Innocent in the Land of the Guilty: Promoting Efficiency and Fairness in CERCLA Defenses

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ABSTRACT

The EPA's recent efforts to improve the operation of the Superfund Program amounts to a tacit acknowledgment that the implementation of CERCLA's goals is deficient and calls for critical reform to better achieve the statute's environmental remediation purposes. A major prerequisite for reaching the Act's goals is addressing certain severe obstacles that stand in the way of greater efficiency and effectiveness of the Superfund. One of CERCLA's major sources of inefficiency and unfairness is the application of the statute to impose potential liability and attendant costs on various groups of owners and operators as to whom the Superfund's liability regime produces unwarranted practical and financial burdens and engenders fundamental unfairness. Strategies to address this problem should focus on ways to remove innocent parties from categorical inclusion into the circle of potentially responsible parties from which they then must seek to extricate themselves, at significant expense, by establishing a defense in litigation. Effective and fair reform should adopt administrative measures under existing administrative law to provide innocent parties stronger binding and preclusive exemptions from CERCLA liability and resulting costs.

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INTRODUCTION

On May 22, 2017, Environmental Protection Agency ("EPA") Administrator Scott Pruitt announced the formation of a Superfund Task Force within the EPA charged with preparing recommendations on how to "streamline and improve" the Superfund Program.[1] The Superfund was established by Congress' enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "the Act").[2] That statute authorized the creation of a revolving trust fund under the Internal Revenue Code known as the Superfund.[3] CERCLA also directed the President of the United States to create a priority list, known as the National Priorities List ("NPL"), of public and private properties throughout the country in which a release or threatened release of contamination by hazardous substances has been established.[4] The Act broadly defines both "release" and "hazardous substance,"[5] and empowers the EPA to undertake measures designed to clean up properties on the NPL, using monies deposited into the Superfund from payment of remediation costs charged to parties responsible for the pollution.[6]

In his letter describing the Task Force and its mission, Administrator Pruitt noted that the objectives of the project would include formulating proposals designed to revitalize the Superfund by promoting management efficiency, improving enforcement, and enhancing the effectiveness of Superfund activities. A particular focus of the study was to examine and develop strategies regarding several particular objectives, specifically how to "restructure the cleanup process, realign incentives of all involved parties to promote expeditious remediation, reduce the burden on cooperating parties, incentivize parties to remediate sites, encourage private investment in cleanups and sites and promote the revitalization of properties across the country."[7] In response, the Task Force issued a report on

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1. Press Release, Environmental Protection Agency, EPA Announces Superfund Task Force (May 22, 2017), https://www.epa.gov/newsreleases/epa-announces-superfund-task-force [hereinafter Superfund Task Force Press Release].

2. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2012) [hereinafter CERCLA]. For further discussion of CERCLA's statutory goals, structure, and operation, *see infra*, notes 20–45 and accompanying text.

3. *See* Hazardous Substance Superfund, 26 U.S.C. § 9507 (2012).

4. *See* 42 U.S.C. § 9605 (2012). Prioritization is based on the relative danger to public health or welfare or to the environment posed by the contaminated properties. In turn, that determination rests on a number of factors identified by CERCLA. Shortly after CERCLA became law, President Ronald Reagan delegated the responsibility for designating and updating the properties on the NPL to the EPA. *See* David R. Hansen, *Environmental Regulation and Just Compensation: The National Priorities List as a Taking*, 2 N.Y.U. ENVTL. L. J. 1, 7 (1993).

5. 42 U.S.C. § 9601 (2012).

6. *See* 42 U.S.C. § 9605 (2012).

7. *See* Superfund Task Force Press Release, *supra* note 1.

July 25, 2017.[8] That Report identified five specific goals: Expediting Cleanup and Remediation; Re-Invigorating Responsible Party Cleanup and Reuse; Encouraging Private Investment; Promoting Redevelopment and Community Revitalization; and Engaging Partners and Stakeholders.[9] To achieve these objectives, the Task Force proposed forty-two recommendations that the EPA should adopt, focusing on key goals such as expediting site remediation and exercising more active use of enforcement authority against parties responsible for causing contamination of soil or water that creates hazards for human health and the environment.[10]

The Task Force proposals frequently reference CERCLA as a source of authority for the measures it urges. The feasibility and success of the recommendations themselves are constrained, however, by two major impediments that derive from the substance and structure of CERCLA itself. First, courts,[11] commentators,[12] and practitioners[13] have long recognized and criticized the labyrinthine law into which CERCLA has evolved over nearly four decades since its enactment. Second is the inequity inherent in the operation and application of the statute as to certain owners or operators of property contaminated by hazardous substances. For the purposes of this Note, those persons are referred to generically as "innocent parties" and comprise four subgroups: innocent landowners, good faith purchasers, adjacent owners, and tenants. Parties within these classes are similarly situated with regard to potential exposure to CERCLA liability, and consequently share an interest in efforts to escape or mitigate the operation of an enforcement regime that, under some circumstances, falls upon them unreasonably, and at times produces excessively harsh results.

Despite legislative and administrative measures that acknowledged and endeavored to address the severity of CERCLA's liability as it applies to innocent parties, the solutions that have emerged have failed to respond adequately with

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8. Press Release, Environmental Protection Agency, EPA Announces Superfund Task Force Recommendations, (July 25, 2017), https://www.epa.gov/newsreleases/epa-announces-superfund-task-force-recommendations [hereinafter Superfund Task Force Report].

9. *See id*. at 1–26. These goals and recommendations are discussed in further detail in Part III of this Note.

10. *See id.*

11. *See, e.g*., United States v. Bestfoods, 524 U.S. 51, 56 (1998); United States v. Alcan Aluminum Corp., 990 F.2d 711, 721 (2d Cir. 1993); United States v. Alcan Aluminum Corp., 964 F.2d 252, 267 (3d Cir. 1992).

12. *See, e.g*., John Copeland Nagle, *CERCLA, Causation, and Responsibility*, 78 MINN. L. REV. 1493, 1517 n.104 (1994); L. Jager Smith, Jr., Note, *CERCLA's Innocent Landowner Defense: Oasis or Mirage?*, 18 COLUM. J. ENVTL. L. 155, 156 (1993); Owen T. Smith, *The Expansive Scope of Liable Parties under CERCLA*, 63 ST. JOHN'S L. REV. 821, 837 (1989).

13. *See, e.g*., Greg DeGulis, *Burlington Northern: CERCLA and its Ever-changing, Unpredictable Landscape*, 28 NAT. RES. & ENV'T 40, 44 (2014); Jenny McClister, *CERCLA's Bona Fide Prospective Purchaser Defense: The Good, the Bad, and the Ugly*, 29 NAT. RES. & ENV'T 13, 14 (2014); Hong N. Huynh, *Managing the Risks of Ashley II to Protect CERCLA Defense*, 28 NAT. RES. & ENV'T 52, 52 (2013).

improvements that go to the heart of the problem.[14] Because of the potential substantial costs, practical burdens, and unfairness that these circumstances engender, they constitute a major source of inefficiency for the implementation of CERCLA and an impediment for the full realization for the Superfund Task Force's recommendations. These effects result insofar as the statute's enforcement and liability provisions generate more and longer litigation and complicate disputes. To the extent the process encompasses parties who may not belong in the circle of the truly guilty brought into court, its duration and costs are bound to be magnified when those litigants must struggle vigorously in litigation to extricate themselves from the proceedings. That measure of inefficiency is further exacerbated not only by the complexities associated with CERCLA, but by normative administration of justice concerns regarding the harsh and arbitrary outcomes it yields as applied in cases involving genuinely innocent parties. To the degree these fundamental issues are not adequately addressed, EPA's recent efforts to promote efficiency and effectiveness in the operation of the Superfund program by means of the recommendations advanced in the Superfund Task Force Report are bound to prove deficient, if not be rendered illusory.

The extensive substantive and procedural intricacies surrounding CERCLA are well-documented in the academic professional literature and will not be discussed here.[15] This Note, rather, seeks to review the underlying problems created by application of CERCLA liability in general, and as to innocent parties in particular. This Note also underscores the adverse effects this aspect of the statute's enforcement framework likely will have on the EPA's attempts, through the Task Force's recommendations and other efforts, to foster greater efficiency in the administration of the Superfund Program. Part I of this Note examines the doctrinal structure and enforcement mechanisms associated with CERCLA's liability as typically implemented by the EPA and private parties against potentially responsible parties in actions that often unnecessarily drag innocent parties into the proceedings. Part I argues that in operation, these developments have been counterproductive, embodying major inefficiencies and inequities, the net product of which have hampered achievement of the exemption from liability that CERCLA carved out to mitigate its severe consequences. Part I further suggests that there are no practical or principled grounds supporting the disproportionate burdens and outsized unfairness that CERCLA imposes on some landowners and operators, especially innocent parties, in certain circumstances.

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14. The shortcomings of legislative and administrative measures adopted to remedy the difficulties associated with application of CERCLA to innocent parties have generated a substantial body of skeptical commentary questioning the value and effectiveness of those efforts. *See, e.g.*, Damon. D. Tanck, *Getting Snagged in the Environmental Liability Web: The Trouble with CERCLA and Why the Brownfields Act Provides Only Modest Relief*, 35 TEX. TECH L. R. 1325 (2004); Robert P. Dahlquist & Tiffany A. Barzal, *Ah: Relief from CERCLA. But Where's the Relief?*, 12 A.B.A. BUS. L. TODAY 39 (May/June 2003); McClister, *supra* note 13; DeGulis, *supra* note 13; L. J. Smith, *supra* note 12.

15. *See generally* GENE A. LUCERO, CERCLA RIGHTS AND LIABILITIES HANDBOOK (2012).

Part II of this Note examines the inequitable dilemmas that the CERCLA liability scheme presents to defendants who fall into the particular categories of innocent parties that the statute recognizes and has sought, through various amendments, to exclude from its application. Specifically, the four categories of persons characterized above as "innocent parties" are described in the statutory text as: "third parties" who did not know of or cause contamination of a property (informally referred to by courts and scholars as "innocent landowners");[16] "bona fide prospective purchaser[s];"[17] "contiguous property owner[s];"[18] and "tenant[s]."[19]

Part III of this Note discusses the difficulties these flaws in CERCLA's liability scheme create for achieving the Superfund Task Force's recommendations announced by the EPA in July of 2017.

Part IV then outlines proposals for legislative and administrative actions designed to address the structural flaws embodied in the CERCLA liability scheme described in Part II, as well as some weaknesses in the Superfund Task Force's proposals discussed in Part III. This Note maintains that efficient, effective, and fair implementation of the Superfund Program calls for such reforms.

I. HASTE AND WASTE: THE ORIGIN OF CERCLA

Congress enacted CERCLA[20] in 1980 to achieve two central goals: first, to provide a mechanism and resource to ensure that sites containing hazardous substances are cleaned expeditiously, and second, to ensure that the parties responsible for causing the contamination bear the costs of the necessary cleanup.[21] To these ends, CERCLA authorizes the EPA to undertake remediation measures and seek reimbursement of the costs from "potentially responsible parties" ("PRPs").[22] Similarly, the statute creates a right of action, which inures to the benefit of private parties who have incurred costs in cleaning up a hazardous waste site, regardless of whether they caused the pollution, so as to enable them to recover the costs from PRPs.[23]

16. 42 U.S.C. § 9607(b)(3) (2012). *See also* L. J. Smith, *supra* note 12, at 157 n.13.

17. *Id.* § 9601(40).

18. *Id.* § 9607(q)(1)(A).

19. *Id.* § 9601(40).

20. *Id.* §§ 9601–75.

21. *See* Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 602 (2009) (stating that CERCLA "was designed to promote the timely cleanup of hazardous waste sites and ensure that the costs of such cleanup efforts were borne by those responsible for the contamination").

22. *See* 42 U.S.C. § 9606(c) (2012).

23. *Id.* § 9607(a). *See also* PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 167–68 (4th Cir. 2013) (declaring the elements that a private party must demonstrate to state a prima facie case for cost recovery under CERCLA, specifically "that (1) the defendant is a [PRP]; (2) the site constitutes a single 'facility'; (3) a 'release' or threatened release of hazardous substances exists at the 'facility'; (4) the plaintiff has incurred costs responding to the release or threatened release of hazardous substances ('response costs'); and (5) response costs conform to the National Contingency Plan"). CERCLA requires the preparation of a National Contingency Plan as a comprehensive program to deal with the

CERCLA defines PRPs in four classes of persons, according to their relationship to the property or facility where the disposal or release of hazardous waste occurred, or to the role the PRPs played in creating or contributing to the contamination. These categories comprise: (1) the current owner or operator of the facility;[24] (2) any owner or operator "at the time of disposal" of such hazardous substances;[25] (3) any person who arranged for the disposal or treatment of the hazardous substances;[26] and (4) persons who transported the hazardous substances to the site for disposal or treatment.[27] In the text of these and several other provisions, CERCLA has been described as "hastily drafted"[28] and "riddled with uncertainty."[29] Indeed, the United States Supreme Court has noted how "CERCLA, 'unfortunately, is not a model of legislative draftsmanship.'"[30] Compounding the flawed drafting, the substance of the statute itself has raised concerns that in many applications it produces results characterized as "harsh"[31] and "unfair."[32] As one federal Circuit Court has acknowledged, "[c]ourts do not consider equity in determining whether a party is a PRP."[33]

Because the statute was designed primarily to expedite cleanup of existing contaminated sites and prevent taxpayers from having to bear the remediation costs associated with cleaning future sites,[34] CERCLA imposes strict liability upon PRPs.[35] Under this standard, neither the plaintiff in a private action nor the EPA in a government enforcement proceeding is required to show causation as an element of a prima facie case in order for remedial obligations to attach to PRPs.[36]

In many cases, particularly where the contamination may involve multiple sources or substances and multiple PRPs, liability for the disposal may not be

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difficulties and challenges presented by disposal of hazardous substances from contaminated properties. *See* 42 U.S.C. § 9605 (2012).

24. *Id*. § 9607(a)(1).

25. *Id*. § 9607(a)(2).

26. *Id*. § 9607(a)(3).

27. *Id*. § 9607(a)(4).

28. Lora E. Keenan, *Attorney Fees in Private Party Cost Recovery Actions under CERCLA*, 22 ECOLOGY L. Q. 449, 458 (1995) (quoting Bulk Distrib. Ctr. Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984)).

29. *Id*.

30. United States v. Bestfoods, 524 U.S. 51, 56 (1998) (quoting Exxon Corp. v. Hunt, 475 U.S. 355, 363 (1986)).

31. United States v. Alcan Aluminum Corp., 990 F.2d 711, 721 (2d Cir. 1993).

32. United States v. Alcan Aluminum Corp., 964 F.2d 252, 267 (3d Cir. 1992) (noting that the absence of causation as an element of CERCLA liability would appear to "lead to unfair imposition of liability"); *see also* Nagle, *supra* note 12, at 1517 n.104.

33. PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 172 (4th Cir. 2013).

34. *See* O.T. Smith, *supra* note 12, at 837.

35. CERCLA itself does not expressly provide for strict liability but incorporates by reference the standard applicable to the Clean Water Act, which courts have interpreted to mandate strict liability. *See* United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 843–44 (W.D. Mo. 1984); *see also* Joel S. Moskowitz, *Enforcement of CERCLA against Innocent Owners of Property*, 19 LOY. L.A. L. REV. 1171, 1175 (1986).

36. *See* Nagle, *supra* note 12, at 1508.

traceable to a particular origin and thus would not be divisible. Consequently, CERCLA provides that PRPs are joint and severally liable for the costs of cleanup at a site. In practice, the EPA and private plaintiffs can therefore target for remedial action or contribution the particular defendant who may be most readily identifiable—typically the current owner or operator—or the one who may have the deepest pockets, thus placing the burden on that defendant to prove exemption from liability or to find and implead other PRPs to share in the allocation of liability.[37] The net effect of joint and several liability in the CERCLA context is that a defendant with only a slight relationship to the property or to the hazardous substance disposed there may be responsible for a disproportionate share, or even all, of the response costs of the cleanup. The statutory scheme thus alters traditional tort liability in a way that shifts a heavy burden to defendants.

CERCLA's strict liability scheme, as grounded solely on the status of a person's relationship to the site, created fundamental problems for some persons caught inequitably in the web of the categorical statutory definition of PRP. In particular, the statute's strict liability standard would give rise to uniquely severe consequences for the specific innocent parties described above, and discussed in more detail in Part II of this Note. These are: (1) persons who acquired contaminated property by private purchase or involuntary means such as inheritance, foreclosure, or business merger, or by public processes such as condemnation, eminent domain, or escheat, and who at the time of acquisition had no knowledge or reason to know that soil or water on the site contained hazardous substances; (2) landowners who, after due diligence, acquired the property in good faith knowing about the contamination, but with the expectation that they would not bear the liability for remediation of pre-purchase pollution; (3) property owners whose land is located contiguous to contaminated soil or water, of which they had no knowledge or reason to know, and from which there is a release of toxic waste to an adjacent property; and (4) tenants who occupy or operate a leased property containing hazardous substances of which they had no knowledge or reason to know at the time they acquired their possessory interest in the land from owners who may or may not have known about or caused the contamination.[38]

In relation to each of the preceding groups, the land owners, operators, or lessees may be "innocent" at the time of their acquisition of the site insofar as they did not cause the contamination, had no knowledge of it, and sought reasonable ways to protect against liability by due diligence inspection and appropriate care. But under CERCLA's enforcement and cost recovery provisions, these persons nonetheless may find themselves thrown into the statute's pool of PRP strict liability and exposed to its severe burdens of joint and several obligations to perform remedial measures.

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37. *See id.* at 1533.
38. *See* 42 U.S.C. §§ 9601(35)(A)(i)–(iii) (2012).

To address some of the concerns raised by application of the statute's rigid PRP provisions and absolute enforcement scheme, CERCLA has provided an escape hatch protection by which such innocent parties may establish entitlement to exemption from liability.[39] As further detailed below, the development of the statutory innocent party exceptions has been evolutionary, but with each incremental reform failing to effectively correct the problem and thus provide sufficient relief. In the text of the original statute, the innocent party exception applied only to property contamination arising from acts of God, acts of war, or acts of "third parties" who had no employment, familial, or contractual relationship to a PRP defendant.[40] The EPA's adoption of an interpretation of "third parties," which provided that any property transaction such as a deed, lease, or other conveyance by which the land was acquired qualified to create a contractual relationship that would nullify the defense, rendered this original exception ineffective.[41] Accordingly, a person who by deed, lease, inheritance, or foreclosure acquired property on which there was a release or threatened release of hazardous substances could be held liable for remediation costs even if the transferee was unaware of the contamination before the transaction. Furthermore, parties could only utilize this protection by means of a defense in litigation, and this brought the innocent third parties into court proceedings in which they did not properly belong. To secure it, defendants invoking the innocent party safeguard had to bear the burden of proof by preponderance of the evidence.[42] Thus, even if an innocent party succeeded in qualifying for the exception, to do so required their incurring the enormous expense of litigation and other costs. More consequentially, though the innocent party could enter into the acquisition or lease of the contaminated property and potentially be eligible to claim the exemption from liability, circumstances could arise by reason of which that owner or operator or lessee could lose eligibility to assert the defense, and thus face the possibility of bearing the full measure of PRP liability.[43]

Combined, these circumstances produced perhaps the most troubling incidence of harshness and inequity that CERCLA raises. That result stemmed from the prospect of imposing strict liability on innocent parties, with the normative implications of unfairness and inefficiency such outcomes engender for the administration of the environmental laws, for courts and the legal system in general, and for the larger society. Thus, the third party defense component of CERCLA as originally structured, despite its express safety net exemptions, created significant tension with this fundamental fairness concept, as well as with effective

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39. *See id.* § 9607(b).

40. *See id; see also* L. J. Smith, *supra* note 12.

41. *See* L. J. Smith *supra* note 12.

42. *See* 42 U.S.C. § 9607(b)(3); *see also* Washington v. Time Oil, Inc., 487 F. Supp. 529, 532 (W.D. Wash. 1988).

43. *See id.* § 9607(b)(3)(A); *see also* Containerport Group, Inc. v. Am. Financial Group, Inc., 128 F. Supp.2d 470, 480 (S.D. Ohio 2001).

administration of the Superfund Program.[44] Because the CERCLA liability framework is grounded not on causation but on the categorical status of the defendant as an owner or operator of the facility or generator or transporter of the hazardous substance, some parties initially brought into the litigation by the EPA or private plaintiffs could face strict liability for response costs incurred in the cleanup. This could occur despite their having done nothing or not enough to contribute to the injury, and thus, they may be compelled to bear a disproportionate burden for cleanup.[45]

II. THE BANDAGES OF SARA AND BROWNFIELDS

Because CERCLA's third party defense, as initially drawn, proved of little value to innocent parties, Congress adopted legislation on two occasions amending the exemption to remedy the hardships engendered by the statute. Moreover, as interpreted and applied, the original statute not only denied the third-party defense to persons who, unaware of the hazardous waste on the property, acquired contaminated land through any contractual or familial relationship with the polluter. In addition, it raised equitable issues regarding the status of (1) private persons who acquired such property by inheritance[46] or foreclosure on a mortgage or other security interest or by corporate merger, or (2) government entities which acquired such properties through eminent domain, condemnation, or escheat.[47] In particular, these circumstances brought about uniquely inequitable legal, financial, and practical consequences to the four groups of innocent parties. The difficulties applicable to each are discussed below in turn.

A. THE PARADOX OF THE INNOCENT LANDOWNER

To address CERLCA's weaknesses with regard to innocent parties, Congress explicitly defined the third party defense in the 1986 Superfund Amendments and Reauthorization Act ("SARA").[48] This provision exempted from liability persons referred to in case law and academic literature as "innocent landowners," who did not know or have reason to know of a property's contamination at the time of its sale, and who demonstrated by a preponderance of the evidence that (1) the contamination at the site was caused solely by the conduct of a third party, (2) the property owner invoking the exemption had no relationship with the person who caused the release of the hazardous substances, and (3) the defendant exercised

44. *See* Nagle, *supra* note 12, at 1533 ("CERCLA presently holds current owners and operators responsible for the costs of cleaning up a site even if all the hazardous waste were disposed of at the site prior to their arrival."); *see also id*. at 1525–26.

45. As the Third Circuit expressed this concern: "CERCLA seemingly would impose liability on every generator of hazardous waste, although that generator could not, on its own, cause any environmental harm." United States v. Alcan Aluminum Corp., 964 F.2d 252, 267 (3d Cir. 1992).

46. *See, e.g*., 42 U.S.C. § 9601(35)(A)(iii) (2012).

47. *See id*. § 9601(20)(E)(ii).

48. *See id*. §§ 9601–75.

reasonable care regarding the hazardous waste and safeguarded against contamination by third parties.[49]

SARA endeavored to clarify the text and application of the third-party defense by modifying the definition of persons having a contractual relationship with the polluting landowner. To this end, it excluded from CERCLA coverage property owned or operated by persons whose acquisition of the contaminated land occurred after the disposal of hazardous waste on the site, and who could establish their unawareness of the existence of contamination on the property, or who acquired the property by inheritance.[50] These modifications, however, proved inadequate and failed to remedy the inequitable exposure to liability to which not only innocent landowners but other classes of innocent parties may be subjected. Critics have pointed out that even as amended, the exemption actually provides no reliable remedy to innocent parties. As one commentator remarked, "the innocent landowner defense provides effectively *no* reliable defense to a purchaser of real estate today; while it appears to be an oasis for the innocent purchaser of contaminated property who desperately needs help in the strict liability desert of CERLCA, it frequently turns out to be a mirage for those who seek to assert it."[51]

Three fundamental issues account for why basic defects remain in the statutory enforcement and liability scheme relating to the innocent landowner despite the textual revisions, and why the defense continues to present critical concerns not only for innocent landowners unfairly subjected to potentially ruinous litigation, but for the justice system. First, the imposition of strict liability relieving plaintiffs of the burden of showing causation, combined with joint and several liability in many cases, still means that innocent landowners may be thrown into the pool of PRPs and thus exposed to substantial costs and possibly liability at the initial stages of the litigation.

Second, because of the rigorous strict liability standard that ordinarily is difficult to overcome, it is effectively at the end of litigation—the contribution and damages phases—that some innocent landowners may avail themselves of their affirmative defense claiming innocence. To make matters more difficult for the innocent parties, they bear the burden of proof by a preponderance of the evidence. Accordingly, as one commentator noted, "instances remain . . . in which responsibility for cleanup attaches to parties who can prove that they did not cause the contamination at the site. In still more instances, responsibility exceeds a party's 'fair share' of cleanup costs."[52]

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49. *See id.*

50. *See id.*

51. L. J. Smith, *supra* note 12, at 157 (emphasis in original); *see also* Nagle, *supra* note 12, at 1525 (noting that "because CERCLA as presently written sometimes contradicts its stated goal of imposing liability on those parties responsible for hazardous waste contamination, Congress should amend CERCLA to better relate responsibility to causation.").

52. Nagle, *supra* note 12, at 1525.

Third, even if current landowners or operators prevailed in establishing an innocence defense, they are not relieved of the large burdens, financial, reputational, and in other ways, that CERCLA litigation imposes on them. The protection accorded by a legal defense is merely that: a defense, a procedural means devised to challenge liability once the party has been hauled into court. Persons who own or control property containing hazardous substances—regardless of the method by which the land was acquired, no matter how forceful their defense may be asserting innocence, and despite the strength of the faith such landowners may have in the merits of their denial of responsibility—nonetheless remain essentially at the mercy of the other PRPs rounded up to respond to a CERCLA action alleging liability for contamination and seeking remediation measures. Such PRPs are likely to press their claims as vigorously as their resources permit against any other person who may possibly qualify as a PRP, however marginally, or who may be even remotely affiliated with a PRP—connections that are not difficult to find in regard to property transactions occurring in the contexts of commercial or family relationships.[53]

In *United States v. Slay*,[54] for instance, defendant Slay, upon being sued by the EPA for remediation of a contaminated facility, commenced an action asserting claims for contribution against NBR Maritime II, LLC ("NBR"), a prior owner from whom Slay had purchased the property at issue. In the court proceedings, NBR submitted evidence establishing that when it acquired the land, a Superfund site, "there was no actionable contamination on the property;"[55] that an EPA Record of Decision had determined that prior remediation actions had reduced the amount of hazardous substances below levels that posed risk to human health or the environment; that the EPA had concluded that remediation at the facility was complete; and that the EPA had released its liens against the property, issued a statement indicating that NBR was not regarded as a PRP, and removed the site from the NPL.[56] None of these factual exculpations proved sufficient for NBR to definitively avert or curtail the litigation at its inception. NBR's experience thus presents a dramatic illustration of the hardships and pitfalls that some litigants encounter during the course of CERCLA enforcement proceedings, even if in the end they can establish that in fact they qualified as innocent parties all along.

In other words, the innocent landowner exemption does not shield a defendant from having to appear in judicial or administrative proceedings to answer charges

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53. *See* Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections, EPA (Sept. 21, 2011), https://www.epa.gov/sites/production/files/2013-11/documents/affiliation-bfpp-cpo.pdf (describing the broad categories of direct or indirect prohibited relationships under CERCLA's defenses); *see also* James Andreasen, *Is CERCLA Owner Strategy Changing?*, 28 NAT. RES. & ENV'T 55, 55 (2013) ("In the end, a purchaser might feel a reasonable degree of certainty based on the defenses, but absent a body of case law helping to circumscribe the meaning of the defenses some inchoate risk remains.").

54. United States v. Slay, 2013 WL 1312559, at *1 (E.D. Tex. Feb. 27, 2013).

55. *Id.* at *4.

56. *See id.*

alleging contamination and establish their innocence by preponderance of the evidence. Under these circumstances, by the time the innocent landowners could obtain relief by invoking the defense, they will have incurred significant costs for expert due diligence investigations, other reports to demonstrate their exercise of appropriate care and reasonable steps in addressing the contamination, as well as attorney's fees and other transaction outlays—all such expenditures necessary to exonerate the innocent party, or to identify and bring the actually responsible parties into the litigation.[57] Typically, those expenses can be staggering, running into the tens of thousands or even millions of dollars, sometimes far disproportionate to the innocent landowner's role in the dispute.[58]

The innocent landowner defense, even as improved by SARA, contains another retrograde catch. Owners or operators who did not cause the contamination already present at the site at the time of their acquisition of the property, and who as of that point did not know or have reason to know of the presence of hazardous substances, may still not qualify to assert the innocent landowner defense if they fail to satisfy several other conditions. For example, they may lose the protection if upon becoming aware of the contamination, they did not exercise due care to remove or diminish a potential threat to human health or to the environment at the site;[59] if they had constructive notice of the pollution that was based on ground borings taken on the property after purchase by the owner, or on newspaper accounts about contaminants found at an adjoining property;[60] or if they did not make appropriate inquiry prior to the acquisition, or caused delays in remediation actions by not responding speedily enough to a governmental proposal.[61]

B. BONA FIDE PROSPECTIVE PURCHASERS AND THE LIMITATIONS OF GOOD FAITH

In 2002, Congress again revisited the innocent party issue by addressing some of the fundamental concerns that persisted despite the SARA reforms. To this end, it enacted the "Brownfields Act," further amending CERCLA by creating

57. *See* Nagle, *supra* note 12, at 1534 ("Even if a current owner or operator ultimately succeeds in allocating most of the costs to the parties who actually caused the hazardous substances contamination, the current owner or operator must assume the transaction costs of bringing those parties into the litigation. The existing statutory innocent landowner defense falls far short of remedying any of these problems.").

58. *See* Smith, *supra* note 12, at 177 n.117 (noting that litigation costs in establishing a CERCLA defense can amount to as much as 24 to 44% of the direct costs of the site's cleanup, a figure that on average can range into the millions or tens of millions of dollars).

59. *See* Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 548 (6th Cir. 2001).

60. *See* United States v. A&N Cleaners & Launderers, Inc., 854 F. Supp. 229, 234 (S.D.N.Y. 1994).

61. *See* New York State Electric & Gas Corp. v. First Energy Corp., 808 F. Supp.2d 417, 533 (N.D.N.Y. 2011).

several exceptions to PRP designation and attendant liability defenses.[62] Among these new defenses was the "bona fide prospective purchaser" ("BFPP") exemption. That protection shields a landowner or operator from CERCLA liability if the party satisfies eight criteria set forth in the statute.[63] Specifically, those provisions require that the party asserting the BFPP exemption prove, by a preponderance of evidence, that they: (1) established that all disposal of hazardous wastes took place before the BFPP's ownership or operation of the site;[64] (2) made "all appropriate inquir[ies]" into the prior ownership and uses of the facility;[65] (3) provided legal notice if it discovered hazardous substances;[66] (4) exercised "appropriate care" with respect to hazardous substances located on the property by taking "reasonable steps" to stop and prevent release of toxic waste and protect against environmental exposure to such releases;[67] (5) fully cooperated and assisted with authorized inspections and responses to releases;[68] (6) complied with land use restrictions and did not impede response actions;[69] (7) complied with all government subpoenas;[70] and (8) was not a PRP or affiliated with any PRP prior owner or operator of the facility.[71]

Two observations regarding these factors warrant underscoring for the purposes of this Note. One relates to the timing of the underlying events to which the conditions relate. The first three and the eighth criteria concern actions that occur before the BFPP enters into the agreement to acquire ownership or control of the property.[72] The other four considerations describe circumstances referred to as "continuing obligations" that may arise after the BFPP has assumed ownership or control.[73] Such continuing obligations have been described as "very burdensome"[74] and "ambiguous and potentially confusing."[75] Additionally, to be

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62. *See* Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. Law No. 107–118 (Jan. 11, 2002); *see also* PCS Nitrogen Inc. v. Ashley II of Charleston LLC [*Ashley II*], 714 F.3d 161, 179 (4th Cir. 2013).

63. 42 U.S.C. §§ 9601(40)(A)–(H) (2012).

64. *Id.* § 9601(40)(A).

65. *Id.* § 9601(40)(B).

66. *Id.* § 9601(40)(C).

67. *Id.* § 9601(40)(D).

68. *Id.* § 9601(40)(E).

69. *Id.* § 9601(40)(F).

70. *Id.* § 9601(40)(G).

71. *Id.* § 9601(40)(H).

72. Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), EPA Mar. 6, 2003, https://www.epa.gov/sites/production/files/documents/common-elem-guide.pdf [hereinafter 2003 Interim Guidance].

73. *See id.*

74. Tanck, *supra* note 14, at 1356.

75. William R. Weisman, *Revitalizing the Brownsfields Revitalization and Environmental Restoration Act: Harmonizing the Liability Defense Language to Achieve Brownfield Restoration*, 33 VA. ENVTL. L. J. 257, 277 (2015) (noting for example that CERCLA and the Brownfields Amendments do not define "land use restrictions" or "institutional controls").

eligible for exemption from PRP liability, a BFPP must establish each of the eight standards.[76]

These prerequisites and their temporal division are significant because they embody perilous pitfalls and severe financial and practical consequences for BFPPs. Both pre- and post-site acquisition requirements are extremely difficult to establish and costly to prove.[77] But, once demonstrated through such a rigorous process, they may be easy to lose. Like the innocent landowner, a BFPP may enter into an acquisition of a contaminated property while satisfying the conditions of good faith and lack of causation regarding the contamination that define a party entitled to exemption from CERCLA liability. Nonetheless, by reason of a mishap during post-acquisition events, the BFPP may readily forfeit the benefit of the defense, and thus be subject to treatment as a PRP.[78] The result could be potentially catastrophic for the BFPP, and vastly disproportionate to the BFPP's conduct in relation to a particular release or disposal of hazardous substances at the facility. For instance, theoretically, on account of a relatively minor act of negligence that may not have added to the original contamination on a property—such as failing to respond timely to a government request for information about conditions at the facility—a BFPP could effectively forfeit the protection of CERCLA's liability exemption.[79] As a consequence, the BFPP could incur full exposure for remediation costs to the same extent as a PRP who actually caused the pollution in the first instance.[80]

PCS Nitrogen Inc. v. Ashley II of Charleston LLC illustrates the preceding point.[81] In that case, the Fourth Circuit issued the first federal appellate court interpretation of the BFPP exemption.[82] The litigation arose after Ashley II of Charleston, LLC ("Ashley") purchased portions of a site which was contaminated from fertilizer manufacturing.[83] Ashley knew of the contamination and intended to remediate the soil.[84] Ashley then brought a cost recovery action against PCS Nitrogen Inc. ("PCS"), an alleged successor corporation to a previous owner of the site, seeking to recover costs that Ashley had already incurred, invoking the BFPP exemption, and requesting a declaratory judgment determining that PCS

76. *See* PCS Nitrogen Inc. v. Ashley II of Charleston LLC [*Ashley II*], 714 F.3d 161, 180 (4th Cir. 2013).

77. *See* Smith, *supra* note 12, at 177 n.117; Diana L. McDavid, *Liabilities of the Innocent Current Owner of Toxic Property Under CERCLA*, 23 U. RICH. L. REV. 403, 413–15 (1989).

78. *See* Kenneth A. Hodson & Charles H. Oldham, *Defenses to Liability under CERCLA*, 46 ARIZ. ST. L. J. 459, 464 (2014).

79. *See id*. at 474.

80. As an EPA guidance memorandum acknowledged: "There could be unusual circumstances where the reasonable steps required of a bona fide prospective purchaser, contiguous property owner, or innocent landowner would be akin to the obligations of a potentially responsible party." 2003 Interim Guidance, *supra* note 72, at 10 n.10.

81. *See Ashley II*, 714 F.3d at 167.

82. *See* Huynh, *supra* note 13, at 52.

83. *See Ashley II*, 714 F.3d at 168–71.

84. *See id*. at 171.

was jointly and severally liable for all response costs as a PRP.[85] In analyzing the BFPP factors, the district court rejected Ashley's contention.[86] It found that although Ashley had met some of the criteria, it did not sufficiently demonstrate compliance with the "appropriate care" standard insofar as it did not take reasonable steps to prevent the release of hazardous substances on the site during its ownership.[87]

In affirming the district court's decision, the Fourth Circuit raised a question regarding the proper standard for "appropriate care" for BFPPs, specifically whether it should be higher than the "due care" test applicable to innocent landowners.[88] In the end, the court did not resolve the issue because it determined that, based on the facts presented, Ashley was liable under either standard.[89] In suggesting the prospect that a heightened standard of care may apply to the inquiry regarding BFPP status, the court not only created uncertainty, but essentially signaled a possible shift of the BFPP standard of care away from one analogous to that which governs innocent landowners, despite similarities in the construction of both exceptions, and approaching the standard employed to determine PRP liability.[90]

Ashley maintained that "landowners will not undertake voluntary brownfields redevelopment for fear of becoming fully liable for cleanup costs as a result of minor mistakes that may not even contribute to harm at the facility."[91] The Circuit Court rejected that argument, primarily on the ground that Ashley knew about the contamination on the property at the time Ashley acquired it.[92]

In ruling as it did, the Fourth Circuit ignored or gave short shrift to two important points. First, the BFPP protection was enacted as an incentive for industrial companies, land developers, and small businesses to acquire and improve brownfields. To this end, the strategy the amendments adopted was precisely designed to recognize the good faith with which land purchasers enter into the acquisition of the contaminated property, and thus sought to avoid imposing liability on some owners—even if they possessed advance knowledge of the presence of hazardous substances at the facility.[93] Second, the *Ashley II* court failed to address the substantial inequity entailed in two regards: first, the disproportionate outcome a landowner experiences upon losing its BFPP

85. *See id*.
86. *See id*. at 179–80.
87. *Id*. at 180–81.
88. *Id*. at 180.
89. *See id*. at 180–81.
90. *See* Huynh, *supra* note 13, at 53*; see also* Nicholas J. Ortolano III, *Appropriate Care Under the Brownfield Amendments: A Better Standard after the Fourth Circuit's Holding in* PCS Nitrogen v. Ashley II, 5 SEATTLE J. ENVTL. 25 (2015); Christopher D. Thomas, *Tomorrow's News Today: The Future of Superfund Litigation*, 46 ARIZ. ST. L. J. 537 (2014).
91. *Ashley II*, 714 F.3d at 180.
92. *See id*. at 181.
93. *See id*. at 179.

exemption after incurring the significant costs necessary to obtain it, and second, the initial good faith and absence of causation on the BFPP's part in creating the underlying contamination.

C. CONTIGUOUS PROPERTY OWNERS: SINS OF THE NEIGHBOR

CERCLA excludes from PRP liability a person who owns property situated contiguous to the source of contaminated substances found on that person's land or water, and who satisfies the conditions prescribed by CERCLA § 107(q)(1)(A).[94] This provision, also adopted as part of the Brownfields Act,[95] was designed to "protect[] parties that are essentially victims of pollution incidents caused by their neighbor's actions."[96] To qualify for the protection of this provision, a contiguous owner must establish by a preponderance of the evidence that the person: (1) did not "cause, contribute, or consent" to the contamination;[97] (2) is not a PRP or affiliated with a PRP by family, contract, corporate, or financial relation;[98] (3) has taken reasonable steps to stop, limit, or prevent release of hazardous substances from the property;[99] (4) fully cooperates and provides access and assistance in connection with approved respond actions;[100] (5) complies with and does not impede the effectiveness of any use restriction on institutional control applicable in connection with a response action at the property;[101] (6) provides information requested by subpoena;[102] (7) gives required notices regarding the release of hazardous substances at the property;[103] and (8) conducted all appropriate inquiry concerning the property, and did not know or have reason to know that the property was or could be contaminated by a release of hazardous substances emanating from other property not owned or operated by the person.[104]

The preceding conditions substantially mirror those described above as they pertain to BFPPs. Consequently, many of the same weaknesses that narrowly restrict the application of the other innocent party exemptions extend as well to circumstances involving contiguous property owners, and mostly for the same reasons.[105] In fact, the statute provides that a person who fails to qualify for the

94. *See* 42 U.S.C. § 9607(q)(1)(A) (2012).
95. *See id.* § 9607(q).
96. 2003 Interim Guidance, *supra* note 72, at 3 (quoting S. Rep. No. 107-2 at 10 (2001)).
97. 42 U.S.C. § 9607(q)(1)(A)(i) (2012).
98. *Id.* § 9607(q)(1)(A)(ii).
99. *Id.* § 9607(q)(1)(A)(iii).
100. *Id.* § 9607(q)(1)(A)(iv).
101. *Id.* § 9607(q)(1)(A)(v).
102. *Id.* § 9607(q)(1)(A)(vi).
103. *Id.* § 9607(q)(1)(A)(vii).
104. *Id.* § 9607(q)(1)(A)(viii). However, under the Brownfields Amendments, contiguous property owners are not required to take certain remedial measures, such as performing underground water investigations, or installing water remediation systems. *See id.* § 9607(q)(1)(D).
105. *See* Tanck, *supra* note 14, at 1360–61 (observing that "[o]verall, the contiguous property exemption will be of little benefit for most owners whose property becomes contaminated by an offsite release").

contiguous owner protection due to knowledge of the contamination at the property at the time of acquisition may still qualify to invoke the exemption as a BFPP if that landowner or operator otherwise satisfies all of the criteria applicable to the BFPP exception.[106] But, because of the rigorous requirements prescribed for pre-acquisition appropriate inquiries, as well as for the post-acquisition continuing obligations, the value of the contiguous property owner protection may be limited in many cases.[107] As one source expressed this point, there are many commentators "of the belief that the [Brownfields] Amendments are complex with difficult standards to meet, and instead of providing greater protection and certainty, the Brownfields Act 'creates extremely narrow liability exceptions that apply in very limited circumstances.'"[108]

D. A HOUSE BUILT ON SAND: TENANTS AND THEIR TENUOUS PROTECTIONS FROM CERCLA LIABILITY

In December 2012, the EPA promulgated a new set of enforcement guidelines with respect to the liability of tenants of contaminated property based on the BFPP exemption.[109] In its memorandum, the EPA affirmed that such tenants are derivatively entitled to avail themselves of the BFPP defense, even in situations where a facility's owner may not be a BFPP.[110] The memo concluded that the EPA would "exercise its enforcement discretion on a site-specific basis to treat the tenant as a BFPP when the tenant itself meets all of the BFPP provisions in CERCLA §§ 101(40)(A)–(H) and 107(r)(1)."[111] In spite of this apparent leniency, however, uncertainty remains for tenants who may still face potential liability even if they play no role in causing the release of hazardous substances. For example, if a landlord fails to meet any of the BFPP criteria required by the statute, it may be difficult for a tenant to prove that it satisfied the requirements independently.[112] Furthermore, it is unclear what would happen in a case in which a

106. 42 U.S.C. § 9607(q)(1)(C) (2012).

107. Tanck, *supra* note 14, at 1329.

108. *Id*. at 1329 (quoting Dahlquist & Barzal, *supra* note 14, at 45); *see also* Peter Niemiec, *The Brownfields Blues*, 25 L.A. LAW. 32, 36 (Jan. 2003) ("[The Brownfields Amendments] offer[] little reform, little incentive to do Brownfields deals, and little reason to think that the fundamental ways of doing the deals will change. The amendments do, however, add potential traps for those who might be tempted to take advantage of the so-called reforms being offered.").

109. *See* Memorandum from Cynthia Giles, Assistant Administrator, Office of Enforcement and Compliance Assurance of EPA to Regional Administrators (Dec. 5, 2012), http://www2.epa.gov/sites/production/files/documents/tenants-bfpp-2012_0.pdf [hereinafter 2012 Tenant Enforcement Guidance].

110. *See* John Morris, *What Tautology?: How the Whole Act Rule Could Inform CERCLA's Ownership Definition*, 44 TEX. ENVTL. L. J. 267, 267–268 (2014).

111. 2012 Tenant Enforcement Guidance, *supra* note 109, at 5.

112. *See id*. at 3. The policy provides that a tenant may derive the protection of BFPP status from an owner who satisfies the BFPP requirements, and for as long as the owner remains in compliance. However, "if the owner loses its BFPP status whether by its own action or inaction, or that of the tenant, in the EPA's view of CERCLA's provisions, the tenant generally would no longer be a tenant with derivative BFPP status." *Id*. This contingency and dependence, as the EPA guidance itself recognizes,

tenant is aware of and is relying on its landlord's status as a BFPP, if the landlord subsequently loses its BFPP protection through its own fault.[113]

The uncertainty about the extent to which a tenant who occupies or operates a contaminated facility may be regarded as a landowner and a PRP and thus held liable for remediation actions, has been the subject of litigation. Responding to this question, several courts which have considered the issues have formulated different standards and offered varying guidance.[114] Three tests emerge from this case law. Under one, a tenant may be treated as if it stood in the place of the owner, based on the level of control the tenant exercised over leased property in which hazardous substances are found.[115] Another test focuses the analysis on an inquiry of de facto ownership, which is determined by the tenant's "indicia of ownership vis-à-vis the record owner."[116] A third standard for asserting a tenant's CERCLA liability as an owner would look to the applicable rules of state common law.[117]

To recap the points emerging from the preceding discussion concerning innocent parties, effective enforcement of CERCLA and achievement of its legislative goals has been hampered by the enduring concerns presented by application of the statute's remediation provisions to the four categories of innocent parties detailed above. Numerous attempts to remedy the problem have failed to correct it because they have not focused adequately on the crux of the difficulty, nor formulated remedies designed to provide effective relief. Insofar as the number of persons actually or potentially affected by a flawed liability scheme that generates inequitable and unduly harsh results is substantial, expediting cleanup of Superfund sites and attracting public and private investment for the restoration of contaminated properties to productive use will remain an elusive perhaps even illusory goal. By the same token, to the extent the Superfund Program remains encumbered by uncertainties, inequities, disincentives, and significant risks for certain groups of property owners or operators, its revitalization will be correspondingly hindered. For these reasons, any major CERCLA reforms to improve the operation of the Superfund should include effective means to address the various issues associated with the innocent parties. On this score, the Superfund Task Force's Report falls short.

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creates uncertainty and a risk of liability for the tenants of contaminated property. *See id*. at n.6; *see also* McClister, *supra* note 13, at 14.

113. *See* Hodson & Oldham, *supra* note 78, at 477.

114. *See generally* Morris, *supra* note 110.

115. *See* United States v. South Carolina Recycling and Disp., Inc., 653 F. Supp. 984 (D. S.C. 1986).

116. Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 330–31 (2d Cir. 2000) (noting as relevant factors the length of the lease and the owner's ability to determine: how the property is used; when the lease terminates; whether the tenant may sublease without notice to the owner, the payment of taxes, assessments, insurance, and other operation costs; who makes structural and other repairs).

117. *See* City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 444 (9th Cir. 2011).

III. SUPERFUND TASK FORCE REPORT: THE TREADMILL

In a cover letter transmitting the Superfund Task Force recommendations to EPA officials and the public, Administrator Pruitt noted that upon assuming office, he had learned that there were more than 1,330 Superfund sites throughout the country.[118] He added that some of those properties had been on the NPL "for decades, some for as many as 30 years," while the properties languished with contaminants seeping into the soil and water.[119] Undoubtedly, many and varied causes have combined over the years to produce these adverse results. As Part II of this Note has suggested, one likely and significant contributor to this turn of events has been the failure of the EPA, Congress, and the courts to devise a workable, lasting response to the fundamental issues raised by CERCLA's liability structure as it pertains to PRPs in general. While the issues facing innocent parties represents only one component of the larger problem, the presence of this element in the mix can only further exacerbate an already complex enforcement and liability regime. Absent an effective means to address the difficulties that the current CERCLA enforcement and liability scheme generates, resolving disputes concerning responsibility for contamination response costs at any given site will continue to consume many years and tens of millions of dollars.[120] Against that reality, current landowners and potential investors may continue to be deterred from taking necessary steps to acquire or clean up and reuse Superfund sites, and to vigorously resist public and private efforts to carry out the statute's mandate by the most efficient, expeditious, and economical means possible.

Upon receiving the Superfund Task Force's recommendations, Administrator Pruitt wrote that the Report "abounds with new ideas and dynamic thinking."[121] In fact, the various strategies and forty-two recommendations advanced to achieve the Task Force's five goals are comprehensive and far-reaching, perhaps a testament recognizing that, overall, past efforts to deal with the underlying issues have failed, and that deep-rooted problems still persist. Regarding the innocent parties' dilemma, however, the Task Force's proposed measures present nothing new or dynamic. In fact, the recommendations essentially leave the prevailing widespread concerns standing still.

Though some of the Task Force's strategies and recommendations allude in general terms and tangentially relate back to strands of the innocent parties' problem, none of the recommended actions directly recognizes the core issues or

118. *See* Superfund Task Force Report, *supra* note 8, at i.

119. *Id.*

120. *See* Smith, *supra* note 12, at 177.

121. Memorandum from E. Scott Pruitt, Administrator of EPA to Deputy Administrator, General Counsel, Assistant Administrators, Inspector General, Chief Financial Officer, Chief of Staff, Associate Administrators, Regional Administrators, Receipt of Superfund Task Force Report and Next Steps for Revitalizing the Superfund Program, at 2 (Jul. 25, 2017), https://www.epa.gov/sites/production/files/2017-07/documents/receipt_of_superfund_task_force_report_and_next_steps_for_revitalizing_the_superfund_program_memo.pdf [hereinafter Receipt of Task Force Report].

frontally advances a detailed framework to address them. Several goals and strategies, for instance, acknowledge persistent reservations held by third parties about the efficacy of the BFPP exemption "to address liability concerns before the third party can move forward with cleanup and reuse of the site."[122] On this point, the Task Force's Report concludes that "more substantive tools must be used," and suggests as a specific follow-up action to expand use of agreements for prospective purchasers to limit their liability.[123] Other proposals in this Report recognize the need to streamline procedures concerning dispute resolution with PRPs that arise in the course of carrying out remediation, to this end suggesting a need to provide incentives for early settlement.[124] A third set of recommendations tacitly recognizes weaknesses in ongoing third party concerns relating to the current use and models of comfort letters.[125]

Thus, to the extent the Superfund Task Force Report acknowledges the longstanding problems raised by the application of CERCLA liability to innocent parties and the enduring flaws in the statutory exemptions for those property owners or operators, the recommendations are strong on generalities but fall short on specific details compellingly responsive to the underlying issues. In this respect, the Report constitutes a missed opportunity for meaningful reform of a basic deficiency in CERCLA's enforcement scheme that is likely to impede maximum achievement of the Task Force's goals and recommendations.

Part IV of this Note recognizes that the work of the Task Force is ongoing.[126] Insofar as those continuing efforts may invite comment to strengthen this endeavor with more details to fill in the generalities, Part IV of this Note elaborates suggestions for a more effective response to the various innocent parties' concerns.

IV. RESPONSIVE REMEDIES

For many innocent parties enmeshed in CERCLA litigation, the defense of innocence that the statute provides has proven to be, as one commentator noted, a "mirage" for landowners and operators who endeavor to invoke it.[127] However bona fide their assertion of innocence and denial of liability for an environmental contamination may be, being swept into court along with other PRPs to answer charges in CERCLA enforcement proceedings may amount to a losing

122. Superfund Task Force Report, *supra* note 8, at 15.

123. *Id*.; *see also id*. at 19 (noting that despite the existing innocent landowner and BFPP protections, some local governments "continue to raise potential liability concerns about the acquisition of contaminated property as a barrier to reuse," and for this purpose recommend issuance of "new enforcement guidance").

124. *See id*. at 8, 10.

125. *See id*. at 15 (labeled strategy to "streamline the process for comfort letters and settlement agreements with third parties"); *id*. at 18 (recommendation to "Provide Greater 'Comfort' in Comfort/Status Letters").

126. Receipt of Task Force Report, *supra* note 121, at 2.

127. L. J. Smith, *supra* note 12, at 157.

proposition from the start. That may be the case regardless of the ultimate outcome of the litigation, and even if the innocent party prevails in establishing the relevant defense. This point was amply demonstrated by the evidence the court found in *Slay*.[128] Even in the face of NBR's overwhelming showing of its innocence in connection with the contamination at issue, NBR was forced to run the gauntlet in court proceedings to prove its defense.[129] Yet, though in the end it prevailed in this regard, the costs NBR incurred to do so must have proved the win a pyrrhic victory. These observations suggest a path to an effective, efficient, and fair reform of CERCLA's innocent party liability scheme.

The starting point for reaching that objective is a lesson amply illustrated by NBR's experience in *Slay*: that the Superfund program's innocent party provisions are severely defective. As it emerged in *Slay*, the scheme is deficient in two major respects. First, in pre-acquisition, the landowner incurred substantial expense undertaking due diligence inspections, conducting all appropriate inquiry, and otherwise exercising due care to show that it was not responsible for the contamination found on the site. NBR took all of these steps pursuant to the applicable EPA standards, compliance which the EPA itself acknowledged in various ways.[130] Yet, NBR's remedial and preventative measures and EPA assurances proved unavailing to NBR in its attempts to stave off being sued as a PRP by third parties.[131] A landowner who goes to such lengths to obtain evidence of full compliance with governmental regulations and to establish absence of responsibility for causing environmental harm should be entitled to stronger protection for its reliance on the government's declarations and formal certifications establishing particular exculpating facts. By the same token, official factual findings of a party's absence of responsibility for causing a particular harm should be accorded greater weight in subsequent administrative or court proceedings in which either the government agency or a third-party challenges or ignores those official determinations.

Second, the statute's liability protection system is faulty insofar as it compels some landowners or operators to appear in litigation that typically stretches for years and entails huge costs, only to prove that they should not have been entangled in the controversy in the first place. A legal system that countenances a process under which innocent parties are inevitably dragged into court—and in fact are expected to be snared in a litigation web for years simply because they happened to be found on the spot of land ownership or control when the action starts—is bound to breed excessive and unnecessary administrative and court

128. *See supra*, notes 55 and 56 and accompanying text.

129. *See* United States v. Slay, 2013 WL 1312559 at *9 (E.D. Tex. Feb. 27, 2013).

130. *See id.* at *4 (noting evidence established that at the time NBR acquired the Superfund site at issue, there was no contamination on the property, which had been deleted from the NPL and determined to be safe for industrial or commercial development).

131. *See id.* at *1–2.

proceedings. To that extent, the enforcement system is not only fundamentally inefficient, but grossly inequitable.[132]

To address the critical defects inherent in CERCLA's innocent party mechanism calls for a strategy embracing several central objectives. First, the system should contain a means by which innocence—that is, absence of knowledge and/or causation of the hazardous waste disposal or release—could be authoritatively established before, rather than during or after litigation commences. To this end, the Congress should amend CERCLA to remove the current owner or operator from the automatic classification of a PRP if they have obtained an administrative determination of innocent party status. Specifically, the statute should provide for innocent parties to secure from the EPA an authoritative declaration of no responsibility, thus absolving them from CERCLA liability if the persons satisfy the pre-acquisition conditions which apply to innocent party defenses. In particular, the owners or operators should sufficiently demonstrate that they did not know about and/or did not cause or contribute to the contamination and took reasonable steps to obtain information about environmental conditions on the site.

A second reform would entail administrative action that the EPA can undertake pursuant to its existing CERCLA mandate but may involve exercise of rulemaking authority. Rather than informal guidance or statutory interpretation, the EPA should provide reliable assurances to persons who can establish innocence pre-acquisition of a contaminated property that the agency would not involve them in CERCLA enforcement proceedings under appropriate conditions—in essence "no action" letters.[133] Though administrative agencies have developed various procedures under which they issue statutory interpretations, regulatory guidance, comfort letters, and assurances of an exercise of non-enforcement discretion against a particular person under particular facts, those mechanisms are inadequate.[134] They tend to be informal and non-binding, and therefore do not afford

132. Of course, if it is established that post-acquisition release or disposal of contamination was caused by the landowner's or operator's failure to exercise due care, the innocence defense should not apply.

133. For a reference to the EPA's prevailing outlook towards no action letters, *see infra* note 134.

134. *See generally* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386–90 (2004). The EPA has developed and promulgated a policy governing the issuance of comfort letters. *See* Memorandum from Cynthia Giles, Assistant Administrator of EPA to Regional Administrators, EPA Revised Policy on the Issuance of Superfund Comfort/Status Letters (Aug. 25, 2015), https://www.epa.gov/sites/production/files/2015-08/documents/comfortstatus-rev-mem-2015.pdf. Through this process, the Agency "communicates key information that EPA has about the property's conditions, its cleanup status, and any potential associated liabilities or protections so a party can make an informed decision regarding the purchase, lease, or redevelopment of the property." *Id.* at 1. But the policy includes various caveats that tend to diminish the value of the procedure as effective advice and reliable assurances. The guidance it provides, for example, is described as non-exhaustive "suggestions" based on what EPA "currently believes" to be necessary steps to satisfy CERCLA requirements and thus "should not be construed as the only actions that may be required by a party to avoid liability." *Id.* at 3. Moreover, comfort letters are subject to the Agency's policy against providing "no action" assurances, and therefore "not intended to limit or affect the EPA's authority under CERCLA or any other law, or to provide a release from liability under CERCLA or any other federal or state law." *Id.* at 4; *see also* Williams,

reliable protection against enforcement proceedings because the agency's actions may be subject to later change.[135]

Administrative rulemaking, however, is typically complex and time-consuming. To avoid rulemaking's pitfalls and shortcomings, there is a way under existing administrative law to improve the innocent party exemptions by reinforcing the effect given to an EPA determination of a particular person's absence of responsibility for pollution at a particular site. Under current practice, despite a recognized declaration of innocence, and EPA assurances of no-enforcement, innocent parties can still be brought into CERCLA litigation as PRPs, as occurred to NBR in *Slay*.[136] To address these concerns, an EPA declaration of innocence should be devised that could be accorded a presumptive, preemptive, or even preclusive effect binding upon the EPA and entitled to recognition and high deference by the courts, as well as given priority in the adjudication of a CERCLA enforcement action ahead of other issues.

In fact, a little-known, infrequently used procedure exists that contains provisions which would authorize the EPA to grant such relief. The process would entail issuance of a declaration of innocent party status as a declaratory order under section 554(e) of the Administrative Procedure Act ("APA").[137] That provision states that "[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."[138] The declaratory order under section 554(e) functions like the Declaratory Judgment Act to authorize federal agencies to render, in response to a petition or on their own motion, orders resolving controversies or providing guidance or interpretation of statutes or regulations that would be legally binding on the agency and the parties to the proceeding.[139]

The declaratory order process raises questions as to what effect such rulings should be accorded by the administrative agencies and the courts in subsequent

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Mullen, Christian & Dobbins, *Are EPA's New "Comfort" Letters All That Comfortable?*, 4 No. 11 VA. ENVTL. COMPLIANCE UPDATE 1 (1997) (remarking that "the caveats and conditions that the EPA puts in the 'comfort' letters negate much of the 'comfort' they purport to provide"). To overcome the constraints of this informal process may call for stronger authority based on rulemaking.

135. *See* Administrative Conference of the United States Adoption of Recommendations, 80 Fed. Reg. 78161, 78163 (Dec. 16, 2015) (hereinafter "2015 Adoption of Recommendations").

136. *See* United States v. Slay, 2013 WL 1312559 at *1–2 (E.D. Tex. Feb. 27, 2013).

137. *See* 5 U.S.C. § 554(e).

138. *See id*. Recent scholarship has recognized the declaratory order as "a highly efficient procedural tool . . . [that could] potentially benefit all parties, including the agency." Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 ADMIN. L. REV. 1097, 1123 (2004). However, despite their efficiency and recent encouragement by courts, administrative agencies only infrequently utilize declaratory orders as a regulatory instrument. *See id*. at 1101–1102.

139. *See* Lubbers & Morant, *supra* note 138, at 1102 (noting that the declaratory order provision "was included in the APA to develop predictability by authorizing binding determinations 'which dispose of legal controversies without the necessity of any party's acting at his peril upon his own view'") (quoting Final Report of the Attorney General's Committee on Administrative Procedure 30 (1941)).

proceedings as regards the agency and the parties covered by the order, as well as to third parties. The Supreme Court has held, in the context of a determination made by an administrative tribunal in a trademark registration and infringement proceeding, that the agency's determination is binding as to the parties to which it applies and carries preclusive effect in a subsequent action between those parties.[140] The Court explained that "issue preclusion is not limited to those situations in which the same issue is before two *courts*. Rather, where a single issue is before a court and an administrative agency, preclusion also applies."[141] Though the case involved a trademark registration and infringement action under the Lanham Act, the Court's decision is broadly worded to suggest application of the preclusive effect to administrative proceedings more widely.[142] The logic of the Court's explanation should extend beyond the trademark context to encompass other administrative proceedings, including declaratory orders potentially issued by EPA under APA section 554(e).[143]

A different aspect of the question concerning the effect of the declaratory order device relates to its application to third parties not involved in the administrative agency proceeding from which the innocent party determination emerged. Typically, in CERCLA enforcement proceedings, not all PRPs are initially known or necessarily brought into the action, even when identified; such parties may be impleaded into the proceedings by other parties subsequently joined and may then seek to enmesh a person who may have already established innocent party status. On this point, an analogue exists that could serve as a basis for extending relief to innocent parties who encounter these circumstances. There is substantial support for the proposition that declaratory orders carry preemptive effect, binding state entities not parties to the administrative actions in cases involving federal agency determinations that assert exclusive jurisdiction over matters within the federal agency's authority.[144]

The more difficult and uncertain dimension of the declaratory order effect concerns the extent to which such rulings could be extended so as to bind private third parties not involved in the administrative agency proceedings that produced the declaratory order. Relevant authority exists to this effect. Some courts have

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140. *See* B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293 (2015).

141. *Id*. at 1303 (emphasis in original).

142. *See id*. at 1303–04 (noting that "'[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose'" (internal quotations omitted)).

143. *See* Weinberg v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 626 (1973) (upholding application of declaratory order issued by the Federal Drug Administration); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 367 (1969) (same with regard to declaratory order by the Federal Communications Commission).

144. *See, e.g*., Merchants Fast Motor Lines, Inc. v. ICC, 5 F.3d 911, 916 (5th Cir. 1993); *see also* Lubbers & Morant, *supra* note 138, at 1115–17; 2015 Adoption of Recommendations, *supra*, note 135 at 78164 (noting that declaratory orders may be used to address questions of agency jurisdiction and preemption).

sustained declaratory rulings that affect the interests of private third parties when such parties have had notice of or participated in the administrative proceedings, although not as official parties to the action.[145]

To improve the efficiency and predictability of CERCLA innocent party determinations, the EPA should employ the declaratory order device. At minimum, the agency's determinations in this regard should be given presumptive effect by the EPA in CERCLA enforcement proceedings, as well as by the courts in litigation. Such treatment should effectively shift the burden of proof from the prospective innocent party to PRPs who contest the innocent party defense. To the extent there is doubt about whether an EPA declaratory order in this area would carry binding preclusive effect on third parties, an amendment of CERCLA to prescribe such a result would be warranted.

Finally, another proposal to address the flaws associated with the innocent party exemption would provide for awards of attorney's fees and costs. Upon establishing no-liability in litigation, innocent parties should be considered prevailing parties and be entitled to recover their attorney's fees and other transaction costs from PRP litigants who commenced the action or brought the innocent parties into it.[146]

CONCLUSION

The EPA's recent announcement of the Superfund Task Force Report recommending comprehensive measures to promote greater efficiency and effectiveness in the operation of the Superfund Program amounts, as this Note suggests, to a tacit acknowledgment that the implementation of CERCLA's goals is deficient and calls for critical reform to better achieve the statute's environmental remediation purposes. A major prerequisite for reaching the Act's goals is addressing certain severe obstacles that stand in the way of greater efficiency and effectiveness of the Superfund: the complexity which characterizes CERCLA's enforcement and PRP liability as it has evolved. This development has given rise to excessive and unnecessary litigation and patently inequitable results in some circumstances.

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145. *See* Wilson v. A.H. Belo Corp., 87 F.3d 393, 398 (9th Cir. 1996) (holding that APA section 554 (e) "clearly contemplate[s] that the FCC may issue a declaratory ruling *sua sponte*—even in the absence of any parties before it—to terminate a controversy or remove uncertainty" and that such a ruling is binding on persons "even though they were not parties to the FCC proceedings"); Frozen Food Express v. United States, 351 U.S. 40, 44 (1956); *see also* Lubbers & Morant, *supra* note 138, at 1117 n.93. Some scholars have questioned the correctness of these decisions. *See id*. Commenting on this issue, the Administrative Conference of the United States recommended that, as regards parties to the proceeding, a declaratory order may provide a legally binding ruling, but with respect to non-parties to the proceeding "it can provide non-binding guidance." 2015 Adoption of Recommendations, *supra* note 135, at 78164.

146. Congressional action would be required to adopt this reform because the Supreme Court has determined that attorney's fees in connection with CERCLA litigation are not recoverable. *See* Key Tronic Corp. v. United States, 511 U.S. 809, 809 (1994).

In particular, one of the major sources of inefficiency and unfairness inherent in CERCLA enforcement is the application of the statute to impose potential liability and attendant costs on various groups of owners and operators as to whom the Superfund's liability regime produces unwarranted practical and financial burdens and engenders fundamental unfairness. To the extent this cause of inequity continues to characterize CERCLA enforcement, it constitutes a source of additional, probably unnecessary, litigation that will impede the EPA's efforts to improve the efficiency of the Superfund Program and achieve the goals of the Task Force. Despite longstanding recognition of these difficulties, prior legislative and administrative efforts to remedy the problem have fallen short, and the mechanisms that have been adopted to address the underlying concerns remain seriously flawed.

Strategies to address this problem should focus on ways to remove innocent parties—specifically, innocent landowners, bona fide prospective purchases, contiguous property owners, and tenants of contaminated sites—from categorical inclusion into the circle of PRPs from which they then must seek to extricate themselves, at significant expense, by establishing a defense in litigation. Instead, effective and fair reform should adopt administrative measures under existing administrative law to provide innocent parties stronger binding and preclusive exemptions from CERCLA liability and resulting costs, both pre-acquisition of contaminated property and during the course of any litigation in which innocent parties are named unnecessarily.