

Expanding Incentives for Brownfield Redevelopment: What Has Changed?



The BUILD Act provides additional protections and enticements for brownfield redevelopments while prioritizing the development of renewable energy and energy-efficient projects.

By Giuliano Apadula and Grant E. Nichols | [September 20, 2018](#) | [The Legal Intelligencer](#)

The Brownfields Utilization, Investment and Local Development (BUILD) Act was enacted on March 23 as part of the Consolidated Appropriations Act of 2018. The BUILD Act provides additional protections and enticements for brownfield redevelopments while prioritizing the development of renewable energy and energy-efficient projects. While there are some notable updates to the U.S. Environmental Protection Agency's (EPA) existing Brownfields program, all of which are meant to encourage development of environmentally contaminated properties, the BUILD Act does not significantly alter the landscape for companies or individuals operating, purchasing or leasing contaminated properties.

Petroleum Brownfield Enhancement. Section 3 of the BUILD Act removes a hurdle for brownfield sites with petroleum contamination by allowing grants to assess and clean up petroleum contaminated sites that are not required to be remediated under other programs such as those for hazardous waste.

Lessees as Bona Fide Prospective Purchasers. Section 5 of the BUILD Act clarifies the definition of a bona fide prospective purchaser to include lessees of property who entered into a lease after Jan. 1, 2002, and who otherwise meet the requirements for the bona fide prospective purchaser defense. Although the

BUILD Act provides clarity toward lessees, it was previously expected that lessees could qualify as bona fide prospective purchasers, so this is not a significant change.

Expanded Eligibility for Nonprofit Organizations. Section 6 of the BUILD Act authorizes brownfield revitalization funding for nonprofit organizations, including nonprofit limited liability companies and community development organizations. In addition, publicly owned sites acquired prior to 2002 may apply for assessment and remediation grants even if such public entity does not qualify as a bona fide prospective purchaser, but only if the entity is not responsible for the contamination.

Increased Funding for Remediation Grants and Multipurpose Grants. The BUILD Act also increased the cleanup grant funding amount from \$200,000 to \$500,000 per site, and eligible entities may request a waiver to obtain \$650,000 per site based on the anticipated level of contamination and size of the site. The BUILD Act eliminates the current prohibition on administrative costs and allows grant recipients to use up to 5 percent of grant awards on administrative costs. Section 9 of the BUILD Act authorizes cleanup and assessment combination grants of up to \$1 million.

New Ranking Criteria. Section 11 of the BUILD Act adds several new ranking criteria focusing on renewable energy, energy efficient projects and revitalization of waterfront property, all of which will now be considered in evaluating grant applications.

Brownfields Funding and Technical Assistance Grants. The BUILD Act nearly doubles the annual funding previously available to \$200 million and authorizes a new grant program for states and tribes to provide training, technical assistance and research for small communities (less than 15,000 population), Indian tribes, rural areas and disadvantaged areas (maximum of \$20,000 per community).

From a risk management perspective, the BUILD Act does not fundamentally alter the liability protections under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), but simply expands the universe of who may assert these protections. Instead, the original bona fide prospective purchaser provision from 2002 continues to shape liability protections.

Bona Fide Prospective Purchaser

By way of background, CERCLA provides that a bona fide prospective purchaser is not liable as an owner or operator for response costs. A bona fide prospective purchaser must: perform “all appropriate inquiries” prior to acquiring the property; and demonstrate “no affiliation” with a potential liable party.

“All appropriate inquiries” is the process of evaluating a property’s environmental conditions and assessing the potential liability for any contamination. A written report following the International Standards ASTM E1527-13 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process (Phase I Reports) can be, and typically is used to satisfy the statutory requirements for conducting “all appropriate inquiries.”

To demonstrate “no affiliation,” a bona fide prospective purchaser must not be potentially liable for contaminating the site or affiliated with any person or entity that is potentially liable. The bona fide prospective purchaser must also satisfy specific obligations, which include complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls; taking “reasonable steps” with respect to hazardous substances and releases affecting a landowner’s property; and providing cooperation, assistance and access and complying with information requests and administrative subpoenas. In transactions involving a person or entity that is potentially responsible for contaminating

the site, care must be given to any post-closing employment or joint ownership with those potentially responsible parties to avoid violating the no affiliation requirement.

By clarifying that lessees may invoke the bona fide prospective purchaser defense, the BUILD Act confirms that entering into a lease with a potentially responsible party does not, in itself, deem the lessee affiliated with the potentially responsible party. Any lessee, however, must continue to satisfy the requirements of the bona fide prospective purchaser defense and take care in its lease agreement not to incur liabilities for historical environmental issues contractually. This is particularly the case where the lessee is operating an industrial facility on the property. It is also important to keep in mind that any bona fide prospective purchaser protections apply to historical pollution releases (i.e., those that pre-date the tenancy). Any pollution releases that commence on or after the beginning of the lease term would not be the subject of the bona fide prospective purchaser defense.

In addition, by expanding the bona fide prospective purchase defense to nonprofit organizations, local community development organizations should be encouraged to proactively target contaminated redevelopment projects without fear of CERCLA liability.

Brownfields Grants

Arguably more significant to smaller and midsize developers and purchasers of potentially contaminated property is the increase under the BUILD Act in direct funding for remedial actions and assessments conducted on the property. The EPA's Brownfields program provides direct funding, in the form of competitive grants, as well as capitalization of revolving loan funds. The increase in grant allowance alone can help provide significantly more capitalization on a deal, which is two-and-a-half times larger than previously allowed. Moreover, the BUILD Act now incentivizes renewable energy and energy efficiency project, as that is now a criterion to be considered in evaluating grant applications.

However, it is important to keep in mind that beneficiaries under these grant programs are prohibited from using grant money to pay response costs at a contaminated site for which the grant receiver is potentially liable under CERCLA. So, to be eligible for an EPA brownfield grant, entities must demonstrate that they are a bona fide prospective purchaser (or one of the other liability protections or defenses set forth in CERCLA).

Takeaways

The BUILD Act is a small step in a positive direction for the development of brownfield properties. Increases in available grants should always be welcomed by developers of contaminated properties and the expanded liability protections for lessees and local governments should provide additional comfort for available CERCLA defenses. Finally, given the continued and growing interest in renewable energy-related projects and waterfront development, the BUILD Act should encourage participation in an underutilized program.

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