the innocent landowner defense, the rising obligation of environmental due diligence must be evaluated in terms of the overall goals of CERCLA and the social policy values of efficiency and fairness.

Environmental due diligence promotes CERCLA's goals of rapid cleanup and government reimbursement from responsible parties by lowering the costs of the CERCLA enforcement process. The obligation requires innocent landowners to generate essential information concerning the environmental condition of a particular property, the presence of hazardous substances at that property and the previous ownership and

172. See supra notes 23-30 and accompanying text.
173. See Note, Superfund Settlements, supra note 4.
174. See supra notes 31-74 and accompanying text.
175. See supra note 29 and accompanying text; see generally Developments, supra note 77, at 1466; Lyons, supra note 1, at 272 ("The substantial transaction costs which arise from the government's efforts to have responsible parties bear site cleanup costs in effect impose enormous but unseen opportunity costs on society by shifting resources which might have been used to finance cleanup efforts to the process of imposing legal and financial responsibility for cleanup costs on responsible parties.").
uses of the property. The innocent landowner must provide such documentation to EPA in order to obtain a release from liability as a *de minimis* contributor in a CERCLA settlement concerning the property. The obligation thus encourages early settlement of liability and efficient cleanup by providing historical and current information necessary to apportion liability among the PRPs and remove the environmental contamination from the site.

The innocent landowner also must provide such environmental information in claiming the innocent landowner defense under CERCLA § 107(b)(3)/101(35). Although the efficiency goals of CERCLA are more attenuated in the litigation context, due diligence facilitates this process by providing factual evidence to determine responsibility for the creation of hazardous waste contamination. The environmental information arising from the exercise of diligent inquiry thus lowers the transaction and opportunity costs of the CERCLA enforcement process by facilitating the allocation of responsibility among the PRPs connected with the investigated property in both settlement and adjudication. These informational benefits of due diligence are attainable if the proposed Amendment is enacted because the legislation clarifies the due diligence obligation and requires specific environmental information concerning every property acquisition. Under the current statutory standard, much of the information deemed essential would not be generated because the scope of the inquiry requirement is uncertain.

Overall, the innocent landowner defense provides societal benefits by requiring, through due diligence, the generation of essential environmental information. However, the defense does not effectively discourage the unabated transfer of contaminated property by threatening sellers of real estate with the purchaser's investigation of the property. The latter benefit is both illusory and inefficient under CERCLA. It is illusory because most purchasers will simply seek a contractual right of contribution or indemnification from the seller at the time of transfer in the future event of a response action involving the property. Such a con-

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177. Guidance, supra note 17, at 3505; see supra notes 170-71 and accompanying text.


179. See supra notes 88-129 and accompanying text.


181. The contribution option certainly is available to the innocent purchaser. However, due
tractual provision is allowed by CERCLA and is less costly for both parties. The purchaser does not add the cost of the seller's cleanup effort or her own investigation to the price of the property, and the seller is not required to incur the cost of remediating the site before transfer.

A more efficient method than the innocent landowner defense of encouraging the seller to clean up contaminated property is that used in the Environmental Cleanup and Responsibility Act (ECRA) of New Jersey. Under ECRA, the seller may only offer property for transfer that is free from environmental contamination. The ECRA scheme is more efficient than CERCLA because ECRA assures that every property offered for transfer is uncontaminated, and cleanup is not delayed by an indemnification agreement between the parties.

With the enactment of the Amendment, environmental due diligence provides a private benefit to innocent purchasers of real estate. Clarification of diligent environmental inquiry allows innocent landowners to conduct productive enterprises in a context of greater legal certainty. The cost of environmental due diligence borne by the innocent landowner may be viewed as a type of private insurance against future environmental liability. However, if the due diligence obligation is to become an integral and effective component of every commercial real estate acquisition, the costs of this pervasive, daily obligation must be re-

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182. See SARA, 42 U.S.C. § 9113(f). See also supra notes 78-84 and accompanying text.
183. N.J. STAT. ANN. §§ 13:1k-6, 13:1k-13 (1983). Under ECRA, the current owner is required to remove hazardous substances from industrial property before the property can be sold or transferred. This obligation is triggered by various real estate and commercial transactions, not by the endangerment or threat to the environment standard under CERCLA. See SARA 42 U.S.C. § 9607. For a discussion of obligations of the seller under ECRA, see Understanding ECRA Regulations, 19 [Current Developments] Env't Rep. (BNA) 1671 (1988).
184. The seller, prior to sale, must:
   (1) provide a sworn declaration that there are no hazardous wastes on her property or that any past discharges have been cleaned up to appropriate Department of Environmental Protection (DEP) Standards, (2) where hazardous waste contamination exists, follow a detailed cleanup plan and insure the funds to clean up the property, or (3) enter into a detailed DEP "Administrative Consent Order."
Levine, supra note 180 at 212-13; see N.J. STAT. ANN. § 13:1k-9(b).
185. The encouragement of productivity and development provided by legal certainty could also be viewed as a public benefit of the due diligence obligation. However, by "public benefit," I am referring to the benefits to society defined by the goals of CERCLA, especially the aim of efficient cleanup of environmental contamination from inactive hazardous waste sites.
duced by the legal certainty of the Amendment. Notwithstanding the private benefit due diligence provides to landowners, the issue of whether due diligence is fairly imposed on innocent parties appears to be irrelevant given the extensive liability and pervasiveness of the CERCLA regime. The obligation is a mechanism which further privatizes the costs of the CERCLA enforcement process by reducing the Government's actual and transaction costs. Although Congress effected a broader-based apportionment of costs through SARA, the fairness concerns with environmental due diligence are diminished by increasing the efficiency of the obligation through legal certainty with the enactment of the Amendment.

VII. CONCLUSION

The innocent landowner who conducts a diligent inquiry into a property's environmental condition has performed a valuable service to the Government, other PRPs and the public by freeing social resources from CERCLA consumption to be used for additional environmental cleanup tasks. As environmental due diligence evolves into the substantial obligation that is forecasted by the Amendment and EPA's Guidance, this savings in social resources should be recognized in the CERCLA regime, especially in the increasing use of the settlement process and in the exploration of alternatives to CERCLA's liability scheme such as mixed funding.

Environmental due diligence privatizes the costs of the CERCLA program and benefits the public by facilitating the prompt solution of the problems posed by inactive hazardous waste sites. Because environmental due diligence provides significant benefits both privately and publicly, the obligation is fairly imposed as long as these benefits are recognized in

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187. "CERCLA's liability system primarily operates to further the goal of compensation" of the Government. Note, Deep Pockets and CERCLA, supra note 174, at 309. This compensation justification of CERCLA's liability provisions is consistent with a fairness justification for the innocent landowner defense, i.e. the due diligence obligation is fairly imposed on innocent parties because it furthers the process of Government compensation.
190. See Lyons, supra note 1, at 332-44 (exploring the viability of alternatives to the CERCLA liability regime); Note, Superfund Settlements, supra note 4 (discussing the alternatives of EPA funding for "orphan shares" at sites, non-binding preliminary assessments, and PRP participation in remedial investigation/feasibility studies to remove obstacles to prompt settlements).
the CERCLA regime and the costs of the obligation are decreased by the legal certainty of the Amendment. A defined standard of environmental due diligence contributes to a heightened environmental awareness and aids in future decision-making concerning the preservation of an essential resource.

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