

## **New York Enacts Historic Brownfields Legislation**

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On October 9, 2003, Governor Pataki signed into law important legislation establishing a statutory Brownfield Cleanup Program in New York State. The new law is the product of seven years of effort by the State Senate and Assembly, and is admittedly imperfect. Many important details remain to be worked out in administrative regulations. Nevertheless, the law has the potential to spur development in some of New York's economically blighted former industrial areas and to encourage voluntary cleanups in other parts of the State. Key aspects of the 107-page law are described below.

### **Brownfield Cleanup Program**

Brownfields are abandoned or under-used properties, typically industrial or commercial properties, where the real or perceived presence of environmental contamination complicates redevelopment or reuse. There are over 14,000 known brownfield sites spread throughout New York State, with nearly 4,000 acres of abandoned industrial property in New York City alone. These contaminated sites often impose environmental, legal, and financial burdens on communities. The Brownfield Cleanup Program created by this new law is designed to encourage the voluntary remediation and redevelopment of brownfield sites through economic incentives and liability reform.

Since 1994, brownfield sites in New York have been remediated through the Voluntary Cleanup Program (VCP), administered with mixed success by the New York State Department of Environmental Conservation (DEC). Over 440 sites have been cleaned up under this program. Until the enactment of this legislation, DEC has run the VCP using informal articles and speeches delivered by DEC personnel, without the benefit of any regulations or explicit statutory authority. This lack of formality, combined with the prospect of joint and several liability under the federal Superfund law, has discouraged investment in the cleanup and redevelopment of contaminated properties.

The Brownfield Cleanup Program codifies various practices under the VCP, which should add some predictability and consistency to the redevelopment of brownfields. For example, DEC is instructed to promulgate three generic tables of use-based soil cleanup standards for unrestricted, commercial, and industrial uses. Assuming that the standards are achievable, such "lookup tables" could be quite effective at providing certainty to prospective lenders and other investors. Similarly, time frames are provided for DEC decisions at various points, which is intended to keep the process moving despite all the new procedural requirements that have been added. However, DEC is only required to use "best efforts" to meet the time frames. At this stage, it is difficult to say whether DEC is capable of meeting them, and actual implementation probably will vary by DEC region.

On October 31, 2003, DEC will begin accepting applications under the Brownfield Cleanup Program and will no longer accept VCP applications.

### **Participants and Volunteers**

The Brownfield Cleanup Program creates two categories of applicants: “participants” and “volunteers.” Participants are applicants who either owned a site at the time of the disposal of hazardous waste or discharge of petroleum, or who are otherwise responsible for the site’s contamination under applicable principles of statutory and common-law liability. Volunteers are applicants who are not responsible for such contamination and whose involvement with a site arose subsequent to the site’s contamination.

The distinction between participants and volunteers is important because participants are subject to requirements and liabilities that are not applicable to volunteers. For example, all applicants must prepare a work plan for investigating and characterizing the nature and extent of contamination within a site’s boundaries. However, participants must also investigate and characterize the nature and extent of off-site contamination and conduct any necessary off-site remediation, while volunteers need only perform a “qualitative exposure assessment” for off-site contamination. Participants in the current VCP will notice that this off-site exposure assessment is a new requirement for volunteers, and could entail off-site sampling and investigation. Further, all applicants must pay “all state costs incurred in negotiating and overseeing the implementation” of a brownfield site cleanup agreement, whereas participants must also pay “all costs incurred by the state up to the effective date” of an agreement.

Several categories of sites are not eligible for participation in the Brownfield Cleanup Program, including sites listed in the State registry of inactive hazardous waste sites (unless the property is owned by a Volunteer), sites listed on the federal National Priorities List, and sites subject to an enforcement action or order relating to the contamination. In addition, DEC is authorized to reject an application on numerous grounds, including a violation by the applicant of any state or federal environmental law. This is another provision subject to potential abuse or inconsistent application by DEC.

Once an applicant’s request for participation is approved by DEC, the applicant enters into a cleanup agreement with DEC, similar to the voluntary remediation agreements currently used in the VCP. The agreement covers preparation and submission of investigation and remediation work plans, conducting interim remedial measures (IRMs) where warranted, complying with citizen participation requirements, and payment of State oversight costs. With the exception of the new requirement for off-site exposure assessments, the site investigation process is similar to current VCP practice.

### **Multi-Track Approach**

Based on the results of the remedial investigation, the Brownfield legislation identifies 25 factors to be considered in selecting a remedial program. The cleanup level for a particular site will depend on which one of four “tracks” is appropriate for the site, based on the intended use and the ability of the remedy to achieve the use-based soil cleanup standards promulgated by DEC. For instance, the remedial program for Track 1 sites must achieve a cleanup level

that allows the site to be used for any purpose without restriction and without the use of long-term institutional or engineering controls. The remedial program for Track 4 sites must achieve a cleanup level that will be protective for the site's current, intended or reasonably anticipated residential, commercial, or industrial use with restrictions, and with use of long-term institutional or engineering controls.

A remedial alternatives analysis must be prepared for all sites, and at least one alternative must achieve a Track 1 (unrestricted use) cleanup. The alternatives analysis is essentially a streamlined version of the feasibility study required under the federal Superfund program. In all cases, the target risk of residual contamination must not exceed an excess cancer risk of one in one million for carcinogenic end points and a hazard index of one for non-cancer endpoints, which are the most stringent risk levels used under the federal Superfund program. However, the cleanup level for a Track 4 site may exceed an excess cancer risk of one in one million for carcinogenic end points if DEC, in consultation with the State Department of Health, finds that the selected level is "protective of public health and environment."

In the event institutional or engineering controls are proposed, an environmental easement for the benefit of DEC must be prepared and recorded limiting future uses of the property as appropriate based on the level of remediation accomplished. In addition, periodic certifications must be made to DEC—under penalty of perjury—that the institutional or engineering controls are still in place and nothing has occurred that would impair the ability of the controls to protect human health and the environment.

### **Citizen Participation**

Public participation requirements are significantly expanded under the Brownfield Cleanup Program. At least seven public notices are required during the process, at least three 30- to 45-day public comment periods are required, and public meetings may be requested by the affected community at any site. Furthermore, technical assistance grants of up to \$50,000 may be provided to affected community groups to interpret technical information and hire experts. The funding for these grants may come from the State, but DEC is authorized to require responsible parties to fund them.

These requirements are significantly more stringent than those under the existing VCP. Indeed, they are more stringent than the public participation requirements at run-of-the-mill inactive hazardous waste sites. Site cleanups unquestionably will take longer under the Brownfield Cleanup Program, even with the new deadlines for DEC decision making, and project opponents will have more opportunities to contribute costs and delays to controversial projects.

### **Covenant Not To Sue**

The remediation of a brownfield site culminates with DEC's issuance of a certification of completion, as well as a release and covenant not to sue. The release and covenant not to sue shields applicants, as well as applicants' successors or assigns and future developers and occupants of the site, from liability to the State for any statutory or common-law cause of action arising from contamination at the site. However, the protections do not extend to any

person responsible for the contamination unless that person was a party to the DEC cleanup agreement.

The release and covenant under the Brownfield Cleanup Program is broader than the protection currently provided by DEC under the VCP, which is quite limited because it binds only DEC and not any other agency of the State. The release and covenant provided under the Brownfield Cleanup Program does not affect any applicant's liability with respect to third party claims, except claims for contribution regarding matters addressed in the DEC agreement, which are likely barred by the federal Superfund law. Nor does the release and covenant protect a participant from liability for natural resource damages that may be available under federal law. The release and covenant is subject to several reopeners, such as a change in use of the site or the discovery of new information, but they are identical to reopeners currently included in agreements under the VCP.

### **Municipalities**

The new legislation creates important incentives and financial relief to municipal governments. State financial assistance to municipalities is increased from 75% to 90% of on-site investigation and cleanup costs, and 100% of off-site remediation costs, at properties owned by the municipality. This funding also is made available to community based organizations for investigating and proposing potential Brownfield Opportunity Areas. Municipalities are exempted from any liability to the State for contamination where the municipality acquired the site involuntarily and did not participate in the development of the site. The legislation also provides that, in a proceeding to foreclose on a tax lien, the temporary incidents of ownership do not render the taxing district liable as an owner of the contaminated parcel.

For municipal governments holding contaminated properties in economically blighted areas, the Brownfield legislation will provide tangible incentives for redevelopment in the form of tax credits.

### **Tax Credits**

Perhaps the most significant new incentive for brownfield development is the creation of potentially substantial tax credits to brownfield developers. Eligible taxpayers are allowed a credit for brownfield site preparation costs, groundwater remediation, and even the costs of buildings and other improvements on the property. The total credit is geared to the number of jobs created by the development and is subject to a percentage limitation of 10-12%. The percentage limitation is increased by 8% if at least half of the site is located in an "environmental zone," which refers to areas designated by the Commissioner of Economic Development as having a poverty rate of at least 20% and an unemployment rate of at least 1.25 times the statewide unemployment rate. The limitation is increased by an additional 2% if the site is remediated to Track 1 levels.

In addition, recognizing the widespread use of insurance products in brownfield redevelopment projects, a tax credit is allowed up to \$30,000 for environmental remediation insurance premiums.

## **State Superfund Revisions**

The legislation also refinances and amends the State's Inactive Hazardous Waste Site Remediation Program (Superfund) in several important respects. For example, the definition of "hazardous waste" is expanded to cover the broader category of chemicals included in the definition of "hazardous substances" used in the federal Superfund law. This difference in scope had excluded a number of sites in New York from coverage under the State Superfund program. One issue not addressed in the new law is the lack of a private right of action under the State Superfund law. Rather, public and private entities must continue to rely on the federal Superfund law to bring cost recovery and contribution actions, as is currently the case.

The State's Superfund law is amended to provide liability relief to lenders similar to the defense provided in the federal Superfund law, exempts municipalities that voluntarily take title (discussed above), and creates a fiduciary liability cap that limits the liability of a fiduciary to the assets held in a fiduciary capacity. Similarly, affirmative defenses are created for acts of God, acts of war, and acts or omissions of third parties, again modeled on the defenses in the federal Superfund law.

In addition to refinancing and amending the State's Superfund program, the new legislation provides a third-party defense under the Navigation Law, which governs petroleum contamination. Finally, the law establishes a Groundwater Protection and Remediation Program, which requires DEC, in consultation with the State Department of Health, to develop a strategy to address the long-term remediation of groundwater contamination.

## **Conclusion**

Municipalities will enjoy significant benefits under New York's new Brownfield legislation. For private landowners, however, the benefits of the legislation are mixed. A table of DEC cleanup levels, detailed procedural regulations, and time frames for DEC decision making will create more certainty in the process. However, increased certainty means flexibility in some cases will be diminished, and the program is certainly more procedurally burdensome and substantively stringent than current practice in several respects.

The success of the new brownfields program now is in the hands of DEC, which must promulgate regulations and soil cleanup standards, and proceed with the day-to-day administration of the program. Only time will tell whether DEC can successfully transform itself into a partner for the cost-effective and expeditious redevelopment of brownfields, while at the same time complying with its statutory mandate to impose the most stringent environmental cleanup standards in the Nation.

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