

Defeating CERCLA Liability Under the BUILD Act: New Defense Strategies for Tenants

Asserting BFPP Defense After Brownfields Utilization, Investment, and Local Development Act of 2018

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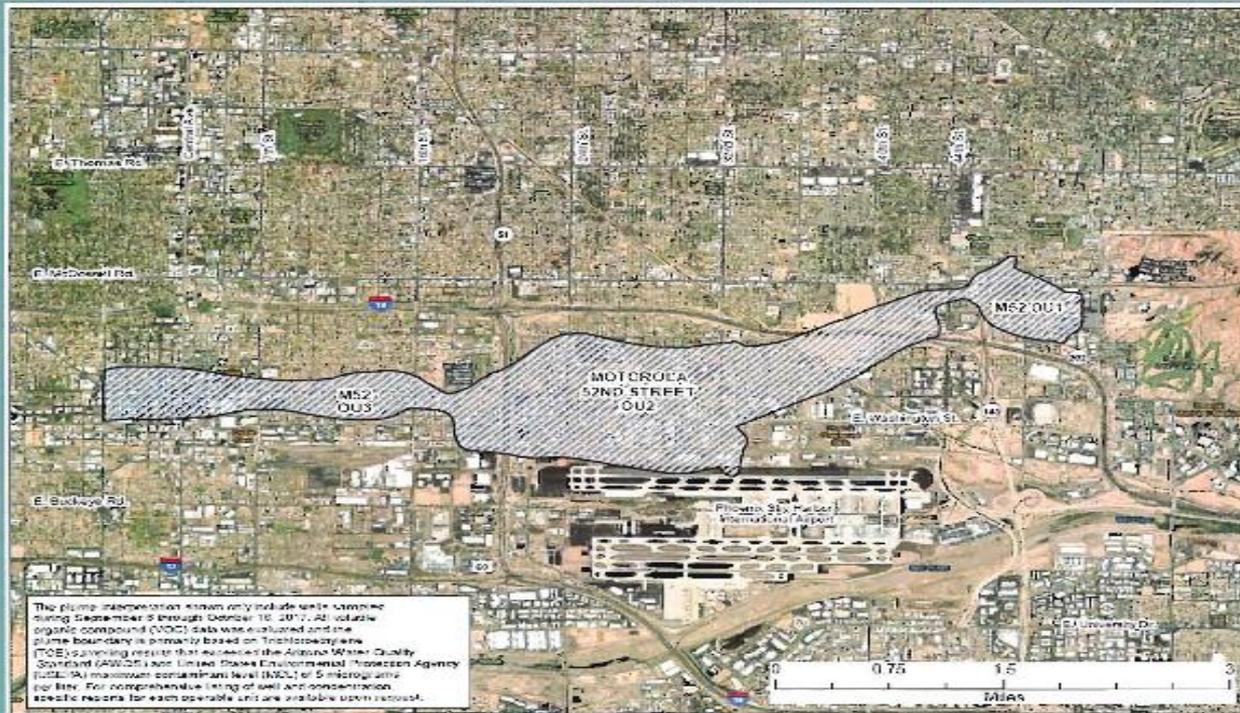
Asserting BFPP Defense After Brownfields Utilization, Investment and Local Development (Build) Act of 2018

November 6, 2018

Presented by JERRY D. WORSHAM II

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VOLATILE ORGANIC COMPOUND PLUME EXTENT MOTOROLA 52nd STREET (from ADEQ webpage)



The plume extent shown on this map was determined during September 5 through October 16, 2017. All volatile organic compound (VOC) data was evaluated and the plume boundary is primarily based on Trifluoromethane (TFM) pluming results that exceeded the Arizona Air Quality Standard (AAQS) and United States Environmental Protection Agency (USEPA) maximum contaminant level (MCL) of 5 micrograms per liter. For comprehensive listing of well and concentration specific reports for each possible unit are available upon request.



Superfund

Plume Data Update: 07/01/2018



Plume boundaries, location of Superfund facilities, ADEQ's location of land parcels, or the map are not intended to be used to provide the public with information as to the relative geographic location or scope of contamination or of the date of investigation. The above extent of contamination may, however, be used to help identify the geographic area where further information is needed.

Date Map Screen: 07/02/18



Publication Number: 33-1940

CERCLA BASICS

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT ("CERCLA" OR "SUPERFUND") 42 U.S.C. 9601 *et seq.*

Liability for sites with a release or threatened release of hazardous substances, potentially responsible parties ("PRPs") include any person or party that:

- Currently owns or operates the property. (Tenants can qualify as operators.)
- Formerly owned or operated the property at the time of the disposal of hazardous substances.
- Arranged for hazardous substances to be disposed of at the site or transported to the site for disposal.
- Transported hazardous substances to the site.

CERCLA LIABILITY IS:

- Retroactive – Parties may be held liable for acts that happened before CERCLA's enactment in 1980.
- Joint and Several – Any one PRP may be held liable for the entire cleanup of the site (when the harm caused by multiple parties cannot be separated).
- Strict – A PRP cannot simply say that it was not negligent or that it was operating according to industry standards.

A PRIMA FACIE CASE OF CERCLA SECTION 107 LIABILITY:

In order to claim cost recovery under CERCLA Section 107(a), a private party plaintiff must establish the following four elements:

- (1) the site on which the hazardous substances are contained is a “facility” under CERCLA’s definition of that term;
- (2) a “release” or “threatened release” of any “hazardous substance” from the facility has occurred;
- (3) such “release” or “threatened release” has caused the plaintiff to incur response costs that were “necessary” and “consistent with the national contingency plan” (“NCP”); and
- (4) the defendant is within one of four classes of persons subject to the liability provisions of CERCLA Section 107(a). Satisfying these four elements is essential for recovering response costs.

A PRIMA FACIE CASE OF SECTION 107 LIABILITY: (5) DEFENDANTS ARE ALSO LIABLE FOR ALL FUTURE RESPONSE COSTS

Plaintiffs may obtain a declaratory judgment that Defendants are liable for all further response costs that are necessary and consistent with the NCP. 42 U.S.C. §9613(g)(2); see, e.g., *City of Colton v. Am. Promotional Events, Inc.*, 614 F.3d 998, 1007 (9th Cir. 2010) (once liability is established under Section 107, Plaintiff “is entitled to a declaratory judgment on present liability that will be binding on future cost-recovery actions.”)

DEFENSES TO CERCLA LIABILITY

The defenses that PRPs may raise to CERCLA liability are available only if the release was caused by:

- An act of God;
- Acts of war; or
- Acts/omissions of a third party with whom a PRP has no contractual relationship, commonly referred to as a “third-party defense.”

PREVIOUS PROTECTIONS FOR COMMERCIAL TENANTS?

No Current Federal Superfund Interest “Comfort/Status” Letter

- Since 1996, EPA has issued these CERCLA Comfort/Status letter. Not necessarily helpful.
- Intended to provide the Lessee with information the EPA currently has about the property.
- Revised in December 2012 and August 2015.

PROBLEM: HOW TO PROTECT COMMERCIAL TENANTS FROM CERCLA LIABILITY?*

The passage of the Small Business Liability Relief and Brownfields Revitalization Act (2002) included “tenant of a person” in the law’s definition of Bona Fide Prospective Purchaser (“BFPP”). Commercial tenants facing CERCLA liability could only take advantage of the BFPP defense under very limited circumstances.

***See:**

<https://www.cavanaghlaw.com/lessee-tenant-cercla-liability-and-due-diligence-the-build-act-of-2018-a-new-wrapper-on-an-old-package/>

WHO CAN WE PROTECT FROM FUTURE CERCLA LIABILITY?

The CERCLA statute provides protection from liability for certain parties, provided they comply with specific criteria. Parties with liability protection under CERCLA can include:

- Innocent Landowners, CERCLA Section 101(35)(A)(i).
- Contiguous Property Owners, CERCLA Section 107(q).
- BFPP, CERCLA Sections 101(40)(A) – (H) and 107(r). (Includes Residential Property)
- Units of state or local government that acquire ownership or control involuntarily through bankruptcy, tax delinquency or abandonment, CERCLA Section 101(20)(D).
- Government entities that acquire property through eminent domain, CERCLA Section 101(35)(A)(ii).
- Person acquired the property by inheritance or bequest, CERCLA Section 101(35)(A)(iii).

WHAT ARE THE CONDITIONS FOR ATTAINING LIABILITY PROTECTION UNDER CERCLA?

To be eligible for liability protection under CERCLA as an Innocent Landowner, Contiguous Property owner or BFP, prospective property owners must:

- (1) Conduct All Appropriate Inquiry (“AAI”) in compliance with the 40 Code of Federal Regulations (CFR) Part 312, before acquiring the property.
- (2) Comply with all continuing obligations after acquiring the property, CERCLA Sections 101(40)(C–G) and Sections 107(q)(A) (iii–viii)).
- (3) Not be affiliated with any liable party through any familial relationship or any contractual, corporate or financial relationship (other than a relationship created by conveying or financing the property).

Note: Property acquisition includes properties acquired as gifts or through zero-price transactions.

COMMERCIAL PROPERTY DUE DILIGENCE

PHASE I ENVIRONMENTAL SITE ASSESSMENT (“ESA”)

ASTM E1527-93 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” has been the industry standard for acquiring property or due diligence for mergers/acquisitions since 1993.

1. WHAT IS “ALL APPROPRIATE INQUIRY”?

AAI is the process of evaluating a property’s environmental conditions and assessing potential liability for any contamination. See 40 CFR Part 312. EPA now recognizes two ASTM International Standards as compliant with or equivalent to AAI requirements:

- ASTM E1527-13 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process”; and
- ASTM E2247-16 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property”.

2. WHAT ARE CONTINUING OBLIGATIONS UNDER CERCLA?

After acquiring a property, to maintain liability protections, landowners must comply with “continuing obligations” during their property ownership. The continuing obligations include:

- Exercise appropriate care of the hazardous substances by taking reasonable steps to stop or prevent continuing or threatened future releases and exposures, and to prevent or limit human and environmental exposure to previous releases.
- Provide full cooperation, assistance, and access to individuals authorized to conduct response actions or natural resource restoration.
- Comply with land-use restrictions and not impede the effectiveness of institutional controls.
- Comply with information requests and subpoenas.

U.S. ENVIRONMENTAL PROTECTION AGENCY “COMMON ELEMENTS GUIDANCE REFERENCE SHEET” (MARCH 6, 2003)

Common Elements of the Brownfields Amendments Landowner Provisions

Threshold Criteria:

- < all appropriate inquiry
- < no affiliation with a liable party

Continuing Obligations:

- < compliance with land use restrictions and institutional controls
- < taking reasonable steps with respect to hazardous substances on property
- < cooperation, assistance and access
- < compliance with information requests and administrative subpoenas
- < providing legally required notices

EPA'S 2003 COMMON ELEMENTS GUIDANCE (MARCH 6, 2003)

Chart Summarizing Applicability of "Common Elements" to Bona Fide Prospective Purchasers, Contiguous Property Owners, and Section 101(35)(A)(i) Innocent Landowners

<i>Common Element among the Brownfields Amendments Landowner Provisions</i>	Bona Fide Prospective Purchaser	Contiguous Property Owner	Section 101 (35)(A)(i) Innocent Landowner
All Appropriate Inquiry	U	U	U
No affiliation demonstration	U	U	u
Compliance with land use restrictions and institutional controls	U	U	U
Taking reasonable steps	U	U	U
Cooperation, assistance, access	U	U	U
Compliance with information requests and administrative subpoenas	U	U	u u
Providing legally required notices	U	U	u u u

3. AFFILIATION - EPA'S COMMON ELEMENTS GUIDANCE FOOTNOTES

- u Although the innocent landowner provision does not contain this “affiliation” language, in order to meet the statutory criteria of the innocent landowner liability protection, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. CERCLA § 107(b)(3). Contractual relationship is defined in section 101(35)(A).

- uu Compliance with information requests and administrative subpoenas is not specified as a statutory criterion for achieving and maintaining Section 101(35)(A)(i) innocent landowner liability protection. However, CERCLA requires compliance with administrative subpoenas from all persons, and timely accurate, and complete responses from all recipients of EPA information requests.

- uuu Provision of legally required notices is not specified as a statutory criterion for achieving and maintaining the Section 101(35)(A)(i) innocent landowner protection. These landowners may, however, have notice obligations under federal, state and local laws

OPTIONS FOR COMMERCIAL TENANTS

- (1) Request a Comfort/Status Letter from EPA
- (2) Establish the Landlord as a BFPP for derivative protection and confirm that the Landlord has completed the AAI/ASTM E1527 Phase I ESA and continuing obligations.

**HOW CAN THE BUILD ACT OF
2018 BE USED TO
PROTECT PROSPECTIVE
COMMERCIAL TENANTS?**

Brownfields Utilization, Investment, and Local Development Act of 2018 (BUILD Act)

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BUILD Act Overview

Enacted as Division N of the Consolidated Appropriations Act, 2018 (Pub. L .No. 115-141)
Omnibus Bill

- Increases certainty
- Establishes liability relief
- Expands grant funding, creates funding flexibility, and broadens eligibility

BUILD Act

Overview: Certainty and funds for municipalities and state governments

- Clarifies liability protection for government acquisition of sites (e.g., acquisition by seizure, law enforcement tax foreclosure, abandonment, bankruptcy, or other local functions). *Amends CERCLA §101(20)(D) by removing the term “involuntary”*
- Publicly-owned sites acquired before 2002 eligible for grant funding, even if BFPP status for brownfield site ownership is not shown, as long as locality did not “cause or contribute” to a pollution release
- Protection for Alaskan Natives. Removes liability for Alaska Native Villages and Alaska Native Corporations that received contaminated site from U.S. government. Amendments CERCLA §101(20)

BUILD Act

Overview: Competitive Grant Programs (at a glance)

- Expanded eligibility for nonprofit organizations and limited liability corporations. Big implications for non-profit housing providers.
- Authorizes grant funding at \$200M from \$80M for FY 2019 – 2023, plus \$50M for States. Significant bump in funding authorization.
- Increases funding for cleanup grants from \$200K to \$500K per site (waiver up to \$650K).
- New ranking criteria for grant programs (sites adjacent to water bodies/flood plains, and brightfields/energy efficiency improvements at a brownfields site)

BUILD Act

Overview: Certainty for Lessees

- Revised §101(40) Bona Fide Prospective Purchaser definition to include tenancy or leasehold interests
 - Previously, EPA exercised its enforcement discretion under a Dec. 5, 2012 Memorandum, to treat certain leasehold interests as BFPPs, but: decisions were made on a fact specific basis, EPA enforcement discretion has no bearing on third contribution or cost recovery actions.

BUILD Act

Conclusion: A Good Start

Build Act provides:

- Liability Relief
- Greater Funding Opportunities and Flexibility
- Greater Certainty for Government Entities and Lessee



The BUILD Act: Impact on Lease Provisions and CERCLA Liability

NOVEMBER 6, 2018

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What does the potential of BFPP Status mean for a Tenant?

Benefits

- The tenant has more control over and certainty related to its status.
- The tenant no longer has to rely on...
 - The Landlord's status as a BFPP
 - The Landlord's continuing exercise of due care
 - The enforcement discretion of EPA
- The tenant has less to fear about being considered an "owner" if it has a lease that gives it great control over the property
- This new status can be used as a bargaining chip in lease negotiations

Freedom to Take Control

- If a tenant exercises a considerable amount of control over the property, courts may view it as a de facto “owner.” *United States v. Union Corp.*, 259 F.Supp.2d 356, 384 (2003). The following factors are considered: whether...
- (1) the lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used;(2) the lease cannot be terminated by the owner before it expires by its term; (3) the lessee has the right to sublet all or some of the property without notifying the owner; (4) the lessee is responsible for payment of all taxes, assessments, insurance and operation and maintenance costs; and (5) whether the lessee is responsible for making all structural and other repairs.
- If a tenant desires this type of lease arrangement, it can now protect itself directly through the BFP defense.

Impact on Lease Provisions

Common Lease Restrictions on Tenants

- Prohibition on the use, storage, or handling of hazardous substances onsite
- Tenant must give landlord notice of any violations of, or claims of liability, under environmental laws
- Tenant must remediate any contamination that it causes or exacerbates
- Access for landlord to perform due care obligations and environmental investigations (including Phase I and Phase II testing)
- Indemnity of landlord for environmental costs
- Sharing of costs between landlord and tenant related to pre-existing environmental conditions
- Due care obligations

Opportunities for Negotiation

- Tenants with BFPP status can use it to negotiate:
 - Against the restrictive lease provisions on the prior page
 - For greater restrictions on the landlord's access to the premises
 - Indemnification

Impact on CERCLA Liability

Asserting the BFP Defense: Two Options for Tenants

- Derivative: By showing that the property owner/landlord satisfied all the elements needed to establish and maintain the defense.
- Direct: By performing its own all appropriate inquiries before signing the lease or occupying the property, and then continuing to meet due care and cooperation conditions

Caveat

- To qualify as a BFPP, a Person must establish “by a preponderance of the evidence that **the leasehold interest is not designed to avoid liability under this Act** by any person”

Sec. 5: Prospective Purchasers and Lessees, The Brownfields Utilization, Investment and Local Development Act of 2018



Defeating CERCLA Liability Under the BUILD Act: Practical Considerations for Landowners & Tenants

Strafford Webinar: Nov. 6, 2018

David R. Gillay, Esq.

Setting the Stage

- General considerations
- Landowner / Tenant perspectives
- Hot Liability Issues
- Suggested Strategies

General Considerations

- Liability protections under CERCLA only apply to hazardous substances (not petroleum).
- These landowner and tenant liability defenses are self-executing; affirmative defenses.
- Some states/regions offer so-called “Comfort Letters” or Prospective Purchaser Agreements (but be careful for what you ask for).
- Carefully select your Environmental Professional

General Considerations

- Perform AAI/Phase I ESA, BUT:
 - What is purpose?
 - Request in DRAFT
 - Carefully & critically assess the findings and conclusions
 - Significant data gaps?
 - Quality of the file review
- Get recommendations in a separate cover letter.

Landowner Considerations

- Tenants may be able to qualify even if landowner does not.
- Heightened focus on landowner liability protections and new inquiries.
- Demands by existing tenants for indemnity and other assurances.
- Coordinate and reduce/share costs with tenants to maintain liability protections.

Tenant Considerations

- Determine if landowner qualifies as a BFPP.
- Is landowner taking reasonable steps to maintaining its BFPP status?
- Reliance : avoid pitfalls by simply relying on prior Phase I ESAs.
- User: Must complete questionnaires.
- Timing : Must timely complete AAI prior to executing lease.
- Existing Leases : carve out “source” areas.

Hot Issues

- TCE Toxicity
 - Sept. 28, 2011 –new toxicity values released and dramatically lowered indoor air level to $2.1 \mu\text{g}/\text{m}^3$
 - Toxicity linked to potential short-term risks of fetal heart malformations (developmental toxicity).
- Vapor Intrusion (VI) Pathway
 - Requirement of AAI (soil gas migration)
 - Rapidly evolving guidance and science
 - Heightened regulatory scrutiny with TCE toxicity

Continuing Obligations (CO)

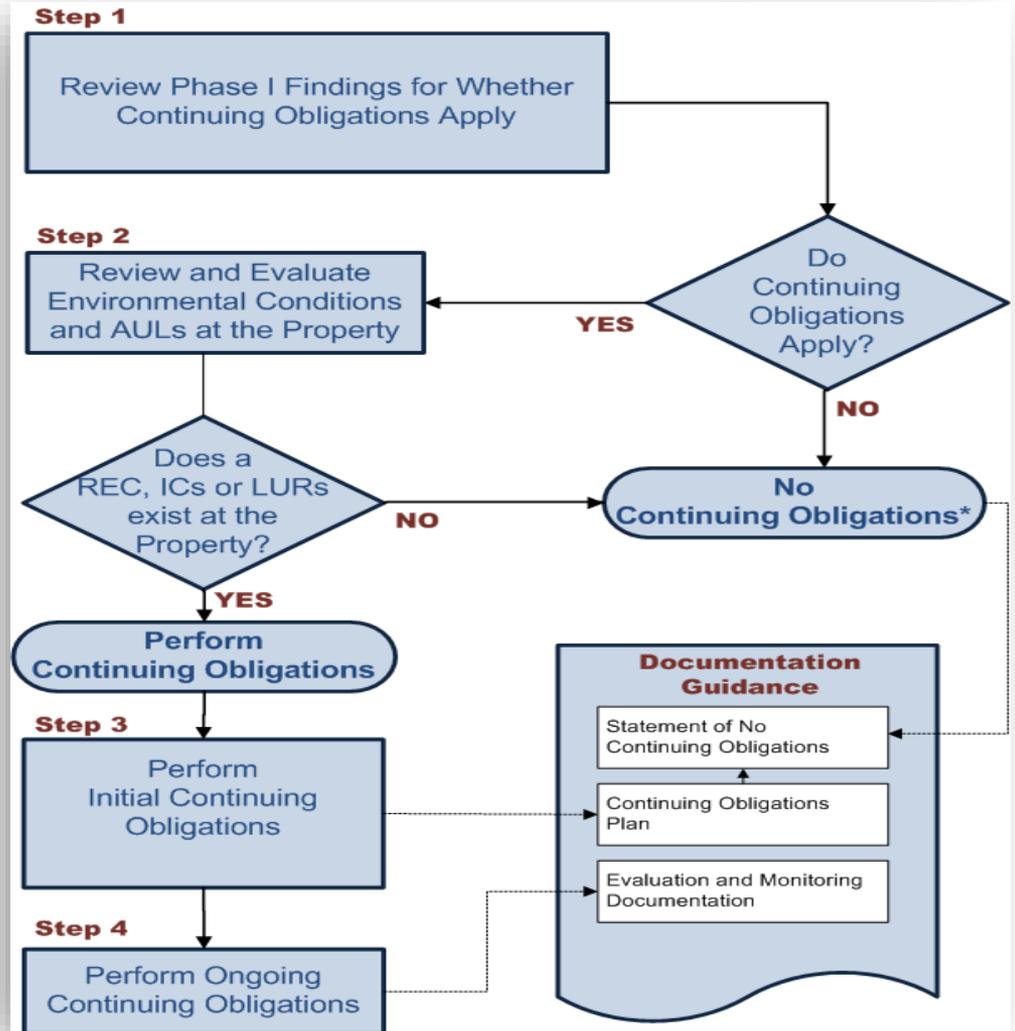
- As noted earlier, there are required CO to maintain liability protections.
- An important component requires “reasonable steps” to:
 - (a) stop any continuing release
 - (b) prevent any future threatened release; and
 - (c) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.
- What if a groundwater plume is migrating off-site?
- What does this really mean?

Develop a Site-Specific CO Plan



Designation: E2790 – 11

Standard Guide for Identifying and Complying With Continuing Obligations¹



Some Suggested Strategies

- There is relevant and helpful guidance (e.g., CO) that can be tailored & effectively implemented.
- Understand when and where a CO Plan is necessary to maintain landowner liability protections.
- Use institutional controls as a key feature of your CO Plan.
- Develop a multi-disciplinary team to conduct AAI.
- Be cautious about jumping to pre-emptive mitigation to address VI pathway.

Other Recommendations

- Identify former owners and operators/tenants “at time of disposal”.
- Determine whether you or a former owner/operator have any potential CGL insurance policies.
- Determine scopes and limits of Pollution Legal Liability (PLL) insurance policies to manage risk.
- Conduct a receptor survey and determine potential exposure pathways.

Questions?

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