TURNING BROWN INTO GREEN: PRACTICAL CONSIDERATIONS FOR LENDERS AND BUYERS OF CONTAMINATED PROPERTY IN A RED ECONOMY

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I. INTRODUCTION

Just when it seems like things can't get any worse, the TV monitor in the office elevator reports the stock market has dropped to a new low. Daily, we are bombarded with news of our troubled economy—incipient recession, no new development deals, construction stalled, foreclosures in every commercial district and residential neighborhood, no available credit, layoffs, stalwart businesses closing their doors or filing for bankruptcy, and state workers furloughed. The list goes on and on, and we ponder how long it will take to turn things around.

But such crises also provide for opportunities,[1] and one of the few bright spots may be the acquisition and development of "Brownfields sites"[2] or environmentally impaired properties. Whether you are an opportunistic developer taking advantage of low market prices, or an unfortunate lender facing foreclosure on an operating hazardous waste recycling facility, the ability to successfully acquire, develop or resell such properties will depend in large part on how well the purchaser or lender has minimized its environmental cleanup liabilities.

This article provides the "glass half-full" perspective on how lenders and buyers can acquire and develop contaminated property during a red economy, while keeping liabilities in check. Section II provides an overview of the key environmental statutes that impose cleanup liabilities. Section III then addresses the legal protections available to lenders, prospective purchasers and landowners that help maximize the acquisition and development of Brownfields sites while minimizing potential cleanup liability. Finally, Sections IV and V provide practical tips to lenders and prospective purchasers who want to turn Brownfields sites into green opportunities.

II. OVERVIEW OF ENVIRONMENTAL LIABILITY SCHEMES

A. The Driving Force Behind Environmental Cleanup Liabilities: "Superfund" Statutes

Adopted in 1980, the federal Comprehensive Environmental Responsibility, Compensation and Liability Act[3] ("federal Superfund") is the primary environmental statute affecting cleanup liabilities in real property transactions. California's counterpart, the Carpenter-Presley-Tanner Hazardous Substances Account Act[4] ("state Superfund"), has parallel liability provisions and was enacted in 1981 (collectively, the federal and state Superfund are referred to as "Superfund laws"). These Superfund laws are strict liability statutes, imposing retroactive liability on "potentially responsible parties" ("PRPs") to pay for or carry out the cleanup of contaminated property.[5]

The Superfund laws establish four classes of PRPs[6] that can be held liable for cleaning up contaminated property: (1) the current owners and operators of a facility where hazardous substances[7] were released; (2) the former owners or operators of a facility at the time hazardous substances were released at the facility; (3) generators or persons who arranged for the treatment or disposal of hazardous substances at a facility;[8] and (4) transporters of hazardous substances to a facility they selected.

PRPs may be ordered to conduct the cleanup of contaminated property,[9] or the government may carry out the cleanup and recover cleanup costs from the PRPs.[10] Such cleanup costs can include the costs to investigate, remove, manage, and remediate hazardous substances released at a facility, and any other necessary response costs (including those incurred by the government). Thus, Superfund laws can impose cleanup costs on the current owner or operator of contaminated property (and other PRP categories) for releases of hazardous substances that occurred before its ownership or operation of the property, although the owner or operator may be able to recover some of those costs from other PRPs.[11]

B. Don't Overlook Other Federal and California Statutes that May Impose Environmental Cleanup Liabilities

While Superfund is perhaps the most widely known and feared environmental liability statute, it is but one of many that may impose liability on owners and operators of contaminated property. Several key statutes imposing liability are highlighted below.

1. Federal and California Hazardous Waste Laws Can Trigger Cleanup Liability

The federal Resource Conservation and Recovery Act[12] ("RCRA") and its California counterpart, the Hazardous Waste Control Law[13] ("HWCL"), impose requirements on persons that generate or transport hazardous waste, and operate facilities that treat, store, or dispose of hazardous waste (including storage or treatment in underground storage tanks ("USTs")).[14] Closure of a hazardous waste facility regulated under RCRA or the HWCL will obligate the owner or operator to remove hazardous waste from the facility and take actions required to prevent any hazardous waste remaining onsite from adversely affecting human health or the environment.[15]

In addition, an owner or operator may be required under "corrective action" authority to cleanup contaminated property at which hazardous waste management activities occurred, even if the contamination was unrelated to such activities.[16] As part of post-closure care and long-term corrective action obligations, owners and operators may be required to provide financial assurance that cleanup obligations will be met.[17] Moreover, because hazardous waste laws apply to property owners, prospective purchasers, and foreclosing lenders, these entities may find themselves similarly saddled with such cleanup obligations.

2. Cleanup Liability for Discharges of Waste to Surface and Groundwater

The California Porter-Cologne Water Quality Control Act[18] regulates discharges of waste[19] to surface water and groundwater within California. Regional Water Quality Control Boards ("RWQCBs") within the state may issue investigation and cleanup orders to any person (including past and present owners and operators) who has, or is suspected to have, discharged waste that could affect the quality of surface water or groundwater.[20] Cleanup orders by the RWQCB frequently target historic discharges such as leaking underground gas tanks, releases of wastes from dry cleaning facilities and semi-conductor operations. Since it is not uncommon for releases of these wastes to contaminate groundwater, groundwater remediation often comprises a significant amount of cleanup costs associated with remediation of contaminated property in California.

III. LEGAL PROTECTIONS FROM POTENTIAL FEDERAL AND STATE SUPERFUND LIABILITY

As onerous as these environmental statutes can be, affirmative defenses do exist and can provide protection to parties that acquire contaminated property either voluntarily or involuntarily. Superfund laws provide three statutory defenses—an act of God, an act of war, and the most popular, an act or omission of a third party. The most useful application of this third party defense arises in the context of secured creditors (primarily lenders), prospective purchasers and innocent landowners. These protections are highlighted below.

A. Liability Protection for Lenders—Superfund's Secured Creditor Exemption

Superfund laws have evolved over the years to provide secured creditors with protection from liability for cleanup of contaminated property both before and after a lender forecloses on the property.[21] The federal Superfund "Secured Creditor Exemption" excludes from the definition of owner/operator "a lender that, *without participating in the management* of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility."[22] The parallel security interest exemption in the state Superfund law is structured differently, comprised of an entire chapter within the Health and Safety Code. Though the scope of protection is substantially the same between the federal Superfund and state laws, several important distinctions exist.[23]

While the Secured Creditor Exemption was included in the original federal Superfund law, prior to federal amendments in 1996 there was confusion in the courts over whether the Secured Creditor Exemption applied to post-foreclosure activities by the lender.[24] Confusion also existed as to whether the mere capacity to control the actions of the borrower prior to foreclosure, without actually exercising such control, constituted "participation in management" that resulted in the lender becoming an "owner or operator," and thus losing the exemption.[25] In 1992, the United States Environmental Protection Agency ("EPA") promulgated its "Lender Liability Rule" to clarify the actions that lenders could and could not take to avoid Superfund liability.[26] EPA's Lender Liability Rule was subsequently vacated by a federal court in 1994 on the grounds that EPA lacked authority to issue the rule as a binding regulation.[27] Although EPA stated thereafter that it would rely on the vacated rule as an enforcement policy,[28] confusion remained as to the scope of the Secured Creditor Exemption.

The 1996 amendments to federal Superfund ("1996 Amendments"), in effect, codified the vacated rule.[29] These amendments broadened the definition of lender and specifically stated that the Secured Creditor Exemption applies to any lender that did not participate in the management of a borrower's facility.[30] The 1996 Amendments also clarified what constitutes "participation in management" and whether a lender becomes liable as an owner after foreclosing on contaminated property.

Fundamentally, the 1996 Amendments clarified that the lender must demonstrate that it did not actually participate in the management of the property pre-foreclosure.[31] Pursuant to the 1996 Amendments, participation in management would occur if the lender exercised either decision-making control over environmental compliance, or control comparable to that of a manager who has responsibility for the overall management of or substantially all the operational functions of a facility or vessel.[32] The 1996 Amendments also provided examples of certain activities excluded from the definition of "participation in management."[33] Despite the additional clarity provided by these amendments, the inquiry into the applicability of the pre-foreclosure portion of the Secured Creditor Exemption is certain to be fact-specific and thus, may depend on the time and pervasiveness of the lender's involvement with the environmental conditions at a particular site.

Foreclosure is a necessary part of protecting a lender's security interest in the property, and as such, is permitted under the Secured Creditor Exemption. A lender may remain exempt from liability after foreclosing on contaminated property so long as the lender did not participate in management of the facility prior to foreclosure.[34] Under Superfund laws, a lender must divest itself of a foreclosed property in a *reasonably expeditious manner* using whatever *commercially reasonable means* are available or appropriate. Section IV provides practical considerations for lenders leading up to, during and following foreclosure.

B. Liability Protection for Prospective Purchasers

1. Federal Laws Providing Liability Protections to Prospective Purchasers

In the early years of Superfund, prospective purchasers often found themselves between a rock and a hard place if they wanted to purchase environmentally impaired property. Such a purchase would immediately transform the purchaser into a "current owner" under the Superfund laws. The "innocent landowner" defense protected such a purchaser from owner liability provided the purchaser had *no knowledge* of any environmental contamination on the property based on inquiries made prior to the purchase.[35] But in many cases, environmental problems were frequently identified—or could not be ruled out—in Phase I or Phase II environmental site assessments ("ESAs"). Consequently, prospective purchasers were left with lingering doubts about whether they had an adequate shield of protection from Superfund liability should they become owners of such contaminated properties.

EPA attempted to quell such doubts and encourage cleanup and development of contaminated properties in the early 1990s. Over the next decade, EPA developed a number of tools within the Superfund program and enforcement offices to encourage redevelopment of Brownfields sites, including Prospective Purchaser Agreements ("PPAs") aimed at providing liability relief in exchange for payment and/or cleanup work by the purchaser (even where the prospective purchaser had not caused the contamination).[36] This and other efforts by EPA were steps in the right direction but they did not go far enough to drive the expeditious and cost-effective remediation of Brownfields sites.

In response, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act of 2002 ("Brownfields Amendments"), which provided a powerful and positive shift in landowner liability protections and help for prospective purchasers of Brownfields sites. The Brownfields Amendments provided liability relief to three classes of landowners: (1) bona fide prospective purchasers ("BFPPs"); (2) contiguous property owners ("CPOs"); and (3) innocent landowners ("ILOs"). In order to qualify for the conditional Superfund immunity, each class of landowners must meet certain threshold conditions prior to the acquisition of contaminated property and each must satisfy certain continuing obligations during its ownership.[37] The attributes of each class are briefly summarized below.

Bona Fide Prospective Purchasers: Congress' establishment of the BFPPs class of landowners significantly changed Superfund's liability landscape. Prior to the Brownfields Amendments, this class of purchasers who acquired property with knowledge of the contamination became de facto "owners" under the Superfund law. Now, these prospective purchasers ***can acquire property with knowledge of the contamination and obtain liability protection*** from the broad reach of Superfund laws.[38]

Contiguous Property Owners: Since the early days of Superfund, prospective and current landowners have worried about being tagged with liability for contamination migrating onto their property from off-site sources. [39] CPOs can now take advantage of the conditional Superfund immunity. This immunity is limited, however, to situations in which a CPO did not know or have reason to know that its property was or could have been contaminated by the off-site sources.[40]

Innocent Landowners: This class of landowners are those who, at the time of purchase, acquired the property without knowledge or reason to know of any contamination on the site. Such entities have been historically protected by Superfund's innocent landowner defense. The Brownfields Amendments however clarified what an innocent landowner must do to qualify for the statutory protection.[41]

In addition to the three landowner classes created by the Brownfields Amendments, EPA recently identified a fourth landowner-type class that may be eligible for Superfund liability protection.

"Derivative" BFPP Status for Tenants: The latest word from EPA on the Brownfields Amendment is EPA's January 2009 guidance addressing liability protection for tenants.[42] In this memorandum, EPA acknowledges the importance that leasehold interests play in the cleanup and reuse of Brownfields sites. Accordingly, EPA extends some measure of the BFPP protections to qualifying tenants. While EPA has confirmed that the mere execution of a lease does not trigger owner/operator liability for the tenant, it has also acknowledged the uncertainty that a tenant may experience in executing a long-term lease on contaminated property.

EPA has identified two situations involving tenants where EPA would use its discretion *not* to enforce Superfund liability against the tenant. The first situation is where the lease "gives [the tenant] sufficient indicia of ownership to be considered an 'owner' and who meets the statutory elements of a BFPP."[43] The second gives tenants "derivative" BFPP status from the property owner who has complied with and continues to comply with all BFPP requirements.[44]

2. *California Laws Providing Liability Protections to Prospective Purchasers*

A tenet of the Brownfields Amendments is that states, not the federal government, should serve as the lead in Brownfields cleanups (except for cleanups on federal Superfund sites). California has developed a host of statutory and regulatory programs to protect prospective purchasers from environmental cleanup liabilities or to reduce such liabilities while encouraging and facilitating cleanup of contaminated property. Key statutes are highlighted below.

California Land Use and Redevelopment Act of 2004 ("CLRRA"): The most significant effort by California to provide landowner liability protection was the enactment of CLRRA.[45] Essentially, CLRRA establishes a process in which qualified BFPPs, CLOs, and ILOs may enter into agreements with the California Department of Toxic Substances Control ("DTSC") or RWQCB to clean up contaminated property and receive immunity for certain hazardous materials response costs and other damages.[46] To be eligible, the property must be a vacant or underutilized property in a populated area, must not be a state or federal Superfund site, and must not be solely impacted by petroleum releases from an underground storage tank.[47] Once a CLRRA agreement has been established with respect to a given property, subsequent purchasers may also qualify for immunity if they meet qualifying conditions and continue to carry out the terms of the agreement.[48]

California's Polanco Redevelopment Act ("Polanco Act"): California's Polanco Act has emerged as one of the more effective and efficient tools for Brownfields redevelopment for sites located within the jurisdiction of a redevelopment agency.[49] Key features of the Polanco Act include the ability of redevelopment agencies to obtain information about the environmental conditions at a site from potentially responsible parties, expedite investigation and cleanup, and impose deadlines for regulatory action.[50] It also provides liability protection incentives to developers and lenders that clean up and redevelop such properties pursuant to a plan approved by the DTSC or RWQCB.[51]

California's Unified Agency Review Program ("AB 2061"): Purchasers of contaminated property should also be aware of AB 2061, which was developed to eliminate or minimize the duplication of efforts by various state and local agencies to clean up hazardous materials release sites.[52] Under this program, a current owner may request that a single regulatory agency be designated to oversee the investigation and remediation of the property (the administering agency).[53] After the owner completes the agreed-upon investigation and remediation, the administering agency will issue a certificate of completion, which will prohibit

all state agencies from taking any action against the owner for hazardous materials released at the property, except under limited conditions.[54]

IV. PRACTICAL CONSIDERATIONS FOR LENDERS

Although the Secured Creditor Exemption available under the Superfund laws seemingly provides lenders with a safe harbor from potential environmental liability, lenders nonetheless can quickly find themselves in choppy seas when dealing with financially-distressed borrowers and contaminated properties. Below are some practical considerations to help navigate through these troubled waters.

A. Loan Policing and Work Out Activities

So long as a lender does not *participate in management*, the lender may take appropriate steps without jeopardizing the Secured Creditor Exemption to monitor and enforce the terms and conditions of its loan, including when necessary and appropriate, engaging in loan work out activities. Permissible activities include periodic monitoring or inspecting (*e.g.*, through environmental auditing) of the borrower's facility to assess the borrower's environmental compliance and whether there are any threatened or actual environmental releases.[55] Moreover, the lender may provide financial and other advice and counseling to the borrower, including advice on environmental matters if such advice is given in an effort to mitigate, prevent, or cure a loan default or diminution in value of the property.[56]

Loan agreements typically allow a lender to require the borrower to take appropriate actions to comply with any observed environmental non-compliance, including requiring the borrower to conduct response actions (using contractors approved by the lender) to address actual or threatened hazardous substance releases. If the borrower is unable or unwilling to perform such work, the lender may, in certain circumstances, undertake cleanup work at the borrower's cost without assuming any cleanup liability. In such cases, the lender must be careful to avoid taking actions or failing to take actions that could be construed as causing or contributing to the release of hazardous substances. For example, the lender's hiring of a shoddy contractor that exacerbates existing contamination at the borrower's property may expose the lender to liability for cleanup of such exacerbated conditions.

So what should a lender do to keep itself from *participating in management*? Although there is no definitive guidance from EPA, the law identifies actions the lender should avoid while the borrower is in possession of the property. The lender should avoid exercising decision-making control on matters involving environmental compliance, particularly as it relates to hazardous substance handling and disposal practices.[57] Even if the lender is not involved with environmental compliance matters, the lender should also avoid managing all or substantially all of the operational functions of the borrower's business. Operational functions are akin to those of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.[58] So long as the lender's actions involve financial or administrative functions such as the functions of a credit manager, accounts payable/receivable manager, personnel manager, controller, or chief financial officer, the lender will not be considered to be participating in management.[59]

Although lenders may provide guidance to the borrower, ultimately, the borrower must make the call when it comes to managing environmental compliance and conducting business operations at its facility. To that end, lenders should be careful in sharing with the borrower environmental audit reports prepared for the lender by the lender's consultant which go beyond merely identifying areas of environmental non-compliance (*i.e.*, the lender's consultant is providing specific recommendations on how to manage such non-compliance which could be construed as participation in management by the lender).

B. Pre-Foreclosure Considerations

Lenders faced with the prospect of foreclosing on and taking title to property that is or may be suspected of being contaminated should make a thorough assessment of environmental conditions and potential liabilities associated with the property. If the property turns out to be contaminated, its value will nosedive, placing the lender at financial risk not only for cleanup costs, but for potential third party liability claims from property occupants and neighbors. Even cleaned up property may retain a stigma that could adversely affect the property's market value making the property difficult to resell or re-lease. Depending on the nature of the borrower's operations and property conditions, a thorough assessment may include conducting an environmental due diligence assessment of the property and compliance audit of the borrower's operations.

1. Environmental Due Diligence Assessment

Traditionally, an environmental assessment[60] is part of the lender's due diligence performed during the loan origination process. Because such due diligence predates the borrower's occupancy, reliance on such assessment would critically miss environmental releases that may have occurred during the borrower's operations, not to mention releases from concurrent operations of third parties on adjoining properties that may impact the borrower's property. Therefore, prudent lenders should either update previously performed assessments or conduct entirely new assessments *before* foreclosing.

EPA's All Appropriate Inquiries or "AAI Rule" (discussed in more detail in Section V.A. below) permits a prospective property owner to use a previously conducted Phase I ESA report if the information was collected and updated within one year prior to the date of acquisition of the subject property (*i.e.*, the date the landowner obtains title to the property).[61] Certain aspects of the previously conducted assessment must be conducted or updated within 180 days prior to the date of acquisition of the property, including the conducting of interviews, visual inspections, historical records review, and the search for environmental liens.[62] In addition to giving the lender an ability to potentially qualify itself as a BFPP, conducting a new or updated environmental assessment using the AAI Rule also permits any subsequent purchaser from the lender to qualify as a BFPP, CPO, or ILO for purposes of asserting a defense under the Superfund laws.

2. Environmental Facility Audit

A financially distressed borrower with hazardous materials operations presents additional financial risks to the lender.

Significant equipment and inventory containing hazardous materials may be present as a result of the borrower's operations on the property. In addition, the borrower's operations may be subject to federal, state, and local environmental permits which may contain rigorous closure and decontamination requirements. Because the lender could be left holding the bag with regard to removing hazardous materials and obtaining regulatory closure for the property, the lender should conduct (using an appropriately-qualified environmental consultant) an environmental audit of the borrower's facility *prior to foreclosing* to assess the potential environmental liabilities that may be associated with the borrower's hazardous materials operations.

3. Other Considerations

In addition to assessing its potential environmental liabilities, the lender should also assess if there are any measures that may help to reduce or mitigate its environmental liability exposure. Such assessment often requires the help of an experienced environmental attorney, and may involve consideration of, among other things:

- The nature and extent of the borrower's environmental indemnity, keeping in mind that an indemnity from a financially-distressed borrower may provide little, if any, comfort to the lender;
- The availability of a third party guaranty, financial assurance, or performance bond that would back-stop the borrower's indemnity;
- The availability of environmental insurance, either issued to the borrower or lender, that may cover environmental cleanup costs and third party bodily injury and property damage claims;
- The availability of state cleanup funds (*i.e.*, UST funds) that may help to pay for cleanup costs;
- For properties with tenants conducting hazardous material operations, the availability of indemnity and cleanup or closure commitments from such tenants; and
- Use of a court-appointed receiver or bankruptcy trustee to manage the property.

C. Post-Foreclosure Considerations

As previously noted in Section III.A. above, foreclosure is a necessary part of protecting a lender's security interest in the property, and as such, is permitted under the Secured Creditor Exemption. It is important to remember that the exemption is temporary in nature and is limited to the time in which the lender is seeking to sell or otherwise divest itself of the foreclosed property. Under federal and state laws, lenders should divest themselves of a foreclosed property in a *reasonably expeditious manner* using whatever *commercially reasonable means* are available or appropriate. Under California law, the property must at least be listed for sale, re-lease or other disposition with a broker, dealer or agent within twelve months of foreclosure, or alternatively, be advertised for sale, re-lease or other disposition on at least a monthly basis.[63]

There is no time requirement for the ultimate disposition of foreclosed property. Provided the property is being actively offered for sale or re-lease and no offers of fair consideration are ignored or rejected by the lender, foreclosed property may continue to be held by the lender without the lender being considered an owner or operator of the property. The current global economic crisis has and will continue to have a significant adverse impact on the commercial real estate market for the foreseeable future. Such adverse market conditions will no doubt play a role in defining what a *reasonably expeditious manner* means in the industry.

Once a lender forecloses and takes possession of the property, the lender should exercise care with regard to environmental conditions on the property, otherwise, the lender risks losing the Secured Creditor Exemption. For example, under California law, after taking possession of the property, lenders should take steps to address hazardous materials that have been left on the property.[64]

Lenders should also remember to comply with all applicable statutes, regulations, or ordinances that require disclosure of environmental information or conditions regarding the property to any person.[65] One such provision under California law requires persons selling or leasing nonresidential property who know or have reasonable cause to believe that any release of hazardous substances has come to be located on or beneath the property to provide written notice of such condition to prospective buyers and lessees.[66]

Lenders may undertake actions to protect or preserve the value of its secured asset following foreclosure, including taking steps such as removing hazardous materials and wastes to prepare the property for safe public access incident to the sale or liquidation of assets. Note, however, that in those instances where lenders arrange for or sign manifests sending hazardous wastes or materials to off-site treatment, disposal, or recycling facilities, such lenders may still be independently liable under the Superfund laws as generators for having arranged for transportation and/or disposal of such wastes or materials.[67]

Finally, lenders should also remember that they are not exempt from complying with long-term operation and maintenance requirements that may be imposed on the property by means of an environmental deed restriction, land use covenant, permit, or other regulatory directive. For example, a property may contain a passive vapor mitigation system installed in conjunction with previously-performed remedial activities that may need to be periodically inspected, maintained, and monitored to ensure its continued, satisfactory performance.

V. PRACTICAL CONSIDERATIONS FOR PROSPECTIVE PURCHASERS

The liability protections in the Brownfields Amendments and the recent regulatory developments discussed in Section III above have created perhaps the best climate yet to foster and support redevelopment activities. However, the impact of the recession and credit crisis has already stalled and will likely further stall or delay planned development. Nevertheless, there will be opportunities during this time for prospective purchasers to acquire environmentally impaired properties at fire sale prices and conduct transactional planning so that the "shovels are ready" when the money begins to flow for purchase and

construction. The practical considerations described below may help a prospective purchaser steer steadily through the red economy and hopefully avoid the environmental liability trappings that may come with properties that are "too good to pass up."

A. Assessing Environmental Conditions of the Brownfields Site

Prospective purchasers of contaminated property—whether BFPPs, CPOs, or ILOs—will want to learn as much as they can about the environmental condition of the property and adjacent properties prior to acquisition. Such an undertaking will qualify prospective purchasers for the conditional Superfund liability relief, as well as establish an appropriate purchase price, confirm suitability for the intended land use, avoid potential tort liabilities, avoid (or plan for) increased construction costs and delays, and comply with the due diligence requirements imposed by lenders and investors.

Fortunately for Brownfields developers, the recent development of regulatory and technical standards makes the task of conducting an environmental assessment more straightforward than ever before. In order to qualify for liability relief, the Brownfields Amendments require a prospective purchaser to undertake all appropriate inquiries ("AAI") to evaluate a property's environmental conditions and assess potential liability for any contamination.[68] Congress directed EPA to develop standards and practices for conducing these inquiries, and in November 2005, EPA issued its AAI Rule, which took effect in November 2006.[69] The primary objective of the AAI process is to "identify conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property."[70] One of California's landowner liability relief statutes discussed in Section III.B. above—CLRRA—also imposes the requirement to conduct AAI in a manner compliant with EPA standards as one of its threshold requirements.

Virtually concurrent with EPA's publication of the AAI Rule, ASTM International (originally known as the American Society for Testing and Materials or "ASTM") issued a technical standard entitled, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, Designation: E 1527-05 ("ASTM E 1527-05"), to conform to the AAI Rule requirements. EPA has determined that the ASTM standard is consistent and compliant with the provisions of its AAI Rule.[71] Accordingly, prospective purchasers can now use *either* the revised ASTM E 1527-05 standard *or* the specific AAI Rule requirements to satisfy compliance with the AAI requirement of the Brownfields Amendment, without the need to consult with and receive approval from EPA.

ASTM more recently issued guidelines for assessing potential vapor intrusion impacts to properties, an environmental condition that has taken front and center stage at sites with volatile organic contamination problems.[72] Note that, presently, the AAI Rule and the ASTM E 1527-05 do not mandate compliance with these vapor intrusion guidelines. However, a prudent prospective purchaser should seriously consider conducting such an analysis (depending on the type and concentration of chemicals in the soil and groundwater beneath the site) to determine if vapor intrusion may be a significant problem as there may be long-term maintenance requirements imposed on the property to keep potential vapor problems under control.

B. Statutory and Regulatory Mechanisms for Cleanup Liability Protections for Prospective Purchasers

If a proposed Brownfields acquisition appears promising after completing the AAI process, next steps should include analyzing which statutory and/or regulatory approaches provide the greatest liability protection post-acquisition, while still promoting an expeditious, protective and cost-effective cleanup. A number of factors will shape this decision, including how contaminated the property is, whether cleanup work is already underway, who is conducting the work, which agency (or agencies) if any will oversee the cleanup, the timing of the cleanup and proposed schedule for redevelopment, and what level of investment in cleanup the prospective purchaser is willing to take on.

The statutory and regulatory approaches described below provide varying degrees of liability protection for a prospective purchaser and varying degrees of flexibility in executing the cleanup and redevelopment of contaminated property. Decisions about which path to take are best made with input from a multi-disciplinary team including environmental consultants, environmental counsel, financial advisors, and the like. In addition to liability protection provided by statutory or other regulatory mechanisms, a prospective purchaser should also consider other commercially available tools such as insurance and contractual agreements as liability-limiting measures.

1. Federal Statutory and Regulatory Liability-Limiting Options

In order to gain liability protection, a prospective purchaser may want to supplement making and documenting AAI under the Brownfields Amendments with other statutory and regulatory options, including obtaining a "reasonable steps" letter or a prospective purchaser agreement from EPA.

"Reasonable Steps" Letters: The Brownfields Amendments include a condition that purchasers who want to take advantage of the liability protection undertake "reasonable steps" with respect to hazardous substance releases at the site. On its face, the "reasonable steps" requirement suggests the purchaser has an independent obligation to address releases of hazardous substances; but this is not the case. EPA has clarified that the Brownfields Amendments do not create the same type of response and remedial obligations for the three classes of landowners that exist for other PRPs.[73] These classes of landowners must exercise "due care" in responding to the contamination and they must not ignore the potential dangers associated with the pre-existing contamination on the property. In a number of cases, EPA has been willing to provide "reasonable steps" letters to these classes of property owners defining what specific actions, if any, must be taken by the purchasers to maintain the statute's liability protection.[74]

Prospective Purchaser Agreements: Despite the liability relief under the Brownfields Amendments, some developers of contaminated properties may want further assurances regarding liability protection from EPA even where the developers have conducted AAI. Prior to the Brownfields Amendments, the standard tool was the PPA where EPA provides an otherwise responsible party (including subsequent owners who did not

cause the contamination) with liability relief in exchange for payment and/or cleanup work. While EPA now views PPAs as unnecessary in the post-Brownfields Amendment world (as landowners can now "self-certify" compliance with the AAI requirements without agency involvement), EPA has recognized limited circumstances where PPAs are appropriate to motivate redevelopment of contaminated property.[75]

2. California's Statutory and Regulatory Liability-Limiting Options

California EPA has been an active leader in promoting Brownfields redevelopment activities, and as a result, has developed a number of programs to encourage the cleanup and redevelopment of Brownfields sites derived in large part from the state statutes discussed in Section III.B above. Prospective purchasers should carefully examine the pros and cons of utilizing various state programs,[76] several of which are briefly described below.

California Land Reuse and Revitalization Act of 2004 (CLRRA): Cleanups under CLRRA provide a developer of urban infill sites with a significant liability shield as long as statutory conditions are met, including an AAI assessment. Prospective purchasers must enter into an agreement with either the DTSC or RWQCB in order to take advantage of the CLRRA broad liability protections.[77]

Prospective Purchaser Agreements: California also has developed a program similar to EPA's PPA program to remove or lessen the liability associated with purchasing contaminated property. Under this program, the DTSC or RWQCB would covenant not to sue the prospective purchaser for pre-existing contamination as long as certain remedial actions and other conditions are met. No admission of liability by the prospective purchaser would be required.[78]

Unified Agency Review of Hazardous Materials Release Sites (AB 2061): This program designates a single administering agency to oversee site cleanup.[79] Certificates of completion issued under this program provide broad liability protection against cleanup demands from all state regulatory agencies with regard to the covered cleanup matters.

Voluntary Cleanup Program ("VCP"): One of California's oldest Brownfields programs, the VCP was established in 1993 and allows motivated parties who are willing to pay for site investigation and cleanup to move forward with the work at their own pace. Modest liability protection is provided under this program—project proponents do not have to "admit to legal liability for remediation of a site" by entering into a VCP agreement with the DTSC.[80] Moreover, parties that clean up contaminated sites under this program may have greater control over the timing of the remedial work.

3. Use of Insurance Products to Reduce Risk

The role of insurance in Brownfields development has increased significantly in recent years, as insurance can reduce the risk for the key players in a Brownfields transaction. However enticing insurance products may appear, the utility of such mechanisms to manage liability risks is highly dependent on the type of coverage available, the dollar cap on claims, term limits of the policy, the cost of securing the insurance, and other factors.[81] Accordingly, a prospective purchaser should carefully evaluate available insurance products such as:

- **Cleanup Cost Cap—**places a limit or "cap" on cleanup costs that exceed the estimated costs of remediation;
- **Pollution Legal Liability** (aka Environmental Impairment Liability)—transfers risks for third party liabilities (personal injury, property damage, diminution in value), cleanup of unknown environmental conditions, regulatory "reopeners," and changes in environmental regulations; and
- **Other Insurance Products –-** Contractors pollution liability coverage is available for consultants and contractors who may be performing remedial work on the property. Secured creditor's insurance may also be available to protect lenders against liabilities for environmental conditions on properties foreclosed by the lenders.

4. Private Tools for Managing Liability

Various private mechanisms are frequently used to manage environmental cleanup risks between parties involved with a Brownfields development. Contractual tools such as indemnities, guarantees, release and hold harmless agreements, as well as cost sharing and funding agreements for remedial actions, are commonly used to allocate liability. Note that it is not uncommon for the parties to get bogged down in negotiating such agreements.

Additionally, environmental consulting firms are frequently offering property owners guaranteed fixed-price remediation ("GFPR") arrangements that provide the developer with certainty about cost and time for cleanup. While GFPR agreements can be extremely advantageous by providing greater certainty about costs to remediate a site, they can be fraught with pitfalls due to incomplete information about the site or the use of overly ambitious remedial technologies that fail to perform as promised. If a GFPR agreement makes sense for the cleanup, the property owner is well advised to select an appropriately qualified and well-capitalized and insured environmental firm, and to carefully monitor the activities and proposed remedial strategies during the execution of the GFPR arrangement. In addition, the owner should consider the benefits of engaging an independent remedial expert to oversee the recommendations and work of the fixed-price consultant.

5. Living with "Long-Term Environmental Obligations"

The revitalization of Brownfields sites typically involves cleanups that do not achieve complete removal or treatment of contamination, but instead include measures to safely manage, on a long-term basis, residual contamination that remains on or beneath the site. Regulatory agencies consider such measures to be appropriate remedial approaches to controlling residual contamination, while making the property safe for new and more productive uses.[82]

Such long-term remedial approaches typically utilize engineering controls and/or institutional controls. Engineering controls typically involve the installation of engineered remedial

systems, such as protective soil caps, vapor extraction systems, and groundwater pump-and-treat systems. Often, such systems will require long-term operation and maintenance, the details of which may be set forth in a site or risk management plan. Institutional controls typically involve legal mechanisms, such as land use covenants or deed restrictions, which may restrict certain types of land uses or require the property owner to comply with agency-imposed requirements to prevent exposure to residual contamination on the property. As such, prospective purchasers will want to evaluate any requirements that may impose restrictions on the future use of the property or impair the future marketability of the development of such property.

C. Explore Various Funding Arrangements

In this red economy, traditional opportunities for funding redevelopment seem to have all but dried up. Creative Brownfields developers will want to seek out lesser known, but potentially lucrative, funding arrangements, including the following:

The American Recovery and Reinvestment Act of 2009 ("2009 Act"): First and foremost for potential funding opportunities is H.R 1 signed by President Obama on February 17, 2009. The 2009 Act is chock-full of incentives and funding for Brownfields. First in line is EPA, which received $100 million for the clean up, revitalization, and sustainable reuse of Brownfields sites. Funding under the new stimulus package is available for eligible entities through job training, assessment, revolving loan fund, and cleanup grants.

Clean, renewable and alternative energy development and projects were top winners in the economic stimulus package. The 2009 Act created a Clean Energy Finance Authority and Renewable Tax Credits that together will leverage an additional $100 billion in private investment in the renewable energy sector. While this funding is not specific to projects located on contaminated property, EPA and other commentators are encouraging the use of currently and formerly contaminated lands for renewable energy development.[83]

The 2009 Act also provides funding for existing environmental programs where funds can be directed toward the redevelopment of Brownfields sites, including $600 million for Superfund cleanups and $200 million for enforcement and cleanup of leaking underground storage tanks.[84]

Brownfields Program Grants: EPA's Brownfields Program provides grants that may be used to address sites contaminated by petroleum and hazardous substances, pollutants, or contaminants (including hazardous substances commingled with petroleum). Grant funding is available for environmental assessments (each funded up to $200,000 over three years), revolving loan funds (each funded up to $1,000,000 over five years), and cleanup grants (each funded up to $200,000 over three years). Eligible recipients vary by grant program though they typically include governmental agencies, quasi-governmental agencies, nonprofit organizations, and educational institutions. [85]

Funding for Cleanup of Petroleum Releases: The Brownfields Amendments provide a provision that allocates 25 percent of its funding each year to assess, clean up, and ready for reuse petroleum Brownfields sites. This law expanded the original EPA Brownfields Program by including relatively low-risk petroleum sites as eligible sites for Brownfields assessment and cleanup grant funding.[86]

While California's Underground Storage Tank (UST) Cleanup Program Fund is falling on hard economic times as well,[87] the State Water Resources Control Board has recently established the Contamination Orphan Site Cleanup Fund Program to provide financial assistance to eligible applicants for the cleanup of Brownfields sites contaminated by leaking petroleum USTs where there is no financially responsible party.[88] Regulations to implement this program are currently under development.

VI. CONCLUSION

As Barack Obama said in his first major address to Congress as President, the current economic environment is a chance to "discover great opportunity in the midst of great crisis." While fortune may favor the bold, developers and lenders with an interest in Brownfields sites should take heed of the significant environmental liabilities that can accompany these properties. Fortunately, there are significant safe harbors provided in federal and state laws that developers and lenders can utilize to substantially immunize themselves from these concerns. Taking the time to understand and apply these safe harbor provisions may be the key to turning brown into green in this red economy.

** Special thanks to Jordan Van Druff, Paralegal in Farella's Environmental Law Department, for her editorial assistance.*

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ENDNOTES

1 "The Chinese use two brush strokes to write the word 'crisis.' One brush stroke stands for danger; the other for opportunity. In a crisis, be aware of the danger - but recognize the opportunity." John F. Kennedy, Speech in Indianapolis, April 12, 1959, *available at* http://www.quotationspage.com/quote/2750.html.

2 The federal Superfund law defines a "brownfields site" 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." 42 U.S.C. § 9601(39).

3 42 U.S.C. §§ 9601 *et seq.*

4 CAL. HEALTH & SAFETY CODE §§ 25300 *et seq.*

5 As noted most recently by the U.S. Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. United States*, Nos. 07-1601 & 1607 (U.S. May 4, 2009), although the federal Superfund imposes a strict liability standard, it does not mandate joint and several liability and instead permits courts to apportion Superfund liability among the responsible parties in those cases where the harm created by the contamination is theoretically capable of being apportioned.

6 42 U.S.C. § 9607(a); CAL. HEALTH & SAFETY CODE § 25323.5(a)(1).

7 "Hazardous substances" as defined under the federal Superfund is an exhaustive group of substances, and includes toxic pollutants regulated under the federal Clean Water Act, hazardous air pollutants regulated under the federal Clean Air Act, hazardous wastes, and certain chemicals regulated under the federal Toxic Substances Control Act. 42 U.S.C. § 9601(14). California has a similar definition. CAL. HEALTH & SAFETY CODE § 25316. The Superfund laws expressly exclude petroleum and natural gas (the so-called "petroleum exclusion"). *Id.*; CAL. HEALTH & SAFETY CODE § 25317(a).

8 The U.S. Supreme Court recently provided clarification on what it means to "arrange for" disposal of hazardous substances in *Burlington Northern & Santa Fe Railway Co. v. United* States, Nos. 07-1601 & 1607 (U.S. May 4, 2009). In that case, the Court noted that there is a wide continuum of circumstances under which a party can be deemed to be an arranger under CERCLA and that determining when "arranger" liability attaches involves a fact intensive and case-specific inquiry. In the instant case, the Court held that a seller of pesticide products subsequently released by the buyer was not liable as an arranger, notwithstanding that the seller knew that minor leaks and spills occurred during the transfer of the product from the seller to the buyer.

9 42 U.S.C. § 9606; CAL. HEALTH & SAFETY CODE § 25358.3(a)(1), (e).

10 42 U.S.C. § 9604(a); CAL. HEALTH & SAFETY CODE § 25358.3(a)(2), (b), (c).

11 42 U.S.C. § 9613(f)(a); CAL. HEALTH & SAFETY CODE § 25363(e).

12 42 U.S.C. §§ 6901 *et seq.*

13 CAL. HEALTH & SAFETY CODE §§ 25100 *et seq.*

14 USTs that contain hazardous substances which are not part of a facility that treats, stores or disposes of hazardous waste are regulated in California under a separate statutory program. *See* CAL. HEALTH & SAFETY CODE §§ 25280 *et seq.*; CAL. CODE REGS. tit. 23, §§ 2610 *et seq.*

15 EPA Closure Performance Standard, 40 C.F.R. § 264.111; CAL. CODE REGS. tit. 22, § 66264.111.

16 42 U.S.C. §§ 6924(u) & 6928(h); EPA Corrective Action Program, 40 C.F.R. §§ 264.100, 264.101; CAL. HEALTH & SAFETY CODE § 25187; CAL. CODE REGS. tit. 22, §§ 66264.100, 66264.101.

17 40 C.F.R. Part 264, Subpart H (Financial Requirements); CAL. CODE REGS. tit. 22, ch. 14, Art. 8.

18 CAL. WATER CODE §§ 13000 *et seq.*

19 "Waste" is defined as any and all sewage and waste substances, whether liquid, solid, gaseous, or radioactive, that is of human or animal origin, including manufacturing and processing operations. CAL. WATER CODE § 13050(d).

20 CAL. WATER CODE §§ 13267 & 13304.

21 42 U.S.C. § 9601(20)(A); CAL. HEALTH & SAFETY CODE § 25548.2.

22 42 U.S.C. § 9601(20)(A).

23 The California security interest exemption is provided in Chapter 6.96 of the California Health and Safety Code, §§ 25548 *et seq.* In contrast to the federal exemption which applies solely to federal Superfund law, the state exemption applies to any state or local statute, regulation or ordinance that requires a cleanup action and authorizes the imposition of penalties or fines, or the recovery of damages, in connection with an actual release of hazardous substances. *See* CAL. HEALTH & SAFETY CODE § 25548.2(a)(1). Note that the state exemption does not exempt the lender from claims brought under common law theories, such as nuisance, trespass, strict liability or negligence. In addition, the statute includes an extensive list of activities which are ineligible for the Secured Creditor Exemption, including holding a security interest for investment purposes, and causing or contributing to the release of hazardous materials as a result of the lender's actions or failure to act. *See* CAL. HEALTH & SAFETY CODE § 25548.4. Finally, a lender may be liable for damages resulting from its gross negligence or willful misconduct. *See* CAL. HEALTH & SAFETY CODE § 25548.2(b).

24 *See e.g., Guidice v. BFG Electroplating & Manufacturing Co.,* 732 F.Supp. 556 (W.D. Pa. 1989) (holding that bank became "owner" under federal Superfund after foreclosure).

25 Perhaps the most famous, or infamous, case was *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), which held that that ability to exercise control over environmental matters constituted participation in management, whether or not such control was actually exercised.

26 National Oil and Hazardous Substances Pollution Contingency Plan, Lender Liability Under CERCLA, 57 Fed. Reg. 18344 (Apr. 29, 1992) (Final Rule).

27 *Kelly v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994).

28 After the court decision, EPA and the U.S. Department of Justice (DOJ) issued the "Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily" (September 22, 1995), which stated that the EPA and DOJ were not precluded from following the provisions of the rule as enforcement policy. *See also* "Revitalizing Contaminated Site: Addressing Liability

Concerns – The Revitalization Handbook" (May 2008), hereinafter referred to as "EPA Revitalization Handbook."

29 Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, Pub. L. No. 104-208, 110 Stat. 3009-462.

30 42 U.S.C. §§ 9601(20)(E)(i), 9601(20)(G)(iv).

31 42 U.S.C. § 9601(20)(F)(i).

32 42 U.S.C. § 9601(20)(F)(ii).

33 42 U.S.C. § 9601(20)(F)(iv); *see also* "CERCLA Lender Liability Exemption: Updated Questions and Answers" (July 2007). Further discussion of such excluded activities is provided in Section III *Practical Considerations for Lenders* below.

34 42 U.S.C. § 9601(20)(E)(ii).

35 42 U.S.C. §§ 9607(b)(3), 9601(35)(A)(i).

36 http://www.epa.gov/swerosps/rcrabf/pdf/memoppa.pdf

37 US EPA Memorandum, "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) (hereafter referred to as "EPA Common Elements Guidance"), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf.

38 42 U.S.C. §§ 9607(r) & 9601(40). BFPPs should be aware of the "windfall lien" provision in the Brownfields Amendments which permits EPA to recover from the BFPP the increase in the property's value attributable to the government's cleanup actions. 42 U.S.C. § 9607(r); See U.S. EPA, "Windfall Lien Administrative Procedures" and "Model Notice of Intent to File a Windfall Lien Letter," (January 8, 2008), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/wf-admin-mem.pdf.

39 EPA provided such landowners some measure of protection in its 1996 "Final Policy Toward Owners of Property Containing Contaminated Aquifers." Not only did EPA state that it would not require cleanup or the payment of cleanup costs if the landowner did not cause or contribute to the contamination, it also stated that if a third party sued or threatened to sue, EPA would consider entering into a settlement with the landowner covered under the policy to prevent third-party damages being awarded. http://www.epa.gov/swerosps/bf/pdf/aquifer.pdf. See also US EPA "Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners" (January 13, 2004), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf.

40 Section 107(q)(1)(C) of the Brownfields Amendments provide that a person who cannot qualify as a CPO because contamination is known or discovered during the AAI phase may still qualify for landowner liability protection as a BFPP, as long as the BFPP criteria in 42 U.S.C. § 101(4) are met.

41 If contamination is discovered and exists on the ILOs property, then this liability protection is not available. However, this category may help owners of contaminated property who purchased property prior to 2002 and had no knowledge of contamination who cannot not otherwise take advantage of the BFPP protection (which only covers post-2002 acquisitions).

42 US EPA Memorandum, "Enforcement Discretion Guidance Regarding the Applicability of the [BFPP] Definition in CERCLA § 101(40) to Tenants" (January 14, 2009).

43 *Id*. at 2.

44 *Id*. at 4. The implications of the second situation are significant – the tenant has no independent duty to carry out the BFPP requirements as long as the owner is doing so. Even if the owner loses BFPP status (through no fault of the tenant), EPA may still exercise its enforcement discretion not to pursue a tenant as a responsible party under the Superfund laws.

45 CAL. HEALTH & SAFETY CODE §§ 25395.60 *et seq*. Although CLRRA is scheduled for repeal on January 1, 2010, a bill has been introduced to make these liability protections permanent. *See* SB 143 (Cedillo).

46 CAL. HEALTH & SAFETY CODE § 25395.81.

47 *Id.* § 25395.79.2.

48 *Id.* § 25395.98.

49 *Id.* §§ 33459 *et seq*.

50 *Id.* § 33459.1.

51 *Id.* § 33459.3(e)(2)-(4).

52 *Id.* §§ 25260 *et seq*.

53 *Id.* § 25262.

54 *Id.* § 25264(c).

55 42 U.S.C. § 9601(20)(F); CAL. HEALTH & SAFETY CODE § 25548.1(k).

56 *Id.*

57 *Id.*

58 42 U.S.C. § 9601(20)(G)(v); CAL. HEALTH & SAFETY CODE § 25548.1(k)(2)(A).

59 42 U.S.C. § 9601(20)(G)(ii); CAL. HEALTH & SAFETY CODE § 25548.1(k)(2)(B).

60 Environmental assessments are normally performed in phases. A Phase I assessment is noninvasive (*i.e.*, no drilling and sampling) and generally relies on a visual inspection of the property and research (through interviews and records reviews) of the environmental history of the subject and surrounding properties. As noted below in Section IV.A, ASTM International developed ASTM E 1527-05 as a standard for performing Phase I ESAs. Depending on the results of the Phase I assessment, a more detailed and involved Phase II assessment may need to be performed to investigate the nature and extent of environmental contamination on the property. Such assessment may include drilling, sampling and testing of soil, installation and sampling of groundwater monitoring wells, and sampling and testing of vapor, indoor air and building materials.

61 EPA Standards & Practices, 40 C.F.R. § 312.20(a).

62 EPA Standards & Practices, 40 C.F.R. § 312.20(b).

63 CAL. HEALTH & SAFETY CODE § 25548.5(a)(1). Federal lender liability law does not define *commercially reasonable means*. A similar twelve-month period was cited by EPA in its former "Lender Liability Rule," which was promulgated in 1992 but vacated by a federal court in 1994. *See supra* notes 25 and 26.

64 CAL. HEALTH & SAFETY CODE § 25548.4(i).

65 CAL. HEALTH & SAFETY CODE § 25548.5(b).

66 CAL. HEALTH & SAFETY CODE § 25359.7(a).

67 *See* EPA's Lender Liability Rule, 57 Fed.Reg. 18379.

68 42 U.S.C. § 9601(35)(B).

69 "Standards and Practices for All Appropriate Inquiries," 70 Fed. Reg. 66070, 66086 (Nov. 1, 2005) (Final Rule). The

rule is lengthy and articulates a number of specific activities required to meet the AAI standard. EPA has a number of memoranda and guidance documents to help navigate through the AAI Rule. See, e.g., http://www.epa.gov/brownfields/aai/aai_final_factsheet.pdf; http://www.epa.gov/fedrgstr/EPA-WASTE/2005/November/Day-01/f21455.htm.

70 *Id.*

71 *Id.*at 66081.

72 Standard Practice for Assessment of Vapor Intrusion into Structures on Property Involved in Real Estate Transactions, ASTM Designation: ASTM Designation E2600-08.

73 EPA Common Elements Guidance, see *supra* note 35.

74 EPA Common Elements Guidance, see *supra* note 35, Attachment C, for a sample Federal Superfund Reasonable Steps Letter.

75 EPA has expressed willingness to execute PPAs where project completion is jeopardized, substantial public benefits exists, jobs are created, long blighted, under-utilized property is revitalized, or environmental justice is served. EPA's Revitalization Handbook, see *supra* note 35 at 23-25.

76 DTSC Fact Sheet, "Brownfields Initiatives" (Jan. 2007), *available at* http://www.dtsc.ca.gov/SiteCleanup/Brownfields/upload/BF_Initiative.pdf.

77 DTCS Fact Sheet, "California Land Reuse and Revitalization Act of 2004" (May 2006), *available at* http://www.dtsc.ca.gov/SiteCleanup/Brownfields/upload/Brownfields-CLRRA_FS.pdf. As previously noted in footnote 43, CLRRA will be repealed on January 1, 2010, although a bill has been introduced to make these liability protections permanent. See SB 143 (Cedillo).

78 DTSC Fact Sheet, "Prospective Purchaser Program" (Dec. 2004), *available at* http://www.dtsc.ca.gov/SiteCleanup/Brownfields/upload/BF_FS_ProspectivePurchaser_11-04.pdf.

79 DTSC Guidance, "Questions and Answers for AB2061" (last updated Nov. 14, 2003), *available at* http://www.calepa.ca.gov/legislation/1996/ab2061.htm.

80 DTSC Guidance, "Voluntary Cleanup Program" (May 2006), *available at* http://www.dtsc.ca.gov/SiteCleanup/Brownfields/upload/Brownfields-VCP_FS.pdf.

81 Additionally, the availability of such insurance products are highly dependent on site-specific conditions, including the nature and extent of contamination conditions, remedial work being performed (if any), the contractor performing such work, to name a few.

82 EPA Revitalization Handbook, see *supra* note 26 at 37-40.

83 http://www.epa.gov/renewableenergyland/; http://subscript.bna.com/pic2/eddg.nsf/id/BNAP-7PFMR7?OpenDocument;http://www.nemw.org/bfnews0902.pdf (see item 2); http://www.landpolicy.msu.edu/modules.php?name=News&op=viewlive&sp_id=77.

84 http:/epa.gov/brownfields/eparecovery/index.htm

85 http:/epa.gov/brownfields/pilot.htm;http://epa.gov/brownfields/assessment_grants.htm.

86 http://www.epa.gov/oust/rags/pbgrants.htm.

87 http://www.waterboards.ca.gov/water_issues/programs/ustcf/docs/claim_application_forms/ustcf_claimantnotice012809.pdf.

88 http://www.waterboards.ca.gov/water_issues/programs/ustcf/oscf.shtml.

CRPJ MCLE Test No. 16 (Vol. 27, No. 2)
TURNING BROWN INTO GREEN: PRACTICAL CONSIDERATIONS FOR LENDERS AND BUYERS OF CONTAMINATED PROPERTY IN A RED ECONOMY

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After reading the article *Turning Brown Into Green: Practical Considerations For Lenders and Buyers of Contaminated Property In A Red Economy* complete the following test to receive 1.00 hour of MCLE credit. Please mark all answers on the sheet provided. The Real Property Law Section of the State Bar of California certifies that this activity is approved for and will earn 1 hour of MCLE credit.

1. True/False: The State or Federal Government can recover hazardous material cleanup costs from an owner of a contaminated property for releases of hazardous substances that occurred before its ownership.

2. True/False: President Obama, by signing the American Recovery and Reinvestment Act of 2009, authorized lots of new federal money for you and your clients to use to redevelop contaminated properties.

3. True/False: The Federal government, rather than the States, typically takes the lead in overseeing hazardous materials clean-ups.

4. True/False: By agreeing to undertake a specified environmental assessment of contaminated property prior to acquisition, and to meet certain conditions associated with redevelopment of a contaminated site after acquisition, purchasers can immunize themselves from hazardous materials liability at the federal and state level.

5. True/False: "CERCLA" is California's version of the U.S. Federal Superfund law.

6. True/False: To be a brownfields site, the contamination at the property must originate from an off-site source.

7. True/False: Both Federal and California Superfund laws are based on strict liability rather than on liability for actual causation.

8. True/False: A "PRP" is a criminal.

9. True/False: A lender who forecloses on contaminated property may have liability under Superfund laws.

10. True/False: Despite the many California agencies and programs designed to encourage cleanup of Brownfield sites, a property owner can get one agency to oversee the cleanup, thereby avoiding other agencies from taking cleanup-related action against the owner.

11. True/False: The Secured Creditor Exemption available under the Superfund laws provides all lenders with a safe harbor from potential environmental liability that would otherwise arise if and when the lenders foreclose on contaminated properties.

12. True/False: A lender's periodic monitoring or inspecting (*e.g.*, through environmental auditing) of the borrower's facility to assess the borrower's environmental compliance and whether there are any threatened or actual environmental releases can give rise to a lender's liability for contamination.

13. True/False: A lender providing advice to a borrower on environmental matters gives rise to a lender's liability for contamination.

14. True/False: Because prudent lenders will obtain Environmental Site Assessments ("ESA") when originating real property secured loans, they can quickly foreclose without having to wait to obtain a pre-foreclosure ESA.

15. True/False: EPA's All Appropriate Inquiries ("AAI") Rule permits a prospective property owner to use a Phase I ESA if all information was collected and updated within 180 days before the buyer acquires the contaminated property, even if the ESA was prepared for the seller or another third party and not for the buyer.

16. True/False: Insurance products are available to protect property owners from hazardous materials liability.

17. True/False: By having a Receiver appointed to manage the property, a lender can avoid hazardous materials liability on account of activities occurring during the Receiver's tenure.

18. True/False: If a lender can't sell the property it foreclosed on for over a year, it loses its secured creditor defense.

19. True/False: Adequate remediation of a Brownfields site may involve leaving some level of hazardous material contamination in place on the site.

20. True/False: Any Phase I ESA from a qualified, reputable, and unaffiliated company will constitute AAI by a buyer.

MCLE Test Instructions -- Test No. 16 (Vol. 27, No. 2)

This MCLE test is a free benefit for members of the Real Property Law Section of the State Bar of California. In order to receive credit, you must submit this original Answer Sheet from the *California Real Property Journal*. Photocopies of the test and answers are not permitted.

Please read and study the MCLE article in this issue of the *California Real Property Journal.* Then answer the questions by marking "true" or "false" next to the appropriate number on the answer sheet below. There is only one correct answer to each question.

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You may wish to retain a copy of the test for your records. Within approximately eight weeks, the Real Property Law Section will return your answers via email. This MCLE Test is valid for one year from the date of publication; Issue 1—March 31; Issue 2—June 30; Issue 3—September 30; Issue 4—December 31.

ANSWER SHEET TO CRPJ MCLE TEST NO. 16

1. _____**True** _____**False**
2. _____**True** _____**False**
3. _____**True** _____**False**
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