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COMMENT

**Security and Innocence Under CERCLA:
The Battle Against Confusion**

Bruce Taterka

This article analyzes the confusion which has surrounded CERCLA's secured creditor exemption and innocent landowner defense. This confusion is primarily centered on the phrases "participation in management" as used in the security interest exemption, and "all appropriate inquiry" as used in the innocent landowner defense. These phrases are undefined by CERCLA, and the case law has provided conflicting interpretations. As a result of this uncertainty, no clear guidelines exist by which environmentally diligent real estate lenders and purchasers can insulate themselves from potential CERCLA liability.

The author, however, notes that recent regulatory and private sector activity marks a trend toward clarifying the defenses. The article reviews proposed legislation and regulations defining the terms of the defenses, and discusses the policy implications of the proposed schemes. It is also noted that industry standards for conducting property transfer environmental audits are developing, providing meaning for the phrase "all appropriate inquiry." The article concludes that as the

statutory defenses are maturing confusion is subsiding, and that new regulations and the emergence of industry standards should provide guidelines within which truly "innocent" lenders and purchasers can operate in the future without the unreasonable fear of CERCLA.

I. Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ was enacted by Congress in 1980 to provide a regulatory scheme for the cleanup of hazardous waste sites. One of the effects of CERCLA is that it can place liability for the entire cost of hazardous waste cleanup on the current owner of a site, regardless of whether he was responsible for or had any knowledge of the presence of contamination at the site.² CERCLA can also place liability for cleanup on a lender whose borrower's operation has contaminated a site.³ Strict CERCLA liability can thus impose enormous hazardous waste liability on relatively "innocent" parties. Purchasers risk buying into CERCLA liability when they acquire a site, and lenders face two sources of potential liability: 1) by becoming entangled in the management of a borrower's contaminated facility,⁴ and 2) by foreclosing on and taking possession of contaminated properties.⁵

Recognizing the severity of CERCLA liability, Congress provided two exceptions to apply in certain situations. In the first exception, lenders may be protected from CERCLA liability if they merely hold a security interest in a property and do not participate in its management.⁶ In the second, a defense to CERCLA liability is allowed for landowners who unknowingly purchase contaminated sites, provided they exer-

1. 42 U.S.C. §§ 9601-9675 (1988) [hereinafter CERCLA]. CERCLA was reauthorized by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

2. See *infra* note 16.

3. See *infra* note 31.

4. See *infra* notes 31-36 and accompanying text.

5. See *infra* notes 41-43 and accompanying text.

6. CERCLA § 101(20)(A). See *infra* note 23 and accompanying text.

cise due diligence in an effort to discover hazardous substances prior to purchase.⁷ The source of the *confusion* addressed in this comment lies in the fact that there are no clear standards, either statutory or regulatory, to guide the actions of good-faith lenders and purchasers so that they may confidently avoid CERCLA liability. Additionally, the courts have exacerbated the confusion surrounding CERCLA by providing inconsistent interpretations of the statutory defenses. The result of this confusion is that almost all real estate transactions today have some degree of CERCLA risk attached.⁸

The confusion surrounding CERCLA's defenses has generated a fair amount of litigation and enormous criticism. For the past several years, lawyers, business people, and Congress have waged a battle against CERCLA confusion by attempting to define the parameters of the statutory defenses through the development of regulations,⁹ legislation,¹⁰ and industry standards.¹¹

This paper focuses on the battle against the confusion surrounding the two primary statutory defenses to CERCLA liability — the section 107(b)(3) innocent landowner defense, and the section 101(20)(A) secured creditor exemption. Each defense is discussed separately. The discussion includes an overview of the statutory scheme, the varying judicial interpretations of each defense, the proposed legislative amendments, and the policy considerations associated with the varying interpretations of each defense. It is concluded that although the confusion surrounding CERCLA — the uncertainty of the terms of its statutory defenses — is currently as high as it has ever been, relief may be at hand.

7. CERCLA §§ 107(b)(3), 101(35). See *infra* notes 97-98 and accompanying text.

8. Potential CERCLA liability is associated with traditional real estate transactions as well as business transactions in which corporate control of potentially contaminated sites is involved. J. GORDON ARBUCKLE ET AL., ENVIRONMENTAL LAW HANDBOOK 96-97 (10th ed. 1989).

9. See *infra* notes 57-68 and accompanying text.

10. See *infra* notes 69-83 and accompanying text.

11. See *infra* note 131.

II. Discussion of the CERCLA Liability Scheme

A. CERCLA Clean Up Actions

Whenever there is a release¹² or threat of a release of a hazardous substance¹³ into the environment, the federal government is authorized to arrange for cleanup actions. If a "potentially responsible party" (PRP)¹⁴ is identified and the government determines that the PRP is capable of conducting the cleanup, the PRP may be allowed to carry out and pay for the action.¹⁵ Where PRPs are unidentified, incapable or un-

12. CERCLA § 101(22) states:

The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emission from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of [nuclear material from a nuclear incident subject to financial requirements of the Nuclear Regulatory Commission], and (D) the normal application of fertilizer.

13. CERCLA § 101(14) states:

The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33 [Clean Water Act], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

14. CERCLA § 107(a) refers to a PRP as a "covered person."

15. CERCLA § 104(a)(1) states:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the

willing to carry out and finance the cleanup actions, the government may conduct the cleanup action using money from the Superfund.¹⁶ Once the government has expended Superfund money to clean up a site, any PRPs for that site are liable to reimburse the Superfund for the entire cost incurred by the government.¹⁷

B. CERCLA Responsible Parties

Once a PRP is identified, he may be held strictly liable

national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title.

16. CERCLA § 104(a). The Superfund is a 1.6-billion dollar fund allocated by Congress under CERCLA, and replenished with 8.5-billion dollars under SARA, to finance government response costs at hazardous waste sites. CERCLA § 111(a).

17. CERCLA § 107(a) states:

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 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 [arranged for disposal, treatment, or transportation of hazardous substances],

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . 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 . . . 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;

(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; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

for all costs incurred as a result of the release.¹⁸ PRPs mainly include hazardous waste generators,¹⁹ transporters, and past and current "owners and operators" of a facility²⁰ where there is a release or threat of release²¹ of hazardous substances.²² Parties who have been held liable as an "owner and operator" include owners or operators,²³ lessors, lessees,²⁴ lenders who finance contaminated sites,²⁵ and unknowing purchasers of contaminated sites.²⁶

Lenders who finance contaminated property may be found liable under CERCLA in two different ways.²⁷ If the lender takes title to contaminated property through foreclosure, he may be liable as the current owner of the site.²⁸ A lender may also be held liable for participating in the management of a borrower's contaminated facility.²⁹

18. See *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (owner of a site from which there is a release or threat of release may be held strictly liable under CERCLA without regard to causation); *City of Philadelphia v. Stepan Chem. Co.*, [18 Litigation] *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,133 (E.D. Pa. July 28, 1987) (held employer strictly liable for intentional illegal acts of an employee under CERCLA).

19. See *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988) (held that waste generator defendants must present specific evidence demonstrating that all of their waste was removed from the site prior to the release of hazardous materials, thereby establishing that their waste was not associated with the release).

20. CERCLA § 101(9) defines a "facility" broadly. The courts, too, interpret CERCLA broadly. See *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (held that a subdivision built on the site of a defunct wood-treating operation is a "facility" within the meaning of CERCLA § 101(9)).

21. See *supra* note 12.

22. See *supra* note 13.

23. See *Tanglewood East Homeowners*, 849 F.2d 1568 (rejected defendant's argument that liability may be imposed upon only those persons who both own and operate a polluted property).

24. See *infra* note 106.

25. See *infra* notes 32-35 and accompanying text.

26. See *infra* note 104 and accompanying text.

27. See *Roger J. Marzulla & Brett G. Kappel, Lender Liability Under the Comprehensive Environmental Response, Compensation and Liability Act*, 41 S.C.L. REV. 705 (1990).

28. See *United States v. Maryland Bank and Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (defendant lender was held liable under section 107(a) as a current owner when it foreclosed on and subsequently purchased and maintained ownership of contaminated property).

29. See *infra* notes 31-35 and accompanying text.

In sum, the CERCLA liability scheme allows the federal government to place the burden for cleanup costs on PRPs who are essentially "innocent" with respect to the hazardous substances at a site. The resulting remediation costs may run into millions of dollars. The remediation activities may include conducting extensive hydrogeological investigations to characterize the contamination, excavation of the site, disposal or treatment of contaminated soil and groundwater, providing alternate water supplies to those affected by the contamination, conducting health effects studies, and other costs associated with the hazardous substances.³⁰

III. The Defenses to CERCLA Liability

A. The Security Interest Exception for Lenders

1. The Statutory Scheme: CERCLA Section 101(20)(A)

Section 101(20)(A)(iii) of CERCLA provides an exception to the definition of "owner and operator." This exception applies to a lender who, "without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest."³¹ The key to this "security in-

30. CERCLA §§ 104, 107.

31. CERCLA § 101(20) states:

(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control [of a facility] involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this

terest" exception is the interpretation of the phrase "participating in the management of a . . . facility."³²

The section 101(20)(A)(iii) security interest exception indicates a congressional intent to provide protection for financial institutions that hold title primarily to secure a loan, as long as the financial institution does not participate in the management of the facility.³³ Unfortunately, neither the statute nor the sparse legislative history of CERCLA provides meaningful guidance on the degree of management participation required to incur liability.³⁴ No clear standards exist for establishing whether a lender has participated in the management of a facility.³⁵ The lack of standards has created an acute problem in the banking community, as enormous CERCLA liability may arise from small and apparently benign properties.³⁶ The problems associated from the lack of standards has been exacerbated by conflicting interpretations by the federal courts of appeal.³⁷

2. The Security Interest Exception As Applied by the Courts

The initial standard for management participation was established in *United States v. Mirabile*.³⁸ The *Mirabile* court held that a secured creditor who does not participate in the

chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 [CERCLA § 107] of this title.

32. See Roslyn Tom, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 926 (1989).

33. CERCLA § 101(20)(A)(iii).

34. The House Report on CERCLA provides no guidance for interpreting the meaning of the section 101(20)(A) phrase "participating in the management of a facility." See H.R. REP. NO. 172, 96th Cong., 2d Sess. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 6160, 6181.

35. See Michele B. Corash & Lawrence Behrendt, *Lender Liability Under CERCLA: Search for a Safe Harbor*, 43 SW. L.J. 863, 865 (1990); Tom, *supra* note 32.

36. Corash & Behrendt, *supra* note 35, at 865. "[M]any lenders are now reluctant to make loans to borrowers that face even a small possibility of environmental liability." *Id.*

37. See *infra* notes 49-56 and accompanying text.

38. [15 Litigation] Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992, (E.D. Pa. Sept. 4, 1985); [15 Litigation] Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985).

operational, production, or waste disposal activities of a borrower's facility is free from liability if the creditor merely forecloses on the property after the cessation of hazardous waste activities.³⁹ *Mirabile* distinguished "nuts-and-bolts involvement" with hazardous substances from mere financial involvement, holding that the security interest exception shields creditors from liability unless they have participated in the "operational, production, or waste disposal activities" of the facility.⁴⁰ The *Mirabile* standard was applied, more or less, in lender liability cases until 1990.⁴¹

The *Mirabile* security interest exception was narrowed in *United States v. Maryland Bank and Trust Co.*⁴² In *Maryland Bank*, the defendant lender foreclosed on and held title to a contaminated waste site. The EPA subsequently undertook remediation activities at the site. The government then undertook an enforcement action against the defendant lender.⁴³ The *Maryland Bank* court held that the security interest exception was not available to a foreclosing lender who holds title to a facility at the time of a cleanup.⁴⁴ A lender in such a situation has an ownership interest rather than a security interest, and is thus not protected by the secured creditor exception.⁴⁵ The *Maryland Bank* court distinguished *Mirabile* on the basis that the *Mirabile* lender promptly (within four months) assigned the facility to a third party upon foreclosure.⁴⁶ The court warned that a broadened application of the security interest exception to mortgagees-turned-owners "would convert CERCLA into an insurance scheme for financial institutions." "[M]aking prudent loans" was the recommended course for lender protection.⁴⁷

39. [15 Litigation] *Envtl. L. Rep. (Envtl. L. Inst.)* at 20,993. In *Mirabile* the secured creditor successfully bid on the property at the foreclosure sale, but subsequently assigned their bid to the *Mirabiles*. *Id.*

40. [15 Litigation] *Envtl. L. Rep. (Envtl. L. Inst.)* at 20,996-97.

41. *See infra* text accompanying note 49.

42. 632 F. Supp. 573 (D. Md. 1986).

43. *Id.* at 575-76.

44. *Id.* at 579.

45. *Id.*

46. *Id.* at 579, n.5; *see also id.* at 580.

47. *Id.* at 580.

The *Mirabile* standard for management participation was applied by a federal district court in the first of the *United States v. Fleet Factors Corp.*⁴⁸ decisions. The district court in *Fleet Factors* held that the security interest exception permits a creditor to provide financial assistance, and even isolated instances of specific management advice, to its debtors without risking CERCLA liability if the creditor does not participate in the day-to-day management of the facility.⁴⁹

Both the *Mirabile* and *Maryland Bank* standards were applied in *Guidice v. BFG Electroplating and Manufacturing Corp.*⁵⁰ The court in *Guidice* held that a bank's inspection of a borrower's contaminated facility and participation in its financial matters did not violate the terms of the security interest exception prior to the bank's foreclosure on and purchase of the property.⁵¹ Upon foreclosure, however, the bank became liable as a current owner.⁵²

After several years of relative consistency in which the courts permitted lenders to take limited action without violating the secured creditor exemption, the scope of the exemption was drastically narrowed by the Eleventh Circuit in the appeal of the *Fleet Factors* decision. In the *Fleet Factors* appeal,⁵³ the Eleventh Circuit rejected the *Mirabile* nuts-and-bolts standard as too permissive. Instead, it held that a secured creditor may become liable "by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."⁵⁴ This "capacity to influence" test created a much broader standard for lender management participation than the *Mirabile* standard and raised potential lender liability to a new level. *Fleet Factors* essentially changed the interpretation of management participation from one of actual participation

48. 724 F. Supp. 955 (S.D. Ga. 1988), *rev'd*, 901 F.2d 1550 (11th Cir. 1990).

49. *Id.* at 960.

50. [20 Litigation] *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,439 (W.D. Pa. Sept. 1, 1989).

51. *Id.* at 20,441.

52. *Id.* at 20,441-42.

53. *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990).

54. *Id.* at 1557.

to one of an ability to participate. To qualify for the security interest exception under *Fleet Factors*, lenders must limit their role to one in which they are incapable of influencing their borrowers' hazardous substance management practices. While lenders who do so may be protected from CERCLA liability, they also assume the additional risk of the toxic destruction of their security interest. Such a dilemma was discounted by the *Fleet Factors* court, which explained that rather than encouraging lenders to disassociate themselves from their borrowers' operations, the "capacity to influence" test "should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors."⁵⁵ The *Fleet Factors* decision thus endorses an active role for lenders in policing the environmental integrity of their borrowers' facilities.

The Eleventh Circuit's "capacity to influence" test was avoided by the Ninth Circuit in *In re Bergsoe Metal Corp.*⁵⁶ *Bergsoe* involved a sale of bonds to finance a lead recycling facility operated by Bergsoe. Due to financial difficulties, Bergsoe was forced into bankruptcy by the bank who held the bonds, and by the issuer of the bonds, the Port of St. Helens, to whom Bergsoe was indebted. When the bank filed suit against Bergsoe's owners to collect on its debt, Bergsoe's owners counterclaimed, alleging that the bank and the Port were liable under CERCLA for the cost of cleaning up lead contamination caused by Bergsoe's operation at the facility. To determine whether the security interest exception applied to the bank and the Port, the court first carefully considered the purpose for which the Port held the deed to the Bergsoe property. It found that the Port's purpose was limited to protecting a security interest. The second step in the court's analysis was to determine whether the bank and the Port participated in the management of the facility. The court considered the rule articulated by the Eleventh Circuit in *Fleet Factors*, but avoided endorsing the *Fleet Factors* "capacity to influence" standard.

55. *Id.* at 1558.

56. 910 F.2d 668 (9th Cir. 1990).

In *Bergsoe*, the court claimed to avoid ruling on a management participation standard, preferring to "leave for another day" the opportunity to establish such a rule.⁵⁷ The court reasoned that under any interpretation of CERCLA's management participation doctrine "there must be some actual management of the facility before a secured creditor will fall outside the exception. Here there was none, and we therefore need not engage in line drawing."⁵⁸ Although the Ninth Circuit claimed to avoid articulating a rule which would conflict with the Eleventh Circuit's *Fleet Factors* decision, the Ninth Circuit's standard of actual participation can be interpreted to be at odds with the Eleventh Circuit's "capacity to influence" standard.

The United States Supreme Court, at the urging of the federal government, has declined to settle the differences among the Circuit Courts of Appeals.⁵⁹ The Supreme Court decided not to consider an appeal of the Eleventh Circuit's *Fleet Factors* decision,⁶⁰ in which it could have articulated a management participation standard.

3. The EPA's Proposed Interpretive Rule Defining Lender Liability Issues

In an effort to clarify the permissible level of lender management participation under the secured creditor exemption, the EPA has issued a proposed rule to limit liability of financial institutions under CERCLA.⁶¹ Recognizing that the Elev-

57. *Id.* at 672.

58. *Id.*

59. *Lender Liability Under Superfund Law Will Not Be Reviewed By Supreme Court*, [21 Current Developments] Env't Rep. (BNA) 1675 (Jan. 18, 1991).

60. *Id.* Review was denied because of the interlocutory nature of the appeal. The case will return to the federal district court to determine the degree of the defendant's management participation at the facility. *Id.*

61. *EPA Proposal to Limit Liability of Financial Institutions Under CERCLA (Signed June 5, 1991)*, [22 Current Developments] Env't Rep. (BNA) 430 (June 14, 1991). The proposed rule would be codified as a revision to the National Contingency Plan, 40 C.F.R. §§ 300.1 - 300.86 (1991). This proposal was issued twice in draft form. See *Proposed Draft Rule on Lender Liability Under CERCLA (Jan. 24, 1991)*, [21 Current Developments] Env't Rep. (BNA) 1908 (Feb. 22, 1991); *EPA Draft Proposal Defining Lender Liability Issues Under the Secured Creditor Exemption of CER-*

enth Circuit's *Fleet Factors* "capacity to influence" standard heightened lender uncertainties, the EPA's proposed rule specifies the type of actions which may be taken by lenders while remaining within the bounds of the exemption.

Under the proposed rule, the section 101(20)(A) phrases "indicia of ownership" and "primarily to protect a security interest" would serve to limit the exemption to true security interests.⁶² The proposed rule would allow a foreclosing creditor to take possession of a secured property without triggering CERCLA liability, provided that the creditor acts solely to protect a security interest.⁶³ New or continuing releases of hazardous substances would not trigger section 107 strict liability unless a plaintiff could prove that the defendant is an "owner or operator."⁶⁴

The proposed rule defines the section 101(20)(A) phrase "participation in the management of a facility," which has been the main source of uncertainty following the *Bergsoe*

CLA (Sept. 14, 1990), [21 Current Developments] Env't Rep. (BNA) 1162 (Oct. 12, 1990) [hereinafter *EPA Draft Proposal*].

62. The proposed rule states that the security interest exception is limited to a "legally recognized security interest, and not an interest in property held for some other reason," such as for investment purposes. [22 Current Developments] Env't Rep. (BNA) at 435. The distinction between "interests in the nature of an investment" and "security interests" may, in some circumstances, be a difficult one, especially where property held by a lender serves dual purposes of securing a debt and producing revenue. See *id.* The "facts of each case" determine whether a transaction creates a security interest within the section 101(20)(A) exemption. *Id.* at 442 n.4.

63. *Id.* at 438. In order to demonstrate that a foreclosed-on property is held to protect a security interest, the creditor must at least advertise the property for sale within twelve months of foreclosure, and not reject a written offer of fair consideration at any time after six months after foreclosure.

This issue has raised concern among federal agencies, particularly the Department of Housing and Urban Development, the Federal Deposit Insurance Corporation, and the Small Business Association. *Property Held For More Than Six Months Not Investment, Agencies Say on Lender Liability*, [21 Current Developments] Env't Rep. (BNA) 1733 (Feb. 1, 1991). These agencies and others may be under a statutory duty to maximize financial recovery on defaulted loans, which could require holding foreclosed properties for more than six months. *Id.* However, the proposed rule reiterates CERCLA's exception from the definition of "owner and operator" for government entities who involuntarily acquire contaminated property. [22 Current Developments] Env't Rep. (BNA) at 442 n.14. See also *supra* note 31.

64. [22 Current Developments] Env't Rep. (BNA) at 434.

*Metal*⁶⁵ and *Fleet Factors*⁶⁶ decisions. The proposed rule states:

Participation in the management of a facility means, for the purpose of Section 101(20)(A), actual participation in the management or operational affairs by the holder of the security interest, and does not include the mere capacity, or ability to influence, or the unexercised right to control facility operations.⁶⁷

A security holder would be considered to be participating in management if it exercised decision making or management-level control over its borrowers' environmental compliance to such a degree that it undertakes responsibility for hazardous substance management practices.⁶⁸ A lender would not be considered to be participating in management by inspecting the secured property or even requiring the borrower to clean up hazardous substances during the term of the security interest.⁶⁹ Loan work out activities would not be considered to be participating in management, if structured to "protect and preserve the security interest in an effort to prevent default of the obligation or the diminution in value of the security."⁷⁰ Owner and operator liability will attach, however, when a secured creditor's actions cause a release or threatened release of hazardous substances, thereby creating an independent basis for liability under CERCLA section 107(a).⁷¹

By requiring a standard of actual management participation, rather than the mere ability to participate, the proposed rule endorses the Ninth Circuit *Bergsoe Metal* position and rejects the Eleventh Circuit "capacity to influence" standard as articulated in *Fleet Factors*.

The promulgation of the EPA rule would be a significant

65. 910 F.2d 668 (9th Cir. 1990).

66. 901 F.2d 1550 (11th Cir. 1990).

67. [22 Current Developments] Env't Rep. (BNA) at 441.

68. *Id.*

69. *Id.*

70. *Id.*

71. *See id.* at 437.

step in reducing secured creditor confusion. Not only would the proposed rule serve as a basis for limiting the circumstances in which the government would be inclined to bring a CERCLA action against a secured creditor,⁷² it would also provide definitions and guidelines for courts to apply in third-party CERCLA cost recovery actions against lenders.⁷³

4. Proposed Legislation to Amend and Expand the Security Interest Exception

In addition to the regulations being developed by the EPA, the battle against secured creditor confusion is also being fought in Congress. In 1989, two House bills were introduced by Congressman LaFalce.⁷⁴ These bills sought to include commercial lending institutions, who acquire "ownership or control" of a contaminated property in order to protect a security interest, within the section 101(20)(D) exception for governmental entities who involuntarily acquire contaminated properties through sovereign action.⁷⁵ A bill with a similar effect was introduced by Senator Garn in 1990.⁷⁶ Had any version of these bills been enacted, the protection afforded to governmental entities by section

72. See *Lender Liability Issues Attract Attention at Annual American Bar Association Meeting*, [22 Current Developments] *Env't Rep. (BNA)* 1148, 1149 (Aug. 23, 1991).

73. *Id.* at 1148-49.

74. H.R. 2085, 101st Cong., 1st Sess., 135 CONG. REC. E 1325 (1989); H.R. 4494, 101st Cong., 2d Sess., 136 CONG. REC. E 1023 (1989).

75. See *supra* note 31.

76. Senator Garn proposed S. 2827, 101st Cong., 2d Sess. (1990), an amendment to the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1832 (1988), to provide that: No insured depository institution or mortgage lender shall be liable under any law imposing strict liability for the release, threatened release, storage or disposal of a hazardous substance or similar material from property -

(1) acquired through foreclosure;

(2) held in a fiduciary capacity; or

(3) held, controlled or managed pursuant to the terms of an extension of credit.

This exemption would not apply to any person who (1) caused the release, (2) failed to take reasonable precautions to prevent the release, or (3) benefitted from a government response action.

S. 2827, 101st Cong., 2d Sess. § 1102 (1990).

101(20)(D) would have been broadened to protect private interests. Liability would not attach to lenders participating in management to such a degree amounting to "control" if such control was exercised for the purpose of protecting a security interest. Neither would owner liability attach upon foreclosure.⁷⁷

Such restructuring of the CERCLA liability scheme would significantly shift the burden for hazardous waste site clean up costs from the private to the public sector. Section 101(20)(D), as it stands, protects government entities from CERCLA liability where they involuntarily acquire title through sovereign action,⁷⁸ thus allowing the cleanup of publicly owned contaminated sites to be financed by the Superfund.⁷⁹ If government entities were not protected by section 101(20)(D) and had to expend their own funds for hazardous waste clean up, the Superfund would be strengthened while the unfortunate government entities suffered. This would merely amount to a redistribution of government funds. However, the proposed broadening of section 101(20)(D) to include mortgage lenders would benefit private entities at the expense of the Superfund. Such a policy conflicts with Congress' intention to hold private parties strictly liable for the costs of cleanup, particularly those who directly or indirectly benefit from the release of hazardous substances.⁸⁰ The proposed legislation would amount to a bailout for lenders who finance contaminated sites.

A more sound policy would be to develop definitive standards for CERCLA lender liability over institutions which commit loan funds and exercise management control of secured properties.⁸¹ More recently proposed legislation em-

77. S. 2827, 101st Cong., 2d Sess. § 1102 (1990).

78. See *supra* note 31.

79. See *supra* note 15.

80. See Roger J. Marzulla, *Keynote Address*, [18 News & Analysis] *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,350 (Sept. 1988). "Congress has made the choice in CERCLA . . . that the responsibility for cleaning up hazardous waste across this nation ought to rest upon those who in one way or another profited from, or otherwise helped to create, those sites." *Id.* at 10,351.

81. Marzulla & Kappel, *supra* note 27, at 732.

braces this approach, focusing on providing definitions and standards rather than blanket protection for lenders. In 1991, Congressman Owens proposed the "Superfund Liability Clarification Act," which defines management participation consistently with the EPA's proposed rule.⁸² A bill introduced in 1991 by Congressman LaFalce provides similar clarification of the secured creditor exemption.⁸³ Both of these bills clarify the scope of the exemption while leaving CERCLA's basic policy intact. Creditors are permitted to take environmentally responsible action to protect their security interest without incurring CERCLA liability. Under the Owens bill, a lender causing or contributing to a release of hazardous substances is strictly liable under CERCLA section 107(a),⁸⁴ while under the LaFalce bill the liability of such a lender is limited to the costs attributable to his actions.⁸⁵

82. H.R. 1643, 102d Cong., 1st Sess. (1991). Under H.R. 1643: participation in the management of a vessel or facility does not include -

(I) selling collateral;

(II) actions taken by a mortgage lender [to conduct environmental investigations into a borrower's facility consistent with guidelines imposed pursuant to H.R. 1643];

(III) actions taken by a mortgage lender . . . upon learning of any contamination so as not to cause a release . . . or [to] wind down the affairs of the owner . . . or while diligently proceeding to pass title of the vessel or facility;

(IV) the status of having the capacity or ability to affect hazardous waste disposal management decisions of the vessel or facility; or

(V) engaging in so-called 'work-out' activities

Id. § 2.

83. H.R. 1450, 102d Cong., 1st Sess. (1991). This bill defines the term "participating in the management" as "actual, direct, and continual or recurrent exercise of managerial control by a person over the vessel or facility in which he or she holds a security interest, which managerial control materially divests the borrower . . . of such control." *Id.* § 1.

84. "Nothing in this subparagraph shall affect the liability . . . of a person who, by any act or omission, causes or contributes to a release . . ." H.R. 1643, 102d Cong., 1st Sess. (1991).

85. H.R. 1450, 102d Cong., 1st Sess., § 1 (1991). "A person who . . . causes or exacerbates a release or threatened release . . . shall be liable for the cost of such response, to the extent that the release or threatened release is attributable to the person's activities." *Id.* § 1. Congressman LaFalce maintains that this provision would create a "carrot and stick" situation for creditors. By imposing liability based on fault, secured creditors would be encouraged to take environmentally responsible action without becoming exposed to the full force of strict CERCLA liability. See 137 CONG. REC. H1769, H1770 (daily ed. Mar. 14, 1991)(statement of Rep. LaFalce).

Senator Garn introduced the most pro-banking bill of the 102d Congress, the "Federal Deposit Insurance Improvements Act of 1991."⁸⁶ The Garn bill would limit hazardous waste liability on "insured depository institutions" and "mortgage lenders" to the "actual benefit conferred" on the lender by the cleanup, provided the lender has not actively directed or conducted the operation resulting in the release.⁸⁷ In addition, the bill rejects *Fleet Factors* by prohibiting hazardous substance liability "based solely on . . . the unexercised capacity to influence" operations.⁸⁸

5. Policy Considerations

In order to clarify the current standard of lender liability, Congress must reconcile two conflicting views on how to promote environmentally responsible action by lending institutions. One view promotes an active role for the commercial lending industry in investigating and policing the environmental liability of its borrowers. Under this view lending institutions would not subject themselves to CERCLA liability by influencing the owners of properties to take environmentally corrective action.⁸⁹ Congress implicitly endorsed this view in CERCLA section 101(20)(d), added by SARA in 1986, by expressly providing a broad exception from liability for governmental entities but left unchanged the security interest exception for lenders.⁹⁰ Under the other view, subjecting lending institutions to broad CERCLA liability would encourage increased foresight and supervision.⁹¹

86. S. 651, 102d Cong., 1st Sess. (1991).

87. *Id.* § 152(a). The bill also provides protection from costly CERCLA cleanup actions by stating that "actual benefit conferred . . . shall not exceed the fair market value of the property following such action." *Id.* § 152(b).

88. *Id.* § 152(a)(3).

89. See *supra* note 85 and accompanying text.

90. See *supra* note 31; Alan P. Vollmann, *Double Jeopardy: Lender Liability Under Superfund*, 16 REAL EST. L.J. 3, 11 (1987).

91. Critics of lender liability reform argue that the redefinition of management participation as proposed by the EPA rule and the LaFalce and Garn bills would "remove an effective enforcement tool and reduce environmental vigilance of lenders." *EPA Official Disputes Need Under CERCLA for Amendment Offering Protection to Lenders*, [21 Current Developments] Env't Rep. (BNA) 2252 (Apr. 19, 1991).

Holding lenders liable for their borrower's toxic releases requires the commercial lending industry to employ environmental safeguards prior to and after financing a transaction.⁹² Prudent lenders will both thoroughly investigate a site prior to the financing of a transaction⁹³ and closely monitor their debtors' hazardous waste management practices during the life of the security interest.⁹⁴

The policy of holding lenders strictly liable for minimal management participation is countered by three arguments. First, such requirements make it difficult for borrowers to secure loans.⁹⁵ Lenders must effectively "self-insure" their operations, resulting in heightened caution in committing loan funds and higher interest rates.⁹⁶ Congress has recognized that

State attorneys general have also asserted that such provisions would weaken state efforts to clean up hazardous substance sites. *See id.* at 2253; *see also* Amy T. Phillips, *EPA's Lender Liability Rule: A Sweetheart Deal For Bankers?*, [22 Current Developments] *Env't Rep.* (BNA) 1158 (Aug. 23, 1991).

92. *See* Paul A. Dominick & Leon C. Harmon, *Lender Limbo: The Perils of Environmental Lender Liability*, 41 S.C. L. REV. 855 (1990). "In order to minimize exposure to environmental liability, lenders should develop an environmental risk and liability policy." *Id.* at 870.

93. The *Fleet Factors* court stated that setting the management participation standard at the "capacity to influence" level "should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors." 901 F.2d at 1558. Thorough investigation is thus the pre-acquisition safeguard required under *Fleet Factors*.

94. The *Fleet Factors*' court stated, "[s]imilarly, creditors' awareness that they are potentially liable under CERCLA will encourage them to monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support." *Id.* Creditors are especially well situated to investigate the hazardous waste treatment policies of their debtors. Risk will be weighed into loan agreements, thus creating financial incentives for good hazardous waste management practices by borrowers. *Fleet Factors*, 901 F.2d at 1558, n.12. Commentators have reasoned that the driving force behind CERCLA is to clean up hazardous waste sites; therefore, hazardous waste liability should be treated as a necessary cost of doing business and less debate should be devoted to the protection of "innocent landowner[s]." *See* Roger D. Schwenke, *Environmental Liabilities Imposed on Landowner, Tenants, and Lenders - How Far Can and Should They Extend?*, [18 News & Analysis] *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,361, 10,362 (Sept. 1988).

95. "The spectre of lender liability under CERCLA threatens to stop lenders from making loans with any component of environmental risk." Corash & Behrendt, *supra* note 35, at 885.

96. *See* Laurie J. Hammers & T. Patton Youngblood, Comment, *The Battle Continues: Lenders are Still Searching for Well-Defined Methods to Avoid Hazard-*

strict CERCLA liability and the judiciary's narrow view of the statutory defenses have created a "credit crunch" for farmers, small businesses, contractors, and manufacturers.⁹⁷

Second, it may be impractical for the lending industry to shoulder such a large burden in enforcing safe environmental practices. If lenders decide to retain even minimal influence over their borrower's operations, they may expose themselves to strict liability as facility operators.⁹⁸ Therefore, lenders who chose to retain any degree of control will be forced to exert complete control, effectively serving as environmental policemen with respect to their borrowers' facilities.⁹⁹ This may not be an efficient or practical means of insuring environmental compliance. The third reason is a corollary to the second reason. If lenders decide that they do not want to risk incurring liability as facility operators, they will be forced to relinquish all capability of management participation. These lenders will distance themselves from their borrower's hazardous waste management programs and abandon, rather than assume control of, contaminated properties.¹⁰⁰

ous Waste Cleanup Liability, 19 STETSON L. REV. 633, 657 (1990).

97. 136 CONG. REC. S10,115 (daily ed. July 19, 1990) (statement of Sen. D'Amato); see 136 CONG. REC. E1023 (daily ed. Apr. 4, 1990) (statement of Rep. LaFalce) (there is "a disturbing trend in hazardous waste liability law which is threatening the ability of thousands of small businesses to obtain the financing they need to survive").

98. See *supra* note 53 and accompanying text.

99. See Dominick & Harmon, *supra* note 92, at 870. Lenders must scrutinize borrowers' past records and potential liability with respect to environmental problems and carefully evaluate the environmental condition of the property serving as loan security. *Id.*

100. See Marzulla & Kappel, *supra* note 27, at 723 (lenders should "minimize participation in the borrower's business or ownership of the property. . . . [U]pon default, the lender should carefully weigh the risks [involved] in [a] foreclosure."); Tom, *supra* note 32, at 928 ("[a] narrow interpretation of the phrase 'participating in the management' . . . could encourage banks to monitor waste sites . . . [and] engage in workouts to recover loans . . . thus [enhancing the likelihood] that small waste problems do not increase . . ."); Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139, 180 ("the very lenders who could conceivably encourage borrowers to engage in safer waste handling and disposal practices also could be dissuaded from offering hazardous waste disposal advice for fear of later being held liable for cleanup costs").

B. The Innocent Landowner Defense

Unlike the section 101(20)(A) exemption, which is only available to creditors, the section 107(B)(3) innocent landowner defense is available to any PRP facing liability as a facility owner, provided that the statutory requirements are met. In enacting section 107(b)(3), Congress intended to protect parties who exercised due care in the purchase of property, and were nonetheless ignorant that the property was contaminated.¹⁰¹ The defense also can be used by lenders who have foreclosed on contaminated facilities and are otherwise liable as facility owners under section 107(a).¹⁰²

1. The Statutory Scheme: CERCLA Section 107(b)(3)

Once a PRP has been identified under section 107(a), there are three defenses available under section 107(b). The section 107(b) defenses are: (1) an act of God; (2) an act of war; and (3) the "innocent landowner" defense. To qualify for the "innocent landowner" defense, the owner of a contaminated site must prove that the contamination was caused by a third party "in connection with a contractual relationship," and that the owner exercised "due care" with respect to hazardous substances.¹⁰³

101. See H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 186 (1986).

102. The section 107(b)(3) defense may be asserted by a lender in addition to the section 101(20)(A) secured creditor exemption. The *EPA Draft Proposal* states: "[i]n the limited circumstances in which the secured lender is not in a position to claim the security interest exemption for property which it owns, the lender/owner may seek to defend itself as an innocent landowner in the same manner." See *supra* note 61, at 1166.

103. CERCLA § 107(b) states:

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

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the

As CERCLA was originally enacted in 1980, the terms "contractual relationship" and "due care" were not defined. As a result, it was unclear whether "due care" required a purchaser of a contaminated site to exercise due care prior to acquisition in order to avoid acquiring a contaminated site, whether it merely required that a purchaser exercise due care with respect to hazardous waste after acquisition of the site, or both.

The requirement that the third party action did not occur "in connection with a contractual relationship" with the defendant was even more confusing. It was unclear whether deeds or other forms of conveyance established a "contractual relationship" for section 107(b)(3) purposes. Furthermore, assuming that a deed establishes a "contractual relationship," defendants could argue that the action which caused the release did not occur in connection with the contractual relationship. To clarify the duties of a prospective purchaser, Congress defined the term "contractual relationship" in SARA. Section 101(35)(A), added in SARA, provides that a "contractual relationship" is established by deeds and other instruments transferring title, unless the owner was not responsible for the contamination of the site and, prior to purchasing the site, exercised due diligence in investigating the potential presence of hazardous substances.¹⁰⁴

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 omission; or

(4) any combination of the foregoing paragraphs.

104. CERCLA § 101(35) states:

(A) The term "contractual relationship", for the purpose of [§107(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 and 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 sub-

The effect of the definition of "contractual relationship" is that the section 107(b)(3) defense now turns on whether a purchaser has conducted an "appropriate inquiry" prior to acquisition. If the findings of the inquiry give the purchaser no knowledge or reason to know of any release or threatened release of a hazardous substance, then the purchaser has no constructive knowledge of the presence of contamination and is deemed to have no "contractual relationship" with the previous ownership.

Unfortunately, the "appropriate inquiry" standard provides no indication as to what methods, if any, should be used to detect hidden contamination prior to a transaction. No definitive regulations or guidelines exist for determining whether an "innocent" owner of a contaminated site has satisfied the pre-purchase "appropriate inquiry" requirement.¹⁰⁵ Thus, a purchaser of real estate has no certain method of protecting

stance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

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

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

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of [§ 107(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.

105. The EPA has endorsed a subjective standard for evaluating "all appropriate inquiry." Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, DeMinimus Settlements Under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property, 54 Fed. Reg. 34,235 (1989). A "determination as to what constitutes 'all appropriate inquiry' under all the circumstances is to be made on a case by case basis. . . . In sum, the determination will be made on the basis of what is reasonable under all of the circumstances." *Id.* at 34,238.

himself from potential CERCLA liability.¹⁰⁶

2. The Innocent Landowner Defense As Applied by the Courts

This section discusses the existing section 107(b)(3) case law, in which defendants have rarely succeeded. As is the case with lender liability, judicial interpretation of the terms of the defense has been inconsistent, making it difficult to identify a clear rule.¹⁰⁷

In situations where a purchaser acquires a previously contaminated site, the defense is not available if the release of hazardous substances continues after the new owner takes title.¹⁰⁸ The defense is most often denied on the basis of the purchaser's knowledge, prior to purchase, of the potential presence of hazardous waste at the site. If the purchaser or his hired consultants possess or should possess a suspicion that hazardous materials are present, the defense may be denied.¹⁰⁹ Even where a purchaser's consultants and engineers inspect a facility prior to purchase and report that it is free of hazard-

106. Innocent landowners are "more than anxious to act in good faith and follow the rules. They just do not know what the rules are any longer." 137 CONG. REC. E1129, E1130 (daily ed. Mar. 22, 1991) (statement of Rep. Owens).

107. G. Van Velsor Wolf Jr., *Emerging Contours of the CERCLA "Innocent Purchaser" Defense*, [20 News & Analysis] *Envtl. L. Rep.* (Envtl. L. Inst.) 10,483 (Nov. 1990).

108. *See New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (held that where a current owner of a site had knowledge of a past operator's hazardous waste activities and failed to take precautions against the operator's foreseeable acts, the section 107(b)(3) defense was precluded).

109. *See Jersey City Redevelopment Auth. v. PPG Indus.*, 655 F. Supp. 1257 (D.N.J. 1987) (where evidence indicated that defendant site owner had knowledge that soil at his site was contaminated, and then sold the soil to plaintiff with the knowledge that plaintiff intended to use the soil as fill, the section 107(b)(3) defense was unavailable even though defendant was not responsible for the presence of the contamination in the soil. PPG eventually agreed to pay \$83.4 million under a New Jersey Consent decree); *Wickland Oil Terminals v. Asarco, Inc.*, [19 Litigation] *Envtl. L. Rep.* (Envtl. L. Inst.) 20,855 (N.D. Cal. Feb. 23, 1988) (even where a purchaser of a contaminated site had been misled by the former owners or was genuinely unaware of the potential for contamination, where the purchaser's hired consultants and counsel possess information on the presence of hazardous substances at the site and the purchaser somehow fails to obtain such information, the section 107(b)(3) defense is unavailable).

ous waste, the purchaser may not be protected. A 1988 case, *BCW Assoc. Ltd. v. Occidental Chemical Corp.*,¹¹⁰ denied the defense although the defendant owner and lessor hired an environmental consulting firm and an engineering firm to inspect a warehouse prior to purchase. In *BCW Assoc.*, the court held that the defense was unavailable because: 1) the defendants had knowledge of the presence of dust in the warehouse, although at the time they did not know it was actually hazardous lead dust; 2) it was defendants' activities in the warehouse after they took possession that caused the release of the dust from the rafters; and 3) the defendants purchased the warehouse "as is" and received substantial benefit from its cleanup.¹¹¹

The defense is not available to an owner of a contaminated site where the contamination was caused by a lessee, because a "contractual relationship" exists between the parties.¹¹² Similarly, the owner of a site may not assert the defense on the basis that the contamination was caused by an illegal act of an employee, regardless of whether the act was within the scope of employment.¹¹³ The defense is generally not available to previous owners and operators of contaminated sites, or to hazardous waste generator defendants, regardless of who is responsible for the release of the waste or how long after waste generation the release occurs.¹¹⁴ Courts

110. 3 Toxics L. Rep. (BNA) 943 (E.D. Pa. Sept. 30, 1988), available in LEXIS, Env'tl. Library.

111. *Id.*

112. See *Washington v. Time Oil Co.*, 687 F. Supp. 529 (W.D. Wash. 1988) (the government's summary judgment motion was granted, denying defendant-lessor's defense that his lessee was responsible for contaminating the site).

113. See *City of Philadelphia v. Stepan Chem. Co.*, [18 Litigation] Env'tl. L. Rep. (Env'tl. L. Inst.) 20,133 (E.D. Pa. July 28, 1987) (although the contamination was caused solely by the illegal acts of employees, who accepted bribes to allow hazardous waste dumping at a city landfill, the court held that the employment contract established a "contractual relationship" and that the CERCLA defense did not incorporate the common law principle that employers are only liable for the acts of their employees within the scope of employment); *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985) (the defense was unavailable where a facility owner paid a third party to dispose of the owner's PCB-contaminated oil).

114. See *United States v. Hooker Chem. and Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988) (held that even if Hooker's predecessor had merely disposed of the

strictly construe the section 107(b) requirement that the release be caused solely by the act of a third party with whom the defendant had no contractual relationship.¹¹⁵ In some circumstances, defendants have survived the government's motion for summary judgment. In *United States v. Mirabile*, the court applied a pre-SARA standard in denying the government's motion for summary judgment on the issue of the section 107(b)(3) defense.¹¹⁶ The court held that the defendants could avail themselves of the section 107(b)(3) defense if they "could establish that [they] purchased property on which hazardous wastes were placed by others and that [they] did not add to those wastes[,] exercised due care with respect to the wastes[, and] took precautions against foreseeable acts or omissions of others."¹¹⁷ The defense was not defeated for summary judgement purposes merely because several hundred leaking and decomposing drums were visible on the site at the

waste and that the release and migration of the waste were solely caused by a third party with no contractual relationship, Hooker would be jointly and severally liable for any and all harm caused by the combination of events); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988) (held that waste generator defendants must present specific evidence demonstrating that all of their waste was removed from the site prior to the release of hazardous materials, thereby establishing that their waste was not associated with the release). *But see Westwood Pharmaceuticals v. National Fuel Gas Distrib.*, 737 F. Supp. 1272 (W.D.N.Y. 1990) (defendant property seller survived a motion for summary judgment on the issue of whether it was entitled to assert the innocent landowner defense because there was a factual question as to whether a third party caused the release of hazardous substances placed in the ground by the defendant. The court distinguished *Hooker* on the ground "that not every contractual relationship precludes a former owner from invoking section 107(b)(3) and the [defendant was] entitled to present proof that [the] construction activities at the site were not undertaken 'in connection with' its contractual relationship"). *Id.* at 1286.

115. See *United States v. Western Processing Co.*, 734 F. Supp. 930 (W.D. Wash. 1990) (third-party defense fails where the government has proved that at least some of defendant's arsenic contamination is at the site and defendant merely offers speculative and uncertain proof that arsenic contamination is attributable to other parties); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532 (W.D. Mich. 1989) (the section 107(b)(3) defense is not available where defendants have failed to argue that a third party was the sole cause of the release).

116. [15 Litigation] *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,992 (E.D. Pa. Sept. 4, 1985).

117. *Id.* at 20,994.

time of purchase.¹¹⁸

Similarly, in *United States v. Serafini*,¹¹⁹ the government's motion for summary judgment on the issue of the defense was denied due to the government's failure to present specific evidence showing that defendant Serafini had "specialized knowledge" or "reason to know" of the presence of hazardous substances at the site.¹²⁰ The court was not persuaded by the government's showing that over 1,000 fifty-five-gallon drums were visible at the time of purchase,¹²¹ holding that a failure to inspect the site is not necessarily inconsistent with the section 101(35)(B) requirement of all appropriate inquiry consistent with good commercial practice.¹²²

In *International Clinical Lab. v. Stevens*,¹²³ the court suggested that a purchaser of a contaminated site was protected by the section 107(b)(3) defense even though the purchaser failed to inquire into public records which would have alerted him to the presence of contamination. In *Stevens*, the contaminated site was placed on the New York State Department of Environmental Conservation Inactive Hazardous Waste Disposal Site list prior to purchase by the plaintiff. Although no environmental problems were visible at the time of sale, the purchaser had apparently not inquired into public records which would have confirmed that metals and solvents had been disposed of in cesspools and existed in high concentrations on the site. The court concluded that the previous owner and lessee were not entitled to contribution from the purchaser for response costs.¹²⁴ In dicta, the court stated that the purchaser had satisfied the requirements of CERCLA sections 107(b)(3) and 101(35)(A).¹²⁵ Although the *Stevens* court did not provide its reasoning, its conclusion suggests that a

118. *Id.*

119. 706 F. Supp. 346 (M.D. Pa. 1988).

120. *Id.* at 352.

121. *Id.* at 348.

122. *Id.* at 352.

123. [20 Litigation] *Envtl. L. Rep. (Envtl. L. Inst.)* 20,560 (E.D.N.Y. Jan. 11, 1990).

124. *Id.* at 20,561.

125. *Id.*

failure to discover important public information is not necessarily inconsistent with good commercial practice for conducting appropriate inquiries.

As of this writing, a party has succeeded with the defense in only one case. In *United States v. Pacific Hide and Fur Depot, Inc.*,¹²⁶ the court granted summary judgment for the defendants, where the hazardous waste was disposed of prior to the initial transfer of title, and there was no evidence to show that a release occurred while any of the defendants owned the site. Defendants' success was largely based on the fact that the transactions at issue were in the nature of inheritance or bequest, and were not part of a commercial transaction.¹²⁷

The courts have applied varying standards when weighing a particular purchaser's pre-purchase inquiry. In *Serafini*, the defendant survived summary judgment although he failed to conduct any inquiry at all. In *Stevens*, the court would have allowed the defense even though the fact that the site was contaminated was a matter of public record. However, in *BCW Assoc.*, a pre-purchase inspection of a facility by a consultant and engineer did not satisfy the "all appropriate inquiry" requirement. The uncertain disposition reflected in the case law is a result of two factors: 1) the lack of a definitive, widely recognized standard for pre-purchase investigations, requiring courts to determine investigation standards on a case-by-case basis;¹²⁸ and 2) the inherent conflict in providing a "due diligence" defense in a strict liability statute. The innocent landowner defense involves a negligence standard. If the purchaser fails to perform his statutory duty to investigate, then he can not escape strict CERCLA liability. When

126. [19 Litigation] *Envtl. L. Rep.* (Envtl. L. Inst.) 20,897 (D. Idaho Mar. 13, 1989).

127. *Id.* at 20,900. The legislative history of SARA indicates that Congress intended to impose a three-tier system of strictness on the duty to investigate prior to a transaction: 1) commercial transactions are held to the strictest standard; 2) private transactions are given more leniency; and 3) transfers by inheritance or bequest are treated the most leniently. H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 187-88 (1986).

128. *See infra* note 140.

applying such standards, courts inevitably weigh equitable factors into their decisions, such as the financial positions of the parties to the transaction, the burden or benefit realized from the cleanup, and the relative culpability of the parties.¹²⁹ As a result, there is no consistently applied rule to which purchasers may adhere to protect themselves from liability.

3. What Constitutes "All Appropriate Inquiry?"

As the existing case law shows, a wide variety of actions and relationships will preclude the section 107(b)(3) defense, resulting in a very narrow range of circumstances in which it is available. An "innocent landowner" defendant is required to exercise due care, to protect against the foreseeable acts and omissions of third parties, and to establish that he had no "contractual relationship" with the third party causing the release by showing that he conducted "all appropriate inquiry" into the previous ownership.¹³⁰ A prospective purchaser must carefully consider the findings of the inquiry in deciding whether to inquire further or to proceed with the transaction.¹³¹

The intent of SARA's amendment of the provisions of the "innocent landowner" defense was to exclude from liability good-faith purchasers of contaminated sites.¹³² Unfortunately, in solving one problem, Congress created another. Although there is now a clear duty upon prospective purchasers to conduct "all appropriate inquiry" prior to acquisition, there is little official guidance as to what level of inquiry is required beyond the five general factors provided in section 101(35)(B).¹³³

129. See *supra* notes 104-05 and accompanying text.

130. See *supra* notes 97-98.

131. See *supra* note 103.

132. The SARA conference committee report states that the "definition of contractual relationship is intended to clarify and confirm that under limited circumstances landowners who acquire property without knowing of any contamination at the site and without reason to know of any contamination . . . may have a defense to liability." H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 186 (1986).

133. The five factors enumerated in CERCLA § 101(35)(B) are:

1. any specialized knowledge or experience on the part of the defendant;
2. the relationship of the purchase price to the value of the property if uncontaminated;

The statutory terms should serve to preclude the section 107(b)(3) defense in cases where a purchaser acquires an obviously contaminated property, although the *Serafini* decision suggests otherwise.¹³⁴ However, there is little guidance as to how much diligence, if any, is required to detect hidden contamination such as abandoned landfills, underground storage tanks, subsurface contamination from past dumping, or the subsurface migration of contaminants from adjacent areas, all of which are sufficient to trigger CERCLA liability. So far, the courts have avoided articulating a standard which would clarify the duties of a purchaser under the "appropriate inquiry" standard.

The general nature of both the statutory language and the legislative history supports the view that the adequacy of an inquiry with negative findings must be judged on a case-by-case basis.¹³⁵ In cases where a purchaser is genuinely "innocent," that is, where he has exercised due care, took reasonable steps toward an "appropriate inquiry," and can show that the release was caused by an unrelated third party (i.e., where the equitable factors are in his favor), his success with the defense will depend heavily on the court's evaluation of the standards for conducting "all appropriate inquiry."

By requiring that the "appropriate inquiry" be consistent with "good commercial practice,"¹³⁶ Congress apparently deferred responsibility to the real estate industry for establishing and maintaining the guidelines for conducting pre-purchase inquiries. The current state of the industry comprises various publications by realtors, lawyers, financiers, environmental engineers, and consultants describing the require-

3. commonly known or reasonably ascertainable information about the property;

4. the obviousness of the presence or likely presence of contamination at the property; and

5. the ability to detect such contamination by appropriate inspection.

CERCLA § 101(35)(B).

134. See *supra* notes 113-115 and accompanying text.

135. The SARA conference committee report states that a purchaser should "exercise that degree of due care which is reasonable under the circumstances." H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 187 (1986).

136. See *supra* note 98.

ments of "environmental audits" for real estate transactions.¹³⁷

The "all appropriate inquiry" standard is subjective and must be evaluated against good commercial practice as it existed "as of the time of acquisition."¹³⁸ This task is difficult for several reasons: 1) there are a wide variety of publications recommending requirements for environmental audits for real estate transactions, creating a large, sometimes conflicting body of materials from which to extract a current standard;¹³⁹ 2) the recommended practices for environmental audits have evolved rapidly over the last ten years as a response to growing public awareness of hazardous waste, thus making it difficult to pin down a standard as it existed at a particular point in time;¹⁴⁰ and 3) many properties and facilities have unique

137. See, e.g., PROCEEDINGS OF 1991 ENVIRONMENTAL SITE ASSESSMENTS CASE STUDIES AND STRATEGIES: THE CONFERENCE (The Fawcett Center for Tomorrow, 1991); THE AMERICAN SOCIETY FOR TESTING AND MATERIALS, DRAFT STANDARD GUIDE FOR PHASE I ENVIRONMENTAL PROPERTY ASSESSMENTS (1991); ENVIRONMENTAL AUDITS (Lawrence B. Cahill ed., 6th ed. 1989); Gary C. Ribblett & Kris H. Turschmid, *Advice From Environmental Consultants: How to Achieve Competent, Comprehensive and Understandable Results from Environmental Audits*, 41 S.C. L. REV. 887 (1990); AMERICAN ENVIRONMENTAL GROUP, SCREENING REAL ESTATE FOR ENVIRONMENTAL HAZARDS: A PRACTICAL GUIDE FOR ATTORNEYS, LENDERS & DEVELOPERS (1989); ASFE/ THE ASSOCIATION OF ENGINEERING FIRMS PRACTICING IN THE GEOSCIENCES, PREACQUISITION SITE ASSESSMENTS (1989); CONSULTING ENGINEERS COUNCIL OF METROPOLITAN WASHINGTON INC., GUIDELINES ENVIRONMENTAL SITE ASSESSMENTS (1989); EPA, SELECTED CURRENT PRACTICES IN PROPERTY TRANSFER ENVIRONMENTAL ASSESSMENT (Sept. 1989); Baker, *Tainted Property: Hazardous Substances, Hazardous Waste and Asbestos in Real Property Transactions*, in THE SEVENTH ANNUAL SEMINAR ON HAZARDOUS WASTE AND TOXIC TORTS: REGULATION-LIABILITY 119 (Lippes & Wrubel Co-Chairpersons 1989); JOEL S. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS: LAW AND PRACTICE (1989) (detailed comprehensive audit forms are included in Appendix D); STEVEN A. TASHER AT AL., ENVIRONMENTAL LAWS AND REAL ESTATE HANDBOOK, IV-8 to -9 (2d ed. 1988); Reich & Leifer, *The Effect of CERCLA on Property Transfers*, in Miller & Bennet, *Due Diligence Techniques for the Innocent Landowner/Purchaser*, 3 Toxics L. Rep. (BNA) 434 (1988); RAYMOND W. KANE, ENVIRONMENTAL CONCERNS IN REAL ESTATE TRANSACTIONS (1987); Elliott H. Levitas & John V. Hughes, *Hazardous Waste Issues in Real Estate Transactions*, 38 MERCER L. REV. 581 (1987).

138. H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 187 (1986). "[G]ood commercial or customary practice . . . shall mean that reasonable inquiry must have been made in all circumstances, in light of best business and land transfer principles." *Id.*

139. See *supra* note 130.

140. The practice of conducting environmental audits for real estate transactions

attributes, making it difficult to determine what procedures may or may not have been appropriate at a particular site. Even if a regulatory standard is promulgated to provide a bench mark against which future inquiries may be weighed, with regard to past transactions, courts still must determine "good commercial or customary practice" as it existed at the time of the transaction.

4. "Good Commercial or Customary Practice" Today

With the volume of writings that have been produced to date, a rather clear industry standard has emerged for conducting "all appropriate inquiry . . . consistent with good commercial or customary practice."¹⁴¹ The authorities generally agree that a "phase I environmental audit" should be conducted by an environmental consultant or engineer, and should include a visual review of the facility, a review of available documentation concerning the past use of the site, and a review of government records to determine the site's environmental regulatory history.¹⁴²

5. Legislative Answers

While the phase I environmental audit industry has evolved to a stage where a general standard exists, the current lack of a regulatory standard leaves room for confusion and could lead to unnecessary litigation. Lawmakers have responded to this confusion by proposing legislation to clarify

is a relatively recent development. See Frank J. Priznar, *Trends in Environmental Auditing* [20 News and Analysis] *Envtl. L. Rep. (Envtl. L. Inst.)* 10,179 (May 1990). Prior to 1986, most environmental publications discussed environmental audits mainly in the context of inspections conducted under regulatory statutes, such as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 7401-7642 (1982 & Supp. IV 1986). See, e.g., J. GORDON ARBUCKLE ET AL., *ENVIRONMENTAL LAW HANDBOOK* (7th ed. 1983); *ENVIRONMENTAL AUDITS* (Lawrence B. Cahill et al., ed., 3d ed. 1984); John M. DeMeester, *Practical Guidelines for Due Diligence Environmental Auditing* [18 News and Analysis] *Envtl. L. Rep. (Envtl. L. Inst.)* 12,210 (June 1988).

141. A survey of environmental professionals, released in 1991, indicates that a "professional standard of care already exists." David Stamps, *In Search of Due Diligence*, *EI DIGEST*, Sept. 1991, at 35. CERCLA "appropriate inquiries" are commonly referred to as "phase I environmental audits" or "environmental site assessments."

142. See *supra* note 130.

the CERCLA duties of a prospective real estate purchaser.

a. Proposed Amendments to CERCLA

In 1989, Congressman Weldon introduced H.R. 2787, the "Innocent Landowner Defense Amendment of 1989."¹⁴³ The bill proposed requirements for a "Phase I Environmental Audit," which if performed prior to a transaction would establish a rebuttable presumption that the defendant conducted "all appropriate inquiry" for the purposes of CERCLA section 101(35)(B).¹⁴⁴ The Phase I requirements specified by H.R. 2787 are essentially in agreement with today's state-of-the-art practices, and would have been useful in establishing a baseline set of requirements for property transfer environmental audits.

Because H.R. 2787 was not passed, it can be argued that rather than characterizing "good commercial practice" in 1989, Congress' disposition of the bill suggests a preference for case-by-case standards as opposed to fixed requirements. As such, the history of H.R. 2787 may complicate, rather than resolve, future litigation.

Similar provisions were included in the "Superfund Liability Clarification Act" introduced by Congressman Owens in 1991.¹⁴⁵ Like the LaFalce bill, the Superfund Liability Clarification Act would establish a rebuttable presumption of "all

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

144. H.R. 2787 proposed that the Phase I audit be conducted by an "environmental professional," defined as an attorney, engineer or consultant possessing appropriate academic training and reputation. The requirements of the Phase I audit contained in the bill include:

- a review of the chain of title going back 50 years;
- review of aerial photographs to determine prior use of the site;
- review of reasonably obtainable federal, state and local records regarding hazardous waste activities on the site;
- a visual site inspection.

If the Phase I audit discloses the likely presence of hazardous substances, then the presumption of the "appropriate inquiry" shall not arise unless the defendant has taken reasonable steps in accordance with existing regulations and acceptable engineering practices to confirm the presence or absence of the threat. In other words, Phase II testing must be performed if the Phase I inquiry finds the presence of contamination likely. *Id.*

145. H.R. 1643, 102d Cong., 1st Sess. (1991).

appropriate inquiry" for real estate purchasers who conduct a "Phase I Environmental Audit." The bill would establish a regulatory program in which the states would accredit "Certified Environmental Professionals" who perform audits, and it would adopt a regulatory standard for conducting "Phase I Environmental Audits."¹⁴⁶

b. State Laws

Several states have enacted laws specifying disclosure and/or investigation requirements prior to commercial real estate transactions.¹⁴⁷ While these laws may clearly establish a purchaser's duties under a state "Superfund" law, it is far from clear that compliance with these laws will satisfy CERCLA. The requirements under many state laws (the New Jersey Environmental Cleanup Responsibility Act (ECRA) not included) are less rigorous than the current industry practices. In light of the narrow application of the section 107(b)(3) defense by the courts, it appears unlikely that the limited duties established under most state laws would suffice for purposes of establishing an "appropriate inquiry consistent with good commercial practice" for CERCLA purposes.

IV. Conclusion

Although Congress intended CERCLA liability to be strict, it provided narrow exceptions in certain situations. Unfortunately, these exceptions are vaguely defined in the statute, and judicial interpretations have tended to exacerbate, rather than to clarify, the uncertainty surrounding the terms of the defenses. As a result, the real estate community and its associated industries have been operating in recent years in a state of confusion under the ominous threat of CERCLA lia-

146. *Id.* H.R. 1643 would adopt the standard currently being developed by the American Society for Testing and Materials as the regulatory standard for conducting Phase I Environmental Audits. *Id.*

147. *See, e.g.*, Responsible Property Transfer Law, (IND. CODE ANN.) § 13-7-22.5-1 to -22 (Burns 1990 & Supp. 1991); Environmental Cleanup Responsibility Act, (N.J. STAT. ANN.) §§ 13:1k-6 to -14 (West Supp. 1991); (CONN. GEN. STAT. ANN.) §§ 22a-134 to -134(d) (West Supp. 1991).

bility. However, their complaints have not been ignored, and current efforts to develop standards for real estate lenders and purchasers should provide a measure of protection for those willing to assert due diligence and act responsibly.

The uncertainty for lenders arises from the section 101(20)(A) secured creditor exemption and its use of the term "management participation." The Ninth Circuit's standard of actual participation, stated in the *Bergsoe Metal*¹⁴⁸ decision, is a workable standard which allows lenders to generally gauge their status with regard to the exemption. However, the Eleventh Circuit's "capacity to influence" test, articulated in the *Fleet Factors*¹⁴⁹ decision, broadened the potential liability of lenders to an unprecedented level. Under the *Fleet Factors* standard, lenders must make a difficult decision in structuring loan agreements: either to dissociate themselves from their borrowers' operations such that they are unable to influence management decisions, thus choosing a greater risk of default rather than potential CERCLA liability; or to regulate and inspect their borrowers' operations, essentially becoming private environmental protection agencies.

After several years of confusion, however, it appears that some standards have, or are about to become, recognized. Proposed EPA regulations would codify the *Bergsoe Metal* interpretation that "management participation" under section 101(20)(A) requires *actual* participation. If promulgated, the regulations should serve to limit government enforcement actions to situations in which a lender has actually influenced hazardous waste management practices. In addition, the regulations should serve to guide the courts in private party CERCLA litigation involving secured creditors.

The uncertainty for real estate purchasers arises from the section 107(b)(3) innocent landowner defense and its use of the term "all appropriate inquiry." The statute itself provides only general guidance as to the scope and depth of the inquiry required. Federal regulations clarifying "all appropriate inquiry" have yet to be accepted, and the courts have applied

148. 910 F.2d 668 (9th Cir. 1990).

149. 901 F.2d 1550 (11th Cir. 1990).

varying interpretations as to the adequacy of particular investigations. As a result, a purchaser of an apparently uncontaminated site can not be certain of protecting himself from potential CERCLA liability, regardless of the diligence exercised in investigating the property.

Although industry standards for environmental assessments (or "audits") have evolved into a recognized and somewhat uniform practice, the *BCW Associates*¹⁵⁰ case illustrates that a determination of the adequacy of a particular assessment requires consideration of the circumstances on a case-by-case basis. Because of the uniqueness of real estate and the unlimited variety of activities that may have occurred on or adjacent to a specific site in the past, environmental inspectors must exercise considerable discretion in performing assessments and arriving at their conclusions. Without clear standards for conducting environmental assessments, it can be argued that any investigation which fails to detect hidden contamination may be insufficient to rise to the level of an "appropriate inquiry."

Current practices in environmental auditing can be established by reviewing the numerous publications on the subject by engineers, consultants, and lawyers. While proposed Congressional bills to incorporate these practices into law have been unsuccessful, the development of the ASTM standard on environmental assessment should provide a comprehensive and widely recognized standard for conducting "all appropriate inquiry." "Innocent" purchasers and the courts should be able to use these industry standards, as defined by ASTM, as a decisionmaking tool in evaluating the adequacy of a particular environmental assessment and the degree of diligence required under the circumstances.

Amending CERCLA to provide broad exceptions for lenders and purchasers would not be consistent with the statute's remedial purpose. In order to allow CERCLA's system of strict liability to operate as intended without wreaking financial ruin on "innocent" parties, official standards for environ-

150. 3 Toxics L. Rep. 943 (BNA) (E.D. Pa 1988), available in LEXIS, Env'tl. Library.

mental assessments and for lender management participation are essential. Not only would such standards reduce future litigation attempting to resolve the undefined statutory phrases, but they would also delineate the boundary within which “innocent” purchasers and responsible lenders could operate without the unreasonable fear of CERCLA liability.