



Congress Enacts Redevelopment-Friendly Changes to the Superfund Law, and Tenants and State and Local Governments Gain Clarity on How to Avoid Cleanup Liability

APRIL 4, 2018 | PUBLICATIONS

On March 23, 2018, the President signed into law the BUILD Act of 2018, which significantly clarifies the potential scope of cleanup liability for tenants and state and local governments under the federal Superfund law. Now, a tenant at an industrial or manufacturing site can, under appropriate circumstances, claim the “bona fide prospective purchaser” (BFPP) defense to Superfund liability and escape what would otherwise be strict, joint, and several owner/operator liability when leasing previously-contaminated property. The changes to the Superfund statute also expand the methods by which a state or local government can acquire title to contaminated property as a “sovereign” function – through tax delinquency, abandonment, bankruptcy, seizure by law enforcement, or other similar circumstances – and yet not be treated as the owner or operator of that property for Superfund liability purposes.

The recent developments stem from enactment of the omnibus spending bill (officially, the “Consolidated Appropriations Act of 2018”). The omnibus spending bill includes at Division N a section known as the BUILD Act (officially, the “Brownfields Utilization, Investment, and Local Development Act of 2018”), which amends certain sections of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA,” a/k/a the Superfund law), 42 U.S.C. §9601 *et seq.*

In addition to the clarifying language for tenants and state and local governments, the BUILD Act further provides that even a “liable” state or federal government may receive grants or loans for inventory, characterization, assessment, planning, or remediation activities at publicly owned Brownfields sites, despite acquiring the site prior to January 11, 2002 (the date Congress enacted the original BFPP and Brownfield site law) or being otherwise disqualified from BFPP status, so long as it neither caused nor contributed to a release or threatened release of hazardous substances at the Brownfields site. The BUILD Act also extends and expands funding for the federal Brownfields program, increases the types of entities who can receive Brownfields grant and loan funds, and adds “orphan” sites contaminated with petroleum to the listing of sites that can be redeveloped using Brownfields grant or loan funds.

Specific details about, and summaries of, the BUILD Act’s impacts appear below.

A. A new BFPP defense for tenants.

The bona fide prospective purchaser defense to Superfund liability is described at CERCLA Section 101(40). As anyone who has purchased commercial real estate in the last thirty years knows, to claim the BFPP defense a potential buyer must perform an “all appropriate inquiry” due diligence investigation into the current and past uses of the property before taking title. These activities take the form of a Phase I Environmental Site Assessment and, if completed pre-acquisition, serve as the base of the BFPP safe-harbor defense to environmental cleanup liability even if the property is shown (then or later) to be contaminated. For more details on the Phase I process and the requirements for claiming the BFPP defense, see [Top 10 Things You Need to Know About Phase I Environmental Site Assessments](#).

The BFPP definition has long included the parenthetical phrase “(or a tenant of a person)” in the opening description of who can claim the BFPP defense. But CERCLA did not otherwise specify what rights or responsibilities a tenant

AUTHORS

- [Kathleen M. Whitby](#)

RELATED PRACTICES

- [Environmental Law](#)

RELATED PUBLICATIONS

- [Avoiding Cleanup Liability for Industrial and Commercial Properties Under New Kansas Law](#)
- [CERCLA Will Not Save a Toxic Tort Claim which is Barred by a State Statute of Repose](#)
- [EPA Issues Guidance Encouraging Greener Cleanup Activities](#)

BLOG TOPICS

- [Environmental and Energy Law Solutions](#)

had concerning the BFPP defense, separate and apart from the rights and responsibilities of the property owner / landlord.

The BUILD Act amends Section 101(40) to fill that void by adding language to the statute which creates two options for tenants to use in proving up a BFPP defense. First, a tenant can assert the defense derivatively, by showing that the property owner / landlord satisfied all the elements needed to establish and keep the defense (making an all appropriate inquiry investigation, then taking post-closing due care for any hazardous substances found at the site, providing cooperation, assistance, and access for any environmental cleanup response actions or natural resource restoration activities, answering subpoenas or information requests, and maintaining institutional controls). This derivative BFPP defense can be sustained by the tenant even if the landlord subsequently loses the landlord's own entitlement to the defense, so long as that loss was not the result of anything the tenant did or failed to do. Section 101(40)(A)(i).

Second, a tenant now also has its own direct BFPP defense, which it can create by performing its own all appropriate inquiry before signing the lease or occupying the property, and then continuing to meet the same post-occupancy due care and cooperation conditions as are required of property owner / landlords. Section 101(40)(A)(ii).

Moreover, leases are now included in the same exclusion from "contractual relationship" documents as are real property title transfer and financial security documents. Under CERCLA, a person who is "affiliated with" a potentially liable party cannot claim BFPP status, and a person can become "affiliated with" a potentially liable party simply by entering into a contract with that party. The original BFPP section of CERCLA specifies that being named in a property's title transfer or financial security documents (*i.e.*, deeds, mortgages, deeds of trust, etc.) does not create an "affiliated with" relationship to others in the property's chain of title. The BUILD Act adds tenancies and leases to the types of contractual relationships that are excluded from creating an "affiliated with" status. This means that a tenant who establishes its own BFPP defense will not be disqualified from asserting that defense, and so itself become potentially liable for cleanup work at a property, just because it signs a lease with a potentially liable landlord. Section 101(40)(B)(viii)(l)(bb).

B. Fewer limits on government property acquisitions.

Section 101(20) of CERCLA defines who is (and is not) an "owner" or "operator" under the Superfund law. This is a key consideration, because current owners and operators of real property have strict, joint, and several liability under CERCLA Section 107(a) for performing or paying for cleanup costs when the property is contaminated with hazardous substances. That owner/operator definition has long excluded state and local government entities when they acquire property "involuntarily," and even lists several categories of such "involuntary" methods of acquisition. Section 101(20)(D).

The BUILD Act makes two changes to this governmental exclusion from owner/operator status. First, the Act deletes "involuntarily" from the statute, although any acquisition must still be "by virtue of" a government's "function as sovereign." Second, the BUILD Act adds at least one, and perhaps two, new acquisition methods by inserting "seizure or otherwise in connection with law enforcement activity" onto the list, which previously included tax delinquency, abandonment, bankruptcy, and "other similar circumstances." *Id.*

C. More Brownfields Site funding is available to more types of entities.

The BUILD ACT has more good news for state and local governments, Alaska Native villages and Native Corporations, and non-profits entities. It removes any requirement that a governmental owner must qualify as a BFPP in order to receive a federal Brownfields grant or loan, so long as the public owner "has not caused or contributed to a release or threatened release of a hazardous substance at the property." It gives relief from owner/operator status to Alaska native entities who take title to property pursuant to the Alaska Native Claims Settlement Act. And it makes certain types of non-profit and community development entities eligible for Brownfields grants and loans for the first time.

Finally, the BUILD Act makes a myriad of other redevelopment-friendly changes to the federal Brownfields Site grant and loan program by:

- adding orphan (no potentially responsible party) petroleum-contaminated sites to the list of funding-eligible categories of Brownfield Sites;
- increasing the cap on Brownfields remediation grants from \$200,000 to \$500,000 (with a possible waiver to reach \$650,000);
- creating a multipurpose grant program with awards of up to \$1 million per recipient for owned Brownfields sites, and allowing multiple sites to be addressed together;
- removing the ban on using Brownfields funds for administrative costs and instead allowing up to 5% of a grant or loan to be so purposed;
- prioritizing grant applications for sites addressing water bodies or in flood plains, or which are suitable for renewable energy or energy efficiency projects; and
- funding a \$1.7 million / year small community technical assistance grant program, with a per-grant limitation of \$20,000.

CERCLA Section 104(k)(1)-(13). The Act renews a \$200 million / year appropriation for the Brownfields Site program for 2019-2023, and a \$50 million / year appropriation for the CERCLA Section 128(a) state response program during those same years.

The Superfund law's statutory provisions involving the BFPP defense, definitions of (and exclusions from) owner/operator status, and the operation of the Brownfields Site grant and loan program are all essential elements of modern real estate transactions, corporate risk analysis, and state and local government land use practice. If you have any questions about the BUILD Act or CERCLA, please contact a member of Spencer Fane's Environment and Energy Practice Group.

This post was drafted by [Kate Whitby](#), an attorney in the St. Louis, MO office of Spencer Fane LLP. For more information, visit spencerfane.com.