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Easement Holder Liability Under CERCLA: The Right Way to Deal with Rights-of-Way

INTRODUCTION

Responding to growing public concern about the accumulation of toxic wastes, Congress in 1980 passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA authorizes federal action to clean up, or to require others to clean up, leaking hazardous waste sites. Congress placed the financial burden for this cleanup on those responsible for the problem and on those who benefited from improper methods of hazardous waste disposal. Through this liability scheme, Congress also intended CERCLA to encourage responsible or benefited parties to respond voluntarily to the hazardous waste problem.

CERCLA imposes liability on four categories of people: present owners or operators of a hazardous waste facility, persons who owned or operated the facility at the time of the waste disposal, generators of the hazardous waste, and transporters of the hazardous substances. Facility is defined broadly to include almost any structure or area in which hazardous substances are disposed, stored or located.

6. Under CERCLA covered persons include:
   (1) the owner and operator of a vessel or a facility,
   (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of
   (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
   (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .
CLA has been interpreted as imposing strict liability on those falling within these four categories of responsible parties. If no responsible party can be found, a "Superfund" established by CERCLA pays for cleanup costs.

The third party, or innocent landowner, defense narrows slightly the expansive reach of CERCLA. CERCLA does not impose liability on potentially responsible parties who can show the release or threat of release of a hazardous substance was caused solely by "(1) an act of God; (2) an act of war; [or] (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship . . . ." and that they "exercised due care with respect to the hazardous substance concerned . . . ." Additionally, the Superfund Amendments and Reauthorization Act (SARA), which amended CERCLA in 1986, granted further protection to the innocent landowner by narrowing the definition of contractual relationship to exclude some relationships which formerly had been encompassed by the term. On the other hand, SARA also imposed an additional requirement for invoking this defense: a landowner cannot have actual or constructive knowledge of the existence of hazardous waste on the property. The landowner can avoid liability by proving due diligence in investigating possible environmental hazards prior to purchasing the land.

Courts have faced difficulty in determining whether an entity is an


13. See CERCLA § 101(35)(A), 42 U.S.C. §§ 9601(35)(A) (1988): The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

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

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

(iii) The defendant acquired the facility by inheritance or bequest . . .
owner for the purposes of CERCLA liability. The statute circularly defines the term stating that an owner or operator is a person owning or operating a facility.\footnote{14} Some courts have interpreted Congress' definition of owner broadly, focusing on the degree of control necessary to constitute ownership. Following this method of analysis, courts have extended ownership liability to some lenders,\footnote{15} lessees,\footnote{16} parent corporations,\footnote{17} and corporate shareholders and officers,\footnote{18} when their degree of control passed a certain threshold. Thus far the courts have not decided whether the same reasoning would apply to easement holders who exercise or have the right to exercise a sufficient degree of control over the land subject to the easement. As of yet, no case has raised this issue.\footnote{19}

Because easements, especially those of utilities and railroads, often cover large tracts of land, the question of whether an easement holder can be liable as an owner under CERCLA looms on the horizon. Hazardous waste sites already have been discovered on property subject to easements,\footnote{20} and quite likely will be found again on such property. In some cases, the easement holder probably exercises dominion over the land to almost the same degree as the owner of a fee simple estate. This Note argues that in these instances easement holders should face

\footnote{14. Owner is defined in conjunction with operator: The term 'owner or operator' means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988). Because CERCLA was hastily drafted, it poses more interpretation problems than many other statutes. See, e.g., Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 COLUM. J. ENVTL. L. 1, 2 (1982) ("In the instance of the 'Superfund' legislation, a hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law.") (adapting IA F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.04[2] (1981)).


18. United States v. Conservation Chem. Co., 628 F. Supp. 391 (W.D. Mo. 1985) (supplemental memorandum opinion) (president of company and owner of 93% of corporate stock held liable as owner); see also infra section III.C.


20. See infra note 105 and accompanying text.
liability as owners under CERCLA unless they fall within the scope of the innocent landowner defense.

Part I asserts that CERCLA's legislative history, when read against the language of the statute itself, supports liability for easement holders as owners under CERCLA. Part II contends that, based on common law and statutory law regarding their general liabilities, easement holders should be found liable as owners under CERCLA if they exercise sufficient control over the land subject to the easement. Part III analogizes to other CERCLA decisions which have broadened the concept of ownership, and argues that easement holders should fall within this wide category. Part IV argues that policy considerations, such as risk spreading and monitoring of hazardous waste sites, suggest that liability should be extended to easement holders. This Part also responds to arguments that interpreting CERCLA to impose liability on easement holders would be unfair or economically inefficient. Part V offers an example of an easement holder who, based on the analysis of this Note, meets the criteria for ownership under CERCLA. This Part also suggests a way of mitigating the harsh consequences of finding this easement holder to be an owner. Finally, this Note concludes that easement holders whose control of the land subject to the easement crosses a certain threshold should be considered owners under CERCLA. In some cases, however, these holders should be entitled to greater protection under the innocent landowner defense than that afforded fee simple owners.

I. CERCLA'S LEGISLATIVE HISTORY

This Part examines CERCLA's sketchy legislative history and argues that based on the language of bills introduced prior to the passage of CERCLA and the final wording of the statute itself, the term "owner" in CERCLA can be interpreted as including easement holders. Additionally, this Part contends that the policy considerations underlying the drafters' choices also support liability of easement holders as owners in some situations.

CERCLA's definition of owner\(^{21}\) does not supply obvious help in interpreting this term since it merely states that an owner or operator is an owner or operator. However, the Comprehensive Oil and Hazardous Substances Pollution Liability and Compensation Act (H.R. 85),\(^{22}\) one of the forerunners of CERCLA, defined owner as "any per-

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22. H.R. 85, 96th Cong., 2d Sess., 126 CONG. REC. 26,369-74, 26,378-86 (1980). Congress struggled for six years to pass legislation addressing the problem of oil spills and hazardous waste releases. Although the bill ultimately enacted was a hastily drafted and rapidly passed compromise measure, Congress previously had considered carefully four major bills and several minor ones dealing with the issue. None of these bills passed both the House and the Senate. CERCLA, however, incorporated features of all these bills. See 1 SUPERFUND, supra note 4, at xiii-xxi. H.R. 85, the first of these bills, imposed liability on owners or operators releasing oil, 96th
son holding title to, or in the absence of title, *any other indicia of ownership of a vessel or facility.*” According to the Committee on Merchant Marine and Fisheries, this definition encompassed those possessing evidence of ownership equivalent to title. This explanation indicates that in drafting CERCLA’s precursors, Congress contemplated nontraditional owners.

Although the exact wording of H.R. 85’s definition of owner was not retained in the final bill, arguably its spirit still remains. No qualifications are attached to CERCLA’s definition of the term “owner,” such as a requirement of title. In fact, both CERCLA and H.R. 85, in nearly identically worded phrases, exclude from the definition of owner one who, “without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.”

The choice of “indicia of ownership” rather than the more succinct “title” suggests that there are people or entities which have “indicia of ownership,” but not title, and that some of them would be considered owners if this exclusion did not exist. Otherwise the exclusion would be phrased to eliminate title holders rather than those having “indicia of ownership.”

When one considers the exclusion juxtaposed against the definition it was drafted to accompany, that of H.R. 85, the breadth of the term “owner” becomes obvious. Even if having characteristics of an owner does not suffice, control accompanied by manifestations of ownership results in liability. An easement holder possesses many of the traits of an owner; she can use the land, albeit in a restricted fashion, sell or devise the easement and often can exclude others from using the easement. When these abilities combine with control over the property

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25. Alternatively, Congress may have intended the courts to defer to the common law definition of “owner,” or to develop a new common law definition for CERCLA based on its roots in tort law. Part II demonstrates that easement holders exercising sufficient control should be treated as “owners” under such a scheme.


27. For an example of a court employing similar reasoning see supra note 136 and accompanying text.

subject to the easement, the easement holder should be regarded as an owner under CERCLA.

An additional component of CERCLA's legislative history, the policies underlying the drafters' imposition of liability on current owners, also indicates that in some situations liability should be extended to easement holders. CERCLA reflects congressional intent to have private parties rather than the government finance the cleanup.\(^29\) Although Congress sought to have responsible parties bear the cleanup costs,\(^30\) it used membership in particular groups as a proxy for responsibility, and imposed strict liability on persons falling within certain categories.\(^31\) Strict liability facilitates enforcement of the statute by eliminating the difficult task of proving negligence.\(^32\) The inherently dangerous nature of hazardous waste disposal justifies this approach;\(^33\) those who engage in this type of business assume responsibility for the harm they might cause.

Landowners who merely purchase contaminated property without intentionally participating in the hazardous waste disposal process have been held liable under CERCLA.\(^34\) Perhaps the difficulties of imposing liability on actual waste generators, disposers or other more directly responsible parties motivated the drafters of CERCLA to include these purchasers within the liability scheme.\(^35\) An additional, influential factor could have been that landowners benefited from the

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30. See supra note 3 and accompanying text.


32. 126 CONG. REC. 26,762 (1980), reprinted in 1 SUPERFUND, supra note 4, at 215 (National Association of Attorneys General Memorandum, submitted in support for adopting strict liability as the standard for H.R. 7020).


34. See, e.g., Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988) (The Court imposed liability on lenders, realtors, and others developing a subdivision found to contain hazardous waste. These people did not contribute to the hazardous waste accumulation.); New York v. Shore Realty Corp., 759 F.2d 1032, 1043-45 (2d Cir. 1985) (purchaser who knew of toxic waste accumulation, though he had not participated in its generation, found liable).

35. Although the legislative history is inconclusive on this matter, several commentators have suggested this as possible congressional motivation. See Note, supra note 29, at 1291; Note, Developments — Toxic Waste Litigation, 99 HARV. L. REV. 1458, 1520 (1986).
hazardous waste accumulation in the form of reduced property costs. Exempting current owners from liability would encourage the sale of waste sites after the conclusion of dumping, since new owners would be protected from CERCLA liability. These owners might then receive a windfall if they enjoyed the increased value of the property after cleanup without contributing to its costs. Because easement holders share many attributes with owners of a fee simple estate, the same logic would dictate finding them liable as well.

Moreover, some easement holders may have deeper pockets than the fee simple owner and therefore would be a more attractive target. In the event of "indivisible harm," CERCLA has been interpreted as permitting the imposition of joint and several liability on responsible parties. In addition to resolving the difficulty of apportioning essentially indivisible claims and proving the liability of multiple defendants, the other obvious benefit of this type of liability is that the government can recover the costs of cleanup fully even if several po-

36. See supra note 4 and accompanying text. Of course sometimes the purchaser does not receive a benefit. If the seller did not know about the waste, she would not discount the price of the land.


38. See United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 580 (D. Md. 1986) (suggesting that lenders who foreclosed on property would greatly benefit from its increased post-cleanup value if they did not contribute financially to the cleanup). However, if the property is sold with neither party having knowledge of the hazardous waste then the cleanup will increase the value only to what the purchaser paid. See Note, supra note 29, at 1291 n.161.

39. See infra notes 53 & 55 and accompanying text.

40. Although easement holders could gain from the cheap acquisition of easements, some probably would not reap as great a benefit as the fee simple owner from the property's increased, post-cleanup value. Appurtenant easements, easements attached to the dominant estate, are generally sold with the dominant estate, R. CUNNINGHAM, supra note 28, at 461, and therefore are not as readily transferable. On the other hand, easements in gross benefit their owner personally, and are unrelated to any particular piece of land. Commercial easements in gross are generally freely alienable. Id.

41. Indivisible harms are harms which "by their very nature, are normally incapable of any logical, reasonable, or practical division. RESTATEMENT (SECOND) OF TORTS § 433A, comment i (1965) (illustrations 12-17).


The A & F Materials court advocated an approach to joint and several liability designed to prevent a small contributor from shouldering an unreasonably heavy burden. In addition to the indivisibility of the harm, the approach considered other factors such as the degree of care exercised and the amount of involvement in the hazardous waste disposal process.

For a good discussion of different approaches to joint and several liability and apportionment, see Note, supra note 35, at 1524-35.

tential defendants are insolvent. Imposing ownership liability on holders of easements increases the chance of finding a solvent "responsible party" and decreases the amount the government spends.

Because "innocent" easement holders are no less morally culpable than "innocent" landowners, a joint and several liability scheme which includes both groups should not be objected to as unfair. Easement holders may avoid liability through the innocent landowner exception, if they can prove lack of actual or constructive knowledge of the hazardous waste on their property. 44 Additionally, they may sue the other potentially responsible parties for contribution, and thus avoidshouldering the entire burden themselves. 45 Since a court hearing a contribution suit would have discretion to equitably apportion the response costs, 46 an easement holder whose easement covers only a small strip of the hazardous waste site would, assuming the presence of other responsible and solvent parties, bear only a small percentage of the response costs.

II. COMMON LAW LIABILITY OF EASEMENT HOLDERS

CERCLA grew out of general tort ideas, such as products liability and liability for ultrahazardous activities. 47 In fact, its critics contend that it duplicates provisions of state toxic tort law. 48 CERCLA, therefore, should be read against the background of the basic definitions of tort law, except when the Act provides otherwise. In considering easement holder liability under CERCLA, the common law view regarding the status of easement holders compared with owners of the fee simple estate can aid in the interpretation of the term owner which the Act inadequately defines.49 In fact, when a federal district court answered a related problem — whether lessees were liable as owners under CERCLA — it considered their common law liabilities. 50 This Part examines the case law dealing with easement holders' responsibilities, as well as the treatment of easement holders under the California Tort Claims Act and the Restatement of Torts. It demonstrates that, under both common law and statutory law, easement holders who assert a requisite amount of control over the land constituting the ease-
ment incur liabilities similar to those of the owner of the underlying fee.

An easement is "a privilege which the owner of one tenement has a right to enjoy over the tenement of another." Although a nonpossessory interest, an easement nevertheless vests the holder with significant rights. According to the Restatement of Property an easement:

(a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
(b) entitles him to protection as against third persons from interference in such use or enjoyment; [and]
(c) is not subject to the will of the possessor of the land . . . .

Common easements include railroad rights-of-way, driveways, paths, roads, pipes, and utility lines. Although the line sometimes blurs, the primary difference between an easement holder and the fee simple owner is that the terms of the easement restrict the former's use of the property, while the latter can enjoy full use of the property. The large number of cases in which an easement holder is compensated for the taking of an easement reflects the importance given this property interest.

A. Common Law Duties of Easement Holders

Duties accompany the rights accorded easement holders, and failure to perform these duties can result in liability. An examination of the liability in tort of easement holders as compared with the liability of the owners of the fee simple estate provides useful analogies for CERCLA liability and supports the extension of owner liability to easement holders in some instances.

Easement holders must maintain and repair the land subject to the easement, or face liability if failure to do so results in injury to third parties. For example, in Kesslering v. Chesapeake and Ohio Railway Co., the plaintiff's decedent crashed into a grade separation structure on which the tracks of a railway crossed the highway. The railroad

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52. Leichter v. Eastern Realty Co., 358 Pa. Super. 189, 197, 516 A.2d 1247, 1251 (1986) (concurring opinion) (quoting the Restatement of Property § 450 comment b (1944)).
53. Restatement of Property § 450 (1944).
54. R. Cunningham, supra note 28, at 435.
55. Id.
had granted the state an easement to build the highway across the tracks.\textsuperscript{60} The plaintiff contended that the accident resulted from poor maintenance and construction of the structure crossing the railroad.\textsuperscript{61} Applying and affirming the general common law rule, a federal district court in Michigan held that the easement holder, rather than the owner of the servient estate, had the duty to repair.\textsuperscript{62}

The cases imposing a duty to repair on the easement holder generally describe this responsibility as repairing or maintaining the structure or path used for access across the servient estate.\textsuperscript{63} When an easement is for a pipeline or another analogous underground structure, the easement holder must install and maintain the pipe so that those making ordinary use of the surface above the pipe do not cause dangerous breaks or leaks of the pipe.\textsuperscript{64} The duty to repair sometimes requires construction of additional features to allow for safe use of the easement.\textsuperscript{65}

The courts’ focus on the easement holder’s obligation to maintain safe conditions on the land constituting the easement presents useful analogies for easement holders’ duties under CERCLA. Hazardous wastes present on the land subject to the easement, just like obstructions on the surface, or leaking pipes below, eventually might render use of the easement unsafe. On the other hand, unless the easement holder is producing or using the hazardous waste, the responsibility for keeping the land subject to the easement free from these hazards is more attenuated than in the above examples. Often the harm from the hazardous waste results from seepage into ground water, rather than any effect on users of the easement itself. Whether the duty to repair extends to keeping land free of hazardous waste therefore is unclear. By imposing the duty to repair on easement holders, however, courts have treated easement holders as having the responsibilities of owners. Such treatment supports the contention that easement holders should be liable as owners under CERCLA.

\subsection*{B. The Significance of Control}

An examination of easement holder liability cases provides further insight into the common law responsibilities of easement holders, and

\begin{itemize}
\item \textsuperscript{60} Kesslering, 437 F. Supp. at 268.
\item \textsuperscript{61} Kesslering, 437 F. Supp. at 268.
\item \textsuperscript{62} Kesslering, 437 F. Supp. at 269.
\item \textsuperscript{63} See, \textit{e.g.}, Kesslering, 437 F. Supp. at 269 (Easement holder would have a duty to repair the grade separation structure which was part of the easement across the highway.); Fry v. Kaiser, 60 Mich. App. 574, 232 N.W.2d 673 (1975) (Easement holder for use of a channel must maintain channel and abutting sea walls.); Mscisz v. Russell, 338 Pa. Super. 38, 487 A.2d 839 (1984) (regarding the duty to repair a driveway with multiple easement holders).
\item \textsuperscript{64} Pioneer Natural Gas Co. v. K & M Paving Co., 374 S.W.2d 214, 218 (Tex. 1963).
\item \textsuperscript{65} See Levy v. Kimball, 50 Haw. 497, 500, 443 P.2d 142, 145 (1968) (requiring construction of handrails and posting of signs).
\end{itemize}
suggests an analogous approach to their duties under CERCLA. In each of the cases discussed below, the easement holder’s degree of control over the land subject to the easement played a critical role in the court’s decision. The first group of cases rely on the Restatement of Torts, which defines possession in terms of occupation and intent to control. Because it attempts to describe the state of the common law, the Restatement itself and cases interpreting it demonstrate that the common law conception of ownership contains a control criterion. This section argues that CERCLA’s definition of owner should be similarly construed.

A Maryland Court of Appeals decision, Wagner v. Doehring, based the limited liability it accorded an easement holder on the tort law conception of possession contained in the Restatement. The defendants in this case owned an easement which provided access to their estate. A motorcyclist trespassing on the property died when his motorcycle crashed into a chain the defendants placed across the right-of-way. The court held that unless the easement holder’s conduct was “wanton or willful” they were not liable for the death.

The Wagner court considered whether an easement holder, like a landowner, only had a limited duty toward the trespasser. The court noted that although property law regards an easement as a nonpossessory interest, tort law, which governs liability in this case, defines possessor differently. The court relied on the tort law definition of possessor contained in the Restatement, and applied occupation and intent to control as criteria for possession. It determined that by using and exercising dominion over the right-of-way the defendant occupied and possessed the land.

With regard to the degree of control necessary for a decreased duty toward trespassers, the Maryland court asserted, “[T]he holder of an easement for ingress and egress is afforded the same protection to which a landowner is entitled with respect to a trespasser, when the easement holder exercises a degree of control over the land which per-

66. See infra note 68.
68. "Section 328E of the Restatement (Second) of Torts (1965) defines a possessor of land as (a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).” Wagner, 315 Md. at 104-05, 553 A.2d at 686-87.
69. Wagner, 315 Md. at 99, 553 A.2d at 685.
70. Wagner, 315 Md. at 100, 553 A.2d at 685-86.
71. Wagner, 315 Md. at 108, 553 A.2d at 689.
72. Wagner, 315 Md. at 103, 553 A.2d at 687.
73. See Wagner, 315 Md. at 104-05, 553 A.2d at 688.
74. Wagner, 315 Md. at 105, 553 A.2d at 688.
mits the holder to exclude trespassers from the easement." The court in deciding the question of control noted that because the servient estate in Wagner was uninhabited, and the owner of the land did not permit anyone to use it, the easement holders could reasonably expect to bar trespassers. In effect, the court tailored the tort law control standard for possession to the specific legal problem of an easement holder's duty to trespassers. This approach suggests that control criteria, consistent with the goals of CERCLA, should be formulated for determining easement holders' liability as owners under the Act.

In Leichter v. Eastern Realty Co., the Pennsylvania Superior Court also applied the Restatement of Torts definition and analyzed control to evaluate the duties of an easement holder to a business invitee. In Leichter, the plaintiff's decedent suffered a heart attack after his abduction from an allegedly improperly lit parking lot. Acme Markets, one of the defendants in this case, held an easement and a parking privilege on the land constituting the parking lot. The plaintiff argued that an easement holder should be considered a "possessor of land," and that consequently, under the Restatement of Torts, Acme had a duty to "protect business invitees from the criminal behavior of people coming onto the land." In evaluating the plaintiff's contention, the Leichter court noted that the definition of possessor in the Restatement focuses on control and occupation rather than on legal title. The court concluded that if the easement holder — in this instance, Acme — exerted sufficient control over the land, it should be considered a "possessor."

Although not explicitly relying on the Restatement, the North Carolina Supreme Court in Green v. Duke Power Co., also used control over the property as the standard for easement holder responsibility. In this case, the power company owned an easement on which it maintained a transformer. A five-year-old girl was injured by touching the transformer which, the plaintiff claimed, the power company negligently left unlocked. Since Duke Power was the sole owner of the

75. Wagner, 315 Md. at 107, 553 A.2d at 689.
76. Wagner, 315 Md. at 107-08, 553 A.2d at 689.
78. Leichter, 358 Pa. Super. at 190-91, 516 A.2d at 1248.
79. To be precise, ACME held an "easement for ingress and egress with a privilege to park."
80. § 344 of the Restatement of Torts places this duty to business invitees on "possessors" of land. Leichter, 358 Pa. Super. at 192-93, 516 A.2d at 1249; Restatement (Second) of Torts § 344 (1965).
81. See Leichter, 358 Pa. Super. at 192 n.1, 516 A.2d at 1249 n.1 (quoting Restatement (Second) of Torts § 328E (1965) (definition of possessor of land)).
83. 305 N.C. 603, 290 S.E.2d 593 (1982).
84. Green, 305 N.C. at 604, 290 S.E.2d at 594.
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transformer, and had the right to operate it and to enter the premises at will, the court found that the fee simple owner could do no more than warn, since more drastic action would infringe upon Duke Power's rights.85 Therefore, the owner satisfied his duty by cautioning the girl.86 The Green court asserted that because it exercised greater control, Duke Power — the easement holder — had the sole duty to protect children from the dangers of the transformer.87

Green supports the argument that if the easement holder, rather than the owner of the fee simple estate, were able to prevent or detect a hazardous waste problem, then she should be held liable as an owner under CERCLA. The Green court focused on which party could better have eliminated the danger, and deemphasized the parties' nominal status as easement holder and owner. An analogous approach to CERCLA cases would encourage courts to consider an easement holder's dominion over the property, and evaluate her ability to monitor for hazardous waste dangers. In contrast with the tort liability considered in Green, CERCLA liability is not an either/or question in which the court must decide whether to hold an easement holder liable instead of the owner. Because the owner of the fee simple meets the criteria for ownership under CERCLA, if the easement holder is found liable, both parties, along with any generators, transporters or former owners or operators, may be jointly and severally liable.88

Under the California Tort Claims Act, as well as under the common law, easement holders have been held liable in tort to the same extent as fee simple owners. Although California courts' interpretations of the term "owner" contained in a state statute do not constitute precedent for CERCLA interpretation, they do indicate that a construction of the term which includes easement holders is logical in some circumstances. As in the Restatement, the Act includes the idea of control within its definitions.89 Again, because this control criterion reflects the common law,90 rather than adds to it, the courts' interpre-

85. Green, 305 N.C. at 611, 290 S.E.2d at 598.
86. Green, 305 N.C. at 613, 290 S.E.2d at 599.
88. See supra notes 42-43 and accompanying text.
89. See infra notes 92-93 and accompanying text.
90. See infra note 96 and accompanying text.
tation of the relationship between control and ownership aids in understanding CERCLA's definition of owner.

California courts have emphasized the issue of control in interpreting the applicability of the California Tort Claims Act to public entities holding easements.91 The California Tort Claims Act imposes liability for the failure of public bodies to protect others against dangerous conditions on their property.92 The Act defines public property as "property owned or controlled by the public entity."93 The California courts have evaluated the relative importance of ownership and control in determining which public entity should bear responsibility under the Act when an easement holder and owner both have property rights in the land.94

For example, in Low v. City of Sacramento,95 an accident occurred on a parking strip. The city held an easement across the strip, and the county owned the underlying fee. The Low court turned to the common law for assistance in interpreting the California Tort Claims Act. The court relied on the common law principle that "control dominates over title."96 In determining which party had the control necessary for liability, the court considered which party could have prevented the problem which led to the accident or rectified the danger once it arose.97 The court held that in this instance both the county and the city had sufficient control and thus both properly were held liable.98

The Low court's analysis provides a useful framework for evaluating the situation under CERCLA in which both an easement holder and a fee simple owner retain some control over a contaminated area. An easement holder who could have prevented the hazardous waste build-up, or who could have discovered it and cleaned it up, should incur liability jointly with the fee simple owner.

In Mamola v. County of San Bernardino,99 another case arising under the Torts Claim Act, the court analyzed the problem of liability similarly and cited Low with approval, although it reached a different

92. Cal. [Govt.] Code § 835 (West 1980), quoted in Mamola, 94 Cal. App. 3d at 787 n.1, 156 Cal. Rptr. at 618 n.2.
93. Cal. [Govt.] Code § 830(c) (West 1980), quoted in Mamola, 94 Cal. App. 3d at 787 n.3, 156 Cal. Rptr. at 618 n.3.
94. According to one court, the problem arises "when ownership is separated from control; when the aggregation of powers called ownership is divided and when various kinds of control are held in separate hands." Low v. City of Sacramento, 7 Cal. App. 3d 826, 831, 87 Cal. Rptr. 173, 175 (1970).
96. Low, 7 Cal. App. 3d at 831, 87 Cal. Rptr. at 175.
97. Low, 7 Cal. App. 3d at 833-34, 87 Cal. Rptr. at 177.
98. Low, 7 Cal. App. 3d at 834, 87 Cal. Rptr. at 177-78.
conclusion based on the different facts involved. An accident occurred on a road owned in fee by a public entity, and subject to an easement of another public entity. The *Mamola* court upheld a conditional order granting an easement holder summary judgment on the issue of liability, because its use of the road was limited to ingress and egress, and it lacked “authority to control or maintain” the road. 100

Although most courts analyze the degree of control asserted by the easement holder to determine liability as an owner or possessor, at least one court implicitly assumed that an easement holder is an owner. In *Citizen's Utility, Inc. v. Livingston*, 101 an Arizona appellate court treated the easement holder as an owner and concentrated on determining the duties of an owner toward a licensee. In this case, the wife of an electric company employee brought suit for wrongful death against another electric company which owned the easement on which her husband was working when he was electrocuted.

In its analysis of the easement holder’s liability, the Arizona court did not question whether the easement holder's duties would necessarily be the same as any other landowner’s. 102 The court regarded the easement holder as an owner for the purpose of tort liability. *Citizen's Utility*, by assuming easement holders to be owners for liability purposes, supports the argument for extending CERCLA’s ownership liability to easement holders.

In sum, easement holders are often found, under both common law and statutory law, to have the same duties and liabilities as owners of the fee simple estate. Most courts, in determining liability, focus on the degree of control the holder maintains over the easement. The amount of control often depends upon nature of the easement and the extent of authority granted to the easement holder. 103 Though two easements might seem the same superficially, the underlying understanding between the easement holder and the owner of the underlying


102. The appellee took the position that the electric company’s liability arose from its status as “the owner of the premises, the easement where the accident occurred.” *Citizen’s Utility*, 21 Ariz. App. at 51, 515 P.2d at 348. The court did not specifically reach the question but treated the utility as an owner for purposes of the opinion.

103. For example, the *Mamola* court noted the limitation of the easement reserved, namely the lack of authority to maintain or control the road, and consequently found the easement holder's liabilities to be correspondingly restricted. *Mamola v. County of San Bernardino*, 94 Cal. App. 3d 781, 789, 156 Cal. Rptr. 614, 619 (1979). In contrast, the terms of the easement in *Green v. Duke Power Co.*, transferred a broader right “to construct, maintain and operate [hereon] . . . transformers . . . together with the right at all times to enter said premises . . . .” *Green v. Duke Power Co.*, 305 N.C. 603, 611, 290 S.E.2d 593, 598 (1982). The easement holder was therefore found to have greater liabilities. Similarly, in *Cooper v. City of Reading*, the easement holder was found “within the purpose of its easement [to possess] some control over the place of discharge, in order to safeguard and repair it for the purposes of efficiency and safety.” 392 Pa. 452, 461-62, 140 A.2d 792, 796 (1958). The easement holder was held to have related liabilities.
fee, as well as the type of use made of the easement, influences the court's decisions. The extension of this approach to CERCLA supports the liability of easement holders whose control over the property passes a certain threshold.

III. ANALOGIES TO OTHER CERCLA CASES

To date, no cases have directly addressed the question of whether easement holders might be found liable as owners under CERCLA section 107. Courts, however, have extended ownership liability to some lessees, lenders, parent corporations, corporate officers and stock holders. Before examining these decisions, this Part clarifies the Note's scope and discusses the problems with using some of the ownership liability cases as analogies to easement holder liability. This Part then examines these cases in detail and concludes that the courts' logic supports ownership liability for easement holders who exercise sufficient control over the easement.

This Note limits its treatment to the liability of easement holders as owners under CERCLA. The question of easement holders' liability as operators does not present many problems, since there is nothing about entities holding easements which would differentiate them from any other operators. An easement holder who operates a pipeline, for example, is considered an operator of a facility under CERCLA. Therefore, if the pipe leaked hazardous chemicals into the surrounding area the easement holder would be liable as an operator.

The question of liability becomes more difficult when the easement holder did not contribute to the hazardous waste problem, and a leaking, hazardous waste site is discovered on the land subject to the easement. Since the easement holder probably cannot be considered an operator of the land containing the waste, the issue becomes whether the easement holder should be considered the "owner" of the land for CERCLA purposes.

CERCLA's legislative history demonstrates that one need not be both an owner and operator to be found liable under CERCLA.

105. CERCLA §§ 107(a)(1) and (2) are codified at 42 U.S.C. § 9607(a)(1), (2) (1988). See supra note 6 for relevant text. In Pennsylvania v. Union Gas Co., suit was brought against the Commonwealth of Pennsylvania, an easement holder, charging that it should be liable as an owner or operator under CERCLA for the pollution caused by tar deposits on the easement. 491 U.S. 1 (1989). However, since the question before the Court was whether a state could be found liable for CERCLA cleanup costs, the issue of the liability of easement owners was not reached. Because the Court decided affirmatively, a lower court on remand will be left to determine whether easement holders can be liable as owners.
106. See infra notes 115-58 and accompanying text.
H.R. 85 (The Comprehensive Oil and Hazardous Substances Pollution Liability and Compensation Act), a precursor of CERCLA, defined an operator in terms of a relationship with the owner, indicating the distinctness of these positions. The Committee Report on H.R. 85 stated: "In the case of a facility, an ‘operator’ is defined to be a person who is carrying out operational functions for the owner of the facility pursuant to an appropriate agreement." This definition suggests the inconsistency of reading CERCLA as requiring both ownership and operation to incur liability, and illustrates one way to differentiate between an owner and an operator.

Perhaps because CERCLA defines the terms “owner” and “operator” together, many courts seem to disregard the distinction between these two categories, often holding a defendant liable as an “owner and operator.” Because courts apply similar reasoning to problems of both ownership and operation, however, even cases emphasizing operator liability aid in the interpretation of easement holders’ ownership liability under CERCLA.

The degree of control exercised often dictates the outcome in CERCLA owner and operator cases. H.R. 85’s definition of operator suggests that analysis of the control over the management of the company determines whether the person (or company) should be considered an operator. Sufficient involvement in the affairs of the facility, without any trappings of ownership, could lead to classification as an operator. Similarly, CERCLA’s definition of “owner or operator” ex-
cludes one holding merely "indicia of ownership" from classification as either an owner or operator unless that person participates in the management of the facility.\footnote{114. "The term 'owner or operator' ... does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988).} Thus, the question of control speaks to ownership as well. Someone with a property interest in the facility who also has sufficient control over the operation of the facility could be classified as an owner. These methods of classification could explain the blurring of the analysis in many of the cases, since the defendants usually had some property interest, often in the form of stock ownership, and also often managed the relevant company. The degree of control exercised would then support classification both as an owner and operator. Although the courts rarely indicate which parts of their analysis pertain to liability of owners and which to operators, this Note will attempt to focus on the aspects of the reasoning relating to ownership.

A. Lessee Liability

A decision regarding the CERCLA liability of a lessee presents the closest analogy to the easement question. Lessees, like easement holders, and unlike shareholders, parent corporations and lenders, directly exert control over the contaminated property. In United States v. South Carolina Recycling and Disposal, Inc.,\footnote{115. 653 F. Supp. 984 (D.S.C. 1984), affd. in part, vacated in part sub nom. United States v. Monsanto Co., 853 F.2d 160 (4th Cir. 1988).} a South Carolina federal district court held a lessee liable as an owner under CERCLA. The defendant corporation leased a site for the purpose of storing chemicals. Later it sublet a portion of this property to another company involved in the waste disposal business. In determining that the original lessee was liable, the court focused on the degree of control the lessee exercised over the property. The court regarded control as a qualification for ownership under CERCLA,\footnote{116. 653 F. Supp. at 1003.} and viewed the company's sublet of the premises as an illustration of control over the property. As further justification for imposing liability, the court relied on common law decisions holding lessees liable as owners in other contexts.\footnote{117. 653 F. Supp. at 1003 n.2. For example, the South Carolina Recycling court notes that under the state constitution tenants have been found entitled to compensation as owners, and the term owner in condemnation statutes has been construed to include lessees.}

Both of the court's arguments in South Carolina Recycling support extension of liability to easement holders. First, easement holders, like lessees, have been found liable as owners in other common law situa-
tions. Additionally, in holding the lessee liable the court implicitly acknowledged that a person with less than a complete bundle of property rights could still be regarded as an owner. In comparison with a lessee, an easement holder possesses a similar number of sticks of ownership. A lessee's interest in the property resembles that of the owner of a fee simple, but is limited temporally. In contrast, the easement holder's interest can extend indefinitely in time, but is restricted in permitted uses. Although lessees generally exercise greater control over the property than easement holders do, an easement could be granted which allowed for extensive use and control. The South Carolina Recycling decision suggests that, if this control were exercised, the easement holder would be regarded as an owner for the purpose of CERCLA liability.

In United States v. Carolawn Co., the district court in South Carolina again found owner liability possible despite the absence of title to the property. As in the lessee case, the court emphasized the link between control and liability. In this dispute one defendant, Columbia Organic Chemical Company (COCC), received title to contaminated property, and within an hour transferred this title to several individuals. In denying COCC's motion for summary judgment on the issue of its ownership liability, the court stated that the company, although relinquishing title, might have maintained "sufficient control over the site to qualify as an owner." The court held that further investigation would be necessary before a decision could be made on the question.

118. See supra Part II.

119. The modern conception of property ownership does not characterize ownership as an indivisible right in the property, but rather describes it as consisting of a bundle of distinct rights (often referred to as sticks), such as the ability to use, sell, devise, and exclude. Thus more than one person can "own" the same property if different people possess different sticks of ownership. See Grey, The Disintegration of Property, in C. DONAHUE, T. KAUPER & P. MARTIN, PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 163, 163-64 (2d ed. 1983).


121. See RESTATEMENT OF PROPERTY § 450 (1944).

122. For an example of such an easement, see supra notes 83-87 and accompanying text.

123. In South Carolina Recycling, however, the lessee was also held liable as an operator, generator, and transporter, and this might have influenced the court's decision to find it liable as an owner. United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1003-06 (D.S.C. 1984), aff'd in part, vacated in part sub nom. United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 109 S. Ct. 3156 (1989). Although the court examined each issue separately and seemed to reach each conclusion independently, the other findings of liability might have reduced the significance of ownership liability and allowed the court to find liability on that ground more easily.


125. 14 Envtl. L. Rep. at 20,698. The court denied defendant's motion for summary judgment on the grounds that lack of title does not necessarily preclude liability.


In both of these cases the courts clearly indicated that control, rather than title, determines ownership under CERCLA. Thus, although easement holders lack title to the land, if they exert dominion over the property, under the South Carolina court's reasoning, they should be liable as owners under CERCLA.

B. Lender Liability

The extension of owner liability to lenders also suggests that easement holders should be held liable under CERCLA. This argument is particularly compelling given that lenders resemble traditional owners even less than do easement holders. Lender liability under CERCLA divides into two subissues: whether a lender who forecloses on property and thus takes title to the land should face liability as an owner, and whether, even without foreclosure, a lender could in some instances be held liable as an owner.129 United States v. Mirabile,130 a federal district court decision, suggests that in some instances the answer to both questions would be yes, even though the court did not bifurcate its analysis in this manner.

The Mirabile court examined the liability of several lenders who had made secured loans to owners of a hazardous waste site. One of these lenders foreclosed on the property. The court considered whether any of the creditors could be considered "owners" as defined in CERCLA,131 or whether they merely held a security interest in the property.132 The court concluded that the security interest exclusion within CERCLA's definition of owner shielded creditors from liability in the absence of a sufficient degree of participation in the day-to-day management of the relevant company.133 Based on this reasoning the court granted summary judgment in favor of two of the defendants, including the one that had foreclosed on the property. With respect to the defendant that foreclosed, the court found its lack of participation in the operations of the company far more significant than its possible acquisition of title.134 Thus, according to this court, title in the absence of control could not lead to liability.

The third defendant in Mirabile presented the opposite problem —

133. Mirabile, 15 Envtl. L. Rep. at 20,995; accord United States v. Nicolet, Inc., 712 F. Supp. 1193, 1205 (E.D. Pa. 1989). The Mirabile court was careful to distinguish between control of financial matters, which would not lead to liability, and control over the actual business itself which could result in liability. For example, the court attached significance to participation in "operational, production or waste disposal activities" as opposed to the "financial ability to control waste disposal practices." 15 Envtl. L. Rep. at 20,995-96.
134. Mirabile, 15 Envtl. L. Rep. at 20,996. The defendant had foreclosed on the property but shortly thereafter transferred its successful bid from the sheriff's sale to another party.
control without title. Representatives of the defendant banks's predecessor participated in the management of the facility without receiving title to the property. With respect to this defendant, the court denied summary judgment, holding that whether the bank had sufficiently participated in the day-to-day operations to incur liability remained to be determined. The court's reasoning implies that CERCLA's definition of owner, with its accompanying security interest exemption, acts not only as a shield, but also as a sword. In suggesting the potential liability of this defendant the court seems to reason from the converse of CERCLA's security interest exemption from the ownership definition, interpreting it to mean that some threshold participation in the operations of a company liable under CERCLA, plus some indicia of ownership, can support liability. In fact, by hinting at the possible liability of this lender, who had neither title nor any other obvious trappings of ownership, except a security interest, the court implies that the "indicia of ownership" requirement is minimal.

In *United States v. Fleet Factors Corp.*, the Eleventh Circuit lowered the control threshold for lender liability set by the *Mirabile* court. The *Fleet Factors* court rejected the *Mirabile* criterion of participation in the day-to-day management of the facility. Instead, the Eleventh Circuit asserted that "financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes" is sufficient for liability.

Although the control of the various lenders analyzed in *Mirabile* and *Fleet Factors* differs from that of an easement holder because the lenders influence the corporation rather than the land itself, this difference actually further justifies liability for easement holders. CERCLA suggests that control over the facility should determine liability. The lender indirectly exerts control over the facility by exercising influence over the corporation.

137. Since the court was ruling on the defendants' motions for summary judgment, it merely had to reach the question of whether the defendants were not liable as a matter of law, or whether there was still a controversy in this area. Although the ruling may have significant implications for other nontraditional "owners" such as easement holders, the court's implicit reasoning as well as its statement of the lender's potential, albeit unlikely, liability is best regarded as *dicta*.
139. *Fleet Factors*, 901 F.2d at 1557. The Ninth Circuit, the only other appellate court to address the issue of lender liability, declined to establish a rule for determining the degree of control necessary for liability. *In re Bergsoe Metal Corp.*, 910 F.2d 668, 672 (9th Cir. 1990).
140. "The term 'owner or operator' ... does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility," CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988) (emphasis added).
141. *But see Mirabile*, 15 Envtl. L. REPTR. at 20995 ("The reference to management of the 'facility,' as opposed to management of the affairs of the actual owner or operator of the facility,
hand, exerts control directly over the facility by asserting dominion over the land constituting the easement. Another seminal lender liability case, *United States v. Maryland Bank & Trust Co.*, rejected the control approach in its examination of the question of ownership after foreclosure. In this case, a federal district court held liable as an owner a mortgagee who foreclosed on property containing hazardous waste, purchased the property at a foreclosure sale, and retained title for four years. The court disagreed with the *Mirabile* court's view that a company must participate in the management of the site after foreclosure in order to incur liability. The *Maryland Bank* court, in rejecting the control approach, emphasized that Congress designed the security exemption to apply to those possessing "merely indicia of ownership" at the time of cleanup rather than to those who foreclosed on their security interest prior to the cleanup and gained title to the property.

The *Maryland Bank* court feared that, if banks were relieved from liability, the federal government rather than the banks would assume the risk of taking security interests in contaminated property. The court wanted to prevent CERCLA from becoming "an insurance scheme for financial institutions, protecting them against possible losses due to the security of loans with polluted properties."

Although foreclosure and purchase technically results in ownership, lenders usually take these steps because there is no other way to protect the security interest. In this respect the lender differs from the

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142. Assuming the land contains hazardous wastes, the property would meet the definition of facility. *See CERCLA § 101(9), 42 U.S.C. § 9601(9) (1988).*

143. In *Mirabile*, and other cases in this Part, the defendant exercises control over an entity contributing to the hazardous waste problem. The easement holder, on the other hand, is further removed from the causal nexus. It must be remembered, however, that fault is not a prerequisite for liability under CERCLA. *See supra note 34 and accompanying text.* For example, in the lender liability context, the *Maryland Bank* court suggests that a lender acquiring property through foreclosure who not only did not contribute to the problem, but also was unaware of its existence, could still be held liable under CERCLA. *See United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 580 (D. Md. 1986).

144. *632 F. Supp. at 573.*


C. Liability of Parent Corporations, Corporate Officers, and Stockholders

Two other related lines of cases also support a broad reading of CERCLA which would classify some easement holders as owners. Generally the corporate structure protects shareholders, including parent corporations, from the liabilities of the corporation as a whole. 149 By focusing on the issue of control, however, courts have sometimes held parent corporations liable under CERCLA. 150 In addition, major stockholders, who were often also corporate officers, have been held personally liable as owners or operators under the statute. 151

149. R. CLARK, CORPORATE LAW 7 (1986). Shareholders are only liable for the amount invested in the corporation. They normally cannot be held personally liable for the actions of the corporation.


Both the Idarado court and Bunker Hill court determined that the control exercised by the respective parent corporation over its subsidiary was sufficient to warrant direct liability as an owner under CERCLA. Bunker Hill, 635 F. Supp. at 672; Idarado, 18 Envtl. L. Rep. at 20,579. The courts did not apply the traditional criteria for piercing the corporate veil, such as a disregard for corporate formalities, or use of the corporate structure as a sham.

In Joslyn Manufacturing the Fifth Circuit flatly rejected the trend, illustrated by Idarado and Bunker Hill, toward broadening the scope of direct liability of owners and operators under CERCLA. Joslyn Manufacturing, 893 F.2d at 82. The court found no evidence in the definition of owner or in its legislative history to justify what it viewed as a departure from corporate law. Joslyn Manufacturing, 893 F.2d at 83. The Joslyn court then independently examined whether the corporate veil should be pierced on the ground of fraud or the use of the corporate entity as a sham and held to the contrary. Joslyn Manufacturing, 893 F.2d at 83.

According to one court's assessment, the Joslyn court represents the minority view. Most courts considering the issue have held in favor of direct shareholder and parent liability under CERCLA. United States v. Allied Chem. Corp., No. C-83-5896-FMS, C-83-5898-FMS (N.D. Cal. June 27, 1990) (1990 U.S. Dist. LEXIS 11695). Of course, whether liability is imposed in a particular case depends on its facts.

151. See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1052-53 (2d Cir. 1985) (major stockholder and officer of company held liable as an officer in an ambiguously worded opinion, the reasoning of which also supports liability as an owner); United States v. Conservation Chem. Co., 628 F. Supp. 391 (W.D. Mo. 1985) (supplemental memorandum opinion) (president of company and owner of 93% of corporate stock held liable as owner); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 846-850 (1984), affid. in part, revd. in part, 810 F.2d 726 (8th Cir. 1986) (The lower court held major individual stockholders who were also officers personally liable as owners and operators. This opinion formed the foundation for the other cases finding stockholders or parent companies liable as owners or operators. The circuit court, without reaching the reasoning of the lower court which gave rise to the liability,
The quantity of stock owned probably played an important role in the courts' decisions. Most of the people found individually liable held controlling quantities of stock in the relevant corporation. Similarly, only parent companies owning large quantities of their subsidiary's stock have been deemed liable as owners in the subsidiary's facilities. Still, in most instances the party found liable held less than 100% of the stock; the courts therefore recognized that less than complete ownership constituted ownership under CERCLA. By analogy, a less than complete property interest, such as an easement, should be sufficient if the use granted and control asserted approaches that of a fee simple owner.

In determining whether parent corporations or corporate officers and stockholders are owners or operators for purposes of CERCLA liability, courts have focused on the degree of control a party holds over the entity responsible for contaminating a site. Two different courts have employed the same test for determining control. According to them, "'[t]he owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage.'" This same test could be applied to easement holders if the pollution occurred while they held the easement.

The test, however, ignores CERCLA's imposition of liability on current owners regardless of whether they are responsible for creating the contamination. Since fixing the problem should require approximately the same degree of control as preventing it, the control criterion also supports a modified test similar to that of the California Torts Claims Act. The Torts Claims Act's test provides that the

152. See, e.g., Shore Realty Corp., 759 F.2d at 1037 (suggesting the defendant was the sole stockholder); Conservation Chem. Co., 628 F. Supp. at 187 (The defendant owned at least 93% of the stock); Northeastern Pharmaceutical, 579 F. Supp. at 848, 849 (Defendants were major stockholders).

153. See Idarado, 18 Envtl. L. Rep. at 20,578 (In making its decision, the Colorado district court expressly considered the percentage of subsidiary stock owned by the corporation. The court determined that 80% ownership during the critical period was sufficient); Bunker Hill, 635 F. Supp. at 670, 672 (The court found Gulf Oil Co. liable for facilities of Bunker Hill, a wholly owned subsidiary).

154. In fact, in United States v. McGraw-Edison Co., 718 F. Supp. 154 (W.D.N.Y. 1989), the court in denying the defendant's motion for summary judgment, held that issues of material fact existed as to whether a 49% individual shareholder was liable as an owner or operator under CERCLA. The shareholder's extent of control over the company, the critical determination, remained to be evaluated. McGraw-Edison, 718 F. Supp. at 157-58.

owner is the one with the capacity to prevent or remedy damage.\textsuperscript{156} Often both easement holders and fee simple owners have the power to clean up the site, and therefore both should be included in the definition of owner.

In implementing a control-based test for stockholders and parent corporations, the courts examine the degree of control exercised by an individual or parent over the company which owns the land.\textsuperscript{157} As in lender liability, this inquiry turns on the question of participation in management of the facility.\textsuperscript{158} Again, a similar method of analysis would support liability for easement holders exercising the requisite degree of control.

In sum, the courts have broadened CERCLA’s reach to encompass various parties not normally considered owners. The logic of the courts, particularly the emphasis on control as an indicator of ownership, suggests that some easement holders could be found liable as well.

IV. A POLICY APPROACH TO EASEMENT HOLDER LIABILITY

Policy considerations should play an important role in assessing easement holders responsibility since no case law explicitly addresses their liability under CERCLA. This Part asserts that easement holders could function as effective monitors of hazardous waste sites. Additionally, easement holder liability would aid in the effective spreading of risk. Finally, this Part refutes arguments which suggest that holding easement holders liable would be economically inefficient or unfair.

A. Monitoring Hazardous Waste Sites

In addition to providing funding for cleanup, CERCLA encourages monitoring of inactive hazardous waste sites. Section 103, for example, outlines notification requirements regarding hazardous waste sites and leaks emanating from them.\textsuperscript{159} Section 101(35)(A) provides a further incentive for monitoring these sites by extending an “innocent landowner” exception only to those who “did not know and had no reason to know that any hazardous substance . . . was disposed of on, in, or at the facility.”\textsuperscript{160} This provision encourages buyers to investigate prior to purchase and discourages sellers from using unsafe disposal methods since their use, if discovered, would impede the

\textsuperscript{156} See supra notes 96-97 and accompanying text.

\textsuperscript{158} See Northeastern Pharmaceutical, 579 F. Supp. at 848.

\textsuperscript{159} CERCLA § 103, 42 U.S.C. § 9603 (1988).

\textsuperscript{160} CERCLA § 101(35)(A)(i), 42 U.S.C. § 9601(35)(A)(i) (1988). This provision was included as part of the SARA amendments.
sale. In some instances, CERCLA may even prompt sellers to undertake the cleanup themselves.

If courts treated easement holders as owners for the purposes of CERCLA, the easement holders could also function as effective monitors. To avoid liability, the buyer of an easement would assess the potential for hazardous waste leakage prior to the purchase. This assessment increases the number of times the land would be investigated for hazardous waste problems. Otherwise, no environmental audit would be done until the next sale of the servient estate.

Even after the purchase, in the case of an easement across a waste disposal facility, the easement holder would continue carefully to monitor the disposal practices of the fee simple owner to avoid potential liability for the owner's improper conduct. Although it is questionable whether easement holders would have the technical ability to monitor adequately, at least some of the larger companies would have the necessary in-house expertise. Individuals or smaller companies would be able to contract for the surveys. In any case, the easement holders would be more effective than the federal government, which lacks the resources and organization to monitor efficiently the large number of hazardous waste facilities across the nation.

B. Risk Spreading Analysis

Among factors to be considered in allocating liability, Professors Prosser and Keeton include the ability to "avoid the loss, or to absorb it, or to pass it on and distribute it in smaller portions among a larger group.”

This theory of risk distribution proposes a wide spreading of losses over large numbers of people, so that each person is only


162. See supra note 5 and accompanying text.

163. Cf. Tom, Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA, 98 YALE L.J. 925, 931-35 (1989) (arguing "that lenders are effective monitors of the environmental health of their debtors").

164. In the case of utilities purchasing easements across large tracts of land, it would prove impractical to do environmental audits of the entire area. Instead, the company might choose to self-insure against the risk or negotiate a lower price to guard against the possibility of liability. Presently, environmental liability insurance is almost unavailable. See infra note 171.

Alternatively, if the interpretation of the innocent landowner exception suggested in Part V is adopted, the easement holder would only have to survey the areas where a reasonable threat of hazardous waste releases exists.

165. Cf. Tom, supra note 163, at 933 (describing various reasons why lenders are better able to monitor hazardous waste sites than the EPA).

minimally affected.\textsuperscript{167} Another theory, the deep pocket approach, argues for placing the loss on those best able to bear it, irrespective of loss spreading ability.\textsuperscript{168} Both approaches minimize "economic dislocations" and therefore increase economic efficiency.\textsuperscript{169}

Imposing liability on easement holders is economically efficient under either of these theories. In some instances, easement holders are able to spread the risk more efficiently than the owner of the fee simple, because the easement holder owns more property interests, has more customers, or is wealthier. Utility companies or railroads, for example, can pass on most of the risk to their customers through higher rates.\textsuperscript{170} Other companies can raise the prices of their goods or buy insurance to guard against the risk.\textsuperscript{171}

Additionally, imposing liability on easement holders serves to distribute the risk by increasing the number of potentially responsible parties. Given the possibility of joint and several liability under CERCLA,\textsuperscript{172} the government might bring suit against only one party. Since this party has the right to sue other parties for contribution,\textsuperscript{173} the loss might eventually come to rest with several entities. Furthermore, in instances where the owner of the fee is just a homeowner, and the easement holder is a utility or other company, the easement holder might be wealthier than the owner of the fee simple estate. Thus, even in the absence of risk spreading ability, the deep pocket theory calls for imposing liability on these parties.

Several objections might be raised to this risk distribution analysis. First, easement owners are not always large corporations. For example, they may be individuals with a right-of-way across their neighbor's land. Next, in the case of corporations, the costs are passed on to innocent consumers, who will be burdened, perhaps unfairly, by high rates or costs of goods. Additionally, if the hazardous waste problem is not caused by the easement holders, their internalizing this cost in the form of increased prices of services or goods is an economically inefficient allocation of costs which will lead to an inefficient distribution of goods or services. The following sections discuss these objections.

\textsuperscript{167} G. Calabresi, The Costs of Accidents 21 (1970). In this book Calabresi popularized an economic approach to tort law which advocated placing liability on the least cost risk avoider.

\textsuperscript{168} Id.

\textsuperscript{169} Id. at 39-40.

\textsuperscript{170} However, federal regulation of these industries might prevent them from fully recouping these costs.

\textsuperscript{171} Presently insurance for environmental liability is almost unavailable. See Abraham, Environmental Liability and the Limits of Insurance, 88 Colum. L. Rev. 942, 944 (1988). However, larger companies might be able to self-insure.

\textsuperscript{172} See supra notes 41-42 and accompanying text.

\textsuperscript{173} CERCLA § 113(f), 42 U.S.C. § 9613(f) (1988).
1. The Problem of the Easement Holder with Shallow Pockets

The possibility that some easement holders may be individuals with "shallow" pockets and a corresponding inability to spread risk would not in itself call for abandoning easement holder liability as economically inefficient. Because the government or private party can choose whom to sue for the cost of cleanup,\(^\text{174}\) they will focus their energies on pursuing those who most likely will be able to pay.\(^\text{175}\) Thus the less wealthy easement holders probably will not incur liability in court proceedings, unless there is not another, richer, solvent party available. If a rule of easement holder liability becomes established, however, even the poorer easement holders might be asked to contribute to settlements.\(^\text{176}\) In these cases their contributions quite likely would be commensurate with their fault and ability to pay.\(^\text{177}\) These contributions, therefore, would ultimately aid in the distribution of the loss by increasing the number of parties bearing the costs, without unfairly burdening the easement holder. Additionally, a small easement holder could avoid even this potential loss through negotiating an indemnification agreement with the owner of the fee simple estate.\(^\text{178}\)

Furthermore, it would be senseless to formulate two rules, one for big, corporate easement holders and one for smaller parties. Lack of clarity in the rules leads to increased litigation and consequently to higher transaction costs.\(^\text{179}\) Because it is likely that the easement holder will be at least as able to bear the loss as the landowner, assigning liability to the easement holder as well would not decrease efficiency.


\(^\text{176}\) See CERCLA § 122(g), 42 U.S.C. § 9622(g) (1988). This SARA provision encourages prompt settlement with de minimis contributors.

\(^\text{177}\) See Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5043 (1985) (amount of waste contributed and the party's ability to pay are factors to consider in evaluating settlement offers).

\(^\text{178}\) Such indemnification agreements or waivers would not protect the easement holder from direct suit by the government or private parties, see CERCLA § 107(e), 42 U.S.C. § 9607(e) (1988), but it could allow them to recover their expenses later from the fee simple holder. Of course a large easement holder would also be able to extract such agreements, but, since they would be a much more likely target for suit, the indemnification agreement would not be as helpful. The fee simple owner might not have enough funds to reimburse the easement holder without becoming insolvent.

2. The Fairness Argument

Although it might appear unfair that innocent customers of the easement holder would bear the ultimate burden for pollution unrelated to the product or service they are purchasing, a further examination of the issue reveals that this really is not as inequitable as it first seems. Rather, it is consistent with the operation of the statute. CERCLA, by incorporating the standard of strict liability, assigns liability regardless of fault.

Pollution has become a grave societal problem. More than 20,000 waste sites with projected cleanup costs of over one hundred billion dollars span the country.\textsuperscript{180} Congressional expansion of the Superfund tax base to include an excise tax on all corporations indicates recognition of hazardous waste as a problem not merely of the petrochemical industry, but of all Americans.\textsuperscript{181} Certainly statements by the Senate Finance Committee suggest this viewpoint.\textsuperscript{182}

CERCLA primarily regulates the problem of inactive waste sites.\textsuperscript{183} Some of these sites have been abandoned,\textsuperscript{184} and the most directly responsible parties are insolvent or cannot be found.\textsuperscript{185} Thus, the burden for cleanup will in any case often rest on innocent parties, and the question then becomes which ones. The Superfund, despite its name, remains limited. CERCLA is designed so that the four categories of “responsible” parties shoulder most of the costs. If this indirectly involves the passing on of the costs to “innocent” customers, it seems unavoidable under the statute in its present form. The alternative would be redrafting CERCLA so that the bulk of its financing came from general taxation. This would increase the burden of many more innocent parties.

3. The Substitution Problem

One commentator analyzed the “substitution problem” in his dis-

\textsuperscript{180} 126 Cong. Rec. 34,632 (1985).
\textsuperscript{182} See Superfund Revenue Act of 1985, Report of Mr. Packwood from the Committee on Finance, 99th Cong., 1st Sess. 13 (1985) (“Cleanup of hazardous waste cites is a broad societal problem extending beyond the chemical and petroleum industries.”).
\textsuperscript{183} 1980 U.S.C.C.A.N., supra note 3, at 6120.
\textsuperscript{185} See Lyons, Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?, 6 Stan. Envtl. L.J. 271, 306 (1986-1987); 1980 U.S.C.C.A.N., supra note 3, at 6139 (noting that the purpose of the Superfund is to finance the discovery and cleanup of abandoned hazardous waste sites “when the company or companies responsible for creating the problem either no longer exist, cannot be identified or lack the financial resources to clean up their own mess.”).
Discussion of the liability of successor corporations. This analysis also applies to easement holders. Although easement holders can efficiently spread risk, allocating risk to them might distort the market by artificially increasing the price of the easement holder's goods beyond their social costs. The possibility of liability might lead to companies purchasing easements over safer land rather than over the most direct route. This inefficient choice would cause the products of the company to reflect the risk of hazardous waste liability, even when this risk is not part of their production cost. Additionally, if the company is risk averse it will pay even more to avoid risk than would be necessary statistically, and thus lead to further inefficiencies. This type of misallocation of costs is known as the substitution problem.

Nevertheless, such allocative inefficiencies seem unavoidable. Ideally, pollution costs should be absorbed by the generator of the pollution. Her products would then reflect their true costs. If the polluter is known and solvent the loss will eventually come to rest at least partially with her, either through direct suit by the government or private parties or through a suit for contribution. Thus, the only case in which the full loss will fall on a nonpolluter will be in the event of unavailability or insolvency of the polluter. In this instance, in order to minimize economic inefficiency, the government would have to fund the cleanup. Then the cost and thus the availability of such products as electricity would only be slightly altered.

CERCLA, however, seeks to have private parties finance the cleanup wherever possible. Additionally, even if the government could distribute the cost more widely through such devices as taxation, the bureaucratic waste and inefficiencies which such a system could entail might counterbalance the economic good of this broader and more equitable distribution of loss. In the end, placing the burden on private industry might be more efficient.

V. AN EXAMPLE

This Note has asserted that in instances in which easement holders

186. Note, supra note 179, at 239-41. The analysis in this section is largely based on the arguments of this commentator.

187. Social costs refer to the costs attributable to production or acquisition of a product. For example, if in producing a good, one pollutes the atmosphere, the cost of preventing this pollution is part of the social cost of the good.

188. See supra notes 45-46 and accompanying text.

189. Nevertheless even a tax applied to all would still be inefficient since many would be paying a price unrelated to the social cost of their goods. However, if the cost is spread over enough people the allocative inefficiencies would diminish.

190. See supra note 29 and accompanying text.

exercise sufficient control over the land subject to the easement they should incur liability as owners under CERCLA. Section A of this Part gives an example of the type of situation envisioned. Section B then concludes that while imposing liability in this example follows logically from the analysis of this Note, the result might be harsher than warranted. This Part proposes a solution which eases the burden on easement holders with widespread property interests, while not relieving them of their responsibilities as owners.

A. Liability

This section argues that an electric company holding an easement to install and maintain electric wires meets the owner criteria for liability under CERCLA. An electric company generally obtains an easement for the use of a 10 or 15 foot strip of land along the edge of a subdivision. The rights of the electric company sometimes include the ability to “install, operate, maintain and remove, from time to time, facilities used in connection with overhead and underground transmission and distribution of electricity and sounds and signals in, over, under across, along and upon the surface of the property.” To carry out these responsibilities the electric company may enter the property, and can remove or trim trees or branches as necessary. Additionally, the fee simple owner may not place obstructions on the land subject to the easement or change the grade of the property without the electric company’s consent.

An agreement such as the one described above gives the easement holder significant rights in terms of use of the property, and simultaneously restricts the fee simple owner’s ability to use the land. The easement holder not only has access to the surface of the land subject to the easement, but can use the air space above and the ground below. Although the agreement limits the easement holder’s control over the property to tasks associated with the transmission of electricity and the maintenance of electric facilities, this grant of power nevertheless equals or exceeds that of easement holders who have been held liable as owners under the common law.

For example, the defendant in Green v. Duke Power Co. had a similar contract with the fee simple owner to allow the installation and maintenance of its electric lines and transformers. Because of the limitations placed on the fee simple owner’s power to control access to the area around the transformer and the power company’s greater ability to exclude others, the Duke Power court suggested that the

194. Id.
195. See supra notes 83-87 and accompanying text.
power company would be the party responsible for a girl's injury from touching the transformer.196

The test applied by some courts in assessing whether someone should be liable as an owner under CERCLA parallels that employed by some courts considering owner liability under tort law.197 The ability to prevent the accident or to rectify the problem once it has occurred indicates sufficient control to qualify as an owner.198 The electric company in the hypothetical example could prevent the accumulation of hazardous waste on the land subject to the easement by monitoring the property and reporting any problems to the appropriate authorities. Additionally, the easement holder could detect any hazardous waste already on the property and clean it up. Although the contract does not explicitly grant this power, it follows from the easement holder’s ability to maintain its power lines. Just as a holder of a right-of-way has the right, indeed the duty, to repair the path, the electric company at minimum possesses the right to prevent its equipment from contamination by hazardous wastes. Thus the electric company would meet the criteria for ownership under this test.

Additionally, compared with the broad range of nontraditional owners such as lenders, lessees, shareholders, and parent corporations, the electric company comes closest to the traditional concept of an owner as well as the concept of an owner under CERCLA. Unlike lenders, shareholders, or parent corporations, the electric company possesses rights over the land itself. CERCLA defines an owner as one who owns a facility.199 The definition of facility encompasses physical entities such as a building or a hazardous waste site,200 and does not refer to a company or corporation. Thus lenders or shareholders only could meet the criteria of owners indirectly, by controlling a corporation which is an owner under the Act. In contrast, an easement holder such as the electric company directly fulfills the requirements.

Finally, the electric company has deep pockets and vast holdings. Making this type of easement holder responsible as an owner under

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196. Although in this instance the object directly causing the injury belonged to the easement holder, this relationship is not a prerequisite for holding easement holders liable as owners. See generally Part II. Instead courts have focused on the easement holder's control over the area. In fact, courts have found easement holders potentially liable for acts only indirectly related to the physical property, such as death caused by a heart attack brought on by abduction from an unlit parking lot. See supra note 82 and accompanying text. In other words, for the purposes of tort law, courts treat easement holders as owners of real property, not only as owners of personal property, fixtures, or other objects causing injury.

197. See supra notes 97 & 99 and accompanying text.

198. See supra note 97 and accompanying text (describing the California Tort Claims Act Test); see also supra notes 155 & 156 and accompanying text (describing the test used by courts in the CERCLA context and proposing a modification to this test).


CERCLA would further the policy goals of risk spreading and monitoring discussed in Part III.

B. Defense

Although the arguments contained in this Note point to the electric company's liability as an owner under CERCLA, this result seems draconian, even considering the harshness of CERCLA. An electric company might hold tens of thousands of miles of easements, and a hazardous waste site crossing any of these tracts could render the company jointly and severally liable. A few such discoveries would quickly empty deep pockets.

In *Sowers v. Tri-County Telephone Co.*, the Indiana Supreme Court suggested a solution to this dilemma. The *Sowers* court determined that an easement holder, a telephone company, was a possessor according to the Restatement's definition. The case involved the telephone company's duties to a tree trimmer, who was injured when he fell into an abandoned manhole. The court, however, took into consideration that the company was a nontraditional owner. In particular, the court recognized that the telephone company, unlike a typical owner, might not come onto the property for years at a time. The court held that requiring the telephone company to inspect its easements regularly, in order to warn business invitees of possible hazards, would be too great a burden, and its duty should relate to actual use.

CERCLA's innocent landowner defense can introduce similar flexibility into CERCLA. Landowners are not eligible for this defense if they have actual or constructive knowledge of the hazardous waste build-up. Generally courts have determined that, in order to come within the ambit of the innocent landowner defense, landowners must thoroughly investigate prior to purchasing the land. Otherwise they can be charged with constructive knowledge of the hazardous waste problem. The courts could consider what knowledge they can fairly impute to the easement holder.

The courts could establish a different duty of care for easement holders such as the electric company who must acquire vast tracts of

201. *See supra* notes 42-43.
203. 546 N.E.2d at 838.
204. 546 N.E.2d at 838.
205. 546 N.E.2d at 839 ("To the extent that Tri-County learned of dangerous conditions near its poles through these visits, of course, it had a duty to warn future invitees.").
206. *See supra* notes 10-13 and accompanying text.
207. *See supra* note 13 and accompanying text.
easements in order to conduct business. The courts could limit such a company's duty to investigate to high risk areas, for example where the easement crosses a chemical plant's property. In this manner the electric company could effectively monitor its easements for the most likely hazards without facing onerous burdens and liabilities.209

The text of the innocent landowners exception supports such a flexible approach. The statute advocates considering various factors such as the “specialized knowledge” of the landowner, “the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property,” the difficulty of detecting contamination, and “the obviousness of the presence or likely presence of contamination at the property.” 210 By attaching appropriate weight to these conditions and construing them in light of the special difficulties faced by companies such as the electric company, the easement holder's duty of care could be reduced to the standard advocated above.

CONCLUSION

Extending owner liability under CERCLA to easement holders exerting sufficient control over land conforms with the Act's legislative history. This extension also follows logically from CERCLA decisions in other areas as well as from the treatment of easement holders under the common law. Furthermore, policy considerations for site monitoring and risk spreading justify the imposition of liability on easement holders.

Countervailing considerations, however, reveal the need for a discriminating approach. Otherwise, public services such as utilities

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209. The innocent landowner defense provides incentive for monitoring current as well as prospective holdings. Only those who exercise “due care with respect to the hazardous substance concerned” and take “precautions against foreseeable acts or omissions of any . . . third party” can invoke the defense. See CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988). When considering the potential liability of an easement holder such as the electric company, courts can read flexibility into this part of the defense as well. They can construe “foreseeable” narrowly and consistently with the duty of care proposed above for this type of easement holder.

If the third party creating the new hazardous waste problem is the fee simple owner, however, the easement holder probably could not use the defense, because a contractual relationship exists between him and the owner of the fee, and the hazardous disposal occurred after the acquisition of the easement. See CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988). On the other hand, many of the fee simple owners who dump hazardous waste probably also are engaged in high risk businesses, and this Note proposes that the easement holder should have the duty to monitor risky areas. Thus, the restriction on the potential protection of easement holders through the innocent landowner defense is not as severe as it first appears.

210. CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B). SARA's House Conference Report further notes that the standard of inquiry depends upon the public awareness of the hazardous waste problem at the time of acquisition of the land. H.R. REP. No. 926, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3280. Taking into account public awareness at the time of acquisition will decrease the chance of easement holders incurring liability for hazardous waste sites they unwittingly acquired before CERCLA even was enacted. A discussion of CERCLA's retroactivity, however, is beyond the scope of this Note.
could soon find themselves facing financial ruin, even while attempting to respond responsibly to the problem of inactive hazardous waste sites. In many instances, their holdings would prove too expansive to monitor or to insure without incurring prohibitive expense. A liberal interpretation of the innocent landowner defense would ease the burden on the utility companies while still providing incentive for them to monitor for hazardous wastes in appropriate instances.

This Note proposes a flexible standard for easement holder liability. Easement holders with extensive holdings which they seldom visit should only have a duty to investigate property on which it is reasonably likely that a hazardous waste problem exists. The easement holders could base the determination of this likelihood on information regarding the history of the property. On the other hand, easement holders with more limited holdings whose actual contact with the property is greater should have to meet the standard of a fee simple owner in order to be eligible for the innocent landowner defense. Such a sliding scale approach to the duty of care acknowledges that, even if the control threshold necessary for ownership liability is met, the easement holder's relationship to the land may differ from that of a fee simple owner.

— Jill D. Neiman