The EPA Guidance on Landowner Liability and the Innocent Landowner Defense: The All Appropriate Inquiry Standard: Fact or Fiction

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Comments

THE EPA GUIDANCE ON LANDOWNER LIABILITY AND THE INNOCENT LANDOWNER DEFENSE: THE ALL APPROPRIATE INQUIRY STANDARD: FACT OR FICTION?

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I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). The aim of CERCLA was to provide the United States Environmental Protection Agency (EPA) with the authority to compel the clean up of hazardous waste sites and otherwise to protect public health and the environment from releases of hazardous substances and waste. In 1986, Congress enacted the

2. Id. 42 U.S.C. § 9604; see also United States v. Conservation Chem. Co., 628 F. Supp. 391, 404 (W.D. Mo. 1985) ("[t]he fundamental purpose of CERCLA is to provide for the expeditious and efficacious cleanup of hazardous waste sites"); City of Philadelphia v. Stepan Chem., 544 F. Supp. 1135, 1142-1143 (E.D. Pa. 1982) (the objective of CERCLA is to "facilitate the prompt cleanup of hazardous dump sites by providing a means of financing both governmental and private responses and by placing the ultimate financial burden upon those responsible for the danger").
3. CERCLA was to deal principally with health and environmental problems associated with the improper disposal of hazardous waste that primarily result in the contamination of groundwater. See 126 CONG. REC. 26,938 (1980). CERCLA (and later, SARA) represents the legislative response to the tremendous danger to human life and the ecosystem presented by the introduc-
Superfund Amendments and Reauthorization Act (SARA). SARA extended the original CERCLA statute for five additional years. Additionally, SARA was aimed at accelerating response activity and providing substantial additional funding for the cleanup of hazardous waste sites.

Important aspects of the SARA amendments were those aimed at clarifying some questions that had arisen regarding the "third party" defense that was contained in CERCLA section 107(b) as initially enacted. In attempting to clear up the ambiguities in the statute, Congress defined certain troublesome terms and, as disclosed by the legislative history, established various hierarchies that the courts and the EPA were to look to for guidance when such a defense was raised. In so doing, Congress established what has come to be known as the "innocent landowner" defense. While it is a type of a "third party" defense of toxic materials into groundwater and soil. H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 54, reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2836.

8. The original version of CERCLA section 107(b) contained an exclusive list of affirmative (third party) defenses. 42 U.S.C. § 9607(b).
9. Prior to SARA, the most troublesome definition the courts faced concerned whether the term "contractual relationship" as used in CERCLA section 107(b)(3) was meant to include deeds, leases, and other instruments of transfer of ownership. The term "contractual relationship" was defined in SARA by adding a new subsection to the definition section, CERCLA section 101(35). Before SARA, the EPA took the position that a real estate deed represented a contractual relationship within the meaning of CERCLA section 107(b)(3), thereby eliminating the availability of this defense for a landowner in the chain of title with the party responsible for the release of the hazardous substance. Before SARA's enactment, however, this issue was never addressed by a court. But see United States v. Hooker Chemicals & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1988) (upholding government's argument on this issue in applying pre-SARA law).
10. Congress established the pertinent hierarchy regarding the level of "all appropriate inquiry" that will be required of landowners, as used in CERCLA section 101(35)(B). Congress dictated that commercial transactions will be held to the highest level of inquiry, private residential transactions will be held to a more lenient level of inquiry, and bequests and inheritances will be held to the most lenient level of inquiry. See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 187-88 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 3279-80. Both the courts and the EPA have acknowledged this hierarchy in their treatment of the innocent landowner defense.
11. The "innocent landowner defense," while not titled as such, is a term of art that has been coined by commentators and practitioners. The innocent land-
fense,\textsuperscript{12} as a statutory defense to CERCLA liability, it has its own separate set of requirements and qualifications in addition to some of the straightforward third party defense requirements.\textsuperscript{13} Although Congress went to great lengths in establishing the innocent landowner defense, there have arisen problems of interpretation in the courts that have left landowners somewhat unsure about the nature of the defense.\textsuperscript{14} The EPA, for its part, remained silent on its position regarding such ambiguities.\textsuperscript{15}

Finally, on June 6, 1989, following years of development, the EPA publicly announced its interpretation of the innocent landowner defense to Superfund liability.\textsuperscript{16} The EPA, in its interpretation, adopts a pragmatic approach to the difficult issues of law and policy inherent in this area.\textsuperscript{17} The EPA's position, however, is problematic because it leaves unanswered the key determination, the determination that is providing the courts with the most difficult problems in this area.\textsuperscript{18} Instead of defining the "all appropriate inquiry" standard, they finesse the question by stating that it will remain a determination to be made on a case by case basis. As a result, at least one amendment has been proposed by Congress to aid in clearing up the inherent ambiguities in making this key determination.\textsuperscript{19}

This Comment will attempt to analyze the utility of the SARA amendments and the changes that they have made with respect to third party defenses enumerated by the CERCLA. It will also be a vehicle for analyzing recent court decisions that have wrestled

\begin{footnotesize}
\begin{itemize}
  \item owner defense is actually a type of third party defense under CERCLA section 107(b)(3) read in combination with the SARA-added CERCLA section 101(35). \textit{See infra} notes 57-95 and accompanying text.
  \item 12. CERCLA section 101(35) defines "contractual relationship" as used in CERCLA section 107(b)(3). Thus the innocent landowner defense is a third party defense, distinguishable from the straightforward third party defense, which remained unchanged by the SARA amendments.
  \item 13. \textit{See infra} notes 57-95 and accompanying text.
  \item 14. \textit{See infra} notes 96-202 and accompanying text.
  \item 15. \textit{See supra} note 10 and accompanying text.
  \item 17. \textit{See infra} notes 203-233 and accompanying text.
  \item 18. \textit{See infra} notes 209-212 and accompanying text.
  \item 19. Congressman Curt Weldon (R.- Pa.) has introduced a bill (H.R. 2787) which would establish the minimum investigation that must be conducted in order to gain a presumption that the third party innocent landowner defense is applicable, provided, of course, that the investigation did not turn up "red flags" that would necessitate further inquiry. As of the date of this writing, this bill has not been passed into law.
\end{itemize}
\end{footnotesize}
with the innocent landowner defense as it was enacted in SARA. It will ascertain practical methods of determining the requirements of the innocent landowner defense in the view of the EPA and their expected response in light of these requirements. Finally, the aim of this Article will be to determine the utility and practicality of the EPA's guidance to landowners concerning potential liability, *de minimis* settlements, and settlements with prospective purchasers of contaminated property.

II. THE THIRD PARTY DEFENSE UNDER CERCLA

Congress passed CERCLA due to the enormous public outcry stemming from the discovery of an abandoned hazardous waste site in the Love Canal neighborhood located in upstate New York in 1980.20 It has little legislative history due to the fact that Congress passed it in the final days of the lame duck session of the outgoing ninety-sixth Congress.21 Moreover, as a result of this swift passage, courts were forced to struggle with congressional intent when attempting to interpret the provisions of the statute.22 In short, Congress' haste resulted in a piece of compro-

20. The Love Canal area gained notoriety due to health hazards posed by the discovery of chemicals buried in the ground years before. At Love Canal, Hooker Chemical and Plastics Corporation had dumped 21,800 tons of toxic wastes, including dioxin, into the canal. Gruson and Lindsey, *Ex-Love Canal Families Get Checks*, New York Times, Feb. 20, 1985, p. 81. Years after the disposal, residents of the Love Canal neighborhood began to suffer physical injuries ranging from a variety of cancers and mental retardation to persistent rashes and migraine headaches. Former residents settled with Hooker for a reported $20 million. *See also No Health Effects From Love Canal, State Appointed Scientific Panel Finds*, 11 ENV'T Rep. (BNA) 948 (Oct. 31, 1980); *Waste Control Issue Follows Air, Water to Become Top U.S. Environmental Priority*, 16 Env't Rep. (BNA) 7 (May 3, 1985). The residents of Love Canal, however, were unable to obtain any legal repose, in the way of forcing the cleanup of the toxic waste site, because the federal statutory scheme contained no mechanisms to which they could turn. *See W. FRANK, SUPERFUND: LITIGATION AND CLEANUP* 1 (1985). Moreover, public awareness of the major public health hazards posed by the improper disposal of hazardous wastes was increasing during this time. *See L. GIBBS, LOVE CANAL, MY STORY* (1982). For a legislative interpretation of the events at Love Canal and their effects on the legislative debate, see S. REP. No. 848, 96th Cong., 2d Sess., 8-10 (1980). For a more in-depth discussion of the legislative history and the motivation behind the enactment of SARA, see generally, Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

21. *See United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1253 (S.D. Ill. 1984). *See generally Grad, supra note 20 at 1-2; ENVTL. L. INST., 1 Superfund: A Legislative History, xiii-xxi (1982). The usual rules were suspended so that amendments could not be added. *Id.* Unusual measures were employed in this way to ensure the swift passage of CERCLA. *Id.*

misse legislation with little or no legislative history or background.

CERCLA section 107(a) identifies four categories of persons potentially liable for cleanup costs: (1) present owners and operators of the facility; (2) persons who owned or operated the facility at the time of the disposal of the hazardous waste; (3) persons commonly called "generators" - who arranged, by contract or otherwise, for the disposal or treatment at the facility of a hazardous waste they owned or possessed; and (4) persons who transported a hazardous waste to the facility. These four categories are commonly referred to as Potentially Responsible Parties (PRPs). For purposes of the third party defense as it relates to the later established innocent landowner defense, only those PRPs identified in categories (1) and (2) are relevant.

While explicitly identifying the PRPs, Congress failed, as a result of compromise, to provide a liability scheme in CERCLA.

sirable andonerous position of construing inadequately drawn legislation."; See also, Bayko & Shore, supra note 6, at 24, col. 1.

CERCLA avoided dealing with major questions such as whether strict liability should apply, what level of causality should the government have to prove, should liability be joint and several, should liability be retroactive, and should responsible parties have the right to seek contribution from other potentially responsible parties (PRPs). To no one's surprise, the courts have played a critical role in crafting the working parts of the statute.

Id.

24. Id.
25. Id.
26. Id.
27. CERCLA § 107(a), 42 U.S.C. § 9607(a).
28. Both the third party defense as originally enacted in CERCLA section 107(b)(3) and the third party innocent landowner defense added by SARA in CERCLA section 101(35) can be maintained only by landowners or those operating the site as lessees. Lessees are entitled to claim both defenses available to landowners. Thus, the "owner or operator" language in both CERCLA sections 107(a)(1) and (2) pertain to landowners and lessees. For reasons of simplicity, this Article will refer only to landowners with the caveat that it is also meant to include lessees. The "generators" and "transporters" in CERCLA sections 107(a)(1) and (2) cannot avail themselves of a CERCLA section 107(b)(3) third party defense of any type because they would be unable to meet the requirements of the defense. The presence of a "contractual relationship" as defined in CERCLA section 101(35)(A) would bar these PRPs from fulfilling the requirements of this defense. While there may be other defenses available to such PRPs, the subject is beyond the scope of this Article and will not be discussed. See United States v. Ward, 618 F. Supp. 884 (D.N.C. 1985) (electrical equipment rebuilder denied third party defense because of presence of contractual relationship with transporter); but see Gibney, The Practical Significance of the Third Party Defense Under CERCLA, 16 B.C. ENVTL. L. AFF. REV. 383, 389 (1988) (suggesting that generator may avail himself of third party defense if transporter had dumped his generated wastes without his knowledge).
29. CERCLA's standards of liability are vague. For two early decisions ad-
Courts have held that Congress intended liability to be strict, joint, and several.\textsuperscript{30} This scheme, while missing from the statute,\textsuperscript{31} was the subject of a last minute compromise in Congress.\textsuperscript{32} Provisions were deleted from the Act mandating such joint and several strict liability.\textsuperscript{33} However, courts pointed to the definition section of the Act\textsuperscript{34} indicating that liability was to be determined with reference to section 311 of the Federal Water Pollution Control Act (commonly known as the Clean Water Act or CWA).\textsuperscript{35}


31. Although the original bills presented in Congress contained a provision imposing joint and several liability, the section was stricken from the Act before it passed Congress. See Grad, supra note 20, at 19.

32. See generally W. FRANK, supra note 20, at 7.

33. See Grad, supra note 20, at 19.

34. CERCLA § 101, 42 U.S.C. § 9601.

Relying on this, courts imposed strict liability on responsible parties. As a result, those individuals who had purchased land without knowing of the presence of hazardous waste on the property (i.e. innocent landowners) would be held strictly liable for the cleanup costs.

The only defenses available to a PRP under CERCLA were those statutory “third party” defenses provided by Congress in CERCLA section 107(b). It is here, and only here, that a PRP may look to avoid liability under CERCLA. The defenses created in CERCLA section 107(b) are affirmative defenses, thereby placing the burden of proof on the PRP who raises the defense. CERCLA sections 107(b)(1) and (2) involve an act of God or an act of war and are not part of the consideration of

section 311 does not explicitly mention strict liability, courts have inferred such liability from the language of the Act, which subjects certain parties to strict liability unless they can successfully assert one of the defenses provided in the Act. See United States v. M/V Big Sam, 681 F.2d 432, 437 (5th Cir. 1982), on petition for rehearing and suggestions for rehearing en banc, 693 F.2d 451 (5th Cir. 1982); United States v. LeBouef Bros. Towing Co., 621 F.2d 787, 790 (5th Cir. 1980), cert denied, 452 U.S. 906 (1981); Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979).

Congress’ reference to CWA section 311 is logical, because the same defenses to liability found there also appear in CERCLA section 107(b). See also S. Rep. No. 848, 96th Cong., 2d Sess. 1 (1980). The Senate committee that introduced CERCLA noted that CERCLA actually had “roots in the liability and funding provisions provided by the Clean Water Act of 1972.”

Parties liable under CERCLA section 107(a) include individuals as well as corporations. 42 U.S.C. §§ 9601(20) and 9601(21).

For a comprehensive overview of the practical effect and pertinent case law of the imposition of liability on landowners due to their status as such and the pertinent case law, see generally Glass, The Modern Snake in the Grass: An Examination of Real Estate & Commercial Liability Under Superfund & SARA and Suggested Guidelines for the Practitioner, 14 B.C. ENVTL. L. AFF. REV. 381 (1987).

So called because the defense requires that the placement or disposal of the hazardous waste on the landowner's property have been done solely by a third party. CERCLA § 107(b), 42 U.S.C. § 9607(b).

See United States v. Monsanto Company, 858 F.2d 160, 170 (4th Cir. 1988) (affirmatively acknowledging statutory language that liability under section 107(a) is “subject only to the defenses set forth” in section 107(b)) (emphasis in the original); United States v. Stringfellow, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987) (holding that these statutory defenses are exclusive).

CERCLA section 107(b) reads in pertinent part: “There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish. . . .” 42 U.S.C. § 9607(b).

42. Id.


the third party defense. To date, there has been little significant litigation concerning these defenses.

CERCLA section 107(b)(3) was and is the heart of the third party defense. The statute provides, in pertinent part:

(b) There shall be no liability... 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:

... (3) an act or omission of a third party other than... one whose act or omission occurs in connec-

46. Both an act of God and an act of war are defenses distinct from the third party defense. 42 U.S.C. § 9607(b).

47. "Act of war" is not defined in the Act. Moreover, since the enactment of CERCLA, the "act of war" defense has never been affirmatively pleaded by a PRP.

In contrast, an "act of God" is defined as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." CERCLA § 101(1), 42 U.S.C. § 9601(1).

In Wagner Seed Co. v. Dagget, 800 F.2d 310 (2d Cir. 1986), an agricultural chemical company attempted to obtain a preliminary injunction against an order by the EPA requiring a cleanup of a toxic waste spill from its warehouse. One of the issues pleaded by the company in this action was that they were entitled to the "act of God" defense, as contained in CERCLA section 107(b)(1), because the release from their warehouse was caused by the burning down of the warehouse due to being struck by lightning. Id. at 313. The court never reached the merits of this defense, holding that it lacked subject-matter jurisdiction to hear such a claim, as it constituted a pre-enforcement review of an EPA remedial action which is contrary to the policies underlying CERCLA. Id. at 317.

In a subsequent action to recover the costs incurred in the cleanup of the toxic wastes released from the warehouse, the District Court for the District of Columbia held that the company would be barred from recovering such costs since they had completed a substantial amount of the cleanup prior to the enactment of SARA, which amended CERCLA section 106(b)(2) to allow for such reimbursement from the Superfund. Wagner Seed Co. Inc. v. Bush, 709 F. Supp. 249, 253 (D.D.C. 1989). Thus, the merits of the "act of God" defense were never reached.

In another case where a defendant asserted the "act of God" defense, the District Court for the Central District of California held that the heavy rainfalls that the defendant alleged were responsible for the release of toxic wastes were not an exceptional natural phenomenon and thus were not an "act of God" within the meaning of the defense. United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987). The court stated that such "rains were foreseeable based on normal climactic conditions and any harm caused by the rain could have been prevented through design of proper drainage channels." Id. The court further held that the rains were not the sole cause of the release. Id. (emphasis in the original).

Thus, while the "act of God" defense has been raised on at least two separate occasions, the merits of the defense were never addressed in Wagner and were struck down in Stringfellow through observance of the statutory language that defines the defense.
tion with a contractual relationship, existing directly or indirectly, with the defendant. . . if the defendant establishes. . . that (a) he exercised due care with respect to the hazardous substances concerned. . . 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.\textsuperscript{48}

Thus, there were three elements contained within the third party defense that a PRP had to establish in order to avoid liability.\textsuperscript{49} To successfully assert a third party defense, a PRP had to prove (1) there was no direct or indirect relationship, contractual or otherwise, between the landowner/defendant (PRP) and the third party;\textsuperscript{50} (2) the landowner (PRP) exercised due care regarding the hazardous substances upon their discovery;\textsuperscript{51} and (3) the landowner (PRP) must have shown that he took precautions against the acts or omissions of the third party.\textsuperscript{52}

The majority of confusion that arose from this statutory defense resulted in an attempt to ascertain congressional intent through the term "contractual relationship."\textsuperscript{53} The basic question in the contractual relationship issue was whether or not instruments of transfer of ownership or interest in real estate such as deeds, leases, and other forms of conveyance were to be included.\textsuperscript{54} As construed by the courts, CERCLA may be used to

\textsuperscript{48} 42 U.S.C. § 9607(b)(3).
\textsuperscript{49} There are in reality four elements, because the release or threat of release of the hazardous substances must have been caused solely by a third party. CERCLA § 107(b), 42 U.S.C. § 9607(b). For the sake of simplicity, this fact will be assumed for purposes of this Article. It is important to note, however, that this is the first hurdle a party must clear, by way of proof, if one plans on successfully asserting any third party defense. Without meeting this first requirement, consideration of the other requirements is unnecessary, as one will lose on the "solely by a third party" proof problem. \textit{Id.}
\textsuperscript{50} CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} "Contractual relationship" is used in defining the requirements of the third party defense. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). A landowner who is claiming the third party defense has the burden of proving, by a preponderance of the evidence, that he had no direct or indirect contractual relationship with the person responsible for the release or threatened release of the hazardous substances. \textit{Id.}
\textsuperscript{54} See United States v. Carolawn, 21 Env't Rep. (BNA) 2124, 2129 (D.S.C. 1984) (denying summary judgement motion of defendant who held title to contaminated property for less than one hour); cf. Cadillac Fairview/California, Inc.
impose liability for cleanup costs on landowners based solely on their status as landowners. Many felt, however, that the reason Congress supplied such a defense was to protect an innocent purchaser of land from significant liability for cleanup costs. In enacting SARA in 1986, Congress set out to clarify these problems and correct some perceived misconceptions.

III. THE INNOCENT LANDOWNER DEFENSE UNDER SARA

A. Addition of the Innocent Landowner Defense

In 1986, Congress amended CERCLA by enacting SARA. Along with changing several provisions of CERCLA, SARA increased the size of the Superfund and accelerated response activity. Furthermore, Congress added the innocent landowner defense provision by defining certain terms used within the CERCLA section 107(b)(3) third party defense as enacted in the original statute.

When drafting SARA, the House of Representatives raised the issue of landowner liability in the form of an amendment. The proposed amendment would have added an entirely new paragraph to CERCLA section 107, dealing specifically with land-

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55. Historically, legislation enacted to protect the public health has been construed to permit the effectuation of the regulatory purpose despite the resulting hardship to individual defendants. See e.g., United States v. Park, 421 U.S. 658, 671-72 (1975); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3d Cir. 1984).

56. This would seem accurate in light of the formation of the innocent landowner defense after SARA. See H.R. Rep. No. 253, 99th Cong., 2d Sess. 15 (1985), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3038 (one of SARA's purposes was protection of interests and rights of those who may be held liable for such cleanups).


58. See Grad, supra note 20 and accompanying text.

59. CERCLA § 101(35), 42 U.S.C. § 9601(35). Added by SARA, this subsection is the basis of the innocent landowner defense when read in conjunction with the third party defense, CERCLA section 107(b)(3), which remained unchanged by SARA. 42 U.S.C. § 9607(b)(3).

60. 42 U.S.C. § 9607(b)(3).

owner liability. This amendment would have made available an affirmative defense to a landowner who was able to prove by a preponderance of the evidence that he had purchased the property in question absent actual or constructive notice of the hazardous condition, and thereafter did not contribute to its existence by permitting the disposal, storage, or treatment of hazardous wastes.

In the course of debate, several members of Congress continued to assert that innocent landowners must not be held liable for cleanup operations. They expressed concern that CERCLA, as it existed, failed to afford the desired protection. The sponsor of the proposed amendment acknowledged that it was unclear whether a landowner who satisfied the requirements of the proposed amendments could be found liable under CERCLA as it had been construed by the courts in the past. However, this amendment was considered necessary to clear up that uncertainty. This thinking was undoubtedly fueled by decisions hold-

62. The text of the proposed amendment was as follows:
(m) LANDOWNER LIABILITY- There shall be no liability under subsection (a)(1) of this section for a person otherwise liable who can establish by a preponderance of the evidence that he-
(1) is the owner of the real property on or in which the facility is located;
(2) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, the release or threatened release of which causes the occurrence of a response cost;
(3) did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission; and
(4) did not acquire the property with actual or constructive knowledge that the property was used prior to the acquisition for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

Id.

63. These are the same requirements that are in the innocent landowner defense as enacted by the addition of CERCLA section 101(35). 42 U.S.C. § 9601(35).

64. In the course of debate Representative Breaux stated the following: It looks like we should try to craft some type of provision that really protects the innocent landowner who has not done anything to put the waste there, or would have no way of knowing that the waste was there, and somehow wind up down the road years in advance that the property has toxic wastes on it. That person should not be held liable.


65. Representative Frank.


67. "While an argument could be made that we do not need this amendment, that it is already taken care of in the law, courts have differed on that point." Id. at H11,159 (statement of Representative Daub).
ing landowners liable for cleanup costs based upon their status as landowners.

The conference committee’s substitute amendment, which ultimately was passed, took a less direct approach than the House, but in the hope of reaching a similar result. Rather than providing a separate defense, a new definition was added to clarify the term “contractual relationship” contained in CERCLA section 107(b)(3) with regard to acts and omissions of third parties. This new definition works in conjunction with the third party defense.

“Contractual relationship” was defined to include land contracts, deeds or other instruments transferring title or possession. This definition thus put to rest the question of whether one in the chain of title is in a contractual relationship with a previous owner, thereby unequivocally rendering him a PRP. A passive landowner, therefore, could be made subject to liability under CERCLA.

However, this same section provides an exception to this liability created by such a contractual relationship, under limited circumstances. Under this section, a landowner is liable:

[U]nless the real property . . . was acquired by the defendant after the disposal or the placement of the hazardous substances 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

68. The requirements of the amendment and the innocent landowner defense as enacted (the conference approach) are essentially the same. See supra notes 61-63 and accompanying text.


70. CERCLA § 101(35), 42 U.S.C. § 9601(35).

71. The added subsection states, “The term contractual relationship, for the purpose of section 107(b)(3) of this title includes . . .” Id. § 101(35), 42 U.S.C. § 9601(35).


73. By defining “contractual relationship” to include deeds, leases, and other instruments transferring title or possession, a landowner who has purchased contaminated land may not avail himself of the pre-SARA third party defense because of this relationship. Instead, he must fulfill the requirements of CERCLA section 101(35)(A). Thus, he is a PRP as that term relates to CERCLA section 107(a).

74. A landowner in a contractual relationship with the previous owner(s) can be excepted from liability upon fulfilling the requirements of the “unless” clause. CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A).
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.\(^{75}\)

This added clause of section 101 when read in conjunction with CERCLA section 107(b)(3) came to be known as the third party "innocent landowner" defense. Thus, a purchaser of property who is able to establish that he "did not know and had no reason to know" of the existence of hazardous wastes on the site,\(^{76}\) and that he has satisfied the requirements of CERCLA sections 107(b)(3)(a) and (b),\(^{77}\) will not be held liable for cleanup costs under the amended CERCLA statute. In effect what the "unless" clause does in this scheme is allow a landowner who has a contractual relationship with the responsible party (which in the pre-SARA era would have defeated the assertion of a third party defense)\(^{78}\) to jump back into the third party defense of CERCLA section 107(b)(3) by having the contractual relationship which is not a contractual relationship by the statute.\(^{79}\) What Congress did was define the term "contractual relationship" to include certain legal relationships unless the party could establish certain other requirements.\(^{80}\) It is a strange and cumbersome, not to mention extremely confusing, way to accomplish such an aim—a separate addition to CERCLA section 107(b) would have been eminently

\(^{75}\) Id.


\(^{77}\) The last sentence of subsection 101(35)(A) states the following: "In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 107(b)(3)(a) and (b)." 42 U.S.C. § 9601(35)(A). Thus, a defendant must still prove all the requirements of CERCLA section 107(b)(3), using CERCLA section 101(35)(A) only to get around the contractual relationship bar in CERCLA section 107(b)(3).

\(^{78}\) There was no exception to the contractual relationship bar in the statute prior to SARA. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1982).

\(^{79}\) While it may seem odd to define "contractual relationship" and then say if one meets certain conditions in connection with that contractual relationship, then it will not be considered such, this is precisely what the statute does. 42 U.S.C. § 9601(35)(A).

\(^{80}\) Id.
clearer and easier to grasp.81

In order for a defendant to prove that he did not know or have any reason to know of the presence of hazardous substances, Congress, in CERCLA section 101(35)(B),82 established an all appropriate inquiry standard.83 This inquiry examines the previous ownership and uses of the property consistent with good commercial and customary practice in an effort to minimize liability.84

The Conference Report suggests that parties engaged in commercial transactions should be held to a higher standard of inquiry than those involved in private residential transactions.85 In the event that an owner acquires knowledge of a release or threatened release, he will be subject to liability if he transfers the site without disclosure of this information.86 CERCLA section 107(35)(B) provides further criteria to be used in determining if a landowner has conducted an all appropriate inquiry.87

B. De Minimis Settlements and Landowners

SARA contained an additional provision applicable to landowners which may serve to eliminate some of the perceived injustices contained in the original statute. In CERCLA section 122(g),88 the statute directs the EPA to promulgate regulations for settlements with de minimis PRPs. To qualify as de minimis, a landowner must not have permitted the generation, transportation, storage, treatment, or disposal of any hazardous substance

81. See supra note 63 and accompanying text.
83. CERCLA section 101(35)(B) states the following:

(B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

84. Id.
87. See supra, note 83.
88. 42 U.S.C. § 9622(g).
at the site and must not have contributed to the release of the hazardous substances.\textsuperscript{89} This provision authorizes the EPA to settle promptly with \textit{de minimis} PRPs, and then require that the bulk of the costs be borne by those primarily responsible for the hazardous condition.\textsuperscript{90} In this way, the liability scheme provides for some correlation between the amount of liability imposed and the relative degree of contribution to the hazardous condition, thereby mitigating the otherwise harsh operation of joint and several strict liability.

It has been suggested that SARA creates a two-tiered system of landowner liability.\textsuperscript{91} Landowners may escape liability completely if they are able to satisfy the requirements of CERCLA section 107(b) in conjunction with CERCLA section 101(35). Those who are unable to prove the absence of actual or constructive knowledge now have the option of qualifying as a \textit{de minimis} PRP. The effect of the EPA's published guidance on this issue, and its impact on the innocent landowner defense, will be discussed in Part V.

The enactment of SARA created a clearer scheme by which a PRP could establish a statutory defense to CERCLA liability. In the alternative, a PRP, under SARA, could look to the \textit{de minimis} settlement provisions for recourse. The statutory requirements needed in order for a PRP to establish an affirmative defense are the following:

(1) the hazardous substances involved in the release or threat of release from the property must have been placed on the property by a third party \textit{other than} an employee, agent, or someone in direct or indirect contractual relationship (such as a previous owner in the chain of title, a tenant, sublessee, etc.) with the landowner; OR
(2) (a) if such third party was a previous owner of the property in the chain of title with the current landowner, the current landowner must also show that he acquired the property \textit{after} the disposal of the hazardous waste, and (b) the current landowner did not know and had no reason to know of the hazardous substances that are the subject of the release by having made all appropriate in-

\textsuperscript{89} \textit{Id.}
\textsuperscript{90} This way the EPA may focus its resources on those primarily responsible for the release or threatened release of the hazardous substance(s).
\textsuperscript{91} See Bayko & Shore, \textit{supra} note 6, at 27 n. 33.
quity into the previous ownership and uses of property consistent with good commercial or customary practice; (3) the current landowner exercised due care with respect to the hazardous substances upon their discovery; and (4) the current landowner took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from them.92

The straightforward third party defense that is unchanged by the passage of SARA would comprise (1), (3), and (4), while the innocent landowner defense (a type of third party defense) would comprise (2), (3), and (4).93 Though the innocent landowner scheme may seem clear, its treatment and interpretation by the courts has proven otherwise.94 The straightforward third party defense, unchanged by SARA, is a different analysis and beyond the scope of this Comment.95

IV. JUDICIAL TREATMENT OF THE INNOCENT LANDOWNER DEFENSE

Since the passage of SARA and the creation of the innocent landowner defense, there has been little case law involving statutory interpretation of the defense. The few cases that have dealt with the issue have shown a lack of consistency as well as a weak grasp of precisely what the defense comprises. Courts have, for the most part, shown an inability to separate the third party innocent landowner defense from a straightforward third party defense. While this has not led to any erroneous decisions (since the party asserting the innocent landowner defense would have been unable to maintain the defense even upon proper analysis), it bears scrutiny in order to avoid any possible future judicial miscarriages.

92. CERCLA § 107(b), 42 U.S.C. § 9607(b) and CERCLA §§ 101(35)(A), (B), 42 U.S.C. §§ 9601(35)(A), (B).
93. At the threshold, the defendant asserting the innocent landowner defense must prove that the release or threatened release is due solely to the actions of a third party. Id. § 107(b)(3), 42 U.S.C. § 9607(b)(3).
94. See infra notes 96-202 and accompanying text.
In *United States v. Monsanto Co.*,\(^96\) the Fourth Circuit Court of Appeals rejected the defendant’s claimed innocent landowner defense.\(^97\) The court properly ruled that the defendant had not carried its burden of such an affirmative defense.\(^98\) Yet, while their holding was sound, their reasoning was misleading. Although the court characterized the defendant as reasserting the third party innocent landowner defense on appeal,\(^99\) the defendant was in reality asserting a straightforward third party defense. The innocent landowner defense could not have been raised by the defendant because the Monsanto Co. owned the land at the time the hazardous waste was deposited.\(^100\) While this fact is not fatal to a straight third party defense,\(^101\) it will prohibit a party from pleading the innocent landowner defense.

The main feature of the innocent landowner defense is that the hazardous waste has already been deposited on the land at the time of purchase.\(^102\) This factor was not explicitly recognized by the court. While the court reached the correct conclusion in its ruling,\(^103\) it should have made clear that it was not a third party innocent landowner defense they were rejecting, but a pre-SARA third party defense. Strangely, the court footnoted to CERCLA section 101(35)\(^104\) which contains the innocent landowner defense but held simply that such an exception merely signalled Congress’ intent to impose liability on those landowners failing to

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96. 858 F.2d 160 (4th Cir. 1988).
97. Id. at 169.
98. Id.
99. Id. at 166-167.
100. If a landowner is the owner of the property at the time hazardous substances are deposited there, he will be limited to the pre-SARA third party defense contained in CERCLA section 107(b)(3). 42 U.S.C. § 9607(b)(3). This is a requirement of the innocent landowner defense as set out in CERCLA section 101(35)(A). 42 U.S.C. § 9601(35)(A). The motivation for enacting the innocent landowner defense in SARA was to allow a defense to liability to those landowners who acquired the property after the hazardous substances were already on the site. As such, the defense is limited to those owners who acquire property after the disposal of the hazardous materials has occurred.
101. If a landowner can prove the elements of CERCLA section 107(b)(3), he will not be liable despite the fact that the hazardous material was deposited on his property while he was the owner. This provision protects landowners from “midnight dumpers” and others beyond control and without knowledge or consent. 42 U.S.C. § 9607(b)(3).
103. The defendant lessors in this case should have pleaded the straightforward third party defense because they had a lease agreement with the responsible party, Columbia Organic Chemical Company, which acts as a bar to the innocent landowner defense. *Id.* § 107(b)(3), 42 U.S.C. § 9607(b)(3).
satisfy its express requirements. As such, the court exhibited a misunderstanding of the distinction between the third party innocent landowner defense and the straightforward third party defense.

In State of Washington v. Time Oil Co., another federal court was faced with a defendant asserting the innocent landowner defense. And again, while reaching the correct result, the district court's reading of the statute regarding the defense was flawed and showed a lack of understanding of the hybrid defense. Unlike the Monsanto court, the Time Oil court properly identified the innocent landowner defense as stemming from CERCLA section 101(35). The problem the court then encountered was that while the innocent landowner defense requires that the hazardous wastes be placed there solely by a third party, it can be a party with whom the landowner has a contractual relationship. If, however, the landowner has a contractual relationship with the third party polluter, he must have purchased the land after the hazardous waste was already present on the land and satisfy the remaining requirements of CERCLA sections 101(35)(A) and (B) (thereby voiding the contractual relationship), and also satisfy the requirements of CERCLA sections 107(b)(3)(a) and (b) The third party defense, on the other hand, requires that the hazardous waste be placed there solely by a third party who has no contractual relationship (at any time) with the landowner. The court, in discussing Time Oil's burden of proof in asserting the affirmative defense of innocent landownership stated in pertinent part:

[I]t becomes Time Oil's burden in asserting the affirmative (b)(3) defense to present evidence sufficient to show the Court that there remain specific factual issues as to whether the releases of hazardous substances were caused solely by an act or omission of someone other than a Time Oil employee or agent, or someone other

105. Id. at 169.
107. Id. at 530.
108. The defendant would have been unable to successfully claim either the straightforward third party defense or the innocent landowner defense.
111. 42 U.S.C. §§ 9601(35)(A), (B).
112. Id.
than a person acting in connection with a contractual relationship with Time Oil.\textsuperscript{114}

While this statement is correct, its misleading tendency is readily apparent. In the innocent landowner defense the presence of a contractual relationship will not defeat the defense \textit{per se}.\textsuperscript{115} Once a party proves the remaining requirements of CERCLA section 101(35)(A) he will not be considered to be in a contractual relationship with the third party.\textsuperscript{116} The court in this passage does not distinguish between Time Oil not being in a contractual relationship with the responsible party in any form (a straightforward third party defense) or Time Oil not having a contractual relationship with the responsible party by virtue of fulfilling the further requirements of CERCLA section 101(35)(A). If the latter, the contractual relationship would be rendered nonexistent for purposes of a CERCLA section 107(b)(3) defense. Again, this is a further example of a court being unclear as to which type of third party defense is being referred to.

The court then proceeded further to muddy the waters by holding that Time Oil could not successfully assert the defense because it could not offer proof that the release of the hazardous waste was caused \textit{solely} by a third party.\textsuperscript{117} One wonders why the court would not begin and end the opinion with this judgement, since Time Oil could not clear the first hurdle of \textit{any} third party defense in CERCLA section 107(b)(3).\textsuperscript{118}

Finally, to render the opinion even more confusing, the court discussed evidence that the last operator on the site was Time Oil's sublessee.\textsuperscript{119} There was substantial evidence that this sublessee's conduct at the time in question was extremely sloppy and that they allowed heavy black oil to leak onto the ground at the site and kept the property in a constant state of disrepair.\textsuperscript{120} This behavior was so destructive that Time Oil sought and obtained a

\begin{itemize}
  \item \textsuperscript{114} Time Oil, 687 F. Supp. at 532 (citations omitted).
  \item \textsuperscript{115} CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A). This is the purpose of the "unless" clause. See supra notes 73-75 and accompanying text.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Time Oil, 687 F. Supp. at 532.
  \item \textsuperscript{118} In order to avail oneself of any third party defense, one must prove that the presence on the property of the hazardous substance was due \textit{solely} to a third party (hence the name "third party" defense). CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). This element must be proven without exception in order to prevail in averring such a defense. See supra note 49 and accompanying text.
  \item \textsuperscript{119} Time Oil, 687 F. Supp. at 532-33.
  \item \textsuperscript{120} Id. at 533.
\end{itemize}
preliminary injunction against the sublessee in order to prohibit such conduct.\textsuperscript{121}

Under such a scenario, Time Oil would be unable to plead the innocent landowner defense on the basis of their being in a contractual relationship with the responsible party after their acquisition of the property.\textsuperscript{122} Of course, they could not plead a straightforward third party defense, either, since their status as lessor would render them in a contractual relationship\textsuperscript{123} with the responsible party. The court never explicitly addresses this, and explains only that Time Oil did not carry its burden for purposes of a summary judgment motion. In the final sentence of the opinion the court states the following:

It is enough to note that the innocent landowner defense cannot be available to Defendant Time Oil, when Time Oil has failed to present specific facts to indicate that some other party having no employment, subsidiary, or contractual connection with Time Oil is solely responsible for releasing all of the hazardous substances which have come to be found on the subject property.\textsuperscript{124}

While this statement, standing alone, is again not inaccurate, the court should point out that the presence of a contractual connection can be voided by fulfilling the further requirements of CERCLA section 101(35)(A).\textsuperscript{125} As such, the presence of a contractual connection will not be fatal per se to an innocent landowner defense because it can be rendered a nullity. Thus, a party may successfully assert a CERCLA section 107(b)(3) third party defense notwithstanding that, technically, there was a contractual connection between the landowner and the responsible party.\textsuperscript{126} A reading of the above passage from the Time Oil opinion, shows

\textsuperscript{121} Id.
\textsuperscript{122} CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A). A feature of the innocent landowner defense is that the contractual relationship entered into between the landowner and the responsible party was entered into after the disposal of the hazardous substance on the property by the responsible party. See supra note 100.
\textsuperscript{123} Id.
\textsuperscript{124} Time Oil, 687 F. Supp. at 533 (emphasis in the original).
\textsuperscript{125} If Time Oil could have proven the remaining elements of CERClA section 101(35)(A) the contractual relationship bar would be removed. 42 U.S.C. § 9601(35)(A). The "solely" by a third party element can not be avoided, however. See supra note 49 and accompanying text.
\textsuperscript{126} 42 U.S.C. § 9601(35)(A). See supra notes 74-79 and accompanying text.
one would be unable to ascertain this.\textsuperscript{127} The innocent landowner defense was constructed to afford relief to those landowners who \textit{did} have a contractual connection to the party responsible for placing the hazardous waste on the property.\textsuperscript{128} Consequently, while it is true that a third party defense requires that the hazardous waste be placed on the property in question solely by a third party, the distinguishing feature of the innocent landowner defense is that even one who \textit{does} have a contractual relationship with the responsible party (as that term is defined by Congress) may still avoid liability through the “unless” clause in CERCLA section 101(35)(A) by having the contractual relationship ignored for purposes of CERCLA section 107(b)(3). Not unlike \textit{Monsanto}, the court in \textit{Time Oil} failed to adequately differentiate between a straightforward pre-SARA third party defense\textsuperscript{129} and the hybrid post-SARA third party innocent landowner defense. While these courts’ respective failures were not fatal in either of these cases, it is incumbent on the courts to accurately define and delineate the exact characteristics of the third party defenses in order to provide guidance to all involved in what is often a serious and extremely expensive proceeding.\textsuperscript{130}

In another recent decision, the Bankruptcy Court for the Eastern District of Michigan also displayed a weak grasp of the subtle technical nuances present in the third party innocent landowner defense. In \textit{In re Sterling Steel Treating, Inc.},\textsuperscript{131} the court discussed whether or not the party attempting to avoid liability could assert the third party defense.\textsuperscript{132} Yet in their analysis they combined aspects of both a straightforward third party defense and an innocent landowner defense. The court began its analysis by correctly characterizing a third party defense as exonerating from liability any party who can prove that the risk posed by a hazardous substance was due to the act of a third party with whom the defendant had no agency or contractual connection.\textsuperscript{133} The court then proceeded beyond a straightforward third party defense...
analysis and shifted to an innocent landowner defense analysis. The court stated the following:

A landowner who innocently or involuntarily acquired contaminated property may invoke the third party defense if he establishes that he inquired into the previous ownership and uses of the property, that the inquiry did not reveal that hazardous wastes had been disposed of on the site and that he therefore had no reason to know that the property was contaminated.

These are the requirements of CERCLA section 101(35)(A) that need to be established in order to have a contractual connection ignored for purposes of a third party defense. While the court was correct in its decision that the landowner in this case could not successfully carry the affirmative defense claimed, the court erroneously characterized it as a straightforward third party defense. While the court was again correct in its belief that the lack of a contractual relationship is the first requirement for a third party defense, their focus shifted to the third party innocent landowner defense without making clear that they were doing so.

The analysis should change when determining whether a party can maintain an innocent landowner defense in that the emphasis will be on nullifying a contractual relationship for purposes of maintaining a third party defense. This question is to be answered using the factors dictated by Congress in CERCLA sections 101(35)(A) and (B). This shift in analysis should be recognized and addressed by a court in a proceeding involving potentially enormous liability. Without such thorough analysis landowners will themselves become confused as to whether or not they have a legitimate defense when faced with such liability.

Additionally, the parties asserting the defense in Sterling Steel purchased the property after the placement of the hazardous

134. Id.
135. Sterling Steel, 94 Bankr. at 929 (citations omitted).
136. See supra notes 73, 76, 78 and accompanying text.
137. The defendant could not have satisfied the all appropriate inquiry standard of CERCLA section 101(35)(A) because there was ample evidence that the defendant knew, or had reason to know, of the presence of hazardous substances on the property prior to the purchase. Sterling Steel, 94 Bankr. at 930.
139. See supra notes 73-79 and accompanying text.
140. See supra note 130.
The fact that the defendants had a contractual connection with the responsible party would prevent them from asserting a straightforward third party defense. The court, in its handling of this issue, never explicitly acknowledged this, nor that such a connection would limit the landowner to asserting a third party innocent landowner defense. Though arguably this distinction may seem insignificant, it is submitted that the courts have a duty to clearly delineate and rule on what the applicable law is in an area that, at the present time, is fraught with uncertainty and filled with landowners and potential landowners fearful of Superfund liability who require guidance in this area of the law.

In another development concerning the third party innocent landowner defense, an even larger blanket of confusion was thrown over the meaning of the requirements of the defense. In an opinion concerning a present landowner asserting the innocent landowner defense, the District Court for the Middle District of Pennsylvania, in United States v. Serafini, struggled with the meaning of the all appropriate inquiry standard as delineated in CERCLA section 101(35)(B). The all appropriate inquiry standard is designed to aid the court in determining the requirement of the innocent landowner defense that a landowner “did not know or have reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on the property.” The court, in the course of its opinion, completely obfuscates the meaning of the all appropriate inquiry standard.

Serafini involved present landowners of a 225 acre tract of undeveloped land, with approximately 1,141 fifty-five gallon drums openly scattered about the site. Upon investigation, the EPA discovered that 847 of these drums contained hazardous substances as defined by CERCLA. The United States brought

141. Sterling Steel, 94 Bankr. at 926-27.
142. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). A contractual relationship will bar a party from establishing a straightforward third party defense.
143. Sterling Steel, 94 Bankr. at 928-30.
144. See supra note 130.
146. Id. at 351-53.
149. Id. Additionally, 105 drums contained non-hazardous substances, and 189 were contaminated by residues. Id. Hazardous substances for purposes of CERCLA are defined by section 101(14). 42 U.S.C. § 9601(14).
suit seeking injunctive relief and recovery of response costs against various parties, including the present landowner.\textsuperscript{150} After a number of defendants had negotiated with the government to complete the remedial work at the site,\textsuperscript{151} the government filed a summary judgement motion on liability against the defendants (the present landowners),\textsuperscript{152} the result of which formed the basis for the opinion issued by the court.

After admitting that the drums were visible to the naked eye at the time of purchase,\textsuperscript{153} the defendant contended that this fact was not enough to establish that they knew or had reason to know that the hazardous substance had been deposited on the site.\textsuperscript{154} They stated that the purchase involved the inspection of various maps to determine the location of the property without the requirement of an on-site inspection.\textsuperscript{155}

In response, the government contended that in no way could

\textsuperscript{150} Serafini, 706 F. Supp. at 348. The government instituted the action on November 10, 1986. \textit{Id.}

\textsuperscript{151} \textit{Id.} The consent decree entered into between the United States and four defendants called for those four defendants to complete the remedial work undertaken by the government at the site. \textit{Id.}

\textsuperscript{152} \textit{Id.} The government’s complaint was filed against defendants Serafini, Bernabei, Buttafoco and Naples, individually and against the Empire Contracting Company, a partnership wholly owned by the individual defendants. \textit{Id.} The Empire Contracting Company had purchased the tract of land in Taylor Borough, near Scranton, Pennsylvania, on December 12, 1969, from the Parmoff Corporation. \textit{Id.} Until at least March 31, 1968, Parmoff had leased a portion of the land to the City of Scranton for the operation of a sanitary landfill and waste disposal site on this leased portion. \textit{Id.}

\textsuperscript{153} Serafini, 706 F. Supp. at 352. The defendant in this case admitted such by failure to respond to the government’s request for admissions that “on December 12, 1969, the cylindrical metal drums were visible to the naked eye.” \textit{Id.} The court had earlier ruled that by operation of Federal Rule of Civil Procedure 36(b) the failure on defendant’s part to answer conclusively established that at the time defendant purchased the land the abandoned drums were plainly visible. \textit{Id.} at 352 n. 7.

\textsuperscript{154} \textit{Id.} at 353. The defendant indicated that at the time of purchase they did not conduct an on-site inspection, nor did they have any reason to do so. \textit{Id.}

\textsuperscript{155} \textit{Id.} The defendant asserted that it was not until 1980 or 1981, when the EPA conducted its investigation, that they became aware of the existence of photographs of the site in 1968 showing the presence of the barrels on the site, placing them on-site prior to the defendant’s purchase of the property. \textit{Id.} Defendant’s counsel had sent these photographs to the EPA on November 17, 1982, as proof that the barrels were there prior to their client’s purchase and therefore the barrels were not their client’s responsibility. \textit{Id.} at 352. The bizarre twist is that the photographs were produced by the defendant’s counsel as proof that the hazardous waste was present on the property prior to the purchase, yet defendant claimed to have no knowledge of these photos prior to the EPA’s investigation in 1981 or 1982, at least 13 years after these photos were allegedly taken. \textit{Id.} Where, then, did these photos come from? The court never addressed this issue.
SARA's all appropriate inquiry standard be satisfied by a landowner who does not visually inspect the land or fails to inquire about its condition or past history. The position taken by the government was that this type of willful blindness could never fulfill such an affirmative duty.

Incredibly, after analyzing the evidence before it, the court held that it could not reach the conclusion that the defendant's inaction was inappropriate under the facts of the case. One can only wonder what the court would consider "all appropriate inquiry." The holding in this opinion becomes even more confusing when one considers that Congress, in the legislative history of SARA, had intended commercial transactions, such as here, to be held to the highest level of inquiry under this standard. The type of willful blindness shown by the defendant in this case, and the court's failure to condemn such inaction, seemingly disregards the all appropriate inquiry standard as applied to the third party innocent landowner defense. As such, it is submitted that this opinion is erroneous or, at the very least, legally questionable.

156. Id. at 353. The government argued that SARA's innocent landowner defense does not protect the owner who fails to inspect the land or fails to inquire into its current condition or past history. Id.


158. Id. How the court could reach this conclusion in light of the evidence presented is a puzzle. Cf. Anderson, Will the Meek Even Want the Earth?, 38 Mercer L. Rev. 535, 539-40 (1987) "only by inspection for the presence of hazardous substances can the landowner determine what precaution, if any, are necessary... a property possessor who fails to inspect or ignores signs of potential hazards may be held liable for cleanup costs, even though another created the hazard); see also Schwenke, Environmental Liabilities Imposed on Landowners, Tenants, and Lenders-How Far Can and Should They Extend?, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10361, 10362 (1988) ("in 1987, almost no one can qualify as an 'innocent landowner'... unless and until they have gone through a complete environmental audit or assessment with respect their property").

159. While cited, one wonders what the court considered the language of CERCLA section 101(35)(B) to mean when, in determining if all appropriate inquiry was made in a specific situation, a court shall consider "commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection." 706 F. Supp. at 352. The court seemed to completely disregard this specific language.


161. In a later proceeding, the same court and the same judge held that the government's supplemental summary judgement motion, on the same ground as the previous discussion, would again be denied. United States v. Serafini, 711 F. Supp. 197, 198 (M.D. Pa. 1988). The government submitted two experts' affidavits that it would be inconceivable to purchase a 225-acre tract of land in 1969.
In contrast, another case involving the all appropriate inquiry standard was recently decided by the District Court for the Northern District of California. In Wickland Oil Terminals v. Asarco, Inc., the court held that the landowner/defendant had not fulfilled his duty to make all appropriate inquiry under the "know or have reason to know" test set forth in CERCLA section 101(35). Consequently, the defendant was denied the use of the third party innocent landowner defense.

The court began its analysis of the innocent landowner defense by correctly determining that since the defendant, as vendee/lessee of the site, had a contractual relationship with the responsible parties, it would have to establish by a preponderance of the evidence that at the time of the acquisition of the property it "did not know and had no reason to know that any hazardous substances which is the subject of the release or threatened release was disposed of on, in, or at the facility." The defendant must establish this lack of knowledge to maintain the innocent landowner defense otherwise the contractual relationship could not be overcome and would bar a third party defense under CERCLA section 107(b)(3).

The evidence presented in this case overwhelmingly demonstrated that the defendant knew of the presence of the hazardous substances on the property. In considering this evidence the court applied the all appropriate inquiry standard in order to establish whether the defendant had met its burden of proof on the "know or had reason to know" test. The application of this standard in this manner was consistent with the language of the statute.

Interestingly, the court went further than considering only what the defendant "knew" in applying the all appropriate in-

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163. Id. at 20856.
164. Id.
165. Id. This properly analyzes the innocent landowner defense, whereby one must look to the requirements of CERCLA section 101(35) in order to nullify a contractual relationship between the landowner and the responsible party. 42 U.S.C. § 9601(35).
166. See supra notes 73, 76, 78 and accompanying text.
168. See supra notes 82-87 and accompanying text.
169. See supra note 77 and accompanying text.
quary standard. The court held that even if the defendant could prove that it did not possess the information regarding the hazardous substances that the evidence tended to show the information was readily available to the defendant and the defendant's failure to obtain this information would also render it unable to meet the all appropriate inquiry standard. The Wickland court, unlike the Serafini court, recognized that Congress intended that those engaged in commercial transactions be held to a higher standard of inquiry than those engaged in private residential transactions. The court further held that the defendant's emphasis on what it "knew" was misplaced. This, then, gave meaning to the "had reason to know" prong of the test, another facet of the statute that the Serafini court neglected in its analysis.

Thus, the district court meaningfully applied the statutory language of CERCLA as Congress intended. It is extremely difficult to reconcile Wickland with the Serafini decision. It is submitted that the Wickland opinion will serve as a more useful guide for landowners through its analysis of the all appropriate inquiry standard of the third party innocent landowner defense.

Another more recent decision dealing with the innocent landowner defense is United States v. Pacific Hide and Fur Depot, Inc. In this case, the District Court for the District of Idaho conducted a thorough analysis of the innocent landowner defense. Here, the facts involved a corporation formed in 1949 by one Samuel McCarty, to operate a scrap metal recycling business on property located in Pocatello, Idaho. McCarty and his wife died in the 1960s, leaving the stock in the corporation to their children, two of whom continued the operations of the company, while a third child owned stock but did not participate in the management of the company. The company redeemed the fourth child's stock.

During the 1970s, capacitors containing polychlorinated bi-

171. Id.
172. See supra notes 10 and 85 and accompanying text.
175. Id. at 1343.
176. Id.
177. Id. at 1343. The company remained in existence until 1982, by which time one of the children running the company had died and the other had given his stock to his children, none of whom had been active in running or managing the company. Id. at 1344-45. The shareholders then dissolved the corporation and distributed the assets in return for the redemption of their stock. Id. at 1344.
phenyls (PCBs), many of which later leaked, were discarded into a pit on the property.\textsuperscript{178} The EPA used Superfund monies to effect the cleanup of the site, and then sued the only child who remained a stockholder and the remaining stockholders for reimbursement, on the theory that they were both the present landowners and past landowners of the facility.\textsuperscript{179} The defendants raised the third party innocent landowner defense.\textsuperscript{180}

The court, after determining that the innocent landowner defense was an amalgam of CERCLA sections 107(b)(3) and 101(35)(A) and (B)\textsuperscript{181} and walking through the language of each section as it defined the defense, held that the defendants\textsuperscript{182} were all entitled to summary judgement regarding liability and had thus conclusively established that they were innocent landowners for purposes of the "current landowner" prong of the government's complaint.\textsuperscript{183} In what could be seen as a hollow victory for the defendants, the court would not grant their summary judgement motions pertaining to liability under the "past owner or operator" prong of the government's complaint, in the absence of adequate information regarding this issue.\textsuperscript{184} Moreover, in so holding the court correctly realized that the innocent landowner defense was inapplicable to this prong of liability because under such a defense a landowner is required to have acquired the property after the disposal or placement of the hazardous substances.\textsuperscript{185} Finally, the court, in referring to a motion to dismiss the entire CERCLA count based on defenses outside of CERCLA section 107(b), indicated that there seemed to be some question whether CERCLA section 107(b) is an exclusive and exhaus-

\textsuperscript{178} Pacific Hide, 716 F. Supp. at 1345. PCBs are classified as a hazardous substance under CERCLA. 42 U.S.C. § 9601(14). In March, 1983, about six months after the stock transfer took place, federal agents discovered the capacitors and discovered that many of them were leaking the PCBs into the pit. Pacific Hide, 716 F. Supp. at 1345. EPA, in its cleanup, removed 590 capacitors, twenty drums of waste, and substantial amounts of contaminated soil from the pit. Id.

\textsuperscript{179} Pacific Hide, 716 F. Supp. at 1345-46.

\textsuperscript{180} Id. at 1346.

\textsuperscript{181} Id.

\textsuperscript{182} The defendants were the grandchildren of the first of the three second-generation owners who had inherited the property from the original owner, the child of the second of the three second-generation owners (who never took part in the operation of the business), and the wife of the third of the three second-generation owners who had transferred his interest in 1982. Id.

\textsuperscript{183} Pacific Hide, 716 F. Supp. at 1350.

\textsuperscript{184} Id. at 1349-50. The liability section of CERCLA names current owners and operators (CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1)) and past owners and operators (CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2)) as PRPs.

\textsuperscript{185} See supra notes 100-102 and accompanying text.
tive list of defenses available in a CERCLA action. In its refusal to grant summary judgement to those defendants raising these defenses, the court held that the issue had not been adequately briefed and that it would await a more detailed briefing before deciding such a complicated issue.

In its opinion, the court reduced its analysis to the question of whether the various defendants had conducted all appropriate inquiry into the previous ownership and uses of the property so as to meet the "know or had reason to know" test of CERCLA section 101(35)(A). It was undisputed that although a contractual relationship existed between the present owner defendants and the individuals owning the facility at the time of disposal, these present owners could overcome this bar to a third party defense by meeting the all appropriate inquiry standard. The court thereby recognized that the critical issue to be decided was whether or not this standard was met.

Additionally, the court noted the hierarchy intended by Congress, contained in the legislative history of SARA, that commercial transactions were to be held to the highest all appropriate inquiry standard, private transactions were to be given more leniency, and inheritances and bequests were to be treated most leniently. The court then characterized the case before them as

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186. *Pacific Hide*, 716 F. Supp. at 1350. *But see* United States v. Stringfellow, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987) (holding that these statutory defenses are exclusive); *see also* CERCLA § 107(a), 42 U.S.C. § 9607(a) (stating that liability under CERCLA is "subject only to the defenses set forth in subsection (b) of this section. . .".) (emphasis added).

187. *Pacific Hide*, 716 F. Supp. at 1350. The court felt that since this was a *pro se* motion on the part of two of the defendants, they would deny the motion without prejudice to the rights of the defendants to raise the issue again upon a full briefing in a subsequent motion. *Id.*

188. *Id.* at 1347-48. The court realized, of course, that the defendants also had to meet the requirements of CERCLA sections 107(b)(3)(a) and (b) in addition to establishing that they had undertaken all appropriate inquiry. *Id.* However, the court never really discussed whether the defendants had met these requirements. One would have to assume that, since the defendants won their summary judgement as current owners, the court felt they had.

189. *See supra* notes 100-102 and accompanying text.


191. *Id.* *See supra* notes 10, 85, 159, 172 and accompanying text. The puzzling point about such a Congressionally established hierarchy is that if a defendant acquired land through inheritance or bequest then, by the language of the statute he would not have to establish that he made all appropriate inquiry (i.e., that he neither knew, nor had reason to know, of the hazardous substances which were the subject of the release or threatened release) into the previous ownership and uses of the property—he would simply have to show that he inherited the land or it was bequeathed to him. CERCLA § 101(35)(A)(iii), 42 U.S.C. § 9601(35)(A)(iii). In other words, if legatee landowners are not subject
more analogous to an inheritance than a private transaction,\textsuperscript{192} thus attaching the most lenient measure of inquiry to their analysis of the defendants' actions. The court added that the immediate case was distinguishable from \textit{Wickland} for purposes of the "obviousness or likely presence of contamination on the property" determination dictated by CERCLA section 101(35)(B), since the PCBs that were the subject of the proceeding were not, in the opinion of the court, obvious or likely to the respective defendants.\textsuperscript{194} The court, however, gave insufficient treatment to the "specialized knowledge or experience" determination dictated by CERCLA section 101(35)(B).\textsuperscript{195}

The government, in response to the defendants' motion, forwarded the same argument made in \textit{Serafini},\textsuperscript{196} namely that in no way can "no inquiry" constitute "all appropriate inquiry."\textsuperscript{197} The government argued that "some inquiry" must be made to meet the all appropriate inquiry standard.\textsuperscript{198} The court responded to this argument by stating in pertinent part:

\begin{quote}
[A]t least one court has rejected this argument by the Government. . .It would have been easy to draft into the statute the very requirements sought by the Government: Congress could have simply said that some inquiry must be made in every case. But Congress did not do so. Instead, Congress used terms like "appropriate" and "reasonable" in describing the necessary inquiry. The choice of such terms indicates to this Court that Congress was not laying down the bright line rule asserted by the Government. Rather, Congress recognized that each case would be different and must be analyzed on its
\end{quote}

to the all appropriate inquiry standard, then the level of judicial scrutiny should be irrelevant. Following the language of the statute, the defendants in this case should have won their summary judgement motion on this point alone.

\textsuperscript{192} \textit{Pacific Hide}, 716 F. Supp. at 1348. The court stated that the defendants' interest in the land was not obtained in an arms-length private sales transaction: they obtained their initial interest by familial gift (shares of the corporation) and their ultimate interest (ownership of the land) by a corporate event beyond their control. \textit{Id.}


\textsuperscript{194} \textit{Pacific Hide}, 716 F.Supp. at 1348.

\textsuperscript{195} \textit{Id.}


\textsuperscript{197} \textit{Pacific Hide}, 716 F. Supp. at 1348. \textit{See supra} notes 155-56 and accompanying text.

\textsuperscript{198} \textit{Id.}
facts.\textsuperscript{199} Therefore, the court held that all defendants had established, by a preponderance of the evidence, that they were innocent landowners under the "current operator" prong of the government's complaint.\textsuperscript{200} As previously mentioned, however, the court declined to rule on their liability under the "past owners or operators" prong of the government's complaint (i.e. that they owned or operated the facility at the time that the hazardous substances were released) because they were not provided enough evidence on this issue.\textsuperscript{201} 

One may look at the result of this opinion in two ways. One way is that Pacific Hide, like Serafini, casts more uncertainty than certainty on the all appropriate inquiry standard of the innocent landowner defense. One can also view this decision as demonstrating the court system's great reluctance to subject those who are merely owners of land by inheritance to potentially tremendous liability for cleanup costs.\textsuperscript{202} This would seem to be in keeping with Congressional intent. It is submitted that Pacific Hide stands for the latter position and should thereby be held to its facts or reasonably similar facts in order to afford much needed protection from CERCLA liability for innocent landowners.

This overview of the relevant case law involving the innocent landowner defense serves to demonstrate that the courts are hardly consistent (or presenting a united front) on the subject of liability in this area. A landowner, and his counsel, are unlikely to find any useful guidance upon reading this set of cases. This area is in need of clarification and standards for a current or prospective landowner to turn to when faced with questions of actual or potential CERCLA liability. On June 6, 1989 many hoped that this type of guidance would be forthcoming. Instead, they are faced with largely the same unanswered questions, compounded

\textsuperscript{199} Id. at 1349 (citations omitted). The court then held that under the facts of this case the conduct of the three grandchildren was reasonable under all the circumstances. Id. Likewise, the court decided in favor of the wife of one of the children of the original owner, holding that since the child had died her acquisition of the property should be treated as an inheritance, also. Id. The child of the owner who had never participated in the operation of the business was also held to have acted reasonably under all the circumstances. Id.

\textsuperscript{200} Id.

\textsuperscript{201} Pacific Hide, 716 F. Supp. at 1349-50. The government's complaint contained allegations that the defendants were liable under CERCLA section 107(a)(2) as owners and operators of the facility at the time the hazardous substances were disposed of. See supra note 184 and accompanying text.

\textsuperscript{202} See supra note 130.
by the possibility of having to make a crucial decision regarding their possible liability.

V. THE EPA INNOCENT LANDOWNER GUIDANCE

Following years of development the EPA, on June 6, 1989, issued its guidance concerning landowner liability, de minimis settlements, and settlements with prospective purchasers of contaminated property.203 This policy sets forth the EPA’s position on issues of landowner liability204 and settlement with de minimis landowners under CERCLA.205 The policy analyzes the language in CERCLA sections 107(b)(3) and 101(35) which provide landowners with the third party innocent landowner defense to CERCLA liability and the language in CERCLA section 122(g)(1)(B) which provides the agency’s authority for settlements with de minimis landowners.206 The discouraging aspect of the policy is that it leaves open the biggest hole that landowners, and seemingly the courts, were looking to have filled.

The one facet of the innocent landowner defense that courts are struggling most with is that of the “all appropriate inquiry” standard of CERCLA section 101(35)(A).207 This is easily demonstrated by the widely divergent approaches, erratic conclusions, and irreconcilable holdings in the Serafini, Wickland, and Pacific Hide decisions. The all appropriate inquiry standard is at the heart of the innocent landowner defense.208 Any landowner who attempts to claim the innocent landowner defense will have the burden of proving that, prior to purchase, he conducted all appropriate inquiry into the condition and past uses of the property.209 This issue becomes the crucial determination to be made when considering the defense.

The EPA, in issuing its policy on landowner liability, took a hands-off attitude when addressing this issue.210 They pointed to the factors to be used in CERCLA section 101(35)(B), indicating

204. CERCLA §§ 107(a)(1), (2), 42 U.S.C. §§ 9607(a)(1), (b).
205. Id. § 122, 42 U.S.C. § 9622.
207. See supra notes 145-202 and accompanying text.
208. Absent all appropriate inquiry analysis, no standard exists with which to evaluate the know or had reason to know requirement, hence CERCLA section 101(35) becomes vague and ambiguous.
that such a determination is to be made on a case-by-case basis.\(^{211}\) They stated, as an example, that a survey for contamination may be appropriate in a commercial transaction (standard operating procedure in today’s corporate world), while it "may not" be appropriate for the purchaser of personal residential property.\(^{212}\) They concluded that the determination will be made on the basis of reasonableness under all of the circumstances.\(^{213}\) This approach provides the courts with very little "guidance" that they did not possess prior to the release of this policy.\(^{214}\)

Additionally, the approach taken by the EPA leaves in the dark those landowners who may require guidance as to what they may do (or will have to do) prior to the acquisition of property to fulfill the all appropriate inquiry standard in order to insulate themselves from liability. While large industrial and commercial landowners and purchasers now take extraordinary steps, often at great expense, to ensure that they fulfill such a duty, smaller commercial and private real estate purchasers will be unable to ascertain what steps to take based upon the EPA’s "guidance" in this area.\(^{215}\)

One wonders if the EPA is running the risk of allowing separate industries to establish their own all appropriate inquiry standard by adopting industry-wide rules and standards to be followed in certain commercial transactions. Arguably, they would be able to point to the statutory language in CERCLA section 101(35)(B)\(^{216}\) that defines all appropriate inquiry in terms of "good commercial or customary practice" as evidence that their compliance with these rules and standards should fulfill their affirmative duty under CERCLA's "all appropriate inquiry" land-

\(^{211}\) Id.
\(^{212}\) Id.
\(^{213}\) Id.
\(^{214}\) This exact language ("under all the circumstances") is used in the Pacific Hide decision. See supra notes 199-202 and accompanying text. In point of fact, the EPA did not say anything here that wasn’t already being used as a measuring stick. As such, the standard remains a vague one.
\(^{215}\) It is now standard procedure for commercial real estate buyers and industrial concerns to secure the results of an environmental audit prior to an acquisition. Moreover, most insurance carriers and commercial lenders insist upon it. Insurer and lender liability are beyond the scope of this Article, but suffice it to say that both types of institutions have been found liable in CERCLA actions. Thus, it is not hard to understand their insistence on an environmental audit. For a comprehensive overview of these issues, see generally Levitas & Hughes, supra note 95; Glass, supra note 38.
\(^{216}\) See supra note 83.
guage.\textsuperscript{217} At least one commentator has noted such an interpretation and that the Federal National Mortgage Association has attempted the first comprehensive effort to issue such industry guidelines.\textsuperscript{218} While no present conflict exists between what an industry issuing guidelines considers all appropriate inquiry and what the EPA considers all appropriate inquiry this does not inexorably lead to the conclusion that a conflict will never arise.\textsuperscript{219} If and when it does, in the absence of more compelling and well reasoned appellate court decisions than those at the present time,\textsuperscript{220} the EPA may have to litigate the issue with very little objective evidence of what the standard ought to be. They may be reduced to arguing what they think the standard should be while a potentially liable defendant may be able to point to the industry guidelines, coupled with the “good commercial or customary practice” statutory language,\textsuperscript{221} and argue that this is what the standard is. Without taking a position on whether such an argument would or would not prevail, one can envisage that the EPA may get painted into just such a corner someday.

An alternative may be for the EPA to get involved (or perhaps be consulted) in the drafting of industry-wide guidelines and take an active role in periodically updating them. The EPA may benefit by taking the initiative within certain industries in drafting such guidelines in order to avoid any pitfalls later, ensuring that their standards are being complied with. As an added benefit, such initiative would finally give industrial and commercial concerns some much needed guidance in this area. Moreover, the beneficial effect would probably extend beyond the particular industry involved. While those within the industry would be given concrete guidelines to follow, those outside the particular industry would be given a basis upon which to build in conducting what they deem to be an all appropriate inquiry. This trickle-down effect would serve to further the EPA’s interest as their opinion of what constitutes an all appropriate inquiry would be adhered to in some manner by all industrial and commercial concerns. While it may be difficult to establish any set procedures or rules, it would

\begin{itemize}
  \item \textsuperscript{217} Id.
  \item \textsuperscript{218} See Leifer, EPA’s Innocent Landowner Policy: A Practical Approach to Liability Under Superfund, 20 Env’t Rep. (BNA) 646 (Aug. 4, 1989).
  \item \textsuperscript{219} It has already happened between the courts. See supra notes 154-159, 197-200 and accompanying text.
  \item \textsuperscript{220} See supra notes 96-202 and accompanying text.
  \item \textsuperscript{221} CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B). See supra notes 83 and 219 and accompanying text.
\end{itemize}
certainly benefit all involved to at least establish minimums to be adhered to that would serve as evidence that the party made a good faith effort to meet the standard. From this base, it would then be possible for such minimums to evolve into a more refined and workable framework for future use.

Another obvious shortcoming in this regard is that individuals who engage in private residential transactions are given no “guidance” at all on what would constitute “all appropriate inquiry” as it applies to them.222 The case law, as seen, also serves as no basis for guidance in this area. The EPA policy does not address, nor does it seem concerned with, this issue. Understandably, the EPA is more concerned with commercial and industrial landowners than with individual private landowners. Yet the fact that this issue does not arise as often as in the commercial and corporate world does not justify ignoring it. It is in this area that the EPA could have made material strides to provide the class of private landowners with guidance in what will be considered all appropriate inquiry for their type of transaction.223 Instead, the EPA simply gives recognition to Congressional intent that the level of inquiry involved in residential transactions for personal use is expected to be less comprehensive than that involved in commercial transactions.224 But they never define the level of inquiry. Thus, not only is the individual landowner given no “guidance” in this regard, he is not even supplied with a reference point from which he may determine what will be expected from him. The EPA has improperly disregarded this issue. Given the often limited resources of many private landowners and the substantial expense of what is swiftly becoming considered standard procedure in commercial transactions (e.g. environmental audits), it is submitted that it is imperative that the EPA at least establish the minimum inquiry that they will expect in private residential transactions.

222. The all appropriate standard does not distinguish between individuals and corporations. CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B). An individual property owner only knows that it was Congress’ intent to hold them to a less stringent standard than commercial and corporate entities. However, if an individual does not know where the high-water mark is, he will never know how close to the surface he will be, nor how close he should be.

223. This could have been done without crossing the line, since Congress intended to hold commercial and industrial concerns to a higher standard than individuals. Establishing guidelines for individuals therefore will not give these individuals reason to sleep easier at night. It may, in fact, cause them to be more diligent if they determine that what the EPA expects from individuals is very near what they are currently doing in this regard.

There may be many who feel that the EPA's failure to address such an issue is more or less inconsequential, because almost all cleanups and their resulting litigation concern commercial or industrial property. While this may be true, virtually no one would want to risk being in such a position, regardless of how slim the chance, if they had some means of insuring that they could avoid that position. While gamblers might like the long odds that would be present in such a scenario (i.e., the small chance that they would be held liable for CERCLA cleanup costs), the enormous potential liability would more than outweigh such odds. The subject of environmental insurance is beyond the scope of this Article, but one can be sure that insurance carriers would have welcomed any opinions on this policy that the EPA was free to express. As such, it is submitted that the EPA should consider enacting such guidelines for individuals engaged in private residential transactions.

Finally, the EPA expressed its opinion in the policy regarding de minimis settlements with landowners who satisfy the requirements of CERCLA sections 122(g)(1)(A) or (B). The policy states that if the Agency determines that a landowner has a persuasive case in proving that they will be able to meet the third party defense requirements of CERCLA section 107(b)(3), the Agency will entertain an offer for a de minimis settlement under CERCLA section 122(g)(1)(B). The EPA avers that the goal of this policy is to allow parties who meet the criteria set forth in CERCLA sections 122(g)(1)(A) or (B) to resolve their potential liability as quickly as possible, thus minimizing litigation costs and allowing the government to focus its resources on negotiations or litigation with the major parties.

The unusual twist set out in this policy is the EPA's position that a landowner who can establish either a straightforward third party or a third party innocent landowner defense "may" be eligible for a de minimis settlement. The question that springs to mind is why should these landowners negotiate a de minimis settlement when, according to the statute, they are not liable at all? The policy even goes so far as to state that if a landowner is able to persuade the EPA that they may ultimately prevail in establish-
ing their third party defense at trial, they may be considered for a *de minimis* settlement in exchange for *cash consideration*, as well as access and due care assurances. Again, one wonders why a landowner would settle by making a cash payment, albeit relatively small, to the government when he is not liable for any damages by virtue of his landowner defense.

Keeping in mind that a *de minimis* settlement may constitute only access and due care assurances, the query remains why a corporate entity would want to settle with the government when they possess a bona fide defense to liability under CERCLA. Corporate entities are very cognizant of the public’s perception of them and a majority of the public looks upon a settlement as being tantamount to an admission of guilt. One wonders why a corporation would run the risk of a negative image, particularly in an increasingly environmentally conscious society. Private individuals may welcome such an opportunity to save litigation costs and thus get themselves removed from any action brought by the government, but it would be unrealistic to think that corporate entities would so readily jump at any such opportunity when armed with a legitimate statutory defense.

Conversely, in an area fraught with uncertainty, a corporate PRP may view the *de minimis* provisions as providing an attractive alternative to litigation for those who qualify. They might analyze it as a question of risk preferences and perceptions of likely trial outcomes. EPA and the corporate PRP may have different perceptions of the probability and the expected value of jury verdicts. Also, the relative certainty of negative press associated with a settlement must be weighed against the possibly more damaging, though perhaps less likely, negative press associated with a court judgment of liability. In addition, press generated by a dismissal would have to be considered in such an analysis. This area, however, is one that presents acute concerns for corporate PRPs. The American public is swiftly becoming more environmentally conscious and concerned at this time than perhaps at any other period in our history. Only recently has a large part of society come to realize how delicate the balance is between man and his ecological surroundings. Recent national events have expanded this emerging societal awareness of environmental issues, and man’s capability to wreak havoc on his natural environment. Corporate entities are certain to become sensitive to these issues and strive to improve their public image in this regard. Thus, settle-

ments with EPA may lose their utility if it is believed that the public may perceive such settlements as an admission of liability or fault. Public awareness, then, may compel corporate PRPs to litigate such liability. While such a scenario is far from certain, it can not be said to be unlikely.

Thus, the policy seems muddled in this area. The use of the word "may" in these statements raises especially troubling questions. Does this mean that one who possesses a bona fide statutory defense may not be eligible for a de minimis settlement? This question appears to go unanswered and seems to be prevalent throughout the discussion on de minimis settlements. Will the EPA force such parties to trial and cause them to incur legal costs in establishing this bona fide defense (when the EPA believes that they will prevail at trial or that there is a substantial likelihood that they will prevail) when the goal behind this policy is declared to be just the opposite?\textsuperscript{232} One could argue that an informal review by EPA for the purposes of allowing a de minimis settlement may not accurately reflect a likely litigation outcome, but may be less stringent thus encouraging settlements and freeing up agency resources. This argument, however, leaves unresolved the predicament that a bona fide innocent landowner may face in such a situation. Compelling a statutorily liability-free landowner to either litigate the issue of liability or settle with EPA appears patently unjust, as well as rendering the third party defenses provided by Congress dead letters. The EPA's attempted reassurance that minimum settlements may only involve access and due care assurances seems illusory, in that it would be difficult to imagine one on whose property hazardous substances were discovered denying access to the government or being careless in their subsequent handling of the aforementioned substances. After all, once an individual is aware that these substances are present on his property it is in his best interest to deal cautiously with them. These two conditions would necessarily be required. Moreover, EPA states that "at a minimum"\textsuperscript{233} access and due care assurances may constitute a minimum settlement, thus seemingly indicating that more may be required of PRPs for settlement.

It is submitted that the EPA's "guidance" policy issued on June 6, 1989 represents a somewhat inadequate guide for landowners facing potential liability under CERCLA. While the EPA's announced policies regarding de minimis settlements are a wel-

\textsuperscript{232} Id. at 34,239.
\textsuperscript{233} Id.
come development for a certain class of landowners, their policies addressing the topic of the innocent landowner defense leave much to be desired. It is imperative that the EPA draft a more useful and operational set of guidelines in order to resolve these ambiguities.

VI. CONCLUSION

The SARA amendments of 1986 have caused parties on both sides of the fence in the environmental struggle to pause in confused reflection. While Congress set out to clear away some ambiguities and misconceptions inherent in a quickly passed statute like CERCLA, they were more effective in some areas than they were in others. It is clear that Congress perceived some injustice in holding an innocent landowner liable for cleanup costs, yet in trying to correct this injustice they seemed to outdo themselves by making the defense tremendously vague and difficult to understand. A more efficient answer to this problem should be found. The defense, confusing and ambiguous as enacted, has posed interpretive problems at both the administrative and judicial levels.

It is time for the courts or the EPA, or both, to step forward and develop substantive guidelines and established minimums. Allowing the inconsistencies to continue, as they have, will only leave landowners with legitimate defenses as enacted, though muddled and speculative as applied. The EPA should assert itself in this area and adopt guidelines for landowners to follow in this regard. Allowing the courts to do so is a slow, cumbersome process and, judging from past opinions, unlikely to produce much certainty in this area. The court system seems too fragmented to lend any meaningful dialogue to this discussion at this point in time. Let the EPA set the patterns and the courts refine them, when and if needed. The amount of environmental litigation is increasing daily and will afford the courts more than ample opportunity to develop substantive and procedural refinements in this arena.

While the EPA may feel that it is functionally impossible to draft guidelines such as those suggested here, without them the situation will probably get worse before it gets better. In the years since the enactment of SARA there have been cases that are almost polar opposites of each other. Even the EPA is disgruntled with some of these decisions.\footnote{234. See, e.g., EPA Guidance, 54 Fed. Reg. at 34,238 n. 11, wherein the EPA expresses their disagreement with the Serafini decision. This is in addition to}
The case law remains undeveloped enough so that it will not pose a significant barrier to EPA action when adopting administrative rules and regulations in this area. It will be a difficult task, but without satisfactory guidelines the EPA seems to be simply treading water while waiting for the courts to definitively speak on the subject. The EPA has the background and expertise to make something like this work, not the courts (at least until the courts receive more exposure to this area through litigation and are able to develop the requisite expertise). Congress has erected the framework, it is time for the EPA to add substance to it. Obviously, without such steps, the framework will be inadequate for its intended purpose. While the EPA will undoubtedly take some lumps along the way, what worthwhile project is free from setbacks and scrapes? The EPA needs to start formulating such a policy as soon as possible, in order to be able to improve and refine it through time, wisdom and experience.

Absent guidance, landowners, especially the private purchasers will have to play a guessing game. Inevitably, this will usually result in too much or too little caution. While many would profess a preference to err on the side of caution, there is no guarantee this would result. Give them a map so that they may find their way. Let those that stray do so at their own risk.

Paul C. Quinn

their assumed disagreement with the Pacific Hide decision, based on their arguments advanced at trial.