



By Peter Niemiec

# The Brownfield Blues

Recent legislation intended to promote the cleanup and reuse of brownfields may actually have the opposite effect

**B**rownfields are properties whose redevelopment is hindered by the presence of contamination. Ostensibly passed to “promote the cleanup and reuse of brownfields,”<sup>1</sup> the Brownfields Revitalization and Environmental Restoration Act of 2001 (BRERA),<sup>2</sup> signed into law in 2002, is the latest set of amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>3</sup> However, analysis of the complex provisions of these amendments reveals little that will promote those ends. Instead, the amendments offer more sticks than carrots, create as many problems as they solve, and contain traps for the unwary.

This situation, unfortunately, is not new. CERCLA has been problematic for owners and purchasers of real estate ever since its passage in 1980 in response to national con-

cern over sites such as the infamous Love Canal.<sup>4</sup> CERCLA was intended to provide the legal tools to clean up contaminated sites.<sup>5</sup> One of those tools is the imposition of strict, joint, and several liability for cleanup on current owners and operators of properties from which there is a release of hazardous substances, as well as persons who owned and operated a property at the time that any disposal of hazardous substances occurred.<sup>6</sup> The list of hazardous substances is long,<sup>7</sup> and liability is not dependent on the amount of hazardous substances released.<sup>8</sup> Current owners are liable even if they had nothing to do with causing the contamination.<sup>9</sup>

This draconian liability scheme has brought much financial pain to those who have bought industrial and commercial properties either before CERCLA’s passage or, afterwards, without due consideration for the problems they were purchasing.<sup>10</sup> It has also

resulted in many contaminated properties lying fallow because of the well-founded concern that their purchase could lead to liabilities that far exceed any economic value that might otherwise be derived from the property.<sup>11</sup> The notion of providing incentives for the redevelopment of contaminated properties was entirely absent from CERCLA.

Recognition that this liability scheme was causing problems came fairly early, but the response was timid—the reform was so narrowly crafted as to be of dubious value. Specifically, the first set of amendments to CERCLA, passed in 1986,<sup>12</sup> created what is now widely known as the innocent purchaser defense. In a typically obscure bit of CERCLA

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drafting, this defense was created by inserting a definition of “contractual relationship,” a term used in one of the three original defenses provided for in the original statute.<sup>13</sup> To qualify as an innocent purchaser, a landowner had to prove satisfaction of six conditions: 1) the disposal of the hazardous substances occurred prior to acquisition, 2) the disposal was caused solely by the act or omission of a third party, 3) “all appropriate inquiry” was made into previous ownership and uses of the property, 4) despite this inquiry, the landowner did not know and had no reason to know that any hazardous substance was disposed of at the facility, 5) the landowner exercised “due care” with respect to the hazardous substances, and 6) precautions were taken against the foreseeable consequences of the acts and omissions of the third party that caused the problem.<sup>14</sup>

This is a formidable set of hurdles to avoid liability for a problem that the landowner did not cause. However, from the perspective of someone considering the purchase of real estate, the most glaring problem with this defense is the nature of its availability: It is necessary to make “all appropriate inquiries” about the property and yet have no reason to know that hazardous substances were disposed of. If the inquiry uncovered reasons to believe that hazardous substances had been disposed of, the defense was not available. On the other hand, if the prospective purchaser did an investigation and hazardous substances were later found, there was a significant risk that the earlier investigation would be found to be insufficient. As a result, this defense was useless to someone hoping to redevelop a property with known contamination issues and was of little comfort to any other purchaser of real estate.

### Continuing Risks

Unfortunately, the BRERA amendments to CERCLA represent a similarly timid response. They create the possibility of purchasing a known contaminated property without incurring CERCLA liability by establishing a new defense of being a bona fide prospective purchaser, but this defense is burdensome to establish. The amendments also specify that certain owners of properties contiguous with contaminated sites are not considered liable persons, but they place many restrictions on the availability of this relief. These statutory forms of relief have a dark side in that they suggest liability for owners who previously had good arguments against liability. The standards for qualifying as an innocent purchaser have actually been made tougher. Funding is available for planning and site characterization, but only through local government entities and only in limited amounts.

Perhaps the best example of these limitations is the new CERCLA Section 107(r)(1).<sup>15</sup> At first blush, the section seems straightforward: It provides that bona fide prospective purchasers are not liable as owners or operators as long as they do not “impede the performance of a response action or natural resource restoration.”<sup>16</sup> However, the simplicity vanishes when one reads the definition of “bona fide prospective purchaser.”<sup>17</sup> In addition to specifying that the defense only applies to persons who purchased property after January 11, 2002, the definition places eight conditions that one

chaser must comply with EPA subpoenas and requests for information, and 8) the purchaser must not be affiliated with any other liable person.<sup>18</sup>

For many reasons, this long list should give pause to anyone hoping to qualify as a bona fide prospective purchaser. Failure to meet any one of these criteria—and many of them are quite complex—relegates the buyer to the status of liable party, doomed to the long and expensive process of negotiating or litigating a share of liability with other liable parties—or, worse yet, left as the only deep pocket at a site where the other liable parties



has to meet to be considered a bona fide prospective purchaser: 1) all disposal of hazardous substances must have occurred prior to acquisition, 2) the purchaser must have made all appropriate inquiry into previous uses (much like an innocent purchaser), 3) the person must have provided all legally required notices regarding the release of hazardous substances, 4) the person must exercise appropriate care with respect to the hazardous substances, including reasonable steps to prevent or limit exposure, 5) the purchaser must provide full cooperation to anyone authorized to take response actions, 6) the purchaser must comply with established land use restrictions and avoid doing anything that would impede the effectiveness or integrity of any institutional control, 7) the pur-

are dead, defunct, or bankrupt.

The second reason to be wary of this list of criteria is less obvious but just as troubling. Criteria three through seven involve actions that the purchaser may be required to take after the acquisition. Thus, someone who qualifies as a bona fide prospective purchaser at the time of acquisition can lose this status because of actions or events that occur later. The most extreme example is the requirement to comply with land use restrictions established in connection with any response action and not to impede the effectiveness of institutional controls.<sup>19</sup> Unless the site is one where all the response decisions have been made and implemented, this means that the purchaser runs the risk that land use restrictions or institutional controls may

be imposed, perhaps long after acquisition, that will be at odds with the planned or actual development of the property. The bona fide purchaser may not have much influence on these cleanup decisions for many reasons, including the fact that the decision maker will know that bona fide purchasers who do not cooperate lose their defense.

The potential for trouble does not end there. Another criterion requires the purchaser to take "appropriate care" with the hazardous substances found at the facility to stop releases, prevent future ones, and limit exposure.<sup>20</sup> The phrase "appropriate care" is new to the CERCLA regime—previously, persons trying to qualify for the preexisting defenses in Section 107(b)<sup>21</sup> had to show that they had exercised "due care" with regard to hazardous substances found at the site.<sup>22</sup> It remains unclear what, if any, difference the courts will find between "due care" and "appropriate care." And when that issue is addressed, another will remain regarding what kind of steps will be "appropriate" to stop releases, prevent future ones, and limit exposure. Finally, differences between the provisions for the bona fide prospective purchaser and the owner of contiguous property raise troubling questions about what will be required to meet the appropriate care element of this defense. Accordingly, an attorney can offer no clear advice to a client about how to avoid becoming a liable party after the property is acquired.

The criterion that all disposal needs to occur before acquisition also contains a trap. To the uninitiated, the provision sounds simple: If the purchaser does not add any contamination, there is no liability. However, examination of the CERCLA case law reveals how wrong this reading may be. The holding in *Kaiser Aluminum & Chemical Corporation v. Catellus Development Corporation*,<sup>23</sup> for example, is that moving contaminated soil to uncontaminated portions of the property constitutes disposal. CERCLA's definition of a hazardous substance pays no regard to quantity, so it is actually quite likely that any redevelopment of a brownfield property could involve this kind of "disposal." Thus, the criterion can easily be violated unwittingly during redevelopment.

Even if the purchaser does nothing to move existing contamination, this condition may still be violated. The possibility arises from the holding in *Nurad v. William E. Hooper & Sons, Inc.*,<sup>24</sup> in which the court found that "the reposing of hazardous waste and its subsequent movement through the environment" can constitute disposal under CERCLA.<sup>25</sup> While several circuit courts, including the Ninth Circuit, have explicitly rejected the notion that the passive migra-

tion of contaminants through soil, without more, constitutes disposal for CERCLA purposes,<sup>26</sup> the rationale for these cases has been undercut by provisions in BRERA concerning the liability of owners of properties contiguous to the source of hazardous substance releases. In short, if the passive migration of contaminants is not disposal under CERCLA, then these contiguous owners would not be liable, and it would not be necessary to establish a defense to protect them. Thus, the contiguous landowner defense may render meaningless the relief that is supposedly afforded by the bona fide prospective purchaser defense. Undoubtedly, the courts will have to decide what this muddle means.

As if all that were not enough to deter anyone from relying on being a bona fide prospective purchaser, BRERA goes on to provide that if EPA has unrecovered response costs in connection with the "facility" (which could include properties beyond the one purchased),<sup>27</sup> EPA is entitled to place a lien on the property for less than or equal to the amount that the cleanup increases the fair market value of the property.<sup>28</sup> The possibility of such a lien raises questions about the purchaser's potential return on investment and carries the prospect of litigation over the amount of the lien. Just as important, if the property is acquired with a loan, the imposition of such a lien runs a high probability of violating the terms of the deed of trust securing the loan.

### Contiguous Property Owners

If the bona fide purchaser provisions are a trap for the unwary, BRERA's provisions on contiguous properties are a dangerous solution in search of a problem to justify their creation. To summarize these provisions is challenging because the statute contains needlessly complex grammatical structures,<sup>29</sup> making one wonder if some darker meaning is being intentionally obscured.

Under BRERA's provisions, owners or operators of properties contaminated by off-site sources can escape liability if they meet eight criteria which in simplified form are that the person 1) did not cause, contribute, or consent to the release, 2) is not affiliated with someone who is liable for the release,<sup>30</sup> 3) takes reasonable steps to stop the release and limit human or environmental exposure (note the absence of either "due care" or "appropriate care," which are found in otherwise parallel requirements for the innocent purchaser and bona fide purchaser defenses), 4) provides full cooperation to those conducting the cleanup, 5) is in compliance with land use restrictions established as part of the response and does not interfere with other institutional controls associated with the release, 6) is in compliance with any

information request from EPA, 7) provides all legally required notices with respect to the release of hazardous substances, and 8) conducted appropriate inquiry into the property at the time of acquisition and yet had no reason to know of the contamination.<sup>31</sup>

This defense raises the question of what need it fills. Arguably, it was necessary because of the holding in *Nurad* that the passive migration of contaminants constitutes a disposal under CERCLA. Under this logic, since passive migration is "disposal," people whose property is contaminated by hazardous substances migrating from off the site are "owners and operators" at the time of disposal and thus liable under CERCLA. However, *Nurad* appears to be a minority view among the circuits.<sup>32</sup> Thus, on the basis of case law, adjoining property owners (especially those in the Second, Third, Sixth, and Ninth Circuits) have had a good argument that they were not liable at all under CERCLA. Besides, if *Nurad* were the problem, a simpler solution is available—namely, a provision indicating that passive migration from an off-site source is not a basis for liability under CERCLA.

There is also a practical reason to question the necessity for the contiguous property owner provisions of BRERA. Little or no evidence exists that contiguous owners have been subject to liability claims. For example, contaminated aquifers underlie large parts of the San Fernando and San Gabriel Valleys, and the contamination in these aquifers continues to migrate. This situation theoretically makes most of the property owners in those areas liable under CERCLA as owners of facilities at the time of disposal, if disposal includes passive migration. Yet to date neither the government nor the private parties that have been the subject of government cleanup claims have sought recovery from these so-called contiguous property owners.<sup>33</sup> Although there were some problems with lenders who were concerned about this source of liability, those concerns appear to have subsided, and lending is a problem in these areas only for properties for which data suggests that they may be a source of contamination.

Yet another reason to question the need for this defense is EPA's 1995 document titled "Policy toward Owners of Property Containing Contaminated Aquifers."<sup>34</sup> In the policy, EPA indicated that, subject to certain conditions, it would not take enforcement action or seek cost recovery from those defined as contiguous property owners under BRERA. EPA based its policy on the notion that such contiguous property owners could claim the defense, already existing in Section 107(b)(3) of CERCLA,<sup>35</sup> that the release was

caused solely by the act or omission of a third party. If this indication is true, why did Congress create a new defense rather than simply continue to rely on the third-party defense found in Section 107(b)(3)? That defense has fewer conditions and would not have raised questions about whether Congress intended that passive migration constituted disposal.<sup>36</sup>

As it stands, this new defense raises the implication that Congress agreed with the theory of *Nurad* that passive migration constitutes disposal. In so doing, it undermines the holdings of the courts that have declined to follow *Nurad*. Those holdings may be saved by Section 107(q)(2),<sup>37</sup> which provides that the new subsection does not limit any existing defenses or create any new liability. However, that seems to be small comfort in the face of the rest of the section, which imposes many conditions on the availability of this new defense and adds even more confusion to CERCLA's already confusing liability provisions.

Those daring to take advantage of this new defense will have to face its shortcomings. The most glaring is that it shares the Catch-22 of the original innocent purchaser defense; namely, it is unavailable if the person acquiring the property had reason to know of the contamination prior to acquisition. This requirement makes the defense useless to anyone wishing to redevelop a brownfield property. Like the bona fide purchaser defense, its availability further depends on events that can occur after acquisition, such as compliance with land use restrictions established as part of the hazardous substance response and compliance with EPA information requests.

One (rather limited) positive aspect of this provision is that Congress specified that the requirement to take reasonable steps to stop or prevent releases does not include a requirement to conduct groundwater investigations or install groundwater remediation systems, except as required by the "Policy toward Owners of Property Containing Contaminated Aquifers."<sup>38</sup> That policy only requires this action in unspecified "exceptional circumstances" or if operation of an existing groundwater well on the property affects the migration of contaminants. The dark side of this provision is that no similar limitation was placed on the obligations of bona fide prospective purchasers, who must comply with a virtually identical appropriate care provision to qualify for that defense.<sup>39</sup> Does this mean that Congress concluded that bona fide purchasers might, in some circumstances, have to conduct groundwater investigation or remediation to preserve their status? Was this an intentional policy choice

or just sloppy drafting? One suspects the latter, but ultimately it will probably be the subject of an appellate decision.

With a similarly double-edged sword, Congress gave EPA the explicit authority to grant persons qualifying for this defense assurances that no enforcement action will be brought or offer protection against cost recovery and contribution suits.<sup>40</sup> No such provision was included for bona fide prospective purchasers, again raising the question of whether this was just an oversight or an intentional policy choice. Since EPA stated in its 1995 policy that it intended to make such relief available to contiguous owners, this provision provides another source of dread about why it was necessary.

### Complicated Innocence

Another telling sign that BRERA was not necessarily designed to alleviate the harshness of CERCLA liability is that the innocent landowner defense (which was the original, limited form of CERCLA liability relief) was made more complicated and harder to demonstrate under BRERA. The first source of complication is the six new conditions that a landowner must meet to qualify for this defense. Specifically, a landowner must now 1) provide full cooperation to EPA's response, 2) comply with any land use restrictions established in connection with EPA's response actions, 3) not do anything that interferes with any institutional control that is part of the response action, 4) take reasonable steps to stop any continuing release, 5) take reasonable steps to prevent any future release, and 6) take reasonable steps to prevent or limit human or environmental exposure to the contamination.<sup>41</sup>

These new conditions are puzzling, in light of the fact that to establish the innocent landowner defense, a person already had to demonstrate that due care was exercised with regard to the hazardous substance and that precautions were taken against the foreseeable consequences of the acts or omissions of the third party who caused the contamination.<sup>42</sup> It would be convenient if these new conditions were merely meant to be a clarification of what constitutes due care and precautions. Nevertheless, given how these amendments are structured, it is equally plausible to argue that these conditions are in addition to the requirements of Section 107(b)(3) for due care and precaution. However, even if the new requirements are read as defining "due care" and "precaution," this significantly limits the discretion of a court to fashion standards that are tailored to the facts of the transaction before it.

Another source of complication for the innocent landowner defense arises from the

statute's attempt to standardize preacquisition environmental due diligence. The BRERA amendments direct EPA to promulgate standards for what constitutes "all appropriate inquiries" for the purposes of establishing this defense.<sup>43</sup> This has the potential to be a positive development, as long as EPA does not create unreasonable standards. However, the amendments also established an interim criterion for property purchased after May 31, 1997: the 1997 version of the *Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process*, published by the American Society for Testing and Materials.<sup>44</sup> This has the potential to be a complication for current transactions, because the ASTM has updated its Phase I standard since issuing the 1997 standard.<sup>45</sup> Thus, an attorney should counsel a client that is considering a purchase to request the consultant doing the Phase I assessment to represent that the report will meet both the 1997 standard and the 2000 standard.

This provision may spell trouble for anyone who acquired property after May 31, 1997, and did not conduct an investigation that complied with the 1997 ASTM Phase I standard. Twenty-two years after CERCLA's passage, there are still people who buy industrial or commercial properties without environmental investigation. At a less extreme level, many people seemed to think that the more abbreviated investigation represented by the ASTM Transaction Screen<sup>46</sup> was a sufficient investigation in some circumstances. Hopefully, when EPA adopts a new standard, it will not be retroactive.

BRERA not only offers new hazards but also lacks incentives to brownfields redevelopment. Few, if any, of BRERA's carrots come in the form of liability relief. Subtitle A of BRERA<sup>47</sup> authorizes EPA to establish a grant program to state and local governments to allow those local entities to engage in remediation themselves or make loans to site operators or developers. BRERA places limitations on the kind of sites for which this assistance is available, specifically excluding sites that are the subject of cleanup orders (even orders on consent) under many federal and state programs.<sup>48</sup> The amounts are limited—a maximum of \$1 million to each state or local government, and a maximum loan of \$200,000 to an owner or developer. While these amounts may be significant for a particular project, the limited amount of authorized appropriations—a maximum of \$200 million over five years—together with the limitation on eligible sites, guarantees that this program is not likely to have widespread impact.

Since BRERA affords little in the way of either liability relief or financial incentives, it

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is likely that brownfields redevelopment will continue to be driven by the market forces that have driven it to date—namely, the need for retail, and in some cases, residential development in urban and suburban areas where a location has become attractive because of changes in surrounding uses and development. Redevelopment will be far more likely where the contamination can be addressed relatively cheaply, or there is a solvent party who is already cleaning up the property, or a redevelopment agency has taken on the burden of getting the site cleaned up.

Lawyers representing parties seeking to acquire brownfield properties will have to rely on the tools that have already been developed for these deals. The cornerstone of the approach to doing the deals is a thorough investigation of the property, including the history of the property's use, the sources of the contamination, and its potential impact on the planned development. The investigation needs to be performed by competent engineering and scientific professionals. The information gathered is essential to advise the prospective purchaser about the risks involved in the deal and how best to protect against them.

Probably the best way to protect against risk is through indemnities and cleanup agreements with other parties who are responsible for the contamination, if those parties have significant resources. Agreements with the government agency that has jurisdiction over the cleanup can be very useful in making financing more available or clarifying the responsibility of the prospective purchaser, especially if there are questions or limitations concerning the ability of other liable parties to perform the cleanup. More often than not, these agreements are with state and local agencies rather than EPA.

There are many reasons for this. Historically, EPA has not been receptive to making agreements with prospective purchasers (although it has done so in the past, especially for high-profile projects having strong support from local political leaders). Probably more important, state and local agencies supervise far more cleanups. There are even some kinds of contamination—such as that associated with gasoline stations—that are beyond CERCLA's statutory reach.<sup>49</sup> If anything, the BRERA amendments will only increase the likelihood that any agreement from the government to protect a prospective purchaser will be with a state or local agency, as EPA has taken the position that formal agreements are less necessary now that there are so-called protections available in the statute.<sup>50</sup> The BRERA amendments, however, do not affect liability under California environmental statutes.<sup>51</sup>

Environmental insurance is another approach that has been used to facilitate deals on properties with contamination issues. In general, however, it is an approach that consumes large amounts of time and money, since the policies almost always need to be specifically negotiated. The market for these products also changes rapidly. Thus, it is difficult to say whether BRERA will have any significant impact on the availability of these products as a solution to making brownfields deals work.

BRERA offers little reform, little incentive to do brownfields deals, and little reason to think that the fundamental ways of doing these deals will change. The amendments do, however, add significant complication to an already complicated statutory scheme and many potential traps for those who might be tempted to take advantage of the so-called reforms being offered. The treacherous conditions that BRERA places on the defenses it creates, and its quirky drafting, will require lawyers who advise clients about its applicability to think long and hard about the possible implications of BRERA's terms. *Caveat emptor.* ■

<sup>1</sup> Preamble to the Brownfields Revitalization and Environmental Restoration Act of 2001, tit. 2 of the Small Business Liability Relief and Brownfields Revitalization Act of 2001, Pub. L. No. 107-118 (Jan. 11, 2002).

<sup>2</sup> The Brownfields Revitalization and Environmental Restoration Act of 2001, tit. 2 of the Small Business Liability Relief and Brownfields Revitalization Act of 2001, Pub. L. No. 107-118 (Jan. 11, 2002).

<sup>3</sup> The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601 *et seq.*

<sup>4</sup> See 1 BROWNFIELDS LAW & PRACTICE §3.01(2) (a) (Michael B. Gerrard, ed., 2000).

<sup>5</sup> *United States v. Reilly Tar & Chem. Co.*, 546 F. Supp. 1100, 1111-12 (D. Minn. 1982).

<sup>6</sup> *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983); *United States v. SCRDI*, 653 F. Supp. 984 (D. S.C. 1984), *aff'd sub nom. United States v. Monsanto Co.*, 858 F. 2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

<sup>7</sup> The definition of "hazardous substance" in CERCLA, which appears at 42 U.S.C. §9601(14), references lists in five other statutes. In addition, EPA generated a separate list of hazardous substances that appears at 40 C.F.R. §302.4, pursuant to the authority granted under 42 U.S.C. §9602.

<sup>8</sup> *B. F. Goodrich Co. v. Murtha*, 958 F. 2d 1192 (2d Cir. 1992).

<sup>9</sup> See, e.g., *New York v. Shore Realty Corp.*, 759 F. 2d 1032 (2d Cir. 1985); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986).

<sup>10</sup> See, e.g., *Amoco Oil Co. v. Borden, Inc.*, 889 F. 2d 664 (5th Cir. 1989), in which Amoco sued Borden over contamination on a property it purchased from Borden in 1978 (two years before CERCLA's passage). Amoco claimed in the suit that the cleanup of the property, for which it paid \$1.8 million, would cost between \$17 million and \$22 million.

<sup>11</sup> 1 BROWNFIELDS LAW & PRACTICE §1.03(2) (b) (Michael B. Gerrard, ed., 2000).

<sup>12</sup> Pub. L. No. 99-499, commonly known as the Super-

fund Amendments and Reauthorization Act of 1986, or SARA.

<sup>13</sup> 42 U.S.C. §§9601(35), 9607(b)(3).

<sup>14</sup> *Id.*

<sup>15</sup> 42 U.S.C. §9607(r)(1).

<sup>16</sup> *Id.*

<sup>17</sup> 42 U.S.C. §9601(40).

<sup>18</sup> *Id.*

<sup>19</sup> An institutional control is usually a restriction on the use or development of the property—e.g., a deed restriction forbidding residential use or a requirement to maintain paving over a certain area of the site—that is designed not to achieve actual cleanup but rather to prevent the spread of contamination or exposure to it.

<sup>20</sup> 42 U.S.C. §9601(40)(D).

<sup>21</sup> 42 U.S.C. §9607(b).

<sup>22</sup> *Id.*

<sup>23</sup> *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1142 (9th Cir. 1992).

<sup>24</sup> *Nurad v. William E. Hooper & Sons, Inc.*, 966 F.2d 837, 845 (4th Cir. 1992).

<sup>25</sup> *Id.*

<sup>26</sup> *Carson Harbor Village Ltd. v. Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001), *cert. denied*, 152 L.Ed.2d 381, 122 S.Ct. 1437 (2002); *United States v. 150 Acres of Land*, 204 F.3d 698, 705-06 (6th Cir. 2000); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358 (2d Cir. 1997); *United States v. CMDG Realty Co.*, 96 F.3d 706, 711 (3d Cir. 1996).

<sup>27</sup> "Facility," as defined in CERCLA at 42 U.S.C. §9601(9) and in implementing regulations at 40 C.F.R. §300.5, includes "any site or area where a hazardous substance has been deposited...or come to be located..." Thus, a CERCLA facility is not limited to a particular legal parcel and can encompass a large area. *See, e.g., Colorado v. Idarado Mining Co.*, 707 F.Supp. 1227 (D. Colo. 1989), where it was held that areas of a river where mine tailings had come to be located were a facility within the meaning of CERCLA despite the fact that these areas were downstream of where the defendant mining companies had actually deposited them.

<sup>28</sup> 42 U.S.C. §9607(r).

<sup>29</sup> *E.g.*, "A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person..." 42 U.S.C. §9607(q)(1)(A).

<sup>30</sup> *See* 42 U.S.C. §9677(q)(1)(A)(ii).

<sup>31</sup> 42 U.S.C. §9607(q)(1)(A).

<sup>32</sup> *See* note 26, *supra*.

<sup>33</sup> The exception to this has been certain owners of groundwater wells. These owners have been subjected to liability claims when there is evidence that the operation of the wells has contributed to the spread of contaminants.

<sup>34</sup> Policy toward Owners of Property Containing Contaminated Aquifers, 60 Fed. Reg. 34790 (July 3, 1995).

<sup>35</sup> 42 U.S.C. §9607(b)(3).

<sup>36</sup> While EPA policy is not necessarily a binding interpretation of the law, it is usually given substantial deference if the agency is interpreting a statute it has the authority to administer and Congress has not clearly addressed the question at issue. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984).

<sup>37</sup> 42 U.S.C. §9607(q)(2).

<sup>38</sup> 42 U.S.C. §9607(q)(1)(D).

<sup>39</sup> Compare 42 U.S.C. §9607(q)(1)(A)(iii) (contiguous owners) with 42 U.S.C. §9601(40)(D) (bona fide purchasers).

<sup>40</sup> 42 U.S.C. §9607(q)(3).

<sup>41</sup> 42 U.S.C. §9601(35)(A) and (B).

<sup>42</sup> The innocent landowner defense was created by expanding the definition of "contractual relationship."

To qualify as an innocent landowner one had to prove that the contamination was caused by the act or omission of a third party with whom one did not have a contractual relationship as well as establishing the other elements of the §107(b)(3) defense. Since the purchase of real estate presumably created a contractual relationship, the defense was created by specifying that in certain conditions, this purchase/sale agreement did not qualify as a contractual relationship. *See* 42 U.S.C. §§9601(35) and 9607(b)(3).

<sup>43</sup> 42 U.S.C. §9601(35)(B)(ii) and (iii).

<sup>44</sup> AMERICAN SOCIETY FOR TESTING AND MATERIALS, STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENT: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS, E1527-97 (1997).

<sup>45</sup> *Id.* at E1527-00.

<sup>46</sup> AMERICAN SOCIETY FOR TESTING AND MATERIALS,

STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENT: TRANSACTION SCREEN PROCESS, E1528-00 (2000).

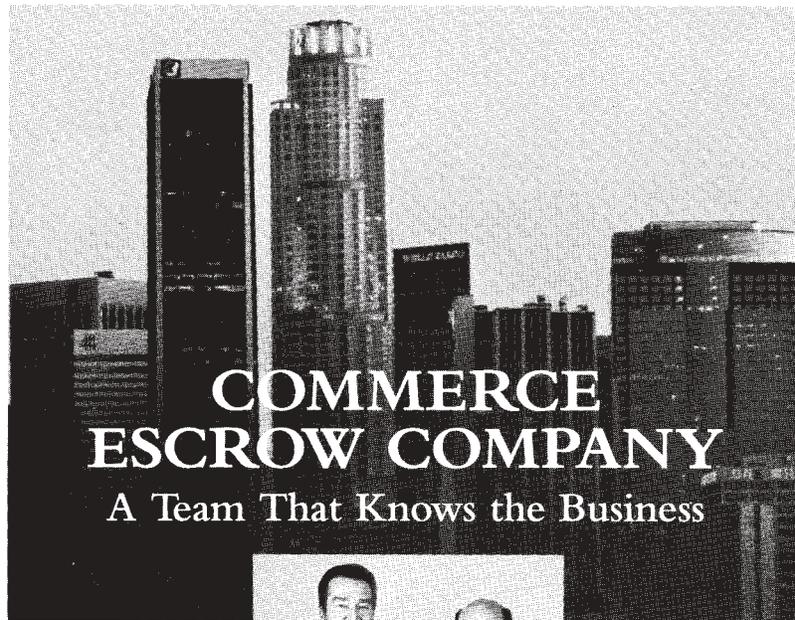
<sup>47</sup> 42 U.S.C. §§9601(39), 9604(k).

<sup>48</sup> *See* 42 U.S.C. §9601(39)(B) (definition of "brownfield site").

<sup>49</sup> *Wilshire Westwood Assocs. v. Atlantic Richfield Co.*, 881 F.2d 801 (9th Cir. 1989).

<sup>50</sup> Memorandum, Bona Fide Prospective Purchasers and the New Amendments to CERCLA, from Barry Breen, Director, OSRE to Superfund Senior Policy Managers and Regional Counsels (May 31, 2002).

<sup>51</sup> The one exception to this may be that BRERA's changes to the innocent purchaser defense may flow through to California's state Superfund law, more formally known as the Carpenter-Presley-Tanner Hazardous Substance Account Act, HEALTH & SAFETY CODE §§25300 *et seq.* *See* HEALTH & SAFETY CODE §25323.5(b).



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