

BUILD Act Makes Two Major Changes to CERCLA

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In March 2018, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) was amended by the Brownfield Utilization, Investment, and Local Development Act of 2018 (“BUILD Act”). The Environmental Protection Agency (EPA) solicited comments on the BUILD Act through July 10, 2018 and recently incorporated the Act’s changes in its FY 2019 brownfields grants guidelines. The BUILD Act makes two major changes to CERCLA: it increases funding for brownfield redevelopment grants, and formally extends the bona fide prospective purchaser (BFPP) statutory defense to tenants of contaminated sites, which previously had been a policy of EPA. Applications for grants to address sites contaminated by hazardous substances, pollutants, or contaminants under the new BUILD Act guidelines are due to EPA by January 31, 2019.

The BUILD Act authorizes the appropriation of \$200 million per fiscal year through 2023 for brownfield revitalization efforts, and an additional \$50 million per year for state and tribal response programs. It also increases the maximum per-site grant amounts and expands grant eligibility to include non-profit 501(c)(3) entities. In addition, the BUILD Act incentivizes renewable energy development by prioritizing grant money to brownfield sites that plan to install renewable energy facilities.

Additionally, the BUILD Act extends the BFPP defense to tenants of brownfield sites whose leases began after January 11, 2002. The BUILD Act codifies three ways for tenants to claim BFPP status and thereby potentially escape joint, strict, and several liabilities arising from their occupation of brownfield sites. The tenant can either (1) establish that its landlord is a BFPP, by showing that the landlord completed the All Appropriate Inquiry (AAI) defined in CERCLA; (2) establish that the landowner completed the AAI, but later failed to comply with or complete the applicable requirements; or (3) establish that the tenant itself is a BFPP by completing the AAI prior to acquiring a leasehold interest (and maintaining compliance). If a tenant performs the required pre-lease due diligence and satisfies the applicable due care requirements during its lease term, the tenant will not be subject to operator liability under CERCLA.

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