

# Brownfield Cleanup Program

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# NYDEC Remedial Programs

- ◆ ECL Title 13 State Superfund Program (SSF)
- ◆ Navigation Law Oil Spill Program
- ◆ Environmental Restoration Program (ERP)
- ◆ Brownfield Cleanup Program (BCP)
- ◆ Petroleum Bulk Storage Act (PBSA)
- ◆ Chemical Bulk Storage Act (CBSA)





# Key DEC Remediation Guidance

- ◆ 6 NYCRR Part 375
- ◆ Technical Guidance for Site Investigation and Remediation (DER-10)
- ◆ Technical and Administrative Memorandum (TAGM) 4046
- ◆ Spill Technology and Remediation Series (STARS) Memo #1
- ◆ Technical and Operational Guidance Series (TOGS) # 1.1.1

# What is Brownfield?

- ◆ Statutory Definition:
  - redevelopment/reuse complicated by
  - presence or potential presence of hazardous waste, petroleum, pollutant or contaminant
- ◆ BCP Guide Definition:
  - Confirmed contamination or “reasonable basis to believe contamination likely present; and
  - Contamination or potential presence “may be” complicating redevelopment /reuse”





# Eligible Sites

- ◆ Hazardous Waste Sites
- ◆ Petroleum Contaminated sites
- ◆ Excluded Sites
  - Class 1 or 2 (unless volunteer enrolls site by July 1, 2005)
  - Permitted TSDF
  - Enforcement Action, Cleanup Order or permit issued under RCRA, SWMA, PBS, Navigation Law
  - 2004 Amendments allow Stipulation



# Is Site Contaminated or Basis to Believe

- ◆ Nature and Extend of contamination;
- ◆ Does contamination exceed guidance values or standards (fill vs. release?);
- ◆ Does contamination exceed historic background;
- ◆ Did prior industrial or commercial operations result in contamination;
- ◆ Has site been subject to closure, removal or prior remedial action by or under agency oversight.

# Does Presence or Potential Presence Complicate Reuse

- ◆ Is Site idled, abandoned or underused;
- ◆ Is site unattractive for redevelopment or reuse because of contamination;
- ◆ Does area have indicators of economic distress such as high vacancy rate or depressed property values;
- ◆ Is estimated cleanup costs “significant” in comparison to value of project.



# Scope of Brownfield

- ◆ NYSDEC Reserves Right to Redefine Boundary of “Brownfield Site”
- ◆ Show contamination in footprint of building (e.g., source, VI)







# Types of Applicants

- ◆ **Volunteers-**
  - Non-PRPs (after discharge or disposal)
  - PRP solely on basis of ownership
- ◆ **Participants-**
  - Anyone who does not qualify as Volunteer

# Volunteer/Participant Obligations

- ◆ **Volunteer**
  - investigate and remediate on-site contamination
  - Qualitative exposure assessment for off-site plumes
  - Exercise “appropriate care” if owner
- ◆ **Participants-**
  - May be required to chase off-site plumes
  - Pay all state costs up to BCA effective date



# BCP Statutory Criteria

- ◆ **All Parties eligible unless**
  - Current state or federal action or proceeding, investigation, removal or remediation of hazardous wastes/petroleum;
  - Prior denial for BCP or another state BCP/VCP;
  - Committed tort or criminal conviction for HW/PH;
  - Other criminal offense
  - Knowingly falsified or concealed material facts to DEC;
  - Person with substantial interest in or acted in managerial capacity/director of entity whose act or omission could result in permit denial; and
  - Serves Public Interest;



# BCP Application Process

- ◆ 10 day completion notice
- ◆ 30 day comment period on completion determination
- ◆ “Best Efforts” to notify applicant within 45 days of approval or denial



# Public Participation

- ◆ Filing of application
- ◆ Before finalizing RI Workplan
- ◆ Before DEC approves RIR
- ◆ Before DEC approves RAW
- ◆ Before Commencing Construction
- ◆ Before DEC approves final engineering report
- ◆ Within 10 days of COC



# BCP Pre-Application Process- Initial Screening

- ◆ Contamination
  - Phase 2 or RI-Quality Sampling
  - Applicable Standards
- ◆ On-Site Source
  - Historical Investigation
  - Link to Contamination
- ◆ Development Plans
- ◆ Timing



# Pre-Application Meeting

- ◆ Information Worksheet
  - Eligibility criteria
- ◆ Prepared to Answer Following Questions
  - Applicant
  - Relationship to Site
  - Site Access



# Pre-Application Meeting Cont'd.

- ◆ Current Use
- ◆ Proposed Development
  - Type (e.g., Residential)
  - Footprint and Excavation
  - Volume of soil
  - Costs
- ◆ Impediments to Construction
- ◆ Schedule
- ◆ Required Local Approvals/zoning
- ◆ Community Outreach





# Pre-Application Meeting Cont'd

- ◆ Sensitive Receptors
- ◆ Site History
- ◆ Outstanding Violations
- ◆ Nature of Contamination
  - Part 375 SCO's
  - Identify AOCs
- ◆ Extent of Contamination (e.g., entire site?)



# 10 Day Application Complete Period

- ◆ Contact Sheet
- ◆ Fact Sheet
- ◆ Access Letter
- ◆ Repository Letter
- ◆ ENB Notice Deadline (Wednesday)



# Finish Line

- ◆ Site Management Plan (SMP)
- ◆ Final Engineering Report (FER)
- ◆ Environmental Easement
  - Title Policy
  - ALTA Survey





# Cleanup Standards

- ◆ Track 1- Unrestricted Use
- ◆ Track 2- Restricted Use with Generic Soil Cleanup Standards
- ◆ Track 3- Restricted Use with Site-Specific Soil Cleanup Standards
- ◆ Track 4- Restricted Use with LUCs

# Liability Release

- ◆ Certification of Completion (COC)
- ◆ Liability Release under statutory and common law for contamination at site as defined by BCA and subject of COC
- ◆ Notice must be filed within 30 days of COC or title, whichever is later
- ◆ Binds all state agencies



# Liability Release Cont'd

- ◆ Runs with land so applies to Applicant successors and assigns
- ◆ Persons who develop and occupy site if exercise “due care” and “good faith”
- ◆ Lenders?
- ◆ Does not apply to PRPs unless parties to BCA
- ◆ Participants not released for NRD



# Liability Release Cont'd.

- ◆ Does not apply to costs, damages or activities not addressed by BCA
- ◆ Contribution protection for matters addressed by BCA
- ◆ Contribution Protection does not apply to third party claims for bodily injury or wrongful death due to acts or omissions of volunteer.





# Reopeners

- ◆ Environmental Conditions no longer protective (not tied to new information or unknown conditions)
- ◆ Non-compliance with BCA or COC
- ◆ Fraud
- ◆ Change in standards renders remedy no longer protective
- ◆ Failure to make substantial progress within 3 years or unreasonable delay
- ◆ Change in Use (§27-1421)



# Change in Use Notice (§27-1425)

- ◆ 60 day advance notice prior to physical alteration or construction constituting change in use
  - Transfer of title
  - Erection of building
  - Creation of park
  - Activity likely to disrupt or result in exposure contaminants
  - Conduct that may significantly interfere with ongoing or completed remedy



# Revocation of COC

- ◆ Failure to Comply with BCA (e.g., intentionally failing to comply with environmental easement)
- ◆ Misrepresentation
- ◆ Good cause
- ◆ Notice of determination
- ◆ 30 days to request hearing



# Environmental Easements

- ◆ Record use restrictions or engineering controls
- ◆ Must follow form established by DEC
- ◆ Deed and other instruments must contain notice of environmental easement
- ◆ Held in perpetuity or until remedy changed
- ◆ Must be extinguished by amendment or new instrument



# Environmental Easements Cont'd

- ◆ May be enforced by grantor, state or local government in law or equity
- ◆ Local government must inform DEC of local permits affecting use or development of such property
- ◆ Recorded at county level
- ◆ Subject to Eminent Domain





# Brownfield Tax Credits

- ◆ Brownfield Redevelopment Tax Credit
  - Site Preparation
  - Tangible Property Costs
  - On-Site Groundwater Remediation Costs
- ◆ Taxpayer must be a party to a BCA(i.e. do not have to be owner of property)
- ◆ Taxpayer must receive COC

# Revised Site Prep Costs

- ◆ Track 1-50%
- ◆ Track 2/3- 50%(unrestricted), 40%(residential), 33%(commercial), 27% (industrial)
- ◆ Track 4-28% (residential), 25% (commercial), 22% (industrial)
- ◆ Percentage set forth in COC



# Tangible Property Tax

- ◆ Amount of Tax Credit
  - 12% for corporate taxpayer of non-BOA site
  - 10% for non-corporate taxpayer of non-BOA site
  - Add 2% if unrestricted use remedy
  - Add 8% if 50% of property in En-Zone
  - Add 2% if BOA



# Revised Tangible Property Tax Credit

- ◆ Non-Manufacturing: Lesser of:
  - \$35MM (hard cap) or
  - 3x Site Prep Costs (soft cap)
- ◆ Manufacturing Sites: Lesser of:
  - \$45 MM (hard cap)
  - 6x site prep costs
- ◆ Grandfathering for BCP applications accepted prior to 6/23/08





# Dual Costs Issues

- ◆ Shift costs to Site Prep Bucket
- ◆ Lose IRS § 198 expense deduction
- ◆ DEC/TDF will scrutinize





# Winners and Losers

- ◆ Build-out to Cleanup Cost Ratio
- ◆ Winners
  - Low BC Ratio (10:1): no hard cap
  - Small sites not in En-zones/BOA
- ◆ Losers
  - Mega sites
  - Smaller sites with high applicable percentages and relatively low cleanup costs

# Remediated Brownfield Credit for Real Property Taxes

- Property Owner Only
- Income Tax Credit
- Available to partners and “S” Corp shareholders and certain LLCs
- Runs with land but successors must take title within 7 years of COC
- 25% (100% in EN-zone) x avg. no of fulltime jobs x eligible real property taxes
- Maximum limit in one year is \$10K x avg. fulltime jobs



# Tax Credits Cont'd

- ◆ Environmental Remediation Insurance Credit
  - \$30K or 50% of premium, whichever is less
  - After BCA is executed
  - One-time Use
  - May be claimed in year COC issued





# SSF Reforms

- ◆ Hazardous Wastes Includes Hazardous Substances
- ◆ Act of God,
- ◆ Act of War
- ◆ Third Party Defense
- ◆ Innocent Purchaser Defense
- ◆ CERCLA Lender and Fiduciary Exemptions
- ◆ Municipalities/IDAs
- ◆ No BFP or Contiguous Owner Defense
- ◆ Appropriate Inquiry Standard

# Navigation Law

- ◆ Third Party Defense
- ◆ Lender Exemption
- ◆ No RCRA UST Lender Liability Exemption





# Environmental Restoration Program (ERP)

- ◆ Remains Distinct Program from BCP
- ◆ SAC share increased from 75% to 90% for on-site contamination
- ◆ 100% SAC for off-site contamination
- ◆ 10% co-share may be satisfied by other grants
- ◆ No share for sale proceeds (and taxes) for costs :
  - First \$ go to local government up to its costs
  - Next \$ for amount of SAC
  - Balance \$ to local government

# ERP Cont'd

- ◆ SAC cost-share adjusted for proceeds from PRPs
- ◆ Municipality may use for public purpose or sell
- ◆ May sell to PRP after cleanup completed but PRP must reimburse SAC plus interest





# ERP Eligibility

- ◆ No Class 2 Sites
- ◆ Taxing Districts Eligible without foreclosing:
  - 20 day notice for petition to obtain temporary incidents of ownership
  - Relief shall be granted unless prior redemption
  - Stay foreclosure until ERP investigation completed
  - Stay lifted upon receipt of report by court



# ERP Eligibility Cont'd

- ◆ Community-Based Organizations (CBO)
  - Must partner with municipality
  - Not liable for contamination
  - Not more than 25% of board, officers or members employed by liable party
- ◆ Municipality that generated, transported or disposed wastes at site not eligible for ERP
- ◆ Private Parties not eligible





# ERP cont'd

- ◆ SAC recipient successor, lender and lessee not liable under statutory and common law for wastes at time of SAC
- ◆ Indemnity
- ◆ Reopeners
  - Failure to implement workplan and LUCs;
  - Fraudulent attainment of cleanup standards;
  - Causing release;
  - Changing use; or
  - Failing to provide notice of change in use