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Ellen JoAnne Gerber

Ohio Environmental Protection Agency

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INDUSTRIAL PROPERTY TRANSFER LIABILITY: REALITY v. NECESSITY

ELLEN JOANNE GERBER¹

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I. INTRODUCTION

The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son: The righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him.

Ezekiel, 18:20

Traditionally, there have been only two parties to a real estate transaction: the buyer and the seller. Today, however, there are three: the buyer, the seller, and the environment. With the ever-burgeoning environmental regulations, unwary buyers or sellers of contaminated property may find themselves dealing with a myriad of laws, regulators and cleanup contractors. This liability does not end quickly nor does it come cheaply. The average federal cleanup of a contaminated site takes years to complete and costs \$25-40 million.²

Environmental regulations are a relatively new consideration in real estate transactions. It was not until 1969 that the first federal agency was established to protect the environment.³ Throughout the next decade, environmental laws focused on "at the pipe" discharges from operating plants and did not consider cleanup of already existing soil, groundwater, and surface water contamination. It was not until the discovery of the 1979 environmental disaster at Love Canal that Congress and the nation demanded additional cleanup standards.⁴

Congress, in response to Love Canal, enacted the Comprehensive Environmental Response Compensation and Liability Act⁵ (CERCLA) of 1980. CERCLA is a remedial statute that serves a dual purpose: (1) to quickly and

²GENE LUCERO & KATHERINE MOERTL, SIDLEY & AUSTIN LAW OFFICES & RAYMOND HOLMES & CAREN ARNSTEIN, ENSR CORP., *SUPERFUND HANDBOOK: A GUIDE TO MANAGING RESPONSES TO TOXIC RELEASES UNDER SUPERFUND 18* (3d ed. 1989) [hereinafter *SUPERFUND HANDBOOK*].

³The Environmental Protection Agency (EPA) was established in 1970.

⁴Gerald B. Silverman, *Love Canal: A Retrospective*, 20 ENV'T REP. CURRENT DEV. (BNA) 835, 838 (September 15, 1989).

⁵42 U.S.C. §§ 9601-75 (1988) (commonly known as "Superfund"). There is general agreement that it was Love Canal that prompted the passage of CERCLA and "raised the consciousness of a nation about the dangers of hazardous waste." Silverman, *supra* note 4, at 835.

effectively clean up abandoned hazardous waste sites, and (2) to insure that those who caused the environmental damage bear the costs of remediating the sites.⁶ CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act (SARA).⁷ SARA further defined CERCLA and incorporated an exception to liability: the "innocent landowner defense."⁸ This defense, however, has not been clearly defined by Congress, the Environmental Protection Agency (EPA), or the courts and is, therefore, of limited use to landowners.

Under CERCLA's broad liability scheme, those most effected are the owners of commercial and industrial property. Oftentimes, urban industrial sites have soil and groundwater contamination caused by the poor environmental practices of previous owners. In many instances the commercial practices that caused the contamination were not illegal or scientifically unsound at the time they were conducted. Nevertheless, under CERCLA, the current owner is liable for the cleanup unless he can prove he is an innocent landowner.⁹

In response to CERCLA, many owners of industrial facilities have chosen to relocate their companies to rural areas . . . the so-called "greenfield" sites.¹⁰ Unfortunately, these actions have a substantial impact on former industrial urban areas. For example, the exodus of industrial facilities contributes to urban blight, reduces the tax base which supports vital city services such as schools, and bypasses the already existing infrastructures of the city such as highways, sewers, and transportation.¹¹

Section II of this article discusses the liability of a landowner in a CERCLA action. In addition, it sets forth the elements of the innocent landowner defense and the case law interpreting it. Section III will discuss proposed amendments and procedural guidelines developed to interpret the defense. Section IV will highlight several states' legislative responses developed to limit liability, to comply with the innocent landowner defense, and to give notice of contamination to potential buyers. Finally, Section V will summarize the needs of the parties to an industrial real estate transaction and suggest a pathway for development of Ohio law.

⁶ See 126 Cong. Rec. 30932 (1980) (remarks of Sen. Randolph); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989).

⁷ Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-75 (1988)). Further references to "CERCLA" in this paper will mean "CERCLA" as amended by "SARA."

⁸ See CERCLA, 42 U.S.C. §§ 9601(35), 9607(b)(3).

⁹ §§ 9601(35), 9607(b)(3).

¹⁰ Louise E. Tosi, *Suggestions for the Development of an Urban Policy to Address Environmental Constraints on the Reuse of Ohio's Industrial Property* (March 21, 1991). Presentation to Governor Voinovich's Cabinet Meeting (unpublished manuscript, on file with author).

¹¹ *Id.*

II. CERCLA LIABILITY AND THE INNOCENT LANDOWNER DEFENSE

A. Elements of CERCLA Liability

CERCLA imposes liability for cleanup costs where there has been a release of a hazardous substance into the environment. Specifically, the government's burden of proof in an action for reimbursement of costs is to establish that:

1. the site where costs were accumulated was a "facility",¹²
2. there was a "release or threatened release"¹³ of a "hazardous substance",¹⁴
3. the release or threatened release caused the government to incur response costs, and
4. the defendant is a responsible "person."¹⁵ Once the government has satisfied its burden, courts have held that liability under CERCLA is retroactive,¹⁶ strict,¹⁷ and joint and several.¹⁸

1. Potentially Responsible Parties

a. Owners, Operators, Generators, Transporters

CERCLA, Section 107(a), provides for liability among a class of four potentially responsible parties (PRPs): (1) "the owner and operator of a vessel or facility," (2) the owner or operator of a hazardous waste disposal facility, (3) any person who arranged for disposal or treatment of hazardous waste, or (4) transporters of hazardous waste.¹⁹ The two most pertinent terms in this

¹²42 U.S.C. § 9601(9).

¹³42 U.S.C. § 9601(a)(4). "Release" defined at 42 U.S.C. § 9601(22).

¹⁴42 U.S.C. § 9601(14).

¹⁵42 U.S.C. § 9607(a)(1)-(4).

¹⁶*United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 734-37 (8th Cir. 1986).

¹⁷*New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

¹⁸*United States v. Chem-Dyne, Corp.*, 572 F. Supp. 802, 805-10 (S.D. Ohio 1983).

¹⁹42 U.S.C. § 9607(a)(1)-(4). The statute provides:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section

- (1) the owner and operator of a vessel [otherwise subject to the jurisdiction of the United States] or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged

definition are "owner" and "facility." Under CERCLA, the term "owner" is broadly defined as: ". . . (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility."²⁰

Several courts have attempted to define the term "owner." The first court to comprehensively construe this requirement was *New York v. Shore Realty Corp.*²¹ In *Shore Realty*, the Second Circuit held the current owner of a parcel of property liable for past disposal practices.²² The court determined that the landowner knew that the tenant of the property it had purchased would continue to dump hazardous waste until evicted.²³ Even though some of the hazardous waste disposal took place before the landowner bought the property, the Second Circuit construed the "owner" requirement to cover current owners, whether or not they caused the release of waste at the site.²⁴

for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances, and

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

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

²⁰ 42 U.S.C. § 9601(20)(A)(ii) (emphasis added). The statute, however, allows for one exception: security interest ownership. See *United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 957 (1991). Nevertheless, even under this exemption, a secured creditor may not foreclose or participate in the management of a facility. *United States v. Fleet Factors, Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 752 (1991). See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986). Therefore, this exception has been of little use and is, in most cases, quite frustrating to lenders.

²¹ 759 F.2d 1032 (2d Cir. 1985).

²² *Id.* at 1044.

²³ *Id.* at 1049.

²⁴ *Id.* at 1039.

The Second Circuit's justification for holding current owners liable for past disposal practices was the concern that if a current owner could avoid liability for contaminated property, the owner may sell the property (after further dumping) to new owners who could also avoid liability.²⁵ If the former owners were deceased or judgment-proof, the Congressional intent of CERCLA to facilitate cleanup of hazardous sites would be frustrated and a large loophole in liability would exist.²⁶ Subsequent court decisions have unanimously accepted the Second Circuit's definition of "owner."²⁷ In addition, most courts will consider the degree of control an owner has over the activity causing the pollution.²⁸ Furthermore, several different types of "owners or operators," such as corporate officers and sublessors, have been held liable.²⁹

b. Facilities

Similar to the "owner" requirement, CERCLA broadly defines the term "facility." A facility is:

A. any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or

B. any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located, but does not include any consumer product in consumer use or any vessel.³⁰

²⁵ *Id.* at 1045.

²⁶ *Shore Realty*, 759 F.2d at 1044-45.

²⁷ *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1151 (1st Cir. 1989); *United States v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341, 1346 (D. Idaho 1989); *United States v. Serafini*, 706 F. Supp. 346, 350 (M.D. Pa. 1988).

²⁸ *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988).

²⁹ *United States v. Northeastern Pharmaceutical & Chemical Co. Inc.*, 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (corporate officers and employees may be personally liable); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (stockholder liable as "operator"); *CPC Intern., Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549 (W.D. Mich. 1991) (parent corporation liable for subsidiary's actions); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984) (sublessor of a facility liable as owner or operator).

³⁰ 42 U.S.C. § 9601(9).

2. Retroactive and Strict Liability

CERCLA has been retroactively applied even though the statute itself does not specifically require it.³¹ Retroactive liability has withstood constitutional challenges because CERCLA's "scheme is rationally related to a valid legislative purpose."³²

Courts have similarly imposed strict liability without any explicit statutory basis.³³ Strict liability has been insisted upon despite the fact that Congress deleted the word "strict" from the statute.³⁴ Courts have relied on CERCLA's reference³⁵ to Section 311 of the Clean Water Act³⁶ to impose strict liability. The retroactive, strict liability scheme appears to be consistent with the courts justification for broadly construing the "owner or operator" requirement.³⁷

3. Joint and Several Liability

Courts have consistently imposed joint and several liability when applying CERCLA.³⁸ The courts, as with retroactivity and strict liability, impose this liability without statutory authority and despite the fact that Congress

³¹CERCLA does not create retroactive liability, but does impose a prospective obligation for the post-enactment environmental consequences of the defendants' past acts. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 996 (D.S.C. 1984); *aff'd in part and vacated in part sub nom.*; *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). *See also United States v. Northeastern Pharmaceuticals & Chemicals Co.*, 810 F.2d 726, 734-37 (8th Cir. 1989), *cert. denied*, 484 U.S. 848 (1987).

³²*United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 997-98 (D.S.C. 1984) (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976)).

³³*New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

³⁴*United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 204 (W.D. Mo. 1985).

³⁵42 U.S.C. § 9601(32).

³⁶Federal Water Pollution Control (Clean Water) Act § 331, 33 U.S.C. 1321 (1988); *See also United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-807 (S.D. Ohio 1983).

³⁷*Shore Realty*, 759 F.2d at 1044-45.

³⁸*United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807-08 (S.D. Ohio 1983); *United State v. Conservation Chemical Co.*, 619 F. Supp. 162, 204 (W.D. Mo. 1985) *See also United States v. Northeastern Pharmaceuticals & Chemicals Co. Inc.*, 810 F.2d 726, 732 n. 3 (8th Cir. 1986).

specifically deleted this type of liability from CERCLA before enactment.³⁹ Courts have justified imposing joint and several liability because it is consistent with CERCLA's intent of "complete cost recovery."⁴⁰ Furthermore, the court in *United States v. Chem-Dyne Corp.*⁴¹ determined that Congress' failure to include joint and several liability did not automatically preclude it.⁴² Rather, the court decided that Congress intended courts to decide on a case-by-case basis whether joint and several liability was appropriate.⁴³

Furthermore, it can be argued that PRP's have a right of contribution from other parties who have been held jointly and severally liable.⁴⁴ SARA also provides for this right of contribution.⁴⁵ While in most cases it will be extremely difficult for a court to apportion damages, they may use equitable principles to allocate costs.⁴⁶

To resolve potential disputes involving the right of contribution, parties to a real estate transaction may prospectively allocate any possible cleanup costs.⁴⁷ However, the standard "as is" clause found in many real estate contracts is not an explicit enough prospective allocation of costs to defeat all potential liability for the seller.⁴⁸

³⁹ *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807-08 (S.D. Ohio 1983).

⁴⁰ *United States v. Monsanto Co.*, 858 F.2d 160, 174 (3d Cir. 1988).

⁴¹ *Chem-Dyne Corp.*, 572 F. Supp. at 807-08.

⁴² *Id.*

⁴³ *Id.* at 808. In *Chem-Dyne Corp.*, the court, quoting Senator Randolph, co-sponsor of the bill, stated:

We have kept strict liability in the compromise, specifying the standard of liability under Section 311 of the Clean Water Act.

. . . The changes were made in recognition of the difficulty in prescribing in statutory terms liability standards which will be applicable in individual cases. The changes do not reflect a rejection of the standards in the earlier bill.

Unless otherwise provided in this act, the standard of liability is intended to be the same as that provided in Section 311 of the Federal Water Pollution Control Act (33 U.S.C. § 1321). I understand this to be a standard of strict liability.

Id. at 806.

⁴⁴ See *Id.* The court stated: "Where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm." *Id.* at 810 (quoting RESTATEMENT (SECOND) OF TORTS § 875 (1977)).

⁴⁵ 42 U.S.C. § 9613(f).

⁴⁶ See *In re Sterling Steel Treating, Inc.*, 94 Bankr. 924, 931 (E.D. Mich. 1988).

⁴⁷ See *Mardan Corp. v. CGC Music, Inc.*, 804 F.2d 1454, 1462 (9th Cir. 1986).

⁴⁸ See *Allied Corp v. Frola*, 730 F. Supp. 626, 638 (D.N.J. 1990).

B. The Innocent Landowner Defense

CERCLA, Section 107(b), provides specific defenses to its strict liability standard.⁴⁹ Under this section, a PRP has the burden of proving, by a preponderance of the evidence, that one of the affirmative defenses apply. The innocent landowner defense arises under Section 107(b)⁵⁰ as well as Section 101(35).⁵¹

⁴⁹ 42 U.S.C. § 9607(b).

⁵⁰ *Id.* The statute provides:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of a 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 (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), 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; or
- (4) any combination of the foregoing paragraphs.

Id.

⁵¹ 42 U.S.C. § 9601(35). The statute provides:

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

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

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

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish

1. Knowledge, Appropriate Inquiry, and Good Commercial Practice

CERCLA provides a landowner, without knowledge of environmental contamination, a defense to strict liability - the innocent landowner defense. Section 107(b)(3) permits PRP's to assert this defense if "the release or threatened release of hazardous substances was caused solely by an act or omission of a third party other than . . . one whose act or omission occurs in connection with a contractual relationship. . . ."⁵² This is oftentimes called the "third-party defense." SARA further defined this third-party defense, and created the innocent landowner defense, by clarifying in Section 101(35), the "contractual relationship" requirement of Section 107(b)(3), the knowledge requirements for parties to the transaction, and the "all appropriate inquiry" requirement.⁵³

For a buyer who has entered into a contractual relationship to assert the innocent landowner defense, it must be established that she did not know or

that he has satisfied the requirements of § 9607(b)(3)(a) and (b) of this title.

(B) To establish that the defendant had no reason to know, as provided in clause (i) 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.

(C) Nothing in this paragraph or in § 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under § 9607(a)(1) of this title and no defense under § 9607(b)(3) of this title shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

Id.

⁵² 42 U.S.C. § 9607(b)(3); *see supra* note 50.

⁵³ 42 U.S.C. § 9601(35); *see supra* note 51.

have reason to know of possible contamination at the facility.⁵⁴ Courts use different levels of scrutiny to determine whether this knowledge requirement has been met. The court in *United States v. Pacific Hide & Fur*⁵⁵ established a three-tier knowledge hierarchy: "[c]ommercial transactions are held to the strictest standard; private transactions are given a little more leniency; and inheritances and bequests are treated the most leniently of these three situations."⁵⁶ Therefore, in an arms-length transaction of industrial property, the buyer is held to the highest level of knowledge concerning existing environmental contamination.

CERCLA, Section 101(35)(B), establishes when a buyer of real estate has undertaken "all appropriate inquiry" into the property "consistent with good commercial or customary practice."⁵⁷ To determine if the party asserting the innocent landowner defense knew or had reason to know of contamination the court will take into account:

1. any specialized knowledge or experience of the buyer;
2. the relationship of the purchase price to the value of the property if uncontaminated;
3. commonly known or reasonably ascertainable information about the property;
4. the obviousness of the presence or likely presence of the contamination on the property; and
5. the ability to detect such contamination by appropriate inspection.⁵⁸

As a result, buyers of commercial real estate have a substantial burden under CERCLA if they choose to assert the innocent landowner defense.

2. Case Law Construing the Innocent Landowner Defense

Unfortunately for buyers and sellers of real estate, few courts have explicitly construed the innocent landowner defense. However, two distinct issues arise when the defense is pursued: (1) the scope of the "contractual relationship" requirement and (2) the scope of the knowledge and "all appropriate inquiry" requirements.

Courts have broadly construed the contractual relationship requirement of CERCLA. Most have held that any deed executed between a buyer and seller

⁵⁴ 42 U.S.C. § 9601(35)(A)(i).

⁵⁵ *United States v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341 (D. Idaho 1989).

⁵⁶ *Id.* at 1348.

⁵⁷ 42 U.S.C. § 9601(35).

⁵⁸ *Id.*

is sufficient to establish a contractual relationship.⁵⁹ For example, a contractual relationship has been found to exist in a transaction as simple as a stock transfer for a quitclaim deed.⁶⁰ Additionally, in *Washington v. Time Oil Co.*,⁶¹ the court held that a contractual relationship existed between a parent company and the sublessee of the parent's subsidiary.⁶² Thus, it may be fair to say that nearly any transfer of property will fulfill the contractual relationship requirement.

Conversely, the constructive knowledge and "all appropriate inquiry" standards that have been established by the courts are much more uncertain. Many of the cases appear to result in disparate treatment for landowners due to the courts' case-by-case approach to this aspect of the defense.

Court responses to the "no inquiry" real estate transaction have varied. In *United States v. Monsanto*,⁶³ the defendants leased their facilities to a chemical company. However, they never inspected the site during the lease.⁶⁴ Thus, the court held that the landowner had or should have had knowledge of the contamination because it leased its land to a chemical company.⁶⁵ Similarly, in *Time Oil*,⁶⁶ the court held the defendant landowner liable for the actions of an oil refinery sublessee.⁶⁷ The court determined that the landowners knew or should have known of the possibility of contamination and did not exercise sufficient control over its sublessee.⁶⁸ Thus, the courts are saying that the defendant landlords, having made no inquiry and knowing of potential contamination, did not use reasonable, customary or good commercial practices in their dealings with their tenants and, therefore, may not assert the defense.

Additionally, the court in *United States v. Serafini*⁶⁹ found the defendant-landowner liable for contamination on the property even though,

⁵⁹ See, e.g., *Westwood Pharmaceuticals, Inc. v. National Fuel Gas*, 737 F. Supp. 1272 (W.D.N.Y. 1990). However, the court allowed the innocent landowner defense because the release was not undertaken "in connection with" the contractual relationship. *Id.*

⁶⁰ *United States v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341 (D. Idaho 1989).

⁶¹ 687 F. Supp. 529 (W.D. Wash. 1988).

⁶² *Id.*

⁶³ 858 F.2d 160 (4th Cir. 1988).

⁶⁴ *Id.* at 169.

⁶⁵ *Id.* at 164.

⁶⁶ 687 F. Supp. 529 (W.D. Wash. 1988).

⁶⁷ *Id.* at 532.

⁶⁸ *Id.* at 533.

⁶⁹ No. CV-86-1591 (M.D. Pa. Dec. 28, 1990).

at the time of purchase, there was a no "inquiry standard" used in industrial practice. In *Serafini*, a developer bought land in 1969 that was contaminated with over one thousand fifty-five gallon drums.⁷⁰ Neither the defendant-landowner nor his representatives inspected the land prior to purchase.⁷¹ The defendant argued that in 1969 it would have been unusual for a prospective purchaser to actually traverse the entire two hundred acre site.⁷² Nevertheless, the court concluded that, even in 1969, prudent prospective purchasers or their agents, at a minimum, should have viewed the site prior to purchase.⁷³ The court ruled that "by not conducting an appropriate inquiry consistent with customary or good commercial practice, the defendants cannot satisfy the statutory requirements of the innocent landowner defense."⁷⁴ The court appears to be saying that while the standard of good commercial practice may be time-dependent, a purchase made at any time in the past will require at least a cursory visual inspection.

Alternatively, the court in *Pacific Hide*⁷⁵ allowed a "no inquiry" standard and upheld the innocent landowner defense. In *Pacific Hide*, PCB contaminated property was transferred to family members in exchange for their stock in a dissolved family corporation.⁷⁶ The court held that since the defendants had no special knowledge of the contamination and because their interests in the property were partially obtained by gift, the innocent landowner defense would apply.⁷⁷ The court noted that its holding was consistent with the Congressional intent to treat inheritance and bequest leniently.⁷⁸ Based on these cases, it would appear that the only time "no inquiry" will be sufficient is in the case of inheritance or bequest.

In like manner, court decisions vary in cases where the buyer made some inquiry as to the condition of the property but failed to discover contamination. In *In re Sterling Steel Treating, Inc.*,⁷⁹ the defendant conducted an on-site visual inspection of the property before his 1987 purchase. During the inspection,

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Serafini*, No. CV-86-1591.

⁷⁵ *United States v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341 (D. Idaho 1989). See *supra* notes 55-56 and accompanying text.

⁷⁶ *Id.* at 1344-45.

⁷⁷ *Id.* at 1348.

⁷⁸ *Id.*

⁷⁹ 94 Bankr. 924 (E.D. Mich. 1989).

however, the defendant failed to inspect a trailer located on the property.⁸⁰ Subsequently, the defendant-purchaser discovered hazardous waste being stored in the trailer.⁸¹ After cleaning up the site, the defendant withheld a portion of the purchase price to pay for costs incurred in the cleanup.⁸² The defendant then claimed the innocent landowner defense in subsequent court proceedings.⁸³

The court held that the defendant had constructive knowledge of the contamination because of his prior business dealings with the site's previous owners.⁸⁴ Therefore, the court determined that the defendant knew of the prior industrial use of the property.⁸⁵ The court also held that because of the defendant's constructive knowledge, they were not exonerated from liability for cleanup costs under 42 U.S.C.A. § 9601(35)(A) as they failed to make an appropriate inquiry into the previous use of the property by failing to inspect the trailer.⁸⁶ Therefore, the innocent landowner defense was denied.

In contrast to the previous case, the court in *International Clinical Laboratories, Inc. v. Stevens*⁸⁷ held that the landowner was entitled to the defense based on a visual site inspection.⁸⁸ After site inspection and purchase, the landowner continued to lease the property to the same industrial manufacturer.⁸⁹ Even though the landowner should have been reasonably suspicious of potential contamination, the court allowed the innocent landowner defense.⁹⁰ While the contamination in *International* and in *Sterling Steel*⁹¹ was not detectable by a visual inspection, and even though both defendants had knowledge of industrial activity on the site, the two courts held them to different standards. Therefore it would appear that a buyer with some knowledge of the property who relies on a visual site inspection may not be able to accurately predict his future CERCLA liability.

A third type of case is one in which the landowner knows of contamination prior to purchase but continues with the transaction. In *Amland Properties Corp.*

⁸⁰ *Id.* at 926-27.

⁸¹ *Id.* at 927.

⁸² *Id.*

⁸³ *Id.* at 929-30.

⁸⁴ *In re Sterling Steel*, 94 Bankr. at 930.

⁸⁵ *Id.* at 930.

⁸⁶ *Id.* at 929, 930.

⁸⁷ 1990 U.S. Dist. LEXIS 3685 (1990).

⁸⁸ *Id.* at 10.

⁸⁹ *Id.* at 6.

⁹⁰ *Id.* at 4.

⁹¹ 94 Bankr. 924 (E.D. Mich. 1989).

v. Aluminum Co. of America,⁹² the plaintiff conducted an inspection of the property before purchasing it.⁹³ Although a laboratory retained by the plaintiff advised that it conduct additional tests on the property, the plaintiff decided to purchase the property without further testing.⁹⁴ After the discovery of PCBs, the plaintiff voluntarily cleaned up the property and then sought to recover the costs from a former owner by asserting the innocent landowner defense.⁹⁵ Despite the laboratory results indicating possible contamination, the court found no evidence that plaintiff was aware of the PCBs at the time of the sale and allowed the defense.⁹⁶

In contrast to *Amland*, the innocent landowner defense was held to be inapplicable in *Wickland Oil Terminals v. Asarco*.⁹⁷ In *Asarco*, there was obvious potential contamination from large slag piles on site.⁹⁸ Wickland claimed that he was ignorant of the hazardous characteristics of the material even though he admitted to a potential risk.⁹⁹ The court held that the innocent landowner defense did not apply since information regarding the hazardous characteristics of the material existed and was available to Wickland.¹⁰⁰ Again, it would appear that the courts in *Amland* and *Wickland* are holding the parties to two different standards when construing the innocent landowner defense.¹⁰¹

It is reasonable to see why a party to a real estate transaction may be left confused concerning the standard that will be applied when the innocent landowner defense is asserted. Strict environmental liability and case law uncertainty may sour potential transactions. This is especially true in sales of commercial property where the potential for contamination and the liability standards which will be applied are high.

⁹²711 F. Supp. 784 (D.N.J. 1989), *superceded by statute as stated in* Con-Tech Sales Defined Benefit Trust v. Cockerham, 1991 WL 209791 (E.D. Pa. 1991).

⁹³*Id.* at 787.

⁹⁴*Id.* at 787-88.

⁹⁵*Id.* at 789.

⁹⁶*Id.*

⁹⁷No. C-83-5906-SC (N.D. Cal. 1988) (LEXIS, Environmental Law Library, ALLELR file).

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.* at 20,857.

¹⁰¹*See also* BCW Assoc. Ltd. v. Occidental Chemical Corp., No. 86-5947, 3 Toxic L. Rep. (BNA) 943 (E.D. Pa. 1988) (no innocent landowner defense for incomplete or inaccurate environmental assessment); *Gopher Oil, Inc. v. Union Oil Co. of Cal.*, No. 91-1159 (8th Cir. 1992) (innocent landowner defense allowed for fraudulent misrepresentation of the property by seller).

III. ENVIRONMENTAL AUDITS: CONGRESSIONAL AND PROCEDURAL GUIDELINES TO THE INNOCENT LANDOWNER DEFENSE

A. *Environmental Audits: What Are They?*

The environmental "due diligence" audit was created in response to the inconsistencies and ambiguities of case law construing the innocent landowner defense as well as in response to the implicit requirement of CERCLA Section 101(35).¹⁰² An environmental audit is an investigation into the history and current status of a particular piece of property. An environmental audit seeks to:

1. identify the presence and extent of environmental contamination from current or previous site activities;
2. determine the level of compliance with current regulations; and
3. provide a general review of environmental risks associated with the site.¹⁰³

An audit should include an on-site inspection of the property, any buildings, and any surrounding properties; review of operation records and facility documents; review of local, state, and federal government records pertaining to the site; and interviews with present and past officers and employees of the company.¹⁰⁴

An environmental audit is usually broken into three phases. Phase I is a preliminary evaluation of the property. It includes a study of past and present site activities; a review of site geology, hydrogeology, and topography; and a site inspection for visual signs of contamination. Based on the information obtained from a Phase I assessment, a judgment can be made concerning the potential for contamination.

If contamination is found on the property, a Phase II audit becomes necessary. This phase confirms or denies the information obtained in Phase I. If contamination is found, this phase will define its cause and extent. Phase II includes sampling and analysis of soils, groundwater, surface water, air, leachate, and other media.

The final phase, Phase III, includes more extensive testing of various materials. The purpose of this phase is to obtain enough information to implement a remedial design.¹⁰⁵

An environmental audit seeks to clarify the phrase "all appropriate inquiry." Under the innocent landowner defense of CERCLA, you may be able to avoid

¹⁰²42 U.S.C. § 9601(35). *See supra* note 51.

¹⁰³Jim Newton, *Real Estate Transaction Environmental Considerations*, POLLUTION ENGINEERING, September, 1988, at 100-04.

¹⁰⁴*Id.*

¹⁰⁵SUPERFUND HANDBOOK, *supra* note 2 at 94.

liability if you have inquired into previous ownership and uses of the property prior to purchase. If no contamination is found on the property, then the inquiry may establish that you did not know about any hazardous substances released or disposed of at the site. A court may consider the owner's knowledge gained from the results of an environmental audit when assessing whether the innocent landowner defense applies.¹⁰⁶

In addition to providing proof of all appropriate inquiry, an audit can offer a buyer and seller many other advantages, such as:

1. the results can be used to negotiate the final purchase price;
2. the results can be used to allocate liability in the contract for sale;
3. the audit can determine whether special insurance is required;
4. the audit can delineate where remedial actions are necessary;
5. the audit can determine if the facility is in compliance with environmental permitting regulations; and
6. the audit can determine if operational changes are necessary to keep the company in compliance.¹⁰⁷

On a long term scale, an environmental audit helps compile records that may be lost over time. As land is transferred from owner to owner, identifying those responsible for any hazardous waste contamination becomes increasingly difficult. In addition, an audit identifies contaminated areas and is, therefore, protective of the environment and public health. Once a hazardous waste site is identified, it can be remediated. Once remediated, it no longer poses a health threat to employees on site or, in the long run, to the general public.

A due diligence audit is usually conducted by a team of experts consisting of legal counsel, environmental consultants, and the owners or operators of the sites. Depending upon the size of the site and the scope of the audit, the initial cost may run from \$2,500 to \$10,000.¹⁰⁸

While an environmental assessment may be designed to delineate "all appropriate inquiry" and thus limit liability, no statutory standard for audits has been established. This has led to a variety of standards that have been established by different organizations with different purposes.

¹⁰⁶H.R. 2787, 101st Cong., 1st Sess. (1989).

¹⁰⁷Newton, *supra* note 103, at 102.

¹⁰⁸*Liability: Government Costs to Soar Under Cleanup Laws*, INSIDE EPA'S SUPERFUND REPORT, (exclusive bi-weekly Washington publication tracking Superfund regulation, litigation, legislation, and policies), Vol. IV, No. 12, at 9, 11, June 6, 1990.

B. *The Weldon Bill*

In 1989, legislation which attempted to define the level of inquiry needed for the innocent landowner defense was introduced before Congress. The proposed amendment to CERCLA was introduced by Representative Curt Weldon and was entitled *The Innocent Landowner Defense Amendment*.¹⁰⁹ The Amendment specifies what is required for an environmental assessment and sets up a rebuttable presumption that the purchaser was truly an innocent buyer.¹¹⁰

The Amendment requires potential landowners to conduct a Phase I audit which includes:

1. a chain of title review for a period of 50 years;
2. review of available aerial photographs;
3. determination of the existence of environmental liens;
4. review of available government records; and
5. a visual site inspection.¹¹¹

¹⁰⁹H.R. 2787, 101st Cong., 1st Sess. 135 Cong. Rec. E2367-68 (1989).

¹¹⁰H.R. 2787, 101st Cong., 1st Sess. § (2)(c)(i)(1989).

¹¹¹H.R. 2787, 101st Cong., 1st Sess. § (2)(1989) provides:
SEC. 2. AMENDMENTS TO SUPERFUND PERTAINING TO
INNOCENT LANDOWNER DEFENSE

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

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

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

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

The Amendment also provides for a Phase II assessment if Phase I discloses the presence of, or likely release of, a hazardous substance.¹¹² In addition, the Amendment requires the environmental assessment to be conducted by a professional consultant.¹¹³

Overall, the Amendment promotes land transactions by promoting the Congressional goals for CERCLA and by providing legal certainty for the buyer and seller. By requiring prospective purchasers to conduct an audit, any

period of 50 years.

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

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

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

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

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

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

¹¹²H.R. 2787, 101st Cong., 1st Sess. § (2)(C)(iv)(1989).

¹¹³H.R. 2787, 101st Cong., 1st Sess. § (2)(C)(ii)(1989).

contamination found on the property can be allocated to the present owner instead of being passed on to future owners. Furthermore, if contamination is found, the owner will, in most cases, attempt a quick cleanup so that the property can again go on the market. Similarly, by setting standards for an audit, the purchaser can easily determine whether or not she can qualify for the innocent landowner defense. Moreover, the legal certainty provided by the standards of the amendment allow the buyer and seller to determine and allocate the risks of the transaction. As a result, by setting standards and requiring an investigation, the Amendment creates a duty of environmental due diligence for real estate transactions.

The Amendment, however, is not without its opponents. Frank P. Grad, Professor of Law, Columbia University, believes the less precise requirements under current law promote broader environmental and legislative goals.¹¹⁴ According to Grad, the "unspecified requirements" under today's laws cause the potential buyer to do a more thorough investigation of the property to avoid liability.¹¹⁵

The Amendment was not made a part of CERCLA during its introduction to Congress in 1989. It may, however, be reintroduced or reconsidered during CERCLA's 1994 reauthorization.

C. ASTM Committee Proposal

Industry has recently attempted to set their own due diligence requirements. The E.50 Committee of the American Society for Testing and Materials (ASTM)¹¹⁶ has proposed a voluntary industry standard to follow in conducting a Phase I environmental site assessment.¹¹⁷ The ASTM hopes that their proposal will become the industry standard for environmental audits and, therefore, define the all appropriate inquiry requirement.

ASTM is proposing two guidelines. The first is a guide for environmental consultants designed to provide a detailed definition of "all appropriate inquiry."¹¹⁸ The second is a checklist for lay persons to follow in conducting an

¹¹⁴Frank P. Grad, Professor of Law, Statements at American Law Institute/American Bar Association Environmental Conference, Washington, D.C. (Feb. 15-17, 1990).

¹¹⁵*Id.*

¹¹⁶The Committee is composed of lenders, realtors, environmental consultants and attorneys.

¹¹⁷ASTM, *Standard Guide for Environmental Property Assessment* (working draft no. 4, July 11, 1991) (not available for reproduction or circulation). The final guidance was introduced in June, 1992, and therefore has had limited field testing.

¹¹⁸*Id.*

audit by themselves.¹¹⁹ The checklist provides for a preliminary review of records, interviews with owners and employees, and a visual site inspection.¹²⁰ After completion of the checklist, the inspector must certify that, to the best of his knowledge, all the information contained in the report is true.¹²¹

In the same way that other proposed standards defining due diligence have met with criticism, so has the ASTM checklist.¹²² For example, one of the most pressing questions that the checklist does not answer is who is competent to conduct an audit.¹²³ The checklist itself contains a series of "yes" or "no" questions followed by guides and pictures designed to help the lay person make an informed decision. At first glance, the checklist appears to be a comprehensive guide. However, as anyone who has conducted an environmental assessment knows, "gray" areas develop in which a "yes" or "no" answer may not be appropriate. A buyer or seller, having an interest in the continuance of the transaction, may be biased in her answer or simply not have the experience to make the correct choice.¹²⁴ A company that faces potential liability for contaminated property may not wish to leave their future in the hands of an inexperienced auditor.

D. Other Procedural Guidelines

All parties involved in real estate transactions have their own ideas of what is necessary and appropriate to comply with the due diligence standard. Therefore, many procedural guidelines have developed, each with its own specific purpose and requirements.

For example, the Federal National Mortgage Association (Fannie Mae) has established environmental procedures for each multifamily project submitted to the Association.¹²⁵ Similarly, the Resolution Trust Corporation expects to conduct a "potential environmental hazards liability" assessment prior to selling a one-to-four family residential property that it acquires.¹²⁶

Furthermore, the Ohio State Bar Association has issued its *Guidance on Customary Practice for Environmental Investigations Prior to Asset Conveyance or*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Phillip B. Rarick, *The Superfund Due Diligence Problem: The Flaws in an ASTM Committee Proposal and an Alternative Approach*, 21 ENVTL. L. REP. 10505 (1991).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Environmental Risk Management Procedures*, a.k.a. DUS Environmental Guidelines (Fannie Mae, Aug. 1, 1988).

¹²⁶ *Id.*

Encumbrance.¹²⁷ The *Guidance* was designed to serve as a checklist for a two-phase assessment. Phase One consists of document review.¹²⁸ Phase Two is a more detailed visual site inspection that may include sampling of various media.¹²⁹

The EPA has also offered guidance on the innocent landowner defense.¹³⁰ This guidance is primarily aimed at *de minimis* settlements under CERCLA, Section 122(g).¹³¹ The guidance specifically states that the Agency has no intention of getting involved in private real estate transactions.¹³² However, it also states that the EPA will rely on the strength of the party's showing regarding the innocent landowner defense, especially the results of a due diligence investigation, to determine how much settlement it will offer.¹³³ In addition, it lists criteria that could lead to a covenant not to sue, which, according to the EPA, would effectively make the buyer an innocent purchaser.¹³⁴ To date, the guidance has been used relatively infrequently.¹³⁵

IV. STATE INNOVATIONS: CLEANUP, NOTICE, AND LIMITED LIABILITY

The passage of CERCLA authorized the EPA to establish regulations to address the risks posed by the nation's worst hazardous waste sites. However,

¹²⁷Ohio State Bar Association, *Guidance on Customary Practice for Environmental Investigations Prior to Asset Conveyance or Encumbrance* (1990).

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰Superfund Program; De Minimis Landowner Settlements, Prospective Purchaser Settlements, 54 Fed. Reg. 34,235 (1989) [hereinafter *De Minimis Landowner Settlements*].

¹³¹42 U.S.C. § 9606 (1992).

¹³²*De Minimis Landowner Settlements*, 54 Fed. Reg. 34, 235 (1989).

¹³³*Id.*

¹³⁴*Id.* The five criteria are:

- (1) the facility must currently or potentially be subject to an enforcement action;
- (2) a substantial benefit, not otherwise available, would accrue to EPA through cleanup;
- (3) continued due care operation of the facility would not aggravate the contamination or interfere with any remedy;
- (4) continued operation would be unlikely to exacerbate the health risk to people present at the site; and
- (5) the purchaser is financially viable.

¹³⁵*Cleanup: EPA Agrees Not to Sue Purchaser of Polluted Plant*, INSIDE EPA'S SUPERFUND REPORT, Vol. IV, No. 20, at 24, September 24, 1990 (Exclusive bi-weekly Washington publication tracking Superfund regulation, litigation, legislation, and policies).

not every contaminated site can be remediated through CERCLA.¹³⁶ Therefore, many states have developed their own "mini-Superfund" laws.¹³⁷ Oftentimes these laws are required to be as stringent or more stringent than federal law. This is especially true in joint Federal/State cleanup efforts.

Many states have developed property transfer legislation due to the stringent requirements and the states' desires to clean up sites quickly and effectively, to recover costs from those who are responsible, to reuse/recycle industrial property, and to accelerate real estate transactions. The following section details some of these state statutes.

A. *The New Jersey Environmental Cleanup Responsibility Act*

1. The Act

New Jersey's Environmental Cleanup Responsibility Act¹³⁸ (ECRA) was the first and most comprehensive state property transfer law. The purpose of the law is to provide for mandatory cleanup of all industrial property before transfer.¹³⁹ To accomplish this, ECRA mandates environmental audits prior to sale of industrial property.¹⁴⁰ Before transferring the property or ceasing industrial operations, ECRA requires that the owner or operator obtain either:

1. The New Jersey Department of Environmental Protection's (DEP) approval of a "negative declaration" that the site is not contaminated;
2. approval of a cleanup plan specifying remediation to occur prior to the transfer; or
3. an Administrative Consent Order allowing the transfer prior to compliance as long as the parties post financial assurances equal to the anticipated cleanup costs.¹⁴¹

The law is transaction-triggered and self-policing.¹⁴² Those planning to transfer property or cease operations must notify the DEP within five days of

¹³⁶CERCLA allows for the cleanup of approximately the top 400 worst contaminated sites.

¹³⁷See generally EPA, OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, HAZARDOUS SITE CONTROL DIVISION AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, (1990 Update), EPA/540/8-91/002 (September, 1990).

¹³⁸N.J. STAT. ANN. § 13:1K-6 to 14 (West 1991).

¹³⁹*Id.* § 13:1K-7 (Legislative Findings and Declarations).

¹⁴⁰*Id.* § 13:1K-9.

¹⁴¹*Id.* § 13:1K-9.

¹⁴²David B. Farer, *ECRA Verdict: The Successes and Failures of the Premiere Transaction Triggered Environmental Law*, 5 ENVTL. L. REV. 113, 114 (1987).

the sale or decision to close.¹⁴³ Failure to comply with this requirement allows the DEP to impose penalties of up to \$25,000 per day and may allow the DEP, or a party to the transaction, to void the property transfer.¹⁴⁴ Noncompliance leads to strict liability for owners and operators and to personal liability for officers and managers.¹⁴⁵

Cleanup costs for properties that have not been addressed by the program are borne wholly by private sector application fees rather than taxes.¹⁴⁶ In conjunction with other state laws, the state has the right to impose a first priority lien, commonly known as a "superlien," on property that the owner has failed to clean up.¹⁴⁷ The superlien is purported to take priority over all other liens on the property.¹⁴⁸

2. Successes and Failures of the New Jersey Act

ECRA went into effect in 1983 and immediately paralyzed the DEP and significantly stalled industrial real estate transactions.¹⁴⁹ The DEP anticipated approximately one hundred ECRA submissions per year, but in 1984 it was deluged with nearly five hundred applications.¹⁵⁰ In addition, thousands of requests for non-applicability determinations were filed that year.¹⁵¹ Today, the DEP receives approximately five to six thousand requests for determinations of applicability per year.

Many other start-up problems were experienced during the first five years of the program, including:

1. understaffing;
2. underfinancing;
3. inexperienced staff in business and real estate transactions;

¹⁴³N.J. STAT. ANN. § 13:1K-9 (West 1991).

¹⁴⁴*Id.* § 13:1K-13.

¹⁴⁵*Id.* § 13:1K-13.

¹⁴⁶*Id.* § 13:1K-10.

¹⁴⁷N.J. STAT. ANN. § 58:10-23.11(f) (West 1992).

¹⁴⁸*Id.* The constitutionality of this provision is questionable since the District Court's holding in *Reardon v. United States*, 731 F. Supp. 558 (D. Mass. 1990), in which a similar CERCLA lien provision was found to deny procedural due process to the property owner. The court held that the lien denies due process by failing to provide for notice and a predeprivation hearing.

¹⁴⁹See *Farer*, *supra* note 142, at 122.

¹⁵⁰*Id.*

¹⁵¹*Id.*

4. inconsistent results due to heavy reliance on the Standard Industrial Classification Code¹⁵² (SIC) to determine applicability of the statute led;
5. lack of sampling and cleanup standards;
6. reliance on policy decisions which were tantamount to rule-making;
7. no prioritization of sites; and
8. no time deadlines for the agency.¹⁵³

Nevertheless, ECRA is still successful. ECRA has been influential in promoting environmental awareness as well as cleanup. Additionally, the statute has promoted environmental due diligence audits which help buyers comply with the requirements of the innocent landowner defense.¹⁵⁴ The Act has also influenced many other states to propose and/or enact similar legislation.¹⁵⁵

B. The Connecticut Transfer Act

The first spin-off of ECRA occurred in 1985 in Connecticut with the passage of An Act Concerning the Disposal of Recycled Hazardous Waste Residue, also known as the Transfer Act.¹⁵⁶ The Act requires the property owner to submit a negative declaration¹⁵⁷ to the buyer. In addition, within fifteen days after the transaction, the seller must submit the declaration to the Commissioner of

¹⁵²OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL (sic) (1987). The SIC is a classification of industrial manufacturing by industrial process. This code puts large categories of industrial processes under one heading.

¹⁵³See Farer, *supra* note 142, at 146.

¹⁵⁴Farer, *supra* note 142, at 143-44.

¹⁵⁵Farer, *supra* note 142, at 136-42.

¹⁵⁶1985, P.A. 85-568, § 2 (codified at CONN. GEN. STAT. ANN. § 22a-134 (West Supp. 1992)).

¹⁵⁷"Negative declaration" is defined at § 22a-134(5):

(1) that there has been no discharge, spillage, uncontrolled loss, seepage or filtration of hazardous waste on-site, or that any such discharge, spillage, uncontrolled loss, seepage or filtration has been cleaned up in accordance with procedures approved by the commissioner or determined by him to pose no threat to human health or safety or the environment which would warrant containment and removal or other mitigation measures and (2) that any hazardous waste which remains on-site is being managed in accordance with this chapter and chapter 446k and regulations adopted thereunder.

Environmental Protection.¹⁵⁸ If the seller is unable to submit a negative declaration due to contamination on the property, the seller and buyer may certify to the state that they will clean up the property.¹⁵⁹

Failure to comply with the requirements of the Transfer Act yields strict liability for the seller.¹⁶⁰ Additionally, any person failing to comply with the Act is liable for penalties of up to \$100,000.¹⁶¹ The Transfer Act, unlike ECRA, does not allow the state or purchaser to void the transaction.

Connecticut's law is much less stringent than ECRA. "There are no preconditions to transfer, no pre-transfer and cleanup plan requirements, no state oversight, and consequently no state-instigated delays."¹⁶² The Transfer Act is more concerned with expediting property transfer rather than transfer and cleanup like ECRA.

C. *Illinois Responsible Property Transfer Act*

The Responsible Property Transfer Act of 1988¹⁶³ (RPTA) is essentially a notice statute. The RPTA requires the seller to complete an environmental disclosure form and deliver the form to the lender and/or buyer at least thirty days prior to the property transfer.¹⁶⁴ If the seller does not comply with this requirement or if the form discloses previously unknown contamination, the purchaser may void the transaction.¹⁶⁵ Under another Illinois law, once notice of environmental releases is given to the state, the owner of the property must clean it up or face liability for the costs of state cleanup.¹⁶⁶

The RPTA has two important effects:

1. it promotes cleanup of environmental contamination by those responsible; and
2. allows the parties to negotiate the liability for the contamination.

¹⁵⁸Section 22a-134a(b) (West Supp. 1992).

¹⁵⁹*Id.* § 22a-134a(c).

¹⁶⁰*Id.* § 22a-134b.

¹⁶¹*Id.* § 22a-134d.

¹⁶²Farer, *supra* note 142, at 137.

¹⁶³ILL. ANN. STAT. ch. 30, paras. 901-07 (Smith-Hurd Supp. 1992).

¹⁶⁴*Id.* para. 904, § 4(a).

¹⁶⁵*Id.* para. 904, § 4(c).

¹⁶⁶Public Health and Safety Environmental Protection Act, ILL. ANN. STAT. ch. 111 1/2, para. 1004 (Smith-Hurd Supp. 1992).

D. *The Minnesota Property Transfer Technical Assistance Program*

The Minnesota Property Transfer Technical Assistance Program¹⁶⁷ is a voluntary cleanup regulation that addresses only "low priority" sites. A low priority site is defined by the program as any site not involved in the federal Superfund program.¹⁶⁸ The program allows the Minnesota Pollution Control Agency (MPCA) to assist, upon request, in the determination of whether real property has been the site of a release or threatened release of a hazardous substance.¹⁶⁹ In addition, the MPCA may be involved in the approval and the development of plans for the remediation of contaminated sites.¹⁷⁰

To be eligible for the program, a party must request assistance and pay the agency's cost for such assistance.¹⁷¹ The party must perform a two-phase environmental audit, consistent with the requirement set out in the MPCA guidelines.¹⁷² The MPCA requires the requesting party to retain a qualified consultant to undertake the investigation.¹⁷³ If, at any time during the assessment, the MPCA determines that the site is a high priority for protection of the public health or the environment, the assistance program will be terminated and the property will be referred to the Superfund program.¹⁷⁴

This program is not intended to satisfy due diligence requirements. However, by following the guidelines, a party may show intent to comply with the all appropriate inquiry standards of CERCLA. On the other hand, with this type of "voluntary" program in place, there is the possibility that a person not complying with it will automatically be deemed to not have complied with the due diligence requirements of the innocent landowner defense.

V. HOW SHOULD OHIO REACT?

A. *The Needs of the Buyer, the Seller, and the Environment*

The needs and interests of the buyer and seller in a real estate transaction have always been similar, just at opposite ends of the scale. Today, however, they have a common enemy -- environmental regulation.

¹⁶⁷MINN. STAT. ANN. § 115B.17, subd. 14 (West Supp. 1992).

¹⁶⁸This information was gained by talking with a staff member at the following office: Minnesota Property Transfer Technical Assistance Program.

¹⁶⁹*Id.* § 115B.17, subd. 14.

¹⁷⁰*Id.* § 115B.17, subd. 14.

¹⁷¹*Id.* § 115B.17, subd. 14.

¹⁷²This information was gained by talking with a staff member at the following office: Minnesota Property Transfer Technical Assistance Program.

¹⁷³*Id.*

¹⁷⁴*Id.*

For the potential buyer of industrial property the most important piece of information she can obtain is notification of any potential contamination on site. Without it, the buyer may be left with the entire cost of cleaning up the property. For some buyers, notification that property is contaminated will put an end to the transaction. In other instances, however, the buyer will go ahead with the transaction. In such cases, the buyer's interests will shift to limiting liability and to cost allocation for cleanup of the contamination. Furthermore, the potential buyer will be interested in expediting the process. Finally, when the process is complete, the buyer will want assurances that the cleanup has met all required standards.

The seller of industrial property has many of the same needs. For example, most sellers want to be notified of any contamination on their property. While some may choose to remain willfully ignorant, notification of contamination can serve the seller by helping her judiciously bargain with the buyer on sale price and cleanup costs. More importantly, notification allows the seller to limit future CERCLA liability. The seller, like the buyer, will be interested in expediting the process of negotiation, cleanup, and property transfer. The seller, in an effort to limit future liability, will also require assurances that the cleanup has been complete.

The environment and environmental regulators have many of the same needs as the buyer and seller but for justifiably different reasons. First, notification is of paramount importance. Regulators must know where the contamination is before it can be remediated. Second, cost allocation to the responsible party is of utmost importance since the regulating agency will seldom have enough money to fund major cleanups. Third, environmental agencies are concerned with expediting the process to keep the contamination from further affecting the public's health or from further degrading the environment. Fourth, environmental regulators are interested in assurance that the cleanup has been complete and has met all current environmental standards.

B. How Should the Law Develop?

1. The Current Law

Although Ohio currently has provisions for deed notification of contamination and priority lien provisions,¹⁷⁵ Ohio has failed to enact a

¹⁷⁵ OHIO REV. CODE ANN. § 3734.22 (Anderson 1989). The statute provides: Before beginning to clean up any facility under section 3734.21 of the Revised Code, the director of environmental protection shall endeavor to enter into an agreement with the owner of the land on which the facility is located, or with the owner of the facility, specifying the measures to be performed and authorizing the director, employees of the agency, or contractors retained by the director to enter upon the land and perform the specified measures.

"mini-Superfund" law or other environmental property transfer legislation. As a result of this inaction many prime industrial areas have sat idle for years because of environmental concerns.¹⁷⁶ Unfortunately, the same barriers confronting industrial redevelopment are also stagnating environmental cleanup.¹⁷⁷

Ohio's current laws are inadequate to remedy the situation. The deed requirement serves only to notify prospective purchasers. It does nothing to limit liability, allocate costs, or provide assurances of cleanup if the property is bought. Therefore, deed notification only informs prospective purchasers of which property not to buy.

Each agreement shall contain provisions for the reimbursement of the state for the costs of the cleanup.

All reimbursements and payments shall be credited to the hazardous waste clean-up fund created in section 3734.28 of the Revised Code.

The agreement may require the owner to execute an easement whereby the director, an authorized employee of the agency, or a contractor employed by the agency in accordance with the bidding procedure established in division (C) of section 3734.23 of the Revised Code may enter upon the facility to sample, repair, or reconstruct air and water quality monitoring equipment constructed under the agreement. Such easements shall be for a specified period of years and may be extinguished by agreement between the owner and the director. When necessary to protect the public health or safety, the agreement may require the owner to execute a restrictive covenant to run with the land that specifies the uses that may be made of the facility after work performed is completed, specifies the period for which the restrictive covenant applies, and provides terms whereby modifications to the restrictive covenant, or other land uses, may be initiated or provided to the director by the owner or by subsequent owners of the facility. All easements or covenants required under this section shall be recorded in the office of the county recorder of the county in which the facility is located, and the recording fees shall be paid by the director.

Upon a breach of the reimbursement provisions of the agreement by the owner of the land or facility or by notification to the director by the owner that he is unable to perform his duties under the reimbursement provisions of the agreement, the director shall certify the unreimbursed portion of the costs of cleanup to the county auditor of the county in which the facility is located. The auditor shall record the costs so certified as a lien against the property on which the facility is located, which costs shall be a lien on the property until discharged. Upon written request of the director, the attorney general shall institute a civil action to recover the unreimbursed portion of the costs of cleanup. Any moneys so recovered shall be credited to the hazardous waste clean-up fund.

¹⁷⁶Tosi, *supra* note 10.

¹⁷⁷*Id.*

The priority lien provision is similarly inadequate. If it does withstand constitutional challenges¹⁷⁸ it may prove to be ineffective against a bankrupt party. Additionally, prospective purchasers will certainly shy away from property with an existing lien. Also, the lien provision applies only to property on which the hazardous waste site is located.¹⁷⁹ Often the cleanup will cost far more than the property is worth.

2. The Future Law?

In light of the shortcomings of Ohio's current laws, a more comprehensive environmental law needs to be drafted. The final section of this article will outline several key components that should be included in such legislation. First, despite its shortcomings, Ohio's current deed notification law serves an important purpose. It provides notification of a release, or potential release, of a hazardous substance to the prospective buyer, the Ohio EPA, and the public. Notification of contamination is a keystone to any environmental regulation. Therefore, deed notification should be made a part of a more comprehensive environmental law.

Second, Ohio needs to set up a program that requires an environmental audit, conducted by a certified professional auditor, prior to property transfer.¹⁸⁰ The results would be made available to the Ohio EPA. This program may be either mandatory or "voluntary"¹⁸¹ since either way it will become evidence for all appropriate inquiry and therefore an industry standard for good commercial practice. By having a set standard for environmental assessments, buyers and sellers will be able to more easily negotiate liability and costs. In addition, they will be provided assurances that they have met the Ohio standard for due diligence. The environment will also benefit. An environmental audit will catch environmental contamination before property transfer. This will allow the state to better allocate costs to the appropriate party and to expedite cleanup.

Third, if contamination is found on the property, two routes could be taken:

1. cleanup of the contamination prior to transfer; or
2. execution of a signed consent order by both buyer and seller providing for cleanup of the property and financial assurances of viability.

¹⁷⁸ See *Reardon v. United States*, 731 F. Supp. 558 (D. Mass. 1990).

¹⁷⁹ See *supra* note 175.

¹⁸⁰ See *supra* note 111. See also N.J. STAT. ANN. § 13:1K-9 (West Supp. 1992) (Legislative Findings and Declarations).

¹⁸¹ See MINN. STAT. ANN. § 115B.17, subd. 14 (West Supp. 1992).

If no contamination is found, a "negative declaration" would be signed by the seller and submitted to the Ohio EPA prior to transfer.¹⁸² Again, all "three parties" would be benefitted. The buyer gets "clean" property, may allocate cleanup costs, and may limit future liability. The seller may sell property that otherwise would sit idle, allocate costs, and limit liability. The environmental agency, in allowing individuals to clean up sites, is limiting costs, and protecting both the environment and the public.

Fourth, in order to effectively and expeditiously accomplish the prior two proposals (audits and cleanups), a set of cleanup standards must be written into the regulation. This appears to be a major hurdle for many environmental regulations.¹⁸³ Without clear-cut standards, many incentives for parties to clean up property are diminished. For example, it is difficult to provide assurances of future limited liability if you do not have a set of standards dictating proper cleanup of the property today.

Ohio may wish to establish cleanup standards that not only protect human health and the environment but are also realistic for today's society. For example, some industrial properties will never again be used for residential purposes. Residential cleanup standards always need to be set higher than industrial standards, because of the increased possibility that people will come into contact with the soil or drink the groundwater. This is not the case in industrialized areas. Therefore, different cleanup standards may be set for "heavy industrial," "light industrial," and residentially zoned properties.

Fifth, Ohio needs a program to certify individuals to perform environmental audits. This program will benefit both the buyer and the seller of property. The buyer will know that the environmental assessment was done by an unbiased certified auditor and may therefore be more assured about future liability. The seller will also know that her money is paying for a proper, well-done site assessment. Additionally, the standardization of certification may help to reduce and stabilize the costs of an environmental audit. This will further reduce costs to the buyer and seller. Ohio may wish to make this a fee-based program which could fund itself and possibly enhance current cleanup funds.

Sixth, Ohio should develop a "sign-off" provision which would allow the State, based upon the aforementioned programs, to certify that specific properties are "clean." Again, this program would provide assurances to both the buyer and seller. The program could also be fee-based, with the monies being used to support the program and fund cleanup accounts.

Finally, Ohio should develop a program that requires a site investigation/audit every 5-10 years. This program would limit the "last minute" problems that transfer-triggered environmental laws run into. For example, property transfers would be expedited because a seller would be informed early of any potential contamination and could remedy it before attempting to transfer property. While this would mean more environmental

¹⁸² See N.J. STAT. ANN. § 13:1k-9.

¹⁸³ Farer, *supra* note 142.

regulations for companies, it would also help to allocate the costs of contamination to the rightful "owner," decrease costs in the long-run, and limit liability for both buyer and seller. In addition, it is environmentally sound because it encourages parties to clean up sites as quickly as possible. Similarly, this benefits both "good" and "bad" companies since even good companies can have bad environmental managers and employees that may purposely or negligently cause contamination. This final suggestion, however, may be better left to the federal Superfund program to enact since it may have detrimental effects on Ohio's industrial base if it is left for this state alone to implement.

VI. CONCLUSION

CERCLA provides minimal guidance on the procedures necessary to avoid liability during property transfer and is equally nebulous concerning the standards required for the affirmative defenses to its stringent liability scheme. Similarly, case law sets no "bright line" standards. Procedural guidelines established by industry and other interested groups are helpful but, so far, no definitive standard has been established. Meanwhile, prime industrial properties continue to sit idle. Since many of them are contaminated and are not addressed in a timely manner, they continue to further contaminate soil, surface water, and ground water. With the pollution at these properties becoming more widespread, future remediation costs are skyrocketing.

If Ohio is to maintain its strong industrial base, it must enact legislation that encourages and guides the cleanup of its "abandoned" industrial properties. Once this is accomplished, all of those involved - the buyers, the sellers, the environment, and the citizens of the State - will benefit through a proliferation of property transfers, a cleaner environment, and a boost in the economy and jobs for the State of Ohio.