

THE BROWNFIELDS ACT: PROVIDING RELIEF FOR THE INNOCENT OR NEW HURDLES TO AVOID CERCLA LIABILITY?

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I. INTRODUCTION: THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT

On January 11, 2002, President George W. Bush signed House Bill 2869, The Small Business Liability Relief and Brownfields¹ Revitalization Act of 2001² (“Brownfields Act”) into law at the Millenium Corporate Center in Conshohocken, Pennsylvania.³ In his remarks before signing the bill, President Bush recognized the Millennium Corporate Center in which he stood as a brownfields development success story.⁴ The President stated that when the steel foundry that had previously sat on the site closed, the site became a brownfield with no investors willing to risk being held jointly and severally liable under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)⁵ for possible existing hazardous

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¹ “A ‘brownfield’ site is abandoned or underutilized urban property which private sources will not redevelop due to the reality or just the perception of hazardous waste . . . and fear of attendant liability for environmental remediation or cleanup.” John W. Lee & W. Eugene Seago, *Policy Entrepreneurship, Public Choice, and Symbolic Reform Analysis of Section 198, The Brownfields Tax Incentive: Carrot or Stick or Just Never Mind?*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 613, 613 (2002).

² Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified as amended in scattered sections of 42 U.S.C. §§ 9601-9628).

³ President George W. Bush, Remarks by the President in Signing of H.R. 2869, The Small Business Liability Relief and Brownfields Revitalization Act (Jan. 11, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/01/20020111-3.html> (last visited Aug. 25, 2003).

⁴ *Id.* para. 17.

⁵ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§

waste contamination.⁶ It was not until the Environmental Protection Agency (“EPA”), local government, and private investors alleviated concerns about liability that the site was redeveloped.⁷ The President continued by heralding the new bill that he was about to sign, saying that it would provide “protection against lawsuits to prospective buyers and others who didn’t create the brownfields, but want to help clean them up and develop them,” adding further, “[w]ith this bill . . . [w]e will protect innocent small business owners and employees from unfair lawsuits, and focus our efforts instead on actually cleaning up contaminated sites.”⁸

President Bush’s enthusiasm exhibited at the bill’s signing reflected the positive view of the Brownfields Act held by some members in the environmental legal community who believe that the clarifications, new exemptions, and funding created by the Act offer solutions to environmental contamination liability problems that have been needed for some time.⁹ Other observers, however, believe that while the authors and supporters of the Brownfields Act intended to provide a simpler, codified escape route for small businesses seeking to avoid liability, the new amendments to CERCLA are, in fact, complex, cumbersome, and impose new hurdles for these businesses to surmount if they are to obtain relief from liability.¹⁰

EPA expresses the belief that the Brownfields Act “generally exempts from liability people that purchase contaminated property if their only basis

9601-9675 (2000).

⁶ Bush, *supra* note 3, para. 18.

⁷ *Id.* para. 17.

⁸ *Id.* paras. 18, 22.

⁹ See *CERCLA Amendments Include Liability Reforms and Brownfields Money*, ENVTL. UPDATE (Riker Danzig Env'tl. Group), Apr. 2002 (suggesting that the Brownfields Act was “the most important amendment to the Comprehensive Environmental Response, Compensation, and Liability Act . . . since the 1986 Superfund Amendments and Reauthorization Act”), available at <http://www.riker.com/feature/3476.html#a>.

¹⁰ See Timothy Harmon & Karen Williams, *Brownfields Revitalization Act: Big Promises Not Delivered in New Brownfields Law*, ENVIRONS (Lane Powell Spears Lubersky LLP, Seattle, WA), Summer 2002 (suggesting the Brownfields Act fails to live up to its promises), available at <http://www.lanepowell.com/pressroom/newsletters/detail.asp?xnltypid=12&nid=318>; Daniel M. Steinway, *Congress Clarifies Innocent Landowner Defense to Superfund Liability*, AM. LAW. CORP. COUNS. MAG. (Sept. 2002) (asserting that the Brownfields Act has improved the viability of the “innocent landowner” defense at the cost of additional burdens on such landowners), reprinted at <http://www.kelleydrye.com/resourcecenter/environmental/articles/2002/a02InnocentLandowner.htm>.

for liability [under CERCLA] is as the current owner of a Superfund site.”¹¹ Prior to the Brownfields Act, CERCLA generally imposed liability for all cleanup costs and damages from hazardous materials release events upon both the current and prior owners of the contaminated site.¹² EPA further suggests that the Brownfields Act “is intended to provide those who purchase contaminated property after the date of enactment the same sort of protection from liability that was previously afforded by Prospective Purchaser Agreements (“PPAs”).”¹³ It is the purpose of this Note to examine the flaws in CERCLA targeted by the Brownfields Act. In particular, this Note will focus on: (1) the deficiencies in the common law interpretations of the CERCLA exemption requirements for “innocent purchasers;” and (2) whether the new statutory responses in the form of the Bona Fide Prospective Purchaser, De Micromis, and Contiguous Property Owner exemptions, when coupled with newly authorized funding as well as state and local government action, will achieve the noble goals set forth by President Bush and EPA.

To provide a proper foundation for this analysis, Part II reviews the circumstances which led to the initial passage of CERCLA in 1980. This entails an examination of both the environmental problems facing the nation in the late 1970s and the limitations of then-existing legal theories under which those responsible for hazardous waste spills could be held liable for their actions. After setting the stage for CERCLA, Part III examines the liability and exemption provisions of CERCLA and their limitations, as well as prior attempts to fix early omissions and ambiguities. This examination

¹¹ Env'tl. Prot. Agency, *Cleanup Enforcement: Brownfields*, at <http://www.epa.gov/compliance/cleanup/brownfields/index.html> (last updated Apr. 8, 2003).

¹² Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a) (2000).

¹³ Env'tl. Prot. Agency, *supra* note 11. The EPA defines Prospective Purchaser Agreements as:

settlement mechanisms used to provide liability relief to a purchaser of Superfund property prior to acquisition, thus allowing the purchaser to avoid becoming a potentially responsible owner under the Superfund liability scheme The most common such agreements provide EPA with a cash payment which goes to partially satisfy EPA's response expenditures at the property. Other PPAs may provide some specific response activity such as operation and maintenance or site monitoring, including an agreement for access and cooperation and exercise of due care.

Id.

will be followed by a study in Part IV of the new Brownfields Act amendments. The Note will analyze in Part V the differences between the common law interpretations of the “all appropriate inquiry” element of the “innocent landowner” defense exemption under CERCLA¹⁴ and the new requirements under the Brownfields Act to determine the likely future effectiveness of the new liability exemptions. The Note will provide in Part VI a brief summary of the new funding for brownfield cleanup authorized by the Brownfields Act as well as the vital role state and local governments can play in encouraging the redevelopment of brownfields. This analysis will demonstrate that although it is too early to determine with certainty if the President’s grand predictions are correct, the Brownfields Act’s amendments clarify glaring ambiguities that existed in CERCLA for over twenty years, properly exempt individuals from liability who have not been able to escape liability in the past, and provide guidance to resolve the confusion among the courts regarding how the CERCLA exemptions should be applied.

When the relief from CERCLA liability that these new exemptions provide is viewed in tandem with the growing financial and administrative support provided by federal, state, and local governments, the future of brownfields is starting to look cleaner.

II. SETTING THE STAGE FOR CERCLA

A. *Toxic Spills in the Late 1970s*

In the late 1970s, the American public saw a number of dangerous releases of hazardous waste materials, both intentional and unintentional, into the environment at sites across the nation.¹⁵ Places like Niagara Falls, New York; Hopewell, Virginia; the Ohio River; Louisville, Kentucky; Guilford, Indiana; Youngstown, Florida; Brightwater, New York; Pensacola, Florida; Houston, Texas; and White Rock, Texas were all sites of environmental disasters involving either the dumping or accidental release of toxic substances into the local ecosystem.¹⁶ Perhaps the most infamous of these

¹⁴ 42 U.S.C. § 9601(35)(B) (2000).

¹⁵ See JAMES W. MOORMAN, DEP’T OF JUSTICE, THE SUPERFUND CONCEPT: REPORT OF THE INTERAGENCY TASK FORCE ON COMPENSATION AND LIABILITY FOR RELEASES OF HAZARDOUS SUBSTANCES 3-9 (1979).

¹⁶ *Id.*

releases is the Love Canal incident in Niagara Falls, New York. During the Love Canal incident, toxic pesticides dumped at a waste disposal site abandoned for two decades migrated into surrounding developed land causing birth defects and other long-term health hazards to local residents.¹⁷ Highly visible hazardous waste release events like Love Canal led to a public outcry for the federal government to take action to prevent such discharges and clean up then existing environmental contamination in the interest of reducing future health risks.¹⁸

During the 1970s, the federal government occupied a minor role in responding to hazardous waste release incidents, merely providing training for local personnel to prepare to clean up hazardous materials.¹⁹ State and local law enforcement and emergency agencies actually responded to release events.²⁰ Although a federal response was statutorily provided for in certain circumstances, such as oil spills in coastal waters or if the President declared the site a disaster area, local authorities were forced to clean up most release events.²¹ It was clear that the federal government needed to respond to this emerging environmental nightmare.²² This response would require a new system of holding those responsible for these hazardous waste events liable for their actions plus provide adequate funding for cleanup and response costs.

B. *Existing Common Law Causes of Action Used to Impose Liability on Those Responsible for Hazardous Waste Release Events Prior to CERCLA*

In 1979, the federal government formed an interagency task force headed by the United States Attorney General to examine the hazardous waste release problem and the existing law with the goal of constructing a new federal statute to make up for the deficiencies in the existing response system.²³ The task force found that due to the lack of statutory causes of action to hold those responsible for hazardous waste releases liable for the

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 9.

²⁰ *Id.*

²¹ MOORMAN, *supra* note 15, at 9.

²² *See id.*

²³ *Id.* at 1.

damage caused by such incidents, common law tort and property theories served as the only means by which liability could be imposed.²⁴ Due to the fact that the magnitude of hazardous material spills only recently garnered national attention, the common law did not regularly venture into the realm of the toxic spill and was therefore not well developed in this area, making it an unwieldy weapon for imposing liability upon toxic-spillers.²⁵ Another major drawback of the Anglo-American common law system that the task force perceived as a problem was the wide variation between the common law holdings among the many different jurisdictions in the United States.²⁶ This lack of uniformity evidenced the need for a standard, statutorily-imposed theory to hold those responsible for hazardous waste events liable for the damage they caused.

1. Tort Theories

Prior to the passage of CERCLA, there were two common law tort theories that provided causes of action to hold tortfeasors or environmental actors liable for the damage and cleanup costs related to hazardous waste releases. These theories were negligence and strict liability.

a. Negligence

The tort theory of negligence was one possible cause of action that was useable against environmental tortfeasors. To meet a negligence standard, the plaintiff must prove that the defendant's lack of reasonable care was the proximate cause of the plaintiff's injuries and that the risk of harm to the plaintiff was foreseeable.²⁷ Under a negligence analysis, courts typically balance the risk of public harm against the public utility gleaned from the tortfeasor's actions.²⁸ Negligence theories of failure to inspect, failure to warn, negligent product design, and negligent misrepresentation were all applicable to the manufacturers or sellers of hazardous or potentially hazardous materials.²⁹ There were problems of proof, however, that rendered

²⁴ *Id.* at 16-17.

²⁵ *Id.*

²⁶ *Id.*

²⁷ MOORMAN, *supra* note 15, at 19.

²⁸ *Id.*

²⁹ *Id.* at 20-21.

many negligence causes of action for hazardous release events unsuccessful. Plaintiffs often had trouble proving fault in a negligence action concerning toxic dumping where the release or deposit of the hazardous materials became known decades after the material was deposited, rendering negligence actions nearly useless.³⁰ It is also worth noting that it might have been difficult to prevail on a negligence claim against the tortfeasor where the discharge was in accordance with then-existing laws and regulations because of problems proving the existence of a higher duty of care.³¹

b. Strict Liability

Strict liability was a more useful theory in this area of environmental law than negligence because proof of fault is not required to establish a case.³² When seeking to impose liability under a strict liability theory, plaintiffs primarily claimed that a hazardous waste release event resulted from an abnormally dangerous activity.³³ In the abnormally dangerous activities analysis, a plaintiff need only prove that the activity in question is “abnormally dangerous” and that this activity caused the harm.³⁴ In the case of *Cities Service Co. v. State*, the State of Florida sued the defendant phosphate mining company for damages resulting from a dam break at a phosphate settling pond that led to the escape of one billion gallons of phosphate-contaminated water.³⁵ The phosphate slimes seeped into the Peace River, killing fish and damaging the ecosystem.³⁶ The court in *Cities Service Co.* applied the strict liability doctrine of the seminal British torts case of *Rylands v. Fletcher*, where the defendant was strictly liable for the leak of water from a reservoir into a mine shaft because the activity of storing water

³⁰ *See id.* at 25.

³¹ *Id.* at 19.

³² *Id.*

³³ MOORMAN, *supra* note 15, at 21.

³⁴ *Id.*

³⁵ *Cities Serv. Co. v. State*, 312 So. 2d 799, 800 (Fla. Dist. Ct. App. 1975).

³⁶ *Id.*

was a non-natural use of the property.³⁷ The *Cities Service Co.* court used a six-factor balancing test to determine that the activity of storing phosphate-laden water was abnormally dangerous, and found the defendant strictly liable on summary judgment.³⁸

The interagency task force recognized that while this abnormally dangerous activities analysis was the most promising theory in the pre-CERCLA years, courts like the Florida District Court of Appeals in *Cities Service Co.* had added a balancing of the equities test to determine if the public benefitted more from the activity than the harm, rendering the theory less useful.³⁹ At that time, no state had adopted a common law rule holding that the manufacture of chemicals was *per se* abnormally dangerous.⁴⁰ Without such a holding, the issue of abnormal danger had to be litigated in every case.⁴¹

2. Property Rights Theories

Common law theories based on the invasion of property (trespass) or interference with the use of property (nuisance) also proved to be useful in imposing liability on releasers of hazardous waste.⁴²

a. Nuisance

The most commonly used property law theory to impose liability on releasers of hazardous wastes was that of nuisance.⁴³ Nuisance law can be split into two separate categories, public and private; the former generally requiring that a public official bring the action and assert a right enjoyed by the general public, while private nuisance is merely the “unreasonable interference with the use and enjoyment of land.”⁴⁴ Bringing a nuisance action for the release of hazardous waste, however, can be difficult under either doctrine. In *Page v. Niagara Chemical Division of Food Machinery*

³⁷ *Id.*

³⁸ *Id.* at 803-04.

³⁹ MOORMAN, *supra* note 15, at 21.

⁴⁰ *Id.* at 22.

⁴¹ *Id.*

⁴² *Id.* at 17.

⁴³ *Id.* at 23.

⁴⁴ *Id.*

and Chemical Corp., the plaintiffs failed on their claims of both public and private nuisance.⁴⁵ The plaintiffs sued to shut down the chemical plant located adjacent to the rail yard where they worked on the theories that the chemicals and dust the plant emitted constituted both a public and private nuisance.⁴⁶ The court affirmed the trial court's dismissal of the complaint because as employees, the plaintiffs did not have a sufficient interest in the property to maintain a private nuisance cause of action, and failed to demonstrate a sufficient special injury to justify their action as private individuals for public nuisance.⁴⁷ Under the nuisance doctrine, the court also must balance the equities component during the determination of an appropriate remedy.⁴⁸

Traditionally, courts are reluctant to use private nuisance actions to further public concerns, such as fighting air pollution. The Court of Appeals of New York in *Boomer v. Atlantic Cement Co.* heard a case involving a private nuisance action by the neighbors of a cement plant that emitted dirt, smoke, and vibrations.⁴⁹ The court suggested its reluctance to use common law causes of action to further environmental policies in stating:

[a] court should not try to [fight air pollution] on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant⁵⁰

⁴⁵ *Page v. Niagara Chem. Div. of Food Mach. & Chem. Corp.*, 68 So. 2d 382, 384 (Fla. 1953).

⁴⁶ *Id.* at 383.

⁴⁷ *Id.* at 383-84.

⁴⁸ MOORMAN, *supra* note 15, at 24.

⁴⁹ *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970).

⁵⁰ *Id.*

b. Trespass

Trespass was the second property rights-based tort theory that served as a possible cause of action to impose liability on those responsible for hazardous waste release events. Although trespass and nuisance are very similar concepts, the fundamental difference between the two is that trespass requires a physical invasion onto property, which could include hazardous waste releases, while the invasion by microscopic particles could constitute a nuisance.⁵¹ In *Martin v. Reynolds Metal Co.*, the Oregon Supreme Court held that fluoride particles from an aluminum plant's emissions constituted a trespass when they settled on the plaintiff's land and rendered the land and drinking water unusable.⁵²

3. Common Law Short Comings in Dealing with the Release of Hazardous Materials

In addition to the lack of uniformity between state common law causes of action used to hold those responsible for hazardous waste release events liable prior to 1980, the interagency task force recognized additional limitations on the effectiveness of common law solutions. One such problem stemmed from the fact that the harmful effects of most hazardous waste releases did not become apparent until years after the event, long after the statutes of limitations for these common law causes of action ran.⁵³ Difficulty in proving causation and the general complexity of the scientific issues concerning hazardous waste releases created daunting hurdles to imposing liability on those responsible for such events.⁵⁴ After examining the state and federal statutes that did impose liability on responsible parties and assigned clean-up responsibilities, the interagency task force laid out a plan for the creation of the Superfund, a plan which the federal government adopted with the passage of CERCLA in 1980.⁵⁵

⁵¹ MOORMAN, *supra* note 15, at 24.

⁵² *Martin v. Reynolds Metal Co.*, 342 P.2d 790, 791-94 (1959).

⁵³ MOORMAN, *supra* note 15, at 18.

⁵⁴ *Id.* at 19.

⁵⁵ *Id.* at 27-40, 46-152; *see also* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2000).

III. THE PASSAGE OF CERCLA

In the fall of 1980, after months of work, Congress passed CERCLA in response to the findings of the interagency task force report and growing public concern that those responsible for future environmental catastrophes would go unpunished.⁵⁶ The Act “authorize[d] the United States or a state to bring actions to recover costs incurred in responding to releases of hazardous substances,”⁵⁷ and also provided for “cost recovery suits by private parties in certain circumstances.”⁵⁸ CERCLA created a trust fund, called the Superfund, from which EPA received funds to find and clean up contaminated brownfields.⁵⁹ Under CERCLA, by using the Superfund,

EPA can pay for cleanup when parties responsible for the contamination cannot be located or are unwilling or unable to perform the work. EPA can also take legal action to force parties responsible for contamination to cleanup the site or reimburse the Federal government for the cost of the cleanup.⁶⁰

⁵⁶ 1 ALLAN J. TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE § 1.1 (1992).

⁵⁷ 42 U.S.C. § 9601(22) broadly defines the term “release” as:

any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace . . . (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident . . . (D) the normal application of fertilizer.

Id.

⁵⁸ 4 THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION § 14.01 (Susan M. Cooke & Christopher P. Davis eds., 1986); *see also* 42 U.S.C § 9607(a).

⁵⁹ RONALD H. ROSENBERG, COMMUNITY RESOURCE GUIDE FOR BROWNFIELDS REDEVELOPMENT 27 (2d ed. 2002) (citing OFFICE OF SOLID WASTE AND REMEDIAL RESPONSE, ENVTL. PROT. AGENCY, No. 542/B-97/001, TOOL KIT OF INFORMATION RESOURCES FOR BROWNFIELDS INVESTIGATION AND CLEANUP (1997)).

⁶⁰ *Id.*

A. *Enforcement Actions*

CERCLA provides several different types of enforcement actions. The federal government can sue to obtain reimbursement for cleanup expenditures paid out of the Superfund or it can force a potentially responsible party ("PRP") to clean up contaminated sites.⁶¹ State governments enjoy the same power to sue PRPs to recoup expenses paid in cleaning up Brownfield sites; however, they do not possess the power to sue for injunctive relief to compel PRPs to cleanup contaminated sites.⁶² CERCLA section 107(a)(4) provides that any "other person" may sue to obtain costs expended for cleanup of contaminated sites.⁶³ The District Court for the Eastern District of Pennsylvania held that the phrase "other person" includes local governments.⁶⁴ While other persons, including state and local governments and private parties, can sue to obtain reimbursement for cleanup expenses, they cannot seek an injunction to force a PRP to undertake remediation of a contaminated site.

B. *Imposition of Liability*

CERCLA imposes a liability for cleaning up contaminated brownfield sites upon PRPs.⁶⁵ CERCLA defined PRPs as:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing

⁶¹ See 42 U.S.C. §§ 9606-9607; 1 TOPOL & SNOW, *supra* note 56, § 3.2.

⁶² See 42 U.S.C. § 9606(a); 1 TOPOL & SNOW, *supra* note 56, § 3.3.

⁶³ 42 U.S.C. § 9607(a)(4); 1 TOPOL & SNOW, *supra* note 56, § 3.4(A).

⁶⁴ See *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1141-42 (E.D. Pa. 1982).

⁶⁵ See 1 TOPOL & SNOW, *supra* note 56, § 3.5.

such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance
...⁶⁶

Courts have been willing to “pierce the corporate veil” in holding corporate shareholders, including parent corporations, liable in Superfund recuperation actions, if the plaintiff convinces the court either (1) that the corporation was merely a fraudulent front to limit shareholder liability, or (2) that limiting shareholder liability would lead to an inequitable result.⁶⁷ In *Stanton Road Associates v. Lohrey Enterprises, Inc.*, the trial court ignored the corporate form and imposed CERCLA liability upon the defendant corporation’s shareholders.⁶⁸ The court reasoned that piercing the corporate veil was equitable because the “[d]efendants’ failure to: adequately capitalize West Coast Valet/Electronic Valet; issue stock; maintain minutes and adequate records; hold board meetings; and observe corporate formalities, constitutes such a unity of interest of the corporation and the individuals that the separate personalities of the corporation and individuals no longer exist.”⁶⁹ Courts also consider many other factors when determining whether to disregard the standard limited liability protection that shareholders of a corporation typically enjoy.⁷⁰

C. Exemptions and Defenses for PRPs Under CERCLA

CERCLA section 107(b) established three main defenses to Superfund liability, stating:

⁶⁶ 42 U.S.C. § 9607(a).

⁶⁷ 1 TOPOL & SNOW, *supra* note 56, at 178.

⁶⁸ *Stanton Rd. Assocs. v. Lohrey Enters., Inc.*, No. C-89-0947-SC, 1991 U.S. Dist. LEXIS 5630, at *21-22 (N.D. Cal. Apr. 15, 1991), *vacated on other grounds*, 984 F.2d 1015 (9th Cir. 1993).

⁶⁹ *Id.* at *21.

⁷⁰ For a laundry list of the various factors considered by courts when determining whether to “pierce the corporate veil,” see 1 TOPOL & SNOW, *supra* note 56, at § 3.6(c)(1).

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

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.⁷¹

Courts have interpreted the Act of God and Act of War defenses in only a handful of cases. Courts interpreted the Act of God provision rather narrowly to include only events where “the release of waste as opposed to another event leading to the incurrence of response costs, was due solely to an Act of God, was not foreseeable, and consequently was not preventable by an act of man.”⁷² In *United States v. Multi-Chem, Inc.*, the defendants unsuccessfully argued against the government’s motion for summary judgment by claiming that because they had exercised due care in preventing leaks or spills from their chemical facility, the fact that a nearby pond became contaminated implied that this release was the result of an Act of God.⁷³ The Act of War defense also has seldom reached a courtroom.⁷⁴

⁷¹ 42 U.S.C. § 9607(b).

⁷² 1 TOPOL & SNOW, *supra* note 56, at § 5.3 (citations omitted).

⁷³ *United States v. Multi-Chem, Inc.*, [1990] 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,553, 20,553 (W.D. Ky. Aug. 1, 1989) (“[T]he existence of care in the ordinary course of conducting one’s business does not, without more, imply that the hazardous condition resulted from an act of God.”).

⁷⁴ *See* 1 TOPOL & SNOW, *supra* note 56, § 5.4 (“As far as we are aware, the Act of War defense has been raised and argued by the parties in only a few reported cases.”).

Unlike the first two defenses, the “sole cause” or “third-party defense” from CERCLA section 107(b) has been a commonly asserted claim.⁷⁵

In order to establish the “sole cause” or “third-party” defense, the defendant must prove by a preponderance of the evidence that: (1) the release or threat of release of a hazardous substance and the resulting damages were caused solely by an act or omission of a third-party; (2) the third-party’s act or omission did not occur in connection with a contractual, employment, or agency relationship (either direct or indirect) with the defendant; (3) the defendant exercised due care with respect to the hazardous substance; and (4) the defendant took precautions against the third-party’s foreseeable acts or omissions and the foreseeable consequences resulting therefrom.⁷⁶

Because this defense requires such an exacting standard of proof, in almost every case where the “third-party” defense has been raised, the defendant has been unable to survive plaintiff’s motion for summary judgment.⁷⁷

D. *The Innocent Landowner Defense*

The original CERCLA bill, when passed in 1980, failed to differentiate between “innocent” and “guilty” owners of sites containing hazardous substances for the purpose of liability.⁷⁸ In 1986, to correct this situation, Congress passed the Superfund Amendments and Reauthorization Act (“SARA”).⁷⁹ Instead of amending the liability provisions of these basic defenses for PRPs, SARA amended the definition of “contractual

⁷⁵ 1 *Id.* § 5.5(A).

⁷⁶ 1 *Id.*

⁷⁷ 1 *Id.* (citing as successful use of the “third-party” defense in surviving plaintiff’s motion for summary judgment, *Shapiro v. Alexanderson*, 741 F. Supp. 472 (S.D.N.Y. 1990); *Westwood Pharm., Inc. v. Nat’l Fuel Gas Distrib. Corp.*, 737 F. Supp. 1272 (W.D.N.Y. 1990); *United States v. Moore*, 703 F. Supp. 460 (E.D. Va. 1988); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); *United States v. Mirabile* [1985] 15 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,992 (E.D. Pa. Sept. 4, 1985)).

⁷⁸ 1 *TOPOL & SNOW*, *supra* note 56, at 433.

⁷⁹ Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended in scattered sections of 42 U.S.C. §§ 9601-9628 (2000)).

relationship” in CERCLA section 101(35) 82a to allow a PRP to escape the “contractual relationship exception”⁸⁰ to the “third-party” defense by demonstrating: (1) the purchaser did not know or have reason to know the site was contaminated at the time of purchase; (2) the purchaser made “all appropriate inquiries” into the site prior to purchase; and (3) the purchaser exercised due care with respect to contamination when it was discovered.⁸¹ Together these three components constitute what has become known as the “innocent landowner” defense.⁸² A PRP may assert the “innocent landowner” defense to avoid CERCLA liability if the landowner can prove by a preponderance of the evidence that, in the most basic of terms, “[the PRP] acquired the property without reason to know that a hazardous substance was disposed of on the property.”⁸³ SARA did not, however, define what steps a prospective purchaser would have to take to meet the “all appropriate inquiries” requirement.⁸⁴ In fact, the legislative history shows that Congress intended to impose a sliding scale of investigative duty based on the purchaser’s sophistication rather than adopting any one uniform standard.⁸⁵

E. *Standards of Liability*

Though the word “strict” does not appear in the liability provisions of CERCLA, Congress defined “liability” by reference to the Clean Water Act (“CWA”).⁸⁶ Courts have universally accepted that Congress intended this

⁸⁰ The “contractual relationship exception” to the “third-party” or “sole cause” of harm defense eliminates any individual, such as a subsequent owner of the site, with a direct or indirect contractual relationship with a PRP from using this defense. *See* 42 U.S.C. § 9607(b)(3).

⁸¹ 1 TOPOL & SNOW, *supra* note 56, at § 5.6 (outlining these three elements from 42 U.S.C. § 9601(35)).

⁸² *See* 1 *id.* § 5.6.

⁸³ ROSENBERG, *supra* note 59, at 41.

⁸⁴ *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended in scattered sections of 42 U.S.C. §§ 9601-28 (2000)).

⁸⁵ *See* 1 TOPOL & SNOW, *supra* note 56, at § 5.6; *cf.* JEFFERY C. FORT ET AL., BUREAU OF NAT'L AFFAIRS, CORPORATE PRACTICE SERIES NO. 57-2ND, AVOIDING LIABILITY FOR HAZARDOUS WASTE: RCRA, CERCLA, AND RELATED CORPORATE LAW ISSUES, A-108 (2003) (discussing courts' applications of the “innocent landowner” defense in the context of successor liability for corporate asset purchases).

⁸⁶ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(32) (2000); *see* Clean Water Act, 33 U.S.C. § 1321 (2000).

reference to incorporate CWA's strict liability standard into CERCLA.⁸⁷ The term "joint and several" also was omitted from the liability portion of CERCLA after some extensive debate.⁸⁸ Following the decision of the District Court for the Southern District of Ohio in the case of *United States v. Chem-Dyne Corp.*,⁸⁹ courts have widely accepted that the principle of joint and several liability could be imposed in CERCLA litigation.⁹⁰ Joint and several liability scares away potential purchasers of brownfields because the current owner of a contaminated site is the most obvious defendant in a CERCLA suit, and if sued, the current owner becomes potentially liable for the entire cost of remediation for past pollution.⁹¹ If any PRP can be held liable for the entire amount of the cleanup costs, the current owner becomes especially vulnerable when previous owners cannot be found or have gone defunct. Even if the current owner is arguably "innocent," the current owner has the burden to prove that it is not a PRP.⁹² Meeting this burden can impose significant litigation costs on current owners of contaminated sites.⁹³ The only limitation on the imposition of joint and several liability is where the amount of environmental damage caused by each PRP can be firmly calculated and the liability can be apportioned appropriately among them.⁹⁴

IV. ANALYSIS

A. *The Brownfields Act: Solving Problems with CERCLA*

Implementation and judicial interpretation of CERCLA following the enactment of the SARA amendments has served to point out additional problems with the rules of liability and the application of various exemptions

⁸⁷ See 1 TOPOL & SNOW, *supra* note 56, § 4.2.

⁸⁸ See 1 *id.* § 4.4.

⁸⁹ 572 F. Supp. 802 (S.D. Ohio 1983).

⁹⁰ 1 TOPOL & SNOW, *supra* note 56, at § 4.4(O) & n.36 (discussing several cases involving the application of joint and several liability under CERCLA).

⁹¹ See RONALD H. ROSENBERG, CTR. FOR PUB. POLICY RESEARCH, COLL. OF WM. & MARY, BROWNSFIELDS REDEVELOPMENT: CLEANING UP CONTAMINATED SITES FOR COMMUNITY RENEWAL 12 (1999).

⁹² See *id.* at 14.

⁹³ See *id.* (noting that courts within the Fourth Circuit narrowly construe the elements of this defense, making it difficult for current owners to meet their burden of proof).

⁹⁴ *Id.* at 12 ("Each party may be liable for only a portion of the cleanup costs if there is some reasonable way of allocating the amount of damage caused by particular parties.").

and expenses. The Brownfields Act was written with the intention of fixing these further flaws in CERCLA.

1. New Exemptions in the Brownfields Act

a. The De Micromis Exemption

Prior to the passage of the Brownfields Act, a PRP could be liable under CERCLA even if the amount of on-site pollution the PRP contributed was minimal.⁹⁵ In *United States v. Keystone Sanitation Co., Inc.*, the District Court for the Middle District of Pennsylvania held that EPA had the authority under CERCLA section 122(g)⁹⁶ to enter into “de micromis settlements” with a PRP if the amount of hazardous waste contribution by the PRP and the toxic effects are minimal when compared to the aggregate pollution at the site.⁹⁷ Although settlements with de micromis contributors were authorized in CERCLA, these PRPs were not exempted from Superfund liability. Section 102 of the Brownfields Act amended CERCLA section 107 to exempt from Superfund liability any PRP who contributed less than 110 gallons of liquid or 200 pounds of solid waste materials if the pollution occurred before April 1, 2001.⁹⁸ This exception, however, is not available where:

the materials containing hazardous substances . . . [1] have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility; or . . . [2] the person has failed to comply with an information request or administrative subpoena issued by the President under this Act or has impeded; or [3] is impeding, through action or inaction, the performance of a response

⁹⁵ See *supra* notes 86-90 and accompanying text.

⁹⁶ 42 U.S.C. § 9622(g) (1996).

⁹⁷ *United States v. Keystone Sanitation Co., Inc.*, Civ. Action No. 1:CV-93-1482, 1996 U.S. Dist. LEXIS 22573, at *10, 29-30 (M.D. Pa. Apr. 29, 1996) (citing 42 U.S.C. § 9622(g)(1) (1996)).

⁹⁸ Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 102, 115 Stat. 2356, 2356 (2002) (codified as amended in scattered sections of 42 U.S.C. §§ 9601-9628).

action or natural resource restoration with respect to the facility; or . . . [4] a person has been convicted of a criminal violation for the conduct to which the exemption would apply, and that conviction has not been vitiated on appeal or otherwise.⁹⁹

Under this new *de micromis* exception, a purchaser who cooperates in an investigation into the site and complies with government information requests can escape Superfund liability, even though the purchaser is responsible for some portion of the dumping. This exemption will serve its purpose—eliminating liability for minimal contributions to pollution. At the same time, this exception will not be subject to rampant abuse because of the provision that excludes a PRP if the small amount of waste she contributes will create a costly or dangerous cleanup project. While a PRP who contributed less than the specified amount of waste is presumptively not liable, this exception from liability will be unavailable if the waste was especially harmful or hazardous and thus contributed significantly to the cleanup.

b. Municipal Solid Waste Exemption

The Brownfields Act also exempts certain PRPs and small businesses that contribute municipal solid waste.¹⁰⁰ As with the *de micromis* exception, a PRP who otherwise would qualify for the municipal solid waste exemption may not receive the benefit of the exception if the PRP's waste creates a costly or dangerous cleanup project.¹⁰¹ This exemption covers most private individuals and many small businesses from unwittingly being held liable under CERCLA for carelessly throwing out contaminants with the weekly trash collection.

⁹⁹ *Id.* § 102, 115 Stat. at 2357.

¹⁰⁰ *Id.* § 102, 115 Stat. at 2357-58. Municipal solid waste is defined by the statute as waste “generated by a household” or is “generated by a commercial, industrial, or institutional entity, to the extent that the waste material . . . is essentially the same as waste normally generated by a household . . . [or] is collected and disposed of with other municipal solid waste . . .” *Id.* § 102, 115 Stat. at 2358.

¹⁰¹ *Id.* § 102, 115 Stat. at 2358.

c. Contiguous Property Owner Exemption

The addition of a contiguous property owner exemption relieves from liability property owners whose land is or may become contaminated by the migration of pollutants from neighboring land.¹⁰² While this provision might seem at first glance to grant sweeping relief from CERCLA liability, a number of restrictions limit its application.¹⁰³ A land owner qualifies for this exemption if the land owner:

- [1] did not cause or contribute to the release or threatened release
- [2] is not potentially liable or affiliated with any other person potentially liable
- [3] exercises appropriate care in respect to the release
- [4] provides full cooperation, assistance, and access to persons authorized to undertake the response action and natural resource restoration
- [5] complies with all land use controls and does not impede the performance of any institutional controls
- [6] complies with all information requests
- [7] provides all the legally required notices regarding releases of hazardous substances [and]
- [8] conducted all appropriate inquiry at time of purchase and did not know or have reason to know of contamination[.]¹⁰⁴

Those who believe that the Brownfields Act fails to meet its goals look to these eight restrictions as a demonstration that the Act is, in fact, more limiting than the previous common law rules.¹⁰⁵ The contiguous property owner exemption also only covers pollution through ground water, and fails to recognize migrating pollution through soil leaching.¹⁰⁶ Adoption of a contiguous property owner exemption, however, was necessary to protect

¹⁰² See *id.* § 221, 115 Stat. at 2368-70.

¹⁰³ See *id.* § 102, 115 Stat. at 2369.

¹⁰⁴ Env'tl. Prot. Agency, *Summary of the Small Business Liability Relief and Brownfields Revitalization Act*, at <http://www.epa.gov/brownfields/html-doc/2869sum.htm> (last updated July 7, 2003) (discussing section 221).

¹⁰⁵ See Harmon & Williams, *supra* note 10.

¹⁰⁶ See *id.*

property owners, wholly unaffiliated with their polluting neighbors, whose property becomes contaminated by no fault of their own. Although the Brownfields Act establishes a number of restrictions on what a landowner can and cannot do when trying to claim the contiguous property owner exception, this amendment is a welcome addition to CERCLA because it fills a long-existing gap.

d. Bona Fide Prospective Purchaser Exemption

The Brownfields Act also amends CERCLA to exempt from liability bona fide prospective purchasers, defined as a person (or a tenant of a person) who acquires ownership of a facility after the date of the enactment of this section and who establishes by a preponderance of the evidence¹⁰⁷ that “all disposal took place before the purchase,”¹⁰⁸ and that the purchaser:

- [1] made all appropriate inquiry
- [2] . . . exercises appropriate care with respect to any release
- [3] provides full cooperation, assistance, and access to persons authorized to undertake response actions or natural resource restoration
- [4] complies with land use restrictions and does not impede performance of institutional controls
- [5] complies with all information requests
- [6] provides all legally required notices regarding releases of hazardous substances [and]
- [7] . . . is not potentially liable or affiliated with any other person potentially liable[.]¹⁰⁹

The qualifications under the bona fide prospective purchaser exemption are substantially similar to those in the contiguous properties exemption.¹¹⁰ The “innocent landowner” defense, however, only applies to owners who did not know and should not have known that the property they were acquiring

¹⁰⁷ See Small Business Liability Relief and Brownfields Revitalization Act, § 221, 115 Stat. at 2370.

¹⁰⁸ *Id.*

¹⁰⁹ Env'tl. Prot. Agency, *supra* note 104 (discussing section 222).

¹¹⁰ See Harmon & Williams, *supra* note 10.

had or could be contaminated.¹¹¹ Under the new bona fide prospective purchaser exemption, owners who discovered site contamination or the possibility thereof prior to purchase, and took action to clean up or prevent the contamination from getting worse, will be protected. The purpose of exempting those prospective purchasers who have conscientiously investigated the possibility or existence of contamination on a site is to eliminate the need for these prospective purchasers to enter into Prospective Purchaser Agreements (“PPAs”) with EPA.¹¹² PPAs are “settlements with the purchasers of contaminated property which then act as covenants not to sue.”¹¹³ Under new PPA criteria adopted in 1999, EPA considers the following five criteria in deciding whether to enter into a PPA with a prospective purchaser:

- [1] An EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken by the agency
- [2] The Agency should receive a substantial benefit either in the form of a direct benefit for cleanup, or as an indirect public benefit in combination with a reduced direct benefit to EPA
- [3] The continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with EPA’s response action
- [4] The continued operation or new development of the property will not pose health risks to the community and those persons likely to be present at the site [and]
- [5] The prospective purchaser is financially viable[.]¹¹⁴

In particular, if the prospective purchaser could demonstrate that EPA would receive a “substantial benefit” from the transaction, that the site could

¹¹¹ See *supra* note 83 and accompanying text.

¹¹² See *Envtl. Prot. Agency, supra* note 11 (discussing PPAs).

¹¹³ ROSENBERG, *supra* note 59, at 53.

¹¹⁴ *Id.* at 55 (citing MARK S. DENNISON, BROWNFIELDS REDEVELOPMENT: PROGRAMS AND STRATEGIES FOR REHABILITATING CONTAMINATED REAL ESTATE 9 (Government Institutes Inc. 1998); Announcement and Publication of Guidance on Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792, 34,792-95 (July 3, 1995)).

be developed by the prospective purchaser without causing additional contamination, that the site posed no health hazard, and that the prospective purchaser had the means to provide adequate consideration, this purchaser could obtain EPA's promise not to sue the purchaser under CERCLA.¹¹⁵ EPA is required to publish notices of proposed PPAs in the *Federal Register* to inform the community.¹¹⁶ The notice of proposed settlement between EPA and the City of Phoenix concerning "[t]he Motorola 52nd Street Superfund Site" details the typical forms of consideration a purchaser can provide in a PPA.¹¹⁷ In that case, EPA granted the City of Phoenix a covenant not to sue under CERCLA for the development of the Superfund site in an effort to expand Sky Harbor Airport in exchange for \$10,000 and an agreement (1) to allow EPA access to the site for cleanup and (2) for the City of Phoenix to cooperate with any EPA requests to implement measures to stop the spread of the contamination.¹¹⁸

Some legal scholars suggest that the restrictions in the Brownfields Act will serve to prevent most brownfield sites from achieving bona fide prospective purchaser status and thereby may prevent further brownfield development by discouraging prospective purchasers.¹¹⁹ If, on the other hand, the bona fide prospective purchaser exemption proves to be usable by conscientious property owners, it will allow individuals who exercise care in discovering contamination problems and take steps to contain these problems to protect themselves from CERCLA liability without having to resort to PPAs. This exemption could have a profound effect on achieving significant gains in national brownfields redevelopment if it proves to be workable.

It is also necessary to note that the bona fide purchaser exemption is an affirmative defense to a CERCLA action. Because the bona fide purchaser exemption only serves as an affirmative defense, it is raised in response to the initiation of litigation against the landowner. As an affirmative defense,

¹¹⁵ See ROSENBERG, *supra* note 59, at 55-59.

¹¹⁶ *Id.* at 58-59 (noting, however, that the *Federal Register* publication does not always provide adequate notice).

¹¹⁷ See Motorola 52nd Street Superfund Site, Phoenix, Arizona; Notice of Proposed Administrative Settlement, 67 Fed. Reg. 56,832 (Sept. 5, 2002).

¹¹⁸ *Id.*

¹¹⁹ See Harmon & Williams, *supra* note 10 ("The requirement that the owner or prospective owner take reasonable steps to stop continuing releases, prevent future releases, and prevent human and other exposure to the hazardous substances may be burdensome. The nature and extent of the required action by the owner is not defined.").

the defendant must raise this exemption in her answer.¹²⁰ Any failure to raise this defense waives its use.¹²¹ PPAs, on the other hand, secure liability relief for the landowner before the property is purchased.¹²² Application of the bona fide purchaser exemption may require the landowner to incur the cost and time of responding to litigation. Although Alternative Dispute Resolution (“ADR”) practices like arbitration and negotiated settlements have been used in CERCLA actions with up to 1200 parties,¹²³ obtaining relief from liability through ADR also consumes the landowner’s time and money. The bona fide prospective purchaser exemption is the codification of EPA’s desire to provide liability relief to conscientious landowners who knew at the time of sale that their new property was or could be considered a Superfund site, without having to go through the relatively cumbersome practice of negotiating and granting PPAs.

2. All Appropriate Inquiries Requirement Defined: Changes in the Innocent Landowner Defense

Section 223 of the Brownfields Act finally defines the phrase “all appropriate inquiries” for purposes of the innocent landowner defense qualifications established by SARA.¹²⁴ The Act directs EPA to establish new standards and practices for the “all appropriate inquiries” requirement by 2004 using a number of statutorily defined considerations.¹²⁵ In the meantime, the Act provides two interim definitions of “all appropriate inquiries.”¹²⁶ For any purchase that took place before May 31, 1997, the “all appropriate inquiries” standard is to incorporate the following five factors:

[1] any specialized knowledge or experience on the part of the defendant;

¹²⁰ FED. R. CIV. P. 8(c).

¹²¹ See FED. R. CIV. P. 12(b).

¹²² See *supra* note 113 and accompanying text.

¹²³ See Env'tl. Prot. Agency, *Cleanup Enforcement: Alternative Dispute Resolution* at <http://www.epa.gov/compliance/cleanup/adr/index.htm> (last updated June 26, 2003).

¹²⁴ Harmon & Williams, *supra* note 10.

¹²⁵ Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 223(2), 115 Stat. 2356, 2373 (2002) (codified as amended at 42 U.S.C. § 9601(35)(B)(ii)-(iii)).

¹²⁶ *Id.*

- [2] the relationship of the purchase price to the value of the property, if the property was not contaminated;
- [3] commonly known or reasonably ascertainable information about the property;
- [4] the obviousness of the presence or likely presence of contamination at the property; and
- [5] the ability of the defendant to detect the contamination by appropriate inspection.¹²⁷

These factors are merely a restatement of those established in SARA.¹²⁸ The statute adopted a simpler interim “all appropriate inquiries” standard for purchases after May 31, 1997. Congress codified the American Society for Testing and Materials’ (“ASTM”)¹²⁹ “Phase I Assessment” as the standard governing these more recent purchases of affected land.¹³⁰ The ASTM Phase I Assessment “must be preformed by an environmental professional,” and “includes a records review, site reconnaissance, interviews, and reports.”¹³¹ It is important to note that no actual soil or groundwater testing is required under this standard. Basically, the ASTM Phase I Assessment is a background check and visual inspection for possible pollution. EPA recently clarified that ASTM Standard E1527-00 (the most recent form of the Phase I Assessment) is the current “all appropriate inquiry” standard.¹³²

Setting the ASTM Phase I Assessment as the second interim standard may have removed the ambiguity from the interpretation of the phrase “all appropriate inquiries,” but now no lesser level of inquiry will suffice. Where a purchaser acted in good faith but had a lesser inspection or assessment performed, she cannot use the innocent landowner defense. Prospectively, this amendment may make the application of the appropriate inquiries requirement uniform and provide a “safe harbor” for property purchasers. It

¹²⁷ *Id.* § 223(2), 115 Stat. at 2374.

¹²⁸ *See* 42 U.S.C. § 9601(35)(B) (2000).

¹²⁹ ASTM “has developed widely accepted standards for evaluating environmental liabilities,” and worked with “the EPA to develop standards for Brownfields redevelopment.” ROSENBERG, *supra* note 59, at 230.

¹³⁰ Small Business Liability Relief and Brownfields Revitalization Act § 223(2), 115 Stat. at 2374 (codified as amended at 42 U.S.C. § 9601(35)(13)(iv)(II)).

¹³¹ ROSENBERG, *supra* note 59, at 231 (citations omitted).

¹³² Clarification to Interim Standards and Practices for All Appropriate Inquiry Under CERCLA, 68 Fed. Reg. 24,888 (May 9, 2003) (to be codified at 40 C.F.R. pt. 312).

should not be overlooked, however, that there are probably landowners who had inspections performed on their property before purchase that do not meet ASTM Phase I Assessment standard who will still be susceptible to CERCLA liability.

The Brownfields Act also established several new substantive conditions for invoking the innocent landowner defense. In addition to making all appropriate inquiries, the purchaser must have taken “reasonable steps to [1] stop any continuing release; [2] prevent any threatened future release; and [3] prevent or limit any human, environmental, or natural re-source exposure to any previously released hazardous substance.”¹³³ These requirements merely ensure that when contamination is discovered at a site, the innocent landowner must act to prevent further environmental damage. Innocent landowner apathy that leads to further environmental damage would hardly justify granting such a landowner relief from liability.

IV. ANALYSIS: WILL THE BROWNFIELDS ACT LIVE UP TO GOVERNMENT PROMISES?

A. *Pre-Brownfields Act Case Law: The Ambiguity of “All Appropriate Inquiries”*

1. A Duty to Inspect?

In the years since the adoption of SARA amendments to CERCLA, there have been a number of cases where the purchaser of a contaminated site has attempted to escape liability through the innocent landowner defense. Some courts have held that although there was no defined standard for the “all appropriate inquiries” required under the “innocent landowner” defense, if the landowner conducted no inspection before the purchase, she could not claim the defense.¹³⁴ Some courts went further to hold that the “all appropriate inquiries” requirement imposed an affirmative duty on prospective purchasers both to inspect the site and to investigate possible previous

¹³³ Small Business Liability Relief and Brownfields Revitalization Act § 223(2), 115 Stat. at 2373 (codified as amended at 42 U.S.C. § 9601(35)(B)(i)(II)).

¹³⁴ 1 TOPOL & SNOW, *supra* note 56, §5.6 (citing *United States v. Serafini*, 791 F. Supp. 107, 108 (M.D. Pa. 1990)).

contamination.¹³⁵ The new definition of “all appropriate inquiries” that requires landowners to meet ASTM Phase I Assessment clearly codifies the existence of an affirmative duty on prospective landowners to inspect sites for possible environmental contamination before purchasing.

2. Inconsistency Between Standards

In addition to codifying an affirmative duty on the part of the purchaser to inspect a piece of property for either actual or possible contamination, the Brownfields Act further establishes a clear standard regarding the level of inquiry required for a purchaser to remain innocent, or bona fide.¹³⁶ Before the Brownfields Act, courts applied a sliding scale standard for the required level of inquiry to determine who was an innocent landowner, applying more stringent standards to more sophisticated landowners.¹³⁷

In *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*, the defendant appealed the district court’s ruling for the plaintiff on several grounds, including the allegation that the district court had erred in holding that the plaintiff was protected from CERCLA liability under the innocent landowner defense.¹³⁸ In its decision, the Court of Appeals for the Sixth Circuit recognized that a “liable facility owner or operator can escape liability by demonstrating that the release or threatened release was caused solely by an act or omission of a third party.”¹³⁹ The Court of Appeals intertwined the third-party defense from section 107(b)(3) and the “innocent landowner” defense from section 101(35)(a) in a most confusing way.¹⁴⁰ The Court of Appeals stated the appropriate rule for determining “all appropriate inquiries” at the time, but never discussed this provision.¹⁴¹ Instead, the court recognized that the plaintiff had no warning

¹³⁵ 1 *Id.* § 5.6 (citing *In re Sterling Steel Treating Inc.*, 94 B.R. 924, 930 (Bankr. E.D. Mich. 1989)).

¹³⁶ Small Business Liability Relief and Brownfields Revitalization Act § 223(2), 115 Stat. at 2373-74 (codified as amended at 42 U.S.C. 9601(35)(B)).

¹³⁷ 1 TOPOL & SNOW, *supra* note 56, § 5.6 (citing *Wickland Oil Terminals v. Asarco, Inc.*, 1988 HWLR 12,533 (N.D. Cal. Feb. 23, 1988)).

¹³⁸ *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 538-39 (6th Cir. 2001).

¹³⁹ *Id.* at 547-48 (citing 42 U.S.C. § 9607 (2000); *United States v. 150 Acres of Land*, 204 F.3d 698, 703-04 (6th Cir. 2000)).

¹⁴⁰ *American Premier Underwriters*, 240 F.3d at 548.

¹⁴¹ *Id.* at 547 n.5.

that the containers of hazardous waste were buried at the site and could not have anticipated the accident which led to the leak, but chose to reject the plaintiff's "innocent landowner" defense on the grounds that the plaintiff's lack of action to prevent the spread of the spill until almost a year after the accident constituted a failure to exercise due care under the statute.¹⁴² Decisions such as this one were not surprising due to the lack of specific guidance from Congress in the form of a "bright line" rule under the defenses set forth in CERCLA.¹⁴³ The court ignored its opportunity to comment on the level of inquiry the plaintiff undertook prior to the purchase of the property, focusing instead on the requirements of the "innocent landowner" defense that required the plaintiff to contain the contamination once discovered.¹⁴⁴

In *United States v. CMGD Realty, Co.*, EPA sued the third-party plaintiff to recoup cleanup costs expended from the Superfund and the plaintiff joined the previous owner for contribution.¹⁴⁵ The Court of Appeals for the Third Circuit held that the previous owner's purpose in drilling holes into a landfill did not matter.¹⁴⁶ Any soil investigative procedure, done for whatever reason, qualified as part of the required "all appropriate inquiries" under the "innocent landowner" defense.¹⁴⁷ The court remanded the case for trial to determine if this drilling had been done negligently.¹⁴⁸ The court's strange approach to the application of the "all appropriate inquiries" standard in *CMGD Realty* may be due to the fact that the new landowner apparently bought the property from the previous owner with the understanding that the site had been used as a landfill and contained hazardous waste.¹⁴⁹ The reasoning of the Court of Appeals in this case illustrates the confusion and misapplication of the previous "innocent landowner" defense. Today, the defendants in this case would have to seek protection under the bona fide prospective purchaser exemption of the Brownfields Act.

As previously noted, applying the all appropriate inquiries standard was intensely fact-specific before the Brownfields Act adopted ASTM Phase I

¹⁴² *Id.*

¹⁴³ See 1 TOPOL & SNOW, *supra* note 56, § 5.6 (citing *United States v. Pac. Hide & Fur Depot, Inc.*, 716 F. Supp. 1341 (D. Idaho 1989)).

¹⁴⁴ *American Premier Underwriters*, 240 F.3d at 548.

¹⁴⁵ *United States v. CMGD Realty, Co.*, 96 F.3d 706, 711-13 (3d Cir. 1996).

¹⁴⁶ *Id.* at 722.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 721-23.

¹⁴⁹ *Id.* at 712.

Assessment as the uniform standard. Because a non-uniform standard requires greater fact-finding before a determination may be made, cases of this type often survived summary judgment motions due to the host of material issues of fact to be proven at trial.¹⁵⁰ With a uniform standard, such as the ASTM Phase I Assessment, the defendant merely has to provide documentation that she had a Phase I Assessment performed before she purchased the property to prove that all appropriate inquiries were taken. This standard leaves fewer issues of fact in dispute and allows for more CERCLA cases where the defendant asserts that she is innocent to be disposed of by summary judgment, which saves the defendant further litigation costs.

B. *The Contractual Relationship Requirement*

In *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, the Court of Appeals for the Second Circuit interpreted the phrase “in connection with a contractual relationship,” from CERCLA section 107(b)(3) to require:

more than the mere existence of a contractual relationship between the owner of land on which hazardous substances are or have been disposed of and a third party whose act or omission was the sole cause of the release or threatened release of such hazardous substances into the environment, for the landowner to be barred from raising the third-party defense provided for in that section. In order for the landowner to be barred from raising the third-party defense under such circumstances, the contract between the landowner and the third party must either relate to the hazardous substances or allow the landowner to exert some element of control over the third party’s activities.¹⁵¹

¹⁵⁰ See, e.g., *In re Hemmingway Transp., Inc.*, 993 F.2d 915, 932 (1st Cir. 1993); *United States v. Domenic Lombardi Realty*, 204 F. Supp. 2d 318, 332-35 (D.R.I. 2002).

¹⁵¹ *Westwood Pharm., Inc. v. Nat’l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 91-92 (2d Cir. 1992).

This interpretation seems at odds with the statutory definition of the phrase “contractual relationship,” as covering “a land transfer, deed, easement, lease, or other instrument that occurred ‘after the disposal or placement of the hazardous substance on, in, or at the facility.’”¹⁵² The Court of Appeals in *Westwood Pharmaceuticals* apparently attempted to further limit the contractual exclusion under SARA to provide relief similar to the standard ultimately adopted in the Brownfields Act.

In *United States v. Domenic Lombardi Realty, Inc.*, the court instead concluded that a landowner’s contract for purchasing the site from the prior owner, who caused the contamination, precluded the use of the third party defense.¹⁵³ The court noted that this conclusion was necessary to give full effect to the statutory definition of “contractual relationship.”¹⁵⁴ Indeed, the court went on to observe that “[t]o adopt the interpretation set forth by the Second Circuit in *Westwood* would render the explicit language of the statutory definition inoperative.”¹⁵⁵ The opposing interpretations of the contract requirement taken by the courts in *Westwood* and *Domenic Lombardi Realty* illustrate the split in the federal courts that the Brownfield Act was meant to remedy.

VI. ENCOURAGING BROWNFIELD REDEVELOPMENT

A. *New Funding*

Although providing new exemptions from CERCLA liability will alleviate some of the concerns held by prospective purchasers of brownfields, funds for the cleanup and renewal of these sites must be available to those who need them to achieve the goal of redeveloping the nation’s up to one million brownfields.¹⁵⁶ The Brownfields Act authorizes the annual appropriation of up to two hundred million dollars for the assessment and cleanup of brownfields, and further requires that one quarter of this amount go to the cleanup of brownfields with petroleum contamination.¹⁵⁷ In addition to

¹⁵² THE LAW OF HAZARDOUS WASTE, *supra* note 58, § 14.01(8)(b)(iv) (citation omitted).

¹⁵³ *Domenic Lombardi Realty, Inc.*, 204 F. Supp. 2d at 322.

¹⁵⁴ *Id.* at 332.

¹⁵⁵ *Id.*

¹⁵⁶ See Bush, *supra* note 3, para. 14.

¹⁵⁷ Env'tl. Prot. Agency, *supra* note 104 (discussing section 221).

private individuals, “States, Tribes, local governments, land clearance authorities, regional councils, redevelopment agencies and other quasi-governmental entities created by States or local governments”¹⁵⁸ are eligible to receive brownfields grants. Providing grants to these entities should encourage state and local governments to establish brownfield redevelopment programs. Grants of up to two hundred thousand dollars per brownfield site are authorized for site assessments and planning.¹⁵⁹ To facilitate this site assessment and planning process, the Brownfields Act creates a training and research program for those engaged in the cleanup of brownfields.¹⁶⁰ Similar grants are available to non-profit organizations for the purpose of cleaning up brownfields owned by the grantee.¹⁶¹ The Brownfields Act also “authorizes grants of up to \$1 million to eligible entities to capitalize revolving loan funds to clean up brownfields.”¹⁶² By providing funding to make financial and technical assistance available to those who wish to cleanup brownfields, this Act goes further than taking away the whip; it places a carrot on the stick.

B. *State and Local Brownfield Redevelopment Programs*

State and local governments can take the first steps toward redeveloping the brownfields that besmirch the landscape with the funding now available to them. Local governments can facilitate the renewal of brownfields by “[b]roking reuse[, p]roviding funding[, c]oordinating public funding and resources[, a]cting as a liaison with environmental regulators[, and a]ssuming liability for contamination.”¹⁶³ States, too, can establish programs to encourage brownfield redevelopment.¹⁶⁴ As an example, Virginia established “the Brownfield site assessment program,” and “the Voluntary Remediation Program.”¹⁶⁵ The purpose of the Voluntary Reme-

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ ROSENBERG, *supra* note 91, at 36 (citing BROWNSFIELDS REDEVELOPMENT: A GUIDEBOOK FOR LOCAL GOVERNMENTS AND COMMUNITIES, International City/County Management Association and the Northeast-Midwest Institute (1997)).

¹⁶⁴ *See, e.g., id.* at 20-35 (discussing Virginia’s Site Cleanup and Redevelopment Policy).

¹⁶⁵ *Id.* at 20.

diation Program is “to encourage hazardous substance cleanups that might not otherwise take place.”¹⁶⁶ The Voluntary Remediation Program works as follows:

the program allows the owner of a site and the state government to arrive at a mutually acceptable remedy for the contamination at the site. This remedy must be one which will bring the site within specific parameters for cleanliness with respect to all contaminants. When the [Virginia Department of Environmental Quality] determines that the work is complete, the landowner receives a Certification of Satisfactory Completion of Remediation. This certificate confers immunity from liability under state enforcement actions with respect to the contamination the participant remedied. In turn, the landowner usually must alter its property deed to limit the property's future use. In addition, it is possible for landowners . . . [who have completed remediation] to be granted exemption or partial exemption from local taxes by the municipality.¹⁶⁷

The Virginia program provides incentives, rewards, and assurances to inspire the cleanup of brownfields, and in turn the renewal of the state's urban areas. For example, the Village at Shirlington Shopping Center in Alexandria, Virginia was cleaned up under the Voluntary Remediation Program.¹⁶⁸ A dry cleaner previously operated on the site, and as a result, solvent tetrachloroethylene seeped into the groundwater.¹⁶⁹ After the successful completion of the remediation process, the previously contaminated site was slated for the construction of an office building.¹⁷⁰ Funding and cooperative programs offered by state and local governments can achieve the desired public benefit, the renewal of long unused industrial sites.

¹⁶⁶ *Id.* (quoting Virginia Dep't. of Env'tl. Quality, *Voluntary Remediation*, at <http://www.deq.state.va.us/brownfields/vrp.html> (last updated June 3, 2003)).

¹⁶⁷ ROSENBERG, *supra* note 91, at 20.

¹⁶⁸ *Id.* at 21-22.

¹⁶⁹ *Id.* at 21.

¹⁷⁰ *Id.* at 22.

VII. CONCLUSION

To a limited extent, critics of the Brownfields Act of 2001 are correct when they say that both the new provisions and the clarifying amendments in the Act are overly technical in construction. No matter how technical these new exemptions and clarifications may be, however, they were adopted after much debate and by unanimous consent in Congress, with the clear goal of assisting blameless purchasers of contaminated or possibly contaminated sites to escape liability under CERCLA. Congress adopted CERCLA in 1980, as a response to the numerous hazardous waste release incidents across the nation. In what proved to be a glaring omission, Congress did not provide an exemption from liability in the original act for truly innocent owners of land who played no part in polluting a contaminated site, whether they knew about the contamination or not.

Congress attempted to correct this mistake with the adoption of SARA amendments in 1986, but did so through an indirect method of defining the contract exception of the third-party defense rather than providing a clear innocent landowner exception. In light of the non-uniform application of the “all appropriate inquiry” requirement for the “innocent landowner” defense, the Brownfield Act’s adoption of ASTM Phase I Assessment as the current “all appropriate inquiry” standard provides a much needed clear standard for courts to apply. By keeping the same “all appropriate inquiries” test from SARA for purchases before May 31, 1997, Congress seems to have intended to protect the expectations of landowners who purchased during this period. As stated earlier, the application of this standard has proven to be intensely fact-based and case-specific, providing great uncertainty for landowners looking for assurance that they will not be subjected to Superfund liability, and making it exceedingly difficult to escape from CERCLA litigation by way of summary judgment.

The bona fide prospective purchaser exemption created by the Brownfields Act was adopted in an effort to eliminate the need for PPAs. This Act provides a defense against liability for a conscientious prospective landowner who performs an ASTM Phase I Assessment, acts to control current contamination, cooperates with the government in cleaning up the site, and can prove that no part of the contamination is her fault. Those who purchased property after May 31, 1997 and inquired into the condition of the property

in good faith, but did so with a method that did not include all the elements of an ATSM Phase I Assessment, may still be subjected to CERCLA liability.

Realistically, prospective landowners have an incentive to engage in inquiry that exceeds the Brownfields Act interim standard of an ASTM Phase I Assessment. In order to rely on any of these exemptions, a landowner will have to demonstrate that he did not contribute to the site contamination. The easiest way to prove that the level of contamination has not increased is to test the soil and groundwater for contaminants prior to purchase to establish a baseline level of contamination. If any contaminants are found, however, the landowner is relegated to seeking relief under the bona fide prospective purchaser exemption rather than the "innocent landowner" exemption, because she would know of the existence of contamination at the site.

Because these exemptions must be raised as affirmative defenses, landowners entitled to relief under these sections will often still have to suffer some litigation expenses in order to obtain relief. Moreover, such costs would arise subsequent to purchase. This stands in contrast to the practice of obtaining pre-transaction Prospective Purchaser Agreements from EPA, which ensured liability relief through a covenant not to sue in exchange for cash, cleanup assistance, cooperation with the government, or some other valuable consideration. Obtaining a PPA could be a difficult and time-consuming process, extracting from the prospective landowner not only the costs of negotiation, but also the cost of providing adequate consideration in the form of other environmentally beneficial actions. If these costs and delays were born before a transaction took place, they could serve to discourage prospective purchasers.

The de micromis and contiguous property owner exemptions are also useful and will provide appropriate relief from liability for parties who have either suffered the effects of a neighbor's hazardous waste contamination, or those who dispose of a small amount of waste with a negligible environmental effect. One continuing problem with these new exemptions is the exclusion from the contiguous property owner exemption of contamination which leeches through the soil. This is an important omission which still needs to be remedied to provide adequate relief under the spirit of the law.

The funding grants that the Brownfield Act provides, which can go to state or local agencies for the purpose of finding and funding brownfield cleanup and renewal provide the means for redevelopment. State redevelop-

ment programs like the Virginia Voluntary Remediation Program can provide incentives in the form of tax breaks to entice developers who already own a brownfield site to cooperate and clean it up. New exemptions from liability and clarifications of existing rules provide a level of comfort for diligent and conscientious prospective purchasers who want to develop brownfields. But brownfield development would not be possible on the national level without funding or state and local programs that provide the means to match prospective purchasers with brownfields and the encouragement to develop the site in the form of tax breaks.

The Brownfield Act amendments were enacted as an attempt to clarify the existing exemptions and provide necessary additional relief for parties formerly overlooked by CERCLA's protections. The new provisions, however, have raised many questions that have yet to be answered and have created a need for either judicial interpretation or further legislative correction. In the past, there have been few instances in which landowners have successfully invoked the exemptions to CERCLA liability as affirmative defenses in litigation. It remains to be seen if the new exemptions and clarifications will prove to be useable, allowing blameless and conscientious landowners to obtain relief from CERCLA liability in a cost-effective, even-handed, and predictable manner. Whether the Brownfields Act keeps the promises of protecting the innocent made by EPA and President Bush is less important than whether these new protections will facilitate the redevelopment of more Brownfields and Superfund sites. It looks like the Brownfields Act just might keep one of President Bush's promises—giving more prospective purchasers the tools and the confidence to redevelop brownfields.