BOUSQUET HOLSTEIN PLLC

Alert

Brownfields Practice Group

Lawmakers Reach Deal to Reform NYS Brownfield Cleanup Program

Syracuse, New York April 2015

New York State Governor Andrew Cuomo and the New York State Legislature have agreed to extend and modify the financial incentives under New York's Brownfield Cleanup Program (BCP) as part of the 2015-2016 State budget, which was signed into law on April 13, 2015. Important program changes to the BCP are also included in the legislation, along with the creation of a streamlined "BCP-EZ" program without tax incentives. This BCP extension and modification act (referred to below as "BEMA") resolves lingering uncertainty over the future of the statewide program for cleaning up and redeveloping properties blighted by contamination, often referred to as "brownfields."

In January, the Governor proposed changes to the BCP, along with significant curtailment of the tax incentives that have been part of the BCP since its adoption in 2003. Those proposals followed his unsuccessful attempt to modify and extend the program in the 2014-15 budget. Our prior alerts regarding the January proposal and the 2014 proposal can be found on our website at www.bhlawpllc.com/brownfields.

The BCP's tax incentives were to sunset for brownfield sites that do not receive a certificate of completion (*CoC*) from the NYS Department of Environmental Conservation (*DEC*) by December 31, 2015. During the 2014 legislative session, the Legislature passed a 15-month extension of that sunset date, but that extension was ultimately vetoed by the Governor.

Under current law, taxpayers may earn refundable New York State income/franchise tax credits for remediation and redevelopment activities, property taxes and on-site employment, and environmental insurance premiums for their BCP sites. The credit for remediation and redevelopment activities, known as the Brownfield Redevelopment Tax Credit (*BRTC*), is the focus of the proposed changes. BEMA will phase out the other two credits (the credit for real property taxes based on employment and the credit for environmental insurance premiums) for sites which have not been accepted into the BCP by the Effective Date noted below.

The BRTC has three components that are currently calculated based on whether the site was accepted into the BCP before, or after, the BCP credits were overhauled in June 2008. The 2008 law change limited the BRTC component for redevelopment costs (including buildings) to a multiple of eligible cleanup costs and an overall limit of $35 million, or $45 million for sites primarily used in manufacturing. In addition to the 2008 changes, BEMA introduces new eligibility criteria and incentives for sites accepted into the BCP after the effective date noted below.

Effective Dates, Sunsets, and Grandfathering

BEMA makes significant changes to the tax credits for sites accepted into the BCP after the later of July 1, 2015 or the date NYSDEC publishes proposed regulations detailed below (referred to below as the "*Effective Date*"). Most provisions of BEMA take effect on that Effective Date. BEMA exempts, or "grandfathers," sites accepted before the Effective Date from the new tax credit structure.

Sites accepted into the BCP after the Effective Date and on or before **December 31, 2022** will be eligible for the new BEMA tax credit structure described below, provided a CoC is issued on or before **March 31, 2026**. No tax incentives will be available for sites accepted into the BCP after December 31, 2022.

Sites currently in the BCP must receive a CoC before specific deadlines in order to preserve the tax credit structure that they were accepted into (pre-2008 or post-2008):

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- Sites with a Brownfield Cleanup Agreement (BCA) dated before June 23, 2008 will have until **December 31, 2017** to obtain a CoC; otherwise they will only be eligible for the tax credits as if they entered the BCP after the Effective Date.
- Sites with a BCA dated on or after June 23, 2008 but before BEMA's Effective Date will have until **December 31, 2019** to obtain a CoC; otherwise they will only be eligible for the tax credits as if they entered the BCP after the Effective Date.

Commentary: Overall, BEMA provides a dose of security after the last several years of legislative wrangling. The relatively long windows for the BCP included in BEMA will provide much needed stability for projects considering the program and the grandfathering provisions provide the same to projects already accepted into the program. Additionally, each of the timelines created by BEMA are more reasonable than some of the proposals introduced in 2014 and 2015.

Under BEMA, existing projects will have to complete remediation and obtain a CoC by either 2017 or 2019. Although this introduces new deadlines, they should actually come as relief to developers that were working up against the previous sunset date of December 31, 2015. Moreover, missing the applicable deadline has much less catastrophic consequences than the Governor had proposed in his 2014 Executive Budget. In that proposal, failure to obtain a CoC by the sunset date would mean the project would have been barred from claiming any of the BCP tax credits. Under BEMA, however, the failure to obtain a CoC by the applicable sunset date will only shift the project into the post-2015 paradigm.

As with other sections of BEMA, the measure of whether a project will be considered part of the post-2008/ pre-2015 program or part of the post-2015 program is whether the project is accepted into the BCP as of the later of July 1, 2015 or the date the DEC issues required regulations. We have been told informally that DEC is targeting to have those regulations published by the July 1, 2015 date. As a result, projects that have applied or intend to apply to be eligible for the post-2008/pre-2015 program should do everything in their power to have an acceptance letter issued by July 1, 2015.

BRTC Credit changes affecting sites accepted on and after the Effective Date

BEMA includes several changes that would take effect for sites that receive notice of acceptance from NYSDEC on or after the Effective Date.

1. **NEW: Separate eligibility "gates" for the Tangible Property Credit Component for sites in NYC ONLY.** The Governor's 2014 and 2015 proposals put forth two "gates" of BCP eligibility - one set of criteria for acceptance into the BCP, and a second set of criteria for the site owner(s) to be eligible for the BRTC's tangible property credit component (*TPCC*). BEMA adopts the two-gate approach, but **only for sites located in a city with a population of one million or more persons**. New York City is the only city in New York State that currently exceeds that threshold. All other BCP sites do not have to meet any additional eligibility criteria for the TPCC. For sites located in such a city, applicants must demonstrate to the satisfaction of NYSDEC that the site meets one of three tests (the so-called "*second gates*"):

- *Option 1: ≥ 50% of site area in EnZone.* The applicant must demonstrate that at least half of the site is located in an Environmental Zone ("*EnZone*"), which the bill would also re-define (a brief description of the changes to EnZones is included below).
- *Option 2: Site is "upside down" or "underutilized."* The applicant would need to demonstrate that the site is either:
  - economically "upside down," meaning that, as of the date of the BCP application, the projected cost of the investigation and remediation exceeds the 75% of the appraised value of the site without contamination; or

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- is "underutilized," which is not defined; however, DEC is instructed to define "underutilized" in regulations after consultation with the business community and the City of New York (again, these gates apply only in NYC). Final regulations are to be adopted no later than October 1, 2015. It is the publication of these regulations on which the Effective Date depends.

- *Option 3: Affordable Housing.* The applicant would need to demonstrate that the site will be developed as an "affordable housing project." The definition of affordable housing was the subject of much debate in the eleventh hour and ultimately was left to be defined in regulations. However, sites that are eligible for the TPCC as "affordable housing projects" will only be eligible for the TPCC based on the affordable housing units, not the costs of the entire project (i.e., the eligible costs will be limited by the ratio of square feet of affordable units to the square feet of the entire building).

  Commentary: The Governor championed a "two-gate" approach in his Executive Budgets for two years in a row. This approach was touted as a response to development on contaminated property that might have otherwise been developed, particularly for sites in the NYC metropolitan area because of the high cost and high demand for land there. Unlike the Governor's proposals, which would have applied state-wide, application of the second gate only to NYC (and, potentially, other large cities) is a much more measured approach and more targeted at the criticisms lodged by the Governor and other critics of the BCP. While NYC sites will have to pass a second gate to be eligible for the TPCC, we expect that many sites will be eligible under the more expansive gates.

2. NEW: Limitations on Eligible Tangible Property. For sites accepted into the BCP after the Effective Date, new limits on costs allowed for the TPCC will apply.

- The following property will be eligible:
  - Depreciable property with a useful life of 15 years or more;
  - "Costs associated with non-portable equipment, machinery, and associated fixtures and appurtenances used exclusively on the site," regardless of whether those items have a useful life of 15 years or more"; and
  - Costs associated with demolition, excavation, and foundation in excess of the amount properly included in the calculation of the site preparation credit component (see below).

    Commentary: Previously, taxpayers were permitted to calculate the TPCC based on the capitalized costs of tangible property with a useful life of four or more years. Items that were previously eligible but will now be ineligible include computers and other office machines, furniture, and decorative items such as artwork. Commercial and residential buildings and depreciable land improvements remain eligible, and most built-in, wired-in, or other items that cannot be regularly moved around should remain eligible. This change appears intended to eliminate credits for easily moved personal property that does not have a long-term life linked to the BCP site.

    The ability to pick up demolition, excavation, and foundation costs should provide some consolation for taxpayers where the amount of such costs exceed the new limits on such costs in the site preparation component. However, a site's 3x/6x cap based on site preparation costs may be affected by the shift in such costs to the tangible property category.

Costs for "related party service fees" may also be included. Previous changes proposed by the Governor sought to totally exclude any payments to related parties from the BRTC calculations.

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The concern appeared to be focused on accrued, but deferred, service fees payable to related businesses, such as development fees. BEMA therefore now requires "related party service fees" to be actually paid in order to be eligible for inclusion in the TPCC calculation, and allows the TPCC for those fees to be claimed only in the year actually paid. This approach is consistent with the recommendations of the Brownfield Task Force of the Environmental Law Section of the NYS Bar Association (the memorandum outlining the recommendation, to which Phil Bousquet and Julia Martin contributed, is available on our website at **http://bhlawpllc.com/publications/nysbarBCP**).

Commentary: This change came out of a perceived abuse by the Tax Department relating to developer fees paid between related parties over a period of time. The Tax Department argued that taxpayers could increase the amount of these developer fees required to be paid to a related party under a contract, and thus boost their credit claims, but ultimately never pay the fee. Early proposals by the Governor would have barred the TPCC on any payments made to a related party. The method taken in BEMA is a significantly more measured approach. Under BEMA, taxpayers may claim the TPCC based on related party service fees only to the extent the fees are actually paid in the taxable year.

It is also important to note that related party service fees can be included in the TPCC, but not in the site preparation credit component or the on-site groundwater remediation credit component.

3. **NEW: Clarification of the timing rule for the Tangible Property Credit Component.** BEMA clarifies that eligible taxpayers may claim the TPCC for up to 120 months after the CoC is issued. BEMA also clarifies that the TPCC will be allowed in the year the CoC is issued for property placed in service prior to the issuance of the CoC - a practice currently approved by the NYS Tax Department in informal advice and in a recent advisory opinion.

Commentary: The previous provisions of the BCP allowed for the TPCC to be claimed for up to ten taxable years after the CoC was issued. The change from ten taxable years to 120 months can be significant. In the course of many projects, changes in ownership as a result of financing or other conditions may result in taxpayers being required to take a short taxable year. In that case, ten taxable years is actually less than ten calendar years or 120 months. Additionally, the 120 month window affords projects more certainty when determining which costs will be eligible; in order to be eligible for the TPCC, costs must be paid or incurred before the tenth anniversary of the CoC date.

4. **Applicable Percentage for Tangible Property Credit Component.** BEMA modifies the "applicable percentage" used to calculate the TPCC. For eligible sites (i.e., sites either outside of NYC or in NYC and meeting one of the second gates described above), the TPCC would have an across-the-board base of **10%** of eligible costs (curtailed as noted below), and new "bump-ups" to the applicable percentage - **not to exceed 24%**, in the aggregate- calculated as follows:

- An additional **5%** for qualified tangible property placed in service on brownfield sites located within and developed in conformance with the goals of a Brownfield Opportunity Area (BOA);
- An additional **5%** for the affordable housing units in an affordable housing project as defined above (based on the proportion of square footage of the units in the overall building);
- An additional **5%** for sites used primarily for manufacturing activities;
- An additional **5%** for qualified tangible property placed in service on a brownfield site having at least fifty percent of its area located in an EnZone. ; and
- **NEW:** An additional **5%** for sites remediated to Track 1 standards (formerly 2%).

Commentary: Compared with the previous TPCC applicable percentage schemes, the applicable percentage calculation under BEMA may be either positive or negative, depending on the characteristics of the site and the redevelopment. In either event, a single base percentage regardless of the type of taxpayer lends welcome predictability to the calculation of the TPCC.

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The bill would not change the applicable percentage for the site preparation (SPCC) and on-site groundwater remediation (OSGRCC) credit components, but the calculation of those components (as well as the TPCC) would change due to the exclusions and adjustments to the credit bases noted below.

5. **NEW: Changes to the Site Preparation and On-Site Groundwater Remediation Credit Components.** BEMA makes several changes to the definitions of "site preparation costs" and "onsite groundwater remediation costs," which form the basis for calculating the respective credit components.

- "Site Preparation Costs" has been redefined to be all capitalized costs that are necessary to implement the site's investigation, remediation, or qualification for a CoC, including: excavation; demolition; activities undertaken under the oversight of the NYS Department of Labor (DOL) or in accordance with standards established by the Department of Health to remediate and dispose of regulated materials including asbestos, lead, or PCBs; environmental consulting; engineering; legal costs; transportation, disposal, treatment, or containment of contaminated soil; remediation measures taken to address contaminated soil vapor; cover systems consistent with applicable regulations; physical support of excavation; dewatering and other work to facilitate or enable remediation activities; sheeting, shoring, and other engineering controls required to prevent off-site migration of contamination from the qualified site or migrating onto the qualified site; and the costs of fencing, temporary electric wiring, scaffolding, and security facilities until the CoC is issued.
- BEMA also indicates that "site preparation costs" includes costs paid or incurred within 60 months after the last day of the tax year in which the CoC is issued "that are necessary for compliance with the [CoC] or subsequent modifications thereof, or the remedial program defined in such [CoC]," including: institutional controls, engineering controls, an approved site management plan, and the site's environmental easement.

  Commentary: The list of enumerated types of costs included in the new definition of site preparation costs provides some clarity to taxpayers about what costs will be eligible. Some commenters have raised a concern that by providing such a list, BEMA will serve to exclude costs that would otherwise have been considered site preparation costs but were not included in the enumerated list (either unintentionally or because of unanticipated changes in technology). However, based on the language making the enumerated list inclusive, not exclusive, we believe the enumerated list is a positive change in the BCP legislation.

  BEMA does not revise the section of the law that deals with the timing of claims for the SPCC. Currently, SPCC claims based on post-CoC costs are allowed "for the taxable year in which the improvement to which the applicable costs apply is placed in service for up to five taxable years after the issuance [of the CoC]." This existing timing rule may be unworkable or unclear because BEMA indicates that appropriate post-CoC costs are compliance-type costs that may not relate to a particular improvement to be placed in service. In contrast, OSGWCC claims based on post-CoC costs are allowed in the taxable year such costs are paid or incurred. It is our expectation that the incongruous provisions of the existing SPCC timing rule will be addressed in technical corrections and the result will be similar to the timing rule for post-CoC OSGWCC claims. We will provide a future alert when and if this correction is made.

- BEMA makes clear that "site preparation costs" includes foundation costs, but only to the extent of the costs of the cover system required for the site

  Commentary: We recommend that developers obtain a quote for a site cover that meets the requirements of the applicable regulations. The quote will serve as the basis for determining the amount of foundation costs that are eligible to be included in the SPCC. As indicated above, any costs in excess of the comparable site cover is eligible to be included in the TPCC calculation.
- BEMA includes a list of potential enumerated costs that would be eligible for the on-site groundwater remediation credit component.

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Other changes to the BCP

The proposed budget includes many other non-tax BCP changes not discussed above, including:

1. **Elimination of Section 22 and 23 credits**. Consistent with the Governor's proposal, BEMA eliminates the BCP credits based on property taxes and environmental insurance premiums for all sites accepted into the BCP after the Effective Date.
2. **New definition of EnZone.** BEMA transfers the authority for designating EnZones to the Commissioner of the DOL and would base the determination of EnZone status on the characteristics of each census tract determined in the most recent five year American Community Survey (ACS). Currently, EnZones are based upon data from the 2000 Census. DOL must redraw EnZones based on the 2009-13 ACS within 90 days of enactment of BAM. At the request of DEC, EnZone designations may be updated based on the most recent five-year ACS. The determination of whether a site is located in an EnZone will be made based upon EnZone designations in effect as of the date DEC notifies an applicant that its application to participate in the BCP is complete.
3. **BCP-EZ Program**. BEMA creates a BCP-EZ Program that will allow volunteer applicants to waive their right to all BCP tax credits and enter into a modified remedial program exempt from procedural requirements (as specified by DEC) relating to investigation and remediation. The BCP-EZ Program has been proposed consistently in both the 2014 legislative session as well as the proposals set forth earlier this year.
4. **CoC transfers**. BEMA clarifies that a CoC can be transferred to a successor to a real property interest in all or a portion of a brownfield site, including legal title, equitable title, or leaseholds. BEMA also provides that the CoC could not be transferred to a responsible party.
5. **DEC oversight costs**. BEMA permits negotiation of flat-fee arrangements with participants.

Next Steps

BEMA was passed into law on April 13, 2015. The final Effective Date will be determined once DEC issues proposed regulations on the definition of "underutilized." Bousquet Holstein's Brownfield Practice Group is closely monitoring developments in this area and we intend to issue an additional alert once the regulations are released. Please do not hesitate to **contact us** with any questions you may have regarding these BCP developments and how they may impact your brownfield projects.

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Alert

Brownfields Practice Group

DEC Issues Revised Regulations Defining Terms for Purposes of the Brownfield Cleanup Program

Syracuse, New York March 2016

On **March 9, 2016**, the New York State Department of Environmental Conservation (DEC) issued revised proposed regulations defining terms relating to the Brownfield Cleanup Program (BCP) tax credits for sites located in New York City. The revisions modify proposed regulations issued last June and discussed in our prior alert. The revised proposed regulations apparently reflect the DEC's consideration of comments to the initial proposed regulations released in **June 2015.**

Significance of the Definitions

The regulations will affect sites located in cities with a population of 1,000,000 or more people (i.e., New York City) that are accepted into the BCP on or after July 1, 2015. Under the 2015-16 NYS Budget provisions, sites located in New York City will be eligible for the tangible property credit component only if:

- at least 50% of the site area is in an Environmental Zone; or
- the site is "upside down"; or
- is "underutilized"; or
- the site will be developed as an "affordable housing project."

The 2015 statutory revisions reviewed in our **April 2015 Alert** included definitions for Environmental Zones and "upside down," but left the definitions of "underutilized" and "affordable housing project" to regulations. Those terms were the subject of the June 2015 proposed regulations, now revised by NYSDEC[1].

"Underutilized"

According to the DEC, the revised definition of "underutilized" is intended to expand the number of eligible sites. The revised proposed definition of "underutilized" includes any real property that meets the following characteristics:

1. No more than 50% of the permissible floor area of the building or buildings is certified by the applicant to have been used under the applicable base zoning for at least three years prior to the application, **and**

2. The proposed use for the site is either:
   a. At least 75% for industrial use, **or**
   b. The site meets the following set of conditions:
      i. At least 75% for commercial uses or commercial and industrial uses, **and**
      ii. The proposed development could not take place without substantial government assistance, as certified by the municipality in which the site is located, **and**

[1] Both the June 2015 and March 2016 regulations also included a definition of "Brownfield site." The June 2015 regulation revised the regulatory definition of a Brownfield site to be consistent with the change in that definition that was included in the Budget legislation. The March 2016 regulations make no changes to the definition proposed in the June 2015 regulations

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iii. At least one of the following conditions exists, as certified by the applicant:

1. Property tax payments have been in arrears for at least five years immediately prior to the application; **or**
2. The site contains a building that is condemned, or has documents structural deficiencies, as certified by a professional engineer, which present a public health or safety hazard; **or**
3. There are no structures on the site.

Any site seeking "underutilized" status must demonstrate that no more than 50% of the permissible floor area has been used in the preceding three-year period.

Sites with proposed uses that are not at least 75% "industrial" or 75% "commercial and industrial" cannot be "underutilized" under this definition. That means, for example, that any site with a proposed use that is more than 25% residential use cannot be "underutilized"

Once the proposed use threshold has been met, sites that intend to be at least 75% industrial need not show anything further. Sites that intend to be at least 75% commercial or commercial/industrial, however, must demonstrate that it needs substantial government assistance and has had tax arrearages, has been condemned, is structurally unsound, or has no structures.

Whether a site meets this definition of "underutilized" is determined as of the date of the BCP application. A chart showing the changes from the June 2015 proposed regulations is available on the next page.

"Affordable Housing Project"

The June 2015 proposed regulations erroneously used the term "tenant" when defining affordable home ownership programs. The March 2016 proposed regulations correct that error.

The definition of an "affordable housing project" is now any project developed for residential or mixed residential use that is subject to a federal, state, or local government housing agency's affordable housing program, subject to a local government's regulatory agreement, to provide either (1) a percentage of rental units dedicated to tenants at a defined maximum percentage of the area median income, or (2) affordable units for homeowners at a defined maximum percentage of area median income.

Comments: The new "underutilized" definition would remove the requirement to obtain municipal certification of certain conditions. Instead, applicants will need to certify to certain conditions. This approach still allows for accountability, while not providing municipal government with an effective veto over a project's eligibility for the tangible property credit component.

Notwithstanding those improvements, the definition is still complex and may prove difficult to attain.. The revised regulations clearly favor "industrial" uses for remediated brownfield sites. The emphasis on industrial use seems anomalous for New York City sites, where so much development is being directed to residential and commercial use. As we noted in our prior alert, the definition would effectively bar market-rate housing development from obtaining the tangible property credit component unless at least half of the site is in an Environmental Zone or the site is "upside down," as that term is defined in the statute.

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June 2015 Proposed Regulations	March 2016 Revised Proposed Regulations
As of the date of application, no more than 50% of the permissible floor area of the building or buildings on the site is **certified by the municipality** to have been used under the applicable base zoning in effect for **at least the** prior **five years**.	As of the date of the application, no more than 50% of the permissible floor area of the building or buildings on the site is **certified by the applicant** to have been used under the applicable base zoning in effect for at least the prior **three years**.
The proposed development is solely for a use ***other than* residential or restricted residential**.	The proposed used is **at least 75% for industrial uses, commercial uses, or commercial and industrial uses**
The property could not be developed without substantial government assistance, as certified by the municipality in which the site is located.	**If the proposed use is ≥75% commercial or commercial/industrial**, the proposed development could not take place without substantial government assistance, as certified by the municipality in which the site is located.
At least *one* of the following conditions exists, as **certified by the municipal department responsible for such determinations** of the municipality in which the site is located: property tax payments have been in arrears for at least five years immediately prior to the application; the site contains a building that is condemned, or has documents structural deficiencies, as certified by a professional engineer, which present a public health or safety hazard; *or* **the proposed use is in whole or substantial part for industrial uses**.	**If the proposed use is ≥75% commercial or commercial/industrial**, at least *one* of the following conditions exists, as **certified by the applicant**: property tax payments have been in arrears for at least five years immediately prior to the application; the site contains a building that is condemned, or has documents structural deficiencies, as certified by a professional engineer, which present a public health or safety hazard; *or* **there are no structures on the site**.

Bousquet Holstein's Brownfield Practice Group works extensively with investors, developers, consultants, and other stakeholder in connection with New York's Brownfield Cleanup Program. Please do not hesitate to contact us with questions you have regarding these developments and your brownfield projects.

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Tax Credits Available Under the Brownfield Cleanup Program

June 2018

BOUSQUET HOLSTEIN PLLC

Overview of NYS BCP Tax Credits

BCP tax credit structure:	Accepted into BCP:	Must receive a CoC by:
BCP 1.0	Before 6/23/2008	December 31, 2017
BCP 2.0	6/23/2008 to 6/30/2015	December 31, 2019
BCP 3.0	7/1/2015 and after	March 31, 2026

- BCP 1.0 sites that did not receive a CoC by 12/31/2017 are now subject to BCP 3.0 credit structure

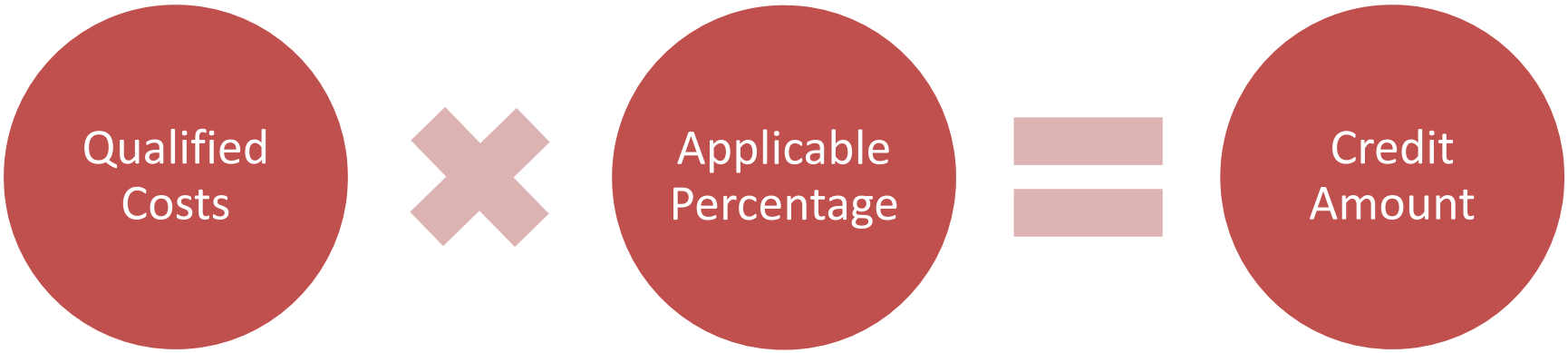
Overview of NYS BCP

Three tax credits:

- Brownfield Redevelopment Tax Credit (BRTC) (Tax Law § 21)
  - Site Preparation credit component
  - On-site groundwater remediation credit component
  - Tangible property credit component
- Credit based on real property taxes (Tax Law § 22)
  - **BCP 1.0/2.0** only
- Credit based on qualified policies of environmental remediation insurance (Tax Law § 23)
  - **BCP 1.0/2.0** only

Overview of NYS BCP Tax Credits

- **Refundable** – treated like an overpayment of tax
- Brownfield Redevelopment Tax Credit components are product of certain **qualified costs** and **applicable percentage**



Site Preparation Credit Component under **BCP 1.0 and 2.0**

- Eligible costs: costs paid or incurred **in connection with** (1) qualification for CoC, AND (2) preparing site for construction of building
- Applicable Percentage:
  - **BCP 1.0**: 10% (individuals) or 12% (corporations) plus 2% for Track 1 and 8% for En-Zones
  - **BCP 2.0**: varies from 22% (track 4, industrial) to 50% (track 1, unrestricted), based on intended use of site and level of cleanup
- Timing: First claimed in year CoC is issued, then up to 5 taxable years after CoC

Site Preparation Credit Component under BCP 3.0

- Eligible costs:
  - Capitalized costs **necessary** to implement the site's investigation, remediation, or qualification for a CoC
  - Post-CoC costs that are "**necessary** for compliance with the [CoC] or the remedial program defined in such [CoC]"
  - Limits site preparation costs foundations to the cost of a cover system pursuant to DEC regulations
- Applicable Percentage: same as BCP 2.0
- Timing: First claimed in year CoC is issued, then up to 60 months after the year the CoC is issued

Tangible Property Credit Component under **BCP 1.0 and 2.0**

- Eligible costs: cost or other basis of depreciable property with useful life of **4 years** or more with situs on brownfield site
- Applicable Percentage: max of 20% (**BCP 1.0**) or 22% (**BCP 2.0**)
  - **BCP 1.0**: 10% (individuals) or 12% (corporations) plus 2% for Track 1 and 8% for En-Zones
  - **BCP 2.0**: additional 2% for sites in BOA and developed in conformance with BOA plan
- Timing: claimed in year property is placed in service, for up to 10 taxable years after CoC is issued
- Cap (**BCP 2.0**):
  - Non-manufacturing sites: *lesser* of $35M or 3 x site preparation costs
  - Manufacturing sites: *lesser* of $45M or 6 x site preparation costs

Tangible Property Credit Component under BCP 3.0

- Eligible costs:
  - Cost or other basis of depreciable property with a useful life of **15 years** or more with a situs on the brownfield site; plus
  - Costs associated with non-portable equipment, machinery, associated fixtures and appurtenances used exclusively on the site, regardless of length of useful life
  - Costs associated with demolition, excavation, and foundation in excess of amount allowable for the *site preparation credit component*
  - "Related party service fees" includable only in year actually paid (related party service fees cannot be included in SPCC at any time)

Tangible Property Credit Component under BCP 3.0

- Applicable Percentage: 10% base plus, up to max of 24%:
  - +5% for BOA sites developed in conformance with BOA plan
  - +5% for affordable housing
  - +5% for manufacturing sites
  - +5% for sites within an En-Zone
  - +5% for sites remediated to Track 1
- Timing: claimed in year property is placed in service, for up to 120 months after date CoC is issued
- Cap: same as BCP 2.0, but can include IRC § 198 costs cap

Tangible Property Credit Component under BCP 3.0

- Additional Changes:
  - Sites are not eligible for the TPCC if either:
    - Contamination is "solely emanating" from property other than the site itself, OR
    - DEC has determined that the property has previously been remediated under other programs such that it may be developed for its then intended use, including: RCRA Corrective Action Program, Inactive Hazardous Waste Disposal Site Program (State Superfund), BCP, Environmental Restoration Program, and Navigation Law
  - Separate "gates" for sites in NYC only in order to be eligible to claim TPCC:
    - At least 50% in En-Zone (newly defined areas for BCP 3.0 sites based on updated census data)
    - "Upside down" (the projected cost of investigation and remediation exceeds 75% of the appraised value of the site without contamination)
    - "Underutilized" (defined in DEC regulations)
    - Developed as an "affordable housing project" (defined in DEC regulations)

BRTC Credit Illustrations

Component	Costs	App. %	Preliminary	Credit Cap	TOTAL
Site Preparation	$2,000,000	50%	$1,000,000		$1,000,000
Tangible Property	$35,000,000	(10%+2%+8%) 20%	$7,000,000	$6,000,000	$6,000,000
BRTC UNDER BCP 2.0			$8,000,000		**$7,000,000**

Component	Costs	App. %	Preliminary	Credit Cap	TOTAL
Site Preparation	$1,800,000	50%	$900,000		$900,000
Tangible Property	$35,100,000	(10%+5%+5%) 20%	$7,020,000	$5,400,000	$5,400,000
BRTC UNDER BCP 3.0			$7,920,000		**$6,300,000**

How BCP Credits Are Claimed

- Claimed on a NYS income or franchise tax return
- Claim is calculated at project entity; if passthrough, flows to upper-tier members to claim on their returns
- Credits are first applied to any tax due, then can be carried forward or refunded to taxpayer
- Return requires only minimal information (i.e., CoC, costs by broad categories, applicable percentage)
- BCP credit claims are routinely audited by NYS Tax Department
- On audit, NYS Tax Department will require detailed information about project costs and BCP credit calculations, including invoices

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The BCP – a Quick Overview

By: Philip S. Bousquet

The Brownfield Cleanup Program (BCP) was designed to foster two goals: (1) to encourage and expedite remediation of "brownfields" -- sites with contamination in excess of regulatory levels allowable for site-specific re-use; and (2) to foster economic development through private sector capital investment in the redevelopment of brownfield sites for productive use. To accomplish these goals, the BCP has two essential elements: (1) broad liability protection (in the form of a statutory covenant not to sue) from the State upon completion of a regulated cleanup under the BCP; and (2) a package of refundable New York State income tax credits available to those who successfully complete remedial activities under the BCP.

The BCP process starts with submission of an application to the NYS Department of Environmental Conservation (DEC) to determine whether the property and applicant entity are eligible for the BCP. If the application is approved, the Applicant must enter into a Brownfield Cleanup Agreement (BCA) with DEC. Under a BCA an Applicant assesses the nature and extent of contamination at the brownfield site and devises and implements a remedial program approved by DEC. Upon successful completion of the remediation of the site, DEC issues a written Certificate of Completion (COC) to the applicant. The COC confirms that that cleanup is complete, recites the liability protection, refers to ongoing restrictions applicable to the site (if any), and sets forth the "applicable percentages" used to calculate NYS tax credits allowable with respect to the site. The COC is the threshold requirement for BCP tax credit eligibility for a brownfield site.

For sites accepted into the BCP after June 30, 2015, BCP tax credits are available through the Brownfield Redevelopment Tax Credit (BRTC), a New York State income/franchise tax credit described in Section 21 of the New York State Tax Law. The BRTC is claimed by filing a New York State income (or franchise) tax return with credit forms attached.

The BRTC is allowed in three components, all of which are "refundable," meaning that the credit must first be used by the taxpayer to reduce income or franchise tax liability on a dollar-for-dollar basis (to zero, for individuals, or to the statutory minimum tax, for corporate taxpayers), and then any excess amount of the BRTC is treated by statute as an overpayment of tax for the year in which the BRTC is allowable, and may therefore refunded to the taxpayer (without interest).

The three "credit components" of the BRTC are: (1) the site preparation credit component (based on remediation costs); (2) the on-site groundwater remediation credit component (specific to groundwater remediation); and (3) the tangible property credit component (based on the cost basis for federal tax purposes of certain tangible property (including buildings) placed in service on the site). Each BRTC component is calculated by multiplying an "applicable percentage" by certain allowable capital costs paid or incurred by the taxpayer. Each credit component may be earned in the same or different years, beginning with the taxable year in which the COC is issued. The tangible property credit component is earned in the year in which the qualified tangible property is placed in service on the site.

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The Evolving "Nature" of Environmental Risk: A Responsible Approach for Residential and Commercial Real Estate

FRANK PICCININNI

Environmental losses suffered by commercial and residential real estate owners are becoming more frequent and severe due to evolving regulatory regimes and the changing global climate. This article reviews the nature of environmental risk, specifically within the context of a changing climate, and proposes the large-scale installation of green infrastructure as both a business opportunity for insurers and a responsible approach.

INTRODUCTION

Owners of commercial and residential real estate face a myriad of hard-to-predict environmental risks such as bodily injury due to asbestos exposure,[1] mold contamination,[2] fuel spills,[3] on- and off-site hazardous waste disposal,[4]

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[1] See e.g., *Kosich v. Metro. Prop. & Cas. Ins. Co.*, 626 N.Y.S.2d 618,618 (N.Y. App. Div. 1995) (affirming the finding that "plaintiffs' losses were caused by asbestos contamination, coverage for which [wa]s specifically excluded under the insurance policy issued by defendant").

[2] See e.g., *American Western Home Ins. Co. v. Utopia Acquisition L.P.,* 2009 WL 792483 (W.D. Mo. 2009) (finding that mold contamination in an apartment building was not covered by a commercial general liability policy).

[3] *Watson v. Travelers Indem, Co.*, 2005 WL 839504 (Mich. Ct. App. 2005) (holding that diesel fuel, accidentally spilled during a roofing project, was a pollutant that was excluded from a commercial general liability insurance policy).

[4] See e.g., *Vermont Mut. Ins. Co. v. Parsons Hill P'Ship*, 1 A.3d 1016 (Vt. 2010) (unsafe levels of perchloroethylene (PCE) in an apartment complex's water system was outside the scope of a comprehensive liability insurance policy).

and indoor air quality issues.[5] These risks have the potential to cause catastrophic financial losses and public relations disasters. To help mitigate exposures of commercial and residential real estate owners, insurers have begun to develop comprehensive environmental coverage such as the General Real Estate Environmental Enterprises Net (GREEN) Program.[6] Despite the effectiveness of these programs, insuring against environmental losses is likely to become increasingly complex due to the imminent impacts of climate change.[7]

A recent report by the United Nations Intergovernmental Panel on Climate Change presented multiple lines of empirical support for climate change, largely due to anthropogenic activities.[8] This evidence included warming ocean temperatures, rising sea levels, changing ocean salinity, acidifying oceans, increasing frequency of warm days, lessening frost days, decreasing snow cover in most regions, degrading permafrost, increasing heavy precipitation events, and retreating sea ice and glaciers.[9] The impact of climate change, coupled with increasingly stringent regulatory policy, will increase the frequency and intensity of loss events. Furthermore, spatial and temporal variability of losses, nonlinear loss functions and single events with multiple correlated consequences will increasingly occur.[10] This article: (1) reviews the emergence and role of environmental insurance; (2) explores the changing nature of risk management for commercial and residential real estate owners in the face of the changing global climate; and (3) suggests that insurers, as proactive risk managers, are well-suited to lead by promoting adaptation to and mitigation of climate change by encouraging the installation of green infrastructure.

I. ENVIRONMENTAL RISKS

The late 1960s and early 1970s gave rise to the U.S. environmental movement, which was marked by the passage of fundamental environmental statutes such as the Comprehensive Environmental Response, Compensation, and Liability

[5] See e.g., *Clipper Mill Fed., LLC v. Cincinnati Ins. Co.* 2010 U.S. Dist. LEXIS 112172 (D. Md. 2010) (ruling that the "plain terms" of the pollution exclusion would be enforced in connection with the indoor airborne contaminants that resulted from a faulty HVAC system).

[6] See e.g., *Environmental Services*, SterlingRisk Insurance, http://www.sterlingrisk.com/business-insurance/specialties-by-industry/environmental-services/green/ (accessed June 27, 2014).

[7] See Sean B. Hecht, Insurance, in *The Law of Adaptation to Climate Change, U.S. and International Aspects,* Michael B. Gerrard and Katrina F. Kuh, eds. (Chicago: American Bar Association Publishing, 2012), 514–515 (describing the challenges that climate change poses for predicting risks and setting appropriate premiums).

[8] *Int'l Governmental Panel On Climate Change, Climate Change 2013: The Physical Science Basis*, http://www.climatechange2013.org/images/report/WG1AR5_ALL_FINAL.pdf

[9] *Id.*

[10] Evan Mills, "Insurance in a Climate of Change," *Science* 309 (2005): 1040, 1040.

Act (CERCLA)[11] and the Clean Water Act (CWA).[12] Increased regulation has created both the beginnings of protecting our natural resources and the potential for major financial liabilities from environmental contamination. These liabilities are routinely excluded from commercial general liability insurance policies.[13] To fill the coverage gap related to pollution exclusions, the insurance industry has manuscripted environmental insurance policies, such as GREEN, to manage these risks for residential and commercial real estate owners.

Environmental losses are generally classified as either first-party or third-party losses.[14] First-party losses are those suffered by the insured, whereas third-party losses include legal action arising out of bodily injury or property damage to a third party for which the insured is allegedly responsible.[15] The two common policy forms available to cover environmental losses are cost cap and pollution liability insurance.[16] Cost cap policies insure against cost overruns associated with known liabilities such as implementing a remedial action plan.[17] Pollution liability insurance insures against new environmental conditions such as newly discovered contamination.[18] Environmental claims are relatively infrequent, but, when they occur, severe and catastrophic losses can result.[19]

One environmental risk commonly faced by commercial and residential real estate owners is CERCLA liability. The act is a necessary way to manage and remediate hazardous contamination and real public threat. Liability under CERCLA is strict, joint, and several[20] and attaches to: (1) the current owner of the property contaminated with hazardous waste; (2) the owner at the time of the release of hazardous waste; (3) any person who disposes of, or arranges for, the disposal of hazardous wastes; and (4) any person who accepts hazardous

[11] 42 USC §§ 9601 et seq.

[12] 33 USC §§ 1251 et seq.; see also Jonathan H. Alder, "Fables of the Cuyahoga: Reconstructing a History of Environmental Protection," *Fordham Environmental Law Journal* 14 (2002): 89 (describing joint state and federal efforts to respond to a "clean water crisis").

[13] T. McRoy Shelly III, "Insurance Coverage for Environmental Claims: Current Litigation Issues in the United States," *Environmental Claims Journal* 26 (2014): 4, 4–5.

[14] Rodney J. Taylor and Howard M. Tollin, "Insurance Market for Global Warming Heats up: Old Products and New Policies Respond to Climate Change Risks," *Environmental Claims Journal* 21 (2009): 247, 249–250.

[15] *Id.*

[16] Howard M. Tollin, "Environmental Insurance for a New Wave of Claims," *Environmental Claims Journal* 16 (2004): 203, 210–211.

[17] *Id.*

[18] *Id.*

[19] Howard M. Tollin and Boris F. Strogach, "Defining "Pollutant": What You Don't Know Can Hurt You," *Environmental Claims Journal* 21 (2009): 156, 157.

[20] Notably, the terms *strict, joint*, and *several* are not referenced in CERCLA, but have been routinely applied by the judiciary in CERCLA litigation. See e.g., *Burlington Northern & Santa Fe Railway Co. v. United State*s 129 S. Ct. 1870, 1882–1883 (2009) (". . .conclud[ing] that the facts contained in the record reasonably supported the apportionment of liability").

substances for disposal.[21] The term *hazardous substance* is defined extremely broadly under CERCLA,[22] and includes many substances commonly used by residential and commercial real estate owners.

The original defenses to liability under CERCLA, which must be proven through a preponderance of the evidence, included claiming that the release was an act of God, an act of war, or an act or omission of a third party not the agent or employee of the potentially responsible party.[23] Subsequently, amendments to CERCLA allow purchasers of property to potentially qualify for the innocent landowner, bona fide potential purchaser, or contiguous property owner defenses to liability if the party conducts "all appropriate inquiries" before acquiring the property.[24] Due, in part, to the deleterious consequences of hazardous waste on human and environmental health, the defenses to CERCLA liability are difficult to successfully prevail upon.[25] Thus, many unknowing real estate owners are found to be potentially responsible parties, resulting in substantial and unforeseen financial loss. For example, in *New York v. Shore Realty Corp.*,[26] the court imposed liability on Shore Realty, despite the fact that the past owners of the property actually caused the release of hazardous waste.

Access to clean water is critical to the survival of all life. Accordingly, the CWA highlights further potential for residential and commercial real estate owners to fall subject to environmental risk.[27] For example, section 303 of the act regulates the discharge of pollutants, including sediment, nitrogen, and phosphorus, into regulated water bodies.[28] These contaminants can impair local ecosystem structure and function jeopardizing the health of local inhabitants. The U.S. Environmental Protection Agency promulgates, or reviews state-promulgated, numerical or narrative water quality standards that "tak[e] into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and also tak[e] into consideration their use and value for navigation."[29] Accordingly, the federal or state

[21] 42 USC § 9607 (a).
[22] 42 USC § 9601 (14).
[23] 42 USC § 9607 (b).
[24] 42 USC § 9601 (35) (innocent landowner defense); § 9601 (40) (bonafide potential purchaser); § 9607 (q) (contiguous property owner). The guidelines for conducting all appropriate inquires are governed by regulation and require, inter alia, interviews with current and past owners, a record search for cleanup liens, and searches of government databases (40 CFR §312).
[25] See J. M. Moss, "Impact of CERCLA on Real Estate Transactions: What Every Owner, Operator, Buyer, Lender,. . .Should Know," *Brigham Young University Journal of Public Law* 6 (1992): 365, 375 (noting that courts typically construe the provisions of CERCLA liberally).
[26] 759 F.2d 1032, 1043–44 (2d Cir. 1985).
[27] 33 USC §§1251 et seq.
[28] 33 USC § 1313.
[29] 33 USC § 1313 (c)(2); see also *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002) (upholding the Environmental Protection Agency's authority to force states to set water quality standards sufficient to protect the designated use even if pollution originated entirely from nonpoint pollution).

administrators require municipalities and industrial point source discharges to adopt best pollution control technologies and obtain a discharge permit through the National Pollution Discharge Elimination System to meet and maintain water quality standards.[30] To comply with federal or state standards, municipalities often enact local ordinances, such as stormwater management laws, that may result in enforcement actions against commercial and residential real estate owners.[31] Although federal, state, and local antidegradation jurisprudence continues to evolve[32] and enforcement is highly site-specific, regulation of water pollution is a notable environmental risk facing commercial and residential real estate owners.

Prior to the enactment of U.S. environmental law, private citizens relied on common law causes of action such as private nuisance to combat pollution from neighboring landowners.[33] Liability in private nuisance suits is found when the defendant intentionally causes a substantial and unreasonable interference with the use and enjoyment of another's land in a continuous or recurring manner.[34] These causes of action remain today and represent a risk to residential and commercial real estate owners.

Significant costs and claims against real estate owners can also result from installed and applied building materials, indoor air quality, and biological contaminates.[35] Common examples of losses include bodily injury resulting from exposure to lead paint[36] and asbestos,[37] as well as losses incurred in connection with removal and disposal of these materials. Furthermore, prior industrial use of the site or migrating irritants can leave buildings' interiors at risk of vapor intrusion and indoor contamination with hazardous wastes.[38]

[30] 33 USC § 1342. States that assume the authority to administer the CWA enact similar state level permitting regimes. See e.g., N.Y. Environmental Conservation Law § 17-0808 (McKinney).

[31] See e.g., Roslyn, N.Y., Code §400 (setting forth stormwater management and erosion control measures).

[32] See Sandi Zellmer and Robert L. Glicksman, "Improving Water Quality Antidegradation Policies," *Journal of Energy and Environmental Law* 4 (2013): 1, 1, (recommending various reforms to antidegradation policy in order to ". . .provid[e] a margin of safety, protect[] high-value natural resources, prevent[] the development of pollution havens, and balance[e] environmental goals and economic growth opportunities").

[33] See e.g., *Madison v. Ducktown Sulphur, Copper & Iron Co.,* 83 S.W. 658, 664 (1904) (finding that damages are properly granted against a copper smelting plant where injury is proven).

[34] *Berenger v. 261 W. LLC*, 93 AD 3d 175, 182(NY Appellate Div. 2012).

[35] Catherine E. Bostock, "Environmental Liabilities of Property Owners: Examples of Common Risks and Strategies to Anticipate and Avoid Them," *Environmental Claims Journal* 26 (2014): 27, 32–35.

[36] See Christine L. Hansen, "Lead Astray and Back Again: Alternative Solutions to the Lead Paint Poisoning Problem in Wisconsin's Rental Housing," *Wisconsin Law Review* (2000): 1073, 1073 (noting the prevalence of lead paint poisoning and its severe effects on young victims).

[37] See James A. Henderson Jr. and Aaron Twerski, "Asbestos Litigation Gone Mad: Exposure-Based Recover for Increased Risk, Mental Distress and Medical Monitoring," *South Carolina Law Review* 58 (2002): 816 (calling asbestos litigation "a blight on the American judicial system").

[38] See Chuck Wah Francis Yu and Jeong Tai Kim, "Building Pathology, Investigation of Sick Buildings-VOC Emissions," *Indoor and Built Environment* 19 (2010): 40 (reviewing some of the causes of indoor air quality issues).

Finally, biological agents, such as mold, can lead to catastrophic losses associated with remediation and bodily injury.[39]

GREEN coverage is a comprehensive environmental insurance policy offered on a "claims made" basis. The coverage is designed to insure new environmental conditions that result in first- and third-party pollution claims such as cleanup costs, associated property damage, claims for bodily injury associated with pollution, and legal defense costs.[40] In addition, coverage extends to indoor contaminates such as mold and bodily injury claims related to installed and applied materials such as lead paint and asbestos. GREEN also insures third-party claims resulting from off-site disposal of hazardous materials. Although GREEN is an innovative insurance coverage that mitigates environmental exposure to residential and commercial real estate owners, climate change is likely to impede the insurability of many environmental risks.[41] Fortunately, because of insurers' financial capacity and ability to influence private individuals and corporations more effectively than the public sector, they are in the position to act as proactive risk managers by endorsing or requiring sustainable practices and loss-prevention measures.[42] Development of such measures requires an understanding of the risks correlated with climate change.[43]

II. ENVIRONMENTAL RISKS IN A CHANGING CLIMATE

The changing climate has already begun to reveal vulnerability in natural and human systems, albeit with high amounts of spatial and temporal variability.[44] Further warming portends pervasive and irreversible effects including more frequent and intense rainfall events such as hurricanes, associated flooding, drought, sea-level rise, and heat waves. Climate risks to commercial and residential real estate owners extend well beyond the initial impact of these disasters; there are potential long-term environmental liabilities resulting from the recovery, the reconstruction, and the resumption of habitation of storm- and flood-impacted areas.

[39] Thelma Jarman-Felstiner, "Mold is Gold: But Will it be the Next Asbestos?" *Pepperdine Law Review* 30 (2002).

[40] GREEN does not automatically cover underground storage tanks, or the abatement of lead or asbestos. Underground storage tanks that are not too old can, however, be added to the policy, although the premium will be adjusted to reflect the increased risk.

[41] Cf. Evan Mills, "Synergisms Between Climate Change Mitigation and Adaptation: An Insurance Perspective," *Mitigation and Adaptation Strategies for Global Change* 12 (2007): 809–810.

[42] *Id.*

[43] See Mills supra, note 10, 1043 ("Insurance is a form of adaptive capacity for the impacts of climate change, although the sector itself must adapt in order to remain viable. It is incumbent on insurers, their regulators, and the policy community to develop a better grasp of the physical and business risks").

[44] See *Intergovernmental Panel On Climate Change*, supra note 8, 7.

Although not explicitly linked to climate change, Superstorm Sandy is thought to be indicative of the frequent and extreme weather expected as our climate changes.[45] The storm pummeled the New York metropolitan area with wind gusts up to 90–100 mph, fourteen feet of storm surge during high tide, and a deluge of rainfall exceeding five inches in many places.[46] The destructive force of the storm was apparent immediately—the storm damaged more than 375,000 housing units and caused an estimated $50 billion worth of damage.[47] The true breadth of the damage, however, only began to emerge as the floodwaters receded. Hazardous materials, swept from destroyed homes and businesses, were deposited throughout the environment; raw sewage from overwhelmed water treatment facilities stood in flooded homes; and mold began to proliferate within floodwater-affected structures.[48]

As disasters such as Superstorm Sandy become more common, U.S. environmental regulatory policy and jurisprudence will likely responsibly evolve to protect health and safety. This, in turn, however, will create a number of new environmental risks to commercial and residential real estate owners.[49] For example, the way in which federal and state governments remedy the release of hazardous wastes may become more stringent, reflecting the greater risk of disturbance to contaminated sites.[50] Under the current regulatory regime, regulators often allow contamination to be remediated through monitored natural recovery or in situ capping.[51] Monitored natural recovery involves utilizing natural processes to reduce the bioavailability of sediments; in situ capping refers to the placement of clean material over contaminated sediments to prevent exposure and stabilize contaminates.[52] Climate change is likely to decrease the efficacy of such measures, as erosion, flooding, and high winds are more likely to affect those sites.[53] Accordingly, regulators are increasingly more likely to require more elaborate remedies that ultimately create greater financial liability for the responsible parties.

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[45] See Kim Knowlton et al., "Post-Sandy Preparedness Policies Lag as Sea Levels Rise," *Environmental Health Prospectives* 121 (2013): 208 (finding that lessons learned from the impacts of Sandy should be translated into adaptive policies).

[46] Jeffery B. Halverson and Thomas Rabenhorst, "Hurricane Sandy: The Science and Impacts of a Superstorm," *Weatherwise* 66 (2013): 14.

[47] John Manuel, "The Long Road to Recovery: Environmental Health Impacts of Sandy," *Environmental Health Prospectives* 131 (2013): 152.

[48] *Id.*

[49] See e.g., Keneth T. Kristl, "Diminishing the Divine: Climate Change and the Act of God Defense," *Widener Law Review* 15 (2010): 325 (finding that the Act of God defense in tort, admiralty, and environmental law will lose significance as the risk of climate change related weather becomes more foreseeable).

[50] Katrina F. Kuh, "Climate Change and CERCLA Remedies: Adaptation Strategies for Contaminated Sediment Sites," *Seattle Journal of Environmental Law* 2 (2012): 61.

[51] Environmental Protection Agency, *Contaminated Sediment Remediation Guidance For Hazardous Waste Sites* (Dec. 2005).

[52] *Id.,* iii–iv.

[53] Katrina F. Kuh, supra note 50, 71–75.

Similarly, regulation under the CWA is likely to become more stringent in order to deal with the impacts of climate change. Climate change is expected to contribute to the degradation of waters by increasing stormwater runoff and altering temperatures and rainfall patterns.[54] In addition, climate change is expected to alter the composition, diversity, and stability of aquatic biological communities.[55] These effects of climate change will exacerbate other anthropogenic impacts on waters such as combined sewer overflows[56] and nonpoint pollution.[57] Currently, section 208 of the CWA provides financial incentives for polluters to adopt best management practices that reduce stormwater runoff and nonpoint pollution, but does not penalize those that decline to do so.[58] In the future, regulation of point sources will likely be insufficient for maintaining quality standards, and command and control regulation of nonpoint sources will likely be enacted. Commercial and residential real estate owners will, therefore, be subject to an ever-increasing degree of liability associated with the CWA.

In addition to evolving regulatory regimes, commercial and residential real estate owners may face environmental liability from private and public common law nuisance claims due to pollution from climate change impacts. Although climate change effects on any given locality are exceedingly hard to predict, it would be prudent for both insurers and the insured to reduce exposures and increase resilience.[59]

III. INSURERS AS PROACTIVE RISK MANAGERS

Insurers have a long history of addressing root causes of risk through proactive risk management—noted examples include fostering the development of fire departments, building codes, and auto safety testing protocols.[60] Climate

[54] Margaret A. Palmer et al., "Climate Change and River Ecosystems: Protection and Adaptation Options," *Environmental Management* 44 (2009): 1053.

[55] *Id.*

[56] Combined sewers collect stormwater, industrial wastewater, and residential wastewater in one pipe and typically direct water to a wastewater treatment facility for treatment and eventual discharge. During major storm events, however, runoff overwhelms the capacity of the system, causing the discharge of untreated wastewater directly into a water body. See Maria R. C. De Sousa et al., "Using Life Cycle Assessment to Evaluate Green and Grey Combined Sewer Overflow Control Strategies," *Journal of Industrial Ecology* 16 (2012): 901, 901 (describing combined sewer overflows as a "public health and environmental liability"). Researchers anticipate that climate change is likely to increase the frequency and intensity of such overflow events. See Annette Semadeni-Davies et al., "The Impacts of Climate Change and Urbanisation on Drainage in Helsingborg, Sweden: Combined Sewer System," *Journal of Hydrology* 350 (2008): 100, 100.

[57] J. S. Baron et al., "The Interactive Effects of Excess Reactive Nitrogen and Climate Change on Aquatic Ecosystems and Water Resources of the United States," *Biogeochemistry* 114 (2013): 71.

[58] *Natural Resources Defense Council v. USEPA*, 915 F.2d 1314, 1317 (9th Circuit 1990).

[59] Cf. Mark E. Keim, "Building Human Resilience: The Role of Public Health Preparedness and Response as an Adaptation to Climate Change," *American Journal of Preventive Medicine* 35 (2008): 508, 508.

[60] Mills, supra note 10, 1043.

change presents the insurance industry the opportunity to lead adaptation and mitigation efforts by promoting it to commercial and residential real estate owners.[61] Insurers can reward such efforts by reducing self-insured retentions, decreasing premiums, or increasing aggregate limits. This responsible approach represents a business opportunity for insurance companies; insurers and brokers can provide risk management advisory services and develop innovative loss mitigation products.[62]

One climate loss prevention strategy that can be employed by residential and commercial real estate owners is the installation of green infrastructure.[63] The definition of *green infrastructure* is somewhat amorphous. It has been described broadly as an interconnected network of green spaces that conserves ecosystem structure and function among human land use.[64] Green infrastructure includes blue roofs,[65] green roofs,[66] rain gardens or planter boxes,[67] bioswales,[68] and permeable pavement.[69] The large-scale development of networks of green infrastructure will boost the resilience of the built environment—a critical first step in preparing for the imminent threat of climate change (Table 1).[70]

In addition to engineered green infrastructure, residential and commercial real estate owners can restore native ecosystems on portions of their parcels where possible.[71] Restoration will enable habitats to respond to change

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[61] See *id.* (noting that public-private partnerships for adaptation and mitigation are essential for spreading risk and developing loss mitigation strategies).

[62] *Id.*

[63] See S.E. Gill et al., "Adapting Cities for Climate Change: The Role of the Green Infrastructure," *Built Environment* 33 (2007): 115.

[64] Mark A. Benedict and Edward T. McMahon, "Green Infrastructure: Smart Conservation for the 21st Century," *Renewable Resources Journal* 20 (2002): 12, 12.

[65] Nonvegetated roofing materials that retains and gradually releases runoff. As a cobenefit, blue roofs provide the sustainable benefit of reducing heating costs. See *Blue Roof and Green Roof*, NYC Department of Environmental Protection, http://www.nyc.gov/html/dep/html/stormwater/green_pilot_project_ps118.shtml http://water.epa.gov/infrastructure/greeninfrastructure/gi_what.cfm*Id* (accessed August 25, 2014).

[66] Roofs covered with growing media and vegetation designed to retain runoff. Green roofs also provide a myriad of cobenefits such as reducing noise pollution and cooling cost, increasing air quality, and providing wildlife habitat. *Id.*

[67] Shallow, vegetated basins designed to collect water from rooftops. *What is Green Infrastructure*, U.S. Environmental Protection Agency, http://water.epa.gov/infrastructure/greeninfrastructure/gi_what.cfmId (accessed August 25, 2014). *Id.*

[68] A vegetated channel designed to move water while promoting bioretention of runoff, nutrients, and other types of pollution. *Id.*

[69] Porous pavement allows for infiltration of water, thereby reducing overland flow and runoff. *Id.*

[70] See S. E. Gill, supra note 63; see also "The Executive Office of the President, The President's Climate Action Plan," 13, http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf (outlining the importance of building "stronger and safer communities" to deal with the exigencies of climate change).

[71] See Constance I. Millar et al., "Climate Change and Forests of the Future: Managing in the Face of Uncertainty," *Ecological Applications* 17 (2007): 2145, 2147–2149 (discussing a need for adaptive

TABLE 1. A hypothesized tabular model of the succession of anthropogenic ecosystem factors varying along a spatiotemporal gradient of green infrastructure network complexity. This tabular model is based on Eugene Odum's famous tabular model of ecological succession. See Eugene P. Odum, "The Strategy of Ecosystem Development," *Science* 164 (1969): 262, 265. The steepness of each gradient is likely to increase as the Earth's climate continues to warm. Note that natural or human disturbances are likely to reset the successional processes.

	Intensive Human Land Use with Little Green Infrastructure	Moderately Developed Networks of Green Infrastructure	Complex Networks of Green Infrastructure
Community Energetics			
Energy Demand for Cooling	High	Medium-High	Low
Vulnerability of Energy Infrastructure	High	Medium-High	Low
Urban Heat Island Effect	High	Medium	Low
Community Structure and Function			
Air Quality	Low	Medium	High
Water Pollution, Stormwater Runoff, Erosion	High	Medium-Low	Low
Resistance and Resilience to Flooding	Low	Medium-High	High
Aquifer Recharge	Low	Medium	High
Electric and Magnetic Field Shielding	Low	Medium-Low	High
Noise Reduction	Low	Medium	High
Overall Homeostasis			
Stability (resistance to external perturbations)	Low	Medium-High	High
Human Health and Well-Being	Low	Medium	High
Environmental Awareness and Prosocial Behavior	Low	High	High

by increasing ecological resistance and resilience.[72] Native forests help to buffer storm waters; lower the water table, which decreases the likelihood of flooding; and act as a mechanical filter to trap pollutants and particulate matter.[73] As our climate continues to warm, the energy demand for indoor cooling is projected to increase.[74] Native forests can help to reduce this demand, and ultimately energy consumption, by moderating the maximum

forest management); James P. Collins et al., "A New Urban Ecology: Modeling Human Communities as Integral Parts of Ecosystems Poses Special Problems for the Development and Testing of Ecological Theory," *American Scientist* 88 (2000): 416, 424 (discussing how standard ecological theory such as successional dynamics can be applied to human dominated ecosystems); Mark J. McDonnell and Steward T. A. Pickett, "Ecosystem Structure and Function Along Urban-Rural Gradient: An Unexploited Opportunity for Ecology," *Ecology* 71 (1990): 1232 ("Urbanization is a massive, unplanned experiment that already affects large acreages and is spreading in many areas of the United States").

[72] See Constance I. Millar et al., supra note 71.

[73] See Frank Piccininni, "Adaptation to Climate Change and the Everglades Ecosystem," *Environmental Claims Journal* 26 (2014): 63, 80–82 (discussing the stabilizing affect of native vegetation in a dynamic ecosystem).

[74] Danny H. W. Li et al., "Impact of Climate Change on Energy Use in the Built Environment in Different Climate Zones—A Review," *Energy* 42 (2012): 103, 103.

surface temperatures and the urban heat island effect (Table 1).[75] Finally, planting trees, shrubs, and herbaceous flora would provide the invaluable ecosystem service of carbon sequestration to mitigate climate change.[76]

Green infrastructure provides redundancy and modularization of ecosystem services, which helps to defuse risk throughout the built environment.[77] In this way, real estate owners have to rely less on centralized infrastructure (e.g., wastewater treatment facilities), which are relatively vulnerable to failure.[78] Moreover, the benefits of green infrastructure (Table 1) are likely to reduce environmental losses associated with regulatory liabilities and common law lawsuits. Finally, and perhaps most importantly, the installation of complex networks of green infrastructure will increase environmental awareness, thereby promoting a responsible stewardship approach to real estate.[79]

CONCLUSION

Environmental law is critical for the maintenance and protection of innocent life, including our own. Yet, it also creates significant liability for residential and commercial real estate owners, which is likely to be exacerbated by the impacts of climate change. Fortunately, the insurance industry is poised to provide leadership in promoting adaptation to and mitigation of climate risk.[80] It is, therefore, incumbent upon insurers to rise to the challenge of developing novel and innovative products designed to cope with the evolving "nature" of environmental risk.

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[75] See S.E. Gill, supra note 63, 116–124 (modeling the effects of "green cover" on surface temperatures under projected climate change scenarios).

[76] See Kathryn R. Kirby and Catherine Potvin, "Variation in Carbon Storage Among Tree species: Implications for the Management of a Small-Scale Carbon Sink Project," *Forest Ecology and Management* 246 (2007): 208, 214.

[77] Jack Ahern, "From Fail-Safe to Safe-to-Fail: Sustainability and Resilience in the New Urban World," *Landscape and Urban Planning* 100 (2011): 341, 342–343.

[78] *Id.*

[79] Cf. R. Edward Grumbine, "What is Ecosystem Management?," *Conservation Biology* 8 (1994): 27 ("Ecosystem management is not just about science nor is it simply an extension of traditional resource management; it offers a fundamental reframing of how humans may work with nature."); David S. Wilson, "Human Prosociality from an Evolutionary Perspective: Variation and Correlations at a City-Wide Scale," *Evolution and Human Behavior* 30 (2009): 190 (using field observations of prosocial behavior, multivariate analysis, and spatial interpolation to demonstrate that prosocial behavior is correlated with neighborhood social support).

[80] Sean B. Hecht, "Climate Change and the Transformation of Risk: Insurance Matters," *UCLA Law Review* 55 (2008): 1559, 1618.

Developments in Federal and State Law

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If You BUILD It, Will They Come? A Look at the 2018 Congressional Reauthorization of the Federal Brownfields Program and Other Amendments to CERCLA

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IN THIS ISSUE

Introduction

It is possible that no federal environmental law has been criticized as much the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[1] Yet perhaps even more than the National Environmental Policy Act,[2] CERCLA has been the cornerstone of much of environmental law practice in this country. It not only governs how liability is allocated at actual Superfund sites but also regulates how private parties resolve their disputes about adjacent property sources of contamination, as well as how liability is allocated between present and past owners and operators of facilities. Some critics have opined that the law "has been an utter failure,"[3] while others have somewhat more kindly noted that "CERCLA has been an exercise in trial and error."[4] Despite its faults, CERCLA is still regarded by some environmental practitioners as an important and progressive piece of legislation. As we approach CERCLA's fortieth anniversary, it is notable that the law has been significantly revised just three times since the 1986 amendments reauthorizing the Superfund.

This article will explore the BUILD Act of 2018—the most recent amendments to CERCLA—which was passed as part of the 2018 federal appropriations bill,[5] and will touch upon the missed opportunity to truly enhance CERCLA.

[1] 42 U.S.C. §§ 9601–9675.
[2] 42 U.S.C. §§ 4321–4347.
[3] Frona M. Powell, *Amending CERCLA to Encourage the Redevelopment of Brownfields: Issues, Concerns, and Recommendations*, 53 WASH. U. J. URB. & CONTEMP. L. 113, 121 (1998).
[4] Garry A. Gabison, *The Problems With The Private Enforcement of CERCLA: An Empirical Analysis*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 189 (2016).
[5] Pub. L. No. 115-141, 132 Stat. 1147.

Prior Significant Amendments to CERCLA[6]

In the aftermath of CERCLA's enactment in 1980, litigation was plentiful, beginning—though not ending—with challenges to the constitutionality of CERCLA's imposition of retroactive liability.[7] The statute was controversial from its inception on various fronts.[8] District courts across the country had to grapple with this new piece of legislation that has been described by federal courts as "hastily-drawn,"[9] "marred by vague terminology,"[10] and "fragmented."[11] The Supreme Court has remarked that the law is "not a model of legislative draftsmanship."[12]

More than six years passed before Congress took its first shot at addressing some of the flagrant problems with CERCLA by passing the Superfund Amendments and Reauthorization Act of 1986 (SARA).[13] With SARA, Congress addressed several glaring fairness issues, including by creating the "innocent landowner" defense[14] to liability for owners who unknowingly purchase contaminated land, so long as they conducted all appropriate inquiries (AAI) into the past history of the property consistent with customary commercial practice and are able to establish other aspects of the defense such as exercising due care.[15] SARA also formalized the right of contribution among potentially responsible parties (PRPs)[16] and added the statutory authority for private suits under CERCLA.[17] In addition to addressing the foregoing liability issues, SARA also reauthorized the Superfund tax and created the National Priorities List—a collection of contaminated sites the EPA should consider the most important, based on certain criteria.

More than 10 years passed before Congress acted on CERCLA again, by passing the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996.[18] With these amendments, Congress created "safe harbor" provisions that exempted lenders and trustees—which had been left exposed after *United States v. Fleet Factors Corp.*[19]—from CERCLA liability by clarifying the definitions of "owner and operator" and "participation in management." Just three years later, Congress amended CERCLA again by passing the Superfund Recycling Equity Act of 1999 (SREA).[20] With SREA, Congress focused its efforts on shielding the solid waste industry by creating a defense to CERCLA liability for persons who send otherwise hazardous materials to a site for recycling purposes.[21]

Then, three years after SREA, Congress passed arguably the most significant improvements to CERCLA since SARA, namely, the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (the Brownfields Act).[22] The Brownfields Act gave us liability protection for "bona fide prospective purchasers" (BFPPs),[23] which was rather more sweeping than the existing innocent landowner defense. The Brownfields Act also created an exemption from CERCLA liability for persons who contribute *de micromis* amounts of waste to sites.[24]

In addition to addressing a number of liability issues, the Brownfields Act amendments created the federal Brownfields

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[6] There have been other amendments to CERCLA not referenced here, including Title VI and Title XI of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, which extended the authorization of appropriations for the U.S. Environmental Protection Agency's (EPA's) Superfund program through fiscal year 1994, and extended the authority to collect the special Superfund taxes on industry through December 31, 1995, respectively. There were also other minor amendments to the law in 1990 and 1996 concerning the transfer of surplus federal property. These amendments are not discussed in this article.

[7] A search in LexisNexis yielded more than 300 reported cases that referenced the statute from the date of enactment until the first amendments in 1986. An almost book-length exhaustive compendium of reported and unreported cases published by BNA in 1990 and entitled "Ten Years of CERCLA Litigation" was an early reference work for litigators. It was jokingly referred to by some as "100 Years of CERCLA Litigation," a reference to Gabriel García Márquez's magical realism novel, *One Hundred Years of Solitude*.

[8] MICHAEL B. GERRARD & JOEL M. GROSS, AMENDING CERCLA: THE POST-SARA AMENDMENTS TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, at xi (2006).

[9] *See, e.g.*, United States v. Davis, 882 F. Supp. 1217, 1220 n.1 (D.R.I. 1995); O'Neil v. Picillo, 682 F. Supp. 706, 719 n.2 (D.R.I. 1988); United States v. Ne. Pharm. & Chem. Co., 579 F. Supp. 823, 844 (W.D. Mich. 1984).

[10] *See In re* Sundance Corp., 149 B.R. 641, 660 (Bankr. E.D. Wash. 1993).

[11] *See* Ninth Ave. Remedial Grp. v. Chalmers, 946 F. Supp. 651, 660 (N.D. Ind. 1996).

[12] *See* United States v. Bestfoods, 524 U.S. 51, 56 (1998).

[13] Pub. L. No. 99-499, 100 Stat. 1613.

[14] "The 'innocent landowner defense,' while not titled as such, is a term of art that has been coined by commentators and practitioners. The innocent landowner defense is actually a type of third party defense under CERCLA section 107(b)(3) read in combination with the SARA-added CERCLA section 101(35)." Paul C. Quinn, *The EPA Guidance on Landowner Liability and the Innocent Landowner Defense: The All Appropriate Inquiry Standard: Fact or Fiction?*, 2 VILL. ENVTL. L.J. 143, 144 n.11 (1991); *see also* CERCLA §§ 101(35) and 107(b)(3), 42 U.S.C. §§ 9601(35) and 9607(b)(3).

[15] CERCLA §§ 101(35)(A)–(B), 107(b)(3), 42 U.S.C. §§ 9601(35)(A)–(B), 9607(b)(3).

[16] CERCLA § 113(f), 42 U.S.C. § 9613(f).

[17] David W. Marczely, Note, *Superfund Liability Alternatives for the Innocent Purchaser*, 39 CLEV. ST. L. REV. 79, 88 (1991).

[18] Pub. L. No. 104-208, 110 Stat. 3009, 3009–462 (Sept. 30, 1996).

[19] 901 F.2d 1550 (11th Cir. 1990).

[20] Pub. L. No. 106-113, 113 Stat. 1501, 1501A-598 (Nov. 29, 1999).

[21] *See* GERRARD & GROSS, *supra* note 8, at 20.

[22] Pub. L. No. 107-118, 115 Stat. 2356 (Jan. 11, 2002).

[23] *See* GERRARD & GROSS, *supra* note 8, at 46; *see also* CERCLA § 101(40), 42 U.S.C. § 9601(40).

[24] *See* GERRARD & GROSS, *supra* note 8, at 41; *see also* CERCLA § 107(o), 42 U.S.C. § 9607(o).

Program found in CERCLA Section 104(k), providing for redevelopment and assessment grants and loans to qualifying applicants. (These provisions were among the most important to undergo significant revision in the 2018 BUILD Act.)

Since 2002, we have seen CERCLA continue to be a thorn in the sides of the regulated community, state and local governments, EPA, and the environmental practitioners who represent them. In the absence of congressional action, CERCLA has instead evolved through federal court litigation and EPA policy over the past 17 years.

Then, in 2018, Congress passed the BUILD Act. As with other minor amendments to CERCLA since 2002,[25] the BUILD Act takes the "low-hanging fruit."

Legislative History of the BUILD Act of 2018

In the 115th Congress, the original version of the BUILD Act (S. 822) was a bipartisan bill introduced by Senator James Inhofe (R-OK) in 2017 that was initially cosponsored by Democratic Senators Markey (MA) and Booker (NJ), as well as other Republican senators. Within a few months, the bill garnered additional bipartisan support, including New York's Kirsten Gillibrand and Massachusetts's Elizabeth Warren. In all, one Independent senator, six Democratic senators, and two Republican senators cosponsored the bill, clearly signaling a bipartisan desire to make at least some revisions to CERCLA.

In September 2017, the Senate Committee on Environment and Public Works (CEPW) issued a report (Senate Report 115-148) on the bill, reporting favorably on it and recommending that the bill be passed. In its report, the CEPW noted the importance of CERCLA, and cited the fact that more than 1,300 contaminated sites remain on the Superfund National Priorities List. The report also noted that EPA estimates there are more than 450,000 brownfield sites across the country.[26] The report highlighted that in 2001, the Senate passed the bill that ultimately turned out to be the Brownfields Act, by a vote of 99-0.[27] The report said the BUILD Act would authorize the appropriation of $250 million annually for brownfields grants and loans.[28] The Senate bill was never scheduled for a Senate vote.

In the House, Representative Elizabeth Esty (D-CT) introduced H.R. 1758, the House version of the BUILD Act, referred to as the "Brownfields Reauthorization Act of 2017," on March 28, 2017, the same day that the House Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment held an oversight hearing on "Building a 21st Century Infrastructure for America: Revitalizing American Communities through the Brownfields Program." The Subcommittee received testimony from a state brownfields agency, two mayors, a city councilman, a county chairman, a real estate investment expert, an EPA representative, and environmental engineering firms, among other interested stakeholders.[29] Like the Senate CEPW, the Committee on Transportation and Infrastructure recommended that the bill pass.

A similar bill (H.R. 3017) was introduced in the U.S. House of Representatives on June 22, 2017 by Representative David McKinley (R-WV), with four cosponsors. After Representative Esty and another member were added as cosponsors, the House ultimately passed that bill by a vote of 409-8 on November 30, 2017. The major difference between the two stand-alone bills (H.R. 1758 and H.R. 3017) was in the amount of funds to be made available for remediation grants under CERCLA Section 104(k)(3)(A)(ii). The earlier bill (H.R. 1758) provided for a higher cap—up to $600,000 for each site to be remediated—as the maximum grant award, and allowed for the EPA to increase that amount to $950,000 by application, while the later bill (H.R. 3017) restricted EPA's authority to increase grants to $750,000. H.R. 3017 also increased the amount of new "multipurpose" grant awards by $50,000 (up to $1 million). Substantively, both bills were virtually identical.

The Senate did not take up the House bill, but on March 23, 2018, Congress passed the Consolidated Appropriations Act of 2018—a thrilling 878-page omnibus bill, which was enacted into law upon signature by the President.[30] Buried deep in this spending directive, beginning on page 705, is Division N, the Brownfields Utilization, Investment, and Local Development Act of 2018, the BUILD Act. With the BUILD Act, Congress sought to clarify Superfund liability for state and local governmental entities, extend liability protections to tenants and certain Alaska Native villages and corporations, and formally reauthorize funding for the federal Brownfields Program, as its prior authorization had expired in 2006.[31]

BUILD Act: Section-by-Section Analysis

Section 1 – *Short Title*: As is the case with most congressional bills, the first section simply provides the short title.

[25] For example, in 2005, CERCLA § 104(k)—the Brownfields Program—was slightly amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1956, 119 Stat. 1144, 1515.

[26] S. REP. NO. 115-148, at 1 (2017).

[27] S. REP. NO. 115-148 at 2.

[28] S. REP. NO. 115-148 at 2.

[29] *See* H.R. REP. NO. 115-419, pt. 1, at 7 (2017).

[30] Pub. L. No. 115-141, 132 Stat. 1147.

[31] It should be noted that although the Brownfields Program's authorization expired in 2006, Congress continued to provide funding. In fiscal year 2016 and 2017, for example, the Program received $162.1 million and $153 million, respectively. *See* H.R. REP. NO. 115-419 at 6. The President's fiscal year 2018 request for the Brownfields Program was just $118.4 million, *see id.*; as noted above and discussed below, the Senate bill proposed to more than double that allotment with the appropriation of $250 million annually for the Program, and the BUILD Act ultimately provided for an annual appropriation of $200 million through fiscal year 2023. *See* discussion accompanying *supra* note 28 and *infra* note 62.

Section 2 – *Redevelopment Certainty for Governmental Entities*: This section provides additional CERCLA liability protection to local and state governments. With these amendments, Congress revised the "owner or operator" exclusion for state or local governments found in CERCLA Section 101(20)(D).[32] Before this amendment, the exclusion provided that state or local governments that acquired ownership or control of a property "involuntarily"—mainly through tax foreclosure—would be exempted from liability. This appeared to leave a gap for potential state or local government liability for property acquired *voluntarily*, namely through asset forfeiture or otherwise as a result of law enforcement activities. To address this issue, Congress struck "involuntarily" from the provision and added language providing that state or local government entities that acquire ownership or control "through seizure or otherwise in connection with law enforcement activity" will now be excluded from being considered owners or operators.

The House Committee on Transportation and Infrastructure Report (House Report) notes that this amendment simply builds on the existing statutory third-party defense for state and local governments found in CERCLA Section 101(35)(A)(ii).[33] Local or state governments that acquire contaminated property pursuant to Section 101(20)(D) are still required to comply with the due care, cooperation, and other requirements of the third-party defense.[34]

One wonders if this amendment was really necessary—do law enforcement agencies ever acquire significantly contaminated property as a result of criminal investigations? Is someone really going to file a CERCLA Section 113(f) contribution suit against a local police department? Nevertheless, local or state law enforcement agencies are now free to obtain property as a result of criminal investigations without fear of facing CERCLA liability.

Section 3 – *Alaska Native Village and Native Corporation Relief*: These amendments add a new exclusion to the definition of "owner or operator" in CERCLA Section 101(20) for Alaska Native villages or Alaska Native corporations that received contaminated property from the U.S. government under the Alaska Native Claims Settlement Act.[35] Without this new exclusion, these Alaska Native villages and corporations could be held liable for contamination caused by the U.S. government and would not be eligible for federal brownfield grants; the amendment corrects the unfortunate imposition of liability by the statute's strict liability scheme. As with most "owner or operator" exclusions in CERCLA, the Alaska Native villages or Alaska Native corporations seeking Superfund liability protection must not have actually caused or contributed to a release or threatened release of a hazardous substance from the property.[36]

Section 4 – *Petroleum Brownfield Enhancement*: With this section of the BUILD Act, Congress updated the definition of "brownfield site," which establishes the scope of sites that qualify for funds under the Brownfields Program in CERCLA Section 104(k).[37] The amendments make it easier for petroleum-contaminated sites to receive funding under the Brownfields Program. The BUILD Act deleted language that previously required EPA or a state to first conduct a risk analysis evaluating whether potential petroleum-contaminated brownfield sites are of "relatively low risk, as compared to other petroleum-only sites in the State" before they are eligible to receive funding under the Brownfields Program. Deletion of the foregoing language should, in theory, accelerate the assessment and cleanup of some petroleum-contaminated brownfield sites.

However, the requirement that EPA find no viable responsible party associated with the petroleum-contaminated brownfield sites still remains.[38] The House Committee on Transportation and Infrastructure apparently received stakeholder input related to this provision and, as a result, has urged EPA to consider whether this requirement is truly necessary and does not unreasonably delay the assessment and cleanup of petroleum-contaminated sites.[39]

Section 5 – *Prospective Purchasers and Lessees*: From the perspective of a CERCLA practitioner, these are probably the most significant amendments to the law because Superfund liability protection has now been formally extended to tenants.

As most environmental practitioners know (or should know), the BFPP provision shields prospective owners from Superfund liability by allowing them to purchase property even though they learn of hazardous substances on the property prior to closing. It therefore differs from the innocent landowner defense to liability, which protects purchasers of property who conducted all appropriate inquiries into the past uses of the property (typically via Phase I Environmental Site Assessments (ESAs) but not exclusively so[40]), but only discovered the presence of hazardous

[32] CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D).
[33] *See* H.R. REP. NO. 115-419 at 11; *see also* CERCLA § 101(35)(A)(ii), 42 U.S.C. § 9601(35)(A)(ii).
[34] *See* H.R. REP. NO. 115-419 at 12.
[35] *See* CERCLA § 101(20)(E), 42 U.S.C. § 9601(20)(E).
[36] *See* CERCLA § 101(20)(E)(ii), 42 U.S.C. § 9601(20)(E)(ii).
[37] *See* CERCLA § 101(39)(D)(ii)(II)(bb), 42 U.S.C. § 9601(39)(D)(ii)(II)(bb).
[38] CERCLA § 101(39)(D)(ii)(II)(bb), 42 U.S.C. § 9601(39)(D)(ii)(II)(bb).
[39] *See* H.R. REP. NO. 115-419 at 12.
[40] "At least one court has determined that a Phase I assessment is not the exclusive means by which a purchaser of land can make all appropriate inquiries. . . . The . . . court determined that the Senate Report on the amendment adding the 'shall satisfy' language to CERCLA read that a Phase I assessment '*can* satisfy' the 'all appropriate inquiries' requirement. . . . That court also noted that 'Congress could have provided that a Phase I site assessment was required or was the exclusive procedure to satisfy the 'all appropriate inquiries' standard; however, Congress made no such mandate.'" Von Duprin LLC v. Moran Elec. Serv., 2019 U.S. Dist. LEXIS 21305, at *47–48 (S.D. Ind. Feb. 11, 2019) (citing R.E. Goodson Constr. Co., Inc. v. Int'l Paper Co., 2006 U.S. Dist. LEXIS 39850, at *6 (D.S.C. June 14, 2006)).

substances after purchase. The benefits of the BFPP exemption are clear—no longer would such prospective purchasers fail to close on property once they discovered hazardous substances—but until now its application was expressly limited to prospective owners. As a result, in the early years of the BFPP provision, tenants could be classified as CERCLA operators (and sometimes as owners) subject to liability for the cleanup of a contaminated site if they entered into a lease with knowledge of the contaminated condition of the property without being able to benefit from the BFPP liability shield.

To address this unfortunate result, EPA issued guidance in December 2012 that broadened the BFPP exemption to include tenants. With this new policy, "Revised Enforcement Guidance Regarding the Treatment of Tenants under the CERCLA Bona Fide Prospective Purchaser Provision," EPA extended this critical CERCLA liability protection to tenants.[41] The policy change was rather narrow, however, and was just policy, always subject to change. As a result, tenants were provided no assurances of this important exemption from CERCLA liability.

In the BUILD Act, Congress provided that tenants can qualify for the BFPP exemption from CERCLA liability regardless of the owner's status as a BFPP. This change is generally consistent with, but even broader than, the EPA enforcement policy from 2012.

A person with a leasehold interest can qualify as a BFPP if (i) he/she acquires a leasehold interest after January 11, 2002; (ii) he/she establishes that the leasehold interest is not designed just to avoid liability; and (iii) one of the following three conditions applies:

1. the owner him/herself is a BFPP;
2. the owner him/herself *was* a BFPP when the leasehold interest was acquired *but* due to circumstances unrelated to the tenant, has somehow lost BFPP status;[42] or
3. the tenant conforms with all of the statutory requirements of BFPPs, including conducting all appropriate inquiries.[43]

Congress also revised the "No Affiliation" requirement for BFPP status to provide that a tenant can still qualify as a BFPP. The amended requirement provides that "the instruments by which a leasehold interest in the facility is created" (e.g., the lease) will not be considered a direct contractual or financial relationship that would otherwise destroy the BFPP exception.[44]

The BUILD Act therefore broadens, as well as codifies, the BFPP liability protection previously afforded to lessees under EPA's policy. Courts, of course, treat administrative agency policy as persuasive authority but not controlling law. Now that CERCLA provides that tenants do not have to rely on their landlords to attain BFPP status, parties and courts will have greater certainty when the issue arises in litigation (as it does from time to time).[45]

This change provides additional incentives for commercial and industrial tenants to perform Phase I ESAs before leasing property to ensure they meet the baseline AAI requirements.

Sections 6 to 13 – *Reauthorization of the Brownfields Program and Amendments Thereto:* The bulk of the BUILD Act consists of various amendments to the federal Brownfields Program created by CERCLA Section 104(k). The summary below touches on some of the more significant or otherwise interesting amendments:

- The amendments first add non-profit organizations and qualified "community development entities," as well as limited liability corporations and limited partnerships in which all managing members or sole members or general partners are nonprofit organizations, to the list of entities eligible for brownfield grants or loans.[46] This should, in theory, broaden the pool of Brownfields Program grant applicants and encourage participation by organizations that serve diverse communities.
- Congress also amended the Brownfields Program by allowing governmental entities to receive grant money for brownfield site characterization, assessment, or remediation for properties acquired by the governmental entities prior to January 11, 2002 (the date BFPP exemption from Superfund liability was added to CERCLA).[47] With these amendments, Congress intended to provide explicit authorization to governmental entities to apply for and use Brownfields Program grant money "even if the eligible entity does not qualify as a [BFPP]," provided such entities have not actually caused or contributed to the release or threatened release of a hazardous substance at the site.[48] While these amendments do not affect the

[41] EPA, Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision (Dec. 5, 2012), https://www.epa.gov/sites/production/files/documents/tenants-bfpp-2012_0.pdf.

[42] For example, this condition might apply where an owner did not exercise appropriate care at the property, failed to cooperate with EPA or a state agency, or did not provide legally required notices with respect to discovery or release of any hazardous substances at the facility.

[43] CERCLA § 101(40)(A)(ii), 42 U.S.C. § 9601(40)(A)(ii).

[44] CERCLA § 101(40)(B)(viii), 42 U.S.C. § 9601(40)(B)(viii).

[45] *See, e.g.*, Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321 (2d Cir. 2000) ("Although we conclude that a lessee may, under some circumstances, be held liable under CERCLA as an 'owner,' we conclude that, under the circumstances of this case, Barlo was not an 'owner' within the meaning of CERCLA. Accordingly, we reverse the judgment of the district court in substantial part [and hold the lessee not liable under CERCLA].").

[46] CERCLA § 104(k)(1)(I)–(L), 42 U.S.C. § 9604(k)(1)(I)–(L).

[47] CERCLA § 104(k)(2)(C), 42 U.S.C. § 9604(k)(2)(C).

[48] CERCLA § 104(k)(2)(C), 42 U.S.C. § 9604(k)(2)(C).

potential Superfund liability of a governmental entity for properties acquired prior to January 11, 2002, it allows these non-BFPP governmental entities to apply for brownfield grants and loans without restrictions.

- The BUILD Act also increases the amount of money that can be awarded by EPA for remediation grants from $200,000 to $500,000, and allows EPA to increase that amount to $650,000 by waiver.[49] According to the 2017 House Report,[50] multiple stakeholders commented that due to inflation and the increasing complexity of some brownfield sites, the prior maximum cleanup grant level of $200,000 was insufficient. Some would argue that even $500,000 (or $650,000) is insufficient to clean up most significantly contaminated brownfields sites.

- In addition to increasing the amount of money that could be awarded for remediation grants, the BUILD Act adds a new grant provision for "multipurpose grants."[51] The previous Brownfields Program provided grants only for site characterization and assessment, or for remediation. These multipurpose grants, however, expressly encourage applicants to also seek funds for inventory and planning activities at brownfield sites—activities for which grant funds were previously unavailable under the previous version of the Program. Under this new authority, EPA may provide a maximum of $1 million in funding per grant to eligible entities.[52] While EPA has authority to award multipurpose grants of up to $1 million, the agency has determined that it will provide grants of no more than $800,000, and anticipates selecting just 10 proposals for these types of grants.[53] The statute requires that a recipient own the brownfield property prior to spending grant money for remediation purposes.[54] Additionally, grant recipients have five years to spend funds, unless EPA grants an extension.[55]

- Congress also decided to remove the statutory prohibition on grantees using funds for reasonable administrative costs.[56] Apparently, the House Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment heard from several stakeholders that this prohibition made it difficult for local governments and community organizations, among others, to effectively implement their cleanup programs and projects.[57] This prohibition also served as a barrier to local organizations using brownfields funding in small, rural, or disadvantaged areas.[58]

- In an attempt to encourage "green" brownfields projects, the BUILD Act expanded the list of grant ranking criteria to include the extent to which projects would address sites adjacent to a waterbody or federally designated flood plain,[59] or the extent to which the grant would facilitate the siting of renewable energy projects (i.e., wind, solar, geothermal) or an energy efficiency improvement project.[60]

- The BUILD Act also repealed a provision that required 25% of annual site characterization, assessment, and remediation grant funds to be allocated to sites contaminated by petroleum or petroleum product.[61]

- Finally, Congress reauthorized the funding of the federal Brownfields Program for $200 million in federal appropriations for fiscal years 2019 through 2023.[62]

Section 14 – *Small Community Technical Assistance Grants*: Congress added a new authority for EPA to make grants of up to $20,000 to states and tribes to provide training, technical assistance, or research assistance to support small communities, Indian tribes, rural areas, or disadvantaged areas.[63]

Section 15 – *State Response Program Funding*: The final section of the BUILD Act amends CERCLA Section 128 to authorize $50 million in federal funds for fiscal years 2019 through 2023. This is the pool of money that can be awarded to states for the implementation of states' own brownfields programs.

Missed Opportunities

As we approach the fortieth anniversary of CERCLA, environmental practitioners across the country would agree the law is ripe for significant changes across several areas. This is not to say that CERCLA has been a failure—but it has been an ambitious

[49] CERCLA § 104(k)(3)(A)(ii), 42 U.S.C. § 9604(k)(3)(A)(ii).
[50] *See* H.R. REP. NO. 115-419, pt. 1, at 14 (2017).
[51] CERCLA § 104(k)(4), 42 U.S.C. § 9604(k)(4).
[52] CERCLA § 104(k)(4)(B)(i), 42 U.S.C. § 9604(k)(4)(B)(i).
[53] *Multipurpose, Assessment, RLF, and Cleanup (MARC) Grant Application Resources*, EPA, https://www.epa.gov/brownfields/multipurpose-assessment-rlf-and-cleanup-marc-grant-application-resources (last updated Feb. 1, 2019).
[54] CERCLA § 104(k)(4)(E), 42 U.S.C. § 9604(k)(4)(E).
[55] CERCLA § 104(k)(4)(D), 42 U.S.C. § 9604(k)(4)(D).
[56] CERCLA § 104(k)(5)(E), 42 U.S.C. § 9604(k)(5)(E).
[57] *See* H.R. REP. NO. 115-419, pt. 1, at 15 (2017).
[58] H.R. REP. NO. 115-419 at 15.
[59] CERCLA § 104(k)(6)(C)(xi), 42 U.S.C. § 9604(k)(6)(C)(xi).
[60] CERCLA § 104(k)(6)(C)(xii), 42 U.S.C. § 9604(k)(6)(C)(xii).
[61] *See* H.R. REP. NO. 115-419 at 5, 16.
[62] CERCLA § 104(k)(13), 42 U.S.C. § 9604(k)(13).
[63] CERCLA § 128(a)(1)(B)(iii), 42 U.S.C. § 9628(a)(1)(B)(iii).

experiment that is in need of seriously overdue fine-tuning. Even if some consider the law an utter failure, we need to be reminded that "failure isn't fatal, but failure to change might be."[64]

We have learned many lessons since CERCLA's enactment and since the post-SARA amendments. With those lessons in hand, I firmly believe that the 115th Congress could have done more to improve the law in several respects. For instance, Congress could have clarified certain aspects of the statute to avoid unnecessary litigation and could have provided additional incentives for the cleanup of brownfield sites by private developers.

Below are just a handful of items that Congress could have addressed and that should be considered for future CERCLA revisions:[65]

1. **Applicable or Relevant and Appropriate Requirements (ARARs) should be updated.** Issues with ARARs must be addressed on several fronts. Rather than specifying standards for contaminants, CERCLA functions as an "umbrella" statute that relies on other statutes or regulations for site remediation standards. Section 121(d) broadly requires that cleanup comply with ARARs to protect human health and the environment.[66] ARARs can include a variety of standards, requirements, or other criteria, creating a complex web of demands for those interested in remediating a site.

   Indeed, members of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) testified before Congress in 2016 and 2017 that their main areas of concern included "[EPA's] inconsistent application of ARARs from site to site"[67] and the lack of written documentation on the rational [sic] used to determine ARARs."[68]

2. **NCP process is outdated and should be revised.** The National Contingency Plan (NCP) should be updated to reflect important lessons learned from almost 40 years of site remediation by EPA, states, and private parties under CERCLA, the Resource Conservation and Recovery Act (RCRA),[69] and state cleanup programs. For example, it is time serious consideration is given to whether every PRP-led and PRP-funded cleanup should go through a complete NCP process. As practitioners may know, the NCP requires a site-specific baseline risk assessment for specific contaminants of concern at the site—this endeavor is typically costly and extremely time-consuming. Instead of this process, Congress should mandate that EPA develop soil and groundwater cleanup standards for the most common contaminants found at Superfund sites, and those standards should vary based on the anticipated future use of the site. This would emulate the model used across the country for various state voluntary cleanup and Superfund programs, including New York's. CERCLA pretends that every contaminated site might someday be put to residential use, which is unrealistic and creates inefficiencies. There are ways to streamline the Superfund cleanup process, and this is one of them.

3. **RCRA and CERCLA should be integrated.** Although RCRA and CERCLA address different purposes and programs,[70] they ultimately serve the same primary goal: ensuring that soil and groundwater at contaminated properties are properly remediated for the protection of human health and the environment. By integrating RCRA and CERCLA, Congress would allow PRPs, EPA, and state government entities the flexibility to select remedial goals and actions that would lead to more efficient cleanups. For example, in the early 2000s, the RCRA Corrective Action Program was transformed into a much more effective cleanup program, allowing states and EPA to speed up investigations and cleanup process while maintaining stringent standards for remediation.[71]

4. **Arranger liability should be clarified.** The Supreme Court's landmark decision in *Burlington Northern*,[72] which settled rather narrow issues with respect to arranger

[64] JOHN WOODEN WITH STEVE JAMISON, WOODEN: A LIFETIME OF OBSERVATIONS AND REFLECTIONS ON AND OFF THE COURT (1997).

[65] It should be noted that some of these suggestions are not entirely new. For example, CERCLA critics have noted for years that the National Contingency Plan process is outdated and due for an update. Additionally, many environmental law practitioners think it is time that CERCLA and the Resource Conservation and Recovery Act (RCRA) be integrated in order to streamline the remediation of contaminated sites. Nevertheless, until Congress decides to actually enact significant amendments to the law, these existing suggestions are worth re-exploring.

[66] CERCLA § 121(d), 42 U.S.C. § 9621(d).

[67] *Oversight of the U.S. Environmental Protection Agency's Superfund Program: Hearing Before the Senate Subcomm. on Superfund, Waste Mgmt., and Regulatory Oversight of the Comm. on Env't and Pub. Works*, 115th Cong. 49 (2017) (testimony of Jeffrey A. Steers, Former President and Vice-Chair CERCLA Post Construction Focus Group, Association of State and Territorial Solid Waste Management Officials (ASTSWMO)).

[68] *Oversight of CERCLA Implementation: Hearing Before the House Subcomm. on Env't and the Econ. of the Comm. on Energy and Commerce*, 114th Cong. 67 (2016) (testimony of Amy Brittain, Remedial Action Focus Group Chair, ASTSWMO).

[69] 42 U.S.C. §§ 6901–6992k.

[70] RCRA provides EPA with the statutory authority to "control hazardous waste from the 'cradle-to-grave' [including] the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA also set forth a framework for the management of non-hazardous solid wastes." *Summary of the Resource Conservation and Recovery Act*, EPA, https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act (last updated Aug. 15, 2018).

[71] *Modernizing the Superfund Cleanup Program: Hearing Before the House Subcomm. on the Env't of the Comm. on Energy and Commerce*, 115th Cong. (2018) (testimony of Stephen A. Cobb, ASTSWMO), *available at* https://docs.house.gov/meetings/IF/IF18/20180118/106783/HHRG-115-IF18-Wstate-CobbS-20180118.pdf.

[72] Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599 (2009).

liability, appears to have opened a Pandora's box of issues. Circuit and district courts are still struggling to determine what constitutes an "arranger." For example, some courts are now grappling with the question of whether "intent to dispose" requires that the alleged arranger knew that materials being disposed of contained hazardous substances.[73] These and other similar issues[74] could be resolved through congressional action.

5. **EPA should be provided more latitude and flexibility in settling cases.** Cost recovery claims brought by EPA that have not been referred to the U.S. Department of Justice (DOJ) and are settled currently require DOJ approval if total response costs are more than $500,000.[75] Given the complexity of most Superfund sites and the fact that EPA response costs can easily run into the millions of dollars, this rather low threshold creates an unnecessary hurdle for settlement. Furthermore, sometimes the need for DOJ approval creates a disincentive for regional EPA counsel to settle quickly. Due to the $500,000 threshold, EPA may prefer to issue consent decrees for *de minimis* settlements to avoid DOJ involvement, which must be sought when administrative orders are used (though orders may be deemed approved if DOJ does not act within 30 days of referral).[76] The threshold could also be increased to encourage EPA to use arbitration for cost recovery settlements.[77]

6. **Federal income tax credits to encourage low- and moderate-income housing.** Grants issued under the federal Brownfields Program are limited in number. Although EPA receives hundreds of applications, EPA typically awards fewer than 200 grants per year. For example, for fiscal year 2018, EPA awarded 149 grants under the Brownfields Program.[78] The vast majority of these grants were awarded to state and municipal entities, with some going to non-profit organizations.

   Amending CERCLA to provide for federal income tax credits would incentivize private developers to pursue brownfield redevelopment. This concept can be taken a step further and bonuses can be issued for the development of low- or moderate-income housing in urban or suburban areas. This type of program has worked well in New York State. There is no reason why it cannot be implemented on a federal level.

Conclusion

The BUILD Act was, at its core, a basic effort by the 115th Congress to reauthorize the Brownfields Program. While the amendments included a handful of useful but relatively minor changes—such as expanding CERCLA liability protection to governmental entities that acquire property as a result of law enforcement activities, excluding certain Alaska Native villages and corporations from "owner or operator" status, and extending BFPP liability protection to tenants—Congress could have done a lot more to advance the underlying goals of the Superfund program and to update parts of CERCLA that have not been touched in decades.[79] Until that does happen, EPA, state and local governmental entities, and private parties—and the environmental practitioners who represent them all—must continue navigating unnecessary hurdles in the complex web of the federal Superfund statute to achieve the central national cleanup goals.

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[73] *See, e.g.*, Town of Islip v. Datre, 245 F. Supp. 3d 397, 424 (E.D.N.Y. 2017) ("Thus, just as the term 'arrange' implies a specific intent to dispose of the substance, . . . so too does it imply knowledge that the substance is hazardous." (citation omitted)).

[74] Another recent CERCLA case explores the meaning of the term "all costs" in Section 107(a)(1) and considers whether a potentially responsible party should also be responsible for reimbursing the government for costs incurred prior to ownership. *See* Pa. Dept. of Envtl. Prot. v. Trainer Custom Chem., LLC, 906 F.3d 85, 91–94 (3d Cir. 2018).

[75] CERCLA § 122(h)(1), 42 U.S.C. § 9622(h)(1).

[76] CERCLA § 122(g)(4), 42 U.S.C. § 9622(g)(4).

[77] *See* CERCLA § 122(h)(2), 42 U.S.C. § 9622(h)(2).

[78] *See Brownfields Grant Fact Sheet Search*, EPA, https://cfpub.epa.gov/bf_factsheets/ (last visited Mar. 8, 2019) (select "2018" for "Grant Announcement Year" filter and "ALL" for other filters).

[79] It should be noted that the 115th Congress made another set of amendments to CERCLA in the Consolidated Appropriations Act of 2018. Buried even deeper in the spending bill—on page 800 of 878—one will find Title XI of Division S, the "Fair Agricultural Reporting Method Act" or "FARM Act." The FARM Act amended CERCLA Section 103(e) to exempt air emissions from animal waste at a farm from reporting under CERCLA. Pub. L. No. 115-141, div. S, tit. XI, § 1101, 132 Stat. 1147. This is hardly a significant update to Section 103 and arguably does nothing to further CERCLA's underlying goals.