

BULLETIN

If You Buy, Own or Lease Real Property, Please Be Aware That:

by Ervin, Cohen & Jessup LLP

On January 11, 2002, President Bush signed into law the "Small Business Liability Relief and Brownfields Revitalization Act," which significantly amends the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), popularly known as the Superfund law. The Act will profoundly affect owners, purchasers and developers of contaminated and potentially contaminated property. Major changes in the Superfund law include the following:

1. Bona Fide Prospective Purchasers. The Act revises the prior exemption afforded bona fide or "good faith" purchasers from CERCLA liability if they meet certain requirements, including if they (i) conduct appropriate environmental due diligence; (ii) have not caused or contributed to the release of hazardous substances; (iii) take steps to contain, stop and/or prevent releases; and (iv) cooperate with response efforts. Contaminated property owned by an exempt bona fide purchaser may become subject to a statutory environmental lien to secure the repayment of certain clean up ("response") costs if the response increases the fair market value of the property.
2. "Innocent Owner" Defense. The Act clarifies the "innocent owner" liability defense, which protects an owner of contaminated property where the owner had nothing to do with the presence of contamination on the property. To qualify for the defense, a property owner must have conducted appropriate environmental due diligence at the time of the purchase. However, the Act adds a potentially troublesome requirement: the property owner must take affirmative steps to contain, stop and/or prevent releases of hazardous substances to preserve the defense.
3. Due Diligence Standards. The Act requires the EPA to establish the due diligence standards and practices with which purchasers and owners must comply to benefit from the bona fide purchaser and innocent owner liability exemptions. Meanwhile, the procedures set forth by the American Society for Testing and Materials, including its "Standards Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process" (ASTM E-1527-97), shall satisfy the due diligence requirements for property purchased after May 31, 1997. A facility inspection and title search that do not reveal any basis for further investigation shall satisfy the due diligence requirements for residential property purchased by a nongovernmental or noncommercial entity.
4. Owners of Property Adjacent to Contaminated Sites. The Act exempts from CERCLA liability owners of property that becomes contaminated solely by the migration of hazardous substances from neighboring sites if the owner meets nearly the same requirements as bona fide purchasers, including environmental due diligence. Significantly, the Act authorizes the EPA to issue assurances to innocent property owners that enforcement will not be initiated and to grant protection against a CERCLA cost recovery or contribution action brought by a third party.

KOREK LAND COMPANY, INC.

15230 BURBANK BLVD., SUITE 101 ❖ SHERMAN OAKS, CA 91411 ❖ (818) 787-3077 ❖ FAX (818) 787-9677
www.korekland.com ❖ mail@korekland.com

5. Brownfields. The Act creates a grant mechanism through which state, local and other government entities may characterize and assess brownfields sites and loan funds to property owners and developers to remediate brownfields sites.

In summary, the Act is a significant, substantive amendment to CERCLA. Purchasers, owners, and developers of contaminated and potentially contaminated property should consult with legal counsel to obtain the benefits of and ensure compliance with the Act and forthcoming EPA regulations.

Written by Roger J. Holt, Esq., Nicolas K. Kublicki, Esq., and Benjamin S. Lehrer, Esq. of Ervin, Cohen & Jessup LLP. For more information, Mr Holt can be reached at (310) 281-6318 or rholt@ecjlaw.com, Mr. Kublicki can be reached at (310) 281-6312 or nkublicki@ecjlaw.com, and Mr. Lehrer can be reached at (310) 281-6392 or blehrer@ecjlaw.com.

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