on the ability of communities to develop or redevelop property.

EPA is issuing this policy to address the concerns raised by owners of property to which contamination has migrated in an aquifer, as well as lenders and prospective purchasers of such property. The intent of this policy is to lower the barriers to transfer of such property by reducing uncertainty regarding the possibility that EPA or third parties may take actions against these landowners.

B. Existing Agency Policy

This policy is related to other guidance that EPA has issued. The Agency has previously published guidance on issues of landowner liability and *de minimis* landowner settlements.[6] Moreover, in other EPA policies, EPA has asserted its enforcement discretion in determining which parties not to pursue.[7]

C. Basis for the Policy

1. The Section 107(b)(3) Defense

Section 107(a)(1) of CERCLA imposes liability on an owner or operator of a ''facility'' from which there is a release or threatened release of a hazardous substance.[8] A ''facility'' is defined under Section 101(9) as including any ''area where a hazardous substance has * * * come to be located.'' The standard of liability imposed under Section 107 is strict, and the government need not prove that an owner contributed to the release in any manner to establish a *prima facie* case.[9] However, Section 107(b)(3) provides an affirmative defense to liability where the release or threat of release was caused solely by ''an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant * * *'' In order to invoke this defense, the defendant must additionally establish, by a preponderance of the evidence, that ''(a) he exercised due care with respect to the hazardous substance concerned taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.'' 42 U.S.C. § 9607(b)(3).

a. *Due Care and Precautions.* An owner of property may typically be unable to detect by reasonable means when or whether hazardous substances have come to be located beneath the property due to subsurface migration in an aquifer from a source or sources outside the property. Based on EPA's interpretation of CERCLA, it is the Agency's position that where the release or threat of release was caused solely by an unrelated third party at a location off the landowner's property, the landowner is not required to take any affirmative steps to investigate or prevent the activities that gave rise to the original release in order to satisfy the ''due care'' or ''precautions'' elements of the Section 107(b)(3) defense.

Not only is groundwater contamination difficult to detect, but once identified, it is often difficult to mitigate or address without extensive studies and pump and treat remediation. Based on EPA's technical experience and the Agency's interpretation of CERCLA, EPA has concluded that the failure by such an owner to take affirmative actions, such as conducting groundwater investigations or installing groundwater remediation systems, is not, in the absence of exceptional circumstances, a failure to exercise ''due care'' or ''take precautions'' within the meaning of Section 107(b)(3).

The latter conclusion does not necessarily apply in the case where the property contains a groundwater well and the existence or operation of this well may affect the migration of contamination in the affected aquifer. In such a case, application of the ''due care'' and ''precautions'' tests of Section 107(b)(3) and evaluation of the appropriateness of a *de minimis* settlement under Section 122(g)(1)(B) require a fact-specific analysis of the circumstances, including, but not limited to, the impact of the well and/or the owner's use of it on the spread or containment of the contamination in the aquifer. Accordingly, this Policy does not apply in the case where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected aquifer. In such a case, however, the landowner may choose to assert a Section 107(b)(3) defense, depending on the case specific facts and circumstances, and EPA may still exercise its discretion to enter into a Section 122(g)(1)(B) *de minimis* settlement.

b. *Contractual Relationship.* The Section 107(b)(3) defense is not available if the act or omission causing the release occurred in connection with a direct or indirect contractual relationship between the defendant and the third party that caused the release. Under Section 101(35)(A) of CERCLA, a ''contractual relationship'' for this purpose includes any land contract, deed, or instrument transferring title to or possession of real property, except in limited specified circumstances. Thus, application of the defense in the circumstances addressed by this Policy requires an examination of whether the landowner acquired the property, directly or indirectly, from a person that caused the original release. An example of this scenario would be where the property at issue was originally part of a larger parcel owned by the person that caused the release. If the larger parcel was subsequently subdivided, and the subdivided property was eventually sold to the current landowner, there may be a direct or indirect ''contractual relationship'' between the person that caused the release and the current landowner.

Even if the landowner acquired the property, directly or indirectly, from a person that caused the original release, this may or may not constitute a ''contractual relationship'' within the meaning of Section 101(35)(A), precluding the availability of the Section 107(b)(3) defense. Land contracts or instruments transferring title are not considered ''contractual relationships'' if the land was acquired after the disposal or placement of the hazardous substances on, in or at the facility under Section 101(35)(A) and the landowner establishes, pursuant to Section 101(35)(A)(i), that, at the time of the acquisition, the landowner ''did not know and had no reason to know that any hazardous substance which is the subject of the release * * * was

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[6] See Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, *supra* note 2. This guidance analyzes the language in Sections 107(b)(3) and 122(g)(1)(B) of CERCLA.

[7] See, e.g., Policy Towards Owners of Residential Property at Superfund Sites, OSWER Directive #9834.6, (July 3, 1991) (hereinafter ''Residential Property Owners Policy'') (stating Agency policy not to take enforcement actions against an owner of residential property unless homeowner's activities led to a release); National Priorities List for Uncontrolled Hazardous Waste Sites, 60 FR 20330, 20333 (April 25, 1995). In this notice the Residential Property Owners Policy was applied to ''* * * residential property owners whose property is located above a groundwater plume that is proposed to or on the NPL, where the residential property owner did not contribute to the contamination of the site.'' See also, Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Waste, OSWER Directive No. 9834.13, (December 6, 1989).

[8] EPA has taken the position that lessees may be ''owners'' for purposes of liability. See Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements, *supra* note 2, footnote 10.

[9] See, *e.g., U.S.* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989)(''CERCLA contemplates strict liability for landowners'').