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Innocent Landowners and Prospective Purchasers Under the Superfund Act

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Abstract. The Superfund Actmore formally, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)contains a liability scheme that is, by any measure, stringent. If a hazardous substance is released, or threatened to be released, from a facility, CERCLA subjects a wide variety of personsincluding the present owner of the facilityto strict, joint, and several liability for cleanup and other costs. At the same time, certain owners of facilities that were already contaminated when acquired can take advantage of mechanisms in the Act that eliminate or contain this liability, or reduce liability-related transaction costs. This report covers three of them.

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"Innocent Landowners" and "Prospective Purchasers" Under the Superfund Act

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“Innocent Landowners” and “Prospective Purchasers” in the Superfund Act

Summary

The Superfund Act contains several mechanisms that eliminate or contain liability, or reduce liability-related transaction costs, normally incurred under the Act by persons that acquire contaminated land. This report covers three of them. Two mechanisms use *innocent landowner* status — “innocent” referring to a landowner’s lack of actual or constructive knowledge on the date of site acquisition as to the presence of hazardous contamination there. The third is based on the *bona fide prospective purchaser* concept, and is intended to encourage redevelopment of sites known at the time of acquisition to be contaminated.

The first innocent landowner mechanism uses that status to invoke the Superfund Act’s third-party defense to liability. One prerequisite is that the release of hazardous substances must have been caused solely by a third party lacking a contractual relationship with the defendant. A landowner is defined to lack a contractual relationship with predecessors in the chain of title if the disposal of the hazardous substances on the site preceded acquisition by the owner and at the time of acquisition he/she did not know and had “no reason to know” that the hazardous substance had been disposed of there. “No reason to know,” in turn, means that before the date of acquisition, he/she made “all appropriate inquiry” into conditions at the site and the history of site uses. In 2002, Congress enacted an important clarification of the meaning of “all appropriate inquiry.” The other prerequisite is that the landowner continued *after* acquisition to exercise due care, took precautions against foreseeable acts of the third party, etc.

The second innocent landowner mechanism makes a current landowner identified by EPA as potentially liable eligible for a “de minimis settlement” with the agency. A de minimis settlement enables a landowner to settle early with EPA and thereby avoid protracted, expensive negotiations with the agency and a myriad of other liable parties over the allocation of liability at the site. Eligibility requires, among other things, that all appropriate inquiry was done by the owner prior to acquisition. This mechanism has not been used often.

The third mechanism aims not to exempt a landowner from liability, but to limit that liability prior to purchase. Its origin lies in the belief that Superfund liability may chill investment in real property that is known or feared to be contaminated (“brownfields”). In 1989, EPA offered in “very limited circumstances” to enter into “prospective purchaser agreements” — negotiated settlements with would-be purchasers of land by which EPA covenanted not to sue. Congressional desire for a less resource-intensive method of encouraging redevelopment of brownfields led to its creation in 2002 of a new exemption from liability, for the “bona fide prospective purchaser.” Eligibility requires that the person not impede the site cleanup, made all appropriate inquiry, etc. Some have urged that buyers of contaminated land pursue *both* prospective purchaser agreements with EPA and bona fide prospective purchaser status, but EPA guidance states that the availability of the former is limited now.

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"Innocent Landowners" and "Prospective Purchasers" in the Superfund Act

The Superfund Act — more formally, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[1] — contains a liability scheme that is, by any measure, stringent. If a hazardous substance is released, or threatened to be released, from a facility, CERCLA subjects a wide variety of persons — including the present owner of the facility — to strict, joint, and several liability for cleanup and other costs.[2] At the same time, certain owners of facilities that were already contaminated when acquired can take advantage of mechanisms in the Act that eliminate or contain this liability, or reduce liability-related transaction costs. This report covers three of them.

Two of these mechanisms use what is called **innocent landowner** status[3] — "innocent" referring to a land buyer's lack of actual or constructive knowledge as to the presence of hazardous contamination at the site, as of the date of acquisition. One innocent-landowner mechanism uses that status as a complete defense to liability under the Act (Part I of this report); the other, with modified requirements, as merely qualifying liable parties for de minimis settlement with EPA (Part II). The third covered device is based on the **bona fide prospective purchaser** concept, and is intended to encourage the purchase and redevelopment of sites that are known at the time of acquisition to be contaminated (Part III).

The stimulus for this report is the January 11, 2002 enactment of the Small Business Liability Relief and Brownfields Revitalization Act (SBA).[4] The SBA amended CERCLA to clarify who is eligible for innocent landowner status as a defense to liability, and to codify from EPA guidance a "bona fide prospective purchaser" defense to liability. Another landowner status newly codified from EPA guidance by the SBA, the "contiguous property owner," is *not* covered by this report.

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[1] 42 U.S.C. §§ 9601-9675.

[2] CERCLA § 107(a); 42 U.S.C. § 9607(a). That the liability standard in CERCLA section 107(a) is, as the text mentions, "strict, joint, and several," is nowhere stated in the Act. Rather, these features of CERCLA liability derive from legislative history, case law, and the CERCLA instruction that its liability standard is the same as that in Clean Water Act section 311. *See* CERCLA § 101(32), 42 U.S.C. § 9601(32).

[3] The actual phrase "innocent landowner" is not used in CERCLA.

[4] P.L. 107-118 (H.R. 2869).

I. Innocent Landowner Status as a Defense to Liability

Put most simply, the innocent landowner defense allows owners of contaminated property to escape CERCLA liability if the contamination was placed on the property before acquisition, and the landowner did not know, or have reason to know, at the time of acquisition of the contamination's presence. As discussed below, the landowner also has several continuing obligations *after* the land is bought and contamination is discovered if he or she is to hold on to innocent landowner status.

The defense evolved over three enactments. It began with the original Superfund Act in 1980.[5] There, Congress created the Act's basic liability scheme, unchanged to this day. As mentioned, that scheme subjects the present owner of the facility to strict, joint, and several liability for cleanup and other costs. One of the few defenses to this stringent liability scheme is the "third-party defense," available when the defendant can show by a preponderance of the evidence that the release or threat of release was caused solely by "an act or omission of a third party *other ... than one whose act or omission occurs in connection with a contractual relationship*, existing directly or indirectly, with the defendant ...."[6] The third-party defense requires further that the defendant establish that (a) he/she exercised due care as to the hazardous substance concerned, and (b) took precautions against foreseeable acts or omissions of the third party.[7]

To the Congress of 1980, the "contractual relationship" exception to the third-party defense must have made perfect sense. Why should a site owner escape CERCLA liability under the defense when the third party who caused the contamination was an entity with whom the owner had contractual dealings? The potential for manipulation seemed obvious. Others pointed out, however, that the contractual-relationship exception might have an untoward result. If the instruments of conveyance between a seller and buyer of land were viewed as placing them in a "contractual relationship," a buyer whose property had been contaminated solely by a predecessor in the chain of title was in a bind. Despite innocence, the buyer could not invoke the third-party defense. He or she remained liable under CERCLA as an owner of the property.

In 1986 amendments to CERCLA,[8] Congress resolved the instruments of conveyance conundrum. "Contractual relationship," the Act now says, does indeed include such instruments, but with a big exception (in effect, an exception to an exception). The exception is for the landowner who acquired the property after the hazardous substance was disposed of or placed there, and —

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[5] Pub. Law No. 96-510, enacted Dec. 11, 1980.

[6] CERCLA § 107(b)(3); 42 U.S.C. § 9607(b)(3).

[7] *Id.*

[8] Pub. Law No. 99-499, enacted Oct. 17, 1986.

> at the time [the landowner] acquired the facility ... [he/she] 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.[9]

The 1986 amendments went on to explain: to establish that a defendant "had no reason to know," he/she "must have undertaken, at the time of acquisition, *all appropriate inquiry* into the previous ownership and uses of the property ...."[10] The 1986 amendments thus answered one question: when does "contractual relationship" include land contracts? But they created another: What does "all appropriate inquiry" involve? Congress did include a brief definition of "all appropriate inquiry" in the 1986 amendments, but just a few years later efforts began in Congress to provide more detailed guidance.

These clarifying efforts culminated in 2002 in the SBA. The SBA instructs EPA to establish by regulation "standards and practices" that satisfy the "all appropriate inquiry" requirement. The regulations, required by January 11, 2004, must include —

- inquiry by an environmental professional
- interviews with past and present owners, operators, and occupants of the facility
- reviews of historical sources, such as chain of title documents and aerial photographs, and land use records
- searches for recorded environmental cleanup liens
- review of government records, waste disposal records, and hazardous waste records
- visual inspection of the facility
- specialized knowledge or experience on the part of the land acquirer
- the relationship of the purchase price to the value of the property if uncontaminated
- reasonably ascertainable information about the property, and
- the obviousness of the property contamination, and the ability to detect the contamination by appropriate investigation.[11]

Plainly, these regulations, when issued, will be a quantum leap beyond the existing CERCLA in the degree of guidance available to land purchasers.[12]

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[9] CERCLA § 101(35); 42 U.S.C. § 9601(35).

[10] CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B), as that provision read before amendment by the SBA (emphasis added).

[11] SBA § 223, amending CERCLA § 101(35)(B).

[12] EPA is using a negotiated rulemaking approach to developing the regulations. Under a negotiated rulemaking approach, persons and organizations with expertise or interest in an issue help to develop the proposed rule, rather than the customary approach under which such entities merely submit comments on an EPA-drafted proposed rule.

Not all property owners will be subject to the new "all appropriate inquiry" regulations. The SBA grandfathers property purchased before May 31, 1997; it need only comply with CERCLA's standards for "all appropriate inquiry" prior to the SBA. These less specific standards are —

- specialized knowledge or experience on the part of the land acquirer
- the relationship of the purchase price to the value of the property if uncontaminated
- reasonably ascertainable information about the property
- the obviousness of the property contamination, and
- the ability to detect the contamination by appropriate inspection.[13]

Property purchased on or after May 31, 1997, but before the new regulations are promulgated, must satisfy American Society for Testing and Materials procedures — including its document entitled "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process." Finally, nongovernmental or noncommercial entities that buy property for residential or similar use need only do a "facility inspection and title search," if they reveal no basis for further investigation.

The SBA adds further prerequisites for invoking the innocent-landowner defense, relating to the defendant's conduct *after* land purchase. He/she must cooperate with those conducting the response action, comply with any land use restrictions linked to the response action, and not impede institutional controls. Further, he/she must take "reasonable steps" to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.[14]

In sum, the innocent-landowner defense to CERCLA liability is available on two multi-part conditions. Both must be satisfied. *First*, the release must have been caused solely by a third party lacking a contractual relationship, direct or indirect, with the defendant. A landowner lacks a contractual relationship with predecessors in the chain of title if the disposal of the hazardous substances on the site preceded acquisition and at time of land acquisition he/she did not know and had "no reason to know" that the hazardous substance had been disposed of there. "No reason to know," in turn, means that before the date of acquisition, he/she made "all appropriate inquiry" (as defined above). *Second*, the landowner must have exercised due care and taken precautions

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[13] SBA § 223, amending CERCLA § 101(35)(B).

[14] This "reasonable steps" requirement raises some issues. First, it seems to overlap with already existing elements of the third-party defense — namely the requirements that the defendant exercise due care as to the hazardous substance and take precautions against foreseeable acts or omissions of the third party (see page 2).

Second, the "reasonable steps" appear, as noted in the text, to be actions taken *after* the property is acquired, since it is hard to imagine stopping a release, etc., before one acquires the property. But as the SBA states it, the reasonable steps must be taken "[t]o establish that the defendant had no reason to know of the matter described in subparagraph (A)(i)," which speaks to the defendant's knowledge "[a]t the time the defendant acquired the facility." This is a seeming contradiction.

against foreseeable acts of the third party, cooperated with the response action, complied with pertinent land use restrictions, and not impeded institutional controls. Further, he/she must take "reasonable steps" to stop any continuing release, prevent any threatened future release, etc.

II. Innocent Landowner Status as Enabling De Minimis Settlement

At large contaminated sites, the number of parties swept into the CERCLA liability net can be daunting — occasionally in the hundreds. To address this, CERCLA requires EPA, when appropriate, to enter into "de minimis settlements" with certain liable parties whose blameworthiness was deemed by Congress to be minor.[15] A de minimis settlement enables a party identified by EPA as potentially liable to settle early with EPA and thereby avoid protracted, expensive negotiations with the agency and a myriad of other liable parties over the allocation of liability at the site. At the same time, it allows the government to focus its resources on negotiations or litigation with the major parties.

One type of liable party eligible for de minimis settlement is the innocent landowner. When "practicable and in the public interest," the agency is directed by CERCLA to settle promptly with a landowner if the settlement involves only a "minor portion" of the response costs and the landowner "in the judgment of [EPA]" —

- owns the land where the facility is located
- did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility
- did not contribute to the release or the threat of release of a hazardous substance through action or omission, and
- did not buy the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.[16]

Note the several terms (e.g., "in the judgment of EPA") that give EPA wide discretion as to whether to offer de minimis settlements. Note also the absence of "all appropriate inquiry" and certain other prerequisites for innocent-landowner status as a third-party defense. Notwithstanding, EPA guidance demands all appropriate inquiry for de minimis settlement eligibility as well.[17] The guidance document makes a two-step argument. First, it asserts that CERCLA's de minimis settlement prerequisite that the landowner lack "constructive knowledge" is similar to the "had no reason to know" language in CERCLA's innocent-landowner-as-defense provision. Second, since "had no reason to know" requires all appropriate inquiry, the lack-of-constructive-

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[15] CERCLA § 122(g); 42 U.S.C. § 9622(g).

[16] CERCLA § 122(g)(1); 42 U.S.C. § 9622(g)(1).

[17] 54 Fed. Reg. 34235, 34238 (Aug. 18, 1989).

knowledge prerequisite for settlement must be read to do the same.[18] Indeed, as a general matter, EPA's willingness to enter into de minimis settlements with landowners is based on the likelihood the landowner can successfully assert innocent landowner status as part of a third-party defense.

Other CERCLA provisions empower EPA to include covenants not to sue in de minimis settlements[19] (as CERCLA authorizes for other CERCLA settlements), direct that such settlements be entered as consent decrees or embodied in an administrative order (presumably for more effective enforcement),[20] and immunize de minimis settlors from contribution suits brought by other liable parties (claiming that the de minimis settlors got off too easy and should have to pay more).[21]

Historically, EPA has entered into few de minimis settlements with landowners.

III. Prospective Purchasers

The prospect of CERCLA liability has long been thought to chill investment in real property that is known or feared to be contaminated. The reason is plain enough. A purchaser of land, as has been mentioned, becomes potentially liable under CERCLA as an "owner" of the site for any response costs that may be necessary. And when a buyer of land knows or has reason to know of its contaminated condition at the time of purchase, he or she does not qualify for use of either innocent landowner device (Parts I and II).

In the current policy debate, such known or possibly contaminated sites are dubbed "brownfields."[22] They often consist of abandoned industrial sites in urban areas, and encouraging private investment in them — cleaning them up for redevelopment — is a goal with which few would argue. But how to get around the CERCLA liability disincentive?

Early on, EPA saw a way. If a buyer could know the amount of his/her liability *in advance of purchase*, an informed business decision could be made as to whether the purchase was attractive even with liability. So EPA in 1989 established a policy

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[18] Even if one accepts the EPA's argument, query whether the recent enactment of the SBA, by expanding the components of "all appropriate inquiry," undermines the agency's view.

[19] CERCLA § 122(g)(2); 42 U.S.C. § 9622(g)(2).

[20] CERCLA § 122(g)(4); 42 U.S.C. § 9622(g)(4). Model language for such judicial consent decrees or administrative orders on consent is provided in the aforementioned EPA guidance as Attachments I and II.

[21] CERCLA § 122(g)(5); 42 U.S.C. § 9622(g)(5).

[22] As amended by the SBA, CERCLA defines "brownfields" as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. CERCLA § 101(39); 42 U.S.C. § 9601(39).

toward prospective purchasers of contaminated property,[23] offering in "very limited circumstances" to enter into a "prospective purchaser agreement" (PPA) — effectively, a settlement with the would-be purchaser by which EPA covenants not to sue based on existing contamination at the site. As authority, EPA cited its inherent enforcement discretion. Its criteria for PPAs included that (1) EPA enforcement action was anticipated at the facility, and (2) the purchaser agreed to make substantial monetary contribution to, or conduct of, the response action, where EPA's response costs would not otherwise be recoverable.

Prospective purchasers of contaminated property were slow to take advantage of the new PPA device. So in 1995, EPA issued superseding guidance to add flexibility to the agency's criteria for entering into PPAs.[24] Still, only about 160-170 were entered into from the 1989 guidance to 2002. For a Congress seeking to encourage redevelopment of brownfields, this number was too low. As a result, the SBA in 2002 inserted a definition of "bona fide prospective purchaser" (BFPP) into CERCLA and gave them not merely eligibility for a liability settlement, but an *outright exemption* from liability [25] — except for the potential windfall lien noted below. And in contrast with PPAs, which require the actuality or likelihood of EPA enforcement at the site and a negotiated settlement with the buyer, the new provisions are self-executing — EPA need not do anything. Once the parcel is bought, the buyer becomes a BFPP automatically as long as the statutory criteria are satisfied.

As EPA put it: "The BFPP provisions represent a significant change in CERCLA. For the first time, a party may purchase property with knowledge of contamination and not acquire liability under CERCLA as long as that party meets the BFPP criteria."[26]

More specifically, the SBA exempts BFPPs and their tenants from CERCLA "owner" or "operator" liability — but not "transporter" or "generator" liability — if the person does not impede the response action or natural resource restoration. The exemption applies to any contaminated site, not just those meeting the SBA definition of "brownfields." A BFPP is a person who acquires ownership after SBA enactment (January 11, 2002) and who shows among other things that —

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[23] 54 Fed. Reg. at 34241-34243.

[24] Guidance on Settlements with Purchasers of Contaminated Property (May 24, 1995), 60 Fed. Reg. 34792 (1995), also available at [http://es.epa.gov/oeca/osre/ppa.html].

The following year, EPA recognized that entering into a PPA is not necessary in every instance where a party contemplates acquiring a property known or suspected of being contaminated. Its Policy on the Issuance of EPA Comfort/Status Letters (Nov. 12, 1996), 62 Fed. Reg. 4.624 (1997), explained the use of such letters to inform the prospective purchaser of the likelihood of EPA's commencing a CERCLA enforcement action at the site, based on known information about the contamination there. As with PPAs, a purpose of comfort letters is to facilitate the cleanup and redevelopment of brownfield properties. In contrast with PPAs, such letters are for informational purposes only; they do not bind EPA or provide a release from CERCLA liability.

[25] CERCLA § 107(r)(1); 42 U.S.C. § 9607(r)(1).

[26] Bona Fide Prospective Purchasers and the New Amendments to CERCLA, Memorandum from Barry Breen, Director, EPA Office of Site Remediation Enforcement (May 31, 2002) (hereinafter Breen memorandum).

- all hazardous substance disposal at the facility occurred pre-acquisition
- the person made "all appropriate inquiry" (as defined in Part I)
- the person exercises "appropriate care" as to hazardous substances found at the facility by taking "reasonable steps" to stop releases, prevent any threatened future release, etc.
- the person provides full cooperation and access to persons authorized to conduct response actions or natural resource restorations
- the person complies with pertinent land use restrictions and does not impede institutional controls, and
- the person is not potentially liable for response costs at the facility, or affiliated with anyone that is.[27]

Finally, the SBA gives the United States a "windfall lien" on the property (or the U.S. may, by agreement with the owner, obtain other assurance of payment) if the United States has unrecovered response costs and the response action increased the market value of the property.[28]

Issues remain, however. What constitutes "reasonable steps" (third bullet above)?[29] As for the amount of the windfall lien, how does one compute the portion of the property's value attributable to the response action? These and other ambiguities in the BFPP criteria have prompted some in the regulated community to point out that lacking a PPA, the buyer of known or possibly contaminated land takes a chance that should EPA ever contemplate enforcement at the site, the agency may not agree with the owner's assessment that he or she is entitled to BFPP status. For this reason, these voices have urged that buyers of such land consider making use of *both* a PPA *and* the new BFPP exemption.

Such a two-prong strategy may have limited prospects under EPA's view as to the effect of the SBA's BFPP provisions, however. A recent agency memorandum states: "EPA believes that, in most cases, the [SBA] make[s] PPAs from the Federal Government unnecessary."[30] To be sure, the memorandum does indicate that even after SBA enactment EPA is willing to consider "PPAs or some other agreement" prior to land acquisition if the public interest is served, but it repeatedly characterizes the

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[27] CERCLA § 101(40); 42 U.S.C. § 9601(40).

[28] CERCLA § 107(r); 42 U.S.C. § 9607(r). The amount of the lien may not exceed the increase in the fair market value of the property attributable to the response action. *Id*.

[29] The phrase "reasonable steps" is also used in CERCLA as an eligibility criterion for innocent landowner status as a defense to liability (Part I). It is used yet again as a criterion for "contiguous property owner" status, another protected category of landowner in CERCLA but one not covered in this report.

The same multiple appearances in CERCLA obtain for the phrase "all appropriate inquiry" in the second-bulleted item above. *See generally* Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), Memorandum from Susan E. Bromm, Director, EPA Office of Site Remediation Enforcement (March 6, 2003) (hereinafter Bromm memorandum).

[30] Breen memorandum, *supra* note 26.

qualifying circumstances as "limited" or "unusual." Thus in a given case a buyer of possibly contaminated land may have only BFPP status as a realistic option.

As recited in the EPA memorandum,[31] the circumstances when a PPA or some other pre-acquisition agreement still may be considered by the Agency are first, "where there is likely to be a significant windfall lien and the purchaser needs to resolve the lien prior to purchasing the property (e.g., to secure financing)." In this circumstance, the agreement with the buyer might only settle the lien claim, nothing more (so far, EPA has entered into two of these agreements). Such an agreement would not be a PPA, since it would not contain a covenant by EPA not to sue. A practical obstacle to use of lien-resolution agreements, of course, is the difficulty of knowing the precise amount of the unrecovered government cleanup costs at a site in advance of cleanup completion.

In contrast to lien-resolution agreements, PPAs are contemplated by the memorandum when "necessary to ensure that the transaction will be completed and the project will provide substantial public benefits to, for example, the environment, a local community because of jobs created or revitalization of long blighted, under-utilized property, or promotion of environmental justice." Such circumstances might arise when (a) "[s]ignificant environmental benefits will be derived from the project ... and there is a significant need for a PPA to accomplish the project's goals"; (b) the facility is currently involved in CERCLA litigation such that the party who buys the facility might be sued by a third party; and (c) there are "unique, site-specific circumstances not otherwise addressed above when a significant public interest would be served by the transaction ...." To reiterate, however, the memorandum frequently characterizes these categories as narrow.

To be sure, while prospects for a two-prong strategy by contaminated-land buyers may be uncertain, the need for pursuing a PPA even when one appears to be a BFPP may have lessened recently. Recall that one reason for seeking the certainty of a PPA was the ambiguity of the SBA phrase "reasonable steps." EPA guidance issued March 6, 2003 may have reduced somewhat the evident confusion over the meaning of "reasonable steps."[32] In addition, buyer uncertainty may be alleviated further by EPA's issuance of a nonbinding "comfort letter," in cases where EPA has enough information about the site to make suggestions as to what "reasonable steps" might be.[33] On the other hand, the same EPA guidance repeatedly (and necessarily) insists that the determination of "reasonable steps" be a "site-specific, fact-based inquiry." Thus, a buyer of land, even with the guidance, simply cannot have total certainty that EPA will see things as the buyer does should the agency eventually initiate enforcement action.

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[31] *Id.*

[32] Bromm memorandum, *supra* note 29, Attachment B.

[33] *Id.*, Attachment C.