

The BUILD Act of 2018

The Brownfields Utilization, Investment and Local Development (BUILD) Act was enacted on March 23, 2018. The main purpose of the BUILD Act was to reauthorize the U.S. EPA's Brownfield Program and amend the 2002 Small Business Liability Relief and Brownfields Revitalization Act. Noteworthy additions and changes outlined in the BUILD Act are described below in further detail.

The BUILD Act adds clarity to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA – better known as Superfund) and its liability protocols. According to the BUILD Act, State and local units of government are not “owners or operators” of land where they “*acquired ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquires title by virtue of its function as sovereign.*” A key word – “involuntarily” – has been removed from this clause. Under the previous verbiage, problems were occasionally created when localities could not satisfy the requirements to demonstrate an “involuntary acquisition.” The Act also excludes the “owner or operator” status of a native village or corporation that receives a facility conveyed by the Alaska Native Claims Settlement Act. Additionally, the Act further explains liability protection for lessees, with discussion on how lessees can obtain liability defense as a Bona Fide Prospective Purchaser, and clarifies that lease arrangements with a liable party do not necessarily constitute an “affiliation” with the Potentially Responsible Party, which might void the liability protection.

The Build Act has also significantly altered the U.S. EPA's Brownfield Grant Program. Alterations include the following: First, certain requirements, which were necessary to establish a property's eligibility to benefit from the U.S. EPA Brownfield Grants, were removed. For a petroleum brownfield site specifically, the BUILD Act dropped the requirement that the EPA or State determines that the petroleum site be “of relatively low risk, as compared with other petroleum-only sites” – which was a subjective and arbitrary demonstration. Second, the types of entities eligible to receive U.S. EPA Grants were expanded to include nonprofit organizations and “qualified community development entities.” Third, the BUILD Act allows the EPA to provide Cleanup Grants up to \$500,000 (instead of \$200,000) with a waiver of up to \$650,000 in certain situations. Fourth, grants can now be provided as “Multipurpose Brownfield Grants,” allowing entities to use the grant for planning, assessment and cleanup. Eligible entities must still own any site where cleanup funds are used. The Act also permits up to 5% of the grant to be used for administrative purposes and expands grant proposal considerations to include Waterfront and Clean Energy.

The BUILD Act allows a local unit of government to qualify for EPA brownfield grant funding, even if it cannot show that it meets the Bona Fide Prospective Purchaser for property acquired prior to the 2002 Brownfield Act “so long as the eligible entity has not caused or contributed to a release or threatened release of a hazardous substance at the property.” This has previously been a significant deterrent to

the assessment and redevelopment of municipally owned sites. Envirologic has worked with several municipalities that voluntarily acquired property long before Superfund laws and environmental due diligence were the norm. Since those municipalities could not demonstrate performance of “all appropriate inquiry” (e.g., Phase I and II Environmental Site Assessments), they could not use their U.S. EPA Assessment Grants to help prepare municipally owned property for redevelopment.

While the BUILD Act also authorizes increased funding for the U.S. EPA Brownfields program to \$200 million, annual budgets still limit the amount to \$70 million – a level of funding that has been consistent for several years.

The EPA is currently developing policy guidance to implement the BUILD Act.

If you have any questions regarding the BUILD Act or how it relates to your redevelopment site, please contact our Vice President, David Stegink, at dstegink@envirologic.com or (800) 272-7802. To learn more about our brownfield services, please visit our website at www.envirologic.com/brownfields.

