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## No Good Deed Goes Unpunished: The CERCLA Liability Exposure Unfortunately Created by Pre-acquisition Soil Testing

Jennifer L. Scheller

*University of Michigan Law School*

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## NOTE

# No Good Deed Goes Unpunished: The CERCLA Liability Exposure Unfortunately Created by Pre-acquisition Soil Testing

*Jennifer L. Scheller*

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### INTRODUCTION

A small business owner looking to open another convenience store in an urban area found a site that appeared perfect. She enlisted her attorney to prepare the paperwork to complete the deal, only to be advised that there might be a problem. The attorney informed her that a federal statute, the Comprehensive Environmental Response, Compensation and Liability Act<sup>1</sup> (“CERCLA”), makes property owners liable for the costs of cleaning up hazardous waste on their property. The attorney explained that in the 1950s and 1960s, there had been a lawn and garden store in the building on the property. Given the lax regulation of the storage and disposal of herbicides during this period, the site could be contaminated with hazardous waste and expensive remediation of the soil might be required in the future.<sup>2</sup> A quick check revealed that the property was not a current target of federal enforcement, but if that changed, the current owner

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1. 42 U.S.C. §§ 9601-9675 (2000).

2. See *K.C.1986 Ltd. P'ship v. Reade Mfg.*, 33 F. Supp. 2d 1143, 1146 (W.D. Mo. 1998) (involving a site formerly used to store and blend chemicals used to manufacture herbicides).

of the site would be liable for the cleanup costs under CERCLA. The attorney said the only way to accurately assess whether the site is contaminated is to conduct an environmental assessment, but conducting the assessment could actually create liability if soil testing disturbs the contamination.<sup>3</sup> The business owner decided to purchase a previously undeveloped lot instead.

The preceding hypothetical illustrates some of the problems associated with developing brownfields — previously developed land that is or might be contaminated by hazardous waste.<sup>4</sup> Fear of CERCLA liability<sup>5</sup> often causes developers to seek property, known as greenfields, that have never been used for industrial purposes before, leaving many brownfields idle and unremediated.<sup>6</sup> The result of greenfield development is sprawl and urban decay.<sup>7</sup> For those willing to consider redeveloping brownfields, environmental assessments are a popular way to avoid, or at least assess, CERCLA liability.<sup>8</sup> Unfortunately, soil testing can also spread contamination.<sup>9</sup> This Note addresses an unnecessary legal complication to the already

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3. See *K.C.1986 Ltd. P'ship*, 33 F. Supp. 2d at 1151-54.

4. CERCLA defines a brownfield site as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” 42 U.S.C. § 9601(39)(A).

5. CERCLA liability can easily reach millions of dollars. See, e.g., *United States v. Bestfoods*, 524 U.S. 51, 57 (1998) (noting that the EPA’s response plan at the site “called for expenditures well into the tens of millions of dollars”).

6. ELIZABETH GLASS GELTMAN, *RECYCLING LAND: UNDERSTANDING THE LEGAL LANDSCAPE OF BROWNFIELD DEVELOPMENT* 7 (2000) (quoting Johnine J. Brown, *Environmental Justice Conflict Could End with Justice if Brownfields Are Reclaimed*, ILL. LEGAL TIMES, June 1995, at 13). There are an estimated 500,000 brownfield sites nationwide. *Id.* at 5.

7. GELTMAN, *supra* note 6, at 7. For more information on factors contributing to the brownfields problem and some proposed solutions, see Michael Allen Wolf, *Dangerous Crossing: State Brownfields Recycling and Federal Enterprise Zoning*, 9 FORDHAM ENVTL. L.J. 495 (1998), and John S. Applegate, *Risk Assessment, Redevelopment, and Environmental Justice: Evaluating the Brownfields Bargain*, 13 J. NAT. RESOURCES & ENVTL. L. 243 (1997-1998).

8. See Keith M. Casto & Tiffany Billingsley Potter, *Environmental Audits: Barriers, Opportunities and a Recommendation*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 233, 234 n.5 (1999); Lorraine Lewandrowski, *Toxic Blackacre: Appraisal Techniques & Current Trends In Valuation*, 5 ALB. L.J. SCI. & TECH. 55, 57 (1994). Although the EPA has identified many hazardous waste sites, any party looking to purchase an industrial site is likely to conduct an environmental assessment of the property, which may include soil testing that could disturb hazardous waste on the property. See MAXINE I. LIPELES, *HAZARDOUS WASTE* 402-04 (3d ed 1997); Casto, *supra*, at 234 n.5.

9. For example, wells dug to monitor the spread of contamination may actually increase the migration rates of some pollutants. See *Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 921 (5th Cir. 2000); *K.C.1986 Ltd. P'ship v. Reade Mfg.*, 33 F. Supp. 2d 1143, 1147 (W.D.Mo. 1998). Similarly, boring into the ground to extract columns of soil for analysis can cause the surrounding soil to cave in, resulting in a mixing or shifting of contamination. See *United States v. CDMG Realty Co.*, 96 F.3d 706, 719-20 (3d Cir. 1996).

complex task of brownfield redevelopment: the fact that the widely used environmental assessment can create CERCLA liability for soil testing companies and those who hire them if soil testing spreads hazardous waste. Following a brief overview of the CERCLA scheme, this Introduction discusses the federal courts' disagreement over whether soil testing creates CERCLA liability. The remainder of the Note explains why soil testers and those who hire them are liable under CERCLA and advocates a legislatively created exemption from CERCLA liability.

### A. CERCLA Overview

CERCLA was created after it became clear that the Resource Conservation and Recovery Act ("RCRA")<sup>10</sup> was inadequate to address sites already contaminated with hazardous waste.<sup>11</sup> CERCLA gives the Environmental Protection Agency ("EPA") the power to respond to an actual or threatened release of a hazardous substance by cleaning up the waste itself, then suing the statutorily-defined potentially responsible parties ("PRPs") for reimbursement of the response costs.<sup>12</sup> It also permits parties that incur response costs to seek reimbursement or contribution from PRPs.<sup>13</sup> CERCLA imposes strict liability,<sup>14</sup> jointly and severally, on responsible parties, although

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10. 42 U.S.C. §§ 6901-6992k (2000).

11. LIPELES, *supra* note 8, at 276. RCRA mainly regulates the disposal of hazardous waste in the future. CERCLA was Congress's response to prominent cases of contamination such as Love Canal. Love Canal garnered national attention when chemicals at the site leaked into the basements of homes and New York State struggled to respond appropriately. *Id.* at 275-76.

12. 42 U.S.C. §§ 9604, 9607 (2000). CERCLA created a federal fund known as the Superfund to finance cleanups conducted by the EPA. *Id.* § 9604(a). Any money collected from responsible parties in reimbursement actions goes back into the Superfund. *Id.* § 9607(c)(3). Because of this fund, CERCLA is sometimes known just as Superfund. LIPELES, *supra* note 8, at 275. The EPA may also force private parties to conduct a cleanup under CERCLA. 42 U.S.C. § 9606. Response costs include the cost to remove, contain, or otherwise neutralize contaminants. *See id.* § 9601(25). The hazardous substances covered by CERCLA can be found at *id.* § 9601(14).

13. 42 U.S.C. § 9607(a)(4)(A) (allowing parties that incur response costs but are not "responsible" under CERCLA to recover their costs from PRPs); *id.* § 9613(f) (allowing PRPs to seek contribution from other PRPs). *See also* Cooper Indus., Inc. v. Aviall Servs., Inc., 160 L. Ed. 2d 548 (2004).

14. 42 U.S.C. § 9607(a) (stating that responsible parties, "subject only to the defenses set forth in [the statute]... shall be liable for" response costs). Congress indicated that it intended the statute to impose strict liability in the legislative history of the main predecessor bill to the Superfund Amendments and Reauthorization Act of 1986 (SARA), which amended the original CERCLA. H.R. REP. NO. 99-253 pt. 1, at 74 (1986). In addition, courts have consistently interpreted CERCLA as imposing strict liability, both before and after the 1986 SARA amendments. *See, e.g.,* Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321 (7th Cir. 1994); Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

courts can apportion liability in appropriate circumstances.<sup>15</sup> CERCLA liability depends on proving four basic elements: 1) hazardous substances were disposed of at a facility; 2) there has been a release or threatened release of a hazardous substance from the facility into the environment; 3) the release or threatened release requires the expenditure of response costs; and 4) the defendant is a PRP.<sup>16</sup> The PRPs are: 1) the facility's current owner or operator; 2) the facility's owner or operator at the time of disposal of any hazardous substance; 3) any person who arranged for the disposal, treatment, or transportation by another entity of hazardous substances ("arranger"); and 4) any person who transported hazardous substances to facilities selected by another person ("transporter").<sup>17</sup> Liability can be avoided completely only if the PRP proves one of CERCLA's narrowly-defined defenses: that the release was caused by an act of God, an act of war, or the act or omission of a third party.<sup>18</sup>

Two of the statute's limitations on liability create special incentives to conduct environmental assessments. The innocent landowner defense, part of the third party defense, allows current owners to escape liability completely if they can show that they "did not know *and had no reason to know*" the site was contaminated with hazardous waste when they purchased the property.<sup>19</sup> In order to meet this standard, the owner must conduct "all appropriate inquiries . . . into the previous ownership and uses of the facility."<sup>20</sup> CERCLA now

15. CERCLA liability is normally joint and several because it is often difficult to apportion liability when hazardous wastes from many sources are commingled at a site. Congress intended CERCLA apportionment to be governed by common law tort principles and guided by the Restatement (Second) of Torts § 443. *E.g.*, *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 895 (5th Cir. 1993).

16. 42 U.S.C. § 9607(a); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258-59 (3d Cir. 1992). For the purpose of this Note, it will be assumed that the first three elements of CERCLA liability can be proved; this Note focuses solely on whether testing companies or prospective purchasers can be PRPs.

17. 42 U.S.C. § 9607(a).

18. *Id.* § 9607(b).

19. *Id.* § 9601(35)(A)(i) (2002) (emphasis added).

20. *Id.* § 9601(35)(B). The few published decisions fail to come to a consensus on what constituted an appropriate inquiry prior to the Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118, 115 Stat. 2356 (codified as amended in scattered sections of 42 U.S.C.) [hereinafter *Brownfields Revitalization Act*]. See *United States v. 150 Acres of Land*, 204 F.3d 698, 707 (6th Cir. 2000) (holding that no inquiry at all might be appropriate when the purchaser is only acquiring a fractional interest in the property to consolidate ownership after an inheritance); *XDP, Inc. v. Watumull Props. Corp.*, No. 99-1703-AS, 2004 U.S. Dist. LEXIS 12057, at \*28 (D. Or. May 14, 2004) (holding that a factfinder could conclude that the owner did not conduct all appropriate inquiries when it "did not hire an environmental consultant, did not review the current [state environmental agency] file, and did not investigate prior owners of" the property); *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105, 128 (N.D.N.Y. 2003) (holding that a defendant that introduced no evidence of any inquiry did not establish the

contains a new partial limitation on liability; the liability of “bona fide prospective purchasers” is limited to a lien on the property for unrecovered government costs up to the increase in the property’s value from the cleanup.<sup>21</sup> Although bona fide prospective purchasers can know that the property is contaminated when they buy it, they must still conduct “all appropriate inquiries” into the previous ownership and uses of property.<sup>22</sup> Thus, CERCLA encourages inspection and testing of sites.

### B. *The Soil Testing Controversy*

Courts that have ruled on the issue of CERCLA liability for soil testing are divided on two questions: whether soil testers or those who hire them are PRPs and, if they are PRPs, whether any exemption from liability applies. When determining whether soil testers and prospective purchasers are PRPs, courts are split on two subquestions: whether soil testing is a disposal and whether the parties are operators, arrangers, or transporters.<sup>23</sup>

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innocent landowner defense); *Advanced Tech. Corp. v. Eliskim, Inc.*, 87 F. Supp. 2d 780, 785 (N.D. Ohio 2000) (holding that assurances that purchaser was only receiving uncontaminated portion of contaminated parcel may have obviated the need for further inquiry); *United States v. Serafini*, 791 F. Supp. 107, 108 (M.D. Pa. 1990) (holding that the inquiry was not appropriate because defendant had not viewed the property before purchase). The Brownfields Revitalization Act commands the EPA to establish standards for conducting “all appropriate inquiries.” 42 U.S.C. § 9601(35)(B)(ii) (2002). The EPA recently issued a proposed rule. *Standards and Practices for All Appropriate Inquiries*, 69 Fed. Reg. 52,542 (proposed Aug. 26, 2004) (to be codified at 40 C.F.R. pt. 312). Until the EPA issues a final rule, the defense will be analyzed under the same five factors as in previous versions of the statute if the property was purchased before May 31, 1997. *Compare* 42 U.S.C. § 9601(35)(B)(iv)(I) (2002) *with id.* § 9601(35)(B) (2000). For property purchased on or after May 31, 1997, the procedures of the American Society for Testing and Materials (“ASTM”), designed to help purchasers comply with the pre-2002 CERCLA, will be sufficient. *Id.* § 9601(35)(B)(iv)(II) (2002) (referring to ASTM, *Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process*, E1527-97).

21. 42 U.S.C. § 9607(r) (2002). The limitation applies to those who buy property after January 11, 2002 and meet other statutory conditions. *Id.* § 9601(40).

22. *Id.* § 9601(40)(B). The standards for inquiry under the innocent landowner defense also satisfy the inquiry portion of the bona fide prospective purchaser limitation. *Id.*

23. All of the categories of responsible parties are defined by their relationship to the disposal of the hazardous waste except the facility’s current owner or operator. *See id.* § 9607(a) (2000). Although the difference in the statutory language of § 9607(a)(1) (current owner or operator) and § 9607(a)(2) (owner or operator at the time of disposal) indicates that prior owners and operators can defend against liability if they were not the owner or operator “at the time of disposal,” ambiguities in the definition of “disposal” have divided the circuits on whether passively allowing waste to enter the environment can create liability under § 9607(a)(2). *Compare* *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992) (concluding that passive migration can constitute disposal), *with* *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001) (concluding that passive migration cannot constitute disposal), *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000) (same), *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351 (2d Cir. 1997) (same), and *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996) (same). The controversy does not affect the analysis of this Note. In looking at liability for soil testing,

Some courts have concluded that soil testing can make testers and those who hire them PRPs. For example, the Third Circuit, in *United States v. CDMG Realty Co.*,<sup>24</sup> held that the testing the defendant had ordered would ordinarily constitute a disposal because the text of CERCLA states that disposal includes discharging or placing hazardous wastes “into or on any land or water,” even if hazardous material was already present.<sup>25</sup> The court also held that there was no threshold level of contamination that needed to be reached before liability would attach.<sup>26</sup> The court did not decide whether the testing company was an owner, operator, transporter or arranger, but asserted it was a PRP and left the precise basis for liability to the district court.<sup>27</sup> Likewise, the Western District of Missouri, in *K.C.1986 Limited Partnership v. Reade Manufacturing*,<sup>28</sup> found that a reasonable trier of fact could conclude that the testing company was a CERCLA operator,<sup>29</sup> and that a disposal of hazardous wastes occurred during testing, thus establishing CERCLA liability.<sup>30</sup>

On the other hand, *Blasland, Bouck & Lee, Inc. v. City of North Miami* concluded that a testing company was not a PRP.<sup>31</sup> The *Blasland* court determined, with little explication of its reasoning, that an environmental testing company that conducted aquifer studies was not an operator because “engaging in clean-up activities at a facility

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this Note assumes some active participation in spreading contamination at a site. For more information on the passive disposal controversy, and whether soil testers and prospective purchasers may also be liable on the theory that they passively allowed waste to migrate during the time of testing, see Robert L. Bronston, Note, *The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste*, 93 MICH. L. REV. 609 (1994), and Patrick D. Traylor, Comment, *Liability of Past Owners: Does CERCLA Incorporate a Causation-Based Standard?*, 35 S. TEX. L. REV. 535 (1994).

24. 96 F.3d 706 (3d Cir. 1996). The owner of the property, HMAT Associates, sued the former owner, Dowel Associates, asserting as one theory of liability that Dowel disposed of hazardous waste on the property because the company ordered testing of the site’s contaminated soil. *Id.* at 710.

25. *Id.* at 719 (quoting 42 U.S.C. § 6903(3) (1988)).

26. *Id.* The court ultimately concluded that summary judgment was inappropriate because a reasonable factfinder could find that a dispersal of contaminants occurred: the holes for testing, which went through layers of many types of wastes, collapsed on themselves. *Id.* at 720.

27. *Id.* at 718 n.11. The district court had not reached the issue because it had concluded that the volume of contamination spread during testing was insufficient to constitute a disposal. *Id.* at 719.

28. 33 F. Supp. 2d. 1143 (W.D. Mo. 1998).

29. *Id.* at 1153-54.

30. *Id.* at 1149-50. Similarly, the Fifth Circuit found that a testing company could be an operator or arranger, depending on the degree of control the company exercised over hazardous waste at the site. *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 928-29 (5th Cir. 2000). The court did not address whether the testing constituted a disposal. *See id.*

31. 96 F. Supp. 2d 1375 (S.D. Fla. 2000).

does not qualify as the type of 'operation' CERCLA contemplates."<sup>32</sup> *Blasland* also concluded that the testing did not result in a disposal because it did not move wastes to an uncontaminated part of the property.<sup>33</sup>

Courts are also split on whether the statute should be read to exempt soil testing from liability. In *CDMG Realty*, the Third Circuit created such an exemption when it held that soil testing must be conducted negligently to constitute a disposal under CERCLA.<sup>34</sup> The court reasoned that because prospective purchasers cannot establish the innocent landowner defense unless they conduct an appropriate inquiry into possible contamination,<sup>35</sup> Congress must have intended soil testing to be exempt from CERCLA liability.<sup>36</sup> The court concluded, however, that liability still could be imposed if the testing was conducted negligently, because such testing would not be an appropriate investigation under CERCLA.<sup>37</sup>

The Western District of Missouri explicitly rejected the Third Circuit's negligence liability standard and refused to create any exemption to CERCLA liability for pre-acquisition soil testing.<sup>38</sup> The court relied on the lack of an express exception in the statute.<sup>39</sup> It reasoned further that the innocent landowner defense would still have continued applicability because soil tests would not be "appropriate"

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32. *Id.* at 1377, 1379-80. The aquifer study included excavating a series of pits in contaminated soil on the property. *Id.* at 1380.

33. *Id.* at 1380. The court may have left open the possibility of liability if testing contaminates clean soil in future cases. *See id.*

34. 96 F.3d 706, 721 (3d Cir. 1996).

35. *Id.* at 721 (citing CERCLA 42 U.S.C. § 9601(35)(B) (2000)).

36. *Id.* It is interesting to note that the court was not addressing environmental assessment soil testing. *Id.* at 722. The former owner, Dowel, had tested the site, an old landfill, to see if it could support construction. *Id.* at 711. This background fact calls into question the court's reliance on the incentive to test property created by the innocent landowner defense because Dowel was not trying to determine if the landfill contained hazardous waste. *Id.* at 722. Indeed, Dowel could not have established the innocent landowner defense; it should have known that hazardous wastes were buried in the landfill it was purchasing because the EPA and state environmental protection agency had started investigating the site several years before Dowel purchased it. *Id.* at 711; *see also* 42 U.S.C. § 9601 (35)(A)(i). This flaw in the court's reasoning does not affect the reasoning of this Note, however, because the Note assumes the testing was performed to detect contamination.

37. *CDMG Realty*, 96 F.3d at 722. The court said that implying a negligence standard was the best way to "harmonize[ ] CERCLA's clear intention to allow soil investigations and its goal of remedying hazardous waste sites." *Id.* at 722. It supported its reasoning by pointing to two provisions of CERCLA that expressly use a negligence standard, the third party defense, 42 U.S.C. § 9607(b)(3)(a), and actions consistent with the National Contingency Plan, *Id.* § 9607(d)(1). *CDMG Realty*, 96 F.3d at 721-22.

38. *K.C.1986 Ltd. P'ship v. Reade Mfg.*, 33 F. Supp. 2d 1143, 1148, 1153 (W.D. Mo. 1998).

39. *Id.* at 1151.



or required in every case and would not create liability unless testing actually spread contamination.<sup>40</sup>

This Note argues that CERCLA, as it is currently written, requires courts to hold parties liable for pre-purchase soil investigations that spread or mix contamination because to conclude otherwise would stretch CERCLA beyond its breaking point. Part I argues that both those who order pre-acquisition soil testing and those who conduct the tests are PRPs if the testing spreads existing contamination. Part II argues that the statute does not allow for the judicial creation of a soil testing liability exception. Part III acknowledges the policy problems created by testing liability and advocates a legislative solution to exempt pre-purchase soil testing from CERCLA liability.

## I. CERCLA LIABILITY FOR PRE-ACQUISITION SOIL TESTING

This Part argues that pre-acquisition soil investigation, when it disturbs existing contamination, makes the prospective purchaser and the testing company a PRP under CERCLA. Specifically, section I.A argues that pre-acquisition soil testing that spreads contamination constitutes disposal. Section I.B argues that testers and those who hire them are operators. Because soil testers and those who hire them are operators at the time of disposal, they are PRPs and exposed to CERCLA liability.<sup>41</sup>

### A. *Pre-acquisition Soil Testing as Disposal*

When asking whether pre-acquisition soil testing can itself create liability, one must first determine whether the testing constitutes a disposal because soil testers generally do not own or operate the property at the time of litigation.<sup>42</sup> CERCLA defines disposal as:

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.<sup>43</sup>

The plain meaning of disposal in the statute encompasses the effects of soil testing. For instance, the drilling or excavating that normally accompanies testing might entail forcing contamination from the

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40. *Id.* at 1152.

41. 42 U.S.C. § 9607(a)(2).

42. See *supra* note 23 (explaining that all PRPs except current owners and operators are defined by their relationship to the disposal of waste).

43. 42 U.S.C. § 9601(29) (incorporating by reference the definition of disposal from the Resource Conservation and Recovery Act at *id.* § 6903(3) (2000)).

upper levels of soil to lower levels of soil or groundwater.<sup>44</sup> Contamination from one testing area may be spread to other areas by equipment that is not cleaned between uses.<sup>45</sup> Such activity would constitute a deposit or placing under a plain understanding of the terms.<sup>46</sup> Similarly, testing may cause a spilling or leaking if a hole made for testing collapses, causing the mixing or shifting of contaminants<sup>47</sup> or if the rate of the spread of hazardous wastes is increased by deep holes in the soil.<sup>48</sup> Any of these activities would likely put hazardous waste in a position to “enter the environment.”<sup>49</sup> Finally, Congress’s choice to define disposal with words that have a wide variety of ordinary meanings such as injection and spilling<sup>50</sup> suggests that it was trying to reach many kinds of situations where contamination spreads. Thus, a broad reading of the individual terms is appropriate.<sup>51</sup> Where the meaning of a term in a statute is plain, there is no need to resort to other canons of statutory construction.<sup>52</sup>

CERCLA applies to hazardous waste placed on “any land.” not just previously uncontaminated land.<sup>53</sup> There are no words of limitation to indicate a congressional intent to restrict disposal to the initial introduction of hazardous waste to a site.<sup>54</sup> This lack of restriction is relevant because when pre-acquisition soil testing spreads contamination, it generally spreads hazardous waste to other areas of the same facility that may already be contaminated.<sup>55</sup> Contrary to the suggestion in *Blasland* that testing must spread hazardous wastes to “clean soil,”<sup>56</sup> Congress’s intent to provide for the cleanup of

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44. See *United States v. CDMG Realty Co.*, 96 F.3d 706, 720 (3d Cir. 1996).

45. See *id.*

46. Accord *id.*

47. See *id.*

48. See *K.C.1986 Ltd. P’ship v. Reade Mfg.*, 33 F. Supp. 2d 1143, 1149-50 (W.D. Mo. 1998).

49. See 42 U.S.C. § 6903(3) (2000).

50. *Id.*

51. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992) (concluding that the words in the definition of disposal have a wide variety of meanings and should not be limited to active disposal only).

52. *Negonsott v. Samuels*, 507 U.S. 99, 104-05 (1993); *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

53. 42 U.S.C. § 6903(3) (incorporated by reference into the definition of disposal in CERCLA at *id.* § 9601(29) (2000)); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342-43 (9th Cir. 1992).

54. 42 U.S.C. § 6903(3).

55. See, e.g., *K.C.1986 Ltd. P’ship v. Reade Mfg.*, 33 F. Supp. 2d 1143, 1147 (W.D. Mo. 1998) (describing an alleged increase in the contamination rate of a regional aquifer due to monitoring wells as a possible disposal).

56. *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 96 F. Supp. 2d 1375, 1380 (S.D. Fla. 2000).

hazardous waste dumps used by multiple companies<sup>57</sup> requires that liability attach to persons who make the contamination worse, including those who spread additional contamination deep into the soil.<sup>58</sup> Thus, when soil testing activities spread contamination, the fairest reading of CERCLA is to conclude that the activity constitutes a disposal.

Likewise, CERCLA's definition of disposal does not exempt small disposals of hazardous waste. CERCLA defines disposal as "the discharge . . . or placing of *any* solid waste or hazardous waste into or on *any* land or water," thus implying that there is no minimum amount of disposal required to trigger liability as long as response costs are also incurred.<sup>59</sup> In addition, hazardous waste is defined without reference to any minimum quantity needed for the substance to be considered hazardous; it is the character, not the quantity, of the substance that makes waste hazardous under CERCLA.<sup>60</sup>

The few places in the statute that Congress did indicate that the amount of hazardous waste involved should lead to specific outcomes supports the interpretation that CERCLA was intended to apply to the disposal of even small amounts of hazardous wastes. The most notable statutory reference to amounts of hazardous waste is the new de micromis exemption, which excludes some arrangers and transporters of small amounts of hazardous waste from liability under the statute.<sup>61</sup> The fact that the de micromis exemption only applies to a limited set of arrangers and transporters — and does not apply to *any* owners or operators — indicates that the 107th Congress believed that the disposal of small amounts of hazardous waste created liability under CERCLA for owners and operators.<sup>62</sup>

In addition, when Congress decided to require facilities to report the release of hazardous substances to the government,<sup>63</sup> it was careful

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57. See *supra* notes 14-18 and accompanying text (describing CERCLA's strict, joint and several liability scheme).

58. See *K.C.1986 Ltd. P'ship*, 33 F. Supp. 2d at 1149.

59. 42 U.S.C. § 6903(3) (emphasis added) (incorporated by reference as the CERCLA definition of disposal by *id.* § 9601(29) (2000)), *construed in* *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 76 (1st Cir. 1999); *United States v. CDMG Realty Co.*, 96 F.3d 706 at 719; *K.C.1986 Ltd. P'ship*, 33 F. Supp. 2d at 1154. *Contra* *United States v. CDMG Realty Co.*, 875 F. Supp. 1077, 1085 (D. N.J. 1995); Monica Shah Desai, *Disposing of United States v. CDMG Realty Co.: The Case Against the Application of CERCLA Liability for De Minimis Disturbances of Pre-existing Contamination*, 6 N.Y.U. ENVTL. L.J. 200 (1997).

60. 42 U.S.C. § 9601(14) (defining a "hazardous substance" as any substance listed in, listed pursuant to, or with characteristics described in various federal environmental laws), *construed in* *Acushnet Co.*, 191 F.3d at 76.

61. 42 U.S.C. § 9607(o) (2002).

62. See *id.*

63. *Id.* § 9603(a) (2000).

to give the EPA authority to set threshold quantities below which releases of hazardous substances need not be reported.<sup>64</sup> The exemption of small releases from CERCLA's reporting requirements indicates that Congress was aware that sometimes only small amounts of hazardous wastes would be released.<sup>65</sup> Despite this awareness, Congress did not give the EPA similar power to exempt PRPs that disposed of small amounts of waste from CERCLA's liability scheme,<sup>66</sup> again indicating that small disposals can create CERCLA liability.

Furthermore, the settlement provisions of the statute<sup>67</sup> treat de minimis contributors of hazardous waste as good candidates for settlement, not as exempt from liability.<sup>68</sup> In addition to giving the EPA the power to settle with any PRP,<sup>69</sup> CERCLA directs the EPA to settle quickly with de minimis contributors under its expedited settlement provision.<sup>70</sup> This provision covers exactly the situation of pre-acquisition soil testers; the EPA is to settle with PRPs when "[b]oth of the following are minimal in comparison to other hazardous substances at the facility: (i) The amount of the hazardous substances contributed by that party to the facility [and] (ii) The toxic or other hazardous effects of the substances contributed by that party to the facility."<sup>71</sup> Although the expedited settlement provision does not apply to suits initiated by private parties rather than the EPA,<sup>72</sup> the provision shows that Congress intended small contributors to be responsible parties under the statute.<sup>73</sup>

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64. *Id.* § 9602(a); *see also id.* § 9603(a) (referring to the threshold quantities set pursuant to § 9602).

65. *See id.* § 9602(a).

66. *See Kelley v. Env'tl. Prot. Agency*, 15 F.3d 1100, 1107-08 (D.C. Cir. 1994) (holding that the EPA has no authority to define who is and is not liable in private suits to recover response costs).

67. 42 U.S.C. § 9622. The settlement provisions are intended to encourage the EPA to settle out of court with potentially responsible parties instead of engaging in costly legal battles if a favorable settlement can be reached. *Id.* § 9622(a).

68. *Id.* § 9622(g).

69. *Id.* § 9622(a).

70. *Id.* § 9622(g).

71. *Id.* § 9622(g)(1)(A). Also, the settlement must "involve[] only a minor portion of the response costs at the facility." *Id.*

72. *Id.* § 9622. If a party enters into a de minimis settlement agreement with the EPA, it is not liable to other PRPs for contribution "regarding matters addressed in the settlement." *Id.* § 9622(g)(5).

73. Similarly, the EPA's guidance on settlements supports the conclusion that de minimis contributors are not exempt from liability under CERCLA. Small contributors to contamination are treated as good settlement candidates, and no mention is made of some minimal amount of contribution necessary before those parties could be liable. Superfund Program; De Minimis Landowner Settlements, Prospective Purchaser Settlements, 54 Fed. Reg. 34,235 (Env'tl. Prot. Agency Aug. 18, 1989); Announcement and Publication of

## B. Soil Testers as Operators

Because soil testing can result in a disposal, if soil testers and those who hire them are operators under the statute, they are PRPs.<sup>74</sup> Congress's definition of an "operator" as "any person . . . operating [a] facility"<sup>75</sup> has been repeatedly recognized as unhelpful for deciding who falls into this PRP category.<sup>76</sup> Nonetheless, Congress's use of the word operator in other sections of the statute indicates that it was interested in ensuring that only those with the ability to control a facility are liable for response costs. For instance, CERCLA states that an operator "does not include a person, who, *without participating in the management* of a . . . facility, holds indicia of ownership,"<sup>77</sup> thus implying that such a person who did participate in the management of a facility would be considered an operator. Similarly, the term does not apply to common carriers after they deliver hazardous wastes to a disposal or treatment facility,<sup>78</sup> again suggesting that Congress's main concern was with those who could control hazardous wastes.

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Guidance on Agreements With Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792 (Envtl. Prot. Agency July 3, 1995); Superfund Program; Revised Model De Minimis Contributor Consent Decree and Administrative Order on Consent, 60 Fed. Reg. 62,849 (Envtl. Prot. Agency Dec. 7, 1995). Although the EPA's guidance statements are not entitled to deference under *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984), because they do not have the force of law, the statements are still entitled to some deference based on their thoroughness, validity of reasoning, consistency, and power to persuade. See *Christensen v. Harris County*, 529 U.S. 576 (2000) (holding that an opinion letter from the Department of Labor was not eligible for *Chevron* deference but was eligible for deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

74. PRPs include "person[s] who at the time of disposal . . . operated [a] facility." 42 U.S.C. § 9607. Some courts have hinted that soil testers might also be arrangers or transporters. *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 929 (5th Cir. 2000); *United States v. CDMG Realty Co.*, 96 F.3d 706, 718 n.11 (3d Cir. 1996); *Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 96 F. Supp. 2d 1375, 1380 (S.D. Fla. 2000). Focusing on operator liability is prudent because the de micromis exemption in the Small Business Liability Relief and Brownfields Revitalization Act of 2002 exempts some arrangers and transporters of small amounts of hazardous waste from liability. 42 U.S.C. § 9607(o) (2002). The exemption applies to arrangers or transporters of less than 110 gallons of liquid material or 200 pounds of solid material if the disposal occurred before April 1, 2001. *Id.* No court has yet addressed whether a party that is an arranger or transporter *and* an operator may take advantage of the de micromis exemption, so it is theoretically possible that some testers may escape CERCLA liability under this provision. The exemption applies, however, only to disposals at the relatively small number of facilities on the National Priorities List ("NPL"), which includes only the most contaminated sites. *Id.* Thus, testing at all non-NPL sites will still expose soil testers and those who hire them to CERCLA liability as operators.

75. 42 U.S.C. § 9601(20)(A) (2000).

76. See, e.g., *United States v. Bestfoods*, 524 U.S. 51, 66 (1998) (stating "[h]ere of course we may again rue the uselessness of CERCLA's definition of a facility's 'operator . . .'" (citing *Bailey v. United States*, 516 U.S. 137, 145 (1995))).

77. 42 U.S.C. § 9601(20)(A) (emphasis added).

78. *Id.* § 9601(20)(C).

The conclusion that an operator must have some degree of control over a facility is consistent with the Supreme Court's interpretation of the term in *United States v. Bestfoods*.<sup>79</sup> Turning to the ordinary understanding of the word operator and considering CERCLA's concern with hazardous wastes, the Court concluded that an operator "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."<sup>80</sup> Both the company performing soil testing of possibly contaminated soil and the person that hires it potentially "manage, direct, or conduct operations specifically related to pollution" in determining if and how testing for contamination will be conducted. Thus, both testers and those that hire them are operators under CERCLA because they exercise control over hazardous waste.<sup>81</sup>

One counterargument is that *Bestfoods* narrowed the definition of operator to encompass only the person with actual control over the entire facility,<sup>82</sup> such as the entity with authority to decide whether or not to clean up hazardous wastes. The interpretation is weak, however, because *Bestfoods* indicated that anyone that "manage[s], direct[s], or conduct[s] operations specifically related to pollution" is an operator<sup>83</sup> and gave no indication that each facility could have only

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79. 524 U.S. at 66-67.

80. *Id.* at 66-67 (citing definitions of operate from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1268 (3d ed. 1992) and WEBSTER'S NEW INTERNATIONAL DICTIONARY 1707 (2d ed. 1958)). *K.C.1986 Limited Partnership v. Reade Manufacturing*, 33 F. Supp. 2d 1143, 1153-54 (W.D. Mo. 1998), engages in a similar reading of the statutory language, although it does not make specific reference to *Bestfoods*, which was decided three months earlier.

81. *Bestfoods*, 524 U.S. at 66-67; see *United States v. CDMG Realty Co.*, 96 F.3d 706, 718 n.11 (3d Cir. 1996) (suggesting that the purchaser could be liable as an operator because it "controlled the source of the contamination"). Several courts have also held that construction contractors were operators because they controlled the movement of hazardous wastes at a site. The lead construction cases are *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir. 1992), and *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988).

82. Although the court in *Blasland* does not clearly articulate a reason for its decision that environmental testers cannot be operators under CERCLA, it likely intended to rely on this argument. See *Blasland, Bouck & Lee, Inc., v. City of N. Miami*, 96 F. Supp. 2d 1375, 1379-80 (S.D. Fla. 2000). *Blasland* emphasized the Supreme Court's statement that an operator is "someone who directs the workings of, manages, or conducts the affairs of a facility," in concluding that an environmental engineering firm was not an operator under CERCLA. *Id.* (citing *Bestfoods*, 524 U.S. at 66). *Blasland*, however, did not address the Court's next sentence in *Bestfoods*, quoted in part in the text accompanying footnote 80, which further clarifies that an operator is not only someone with general control of a site, but someone with control of pollution issues or hazardous waste disposal. The Court said it was further refining its general definition of an operator "[t]o sharpen the definition for purposes of CERCLA's concern with environmental contamination . . ." *Bestfoods*, 524 U.S. at 66.

83. See *Bestfoods*, 524 U.S. at 66.

one operator.<sup>84</sup> Thus, because soil testers and those who hire them are operators at the time of disposal, they are PRPs.<sup>85</sup>

## II. A LIABILITY EXCEPTION?

Having concluded that soil testers and those who hire them are properly characterized as PRPs, the next step is to evaluate whether any exception to CERCLA liability applies. This Part argues that, contrary to the interpretation of CERCLA advanced by the Third Circuit in *United States v. CDMG Realty Co.*,<sup>86</sup> CERCLA's text does not allow for any judicially created exceptions to liability.

The question of whether pre-acquisition soil testing is exempt from liability should begin and end with the text of CERCLA itself; CERCLA expressly forbids courts from applying defenses not articulated in the statute's text.<sup>87</sup> For this reason, courts generally refuse to allow even traditional equitable defenses in CERCLA actions.<sup>88</sup> Because Congress eliminated all defenses in CERCLA actions not articulated in the statute's text, Congress needed to create an exemption for pre-acquisition soil testing if it did not intend the testing to create liability.<sup>89</sup> The text of the Act, however, simply does not mention pre-acquisition soil testing or indicate in any way that such testing should be treated any differently from other types of disposal.<sup>90</sup> None of the explicit statutory defenses apply to pre-acquisition soil testing,<sup>91</sup> therefore the testing is not exempt from CERCLA liability.

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84. *See id* at 66-67.

85. 42 U.S.C. § 9607(a)(2) (2000).

86. 96 F.3d 706 (3d Cir. 1996).

87. 42 U.S.C. § 9607(a) (stating that PRPs are liable "[n]otwithstanding any other provision or rule of law, and subject *only* to the defenses set forth in subsection (b) of this section" (emphasis added)).

88. *See, e.g.*, *Town of Munster v. Sherwin-Williams Co.*, 27 F.3d 1268, 1270 (7th Cir. 1994) (refusing to apply laches); *Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir. 1993) (same); *General Elec. v. Litton Indus. Automation Sys.*, 920 F.2d 1415, 1418 (8th Cir. 1990) (holding that CERCLA does not allow an unclean hands defense to liability); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 90 (3d Cir. 1988) (refusing to apply caveat emptor as a defense to liability).

89. *See, e.g.*, 42 U.S.C. § 9607(b) (establishing the general defenses to CERCLA liability: act of God, act of war, and third party defenses); *id.* § 9619 (exempting contractors working for the government or private parties under the supervision of the government conducting response activities, such as soil removal or remediation, unless those activities were conducted negligently).

90. *See id.* §§ 9601-9675; *K.C.1986 Ltd. P'ship v. Reade Mfg.*, 33 F. Supp. 2d 1143, 1148 (W.D. Mo. 1998).

91. Pre-acquisition soil testing is not an act of God or an act of war. 42 U.S.C. § 9607(b)(1), (2). The third party defense is also not applicable because the release or threatened release of the hazardous substance must have been caused solely by "an act or

The Third Circuit, however, diverged from the accepted principles of interpreting CERCLA — that liability is strict and PRPs can only assert defenses in the statute's text — and created a new defense to liability. The Third Circuit reasoned that because the innocent landowner defense requires an appropriate inquiry into possible contamination at sites, Congress must have contemplated that pre-acquisition soil investigations would occur, thus the investigations should not create liability under the statute.<sup>92</sup> It reasoned that unless pre-acquisition soil testing was immune from CERCLA liability, prospective purchasers would be caught in a double bind if they dispersed hazardous waste during testing — if they bought the property, the innocent landowner defense would not apply because they would know of a previous disposal; if they did not buy the property, the defense would not apply because they would not be the owner of the site.<sup>93</sup> The court then concluded that “[i]n order to give the defense effect, then, an ‘appropriate’ soil investigation cannot constitute disposal.”<sup>94</sup>

Even if the Third Circuit is correct that the double bind would leave the innocent landowner defense without effect, the statute cannot support the construction given to it in *CDMG Realty*. The innocent landowner defense is “‘a limited affirmative defense based on the *complete* absence of causation.’”<sup>95</sup> Far from suggesting that

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omission of a third party other than an employee or agent of the defendant . . .” *Id.* § 9607(b). Even a generous reading of the defense, requiring that the contractual relationship be connected to the hazardous waste at issue before a defendant would be precluded from invoking it, would still exclude soil testing activities from its coverage — the entire purpose of the contract between prospective purchasers and soil testers is to determine whether the site is contaminated by hazardous waste. *See Westwood Pharm., Inc. v. Nat’l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 91-92 (2d Cir. 1992) (holding that for the contractual relationship between the defendant and the person who was the sole cause of the release or threatened release to bar the application of the third party defense, the contractual relationship “must either relate to the hazardous substances or allow the [defendant] to exert some element of control over the third party’s activities.”).

92. *United States v. CDMG Realty Co.*, 96 F.3d 706, 721 (3d Cir. 1996).

93. *Id.*

94. *Id.*

95. *Westfarm Assocs. Ltd. P’ship v. Washington Suburban Sanitary Comm’n*, 66 F.3d 669, 682 (4th Cir. 1995) (quoting *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988)) (emphasis added). Such a narrow interpretation of the defense is also most consistent with the legislative history of the Act. *See, e.g.*, 131 CONG. REC. D1471 (daily ed. Dec. 5, 1985) (statement of Rep. Frank) (“This amendment says that wholly innocent landowners will not be held liable. We have had problems before with the [re]leases being granted improvidently. This amendment, I must say, is drafted in a way to make that extremely unlikely. To get a release from liability under this section, a landowner must not have himself or herself allowed or permitted any storage, not have contributed to the release of any substance and, and this is very important, the landowner has the burden of proof to show that this landowner had neither actual nor constructive knowledge at the time of purchase that the property had been used for hazardous waste materials. In other words, you can get a release under this only if you can show by the preponderance of the evidence that



efforts to establish the innocent landowner defense are immune from liability under CERCLA, the defense itself states that it does not apply to PRPs that contributed in *any* way to a release of hazardous waste.<sup>96</sup> If testing spreads contamination at a site as described in Part I, both the testing company and prospective purchaser contributed to the release of a hazardous substance and the innocent landowner defense cannot apply by its own terms.<sup>97</sup> *CDMG Realty* never addressed this explicit statement by Congress in the innocent landowner defense itself,<sup>98</sup> possibly because the language precludes the court's interpretation of the statute.

Furthermore, *CDMG Realty's* double bind argument is faulty for two reasons. First, although the name "innocent landowner defense" might suggest that it protects all landowners with pure motivations, in fact it only applies to a narrow subset of PRPs — those unfortunate enough to have no reason to know their property was contaminated when they purchased it.<sup>99</sup> Thus, prospective purchasers that test and discover contamination could never take advantage of the innocent landowner defense even under the Third Circuit's altered liability scheme because they would know that the site was contaminated.<sup>100</sup>

Second, although imposing liability for soil testing makes trying to establish the innocent landowner defense more risky, it does not eliminate the defense. The innocent landowner defense is still available if an appropriate soil investigation does not reveal, or spread, any contamination even though contamination was actually present.<sup>101</sup> In fact, such persons — those who do not discover contamination after an appropriate inquiry although contamination is present — are the only ones who *can* take advantage of the defense because the defense is limited to those who had no reason to know of the contamination. Also, soil testing is not required in all situations, such as when the use history of the land does not indicate the presence

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you not only did not contribute to it; you did not even know when you bought it that it had this there.").

96. 42 U.S.C. § 9601(35)(D). CERCLA states in pertinent part:

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.* (emphasis added).

97. *See* *K.C.1986 Ltd. P'ship v. Reade Mfg.*, 33 F. Supp. 2d 1143, 1151-52 (W.D. Mo. 1998).

98. *See* 96 F.3d 706.

99. 42 U.S.C. § 9601(35)(A). *See* 131 CONG. REC. D1471 (daily ed. Dec. 5, 1985) (statement of Rep. Frank).

100. 42 U.S.C. § 9601(35)(A).

101. *K.C.1986 Ltd. P'ship*, 33 F. Supp. 2d at 1152.

of contaminants.<sup>102</sup> Interpreting the innocent landowner defense to apply only when the landowner truly has no reason to know of the contamination after an appropriate investigation of the property best suits the characterization of the defense as “ ‘a limited affirmative defense based on the *complete* absence of causation.’ ”<sup>103</sup>

In sum, the arguments for a special exemption to CERCLA liability are contradicted by the current text of the statute. Thus, testing activity can create liability under CERCLA when it spreads contamination<sup>104</sup> and there is no defense available for such activity.<sup>105</sup> However, allowing responsible testing may encourage the reuse of brownfields or at least reduce the risk of investigating contamination at old commercial sites.<sup>106</sup> Therefore, Part III argues for a legislative solution compatible with Congress’s recently articulated vision for CERCLA.

### III. A LEGISLATIVE SOLUTION

This Part argues that a limited exemption from liability for soil testing will allow Congress to strike the appropriate balance between its original goals for CERCLA and its more recent efforts to ensure

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102. *Id.* See ASTM, *Standard Guide for Environmental Site Assessments: Phase II Environmental Site Assessment Process*, E1903-97. See also, e.g., *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F.Supp. 2d 105, 126 (N.D.N.Y. 2003) (noting the availability of the innocent landowner defense when contamination migrated onto the site from a neighboring parcel); *United States v. Domenic Lombardi Realty, Inc.*, 204 F. Supp. 2d 318, 334 (D.R.I. 2002) (holding that it was an issue of fact whether the defendant had to conduct an environmental assessment when the site had been used as a junkyard).

103. *Westfarm Assocs. Ltd. P’ship v. Washington Suburban Sanitary Com’n*, 66 F.3d 669, 682 (4th Cir. 1995) (quoting *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988)) (emphasis added). Such a narrow interpretation of the defense is also consistent with the legislative history of the Act. See, e.g., 131 CONG. REC. D1471 (daily ed. Dec. 5, 1985) (statement of Rep. Frank) (quoted in fn. 95). The innocent landowner defense was amended in 2002 by the Brownfields Revitalization Act, *supra* note 20, at § 223. The amendments, however, merely define in more detail what facts are necessary to establish the innocent landowner defense. 42 U.S.C. § 9601(35)(B) (2002). The Brownfields Revitalization Act also added the bona fide prospective purchaser liability limitation, which encourages soil testing much like the innocent landowner defense. In fact, the steps necessary to conduct an appropriate inquiry for the innocent landowner defense will also satisfy the appropriate inquiries prong of the bona fide prospective purchaser limitation. *Id.* § 9601(40)(B). The new bona fide prospective purchaser liability limitation undermines rather than bolsters the Third Circuit’s arguments, however. The limitation explicitly states that otherwise potentially liable persons cannot take advantage of it, *Id.* § 9601(40)(H); it reiterates that the liability limitation only applies to purchasers “whose potential liability . . . is based solely on the purchaser’s being considered to be an owner or operator of a facility.” *Id.* § 9607(r)(1). Thus, like the innocent landowner defense, Congress made clear that the bona fide prospective purchaser limitation only protects those that contributed nothing to the contamination.

104. See *supra* Part I.

105. See *supra* Section II.A.

106. See *supra* notes 4-9 and accompanying text.

that fear of CERCLA liability does not prevent developers from purchasing brownfields. Specifically, this Part argues that Congress should amend CERCLA to exempt testing from the definition of disposal if the testing is done for the purpose of conducting “all appropriate inquiries” and is not inconsistent with accepted industry practices.

Although both CERCLA and the SARA amendments<sup>107</sup> were enacted quickly as compromise measures without much legislative history, courts recognize two overarching goals of the statutes: to guarantee that enough money is available to clean up hazardous waste sites, and to ensure that those who contributed to the contamination pay for cleaning it up.<sup>108</sup> In order to deal effectively with the massive problems presented by hazardous waste sites, Congress felt it was important to ensure that “*everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.”<sup>109</sup> Although holding pre-acquisition soil testers liable will advance Congress’s original cash-flow and responsibility goals — more PRPs means more funds to help pay for site cleanup<sup>110</sup>

107. See *supra* note 14 for information regarding the SARA amendments.

108. These goals are a logical response to the Love Canal crisis, which prompted the enactment of CERCLA. See *supra* note 11. Love Canal and other residential areas contaminated with hazardous waste were a problem because the pre-CERCLA legal structure did not ensure that there would be sufficient funds for cleanups, nor that the polluters would be forced to pay the costs. See LIPELES, *supra* note 8, at 275-76. The Senate report lays out the basic elements of the CERCLA scheme this way:

To achieve these goals five basic elements are included in legislation to broadly address the problems. These are:

First, assuring that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions;

Second, providing a fund to finance response action where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup and compensation;

Third, basing the fund primarily on contributions from those who have been generically associated with such problems in the past and who today profit from products and services associated with such substances;

Fourth, providing ample Federal response authority to help clean up hazardous chemical disasters; and

Fifth, providing adequate compensation to those who have suffered economic, health, or other damages.

S. REP. NO. 96-848, at 6119 (1980) (quoted in part with approval in *United States v. Bestfoods*, 524 U.S. 51, 55-56 (1998)).

109. *Bestfoods*, 524 U.S. at 56 n.1 (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion)).

110. See *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342-43 (9th Cir. 1992) (citing the Fifth Circuit’s analysis in *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) to reason that disposal should be defined broadly to encompass more potentially responsible parties, consistent with CERCLA’s remedial goals).

and testing may contribute, albeit in a relatively small way, to the contamination at a particular site<sup>111</sup> — exempting them from liability is more consistent with Congress's refined goals for CERCLA.

The Small Business Liability Relief and Brownfields Revitalization Act<sup>112</sup> reflects a more nuanced view of hazardous waste liability. The preamble to the Brownfields Revitalization Act states that Congress was acting “to promote the cleanup and reuse of brownfields [and] provide financial assistance for brownfields revitalization.”<sup>113</sup> The Brownfields Revitalization Act provides federal funding for the revitalization of brownfields<sup>114</sup> and encourages their reuse through the bona fide prospective purchaser limitation.<sup>115</sup> Thus, CERCLA now not only ensures that funds are available for cleanup, but it also encourages the redevelopment of brownfields. Allowing private parties to conduct responsible soil investigations without fear of creating additional liability will enable prospective purchasers to learn if, or how badly, a site is contaminated and therefore encourage the redevelopment of brownfields.<sup>116</sup> Even though prospective purchasers would still be unlikely to purchase badly contaminated sites because current owners are liable under CERCLA<sup>117</sup> unless they qualify as bona fide prospective purchasers,<sup>118</sup> it would be less risky for them to find uncontaminated or lightly contaminated brownfields to redevelop if Congress exempted soil testers from liability.<sup>119</sup>

In order for Congress to further the goal of brownfields redevelopment identified in the Brownfields Revitalization Act,<sup>120</sup> a soil testing liability exemption should have two elements. First, it should apply to all soil investigations conducted to establish that a person made “all appropriate inquires” because this statutory standard would encourage soil testing.<sup>121</sup> Second, to ensure that only

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111. See *supra* note 9.

112. *Brownfields Revitalization Act*, *supra* note 20.

113. *Brownfields Revitalization Act*, *supra* note 20.

114. 42 U.S.C. § 9604(k) (2002).

115. *Id.* § 9607(r).

116. See GELTMAN, *supra* note 6, at 3.

117. 42 U.S.C. § 9607(a).

118. *Id.* § 9601(40).

119. Although there are an estimated 500,000 brownfield sites nationwide, no one knows if, or how badly, those sites are contaminated. See GELTMAN, *supra* note 6, at 5-7; see also MANUFACTURED SITES: RETHINKING THE POST-INDUSTRIAL LANDSCAPE 4 (Niall Kirkwood ed., 2001) (quoting the EPA's definition of brownfields as “abandoned or underused industrial and commercial sites where redevelopment is complicated by real or perceived contamination” (emphasis added)).

120. See *supra* note 113 and accompanying text.

121. See *United States v. CDMG Realty Co.*, 96 F.3d 706, 721 (3d Cir. 1996).

responsibly conducted testing is exempt from liability, the legislative exemption should not include soil testing that is inconsistent with accepted industry practices. A standard based on why and how the testing was conducted<sup>122</sup> is superior to an exemption based on how much waste was disturbed<sup>123</sup> because it eliminates the need for experts to speculate about how much hazardous waste was moved by particular testing activities.<sup>124</sup> Furthermore, it would be difficult to predict in advance how much hazardous waste a particular testing technique would move at a particular site,<sup>125</sup> but testing companies could avoid conducting testing activities that are inconsistent with accepted industry practices.

### CONCLUSION

This Note demonstrates that CERCLA, as it is currently formulated, leaves courts no choice but to impose the statute's strict, joint, and several liability scheme on pre-acquisition soil testers and those who hire them when that testing spreads contamination. Despite

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122. 42 U.S.C. § 9601(29) currently states that “[t]he term[] ‘disposal’ . . . shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. § 6903].” The Solid Waste Disposal Act defines disposal as

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

*Id.* § 6903(3).

One alternative for Congress would be to add the following language after the definition of disposal: except that any soil testing activity conducted as part of an “all appropriate inquiries” investigation shall not result in a disposal provided that the soil testing activity is not inconsistent with either i) the accepted practices in the environmental inspection industry or ii) the regulations promulgated by the EPA pursuant to 42 U.S.C. § 9601(35)(B)(ii) for “all appropriate inquiries,” or, if the EPA had not yet promulgated such standards and practices at the time of the soil testing activity, the applicable interim standards and practices described in 42 U.S.C. § 9601(35)(B)(iv).

123. CERCLA's de micromis exemption is an example of such a provision. *Id.* § 9607(o).

124. See *United States v. CDMG Realty Co.*, 96 F.3d 706, 720 (3d Cir. 1996) (describing the detailed evidence submitted on the question of whether the soil testing caused the disposal of any hazardous waste). It should be noted that the proposed statutory language, see *supra* note 122, would not exempt the testing activity described in *CDMG Realty* from the definition of disposal. The testing company in that case was performing structural testing to determine if the site, a landfill, could support construction. *Id.* at 722. It is unlikely that such structural testing would be done to establish that a party conducted “all appropriate inquiries.” See 42 U.S.C. § 9601(35)(B). This Note, however, primarily addresses the liability for pre-acquisition soil testing because that liability discourages the redevelopment of brownfields. Congress could, of course, exempt other activities from CERCLA's liability scheme.

125. See *CDMG Realty Co.*, 96 F.3d at 720 (describing the uncertainty around whether testing holes that caved in resulted in the mixing of any contaminants).

this conclusion, courts have not consistently applied CERCLA to pre-acquisition soil testing. The conflicting precedent addressing this question leaves testers and prospective purchasers exposed to uncertain liability. This uncertainty only creates additional risk for brownfield investors, who then have added incentives to forgo valuable brownfield investment opportunities, leaving industrial areas depressed.

This Note concludes that a relatively simple solution to this problem is for Congress to act to clarify the liability of testers. The most promising policy solution would be to exempt from liability testing activities completed to establish that a party conducted "all appropriate inquiries" and that are not inconsistent with accepted industry practices. The exemption would promote responsible testing and facilitate the redevelopment of brownfields.