St. Mary's Law Journal

Volume 22 | Number 1 Article 5

1-1-1990

What Price Innocence - A Realistic View of the Innocent Landowner Defense under CERCLA.

Debra L. Baker

Theodore G. Baroody

WHAT PRICE INNOCENCE? A REALISTIC VIEW OF THE INNOCENT LANDOWNER DEFENSE UNDER CERCLA

DEBRA L. BAKER*
THEODORE G. BAROODY**

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") was enacted to provide the federal government and the states with authority to clean up hazardous waste sites.[1] CERCLA established a trust fund, commonly called the "Superfund," from which the federal and state governments could finance cleanup actions.[2] CERCLA also provided a mechanism to allow the government to recover cleanup costs expended from the

* Debra L. Baker, B.S. University of Maryland; J.D., Georgetown University Law Center, Participating Associate, Fulbright & Jaworski. Ms. Baker is an author and editor of the Texas Environmental Law Handbook (1989).

** Theodore G. Baroody, B.S. Ch.E. Rice University; J.D., Southern Methodist University School of Law. Associate, Fulbright & Jaworski.

1. 42 U.S.C. §§ 9601-57 (1982), *amended by* 42 U.S.C. §§ 9601-75 (Supp. V 1987); *see also* United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988), *cert. denied*, __ U.S. __, 109 S. Ct. 3156, 104 L. Ed.2d 1019 (1989); Seiler, *The Environmental Due Diligence Defense and Contractual Protection Devices*, 49 LA. L. REV. 1405, 1407 (1989) (CERCLA passed during Carter Administration to clean up dangerous waste sites); C. CHADD & L. BEGESON, GUIDE TO AVOIDING LIABILITY FOR WASTE DISPOSAL 27 (1986) (summary of legislative history of CERCLA). CERCLA defines hazardous substance by reference to other federal statutes such as the Solid Waste Disposal Act and The Clean Air Act. *See* 42 U.S.C. § 9601(14) (Supp. V 1987).

2. 42 U.S.C. § 9631 (1982) (repealed 1986). A Trust Fund was continued in 1986 through section 9601(11) of title 42 by reference to section 9507 of title 26. 42 U.S.C. § 9601(11) (Supp. V 1987), 26 U.S.C § 9507 (Supp. V 1987).

Superfund from certain "responsible" parties.[3] Current landowners of property where CERCLA defined hazardous substances were discovered would qualify as "responsible" under CERCLA's liability section.[4] Consequently, landowners suddenly found themselves strictly liable for the cleanup of hazardous waste sites under CERCLA.[5] Landowner liability was statutorily imposed under CERCLA regardless of the landowner's contribution to, or awareness of, the presence of the hazardous substances on his acquired property.[6]

The exceedingly, and apparently unintentionally, harsh impact of CERCLA liability soon became apparent.[7] Purchasers of contaminated property found themselves liable for cleanup costs for remediation of hazardous substances although the purchasers had no knowledge of and did not contribute to the contamination.[8] Additionally, the actual parties who may have caused or contributed to the contamination were often difficult to identify or find, or lacked the funds to clean up the contamination. Thus, the "innocent" landowner was left "holding the bag" due to CERCLA's strict liability provision.

---

3. *See* 42 U.S.C. §§ 9607, 9611 (1982 & Supp. V 1987).

4. 42 U.S.C. § 9607(a) (Supp. V 1987). Parties responsible under CERCLA include current owners and past owners at the time of disposal, operators and those who arrange or transport waste for treatment or disposal. *Id.*

5. New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2nd Cir. 1985); 42 U.S.C. § 9601(32) (Supp. V 1987) (defines liability under CERCLA to be the same standard of liability under section 1321 of the Clean Water Act, a strict liability provision); *see also* C. CHADD & L. BERGESON, GUIDE TO AVOIDING LIABILITY FOR WASTE DISPOSAL 44-47 (1986) (liability standard under CERCLA is strict liability as well as joint and several); *cf.* Satterlee, *De Minimis Party Representation* in HAZARDOUS WASTE LITIGATION 25-60 (1990) (discussion of *de minimis* status to escape joint and several liability) .

6. *Shore Realty Corp.*, 759 F.2d at 1044; *see also* 42 U.S.C. §§ 9601(32), 9607 (Supp. V 1987).

7. *See* Mott, *Surviving the Superfund Nuclear Weapon: Defense of Administrative Orders*, in HAZARDOUS WASTE LITIGATION 209-211 (1990) (discussion of severity of CERCLA's impact).

8. *See, e.g.*, Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257, 1261 (D.N.J. 1987)(purchaser's lack of knowledge of site contamination would not permit purchaser to escape liability under section 9607(a), though such could be basis to assert an affirmative defense); United States v. Tyson, 25 Env't Rep. Cas. (BNA) 1897, 1905 (E.D. Pa. 1986) (even if current owner did not operate facility as a hazardous substance dump site and no hazardous substance was disposed of at the site during ownership, current owner may still be subject to liability under section 9607(a)(1)). Generally, a party found liable for costs of response at a CERCLA facility has the right of contribution from other responsible parties. *See generally* Von Stamwitz, *Recovering Your Cleanup Cost: Private Party Actions Under CERCLA* in HAZARDOUS WASTE LITIGATION 409-419 (1990).

In the Superfund Amendments and Reauthorization Act of 1986 ("SARA") amendments to CERCLA, Congress attempted to provide some relief from the harsh effects of the strict liability provisions of CERCLA for truly "innocent" landowners.[9] The relief became known as the "innocent landowner defense."[10] However, the innocent landowner defense requires a purchaser to show that at the time he purchased the contaminated property, he had "no reason to know" that the disposal of hazardous substances had taken place on the land.[11] The purchaser also had to show that he undertook "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice."[12] In practical application, however, it proved somewhat difficult to show that the landowner "had no reason to know" of the disposal and it was unclear what had to be done to satisfy the requirement that "all appropriate inquiries" be made.[13]

---

9. *See* 42 U.S.C. §§ 9601(35)(A), (B) (Supp. V 1987); Washington v. Time Oil Co., 687 F. Supp. 529, 530 (W.D. Wash. 1988) (section 9601(35) was enacted to protect innocent landowners from liability).

10. *See* United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1346 (D. Idaho 1989); Brown, *Keeping Clean: Avoiding Hazardous Waste Liability* in THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 212 (1988).

11. *Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. at 1348 (where children of corporation owners received interest in contaminated land by gift, children had no reason to suspect that the land was contaminated with PCBs); Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257, 1261 (D.N.J. 1987) (issue of fact existed as to whether purchaser of site previously contaminated with waste mud had requisite knowledge to preclude assertion of the innocent landowner defense); *see also* 42 U.S.C. §§ 9601(35)(A)(i), (B) (Supp. V 1987).

12. 42 U.S.C. § 9601(35)(B) (Supp. V 1987); *see also Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. at 1348; United States v. Serafini, 711 F. Supp. 197, 198 (M.D. Pa. 1988); United States v. Serafini, 706 F. Supp. 346, 348 (M.D. Pa. 1988). In the first *Serafini* opinion, the court found that the defendant bought 225 acres with plainly visible abandoned drums on a portion of the property. *Serafini*, 706 F. Supp. at 348. Based on these facts, in the second *Serafini* opinion, the Government, as plaintiff, moved for summary judgment. *Serafini*, 711 F. Supp. at 198. The court found that a genuine issue of material fact existed as to whether it was the "customary or good commercial practice" in 1969 to visually inspect the property prior to a purchase. *Id.*

13. Public Notice, 54 Fed. Reg. 34,235, 34,238 at note 11 (1989). The EPA, citing *United States v. Serafini*, has acknowledged that the "all appropriate inquiry" standard is evolutionary in nature depending upon the increasing awareness of the dangers associated with hazardous substances that has accompanied passage of CERCLA. *Id.* The court in *United States v. Pacific Hide & Fur Depot, Inc.* acknowledged the uncertain nature of the "all appropriate inquiry" standard as follows:

> The government argues that Congress intended everyone, under any conceivable circumstances, to make some inquiry about the existance of hazardous wastes when obtaining an interest in real property. . . . It would have been easy to draft into the statute the very requirements sought by the government: Congress could have simply said that some in-

The EPA has acknowledged the lack of clear guidance for landowner's seeking to prove innocence under CERCLA in an EPA Guidance document on landowner's liability dated August 18, 1989.[14] In an effort to clarify the occasions when innocent landowners were entitled to avail themselves of the innocent landowner defense, additional legislation to amend CERCLA was introduced by Representative Curt Weldon (Representative of Pennsylvania) in June 1989.[15] Congressman Weldon's bill attempted to clarify the phrase "all appropriate inquiry" in order that real estate purchasers could qualify for the innocent landowner defense.[16]

This article discusses the significance of the so-called "innocent landowner defense" under CERCLA. A brief summary of the statute and the manner in which the innocent landowner defense came into existence will also be addressed. The article also details the recent efforts to clarify the availability of the defense and to analyze the effect, if any, such efforts have had on the amorphous innocent landowner defense.

II. OVERVIEW OF CERCLA AND THE "BIRTH OF INNOCENCE"

CERCLA provided the federal government with the authority and a mechanism with which to clean up hazardous waste sites.[17] Under CERCLA a fund was established to pay for the hazardous waste site cleanups.[18] The government was allowed to seek reimbursement for fund expenditures from parties deemed to be "responsible" under the statute for the wastes at the site.[19]

---

quiry must be made in every case. But Congress did not do so. Instead, Congress used terms like "appropriate" and "reasonable" in describing the necessary inquiry. The choice of such terms indicates to this court that Congress was not laying down the bright line rule asserted by the government. Rather, Congress recognized that each case would be different and must be analyzed on its facts.

716 F. Supp. at 1348-49.

14. Public Notice, 54 Fed. Reg. 34,235, 34,236 (1989).

15. H.R. 2787, 101st Cong., 1st Sess. (1989). On August 29, 1990 Representative Weldon's Bill was pending in the Energy and Commerce Committee's subcommittee on Transportation and Hazardous Materials. Telephone interview with Congressman Weldon's office on August 29, 1990.

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

17. *See supra* note 1.

18. 42 U.S.C. § 9601(11) (Supp. V 1987); 26 U.S.C. § 9507 (Supp. V 1987) (Hazardous Substance Response Fund).

19. United States v. Monsanto Co., 858 F.2d 160, 165 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 3156, 104 L. Ed.2d 1019 (1989) (Government sued nonsettling PRP's under

Among others, CERCLA includes "current owners" of property as parties potentially responsible for remedial costs from the clean-up of a hazardous waste site.[20] Accordingly, the liability for hazardous substance cleanups could be imposed upon landowners who in many cases had not contributed to, and may not have been aware of, the existence of contamination on the property at the time of their real estate purchase.[21]

The provisions of CERCLA that gave rise to the innocent landowner defense, and the resulting need to act with due diligence, is commonly referred to as the "third-party defense."[22] The third-party defense is one of a very limited number of defenses provided to responsible parties under CERCLA.[23] Specifically, a responsible party may evade liability only in extreme circumstances wherein the release and damage are caused *solely* by an act of God, war, or third parties.[24]

CERCLA to recover costs of cleanup response expended from hazardous substance trust fund); 42 U.S.C. §§ 9607, 9611 (1982 & Supp. V 1987).

20. *See, e.g.,* Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988) (court found present owners of previously contaminated property liable for response costs pursuant to section 9607(a)(1)); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (current owner liable for release or threat of release on property); United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1346 (D. Idaho 1989); 42 U.S.C. § 9607(a)(1)-(4) (Supp. V 1987). Parties who may be responsible to the government for cleanup costs of hazardous substances under CERCLA include a current owner of property that contains hazardous substances, a person who owned the property or facility at the time hazardous substances were disposed thereon, a person who arranged for the disposal, treatment or transport of hazardous substances at the facility and persons who transported such substances for treatment or disposal at a facility they selected. 42 U.S.C. § 9607(a)(1)-(4) (Supp. V 1987).

21. *See Tanglewood East Homeowners*, 849 F.2d at 1572 (section 9607(a)(1) manifestly applies to present owners of contaminated sites); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2nd Cir. 1985) (CERCLA section 9607(a)(1) imposes strict liability on present owners of any facility); *see also supra* note 8.

22. United States v. Monsanto Co., 858 F.2d 160, 168-169 (4th Cir. 1988), *cert denied*, __ U.S. __, 109 S. Ct. 3156, 104 L. Ed.2d 1019 (1989); United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1346-47 (D. Idaho 1989); 42 U.S.C. § 9607(b)(3) (1982); *see also* Barr, *An Overview of Federal and State Environmental Provisions That May Affect Business Transactions* in THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 90-92 (1988) (discussion of third party defense).

23. *See* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1118 (D.Minn. 1982) (defenses enumerated in section 9607(b) only permissible defenses to liability imposed by CERCLA); 42 U.S.C. § 9607(b) (1982).

24. 42 U.S.C. § 9607(b) (1982); United States v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988) (section 9607 (b)(3) only available if release or threatened release caused solely by third party) *cert. denied*, __ U.S. __, 109 S. Ct. 3156, 104 L. Ed.2d 1019 (1989); Washington v. Time Oil Co., 687 F. Supp. 529, 532 (W.D. Wash. 1988) (defendant failed to satisfy its burden showing that third party solely responsible for release); United States v. South Carolina Re-

Because the impact of CERCLA liability can be harsh and expensive, and the other defenses are generally unavailable except in extreme circumstances, the third-party defense has been the single hope of many landowners in their effort to avoid CERCLA liability. The third party defense excludes persons from liability in cases where: (1) the release or threat of release resulted solely from the act or omission of a third party who is not the defendant's employee or agent or whose act did not occur in conjunction with a contractual relationship with the defendant *and* (2) if the defendant could show by a preponderance of the evidence that he exercised due care and that he took precautions to avoid omissions or foreseeable acts of third parties and the foreseeable consequences.[25]

A party may use the third-party defense if the contamination did not occur in connection with a "contractual relationship."[26] CERCLA defines contractual relationships to include deeds, land contracts, or other instruments transferring possession or title.[27] Thus, prior to CERCLA's amendment, a landowner could not take advantage of the defense when the contamination existed upon property acquired pursuant to a land contract, deed or transfer instrument.[28]

Six years after CERCLA was passed and liability began to be imposed upon landowners, Congress attempted to provide some relief for "innocent landowners" in the 1986 SARA amendments to CERCLA.[29] The so-called "innocent landowner defense" enacted by SARA was actually an attempt to clarify the third-party defense to provide some relief to innocent purchasers.[30] The amendment provided that land contracts would not be considered "contractual relationships" *if* the land was acquired after hazardous substances were

---

cycling and Disposal, Inc., 20 Env't Rep. Cas. (BNA) 1753, 1756 (D.S.C. 1984) (defendant must show event or third person caused hazardous substance release or threatened release under section 9607(b)).

25. 42 U.S.C. § 9607(b) (1982).

26. 42 U.S.C. § 9607(b) (1982); United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984) (third party defense not allowed when lease contract present); United States v. South Carolina Recycling and Disposal, Inc., 20 Env't Rep. Cas. (BNA) 1753, 1758 (D.S.C. 1984) (third party defense not available when contractual relationship exists).

27. 42 U.S.C. § 9601(35)(A) (Supp. V 1987); United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1347-48 (D. Idaho 1989).

28. *See supra* note 26.

29. 42 U.S.C. §§ 9607(b)(3), 9601(35)(A), (B) (1982 & Supp. V 1987); *see also* United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1347 (D. Idaho 1989); Washington v. Time Oil Co., 687 F. Supp. 529, 530 (W.D. Wash. 1988).

30. *See Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. at 1347.

placed on the land *and* the purchaser could establish by a preponderance of the evidence that he "did not know and had no reason to know" at the time he acquired the property that any hazardous substance involved in the CERCLA release had been disposed thereon.[31] In order to establish that a landowner had "no reason to know" of the presence of a hazardous substance, the landowner had to undertake "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice."[32]

III. THE STRUGGLE TO DEFINE INNOCENCE

Not surprisingly, landowners wishing to establish "innocent" status sought to undertake "all appropriate inquiries" as required by the statute. However, no definition of what constituted "appropriate inquiries" had been provided by the SARA amendments and landowners were, once again, unsure of the way to innocence under CERCLA.

The statute states that in considering whether all appropriate inquiries have been made, courts shall take into account:

> [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;
> [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.[33]

Accordingly, prospective landowners who wanted to establish their status as innocent landowners and avoid potential CERCLA liability began performing what became known as "due diligence inquiries" to

---

31. 42 U.S.C. § 9601(35)(A) (Supp. V 1987). SARA sections 9601(35)(A)(ii) and (iii) also exclude from the definition of a contractual relationship defendants who are government entities acquiring property by escheat, eminent domain, or other involuntary transfer; or other defendants who acquire by inheritance or bequest. *Id.*

32. 42 U.S.C. § 9601(35)(B) (Supp. V 1987); *see also supra* n. 11-13 and accompanying text.

33. 42 U.S.C. § 9601(35)(B) (Supp. V 1987); *see also* United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1347-48 (D. Idaho 1989) (court considered whether defendants possessed any "specialized knowledge" and the "obviousness" of any possible contamination).

establish that they had undertaken all of the "appropriate inquiries" required by the statute.

The phrase "due diligence" was coined to describe the actions and investigatory activities conducted by parties in an effort to become innocent landowners by showing they had no reason to know of a contamination and had undertaken all appropriate inquiries required by CERCLA. Obviously, the primary problem with performing due diligence inquiries to show that all appropriate inquiries have been made is that CERCLA does not define "all appropriate inquiries." An industry standard for performing due diligence inquiries has not been promulgated, and at least one Congressman has acknowledged that "even today no one in the real estate or environmental consulting industries knows exactly what is meant by all appropriate inquiry."[34]

Although legislative clarifications of what constitutes "all appropriate inquiries" have been proposed, the required scope of appropriate due diligence inquiries for proving innocent landowner status, as well as for allocating liabilities and providing facts in connection with real estate transactions, is as yet unclear.[35] For lack of any other guidance, landowners began to undertake due diligence activities guided by the five factors that will be considered by a court pursuant to CERCLA 101(35)(B).[36] Decisions interpreting the sufficiency of environmental due diligence investigations have evolved on a case-by-case

---

34. 135 CONG. REC. H3514-15 (daily ed. June 28, 1989)(statement of Rep. Curt Weldon).

35. Some guidance may be ascertained from the SARA legislative history pertaining to landowner liability:

> The duty to inquire under this provision shall be judged as of the time of acquisition. Defendants shall be held to a higher standard as public awareness of the hazards associated with hazardous substance releases has grown, as reflected by this Act, the 1980 Act and other Federal and State statutes.
>
> Moreover, good commercial or customary practice with respect to inquiry in an effort to minimize liability shall mean that a reasonable inquiry must have been made in all circumstances, in light of best business and land transfer principles.
>
> Those engaged in commercial transactions should, however, be held to a higher standard than those who are engaged in private residential transactions. Similarly, those who acquire property through inheritance or bequest without actual knowledge may rely upon this section if they engage in a reasonable inquiry, but they need not be held to the same standard as part of a commercial or private transaction and those who acquire property by inheritance without knowing of the inheritance shall not be liable, if they satisfy the remaining requirements of section 107(b)(3).

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS 3280-3281.

36. *See supra* n. 33 and accompanying text.

basis.[37] The differences in the types of investigations performed may result from the purpose for performing the environmental due diligence.[38] The type and extent of due diligence inquiry performed may also depend upon what is discovered from preliminary due diligence activities.

IV. THE SEARCH FOR INNOCENCE CONTINUES

Currently, the type of due diligence performed varies with circumstances because no uniform standard exists. Due diligence inquiries generally consist of some type of comprehensive survey designed to identify the existence of any current or potential environmental problems associated with a tract of property or facility. The manner in which such inquiries are made vary, but usually consist of a physical and documentary investigation of the subject tract or facility.

One common trend is the performance of due diligence investigations in phases. For example, a prospective purchaser may conduct a Phase I investigation, sometimes referred to as a Preliminary Site Assessment (PSA). The PSA may be less than a full-scale environmental audit. Generally, a PSA is structured to determine if any hazardous substances are present or if a more detailed investigation is warranted or called for under the particular circumstances. Depending upon the results of an initial investigation, a more detailed Phase II investigation may be instituted. The subsequent investigation may require more sophisticated sampling or other techniques.

Although the degree of investigation varies and no consistent standard of guidance exists as to the performance of due diligence inquiries, general areas of inquiry may include, but are not limited to, consideration of some or all of the following:

1. *Historical and Document Reviews.* Persons attempting to make "all appropriate inquiries" often begin with a historical and documental review relating to a piece of property to discover the property's prior uses. The historical information and tract development may en-

37. *See supra* n. 11-13 and accompany text.

38. *See generally* Seiler, *The Environmental Due Diligence Defense and Contractual Protection Devices*, 49 LA. L. REV. 1405, 1417-1422 (1989) (discussion of different needs of purchasers, lessees and lessors in an environmental due diligence investigation); Bernstein, *Environmental Due Diligence Review in the Merger and Acquisition Context* in THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 303-25 (1988) (type and method of due diligence investigation needed for corporate mergers and acquisitions).

able a person to determine if prior activities could have caused environmental problems. Typically, historical and documental reviews encompass: (1) title searches to determine the chain of ownership; (2) reviews of historical air photos, United States Geological Survey topographical maps and other historical maps, and surveys to determine prior uses and visible abnormalities during site or area development which may indicate potential environmental problems; (3) interviews with former employees, local authorities, neighboring property owners, suppliers, regulatory officials, etc., regarding past uses of the site; (4) reviews of federal and state regulatory information, and other public documents to identify prior site uses and proximity of other waste sites or candidate sites; and (5) reviews of published information about surface and subsurface information for the site vicinity, and geologic data with regard to potential for naturally occurring asbestos, radon or methane gas.

Additional document reviews may include a look at: (1) the Comprehensive Environmental Response, Compensation and Liability Act Information System ("CERCLIS") list for sites within proximity to the property to evaluate the degree of risk posed;[39] (2) all records of the facility/plant/property (including all permits and other regulatory documents); (3) records of local, state and federal authorities of permits, notices of violations, consent orders or decrees, correspondence indicative of past, present or potential environmental problems, enforcement orders, etc.; (4) records or information sources regarding past or present lawsuits filed, or notices of claims from third parties, or potential for such occurrences; and (5) reviews of records and local laws or ordinances for restrictions on property use such as archaeologically significant features, presence of endangered animals, plants or critical habitat, or the presence of protected wetlands.

Interviews are also typically conducted with current and past employees, neighboring property owners, regulatory officials, and others regarding site uses, known or threatened lawsuits, demands or enforcement actions, nature of present compliance and proper notifications made as required by environmental laws.

---

39. The CERCLIS database contains information on sites where there has been a report of a release or threatened release of a hazardous substance. The database includes matters such as the hazard ranking score of the site and what entities are performing any work at the site. CERCLIS information may be obtained through the Superfund Hot-line: 1-800-424-9346.

2. *Physical Site/Building Inspections.* Document reviews are generally followed by physical reviews and inspections to determine and evaluate such things as: existing property uses; the buildings and structures on the property; the presence of asbestos-containing materials; the use of lead paint; the treatment, storage and disposal of hazardous substances or materials; the existence of wastewater discharges; the existence of emissions/sources of gases, exhaust or pollutants; the existence of site drainage, sewer and disposal systems; the existence of drinking water sources; and the existence of visible ground and/or surface contamination (stained soil, oozing liquids, drums, abandoned trash piles or equipment, dirt mounds, trenches, displaced vegetation, graded land, churned soils, etc.); the existence of above-ground or underground storage tanks and pipelines; and adjacent land usage.

3. *Physical Testing.* Physical testing may also be used by landowners to prove their innocence by showing that they did not know nor should they have known that contamination existed on the property. Such physical testing may encompass subsurface exploration, installing monitoring wells, taking soil/groundwater samples, and other chemical testing.

V. INNOCENCE FINALLY DEFINED?

Although due diligence inquiries have generally developed into variations of the types of inquiries set forth above, landowners still chafed under the uncertainty of whether those steps were sufficient to guarantee innocence under CERCLA. Additionally, there remains the question: To what extent must inquires be made to meet what at best is an undefined standard? The question itself is a contradiction in terms.

On June 28, 1989, Representative Curt Weldon introduced House Resolution 2787[40] which specifies how a purchaser of real property could make all appropriate inquiry as to its prior ownership and uses in order to meet the "innocent landowner" defense requirements. Mr. Weldon's introduction of House Resolution 2787,[41] indicated that the legislation was intended to amend CERCLA section 101(35), the innocent landowner defense, by establishing guidelines that a real estate

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

41. 135 CONG. REC. H3514-15, E2367-68 (daily ed. June 28, 1989) (statement of Rep. Weldon).

purchaser could follow to satisfy CERCLA's investigation requirement, and to establish a rebuttable presumption that a purchaser following these guidelines was an innocent landowner.[42] Mr. Weldon went on to note that while the EPA had issued a Guidance on Landowner Liability, the guidance document did not provide assistance on what constituted all appropriate inquiry and demonstrated the EPA's reluctance to provide guidance on this issue.[43]

House Resolution 2787 would amend CERCLA by specifically providing that "A defendant who has acquired real property shall have established a rebuttable presumption that he has made all appropriate inquiry within the meaning of subparagraph (B) if he establishes that, immediately prior to or at the time of acquisition, he obtained a Phase I Environmental Audit of the real property which meets the requirements of this subparagraph."[44]

Additional language in the 5-page bill defines a Phase I Environmental Audit as "an investigation of the real property, conducted by environmental professionals, to determine or discover the obviousness of the presence or likely presence of a release or threatened release of hazardous substances on the real property and which consists of a review of each of the following sources of information concerning the previous ownership and uses of the real property . . . ."[45]

The sources of information to be reviewed would require an investigation into three general areas regarding the environmental condition of real estate. The first required investigation would be historical research into previous ownership and uses such as reviewing recorded documents in the chain of title including deeds, leases, easements, restrictions, and covenants for fifty years; reviewing aerial photographs reflecting prior uses; and ascertaining whether recorded environmental cleanup liens exist.[46] The second required investigation would be a comprehensive governmental records review at the federal, state and local levels to determine known or potential hazardous waste sites.[47] The last required investigation would be a visual site inspection of the real property, the improvements thereon, and all facilities.[48] The site

42. *Id.* at E2367.
43. *Id.*
44. H.R. 2787, 101st Cong., 1st Sess. (1989).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*

inspection must also include an investigation of the immediately adjacent properties as well as an investigation of chemical use, treatment, storage and disposal practices which take place on the property.[49]

At first blush, the amendment seems to be the answer to the prospective innocent landowner's prayer for guidance. However, in reality, it does little more than put into writing what has been the actual practice of persons hoping to qualify as innocent landowners. The bill provides that the landowner has created a "rebuttable presumption" that all appropriate inquiries have been made if certain activities are taken.[50] It does not address the actual effect of the rebuttable presumption. It does not definitively define innocence.

In the August 18, 1989 Federal Register, after House Resolution 2787 was proposed, the EPA published what has become known as its Landowner Liability Guidance.[51] The Guidance does not clarify the scope of due diligence that must be undertaken to meet the "all appropriate inquiry" standard for avoiding liability pursuant to the innocent landowner defense. It merely provides that the factors listed in the section which must be considered by a court clearly indicate that:

> a determination as to what constitutes "all appropriate inquiry" under all the circumstances is to be made on a case-by-case basis. Generally, when determining whether a landowner has conducted "all appropriate inquiry," the Agency will require a more comprehensive inquiry for those involved in commercial transactions than for those involved in residential transactions for personal use. For example, an investigation along the lines of a survey for contamination may be recommended in some commercial transactions, whereas this type of inquiry would not typically be recommended for the purchaser of personal residential property. In sum, the determination will be made on the basis of what is reasonable under all of the circumstances.[52]

Accordingly, the EPA Guidance appears to be somewhat inconsistent with the attempt of House Resolution 2787 to define a standard that would be at least a presumption that all appropriate inquiries have been made. The EPA's Guidance does not clarify the specific steps that must be taken to have made "all appropriate inquiries" nor

---

49. *Id.*
50. *Id.*
51. Public Notice, 54 Fed. Reg. 34,235, 34,238 (1989).
52. *Id.*; *see also supra* n. 33 and accompanying text.

does it define the scope of environmental due diligence that must be expended in such inquiries. Rather, it suggests that a more comprehensive inquiry will be required for commercial transactions than for personal residential transactions and that determinations of whether inquiries are appropriate will be made on a case-by-case basis.[53]

VI. CONCLUSION

Landowner innocence under CERCLA is an elusive concept. The original CERCLA statute did not even contemplate a defense of innocence for landowners, rendering them strictly liable for cleanup liability with only the narrowest of limited defenses available. The SARA amendments purported to provide a defense to "innocent" landowners, but failed to define the parameters that had to be met to prove innocence. Proposed legislation to amend SARA's innocent landowner provision appears to do little more than to assimilate the current practices employed by landowners hoping to meet the "all appropriate inquiry" standard and then only proffers them as a "rebuttable presumption" that the inquiries have been met. The EPA's subsequent Guidance Document appears to take an even different tack by implying perhaps that innocence may not be suitable for definition at all, but that it will be won or lost on a case-by-case basis.

Perhaps the end result will be that innocence will ultimately be decided by the judiciary; after all, in the system of checks and balances, the court has been granted the power to be the ultimate arbiter of guilt and innocence. Perhaps the legislative branch's foray into the definition of innocence was an attempt to take on the judicial function of deciding a party's innocence. Perhaps the executive branch's pronouncement by way of EPA's guidance document espousing innocence on a case-by-case basis is an attempt to ensure that the finding of innocence be relegated to the judicial system and not to the Congress.

53. Public Notice, 54 Fed. Reg. 34,235, 34,238 (1989).