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Overview and Update on the Brownfield Cleanup Program

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NEW YORK BROWNFIELD CLEANUP PROGRAM

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The Brownfield/Superfund Act of 2003 ("Brownfield Act") created the Brownfield Cleanup Program ("BCP") and made sweeping changes to the state's other remedial programs.¹ Since the New York State Department of Environmental Conservation ("NYSDEC") began implementing the BCP,² the agency has made some significant changes in policy because of concerns over the magnitude of the tax credits generated by the BCP. This article will review the how the BCP has evolved and provide practical insights on how to effectively use the program to remediate and redevelop contaminated sites in New York.

I. Overview of New York Remedial Programs

The New York State Department of Environmental Conservation ("NYSDEC") is responsible for administering the following four remedial programs: the State Superfund Program for hazardous wastes ("SSF")³, the Spill Response Program for petroleum contamination, the Environmental Restoration Program for municipal brownfields ("ERP") and the Voluntary Cleanup Program ("VCP").⁴ The Department of Health ("DOH") and State Attorney General also have a role for ensuring the cleanup of inactive hazardous waste disposal sites across the state.

Traditionally, NYSDEC staff for each of the various programs has adopted its own procedures and standards for investigating and remediating sites under its jurisdiction. Moreover, the nine NYSDEC regional offices often have used different cleanup standards and procedures for sites within their jurisdiction. To establish better uniformity across its remedial programs, NYSDEC's Division of Environmental Remediation ("DER") developed a draft "*Technical Guidance for Site Investigation and Remediation*" ("DER-10") in December 2002. DER-10 establishes the minimum steps that must be followed in each remedial program. These steps include Site Characterization, Remedial Investigation, Remedy Selection, Remedial Design/Remedial Action, and Operation, Maintenance and Monitoring ("OM&M").⁵

Until recently, the NYSDEC had not promulgated regulations for remediating contaminated sites. Instead, the agency had used a series of guidance documents that establish cleanup goals and objectives. The principal guidance for determining soil cleanup objectives and cleanup levels for VOCs, SVOCs, heavy metals, pesticides and PCBs has been the Technical and Administrative Memorandum ("TAGM") 4046. The recommended soil cleanup objectives applied to in-situ (non-excavated) soil and excavated soil that will be placed back into the original excavation or consolidated elsewhere on a site. Since December 2000, TAGM 4046 has also been used to develop soil cleanup objectives for gasoline and fuel oil contaminated soils that will be remediated in-situ.

In 2006, NYSDEC promulgated soil cleanup objectives (SCOs) as part of an overhaul of the Part 375 regulations. If a SCO has been established for a particular contaminant, the SCO will supplant the TAGMs for that contaminant. However, if an SCO has not been promulgated for a particular contaminant, the TAGM guidance will still apply.⁶

The Spill Technology and Remediation Series (“STARS”) Memo #1 provides guidance on the handling, disposal and/or reuse of ex-situ (excavated) non-hazardous petroleum-contaminated soil. STARS Memo #1 also provides guidance on sampling soil from tank pits and stockpiles. Excavated petroleum-contaminated soil must meet the guidance values listed in STARS Memo #1 before it can be reused off-site. The principal guidance document for establishing groundwater cleanup goals is the Technical and Operational Guidance Series (“TOGS”) # 1.1.1.

II. Overview of Brownfield Cleanup Program (“BCP”)

The Brownfield Cleanup Program (“BCP”) may be used for cleanups of hazardous waste and petroleum-contaminated sites. The Brownfield/Superfund Act defines a brownfield as real property whose reuse or redevelopment is complicated by the presence or perception of contamination may potentially qualify for the BCP. The definition does not specify if a certain amount of contamination must be present or if the contamination must be due to a release or discharge of hazardous substances or can be associated with contaminated fill material. However, applicants should be prepared to discuss how the contamination that is present at the site has complicated the reuse or redevelopment of the site.

A. Eligible Parties

The BCP adds two important terms to the long list of acronyms such as PRPs that environmental practitioners must know. Two kinds of applicants are eligible to apply for the BCP. Applicants have different obligations under the BCP depending on their classification.

The first category of eligible applicant is a “volunteer”. This is any person not responsible for the contamination at the time of the BCP application, or who is considered a potentially responsible party (“PRP”) solely on the basis of its ownership of site that was contaminated prior to the time the applicant acquired title to the property.⁷

A volunteer must investigate and clean up contamination at the site but is not required to “chase the plume” or remediate contamination migrating off the site. A BCP volunteer will be required to perform a qualitative exposure assessment to determine if contamination has migrated off-site. The assessment is simply to determine if contaminants are present off-site and is not a full-blown site characterization or quantitative assessment.⁸ While the obligation to perform an exposure assessment could involve sampling where potential receptors are located to determine if the receptors are being exposed to contaminants, the volunteer will not be required to characterize the

extent of the exposure. NYSDEC will be responsible for either remediating the off-site contamination or having PRPs address such contamination.⁹

To maintain its status as a “volunteer” under the BCP, the applicant will have to use “appropriate care” in dealing with the contamination.¹⁰ A volunteer who fails to exercise “appropriate care” by not taking reasonable steps will be treated as a “participant”.

The second category of eligible applicant is a “participant”. This category includes any applicant that does not qualify as a volunteer, such as a PRP.¹¹ A “participant” must investigate and characterize the nature and extent of contamination both on-site and emanating from the brownfield site. In addition, a participant may also be required to remediate contamination migrating off-site, including addressing vapor intrusion.¹²

B. Eligible Sites

The statutory definition of “brownfield” is quite broad, and includes any real property whose redevelopment or reuse is complicated by the presence or potential presence of contamination.

1. Statutory Eligible Sites

Sites contaminated with hazardous wastes and petroleum are eligible for the BCP unless they have been classified as a Class 1 or 2 site on the Registry, are on the National Priorities List (“NPL”),¹³ are permitted RCRA sites, subject to an enforcement action or subject to a cleanup order under Article 12 of the Navigation Law.¹⁴ An application can also be rejected if the applicant has engaged in certain prohibited or illegal acts, or for “public interest” reasons.

Under the state superfund program, NYSDEC may place inactive hazardous waste sites that have “consequential” amounts of hazardous waste on the Registry.¹⁵ The BCP initially had an amnesty provision that allowed “volunteers” that owned Class 1 or 2 sites to enroll their sites into the BCP prior to July 1, 2005.¹⁶ While the amnesty provision has expired, there have been instances where NYSDEC entered into what amounts to a prospective purchaser agreement under the state Superfund law for parties that would qualify as “volunteers” under the BCP. Participants that own Class 1 or 2 sites are not eligible for the amnesty process.

Another important incentive is that once a BCP application for a brownfield site has been made, that site will not be listed in any spill report or on the state superfund list, which is known as the Inactive Hazardous Waste Disposal Site Registry (“Registry”), so long as the applicant is acting in good faith and remains in the BCP.¹⁷ This deferral is important because a site that is listed as a Class 1 or 2 site on the Registry is not eligible for the various BCP financial assistance programs and may be not eligible for the used-based cleanup standards available under the BCP. The deferral should serve as an impetus for property owners and municipalities to enroll their contaminated sites in the BCP.

The RCRA exclusion does not apply to interim status sites unless they are subject to a corrective action order. Interim status does not only apply to facilities that treated, stored or disposed of hazardous wastes but can also include facilities that were registered as RCRA generators but may have stored waste beyond their allowable time limit. Since interim status “runs with the land” until releases of hazardous wastes have been remediated, purchasers can unwittingly acquire interim status facilities and find themselves saddled with potential RCRA corrective action liability. RCRA corrective action can be time-consuming and costly since the cleanup standards are technology-based. Allowing interim status facilities to be eligible for the BCP should help expedite the cleanup and redevelopment of these sites.

Many purchasers of petroleum-contaminated sites could not even enroll the VCP because some NYSDEC regions did not want to address petroleum-contaminated sites under the VCP but instead preferred to handle them under the traditional oil spill program. Petroleum-contaminated sites are eligible for the BCP unless they are subject to an enforcement action or cleanup order. NYSDEC regional offices often resolve petroleum spills or leaks from USTs by entering into a Stipulation Agreement (“STIP”) where the responsible party or a volunteer agrees to cleanup the spill. Sites that subject to orders or STIPs issued under the Control of Petroleum Bulk Storage (Title 10 of Article 17) as well as the Navigation Law are eligible for the BCP.

2. NYSDEC Interpretation of Brownfield Sites

Because the Brownfield Act also had a very broad definition of "brownfield" that would have included many projects in New York City, it soon became clear that that certain projects could generate tax credits that would be substantially disproportionate to the amount of cleanup costs, that certain projects generating tax credits would have proceeded irrespective of the BCP, and that the BCP could generate tax credits far in excess of what the legislature apparently contemplated. Indeed, over half of the BCP applications that NYSDEC received through 2004 were for New York City sites.¹⁸ In the absence of a legislative fix, NYSDEC was apparently asked to tighten the BCP eligibility criteria to stem the potential revenue loss for the state. As a result, NYSDEC issued eligibility criteria guidance that had the effect of not only disqualifying many sites in urban areas that are impacted from contaminated fill material.

The NYSDEC eligibility criteria modify the statutory definition by providing that the definition of a brownfield site has two elements: (1) there must be *confirmed contamination* on the property or *a reasonable basis to believe* that contamination is likely to be present on the property; and (2) there must be a *reasonable basis to believe* that contamination or potential presence of contamination may be complicating the development or re-use of the property. For each element, the NYSDEC has identified a number of factors that it will take into consideration to determine whether a particular site meets the agency’s qualified definition of a brownfield.

In determining if there is confirmed contamination or a reasonable basis to believe that contamination is likely to be present on the property, NYSDEC indicated it would consider the following factors:

- *The nature and extent of known or suspected contamination.*
- *Whether contaminants are present at levels that exceed standards, criteria or guidance.*
- *Whether contamination on the proposed site is historic fill material or exceeds background levels.*
- *Whether there are or were industrial or commercial operations at the proposed site which may have resulted in environmental contamination.*
- *Whether the proposed site has previously been subject to closure, a removal action, an interim or final remedial action, corrective action or any other cleanup activities performed by or under the oversight of the State or Federal government.*

The most troublesome criteria for potential brownfield applicants are the third and fourth factors. Many urban properties throughout the state have contaminated fill material that was placed onto the property and that has to be managed as a hazardous waste because it exhibits a hazardous characteristic for metals. Under NYSDEC's current interpretation, unless a developer can show that the historic fill material was contaminated from an on-site source, the site will not be eligible for the BCP even though the developer will incur additional costs to dispose of the hazardous fill materials off-site.

NYSDEC will also review if the proposed site has previously been subject to closure, a removal, remedial or corrective action, or any other cleanup activity performed by or under government oversight. It is not clear why and how the NYSDEC will apply this factor. Will NYSDEC determine that there is no reasonable basis to believe that contamination is likely to be present because it was previously remediated? If residual contamination remains at a site, only one contaminant was addressed (e.g. petroleum) or only a portion of a site was remediated, we do not see how this factor could be use to deny acceptance into the BCP.

In determining if there is a reasonable basis to believe that contamination or the potential presence of contamination may be complicating the redevelopment or re-use of the property, NYSDEC indicated it will look at the following factors:

- *Whether the proposed site is idled, abandoned or underutilized.*
- *Whether the proposed site is unattractive for redevelopment or reuse due to the presence or reasonable perception of contamination.*
- *Whether properties in the immediate vicinity of the proposed site show indicators of economic distress such a high commercial vacancy rates or depressed property values.*

- *Whether the estimated cost of any necessary remedial program is likely to be significant in comparison to the anticipated value of the proposed site as redeveloped or reused.*

Even if an applicant can get past these two hurdles, the BCP Eligibility Criteria provides that NYSDEC may redefine the "brownfield site" so that only a portion of a proposed site may be enrolled in the program. Thus, if the improvements were to be constructed on the portion of the property that NYSDEC determined was not a "brownfield site", the developer would not be to claim BCP tax credits for the improvements even though the building is part of the entire project. As a result, applicants will not only have to demonstrate to NYSDEC that there is contamination or a reasonable belief that contamination is present but also that the prior on-site sources of the contamination were likely located in the proposed footprint of the improvements to be constructed.

C. Application Process

A site owner or other entity willing to undertake a cleanup must submit an application for a Brownfield Cleanup Agreement ("BCA") to NYSDEC to determine if the person is eligible for the program and to identify the reasonably anticipated reuse of the site.

NOTE: It is strongly recommended that potential BCP applicants schedule a pre-application meeting to discuss the proposed project. The pre-application meeting can an invaluable opportunity for providing project information to NYSDEC and demonstrating why the project merits admission into the BCP. In addition, the applicant can determine particular information requirements of the NYSDEC and try to develop a expedited review process for time-urgent projects. The pre-application information sheet should be used to address the key eligibility issues.

Once an application is submitted to the NYSDEC, the agency must notify the potential applicant within ten (10) days if the information is complete and, if not, specify what additional information is needed. Once the application is deemed complete and the applicant provides evidence that it has sent a NYSDEC-approved fact sheet to individuals and organizations on an approved contact sheet¹⁹ as well as published notice of the application in one or more local newspapers of general circulation, the NYSDEC will arrange to have a notice of the application published in the Environmental Notice Bulletin (ENB). The publication in the ENB triggers the public comment period which is either 30 days or 45 days depending if the application includes a remedial action workplan. NYSDEC is required to use best efforts to approve or reject a BCA application within 45 days of receipt of the application.²⁰

The Brownfield/Superfund Act contains specific requirements for the BCA. Each BCA will include payment of state costs, dispute resolution, commitments to investigate and (if necessary) remediate the site, requirements for citizen participation, and implementation and enforcement of any land use and engineering controls required by NYSDEC.²¹

The BCP calls for some degree of public participation in at least seven different stages of the application and cleanup process: when an original application is filed, before finalizing a remedial investigation workplan, before NYSDEC approves a proposed remedial investigation report, before the agency finalizes a remedial workplan, before the applicant commences construction at a brownfields site, before NYSDEC approves a final engineering report, and within ten days of issuance of a certificate of completion. Because the multiple public comment periods can lead to further delays in the cleanup process and add to transaction costs, many applicants have been submitting remedial action workplans with the application to eliminate some of the public comment periods. In some cases, NYSDEC will allow use of fact sheets instead of requiring applicants to provide formal 30-day public participation periods.

Once an investigation is completed, the applicant will submit a final investigation report to NYSDEC. There will be a comment period (variously described as 30 and 45 days), and NYSDEC will determine the completeness of the investigation within 60 days.²²

Within 20 days of the completion of the final investigation work plan report, the NYSDEC must determine if the site poses a “significant threat”. If the agency concludes that the release of hazardous wastes at the site poses a “significant threat”,²³ NYSDEC may defer placing the site on the Registry if the “volunteer” has executed a VCA and agrees to address the significant threat or the agency is in on-going “good faith” negotiations.

Where the significant threat is migrating off-site and the applicant is a “volunteer”, NYSDEC is responsible for the remediation of the off-site plume. NYSDEC is required to identify potentially responsible parties (“PRPs”) for the site and bring an enforcement action within six (6) months to compel the PRPs to address the off-site contamination. If NYSDEC cannot identify PRPs within six months or is otherwise unable to bring such an enforcement action, it is required to use its best efforts to commence remediation of off-site contamination within one year of the completion of such enforcement action or completion of the volunteer’s remediation, whichever is later.²⁴ The NYDEC has indicated that it does not intend to list a site on the Registry in such circumstances because the agency has sufficient enforcement authority and funding sources under the Brownfield/Superfund Act to address the off-site contamination.

If remediation is required, the applicant must submit a proposed remedial action workplan to NYSDEC. The workplan will be subject to 45-day public comment period and, under certain circumstances, a public hearing. NYSDEC is required to use its best efforts to approve, modify, or reject a proposed work plan within 45 days of receipt or within 15 days after the close of the comment period, whichever is later.²⁵

D. Cleanup Standards

The Brownfield Act established four tracks for cleanup. NYSDEC was required to develop regulations establishing three generic tables of cleanup standards: Unrestricted Use (e.g., residential), Commercial Use and Industrial use. The tables must be updated

every five years.²⁶ In 2006, NYSDEC promulgated its Soil Cleanup Objectives (SCOs) as part of a complete overhaul of the Part 375 regulations.²⁷

The Part 375 regulations establish two categories of site use:

- Unrestricted use means a use that may occur without the imposition of environmental easements or other land use controls.²⁸
- "Restricted Use" category will require a site management plan that will rely on institutional or engineering controls to manage exposure to residual contamination remaining at the site.²⁹ The Restricted Use category, in turn, may include the following: "Residential",³⁰ "Restricted-Residential Use"³¹, "Commercial Use"³² and "Industrial Use."

The SCOs create four cleanup tracks with track 1 being the unrestricted residential standard and track 4 allowing for site-specific standards.³³ The SCOs became effective in December 2006 but a group of environmental organizations filed a lawsuit at the end of March seeking to invalidate the cleanup standards.³⁴

- Track 1 cleanup (Unrestricted Use) is designed to permit any unrestricted use without reliance on institutional engineering controls for soil contamination. For groundwater, there is a "carve out" allowing a volunteer to qualify for Track 1 if it has reduced the quantity of groundwater contamination to "asymptotic levels" and proposes to implement long-term engineering or institutional controls to restrict groundwater use.³⁵
- Track 2 cleanups (Restricted Use with generic SCOs) need to achieve the cleanup levels set forth in the NYSDEC look-up tables for the reasonably anticipated use without reliance on long-term institutional controls for soil. However, institutional controls may be used to satisfy groundwater cleanup standards. In general, the SCOs must be achieved to a depth of 15 feet provided the deeper soils are not the source of the contamination.³⁶
- Track 3 cleanups (Restricted Use with modified SCOs) use the same formula/process develop the cleanup numbers for Tracks 1 or 2. However, parties are permitted use site-specific characteristics (e.g. depth to groundwater) instead of the lookup tables to establish the cleanup levels.³⁷
- Track 4 cleanups (Restricted Use with site-specific SCOs) have been the most common standards used to date in the BCP. Institutional or engineering controls can be used. For remedies where a specific contaminant's exposure exceeds 10^{-6} , the NYSDEC can allow such contamination to remain without reliance upon institutional or engineering controls when the Commissioner determines that the proposed remedy will be protective of public health and the environment. For residential projects, the top two feet of exposed soil must comply with the site-specific SCOs while the top one foot of soil for non-residential uses must comply with the Track 2 tables.³⁸

To meet the requirements of the four tracks, applicants may propose a remedy from a list of presumptive remedial strategies that may be developed by the NYSDEC. These remedies may be developed for specific sites types (e.g., manufactured gas plant sites) or specific contaminants (e.g., trichloroethylene).³⁹

In addition, if an applicant proposes to adopt a cleanup track other than Track 1, the applicant must examine at least two remedial alternatives (known as an alternatives analysis) , including one that would satisfy Track 1.⁴⁰ If the site does not pose a significant threat, NYSDEC could require the applicant to evaluate a Track 2 option as one of the remedial alternatives and could require the applicant to implement the Track 2 alternative.⁴¹

The Brownfield Act requires all applicants to address sources of soil contamination using the following hierarchy:

- **Removal/and or treatment-** This is the most preferred approach. It involves removal and or treatment of all free product, concentrated solid or semi-solid hazardous substances, dense non-aqueous phase liquid, light non-aqueous phase liquid in soil and/or grossly contaminated soil “to the greatest extent feasible.”⁴²
- **Containment-** Any source remaining following source removal and/or treatment is to be contained. If full containment is not possible, it must be contained to the greatest extent feasible.⁴³
- **Elimination of Exposure-** Exposure to any source remaining after removal, treatment and/or containment is required to be eliminated to the greatest extent feasible through additional measures such as alternative water supplies or methods to eliminate volatilization into buildings.⁴⁴
- **Treatment of Source at Point of Exposure-** Treatment of the source at the point of exposure, including wellhead treatment or management of volatile contamination within buildings, “shall be considered as a measure of last resort.”⁴⁵
- **Plume Stabilization-** This method is to be evaluated for all remedies, and the further migration of contamination from the site must be prevented “to the extent feasible.”⁴⁶

The BCP remedial program must protect groundwater “for its classified use, the highest of which is drinking water”. NYSDEC is required to promulgate regulations that provide that groundwater use in Tracks 1 (*sic*, should probably be 2), 3 or 4 can be either restricted or unrestricted.⁴⁷ This approach to groundwater cleanups brings New York much closer to other states in the region that allow cleanups to be based on current groundwater use. Prior to the Brownfield/Superfund Act, the policy of New York States was that all the groundwater in the state should be considered potable when developing groundwater cleanup standards. NYSDEC must use a Geographic Information System (“GIS”) to track remedial program information in conjunction with groundwater location and use, and within three years use the information to develop a short and long-term

groundwater remedial strategy. The strategy, once developed, is to govern all groundwater remediation programs.⁴⁸

E. Institutional Controls and Environmental Easements

If institutional and engineering controls are proposed as part of an approved remedial program, the applicant must determine the “long term viability” of the controls as well as the cost to the state to enforce the controls. The BCP Guide provides that financial assurances may be required to ensure the long-term effectiveness of the controls.

A licensed P.E. must file annual certifications that the controls are effective, and owners must certify every five years that the assumptions made in the qualitative exposure assessment remain valid and resample groundwater-monitoring wells at site boundaries.⁴⁹ NYSDEC is considering providing waivers for the annual certifications and allow biannual certifications depending on site-specific conditions.

In addition, the applicant must create an “Environmental Easement” within 60 days of commencement of a remedial design that uses land use controls.⁵⁰ The easement may be enforced in law or equity by the grantor, state or local government against the owner of the burdened property, lessee or any person using the land. The NYSDEC is also required to establish a new database for sites subject to controls.⁵¹

Where sites are subject to environment easements, the Brownfield/Superfund Act prohibits local governments from approving building permits or other applications that affect land use or development without first notifying and receiving approval from DEC.⁵² While this requirement was established to ensure that land use controls are adequately maintained and enforced, it does allow NYSDEC to become involved in local land use decisions.

NYSDEC is now requiring a title insurance policy for the environmental easement that costs approximately \$30,000. The purpose of the title policy is to verify that the environmental easement has been properly recorded and is legally enforceable.

F. Liability Release and Reopeners

When the remediation is completed, the applicant shall submit a final engineering report to the NYSDEC. Upon determination that the remediation requirements have been or will be achieved, the commissioner shall issue a Certificate of Completion (“COC”).⁵³

As part of the COC, the applicant will receive a liability release and covenant not to sue (“CNTS”) that will effectively “run with the land”. The covenant not to sue will apply to applicant’s successors and assigns and to persons who develop or occupy brownfield site provided they use “due care” and in “good faith” adhere to BCA and the COC. The CNTS does not apply to persons responsible under statutory or common law unless they were parties to the BCA and must be recorded within 30 days of issuance of the COC or within 30 days of acquiring title.⁵⁴ An applicant will not be liable under statutory or

common law arising out of contamination that was present on the effective date of the BCA and that is the subject of the COC.

Participants will not be released from liability for natural resource damages under CERCLA.⁵⁵ However, the Brownfield/Superfund Act does not address situations where a federal trustee may have concurrent jurisdiction over the same natural resources (e.g., waterfront property

The Brownfield/Superfund Act is silent on what happens if the applicant fails to record the COC or files it beyond the 30-day period. Will the COC become void or is it voidable at the discretion of the NYSDEC. Another unanswered question is what effect does the exercise of a reopener have on the ability of the applicant to obtain the brownfield tax credits? Do previous tax credits get recaptured?

The legislation also does not specifically provide that the CNTS applies to lenders. Presumably, lenders will be able to rely on the secured creditor exemption of Title 13 prior to foreclosing on contaminated property. However, it is unclear if a lender that fails to comply with the requirements of the secured creditor exemption after foreclosing on property because it failed to timely sell the property could avail itself of the CNTS as a successor of the applicant?

NYSDEC may modify or revoke a COC for “good cause”.⁵⁶ However, this term is undefined. Presumably, NYSDEC’s interpretation of this term will be governed by the “arbitrary and capricious” standard. However, it would be helpful if the agency could provide further clarification on what constitutes “good cause”. Because of the ramifications for revoking a COC, it is hoped that NYSDEC will primarily rely on its ability to reopen COCs and save the revocation remedy to only the most egregious cases.

The release will bind not only the NYSDEC but also all State agencies, including DOH as well as the Attorney General, who shares enforcement power with NYSDEC, and the Comptroller, who has concurrent jurisdiction with NYSDEC over petroleum spills.

While the liability release will provide contribution protection against third party claims for matters addressed by the BCA, it does not appear to include third party claims for personal injury or wrongful death arising out of that person’s acts or omissions.⁵⁷ If contamination is no longer migrating from the site after the COC is issued, it would seem that a plaintiff would have difficulty trying to impose such liability on a purchaser who has complied with all of the requirements of the COC.

One problem with the release is that it does not affect liability for investigation or remediation activities that are not included in the BCP workplan.⁵⁸

As is typical under the federal Superfund law and the remedial programs of other states, there are certain circumstances where liability release will not be effective. These reopeners include the following:

- Environmental conditions at the site no longer being protective of public health or the environment;⁵⁹
- Non-compliance with BCA, workplan or COC;⁶⁰
- Fraud in participation in the BCP;⁶¹
- Change in standards that renders the remedy no longer protective;⁶²
- Change in use of the site subsequent to the issuance of a COC,⁶³ and
- Failure to make “substantial progress” towards completion of proposed development within years, or unreasonable delay by the applicant.⁶⁴

While many of these reopeners are similar to the ones that were used under the old VCP, environmental practitioners and their clients may find some of these reopeners problematic. For example, under the VCP, the remedy reopener was linked to site conditions no longer being protective of human health or the environment because of new information, newly discovered conditions or some failure of the remedy. The BCP reopener does not contain any limitation for new information or newly discovered conditions.

The Brownfield Act has two “change in use” provisions. One reference is the “change in use” reopener.⁶⁵ This reopener is the same that was currently used in the VCP. The second reference to “change in use” requires applicants to notify the NYSDEC of transfers of the property and erection of any structures or buildings on the site 60 days advance notice and then has 45 days to approve change in use.⁶⁶ If NYSDEC determines the change in use is unauthorized, it can exercise this reopener and require additional remediation.⁶⁷ This “change in use” provision is broader than the “change in use” reopener. While it is just a notice obligation, it could result in NYSDEC exercising one of the reopeners or triggering an enforcement action. The BCP Guide provides that the change in use notice requirement is primarily to enable NYSDEC to maintain accurate and up-to-date records and that the agency will not object to such change in use or require additional remedial activities solely because of a change in ownership absent "extraordinary circumstances." If a change in use will result in a physical alteration of the site, the BCP Guide provides that NYSDEC will evaluate if the proposed change would likely result in an increase in the potential for exposure to hazardous waste or interfere with a proposed, ongoing or completed remedy. If the NYSDEC makes such a determination, the BCP Guide provides that the agency will prepare a letter notifying the applicant that the proposed change in use will not be authorized within 45 days of the notice of the change in use.

The reopener for failure to make “substantial progress” was problematic.⁶⁸ Since a COC’s issuance will be based on the satisfactory completion of a cleanup, there does not appear to be any justification for invoking a reopener based on economic or business developments that may be beyond the applicant’s control where the remedy otherwise remains protective of human health and the environment. The technical amendments tried

to address the concerns of developers by extending the time period to five years.

III. Brownfield Tax Credits

One of the most powerful incentives established by the Brownfield/Superfund Act are the tax credits that may be available for parties who have participated in the BCP and have received a COC. The Brownfield/Superfund Act created the most generous tax credits in the country for brownfield sites. Unlike other state brownfield programs, which limit the value of tax credits to the amount of cleanup costs, the Brownfield Act expanded the tax credit base to encompass the costs of improvements, including the erection of buildings and other depreciable assets.

Like any tax provision, the brownfields tax credits are extremely complex. Many of the key terms and definitions refer to the Internal Revenue Code. The state Department of Taxation and Finance (DTF) does not contemplate issuing any guidance or regulations interpreting the scope of the brownfield tax credits. Thus, environmental counsel and their clients should consult with tax specialist to determine their applicability to a particular project or consider obtaining an advisory opinion from the DTF.

A. Brownfield Redevelopment Tax Credit

The first category of tax credit is the Brownfield Redevelopment Tax Credit ("BRTC"). Similar to the state Investment Tax Credit ("ITC"), the BRTC applies to three types of costs: site preparation costs, qualified tangible property costs, and on-site groundwater remediation.

The BRTC was significantly amended in 2008 by Ch 390 of the Laws of 2008 (the 2008 Amendments⁶⁹). The changes apply to new applications and applications that were previously submitted to NYSDEC but had not received a written notice of acceptance into the BCP prior to June 23, 2008.

It is important to note that costs incurred prior to the execution of a BCA are not eligible for the BRTC. However, costs incurred after DEC executes the BCA may be accrued until the COC is issued. The tax credit may not be claimed until after a COC is issued.

The BRTC is a refundable tax credit but may not be used to reduce a taxpayer's liability below its applicable alternative minimum tax. Any unused BRTCs will be treated as an overpayment of income tax for that taxable year, entitling the taxpayer to a tax refund.⁶⁹

1. Site Preparation Costs

The "site preparation" credit includes costs that can be chargeable to a "capital account". This cost component may not only include remediation costs as well as costs of excavation, temporary electric wiring, scaffolding, demolition costs and costs for fencing and security and other costs to make the site usable for commercial, industrial,

residential, recreational and environmental conservation purposes. However, site acquisition costs may not be used to in determining the amount of the credit.⁷⁰ Applicants may claim credits for site preparation costs for up to five years after the issuance of the COC

Prior to the 2008 Amendments, a taxpayer who received a COC from NYSDEC could claim from 10% to 22% of their site preparation costs depending if the taxpayer was an individual vs. corporation, if the property was located in an en-zone⁷¹ or if the cleanup qualified as a track 1 (unrestricted residential) cleanup.⁷² Under the 2008 Amendments, applicants will now be able to claim up to 50% of its site preparation costs depending on the kind of cleanup that is performed.⁷³

Applicants that implement a cleanup that allows for unrestricted use will be able to claim a tax credit for 50% of their site preparation costs. For projects that achieve the restricted residential soil cleanup objectives, the applicable percentage for the site prep costs will be 40% but will drop to 28% for track 4 cleanups. For projects that achieve the soil cleanup objectives for commercial uses, the applicable percentage will be 33% but will drop to 25% if the cleanup only achieves the Track 4 cleanup soil objective. For soil cleanups that achieve soil cleanup objectives for industrial end-use, the applicable percentage will be 27% but will drop to 22% of the cleanup only achieves the Track 4 soil cleanup objective. The site preparation cost percentage will be set forth in the COC issued by the NYSDEC.

2. Qualified Tangible Property Tax Credit

The Qualified Tangible Property Tax Credit ("QTP Credit") cost component is available for costs of buildings and improvements that are placed into service within ten years of the COC. To qualify for the QTP Credit, a property must satisfy the following conditions:

- The property is depreciable pursuant to Section 167 of the Internal Revenue Code;
- The property has a useful life of four or more years;
- The property was purchased pursuant to Section 179(d) of the Code;
- A COC has been issued for the property;
- The property is used for a business, recreational or environmental purpose; and

In 2006, the New York State Legislature plugged a crucial hole in the BCP by passing legislation allowing developers of multi-family and single-family housing to be eligible for the generous brownfield redevelopment tax credit. Prior to the 2006 amendments, it appeared that only rental property and perhaps co-ops where the land is held by the co-op board would be eligible for BRTC these were the only type of residential properties that would qualify as "qualified tangible property" (i.e., depreciable in the hands of the developer). Developers of condominiums and single-family homes could not claim the

tax credit since the property would not be placed into service by the developer but by the purchaser. This quirk in the law meant that the BCP tax credit would not be available to builders of affordable housing.

The QTP Credit may be claimed for up to ten years after the property is placed into service. An applicant does not have to own the property to claim the QTP Credit. Thus, a tenant can claim the credit for the cost of leased improvements provided the tenant is not responsible for disposal or discharge of hazardous wastes or petroleum.⁷⁴

As originally drafted, the QTP had another recapture event when the property was sold within 12 years of the COC.⁷⁵ This would have substantially reduced the attractiveness of the BCP for residential projects since a developer that sold a condominium, townhouse or single-family residence on the brownfield site within 12 years of the COC could lose most if not all of the credit. It was less clear if a recapture event would be triggered by the sale of co-op units since this involves transfer of stock in the co-op and not transfer of title in land. Rental units do not appear to be subject to the recapture provision. The 2006 technical amendments attempted to address the issue by deleting any reference to "disposing" (selling) the property. However, the property would still have to be depreciable for a taxpayer to claim the QTP.

Taxpayers who seek to claim the QTP component will not be able to claim the Investment Tax Credit or the Empire Zone Investment Tax Credit.⁷⁶ However, the Brownfield Redevelopment Tax Credit may be larger in many cases than the Investment Tax Credit and Empire Zone Investment Tax Credit and may be available for broader uses than the other taxes.

Significantly, both a volunteer and a participant may claim the Brownfield Redevelopment Tax Credit so long as they incur eligible costs pursuant to a BCA and receive a COC. Thus, even parties responsible for the contamination may be able to take advantage of this tax credit provided they enroll in the BCP and receive a COC. The credit may be claimed by individual partners in a partnership, members of limited liability companies and shareholders of New York "S" corporations.⁷⁷

The percentage of the tax credit varies depending on whether the party is an individual or corporate taxpayer and whether or not the site is in an "Environmental Zone"⁷⁸. The base tax credit is 12% for a corporate taxpayer and 10% for a non-corporate taxpayer.⁷⁹ If a site is in a BOA, the taxpayer may be eligible for another 8% tax credit. The taxpayer may add another 2% for unrestricted cleanups. If the site is located in a brownfield opportunity area (BOA) and the project is consistent with the BOA goals and priorities established by the municipality where the BOA is located, the 2008 BCP amendments allow applicants to qualify for an additional 2%.

Under the 2008 Amendments, the QTP credit component will be calculated as under prior law, but subject to a limit that is the **lesser** of \$35 million or three times the amount of site preparation costs and the on-site groundwater remediation credit component.⁸⁰ For manufacturing sites, the "hard cap" is \$45 million and the "soft cap" is six times the

amount of site preparation and on-site groundwater remediation credit components for sites that are used primarily for manufacturing activities.⁸¹

a. 2008 Clarification of Transferability of Tax Credits

The BRTC is available to a taxpayer that has received a COC. Since a subsequent site owner would not have been issued the COC, it was initially unclear if the BRTC could be transferred with site ownership. The 2006 technical amendments attempted to address this concern by providing that COCs were transferable to another entity in connection with the sale or conveyance of the Brownfield Site.⁸²

The 2008 Amendments made an important clarification on the transferability of the tax credits to reflect modern real estate practice. The existing law provided that COCs may be transferred if the site was sold. However, sophisticated and complex real estate development like brownfield projects usually involve an array of fractional ownership interests where individual sticks or even twigs of the infamous bundle of rights are conveyed. The legislation confirms that burdens and benefits of a COC run with the land and may be transferred or assigned where less than full title to a brownfield site is conveyed.⁸³ In any event, where the applicant is a LLC, partnership or corporate entity, BRTC should be available by transferring an ownership interest in the entity that received the COC.

There are also some timing issues that need to be resolved. For example, can a developer place a property into service before it receives a COC from the NYSDEC? The DTF has informally allowed developers to claim tax credits so long as the COC was issued in the same year that the project was placed into service. What if a site is transferred after a BCA is executed but prior to issuance of a COC, can a successor who completes the work claim the costs incurred by the seller? Another question is if a purchaser acquires the property after a COC but before the Certificate of Occupancy claim the BRTC for the costs of the improvements constructed by the Seller? One solution might be for the investor to purchase interests in the entity that was the BCP applicant.

b. Impact of 2008 QTP Changes to Brownfield Projects?

For those sites that are admitted into the BCP, the impact of tax credit changes will depend on project-specific factors such as the size of the development, the ratio of amount of the cleanup costs to total project costs and the applicable percentage that will be applied to the project for the qualified tangible property tax credit.

The conventional wisdom is that the Legislature and the Paterson Administration wanted to limit the number of high rise condo projects that would be eligible for the BCP because the size of these projects generated enormous tax credits in proportion to the cleanup costs for the site. For example, consider a \$200 million project in an en-zone with \$10 million in cleanup costs. Assume also that the cleanup was unrestricted cleanup so that a corporate taxpayer would have been eligible for the full 22%. Under the old law, the taxpayer would have been eligible for \$2.2 million site preparation credit component

(22% x \$10 million) and a \$44 million tangible property credit component (22% x \$200MM). Under the new law, the taxpayer would be eligible for \$5 million site preparation credit component (50% x \$10 million). However, because of the cap (the lesser of \$35 million or three times the \$10 million site prep cost) the taxpayer would be limited to a \$30 million tangible property credit. Therefore, the developer would be eligible for a total brownfield redevelopment credit of \$35 million (\$5MM site prep and \$30MM QTP), a reduction of \$11.2 million but still a significant incentive

But look what happens to a smaller project, say a \$50 million affordable housing or mixed use project constructed on an old gas station site with estimated eligible site preparation costs of \$1 million. Under the old law, the developer would have been entitled to 22% of site prep costs (\$220K) and 22% of \$50 million (\$11 million) for a total tax credit of \$11.22 million. Under the new law, the developer would be entitled to a site preparation credit component of \$500,000 (50% of \$1 million). However, the tangible property credit component - \$11 million under prior law - will be limited to \$3 million, which is the lesser of \$35 million or three times the \$1 million in eligible site preparation costs). Thus, the taxpayer's tax credit would be reduced from \$11.22 million to \$3.5 million.

The irony is that while the brownfield "reform" may have been intended to limit the number of high-rise luxury condo projects, the "reform" will have a disproportionately harsh impact on smaller sites such as workforce housing located in En-zones and BOAs where the maximum applicable percentage will be 24%. For these sites, the \$35 million cap will be largely illusory or irrelevant. The "3X" multiplier will set the limit if the ratio of build-out costs to cleanup costs exceeds 12.5:1. In contrast, a project that is only eligible for the base corporate applicable percentage of 12% will not hit the cap until the build-out to cleanup cost ratio exceeds a 30:1 ratio.

c. Site Preparation or QTP Tax Credit Bucket?

A possible reaction from developers of smaller sites would be to try to maximize the amount of eligible site preparation costs. This is because the applicable percentage for site preparation costs has been increased and because the site prep costs would serve as the base from which the "3X" (or 6X) multiplier is applied. Under prior law, the applicable percentage was identical for all of the credit components, so the credit structure did not motivate taxpayers to re-characterize costs into one category or another. Now, taxpayers will have to identify costs that are remedial in nature and yet also result in the creation of a depreciable asset, and then determine whether those costs should be classified as site preparation costs (assuming they meet the statutory definition) or as costs capitalized into the tax basis of qualified tangible property. These "dual use" costs could include, for example, soil vapor mitigation equipment, excavation, retaining walls, shoring, sheeting, and other engineering controls and otherwise depreciable land improvements. Categorizing costs as "site preparation" costs will likely preclude a taxpayer from expensing the cleanup costs under section 198 of the IRS regulations. We anticipate that tax counsel will be working alongside environmental counsel, consultants,

and engineers in advising brownfield redevelopment clients as they plan their remedial actions.

3. On-Site Groundwater Remediation Tax Credit

The “on-site groundwater remediation” cost component refers to costs that are incurred to implement a “remediation work plan” required under a BCA. The technical amendments added costs associated with interim remedial measure workplan. For on-site groundwater costs incurred prior to the issuance of the COC, the credit may be claimed in the year in which the COC is issued. On-site groundwater remediation costs incurred after issuance of the COC may be claim in the taxable year in which the costs are incurred for up to five years after the issuance of the COC.⁸⁴ Presumably, this component would include both the capital costs of constructing the remediation system as well operating costs. It is unclear to what extent a credit may be claimed for costs of a groundwater remediation system that is also designed to treat or capture contamination migrating off the qualified site.

B. Brownfield Remediation Tax Credit for Real Property Taxes

The second category of brownfield tax credits is the Brownfield Remediation Tax Credit for Real Property Taxes ("Brownfield RPT Credit"). This tax credit is modeled after the Empire Zone RPT Program. The Brownfield RPT Credit is based on the number of jobs at a brownfield site, including employees of tenants.⁸⁵ The Brownfield RPT Credit includes credits for eligible real property taxes as well as certain payments in lieu of taxes. The Brownfield RPT Credit may be claimed for up to ten years after issuance of the COC.

Unlike the BRTC, Brownfield RPT Credit is limited to owners of the contaminated property who obtained a COC.⁸⁶ However, also unlike the Brownfield Redevelopment Tax Credit, this credit is transferable to subsequent purchasers of the site who take title within 7 years of issuance of the COC. Like the BRTC, the Brownfield RPT Credit may be claimed by any individual partner in a partnership, member in a limited liability company, or shareholder in an S corporation to whom the COC has been issued.⁸⁷

There is a complicated formula for calculating the Brownfield RPT Credit tax. First, the amount of the eligible real property taxes is multiplied by either 25% (or 100% if at least one-half of the property is located in an En-Zone). This product is then multiplied by an “employment number factor” (the average number of full-time non-executive employees who are employed at the site during the taxable year, including employees employed by lessees of the developer) by the real property taxes paid by the taxpayer as follows:

- For sites with at least 25 but less than 50 employees, the employment number factor is 25%;

- For sites with at least 50 but less than 75 employees, the employment number factor is 50%;
- For sites with at least 75 but less than 100 employees, the employment number factor is 75%; and
- For sites with at least 100 employees or sites located in Environmental Zones, the employment number factor is 100%.⁸⁸

The maximum credit allowed is \$10,000 multiplied by the average number of employees for the taxable year. Thus, for a site not located within an Environmental-Zone that has \$ 2 million in eligible real property taxes and 50 employees, the Brownfield RPT Credit would be calculated as follows: 25% X \$2 million= \$500,000 x 50% (employment number factor)= \$250,000.

Owners of property located in an empire zone may be able to take advantage of either that tax credit or the Brownfield RPT Credit. Once the taxpayer makes its election, it will not be able to switch for subsequent years in which the credit may be claimed.⁸⁹

While the Brownfield RPT Credit may stimulate construction of shopping malls and office buildings, it does not provide much incentive for residential development. Other states such as New Jersey provide for tax credits for residential developments built on brownfield sites that are based on the occupancy rate. In areas like New York City where there is a critical need for low-income housing, such a tax credit could serve as a valuable incentive for building residential developments o brownfield sites.

C. Environmental Remediation Insurance Credit

Finally, the Brownfield/Superfund Act establishes Environmental Remediation Insurance Credits for the lesser of \$30,000 or 50% of the premium paid after the date of a BCA for qualifying brownfield sites.⁹⁰ This is a one-time credit is generally allowed in the year in which the COC is issued.

D. Technical Assistance Grants

NYSDEC is authorized to provide technical assistance grants of up to \$50,000 to facilitate participation of a citizen group in the cleanup decision-making process for a site.⁹¹ The source of the TAG grants may be the \$15 million appropriation and BCP participants (i.e., responsible parties).

V. New Reporting Requirements

The 2008 amendments also impose new reporting requirements on NYSDEC and BCP applicants. All BCP applicants are subject to the new tax credit reporting requirements regardless of when they were accepted into the BCP.

The NYSDEC is required to issue an annual report that will, inter alia, disclose the amount of the tax credits earned by the applicant. However, if the taxpayer is a member of a partnership, limited liability corporation or subchapter S corporation, the report will only disclose the tax credit earned by the entity and not provide any individual-specific information. Starting in 2009, all BCP applicants will be required to submit a Brownfield Credit Report to NYSDEC annually for the eleven years following the execution of the brownfield cleanup agreement. The report must disclose the actual or estimated amounts of state and local taxes generated by the project, including the businesses and employees operating at the brownfield site as well as real estate taxes on behalf of the site.⁹²

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¹ Ch. 1 of the Laws of 2003. Technical amendments were passed in August 2004. Ch. 577 of the Laws of 2004.

² NYSDEC published draft BCP Guide in May 2004 that contain eligibility criteria for the BCP. In August 2004, the NYSDEC proposed revisions to the eligibility criteria and finalized the guidance in March 2005.

³ N.Y. ENVTL. CONSERV. LAW § 27-1301 et seq. The SSF applies to “hazardous wastes”. The Brownfield Act amended the definition of “hazardous waste” to include hazardous substances. This is the opposite approach used under the federal superfund program where “hazardous substances” includes “hazardous wastes.” U.S.C. 9601(14).

⁴ N.Y. ENVTL. CONSERV. LAW § 27-1401 to 27-1431; N.Y. NAV. LAW §§ 170-197 (2003); N.Y. ENVTL. CONSERV. LAW § 56-0505.

⁵ Because the remedial programs have different statutory goals, individual cleanup projects may not be required to complete each of the investigative and remedial steps. For example, when there is a known spill event or the contamination is associated with an underground storage tank, a responsible party may skip certain portions of the Site Characterization process (e.g., records review). In addition, the individual remedial programs continue to use different types of oversight documents used to implement response actions.

⁶ The SCOs can be found in 6 NYCRR Part 375-6

⁷ *Id.* at § 27-1405(1)(b).

⁸ *Id.* at §§ 27-1411(1), 27-1415(2)(b).

⁹ *Id.* at § 27-1411(6).

¹⁰ *Id.* at § 27-1405(1)(b).

¹¹ *Id.* at § 27-1405(1)(a).

¹² N.Y. ENVTL. CONSERV. LAW § 27-1411(1).

¹³ 40 C.F.R. § 300.425(b) (2002).

¹⁴ N.Y. NAV. LAW § 12-170 *et seq.*

¹⁵ NY COMP. CODES R. & REGS. tit. 6, § 375 1.8(a)(1) defines an “inconsequential” as an amount of hazardous waste that could never constitute a significant threat to the environment under any foreseeable exposure scenario.

¹⁶ N.Y. ENVTL. CONSERV. LAW § 27-1405(2).

¹⁷ N.Y. ENVTL. CONSERV. LAW § 27-1405(2)(a).

¹⁸ According to recent testimony of the Director of the New York City Office of Environmental Coordination, 71 of the approximately 150 BCP applications were for New York City Sites. Of the 71 sites, 39 were sites that had transitioned from the VCP and 32 applications were submitted under the BCP.

NYSDEC has approved six of the applications with the remaining 26 in administrative limbo waiting a decision, some for as long as nine months. Based on the final Eligibility Criteria, it is likely than the overwhelming majority of the remaining 26 BCP applications could be rejected by the NYSDEC.

¹⁹ N.Y. ENVTL. CONSERV. LAW § 27-1417. Among others, the contact sheet will include the chief executive officer and zoning board of each county, city, town, and village in which the site is located, as well as site residents and other affected persons.

²⁰ *Id.* at § 27-1407.

²¹ *Id.* at § 27-1409.

²² Compare N.Y. ENVTL. CONSERV. LAW § 1417(2)(e) with § 27-1417(2)(b); § 27-1407(7).

²³ N.Y. COMP. CODES R. & REGS. tit. 6, § 375-1.4(c) A significant threat is deemed to exist if the presence of hazardous waste at a site results in, or is reasonably likely to result in a significantly increased risk to the public health; a significant adverse impact to fish and wildlife; a significant adverse impact due to a fire, spill, explosion, or the generation of toxic gases; or other significant environmental damage. N.Y. COMP. CODES R. & REGS. tit. 6, § 375.1-4(a).

²⁴ N.Y. ENVTL. CONSERV. LAW § 27-1411(6).

²⁵ *Id.* at § 27-1411(4).

²⁶ *Id.* at § 27-1415(6)(c).

²⁷ 6 NYCRR 375-6

²⁸ 6 NYCRR 1.8(g)(1)

²⁹ 6 NYCRR 1.8(g)(2).

³⁰ 6 NYCRR 1.8(g)(2)(i). This category applies to single-family housing. Restrictions on groundwater use are allowed but no other institutional or engineering controls are permitted.

³¹ 6 NYCRR 1.8(g)(2)(ii). This category allows multi-family residences and active recreational uses but prohibits single-family uses and residential uses with vegetable gardens.

³² 6 NYCRR 1.8(g)(2)(iii). This use allows passive recreational use

³³ Developers using a track 1 cleanup for sites being remediated under the BCP are will be entitled to claim an additional 2% of tax credits. The track 2 cleanup standard requires excavation of 15 feet and the source of soil contamination. In some cases, developers may excavate to bedrock to try to achieve the additional 2% tax credit under the BCP. In most cases though, developers have been using track 4 since there are no additional tax credits for implementing a track 2 cleanup.

³⁴ Previous to the promulgation of the SCOs, the NYSDEC relied on a series of guidance documents to establish cleanup goals and objectives. The principal guidance for determining soil cleanup objectives and cleanup levels for VOCs, SVOCs, heavy metals, pesticides and PCBs is the Technical and Administrative Memorandum ("TAGM") 4046. The recommended soil cleanup objectives apply to in-situ (non-excavated) soil and excavated soil that will be placed back into the original excavation or consolidated elsewhere on a site. Since December 2000, TAGM 4046 is also used to develop soil cleanup objectives for gasoline and fuel oil contaminated soils that will be remediated in-situ.

The Spill Technology and Remediation Series (STARS) Memo #1 provides guidance on the handling, disposal and/or reuse of ex-situ (excavated) non-hazardous petroleum-contaminated soil. STARS Memo #1 also provides guidance on sampling soil from tank pits and stockpiles. Excavated petroleum-contaminated soil must meet the guidance values listed in STARS Memo #1 before it can be reused off-site. The principal guidance document for establishing groundwater cleanup goals is the Technical and Operational Guidance Series ("TOGS") # 1.1.1

³⁵ 6 NYCRR 375-8.3(e)(1). See Table 375-6.8(a)

³⁶ 6 NYCRR 375-8.3(e)(2). See Table 375-6.8(b)

³⁷ 6 NYCRR 375-8.3(e)(3) See Table 375-6.8(b)

³⁸ 6 NYCRR 375-8.3(e)(4)

³⁹ ECL § 27-1415(8).

⁴⁰ 6 NYCRR 375-3.8(f). The alternatives analysis is not as onerous as the CERCLA Remedial Investigation/Feasibility Study approach

⁴¹ 6 NYCRR 375-3.8(f)(3)(ii)(d)

⁴² *Id.* at § 1415(5)(a)(i).

⁴³ *Id.* at (5)(ii).

⁴⁴ *Id.* at (5)(iii).

⁴⁵ *Id.* at (5)(iv).

⁴⁶ *Id.* at § 27-1415(5)(b).

⁴⁷ N.Y. ENVTL. CONSERV. LAW § 27-1415(4).

⁴⁸ *Id.* at § 15-3109.

⁴⁹ *Id.* at § 27-1415(7)(b) & (c).

⁵⁰ *Id.* at § 71-3605.

⁵¹ *Id.* at § 71-3605.

⁵² *Id.* at § 17-3607(2).

⁵³ *Id.* at § 27-1419(2)(b).

⁵⁴ *Id.* at § 27-1421.

⁵⁵ *Id.* at § 27-1421(1).

⁵⁶ *Id.* at § 27-1419(5)(c).

⁵⁷ *Id.* at § 27-1421(6).

⁵⁸ N.Y. ENVTL. CONSERV. LAW § 27-1421(5).

⁵⁹ *Id.* at § 27-1421(a)(i).

⁶⁰ *Id.* at § 27-1421(2)(a)(ii).

⁶¹ *Id.* at § 27-1421(2)(a)(iii).

⁶² *Id.* at § 27-1421(2)(a)(iv).

⁶³ *Id.* at § 27-1421(2)(a)(v).

⁶⁴ *Id.* at § 27-1421(2)(a)(vi). The technical amendments lengthened the time period from three to five years. The BCP Guide provides that NYSDEC will evaluate the size, scope and nature of the proposed development in determining if the Applicant engaged in an unreasonable delay.

⁶⁵ *Id.* at §27-1421(2)(a)(iv)

⁶⁶ *Id.* at § 27-1425.

⁶⁷ *Id.* at §§ 27-1421(2)(a), 27-1425(2).

⁶⁸ This reopener has led to some confusion among developers and the regulated community. Applicants may use the BCP to perform cleanups at operating facilities and do not have to propose to redevelop the site. In such cases where redevelopment is not contemplated, this reopener will not apply. Of course, where no redevelopment is planned, the applicant will not be able to generate tax credits. However, the applicant could perform a cleanup and receive the protections established under the BCP.

⁶⁹ N.Y. Tax Law § 187-g(2) (corporate tax), § 210(33)(b) (corporate franchise tax), § 606(dd)(2) (personal income tax), § 1456(q)(2) (franchise tax on banking entities). § 1511 (u)(2) (franchise tax on insurance entities).

⁷⁰ N.Y. Tax Law § 21(b)(2)

⁷¹ En-zones are census tracts that have a poverty rate of 20 percent and an unemployment rate of at least 1.25 times the statewide unemployment rate or a poverty rate of at least double the rate for the county in which the tract is located

⁷² For sites in en-zones, the taxpayer could tack on an additional 8% to the applicable percentage and add another two percentage points for completing a track 1 cleanup.

⁷³ § 2 Ch. 390 of the Laws of 2008

⁷⁴ N.Y. Tax Law § 21(a)(3)

⁷⁵ The recapture provision could possibly be triggered by the sale of condominiums constructed as part of a residential development. However, it is possible that the sale of the co-op units may not trigger the recapture provision. Developers of residential properties seeking to obtain tax credits should consult a tax specialist and may consider seeking a private letter ruling from the state Department of Taxation and Finance.

⁷⁶ N.Y. Tax Law § 21(c)

⁷⁷ N.Y. Tax Law §601(f)

⁷⁸ An “environmental zone” refers to an area where the poverty rate is at least 20% of the population and the unemployment rate in the zone is at least 125% of the statewide unemployment rate as of the 2000 census. Gen. Mun. Law § 958 . This is generally the same definition of an “economic development zone” under General Municipal Law Article 18-B.

⁷⁹ N.Y. TAX LAW § 21.

⁸⁰ § 1 Ch. 390 of the Laws of 2008

⁸¹ "Manufacturing activities" are defined as the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing, as well as the activities of a "qualified emerging technology company" as defined by the Public Authorities Law section 3102-e. The generation or distribution of electricity and natural gas, or generate steam associated with the generation of electricity will not be considered "manufacturing activities" for the purpose of qualifying for the higher cap on the qualified property tax credit component.

⁸² 2004 P.L. 577

⁸³ § 6 Ch. 390 of the Laws of 2008

⁸⁴ N.Y. Tax Law § 21(a)(4)

⁸⁵ N.Y. Tax Law § 22(b)

⁸⁶ Tax Law § 22(a)(3).

⁸⁷ Tax Law § 22(a)(3)(ii).

⁸⁸ N.Y. Tax Law § 22(b)(3).

⁸⁹ N.Y. Tax Law § 22(b)(7).

⁹⁰ N.Y. Tax Law § 23(a).

⁹¹ N.Y. ENVTL. CONSERV. LAW § 27-1417(4).

⁹² § 4 Ch. 390 of the Laws of 2008