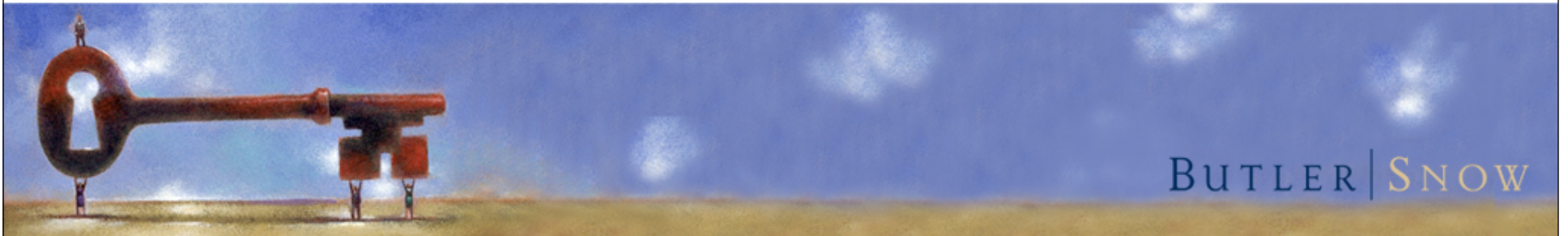


# Liability Protection for Buying Dirty Dirt

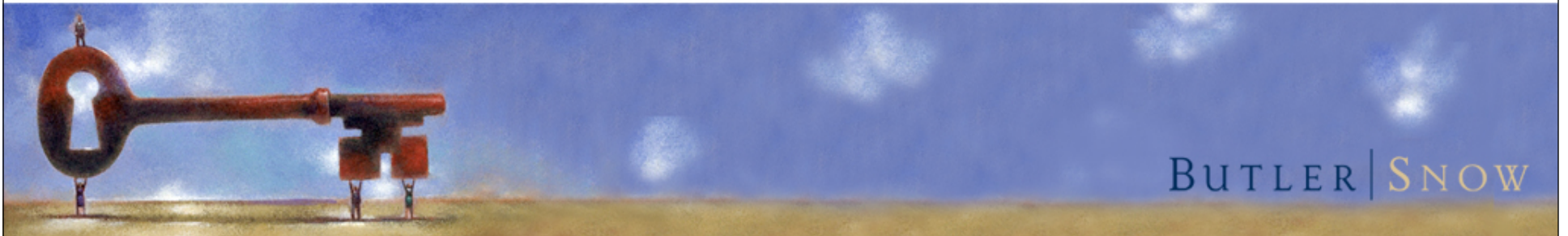
Presented by Michael Caples  
Delta Brownfield Redevelopment Workshop  
April 2, 2015



BUTLER | SNOW

# Land Contamination Laws

- Federal
  - CERCLA or Superfund
    - Strict Liability
    - Joint and Severable Liability
  - RCRA
  - Clean Water Act
  - TSCA



# Land Contamination Laws

- **Mississippi**

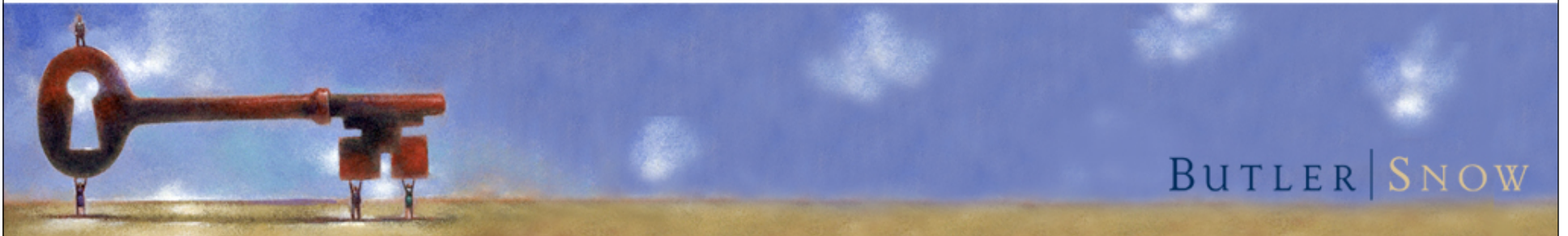
- §49-17-29 (1)(a) and (2)(a)
  - Illegal to cause pollution of air or waters of the state
  - All groundwater is owned by the State of Mississippi
- §49-17-43 (3)
  - Any person who violates rule or regulation and causes the death of fish or other wildlife shall be liable in addition to any penalty for the cost to restock the fish or wildlife.
- §49-17-43 (4)
  - Any person who owns or operates facility, through misadventure, happenstance or otherwise cause pollution necessitating immediate remedial or clean-up action shall be liable for the cost of such clean-up.
- §49-17-601
  - Illegal for the generation of hazardous waste in the manufacture of a controlled substance
  - Felony with up to 30 years prison and fined \$5,000 to \$1,000,000.



# Environmental Liability

- The Who

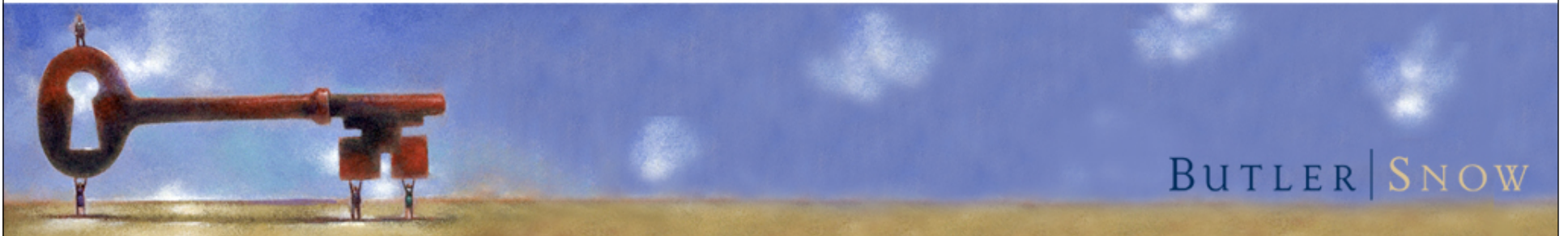
- The owner or operator of a vessel or facility
- Any person who at time of disposal was the owner or operator
- Arranges, anyone who by contract, agreement or otherwise arranged for the disposal or treatment
- Transporter – anyone who accepts or accepted any hazardous substance for transport to disposal or treatment facility



# Environmental Liability

- The What

- All costs for removal or remedial actions by the US, state or Indian tribe
- Any other necessary cost of response
- Damages for injury to, destruction of, or loss of natural resources
- The cost of any health assessments or health effect study
- Shall include interest from date of expenditure



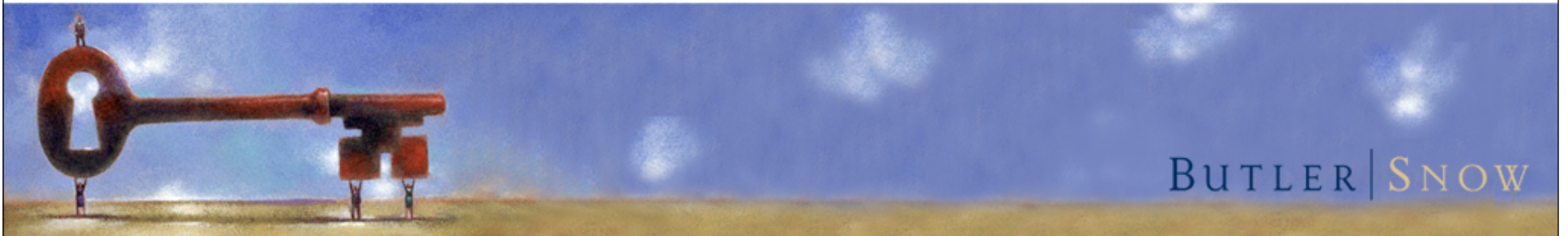
# Environmental Liability Protections

- The Defenses
  - Act of God
  - Act of War
  - Act or omission of a third party
    - No relationship between parties
    - Must exercise due care
    - Must take precautions against foreseeable acts or omissions
  - Rendering Care or Advise
  - State or local government as a result of actions taken in response to an emergency



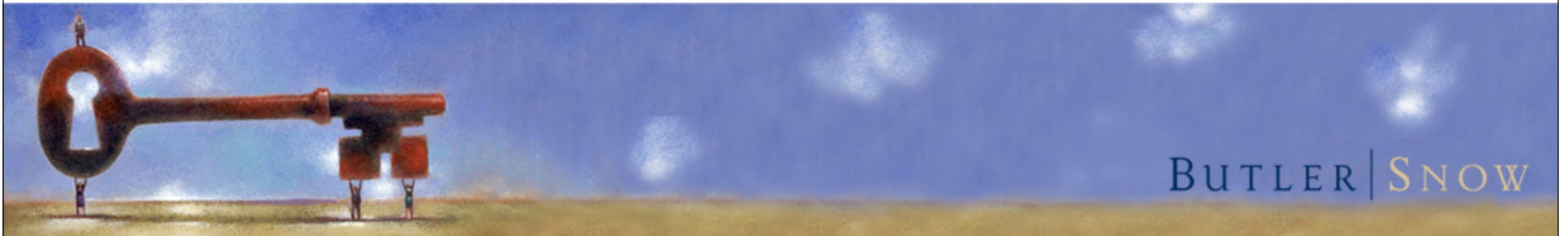
# Environmental Liability Protections

- CERCLA Liability Protections
  - Innocent Landowner
  - Bona Fide Prospective Purchaser
  - Contiguous Property Owner



# Environmental Liability Protections

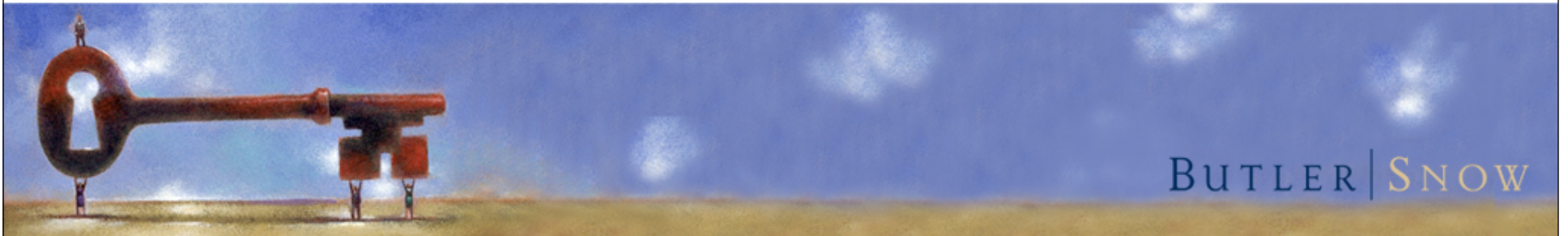
- Common Elements of Liability Projection
  - Must show “all appropriate injury” was done
    - Must conduct a proper Phase 1
  - Must have no knowledge or reason to know that any hazardous substance was disposed on at the property
  - Must take reasonable steps to stop continuing releases, prevent any threatened release and prevent or limit human, environmental or natural resource exposure





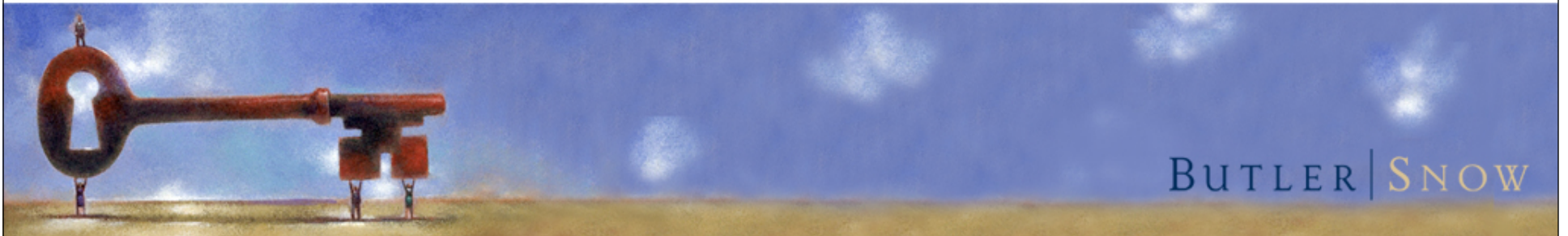
# Environmental Due Diligence

- **Bona Fide Prospective Purchaser**
  - Provides protection from CERCLA Liability and limit's EPA recourse for unrecovered response costs to a lien or the increase in fair market value attributable to EPA's cleanup.



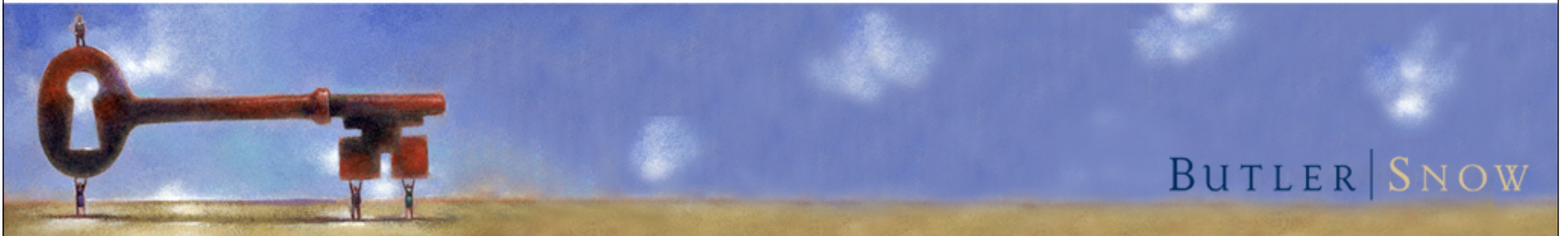
# Environmental Liability Protections

- **Bona Fide Prospective Purchaser**
  - Must have bought the property after January 11, 2002
  - Must have acquired the property after all disposal has ceased
  - Must provide legal notices once discover the contamination
  - Must exercise due care to stop a release, prevent a future release and prevent or limit human and environmental exposure



# Environmental Liability Protections

- Continuing Obligations
  - Must provide full cooperation, assistance and access to the property for cleanup activities
  - Must comply with any land restriction established in connection with the cleanup
  - Cannot impede the integrity of institutional controls
  - Must comply with ongoing operation compliance



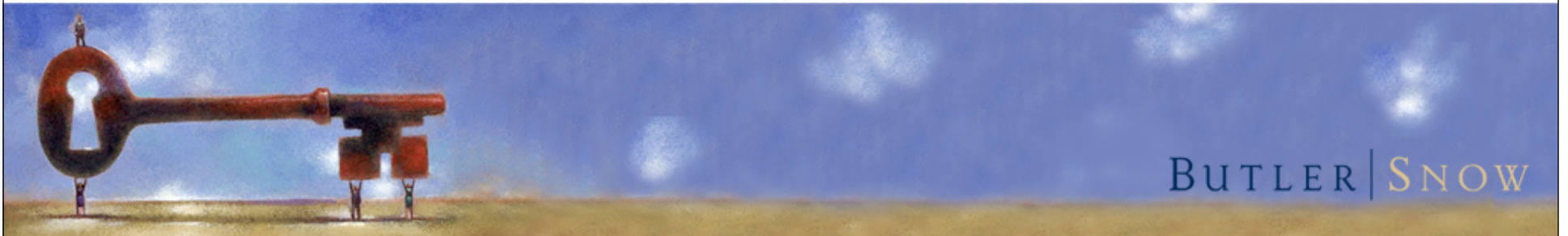
## Environmental Liability Protections

- Ashley II of Charleston, LLC v PCS Nitrogen, Inc, 791 F.Supp. 2d 431 (D.S.C. 2011).
- Court held that purchaser failed to follow recommendation in the Phase I and therefore did not completely satisfy the requirements of a Bona Fide Purchaser.



# Environmental Liability Protections

- Lender Liability Protection
  - Federal Protection - 42 U.S.C. 9601 (20)(E)
  - State Protection - Mississippi Code §49-17-42
    - A person who holds or acquires property as protection of security interest and does not participate in the management of the facility is not liable for environmental cleanup cost.
      - “Security Interest” – right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, lease or any other right accruing to a person to secure repayment of money, the performance of a duty, or any other obligation of a nonaffiliated person.



# Environmental Liability Protections

- Lender is
  - Insured depository institution
  - Insured credit union
  - Bank or association under Farm Credit Act
  - Leasing or Trust Company that is affiliated with insured depository institution
  - Any person that make a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person
  - A person that insures or guarantees against a default in the repayment or acts as a surety for a nonaffiliated person
  - A person who provides title insurance and that acquires property as a result of assignment or conveyance in the course of underwriting claims and claims settlements.

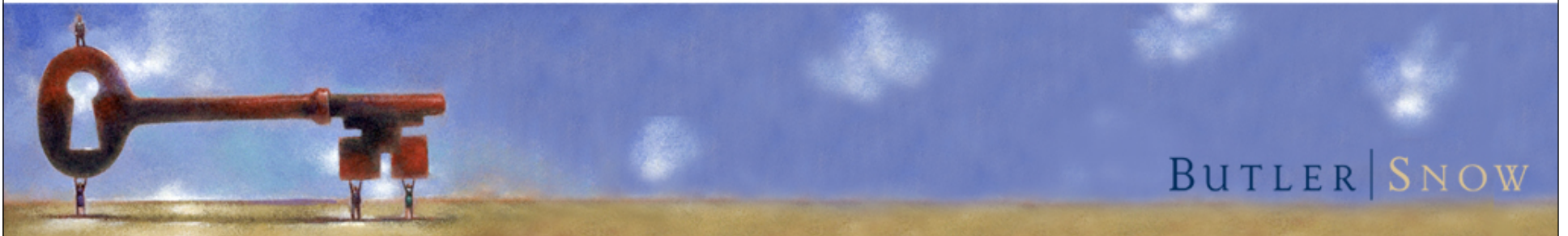


# Environmental Liability Protections

- Lender Foreclosure

- Foreclosure means

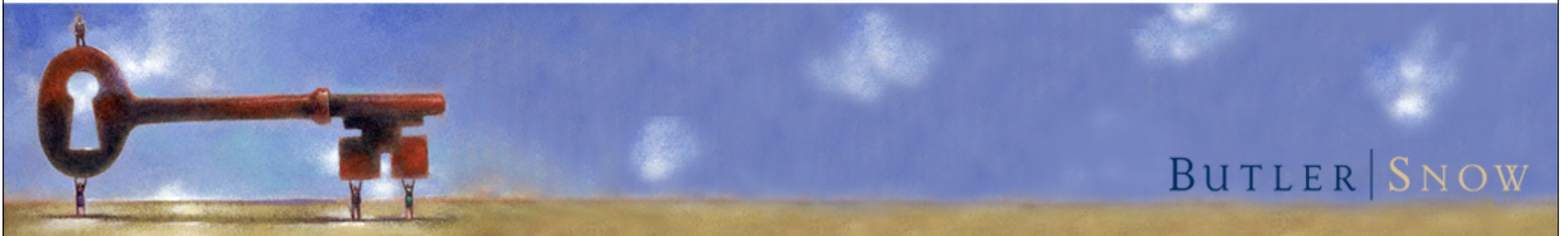
- Purchase at sale under judgment or decree
    - Power of sale
    - Nonjudicial foreclosure
    - Deed in lieu of foreclosure
    - Any similar conveyance from a trustee; or
    - Repossession



# Environmental Liability Protections

- Foreclosure Continued

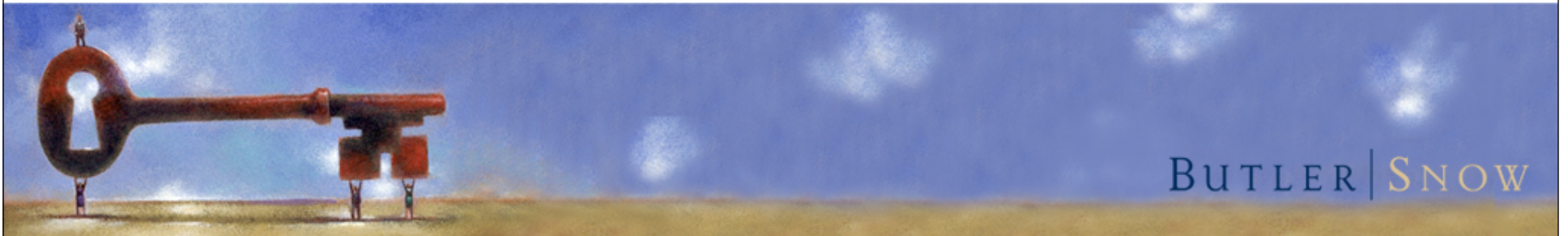
- Provided that
  - Take reasonable steps to divest the property at the earliest practicable, commercially reasonable time, on commercially reasonable terms taking into account market conditions
- Upon Foreclosure may
  - sell, lease, liquidate,
  - maintain business activities
  - Wind up operations
  - Undertake remedial actions
  - Take any measure to preserve, protect or prepare the property for sale.





# Environmental Liability Protections

- Mississippi Environmental Programs
  - Mississippi Voluntary Environmental Program (VEP)
  - Mississippi Brownfield Program
  - Mississippi Underground Storage Tank



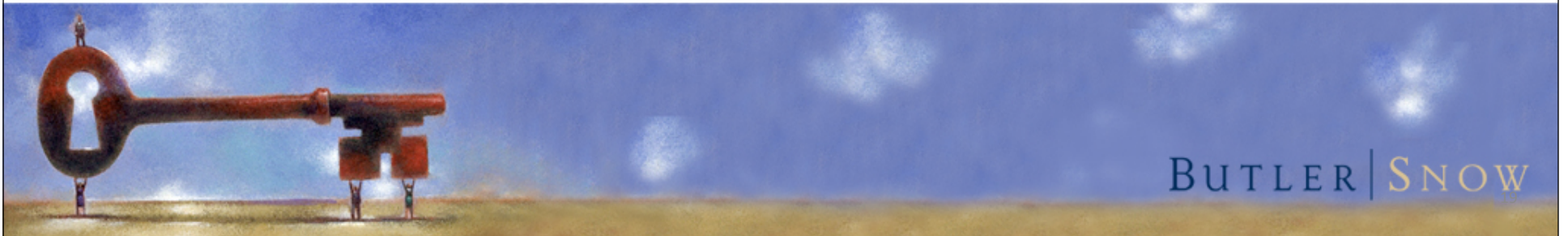
# Environmental Liability Protections

- What is a Brownfield?
  - Brownfield means any real property, the expansion, redevelopment or reuse of which may be complicated by the presence or **potential presence** of contamination.



# Mississippi Brownfields Voluntary Cleanup and Redevelopment Act Miss Code Ann §49-35-1

- VEP and Brownfield Program
  - Completely voluntary and can owner can withdraw at any time
  - Owner pays MDEQ for employees time and travel
  - Cleanup standards are same
  - Institutional controls can be used in both programs



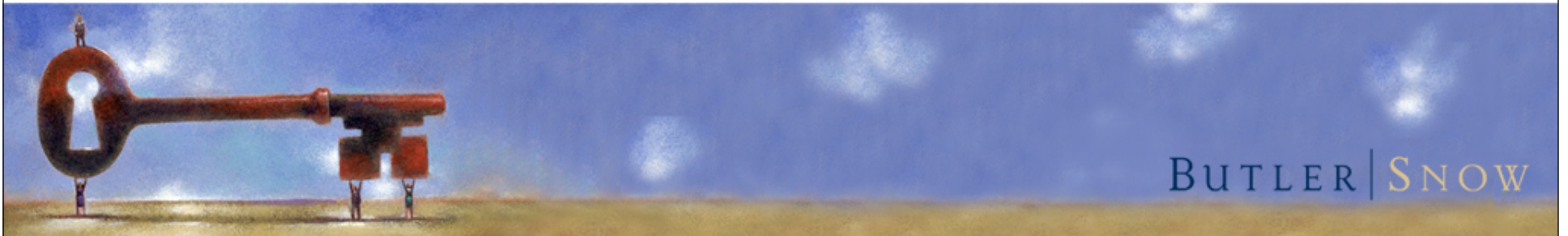
# Mississippi Brownfields Voluntary Cleanup and Redevelopment Act Miss Code Ann §49-35-1

- Brownfield Program
  - Requires and Agreed Order/ Brownfield Agreement with the Commission
  - Requires public notice, public comment period and potentially public hearing
  - Requires actual notification of all neighbors



Mississippi Brownfields Voluntary Cleanup  
and Redevelopment Act  
Miss Code Ann §49-35-1

- Liability Protection to
  - Current Owner or any Future Owner
  - Any person who develops, redevelops or lawfully occupies the property



# Underground Storage Tank Program

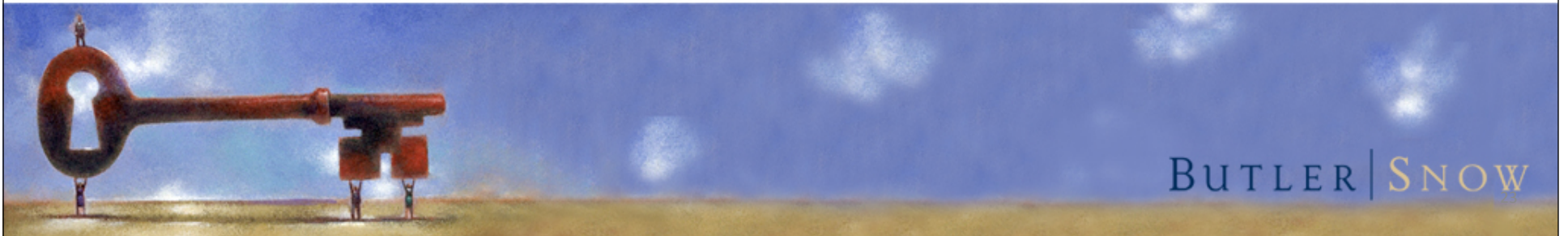
## Miss Code Ann § 49-17-401

- Groundwater Protection Fund
- Owner pay into the Fund
- Must maintain substantial compliance with program
- Fund reimburses Owners for investigation and remediation expenses up to \$1.5 million
- Third-party judgments up to \$1.0 million



# Caution

- “NO FURTHER ACTION LETTER”
- UST Cleanup Levels
  - 18 ppm vs 5 ppb



# Brownfield Sites

- CSX Gautier Oil Cleanup and Restoration Project – 2011 Region 4 Phoenix Award
- Former Pilot Travel Center on Highway 49 in Richland – Taylor Power Equipment
- Whirlpool in Oxford = the University of Mississippi
- Delta Biofuels in Natchez – Elevance Renewables
- Colle Towing in Pascagoula – Sigent Maritime Corporation
- Arizona Chemical in Picayune - the City of Picayune City Hall, Stockstall Construction Company
- One Hour Cleaning in Starkville
- Nashville-Ferry – Glenn Springs in Columbus

