

The Domain of Brownfields in New York State

by Kelly Bennett

The Brownfields Cleanup Program (BCP) is perhaps the most significant piece of environmental legislation enacted in the state in the past two decades. Signed into law in October 2003, it refinances and expands the New York State Superfund Program, broadening the definition of hazardous “waste” to include hazardous “substances.” It also revises the Clean Air/Clean Water Bond Act by increasing the maximum bond act grant for municipal entities from 75 to 90 percent of the cost of a cleanup. Liability protection is also extended to parties not responsible for contamination at brownfield sites, flexible clean-up standards are provided and tax credits and targeted financial incentives are offered for designated redevelopment areas.

The BCP attempts to involve communities in the planning or redevelopment of distressed urban areas. The legislation gives preferences and priority to redevelopment projects in “brownfield opportunity areas” – areas most associated with low-income communities. The legislation also allows bond funds to be awarded not only to municipalities but also to community-based organizations acting “in partnership with” a municipality.

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. Prior to the BCP, over 440 brownfield sites in New York were remediated through the Voluntary Cleanup Program (VCP). The BCP codifies various practices under the VCP, providing predictability and consistency to the redevelopment of brownfields. Since its creation, 169 sites have been approved under the new BCP.

Eligible Sites

The NYS Department of Environmental Conservation (DEC) revised its eligibility guidance in March 2005 and broadly determined that eligibility must be made on a case-by-case basis, following review of all pertinent facts, and considering the totality of the circumstances. The DEC uses up to 15 separate criteria to determine not only if the site is contaminated, but also if the contamination complicates the development or re-use of the property. Based on the determination, the application may be approved in part and rejected in part.

Several categories of sites are not eligible for participation in the BCP, including: sites listed in the state registry of inactive hazardous waste sites, unless the property is owned by a “volunteer” (see Liability Relief section); sites listed on the federal National Priorities List; and, sites subject to an enforcement action or order relating to the contamination. In addition, the DEC is authorized to reject an application on numerous grounds, including a violation by the applicant of any state or federal environmental law.

Once an applicant’s request for participation is approved by the DEC, the applicant enters into a clean-up agreement with the DEC. The agreement covers preparation and submission of investigation and remediation work plans, conducting interim remedial measures where warranted, complying with citizen participation requirements, and payment of state oversight costs.

Clean-up Standards

While allowing flexible clean-up goals and standards, brownfield remediation requires all remedies to be “fully protective of public health and the environment,” with a preference for remedies that achieve a “permanent cleanup.” The BCP creates a multi-track approach for the remediation of contamination and requires the DEC to promulgate contaminant-specific soil cleanup objectives (SCOs) based on a site’s current, intended, or reasonably anticipated

“A significant barrier to brownfield remediation in New York has been the absence of clear clean-up standards.”

– Kelly Bennett, EBA/NYS

future use. The SCO’s were released in draft form in November 2005.

A new Groundwater Protection and Remediation Program, enacted concurrently with the BCP, specifies that groundwater should be protected for its classified use, the highest of which is drinking water. It also recognizes, however, that restoration of groundwater may not be feasible at some sites. The DEC must develop and publish a groundwater remediation strategy by October 2006.

Liability Relief

Liability can be a powerful disincentive for a party to remediate and redevelop contaminated land. For this reason, all brownfield programs must contain clear liability rules and releases for parties interested in cleanup and redevelopment of contaminated land. The BCP draws a distinction between “participants” and “volunteers.” Current owners who acquired property after its contamination are treated as volunteers and will not be held legally responsible for the contamination, provided they exercise “appropriate care” with respect to the contamination. On the other hand, the DEC will bring an enforcement action against participants - those known or suspected to be legally responsible for contamination - where the site poses a significant threat to the public.

Once a developer remediates the property and the DEC has issued a “certificate of completion” (COC), that developer and its successors cannot be held liable by the state for any hazardous substances emanating from that site. Additionally, exemptions from legal liability are provided for lenders, fiduciaries, municipalities, and industrial development authorities. These parties may be legally connected to a brownfield site yet innocent of any role in its contamination.

The DEC may modify or revoke a COC for “good cause” and the

covenant not to sue is subject to a number of standard re-openers (e.g., environmental conditions at the site are no longer protective of human health or the environment; fraud; change in standards, etc.).

Financial Incentives

Financial incentives and direct funding are also crucial to making brownfields attractive to developers. Of the states that offer tax abatements or credits as part of a brownfield cleanup program, New York's are the most generous to developers. The DEC estimates that the value of the tax credits will be approximately \$135 million when they become fully effective. Like any tax provision, the brownfield tax credits are extremely complex.

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. New York gives builders a tax break for a percentage of the cost of redevelopment, up to 22 percent. If the credit amounts to more than what the developer owes in state income tax, New York State will pay the difference in the form of a rebate check. 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.

In Place for Success

The Brownfield/Superfund Act brings the state's superfund program more in line with those of its neighboring states. The law provides the DEC with enhanced tools to implement an effective brownfield program. The incentives provided to municipalities through grants, liability relief, and reduction of matching requirements, and to private entities through tax credits, should prove critical to the successful and widespread redevelopment of contaminated properties throughout New York.

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Fueling Municipal Cleanups

by Kelly Bennett

Since the public sector often plays a crucial role in the development of brownfields, it is significant that the law provides valuable funding sources and liability relief for municipalities. Notably, the 2003 Brownfield Cleanup Program (BCP) legislation offers an area-wide, collaborative planning approach to brownfield redevelopment and neighborhood revitalization through the provision of financial and technical resources to municipalities and their community-based partners.

Environmental Restoration Program

The \$1.75 billion Clean Water/Clean Air Bond Act of 1996 established a \$200 million fund under the Environmental Restoration Program (ERP) to clean up brownfields owned by

municipal governments. Under the ERP, municipalities could obtain a State Assistance Grant (SAG) to either investigate or remediate hazardous substances or petroleum on the property.

The ERP had several disincentives, however. Because the grant only covered up to 75 percent of eligible costs, municipalities had to meet a 25 percent cost share requirement. As a result, much of the \$200 million remained unspent. In addition, the local governments were required to share any profits with the state when brownfield properties were subsequently sold.

New York State counties, cities, towns, and villages, as well as local public authorities, public benefit corporations, school and supervisory districts, and improvement districts are eligible for the ERP. The municipality must own the property and cannot be responsible for the contamination. The property cannot be listed as a Class 1 or 2 site on the New York State Registry of Inactive Hazardous Waste Disposal Sites.

The ERP is vastly improved under the new BCP program. The SAG payments are increased to 90 percent for on-site contamination and 100 percent for off-site contamination. The local government is now allowed to use other funding to satisfy the 10 percent cost share. In addition, proceeds from the sale of property no longer must be shared with the state. Once site investigation is complete, the municipality can flip the site to a private entity to remediate the site and obtain the powerful tax credits for the redevelopment project.

An important feature is the provision allowing taxing districts that are not foreclosing on a tax lien to be considered title holders for the purposes of receiving ERP investigation grants. The taxing authority may be granted tempo-



Photo courtesy of New York State Department of Conservation

Yonkers waterfront benefits from Clean Water Bond Act.

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rary ownership to conduct an ERP and receive an ERP investigation SAG. This allows municipalities to inspect the site without foreclosing on the property.

Brownfield Opportunity Areas

The Brownfield Opportunity Areas (BOA) program provides municipalities and community-based organizations with assistance to complete area-wide approaches to brownfields redevelopment planning. Urban areas often have significant areas of contiguous brownfields in their former industrial areas. Addressing brownfields on an area-wide basis can result in more efficient cleanups and generate redevelopment synergies.

Both municipalities and qualifying CBOs are eligible to apply for a BOA grant. Funding is available to cover 90 percent of the costs to complete Pre-Nomination Studies, Nomination Documents, and Site Assessments. The goal is to identify areas and strategic sites that are most likely to stimulate economic investment, promote community revitalization, provide location for public amenities, and enhance community health and environmental conditions.

The process creates a clear direction to guide future actions in the BOA, with defined future uses for all properties in the area and an emphasis on future reuse of priority brownfield sites. The BOA designation also give entities a source of technical assistance to resolve brownfield and associated redevelopment issues. Finally, projects in the BOA receive priority and preference when considered for funding for financial assistance.

Liability Exemptions

A municipality receiving SAG funds, and its successor, lender, and lessee not liable for the site contamination, are indemnified by the state provided that they did not generate, transport or dispose of hazardous substances at the site. Similar to the other liability provisions in the BCP, the exemption is subject to a number of re-openers.

The law also establishes a liability defense for municipalities that involuntarily acquire ownership or control of a contaminated site and do not "participate in development" of the site, provided they did not cause or contribute to the release of hazardous substances. This can be particularly helpful to local governments to help them assemble parcels of smaller brownfield sites into a larger site that has greater development potential.



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