



NY Brownfield 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 Extent 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