Analysis&Perspective

BROWNFIELDS

Since the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act more than 20 years ago, potential purchasers of brownfields have faced a daunting liability scheme that many say has discouraged the redevelopment of contaminated sites. In this piece, attorneys Gaines Gwathmey III, and William J. O'Brien examine the landscape of liability facing owners of brownfields sites, discussing last year's brownfields act, and EPA's guidance on landowner liability issued earlier this year. Finally, the authors discuss ways in which potential purchasers of contaminated sites can minimize the risk of liability.

Landowner Liability Defenses Pursuant to the Brownfields Act

BY GAINES GWATHMEY III, AND WILLIAM J. O'BRIEN

In response to the discovery in the late 1970s of numerous abandoned hazardous waste disposal sites, in 1980 Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act,[1] to address unregulated historic disposal of hazardous substances.[2] To fund investigation and remediation of such disposal where the responsible party is no longer available, CERCLA casts a wide liability net. It imposes joint and several liability for the costs of remediation of property contaminated by hazardous substances on, inter alia, the current owner of the property, whether or not the current owner was involved in the event that resulted in the contamination.[3] Although CERCLA provides certain limited defenses to this strict liability scheme, current landowners have historically found it difficult to maintain such defenses.

CERCLA has been accused of negatively impacting the redevelopment of former industrial properties (brownfields) by imposing its strict liability scheme and limited defenses thereto upon potential purchasers of such properties.[4] In response to these concerns, on January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Act), which had among its goals fostering a more favorable environment for such redevelopment.[5] The Brownfields Act, at Title II, codified with the intent of clarification certain pre-existing defenses to CERCLA liability for current owners of

[1] 42 U.S.C. § 9601 *et seq.* As to CERCLA's purpose, *see* S. Rep. No. 107-2, at 2 (2001).

[2] Where this article refers to "contamination" or "environmental contamination," those terms refer to contamination by "hazardous substances," as that term is defined in CERCLA. 42 U.S.C. § 9601(14).

Gaines Gwathmey III is head of the environmental law group at Paul, Weiss, Rifkind, Wharton & Garrison LLP, in New York, dividing his practice between environmental litigation and advice to financial sector clients in the mergers and acquisitions area. He can be reached at (212) 373-3351, or at ggwathmey@paulweiss.com. William J. O'Brien is counsel in the firm's environmental law group, focusing on environmental aspects of corporate mergers and acquisitions, financings, and securities offerings. He can be reached at (212) 373-3404, or at wobrien@paulweiss.com.

[3] 42 U.S.C. § 9607(a).

[4] S. Rep. No. 107-2, at 2-3 (2001); R. Fox, P. McIntyre, "Brownfields Revitalization Measure Enacted: Is Half a Loaf Better Than None?," *The Legal Intelligencer*, January 17, 2002.

[5] Publ. L. No. 107-118. For the intent of the Brownfields Act, see Preamble ("... to promote the cleanup and reuse of brownfields") and the Senate Committee Report, S. Rep. No. 107-2, at 2-4 (2001). In addition to the landowner liability defense provisions, the Brownfields Act creates liability exemptions under CERCLA for de micromis contributors of waste to abandoned hazardous waste sites and generators of municipal solid waste disposed at abandoned hazardous waste sites, authorizes for appropriation $200 million per year through 2006 in brownfields remediation funding, and establishes a bar to federal CERCLA enforcement, subject to certain reopeners, at certain sites that have been remediated under state brownfields programs.

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property contaminated by hazardous substances: the innocent landowner, contiguous property owner and bona fide prospective purchaser defenses (collectively, the "landowner liability defenses").[6]

In an effort to provided additional guidance with respect to the elements of the landowner liability defenses, on March 6, 2003, the Environmental Protection Agency issued an interim guidance on the requirements of the landowner liability defenses (the 2003 Guidance).[7]

This article reviews the elements of the landowner liability defenses before and after codification in the Brownfields Act. The article also reviews the impact of the 2003 Guidance on the application of the landowner liability defenses and offers recommendations for purchasers of real property seeking to qualify for such defenses.

CERCLA's Third Party Defense to Liability. CERCLA affords limited defenses to the strict, joint and several liability of a current owner of contaminated property where the contamination was solely caused by an act of god, act of war or, in certain limited circumstances, the act of a third party (the third party defense).[8] The act of god and act of war defenses have been infrequently invoked[9] and are of little value to a potential purchaser evaluating its potential CERCLA liability. The third party defense offers more promise. To be eligible for the third party defense, a property owner must establish by a preponderance of the evidence that (i) the release of hazardous substances was caused solely by a third party; (ii) the owner does not have a contractual relationship with the third party that caused the contamination; (iii) the owner took reasonable precautions against the acts or omissions of third parties; and (iv) the owner exercised due care regarding hazardous substances at the property.[10]

The CERCLA defenses to liability apply only to CERCLA, which regulates "hazardous substances," which notably excludes petroleum products, asbestos and pesticides.[11] The hazardous substances addressed by CERCLA are also regulated pursuant to other federal, state and local laws, and may serve as the basis for liability in common law toxic tort actions. None of these alternate sources of liability are addressed by the landowner liability defenses.

The Innocent Landowner Defense Prior to the Brownfields Act. The innocent landowner defense allowed a purchaser of real property to be eligible for the third party defense, notwithstanding the existence of a contractual relationship (in the form of a purchase agreement) with the person who caused the contamination, where the purchaser undertook "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability," and didn't know or have reason to know of the release or presence of hazardous substances.[12] The other requirements of the third party defense, including the requirement for due care, also apply to the innocent landowner defense. Prior to the Brownfields Act, if a purchaser did not discover contamination prior to the purchase, courts typically ruled that the purchaser's investigation did not constitute all appropriate inquiry, and that the purchaser consequently was not eligible for the innocent landowner defense.[13] In practice, qualification for the innocent landowner defense proved to be so difficult that innocent landowners have been referred to as the "unicorn" of Superfund law, in that their "existence is a theoretical possibility but no one has ever seen one."[14]

Innocent Landowner in Brownfields Act. The Brownfields Act modifies the "all appropriate inquiry" requirement of the innocent landowner defense to increase the likelihood of the defense's successful application. It also added several additional continuing obligations and retained its original provisions with respect to managing contamination after its discovery.[15] The eligibility requirements and continuing obligations for the innocent landowner defense are discussed below.

The Bona Fide Prospective Purchaser Defense Prior to the Brownfields Act. Prior to enactment of the Brownfields Act, no statutory defense to CERCLA liability was available to a purchaser with respect to *known* contamination, but a defense was available in practice by means of a "prospective purchaser agreement" with the EPA. Where the purchaser was not responsible for the contamination but was willing to undertake limited steps to control or prevent access to the contamination and the EPA's other criteria were satisfied, the EPA provided a covenant not to sue under CERCLA in favor of the purchaser and protection against contribution actions pursuant to CERCLA by third parties.[16] After entering into

[6] The Brownfields Act, Sections 221-223.

[7] "Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability," March 6, 2003, by Susan E. Bromm, Director, Office of Site Remediation Enforcement.

[8] 72 U.S.C. § 9607(b).

[9] *See, e.g., U.S. v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (Heavy rainfalls do not constitute act of god for defense).

[10] 42 U.S.C. § 9607(b)(3).

[11] 42 U.S.C. § 9601(14).

[12] 42 U.S.C. § 9601(35). In determining whether a purchaser has undertaken all appropriate inquiry, the court is directed to consider "any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

[13] *See, e.g.*, R.J. Beless, "Superfund's 'Innocent Landowner' Defense: Guilty Until Proven Innocent," *17 J. Land Resources and Envtl. Law 247* (1997); *BCW Associates Ltd. v. Occidental Chemical Corp.*, 1988 West Law 102641 (E.D. Pa.)(Phase I environmental site assessment of warehouse that identified no recognized environmental conditions deemed insufficient inquiry).

[14] D.J. Freeman and R.L. Wegman, "The Brownfields Revitalization and Environmental Restoration Act: Some Implications for Property Owners and Developers," *33 BNA Environment Reporter 765, 766* (May 5, 2002).

[15] 42 U.S.C. § 9601(35).

[16] "Guidance on Settlements with Prospective Purchasers of Contaminated Property," 60 Fed. Reg. 34792, July 3, 1995 (the PPA Guidance). The EPA would enter into a prospective purchaser agreement with a purchaser of contaminated property where (i) EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken by EPA; (ii) the EPA

a prospective purchaser agreement, the purchaser was required to exercise due care with respect to the contamination and allow access to the property for conduct of the response action.[17] Because each prospective purchaser agreement was negotiated individually and subject to public comment and because extensive information on the site contamination was required,[18] there were significant transaction costs and delays associated with such agreements. However, the prospective purchaser agreement provided the benefit of EPA confirmation of a defense to CERCLA liability and comparatively specific identification of the due care obligations.[19]

Prior to the Brownfields Act, the EPA also offered a more informal comfort letter to parties purchasing, developing or operating contaminated properties to the effect that the EPA did not intend to pursue such parties for CERCLA response costs arising out of such contamination.[20] These comfort letters were only available where there was a realistic likelihood of CERCLA liability, a comfort letter would facilitate redevelopment, and no other available mechanism would adequately address the purchaser's concerns.[21] The comfort letter was not available where further response action was contemplated at the site. The standard comfort letter provided that "EPA does not *presently* contemplate additional Superfund action for this property"[22] and did not legally bind the EPA.[23]

Bona Fide Prospective Purchaser in Brownfields Act. The Brownfields Act provides that a purchaser of real property with known environmental contamination may purchase the property with knowledge of the contamination and have a defense to CERCLA liability as long as that party meets the criteria established by the Brownfields Act.[24] Only transactions after the effective date of the Brownfields Act (January 11, 2002) are eligible.[25] The eligibility requirements and continuing obligations for the bona fide prospective purchaser defense under the Brownfields Act are discussed below.

The EPA holds a windfall lien on a property subject to the bona fide prospective purchaser defense for its unrecovered response costs to the extent of any increase in the property's fair market value attributable to the EPA's response action.[26] This lien continues until its satisfaction or EPA's recovery of all response costs.[27]

The Contiguous Property Owner Defense Prior to the Brownfields Act. Prior to enactment of the Brownfields Act, an owner of property contaminated by the subsurface migration of contamination from an offsite source was technically subject to CERCLA liability but an EPA policy (the Contaminated Aquifers Policy) provided that such contiguous property owners would not be pursued for the cost of addressing contamination migrating via the ground water from an offsite source.[28] The requirements of the policy, based upon the third party defense, were that: (i) the contiguous property owner must not have caused or contributed to the release of any hazardous substance through its act or omission; (ii) the person that caused the release must not be the agent or employee of, or in a direct or indirect contractual relationship with, a responsible party, and (iii) there must not be an alternative basis for the contiguous property owner's liability for the subsurface contamination.[29] The contiguous property owner defense, as articulated in the Contaminated Aquifers Policy, did not specifically impose the due care requirement of the third party defense or any other affirmative obligations on the property owner, except in limited circumstances where a ground water well was located on the property.[30]

Contiguous Property Owner in Brownfields Act. The Brownfields Act codifies the contiguous property owner defense, adding certain eligibility requirements and continuing obligations.[31] The Brownfields Act authorizes the EPA to issue written assurance to a qualifying contiguous property owner that the EPA will not undertake an enforcement action against it, and to provide protection against a third-party claim for contribution or cost recovery.[32] The eligibility requirements and continuing obligations established by the Brownfields Act for the contiguous property owner defense are discussed below.

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should receive a substantial benefit either in the form of a direct benefit for cleanup or as an indirect public benefit in combination with a reduced direct benefit to the EPA; (iii) continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with EPA's response action; (iv) the continued operation or new development will not pose health risks to the community and those likely to be present at the site; and (v) the prospective purchaser is financially viable. *Id.* at 34793-34794.

[17] *Id.* at 34795.

[18] "EPA may not enter into an agreement if the available information is insufficient for purposes of evaluating the impact of the proposed activities." *Id.* at 34794.

[19] Although the EPA has not issued a guidance with respect to the practice, on at least two occasions it made available Prospective Purchaser or Lessee Agreements applicable to liability pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* *See* 68 Fed. Reg. 17377 (Notice of Proposed Prospective Lessee Agreement pursuant to CERCLA and RCRA, Former Allied-Signal Property, Baltimore, Md., April 2, 2003); Agreements and Covenant Not to Sue Solutions Way Management, in the matter of Genicom Facility, Waynesboro, Va., RCA-03-2001-0272 (Solutions Way Agreement).

[20] "Guidance and Policy on the Issuance of Comfort/Status Letters," by Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, 62 Fed. Reg. 4624 (January 30, 1997) (the Comfort Letter Guidance).

[21] *Id.* at 4627.

[22] *Id.* at 4627 (emphasis supplied).

[23] *Id.* A comfort letter, in similar form, is also available to address RCRA liability. It is available in similar circumstances and is similarly not legally binding. "Comfort/Status Letters for RCRA Brownfields Properties," B. Breen, Director, Office of Site Remediation Enforcement, February 5, 2001.

[24] 42 U.S.C. §§ 9601(40) and 9607(r)(1).

[25] 42 U.S.C. § 9601(40).

[26] 42 U.S.C. § 9607(r)(2) and (3).

[27] 42 U.S.C. § 9607(r)(4)(D).

[28] "Policy Toward Owners of Property Containing Contaminated Aquifers," by Bruce M. Diamond, Director, Office of Site Remediation Enforcement, 60 Fed. Reg. 34790, July 3, 1995.

[29] *Id.* at 34790-34791.

[30] *Id.* at 34791 ("It is the Agency's position that where the release or threat of release was caused solely by an unrelated third party at a location off the landowner's property, the landowner is not required to take any affirmative steps to investigate or prevent the activities that give rise to the original release.")

[31] 42 U.S.C. § 9607(q)(1)(A).

[32] 42 U.S.C. 9607(q)(3).

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Threshold Requirements. The Brownfields Act imposes certain threshold eligibility requirements for all three of the landowner liability defenses.

No Involvement in Contamination. All three landowner liability defenses are unavailable if the purchaser is involved in the events giving rise to contamination. The innocent landowner and the bona fide prospective purchaser defenses are only available if all disposal of hazardous substances occurred prior to purchase of the property and the purchaser had no involvement in the disposal.[33] The contiguous property owner defense is only available if the purchaser "did not cause, contribute or consent to the release or threatened release" of hazardous substances.[34] This requirement is consistent with the requirements of the landowner liability defenses prior to the Brownfields Act.

No Knowledge of Contamination. The innocent landowner and contiguous property owner defenses require that the purchaser did not know or have reason to know that the property is or could be contaminated.[35] This requirement is consistent with a requirement of the innocent landowner defense, indeed, of the third party defense, prior to the Brownfields Act. The pre-existing contiguous property owner defense, as set forth in the Contaminated Aquifers Policy, however, did not specifically preclude knowledge of the contamination. A bona fide prospective purchaser, by definition, has knowledge of the contamination prior to the purchase.[36]

All Appropriate Inquiry. Prior to purchase, a prospective purchaser seeking to assert any of the landowner liability defenses must conduct "all appropriate inquiry" into the presence of hazardous substances on the property in accordance with generally accepted practices and standards established by the Brownfields Act.[37] The same standard was imposed upon purchasers seeking eligibility for a third party defense, including the innocent landowner defense, prior to the Brownfields Act. However, as noted above, prior to the Brownfields Act, the requirements of the standard were not clear and proved difficult to satisfy in practice.[38]

The Brownfields Act defines all appropriate inquiry differently for purchasers of real property in different time periods: (i) for purchasers prior to May 31, 1997, what constitutes all appropriate inquiry is a fact-specific inquiry; (ii) for purchasers after May 31, 1997 until the EPA promulgates new regulations (required by the Brownfields Act no later than January 2004),[39] all appropriate inquiry is satisfied by a Phase I environmental site assessment, pursuant to Standard E-1527-97, "Standard Practice for Environmental Site Assessment-Phase I Environmental Site Assessment Process," of the American Society for Testing and Materials (ASTM);[40] and (iii) for purchasers after the promulgation of the new standards, the new standards will govern.[41]

The Brownfields Act and the 2003 Guidance do not elaborate any further on the application of the all appropriate inquiry standard to purchasers prior to May 31, 1997, or the meaning of all appropriate inquiry for a bona fide prospective purchaser where potential or known contamination has been identified (i.e., how much further investigation is required before purchase to quality for the bona fide purchaser defense with respect to known contamination).

No Affiliation with Responsible Parties. The bona fide prospective purchaser and contiguous property owner defenses require as a threshold matter that the owner not be otherwise potentially liable pursuant to CERCLA, and that there be no "affiliation" between the landowner and any party potentially liable for the con-

[33] 42 U.S.C. §§ 9601(40)(A) (bona fide prospective purchaser) and 9601(35)(A) (innocent landowner).

[34] 42 U.S.C. § 9607(q)(1)(A)(i).

[35] 42 U.S.C. § 9601(35)(A) (innocent landowner), 42 U.S.C. § 9607(q)(1)(A)(viii)(II) (contiguous property owner).

[36] A contiguous property owner with knowledge of contamination migrating into its property is eligible for the bona fide prospective purchaser defense if it satisfies the relevant criteria. 42 U.S.C. § 9607(q)(r)(C).

[37] 42 U.S.C. § 9601(40)(B) (bona fide prospective purchaser); 42 U.S.C. § 9607(a)(1)(A)(viii) (contiguous property owner); 42 U.S.C. § 9601(35)(B)(i) (innocent landowner). For residential or similar property purchased by a private, noncommercial entity, facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the "all appropriate inquiry" requirement for innocent landowner status. 42 U.S.C. § 9601(35)(B)(V).

[38] Pursuant to the relevant guidances, prior to the Brownfields Act, the EPA did not specifically condition eligibility for the contiguous property owner or bona fide prospective purchaser defenses on the conduct of all appropriate inquiry by a purchaser (though a prospective purchaser was in any event required to thoroughly investigate the known contamination). The Contaminated Aquifers Policy, the PPA Guidance and the Comfort Letter Guidance.

[39] 42 U.S.C. § 9601(35)(B)(ii).

[40] 42 U.S.C. § 9601(35)(B)(iv)(II). An EPA rule, effective June 9, 2003, clarifies that ASTM's Standard E-1527-00 for Phase I environmental site assessments, the successor to Standard E-1527-97, may also be used to satisfy the all appropriate inquiry standard. 68 Fed. Reg. 24888.

[41] 42 U.S.C. § 9601(35)(B)(ii). The Brownfields Act provides that the following due diligence tasks should be considered in developing the 2004 standard: (i) inquiry by an environmental professional; (ii) interviews with past and present owners, operators and occupants concerning the potential for contamination at the property; (iii) review of historical sources (chain of title, aerial photos, building department records, land use records) to determine the uses and occupancies of the property since first developed; (iv) search for recorded environmental liens; (v) review of federal, state and local environmental records; (vi) visual inspection of the property and adjoining properties; (vii) the specialized knowledge or experience of the purchaser; (viii) the relationship of the purchase price to the value of the property if not contaminated; (ix) commonly known or reasonably ascertainable information about the property; (x) the degree of obviousness of the presence of contamination at the property; and (xi) the ability to detect contamination by appropriate investigation. 42 U.S.C. § 9601(35)(B)(iii). Items 1 through 6 on this list bear a close resemblance to the ASTM Phase I environmental site assessment scope of work, while Items 7 through 11, which are consistent with the standards applied to the evaluation of all appropriate inquiry prior to the Brownfields Act, effectively serve as standards for the evaluation of the results of the investigative work described in Items 1 through 6. The EPA is employing a negotiated rulemaking to develop the new standard. This process involves the gathering of stakeholders, including representatives of industry, environmentalists and real estate developers. In an April 30, 2003 meeting, the stakeholders group recommended a tiered investigation system, involving less investigation at sites where the site history indicates that contamination is less likely. *Environmental Policy Alert*, May 14, 2003.

tamination.[42] Prior to the Brownfields Act, neither the PPA Guidance nor the Comfort Letter Guidance required that a bona fide prospective purchaser not be affiliated with a potentially liable party, although they did require that the purchaser not be otherwise potentially liable and it was within the discretion of the EPA to refuse to negotiate a prospective purchaser agreement with a purchaser affiliated with a responsible party. Pursuant to the Contaminated Aquifers Policy, prior to the Brownfields Act, a contiguous property owner was subject to a requirement that it not be in a contractual relationship with, or be an agent or employee of, a responsible party.

While noting that "the potential breadth of the term 'affiliation' could be taken to an extreme," the 2003 Guidance reported that the "EPA intends to be guided by [what it identified as] Congress's intent of preventing transactions structured to avoid liability." [43] This is unhelpful to prospective purchasers, in that the goal of any purchaser legitimately seeking the bona fide prospective purchaser defense or contiguous property owner defense is to avoid liability and the EPA's announced intent is itself so broad as to arguably encompass both legitimate and illegitimate efforts to avoid liability. This announced intent engenders further uncertainty about the extent of this limit to liability protection.

The innocent landowner defense has a similar threshold criterion, requiring for eligibility that the act or omission that caused the contamination was caused by a third party with whom the person does not have an employment, agency or contractual relationship.[44] This requirement is essentially unchanged by the Brownfields Act.

Continuing Obligations to Maintain Landowner Liability Defenses. Qualifying purchasers must also satisfy certain continuing obligations to preserve their landowner liability defenses. Prior to the Brownfields Act, the only continuing obligation for a party seeking a third party defense was to exercise due care with respect to the contamination. Pursuant to the Brownfields Act, all three landowner liability defenses required the property owner to (i) comply with land use restrictions and not impede the effectiveness or integrity of institutional controls; (ii) take "reasonable steps" with respect to the hazardous substances contaminating the property; (iii) provide cooperation, assistance and access to those responding to the contamination; (iv) comply with governmental information requests and administrative subpoenas with respect to the contamination; and (v) provide any legally-required notices of the presence or discovery of the contamination.

Land Use Restrictions/Institutional Controls. The continuing obligations imposed upon purchasers seeking any of the landowner liability defenses include a requirement to comply with any land use restrictions established or relied upon in connection with any response action addressing the contamination,[45] and to avoid impeding the effectiveness or integrity of any institutional control employed in connection with such response action.[46] These obligations obtain even if the land use restrictions or institutional controls were not in place at the time of purchase.

According to the 2003 Guidance, a land use restriction may be considered 'relied upon,' and thus one a purchaser seeking landowner liability protection must comply with, when it is identified as a component of the remedy for contamination at a property, even if it has not been formally implemented as an institutional control.[47] Land use restrictions may be documented in a variety of forms, including risk assessments, remedy decision documents, permits, orders, consent decrees and statutes.[48]

The 2003 Guidance explains that institutional controls are means used to implement land use restrictions.[49] The 2003 Guidance further explains that institutional controls are the administrative and legal controls that minimize the potential for human exposure to contamination and protect the integrity of remedies by limiting land or resource use or providing information to modify behavior (for example, prohibiting the development of drinking water wells in contaminated aquifers or posting signs providing notice of the contamination and limiting access).[50]

The 2003 Guidance suggests that a property owner could impede the effectiveness or integrity of a remedy, and thereby lose eligibility for a landowner liability defense, without physical disturbance of the property by, for example, failing to record a deed notice or failing to give required notice to a purchaser.[51]

Reasonable Steps. The continuing obligations of a property purchaser seeking any landowner liability defense include undertaking "reasonable steps" with respect to contamination on the property to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental and natural resource exposure to any previously released hazardous substances.[52] Prior to the Brownfields Act, innocent landowners and bona fide prospective purchasers were required to exercise due care with respect to property contamination, while the contiguous property owner was not specifically required to do so pursuant to the Contaminated Aquifer Policy.[53]

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[42] 42 U.S.C. § 9607(a)(1)(A)(ii) (contiguous property owner); 42 U.S.C. § 9601(40)(H) (bona fide prospective purchaser). The affiliation may be through any direct or indirect familial relationship or any contractual, corporate or financial relationship (except relationships created by contracts for sales of goods or services or, with respect to bona fide prospective purchasers, created by instruments conveying or financing title to the property).

[43] The 2003 Guidance, at 5.

[44] 42 U.S.C. § 9607(b)(3).

[45] The EPA and state regulators may rely upon a use restriction as a justification for refraining from requiring the removal of contaminated material. Leaving contamination in place is obviously much less expensive than removing and disposing of it.

[46] 42 U.S.C. § 9601(40)(F) (bona fide prospective purchaser); 42 U.S.C. § 9607(q)(1)(A)(v) (contiguous property owner); 42 U.S.C. § 9601(35)(A) (innocent landowner).

[47] The 2003 Guidance, at 7.

[48] *Id.*

[49] *Id.*

[50] The 2003 Guidance, at 6-7.

[51] The 2003 Guidance, at 8.

[52] 42 U.S.C. § 9601(40)(D) (bona fide prospective purchaser); 42 U.S.C. § 9607(q)(1)(A)(iii) (contiguous property owner); 42 U.S.C. § 9601(35)(B)(i)(II) (innocent landowner).

[53] However, to the extent that the contiguous property owner defense is a form of the third party defense, the contigu-

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In the 2003 Guidance, the EPA offers its belief that, by requiring such reasonable steps, "Congress did *not* intend to create, as a general matter, the same types of response obligations [for a purchaser asserting a landowner liability defense] that exist for a CERCLA liable party."[54] The Senate Committee Report on the Brownfields Act suggests that, except in exceptional circumstances, full-scale response actions would not be required to satisfy the contiguous property owner defense and that modest efforts such as providing notice and erecting or maintaining signs or fences or maintaining any existing barriers or other elements of a response action would be sufficient "reasonable steps."[55] The Brownfields Act provides specifically that a contiguous property owner need not test for or remediate groundwater contamination from an adjacent site.[56]

The burden of undertaking reasonable steps with respect to identified contamination is likely to fall most heavily on bona fide prospective purchasers.[57] The EPA has indicated that, in certain circumstances, it may require bona fide prospective purchasers, in particular, to undertake reasonable steps that include some degree of investigation and cleanup.

Ideally, a bona fide prospective purchaser would be able to clarify its continuing obligations with respect to the contamination by obtaining EPA approval of its proposed reasonable steps prior to consummating the purchase. As discussed above, prior to the Brownfields Act, such approval was available pursuant to a prospective purchaser agreement or a comfort letter, though the latter was not legally binding on the EPA. However, based on the 2003 Guidance, it appears that EPA will only offer such approval in very limited circumstances. The EPA has stated that it now considers prospective purchaser agreements unnecessary in most circumstances, but that a prospective purchaser agreement may be available where it is necessary to ensure the completion of a project that will bring substantial public benefits to "the environment, a local community because of jobs created or revitalization of long blighted property or promotion of environmental justice."[58]

The 2003 Guidance also offers a model comfort letter that identifies appropriate "reasonable steps" with respect to hazardous substance contamination at a property.[59] According to the 2003 Guidance, this comfort letter is available only in limited circumstances to bona fide prospective purchasers. It states that the comfort letter is "not necessary or appropriate for purely private real estate transactions" and limits the availability of a comfort letter to circumstances where "(1) there is a realistic perception or probability of incurring Superfund liability, (2) such comfort will facilitate the cleanup and redevelopment of a Brownfields property, (3) there is no other mechanism to adequately address the party's concerns, and (4) EPA has sufficient information about the property to provide a basis for suggesting reasonable steps."[60]

The EPA has predicted that bona fide prospective purchaser defense "should provide significant savings of time and transaction costs" by avoiding the need to negotiate a prospective purchaser agreement.[61] However, industry officials have criticized curtailing the use of prospective purchaser agreements, arguing that, in the absence of prospective purchaser agreements, the ambiguity of the language of the Brownfields Act will create uncertainty with respect to the "reasonable steps" required of a bona fide prospective purchaser and discourage development of brownfields properties.[62]

The context for evaluating reasonable steps for other landowner liability defenses is different, because in these cases the purchaser did not have knowledge of the contamination prior to purchase. The 2003 Guidance describes the extent to which innocent landowners and contiguous property owners will be required to undertake significant response action with respect to discovered contamination. First, it states that a contiguous property owner is not likely to be required to undertake significant remedial action, referencing the legislative history of the Brownfields Act: "absent exceptional circumstances . . . , these persons are not expected to conduct ground water investigations or install remediation systems, or undertake other response actions that would be more properly paid for by the responsible parties who caused the contamination."[63] However, quoting the Contaminated Aquifers Policy, the 2003 Guidance notes an exception "where the property contains a ground water well, the existence or operation of which may affect the migration of contamination in the affected area."[64] The 2003 Guidance indicates that, in such circumstances, "reasonable steps may simply mean operation of the ground water well consistent with the selected remedy. In other instances, more could be required."[65]

The Senate Committee Report on the Brownfields Act states that a purchaser asserting the innocent landowner defense must comply with the existing due care requirement as well as the reasonable steps requirement imposed by the Brownfields Act.[66] However, it is not clear from the Brownfields Act, the Senate Committee Report or the 2003 Guidance whether these two re-

ous property owner would be subject to the due care requirement.

[54] The 2003 Guidance, at 9 (emphasis original).

[55] S. Rep. No. 107-2, at 10-11 (2001). The Senate Committee Report references the exceptional circumstances identified in the Contaminated Aquifers Policy, so this exception to the limited obligation of a contiguous property owner has not been changed by the Brownfields Act.

[56] 42 U.S.C. § 9607(q)(1)(D).

[57] The 2003 Guidance states that "knowledge of contamination and the opportunity to plan prior to purchase should be factors in evaluating what are reasonable steps, and could result in greater reasonable steps obligations for a bona fide prospective purchaser [than for an innocent landowner or contiguous property owner that identifies contamination subsequent to purchase]." The 2003 Guidance, at 11.

[58] *"EPA Guidance on Bona Fide Prospective Purchasers and the New Amendments to CERCLA,"* B. Breen, Director, Office of Site Remediation Enforcement, May 31, 2002.

[59] The 2003 Guidance, at Attachment C.

[60] *Id.*

[61] The 2003 Guidance.

[62] *Environmental Policy Alert*, July 24, 2002, at 10. A March 6, 2003 Report by the Congressional Research Service identified uncertainty in the regulatory community with respect to what constitutes "reasonable steps" to prevent future contamination.

[63] The 2003 Guidance, at Attachment B, quoting S. Rep. No. 107-2, at 11 (2001). *See also* the Contaminated Aquifers Policy.

[64] The 2003 Guidance, at Attachment B, quoting the Contaminated Aquifers Policy, at 34791.

[65] The 2003 Guidance, at Attachment B.

[66] S. Rep. No. 107-2, at 13-14 (2001).

quirements differ in any material respect. The 2003 Guidance suggests that "the existing case law on due care provides a reference point for evaluating the reasonable steps requirement. When courts have examined the due care requirement in the context of the pre-existing innocent landowner defense, they have generally concluded that a landowner should take some positive or affirmative step(s) when confronted with hazardous substances on its property." The 2003 Guidance also states that "[g]enerally, where the property owner is the first to discover the contamination [i.e., where the owner is an innocent landowner or a contiguous property owner], she should take certain basic steps to assess the extent of contamination . . . While a full environmental investigation may not be required, doing nothing in the face of a known or suspected environmental hazard would likely be insufficient."[67]

Reasonable steps in response to the presence of hazardous substances may include site access restrictions (e.g., erecting and maintaining signs and fences),[68] or immediate containment of hazardous substances (e.g., aggregation and identification of leaking drums, repairing breaches in cap or containment system).[69] The 2003 Guidance notes that if a third party has responsibility for a site containment system, "[a]t a minimum, the current owner should give notice to the person responsible for the containment system and to the government. Moreover, additional actions to prevent containment migration would likely be appropriate."[70]

The 2003 Guidance states that, if an innocent purchaser discovers a release of hazardous substances on its property, while "EPA would not, absent unusual circumstances, look to her for performance of *complete* remedial measures . . .[;] notice to appropriate governmental officials and containment or other measures to mitigate the release would probably be considered appropriate."[71]

In light of the EPA's statements, consistently maintaining the possibility that more extensive reasonable steps may be required even of a blameless innocent landowner or contiguous property owner, what constitutes reasonable steps will be a site-specific, fact-specific inquiry and therefore remains uncertain for a purchaser unaware of contamination.[72]

Cooperation, Assistance and Access. The continuing obligations of a purchaser asserting a landowner liability defense also include providing cooperation, assistance and access to the contaminated property to the parties authorized to conduct response actions or natural resource restoration with respect to the contamination at issue.[73] This obligation did not exist for innocent landowners or contiguous property owners prior to the Brownfields Act, but was often found in prospective purchaser agreements.[74] The Brownfields Act changes existing practice for contiguous property owners with respect to providing access. Previous practice was that the responsible party seeking such access would be required to pay fair market value;[75] the Brownfields Act does not provide for such payments.

Information Requests and Legally-Required Notices. The continuing obligations of a purchaser asserting the bona fide prospective purchaser defense or the contiguous property owner defense include compliance with any request for information or administrative subpoena pursuant to CERCLA, and the provision of legally required notices of the discharge or presence of hazardous substances.[76] The EPA has stated that it will also require compliance with these requirements by those asserting the innocent landowner defense.[77] These requirements, which were not specifically identified as a requirement of the landowner liability defenses prior to the Brownfields Act, condition availability of landowner liability protection on compliance with pre-existing legal requirements. The Brownfields Act does not provide an exception to these obligations for immaterial failure to comply with these legal requirements.

Standard of Proof. The Brownfields Act places the burden of proof, by a preponderance of the evidence, as to the necessary elements of each of the landowner liability defenses upon the party asserting the defense.[78] This is consistent with the prior versions of the defenses.[79]

Recommendations The Brownfields Act provides improved specificity with respect to the nature of all appropriate inquiry for purchasers seeking landowner liability protection: an ASTM Phase I environmental site assessment should be sufficient in most circumstances, though this may change when the EPA promulgates the new standard for "all appropriate inquiry." Since the criteria for EPA's development of new standards in January 2004 contain several additional elements not in the scope of the ASTM Phase I environmental site assessment (e.g., lien search, interviews with past property owners and operators), a purchaser would be well advised to include these additional elements in a Phase I environmental site assessment undertaken prior to the promulgation of the new standard. Furthermore, even the apparent certainty of this standard fails to resolve latent uncertainty: for example, how aggressive must an environmental consultant be in identifying potential

[67] The 2003 Guidance, at Attachment B.
[68] S. Rep. No. 107-2, at 10-11 (2001).
[69] *Id.*
[70] The 2003 Guidance, at Attachment B.
[71] The 2003 Guidance, at Attachment B (emphasis added). An unidentified senior EPA official, in informal discussions, has been quoted that the "new appropriate-care standard should be read simply as requiring the new owner to take the minimal steps necessary to prevent imminent releases, cut off exposure pathways, and stabilize existing conditions where modest, immediate measures could prevent significant exposure to, or exacerbation of, those conditions." G.D. Trimarche, "CERCLA's New Prospective Purchaser Defense," *Hazardous Waste Litigation Reporter*, December 20, 2002.
[72] *Id.*
[73] 42 U.S.C. § 9601(40)(E) (bona fide prospective purchaser); 42 U.S.C. § 9607(q)(1)(A)(iv) (contiguous property owner); 42 U.S.C. § 9601(35)(B) (innocent landowner).
[74] *See* Solutions Way Agreement, *supra*, at 19.
[75] Freeman and Wegman, *supra*, at 1286.
[76] Information Requests: 42 U.S.C. § 9601(40)(G) (bona fide prospective purchaser); 42 U.S.C. § 9607(q)(1)(A)(vi) (contiguous property owner); Legally-Required Notices: 42 U.S.C. § 9601(40)(C) (bona fide prospective purchaser); 42 U.S.C. § 9607(q)(1)(A)(vii) (contiguous property owner).
[77] The 2003 Guidance, at Attachment A.
[78] 42 U.S.C. § 9601(40) (bona fide prospective purchaser); 42 U.S.C. § 9607(q)(1)(B) (contiguous property owner); 42 U.S.C. § 9607(b) (innocent landowner).
[79] *See*, 42 U.S.C. § 9607(b).

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sources of contamination in the Phase I environmental site assessment, and how aggressively must a purchaser investigate any such potential sources of contamination identified in the Phase I environmental site assessment?

The contiguous property owner and innocent landowner liability defenses are unavailable to a purchaser that had "reason to know" of the presence of contamination. This creates an opportunity, after the purchase when contamination is identified, for a governmental agency or a responsible party seeking contribution or cost recovery to second guess the purchaser's due diligence, including the conclusions reached based on the information gathered. For example, is the mere fact of historic industrial usage a sufficient "reason to know" of the presence of contamination? We would recommend that a purchaser seeking to maintain a landowner liability defense aggressively identify and investigate any potential sources of contamination (e.g., by confirmatory subsurface sampling). In light of the specific continuing obligations relating to land use restrictions and institutional controls, the purchaser's diligence should also include thorough review of relevant title records and governmental agency files for such land use restrictions or institutional controls.[80]

'Reasonable Steps.' The "reasonable steps" requirement is potentially costly to a purchaser asserting a landowner liability defense, in that it could require the purchaser to incur significant response costs to stop continuing or prevent future releases or to prevent or limit exposure to existing releases. A purchaser seeking bona fide prospective purchaser liability protection with respect to identified contamination faces a particularly significant potential source of costs in the obligation to undertake reasonable steps with respect to the contamination. In its pre-purchase environmental due diligence, a purchaser seeking the bona fide prospective purchaser defense should gather sufficient information about the identified contamination to enable it to develop a post-purchase program incorporating reasonable steps to address the contamination and determine whether the purchase of the property is cost-effective in light of the cost of undertaking such steps. We would also recommend that, where practicable, given the absence of more specific guidance from the EPA or in decisional law on the nature of reasonable steps, the bona fide prospective purchaser seek a prospective purchaser agreement or, at least, a comfort letter from the EPA, notwithstanding the EPA's announced intent to minimize the number of such agreements and letters it provides, to clarify the reasonable steps that will be required of a bona fide prospective purchaser.

A purchaser that has identified, prior to the purchase, contamination migrating onto the subject property from an offsite source should proceed with caution. The Brownfields Act requires the EPA to treat such a purchaser as a bona fide prospective purchaser potentially required to undertake more rigorous and costly reasonable steps rather than a contiguous property owner. Therefore, such a purchaser should take the steps recommended for a bona fide prospective purchaser.

[80] In addition, if contamination is not identified through other elements of the environmental due diligence, the presence of institutional controls may provide an indication of the presence of contamination.

The status of the contiguous property owner may be adversely affected by the Brownfields Act. Contiguous property owners, pursuant to the previous EPA policy, had no liability under CERCLA, and extremely limited affirmative obligations, with respect to contamination migrating from offsite. The Brownfields Act requires contiguous property owners to comply with its threshold requirements and continuing obligations, obligations creating the possibility that contiguous property owners will be held liable, where they would not have been prior to the Brownfields Act, where they fail to satisfy one of the statutory requirements or obligations for the liability defense.[81] A property owner seeking the contiguous property owner defense after discovering contamination migrating onto its property from an offsite source would be well advised to promptly seek written assurance from the EPA of its eligibility for the defense and of the specific continuing obligations to which it is subject with respect to the contamination according to certain industry attorneys.

Continuing Obligations. Any purchaser seeking landowner liability protection pursuant to the Brownfields Act is well advised to carefully comply with the continuing obligations required of a landowner seeking liability protection pursuant to the Brownfields Act. The absence of materiality exceptions to the continuing obligations (comply with land use restrictions and don't interfere with institutional controls; provide cooperation, assistance and access; file legally required notices; respond to EPA requests for information) creates the possibility of forfeiture of any of the landowner liability defenses due to an immaterial, trivial breach. For example, state and federal laws and regulations requiring notice of the presence or release of hazardous substances are numerous, overlapping and often vaguely worded,[82] yet the Brownfields Act does not provide an exception to this obligation for immaterial failures to comply with applicable notice requirements. Furthermore, one can expect third parties seeking contribution or cost recovery under CERCLA to raise even immaterial technical violations of the requirements of the Brownfields Act in response to any assertion of landowner liability defense.

The landowner liability defenses codified by the Brownfields Act apply only to CERCLA, and other federal, state and local laws provide independent sources

[81] A contiguous property owner can lose landowner liability defense pursuant to the Brownfields Act, where it would not have before, if, for example, it knew of the contamination before purchasing the property, it did not undertake "all appropriate inquiry," it is affiliated with a responsible party, it did not take "reasonable steps" in response to the contamination, or it failed to provide all legally required notices or responses to EPA requests for information. *See* H.M. Sheldon, "New Liability Exposure for Contiguous Property Owners and Purchasers," *Environmental Compliance and Litigation Strategy*, Vol. 17, No. 9.

[82] *See* Trimarche, *supra*, Freeman and Wegman, *supra*. In previous practice enforcing these notice requirements, state and federal environmental regulators have been "pragmatic and reasonable" with respect to notice requirements and have not typically pursued technical violations. Where, however, failure to strictly comply with such notice requirements could result in loss of a defense to CERCLA liability, for example, in circumstances where no other responsible party is available to fund response costs, it is not clear that the EPA will continue to be so forgiving.

of liability for environmental contamination. Therefore, a purchaser should take care to investigate such other potential sources of liability and pursue, if appropriate, potential defenses thereto, under RCRA and other federal, state and local laws. In addition, a purchaser seeking a prospective purchaser agreement would be well advised to seek to make the relevant state a party to such agreement and to obtain in the agreement defense against liability under relevant state law.

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