Environmental Remediation Process Is Undergoing Sweeping Changes Mandated by New Brownfields Law

BY DALE DESNOYERS AND LARRY SCHNAPF

New York State is in the process of implementing what is perhaps the most significant piece of environmental legislation in the state in the past two decades. The measure, signed into law by Governor Pataki in October 2003 and recently amended by the Legislature,[1] makes sweeping changes to the state's environmental remediation programs.

The legislation (the "Brownfield/Superfund Act") amended the state's 1979 superfund law to add important liability reforms, established a comprehensive Brownfield/Superfund Cleanup Program (BCP), and infused the state superfund with $120 million.[2] The Brownfield/Superfund Act also created a $15 million fund for Technical Assistance Grants (TAGs), Brownfield Opportunity Area (BOA) grants and state oversight of the BCP. The New York State Department of Environmental Conservation (DEC) is in the process of developing guidance documents and regulations to carry out the new BCP.

In general, the measure provides incentives to clean up hazardous waste sites and specific standards for cleanups, especially for urban sites to be redeveloped for industrial use. This article reviews key features of the legislation and provides practical insights on how to use the program to remediate and redevelop contaminated sites in New York.

The New Title 14 Brownfield Cleanup Program

The BCP may be used for cleanups of hazardous waste and petroleum-contaminated sites. The Brownfield/Superfund Act defines a brownfield as real property, the reuse or redevelopment of which is complicated by the presence or perception of contamination.[3] The definition does not specify whether a certain amount of contamination must be present or if the contamination must be due to a release of hazardous substances or can be associated with contaminated fill material. Nonetheless, applicants should be prepared to discuss how the contamination that is present at the site has complicated the reuse or redevelopment of the site.

Eligible Parties Two kinds of applicants are eligible to apply for the BCP. They will have different obligations under the BCP, depending on their classification.

The first category is a "volunteer." This is any person not responsible for the contamination at the time of the BCP application, or one considered a potentially responsible party (PRP) solely on the basis of its ownership of a site that was contaminated prior to the time the applicant acquired title to the property.[4] A volunteer must investigate and clean up contamination at the site but is

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not required to "chase the plume" or remediate contamination migrating off the site. If, however, contamination is migrating off a site, a volunteer will be required to perform a qualitative exposure assessment to evaluate the risk to public health and the environment of the off-site contamination.[5] 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.[6] To maintain its status as a "volunteer" under the BCP, the applicant will have to use "appropriate care" in dealing with the contamination.[7] A volunteer who fails to exercise "appropriate care" by not taking reasonable steps will be treated as a "participant." When a volunteer is remediating a site, the DEC will be responsible for either remediating the off-site contamination or having PRPs address such contamination.[8]

The former Anaconda Wire and Cable Company in Hastings, on the Superfund list.

Photo by David Wilkes

The second category of eligible applicant is a "participant." It includes any applicant that does not qualify as a volunteer, such as a PRP.[9] 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.

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 DEC's Inactive Hazardous Waste Disposal Site Registry (the "Registry"), are on the National Priorities List (NPL),[10] are permitted Resource Conservation and Recovery Act (RCRA)[11] sites, are subject to an enforcement action or are subject to a cleanup order under Article 12 of the Navigation Law.[12] An application may also be rejected if the applicant has engaged in certain prohibited acts, or for "public interest" reasons.

Under the state superfund program, the DEC may place inactive hazardous waste sites with "consequential" amounts of hazardous waste on the Registry.[13] The Brownfield/Superfund Act does have amnesty provisions that allow volunteers that own Class 1 or 2 sites to enroll their sites into the BCP prior to July 1, 2005. After that date, those parties will be subject to the traditional superfund enforcement process.[14] Participants that own Class 1 or 2 sites are not eligible for the amnesty process.

The amnesty provision for Class 2 sites provides a potentially important incentive for remediating contaminated sites that could also possibly increase the potential value of the property. For example, while a participant who owns a Class 2 site is not eligible for the BCP, a volunteer who acquires the property from the participant could enroll in the BCP if it does so prior to July 1, 2005. Likewise, the older administrative orders on consent (AOCs) that were issued under the state superfund program often addressed only portions of a contaminated site, which were referred to as "operable units" (OUs). If a participant has completed an AOC for a particular OU, the AOC can be considered terminated and the participant could then transfer the property to a volunteer to complete the cleanup under the BCP.

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 Registry, so long as the applicant is acting in good faith and remains in the BCP.[15] 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 ineligible for the user-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 not only applies 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. Because interim status "runs with the land" until releases of hazardous wastes have been remediated, purchasers can unwittingly acquire interim status

Overview of Existing Remedial Programs

The New York State Department of Environmental Conservation (DEC) is responsible for administering four remedial programs: the State Superfund Program for hazardous wastes, the Spill Response Program for petroleum contamination, the Environmental Restoration Program (ERP) for municipal brownfields, and the Voluntary Cleanup Program (VCP).[1] The New York State Department of Health (DOH) and the state attorney general also have roles in ensuring the cleanup of inactive hazardous waste disposal sites across the state.

To establish uniformity across its remedial programs, the DEC'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).[2]

The DEC has not, however, promulgated explicit regulations for remediating contaminated sites. Instead, the agency issued a series of guidance documents that established cleanup goals and objectives. The principal guidance for determining soil cleanup objectives and cleanup levels for VOCs (volatile organic compounds), SVOCs (semi-volatile organic compounds), 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 has also been 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.

Before passage of the Brownfield/Superfund Act, the DEC had also established the administrative voluntary cleanup program (VCP) to allow landowners, prospective purchasers and other volunteers to investigate and/or remediate sites that were contaminated with hazardous substances and petroleum. The work has been performed under the oversight of the DEC and DOH, and the volunteer pays the state's oversight costs. When the volunteer completes work, it receives a release from liability from the DEC, which has used a standardized Voluntary Cleanup Agreement (VCA) that is essentially non-negotiable. The DEC prepared a *Voluntary Cleanup Program Guide* in May 2002 that details the program requirements.[3]

The administrator of the state Environmental Protection and Spill Compensation Fund (the "Oil Spill Fund") and the attorney general also have authority over petroleum spills. Because a VCP liability release is binding only on the DEC, volunteers have had to request that the attorney general also execute a release, especially where volunteers are not required to remediate off-site petroleum contamination. Otherwise, the Oil Spill Fund Administrator would not be precluded from seeking reimbursement from volunteers for off-site petroleum migration.

1. ECL §§ 27-1401–27-1431; Nav. Law §§ 170–197; ECL § 56-0505.
2. DER-10 *available at* <http://www.dec.state.ny.us/wwebsite/der/guidance/der10dr.pdf>. 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.
3. Previously, the regulated community had to rely on speeches for guidance on the scope of the program, a procedure that one of the authors (Larry Schnapf) has termed "rulemaking by speechmaking."

facilities and find themselves saddled with potential RCRA corrective action liability. Such RCRA corrective action can be time consuming and costly because 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.

Petroleum-contaminated sites are eligible for the BCP unless they are subject to an enforcement action or cleanup order. DEC regional offices often resolve petroleum spills or leaks from underground storage tanks (USTs) by entering into a stipulation agreement (STIP) where the responsible party or a volunteer agrees to

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clean up the spill. Thus, there was a question whether STIPs fell within the definition of a cleanup order under the Navigation Law, which governs spills. The recent technical amendments clarified that the existence of a STIP would not preclude a site from the BCP.[16]

To help stimulate redevelopment of contaminated sites, the Brownfield/Superfund Act requires the DEC to establish a public database for each brownfield site.[17] In addition, each county must undertake a survey to inventory hazardous waste sites in its jurisdiction.[18]

Application Process A site owner or other entity willing to undertake a cleanup must submit an application for a Brownfield Cleanup Agreement (BCA) to the DEC to determine whether the entity is eligible for the program and to identify the reasonably anticipated reuse of the site. The DEC must notify the potential applicant within 10 days if the information is complete and, if not, specify what additional information is needed. The DEC must also contact the Oil Spill Fund administrator to determine if the applicant is responsible to the Oil Spill Fund for cleanup and removal costs incurred to respond to petroleum discharges. The fund administrator must respond to the DEC within 30 days. The DEC is required to use best efforts to approve or reject a BCA application within 45 days of its receipt.[19]

Where the significant threat consists of migration off-site and the applicant is a "volunteer," the DEC is responsible for the remediation of the off-site plume.

The Brownfield/Superfund Act contains specific requirements for the BCA. Each BCA will require payment of state costs, dispute resolution, commitments to investigate and (if necessary) remediate the site, citizen participation, and implementation and enforcement of any land use and engineering controls mandated by the DEC.[20]

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 work plan; before the DEC approves a proposed remedial investigation report; before the agency finalizes a remedial work plan; before the applicant commences construction at a brownfield site; before the DEC approves a final engineering report; and within 10 days of issuance of a certificate of completion.[21] The Legislature created these numerous opportunities for public comment even though the public has rarely provided comments on cleanups under the voluntary cleanup program (VCP). The multiplicity of public comment periods could lead to further delays in the cleanup process and add to transaction costs. Fortunately, the BCP Guide provides that only three of these notice periods require formal public participation, with the other notice requirements being satisfied by the publication of fact sheets.

The Brownfield/Superfund Act provides that, once the BCA is executed and a work plan is prepared, a 30-day comment period begins. The DEC is required to publish notice of the BCA in the *Environmental Notice Bulletin* (*ENB*) and a local newspaper of general circulation. The DEC will also notify 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.[22]

Once an investigation is completed, the applicant will submit a final investigation report to the DEC. There will be a comment period (variously described as 30 and 45 days), and the DEC will determine the completeness of the investigation within 60 days.[23]

Within 20 days after the final investigation work plan report is completed, the DEC must determine whether the site poses a "significant threat." If the agency concludes that the release of hazardous wastes at the site poses a "significant threat,"[24] the DEC may defer placing the site on the Registry if a "volunteer" has executed a BCA and agrees to address the significant threat or the agency is in on-going "good faith" negotiations.

Where the significant threat consists of migration off-site and the applicant is a "volunteer," the DEC is responsible for the remediation of the off-site plume. It is required to identify potentially responsible parties for the site and to bring an enforcement action within six months to compel the PRPs to address the off-site contamination. If the DEC 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.[25] The DEC 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 work plan to the DEC. The work plan will be subject to a 45-day public comment

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period and, under certain circumstances, a public hearing. The DEC must 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.[26]

Cleanup Standards In the past, the DEC has not promulgated cleanup standards for its remedial programs. This absence of cleanup standards has not only made it difficult for developers of brownfield sites to estimate their costs, but has also required property owners to expend significant legal and engineering resources negotiating site-specific cleanup standards. In recent years, the DEC has taken land use into account when developing cleanups under the VCP, but its official policy has been not to consider land use when developing cleanup standards under its other remedial programs.

The Brownfield/Superfund Act changes this by establishing four tracks for cleanups. The DEC is required to develop regulations establishing three generic "look-up" tables of cleanup standards: Unrestricted Use (*e.g.*, residential), Commercial Use and Industrial Use. The tables must be updated every five years.[27]

A Track 1 cleanup is designed to permit any unrestricted use without reliance on institutional or 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.[28]

Track 2 cleanups will need to achieve the cleanup levels set forth in the DEC look-up tables for the reasonably anticipated use without reliance on institutional controls for soil. Institutional controls may be used to satisfy groundwater cleanup standards.[29]

Track 3 cleanups will use the same formula/process used to develop the cleanup numbers for Tracks 1 or 2. However, parties will be permitted to use site-specific characteristics (*e.g.*, depth to groundwater) instead of the lookup tables to establish the cleanup levels.[30]

Track 4 cleanups will be similar to the existing process used for determining soil cleanup numbers. Institutional or engineering controls can be used. For remedies where a specific contaminant's exposure exceeds 10^{-6} ppm, the DEC can allow such contamination to remain without reliance upon institutional or engineering controls when the DEC commissioner determines that the proposed remedy will be protective of public health and the environment. In addition, the top two feet of soil (for residential uses) and top one foot of soil (for non-residential uses) must comply with the Track 2 tables.[31]

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 DEC. These remedies may be developed for specific site types (*e.g.*, manufactured gas plant sites) or specific contaminants (*e.g.*, trichloroethylene).[32]

An applicant who proposes to adopt a cleanup track other than Track 1 must examine at least two remedial alternatives, including one that would satisfy Track 1. If the site does not pose a significant threat, the DEC 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.[33] While this alternatives analysis is not as onerous as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Remedial Investigation/Feasibility Study approach, it is still more burdensome than the approach of other states' brownfield programs and creates a disincentive for brownfield redevelopment. Requiring applicants to engage in remedial alternatives analysis is likely to result in unnecessarily increased transactional costs and project delays.

While the use of cleanup tracks suggests that property owners will have some flexibility in creating a remedial plan for a development, the legislation provides that the remedial action objectives should have a "target risk" that does not exceed an excess cancer risk of one in one million ("$1x10^{-6}$") for carcinogenic end points and a hazard index of one ("1 Hazard Index") for non-cancer end points. In addition, the DEC is required to consider five factors when developing these look-up tables.[34]

The DEC is authorized to exceed the "target risks" if the rural background levels exceed that risk level.[35] This requirement could pose an obstacle to redeveloping urban brownfield sites with fill material. Frequently, the fill material contains contaminants that are not a result of any discharges at the site but instead are associated with the material that was used for the fill, such as coal ash. Requiring applicants to remediate contaminated fill material does not even the playing field for brownfield sites and will encourage developers to locate their projects in undeveloped areas. Observers hope that the DEC will be able to adopt guidance that will take the presence of historic contaminated fill material into account when developing remedial actions for a site.

Hierarchy for Addressing Soil Contamination The Brownfield/Superfund 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 haz-

ardous substances, dense non-aqueous phase liquid, light non-aqueous phase liquid in soil and/or grossly contaminated soil "to the greatest extent feasible."[36]

• *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.[37]

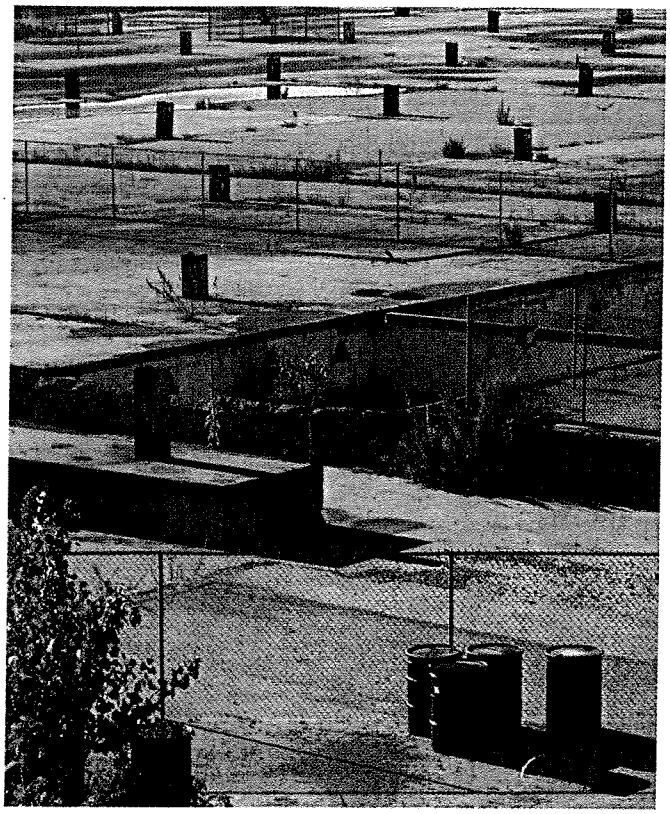
• *Elimination of exposure.* Exposure to any source remaining after removal, treatment and/or containment is required to be eliminated to the greatest extent feasible through additional measures such as alternative water supplies or methods to eliminate volatilization into buildings.[38]

• *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."[39]

• *Plume stabilization.* Plume stabilization as a method is to be evaluated for all remedies, and the further migration of contamination from the site must be prevented "to the extent feasible."[40]

The BCP remedial program must protect groundwater "for its classified use, the highest of which is drinking water." The DEC must promulgate regulations that "provide that groundwater use in Tracks 1 [*sic*, should probably be 2], 3 or 4 can be either restricted or unrestricted."[41] 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, New York State's policy was that all the groundwater in the state should be considered potable when developing groundwater cleanup standards. The DEC 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.[42]

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 professional engineer must file annual certifications that the controls are effective. The owner must certify every five years that the assumptions made in the qualitative exposure assessment remain valid and must resample groundwater-monitoring wells at site boundaries.[43] The DEC is considering providing waivers for the annual certifications and allowing biannual certifications, depending on site-specific conditions.



The 96-acre site of the GM facility in Sleepy Hollow, which once produced the Chevrolet Lumina minivan.

Photo by David Wilkes

The applicant must also create an "environmental easement" within 60 days of commencement of a remedial design that uses land use controls.[44] The easement may be enforced in law or equity by the grantor, or the state or local government against the owner of the burdened property, a lessee or any person using the land. The DEC is also required to establish a new database for sites subject to controls.[45]

Where sites are subject to environmental 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 the DEC.[46] While this requirement was established to ensure that land use controls are adequately maintained and enforced, it does allow the DEC to become involved in local land use decisions.

The Brownfield/Superfund Act is silent on what happens if the local government does not notify the DEC of a planned project. In the absence of local government action, can an adjoining landowner who opposes the project file the notice with the DEC? Also unclear is what the statute of limitations is for the DEC

to take action. Can the agency wait a year or so before disapproving the project? If the project is extremely time-sensitive, can local government notification impose a time requirement for the DEC approval, after which the agency will be deemed to have consented to the proposed project?

Liability Release and Reopeners When the remediation is completed, the applicant must submit a final engineering report to the DEC. Upon determination that the remediation requirements have been or will be achieved, the commissioner shall issue a certificate of completion (COC).[47]

As part of the COC, the applicant receives a liability release and covenant not to sue (CNTS) that effectively "runs with the land." The CNTS applies to the applicant's successors and assigns and to persons who develop or occupy the brownfield site, provided they use "due care" and in "good faith" adhere to the BCA and the COC. The CNTS does not apply to persons responsible for the contamination under statutory or common law unless they were parties to the BCA, and it must be recorded within 30 days of issuance of the COC or within 30 days of acquiring title.[48] An applicant will not be liable under statutory or common law for claims 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.[49] The Brownfield/Superfund Act, however, does not address the situation where a federal trustee may have concurrent jurisdiction over the same natural resources (*e.g.*, waterfront property).

Upon determination that the remediation requirements have been or will be achieved, the commissioner shall issue a certificate of completion.

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 DEC? Another unanswered question is what effect a reopener would have on the ability of an applicant to receive the brownfield tax credits. Will previously granted tax credits be 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 of the Environmental Conservation Law 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, by failing to sell the property on a timely basis, could avail itself of the CNTS as a successor of the applicant.

The DEC may modify or revoke a COC for "good cause";[50] however, this term is undefined. Presumably, the DEC's interpretation of this term will be governed by the "arbitrary and capricious" standard. It would nonetheless be helpful if the agency could provide further clarification on what constitutes "good cause." Because of the ramifications of revoking a COC, the hope is that the DEC will rely primarily on its ability to reopen COCs and save the revocation remedy for only the most egregious cases.

Unlike the VCP, this release will bind not only the DEC but also all state agencies, including the Department of Health (DOH) and the Office of the Attorney General, that share enforcement power with the DEC, and the Office of the Comptroller, which has concurrent jurisdiction with the DEC over petroleum spills.

Although the 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.[51] 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 had complied with all 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 work plan.[52] Under the VCP, the release extends to "Covered Contamination" and is not limited to specific activities. The limited nature of the release would seem to undercut its value.

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

- Environmental conditions at the site are no longer protective of public health or the environment;[53]
- Non-compliance with the BCA, work plan or COC;[54]
- Fraud in participation in the BCP;[55]
- Change in standards that renders the remedy no longer protective;[56]
- Change in use of the site subsequent to the issuance of a COC;[57] and

• Failure to make "substantial progress" toward completion of proposed development within five years, or unreasonable delay by the applicant.[58]

While many of these reopeners are similar to the ones that were used under the 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 period of limitation for new information or newly discovered conditions.

The VCP also had a reopener for changes in use that would result in a higher use and a more stringent cleanup than that approved under the VCP. The Brownfield/Superfund Act is confusing because it contains two "change in use" provisions.

One reference is the "change in use" reopener.[59] This reopener is the same as currently used in the VCP. The second reference to "change in use" requires applicants to notify the DEC 60 days in advance of transfers of property and erection of any structures or buildings on the site. The DEC then has 45 days to approve the change in use.[60] If the DEC determines that the change in use is unauthorized, it can exercise this reopener and require additional remediation.[61] This "change in use" provision is broader than the "change in use" reopener. While it is just a notice obligation, it could result in the DEC exercising one of the reopeners or triggering an enforcement action. The BCP Guide provides that the change in use notice requirement is primarily intended to enable the DEC to maintain 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 the DEC will evaluate whether 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 DEC 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" is also problematic.[62] Inasmuch as 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 recent amendments attempted to address this concern by extending the time period from three years to five years.

Transitioning from VCP to BCP The majority of VCP projects are in various phases of investigation and/or cleanup. One issue of concern has been what happens to the existing volunteers. The DEC stopped accepting new VCP applications as of October 31, 2003, and hopes to phase out the VCP.

Volunteers already accepted into the VCP or whose applications had been approved or were under review had until June 1, 2004, to transition to the BCP. Volunteers who did not choose to transition to the BCP will be required to complete their projects under the VCP.

A volunteer who transitioned to the BCP has not been required to resubmit documents or repeat work that was approved under the VCP but that may not meet the requirements of the BCP. All future work however, will have to comply with the BCP. The decision of whether to remain in the VCP or opt into the BCP required a site-specific and client-specific analysis that hinged on the nature of the cleanup and the tax credits or other financial incentives that might be available under the BCP. In some cases, it may be more beneficial to have remained in the VCP because of the broader reopeners (discussed earlier) and other enhanced enforcement rights that the DEC has under the BCP.

Financial Incentives for Brownfield Redevelopment

The Clean Water/Clean Air Bond Act of 1996 established a $200 million fund under the Environmental Remediation Program (ERP) to clean up contaminated properties owned by municipal governments.[63] Under the ERP, municipalities could obtain a State Assistance Grant (SAG) to conduct an ERP investigation or remediation at sites contaminated by releases of hazardous substances and petroleum.

The ERP had several disincentives, however. For example, the SAGs only covered up to 75% of certain eligible costs for municipally owned sites.[64] This meant that municipalities had to absorb the remaining 25% of the costs. As a result, the ERP is one of those few government programs where only a fraction of the available money has actually been spent. In addition, the local governments were required to share any profits (*i.e.*, funds received in excess of the project costs) with the state when brownfield properties were subsequently sold.

New York also has other programs, such as the Clean Water State Revolving Fund (CWSRF),[65] that could be used for some brownfield-related activities but have not been specifically targeted for brownfield redevelopment.[66]

1996 Bond Act Environmental Restoration Program Amendments The Brownfield/Superfund Act modifies the eligibility requirements for the ERP funding and establishes financial incentives for certain qualifying community-based organizations (CBOs) to undertake studies to facilitate redevelopment of qualifying areas and sites.

It is important to note that the ERP remains a distinct program from the Title 14 BCP. However, some of the new requirements of the ERP flow from the BCP. For example, the ERP now provides that engineering and institutional controls must be developed and maintained in accordance with the BCP requirements.[67] ERP remediation projects are supposed to use the same remediation goals of the state superfund.[68]

The legislation expands the definition of "municipality" to include qualifying CBOs that partner with the local government.[69] A CBO will be eligible for the SAG provided it is acting in partnership with the municipality where the brownfield is located and has not caused or contributed to a release of hazardous waste or petroleum, or generated, disposed of, or transported the same at the brownfield site. The CBO will not be eligible for ERP funds if more than 25% of its members, board members or officers are or were employed by a person responsible for contamination under the state superfund law or the Navigation Law. A municipality that generated, transported or disposed of wastes at the site is not eligible for such assistance. Private parties are also not eligible for funding.[70]

The SAG payments are increased to 90% for on-site contamination and 100% for off-site contamination.[71] The local government will also be allowed to use other federal or state assistance to satisfy its 10% cost-share obligation. SAG cost share will be recalculated if a municipality receives any payments from PRPs.[72] Local governments may also leverage SAG grants by applying for an SAG investigation grant and then having a private developer apply to the BCP to remediate the site and obtain tax credits for the redevelopment.[73]

In addition, proceeds from the sale of property that exceed the municipality's costs of property acquisition, including taxes, no longer have to be shared with the state.[74] Instead, the municipality will first recover its costs, the state will then be entitled to its costs (*i.e.*, the amount of the SAG) and then the local government will be able to keep any remaining proceeds from the sale. The state is required to use reasonable efforts to pursue responsible parties, but not those parties who are responsible parties solely because of ownership, for the full amount of the SAG.[75]

After completing the cleanup, the municipality may use the property for a public purpose or dispose of it. If sold to a PRP, the PRP must pay the amount of the SAG plus interest, in addition to any consideration received by the municipality.[76]

An important feature for many upstate county governments is the provision allowing taxing districts that are not foreclosing on a tax lien to be considered titleholders for purposes of receiving ERP investigation SAGs. The taxing authority may petition on 20 days' notice for an order granting the taxing district temporary incidents of ownership to conduct an ERP and receive an ERP investigation SAG. Relief shall be granted unless a party having the right of redemption has redeemed the parcel. The order will stay the foreclosure proceeding until the ERP investigation is completed. The report is to be delivered to the court, which shall then lift its stay of the foreclosure.[77]

A municipality receiving funds pursuant to an SAG, its successor, lender and lessee not liable under statutory or common law arising out of the presence of hazardous substances existing at the time of the SAG, shall each be indemnified by the state provided that they did not generate, transport or dispose of hazardous substances at site.[78] The liability exemption has the following reopeners: (1) failing to implement the approved work plan, including land use controls; (2) fraudulently showing cleanup levels were achieved; (3) causing a release; (4) changing the property's use; or (5) using the property in violation of ECL § 56-0511.[79]

Brownfield Opportunity Areas (BOAs) Urban areas often have sizeable areas of contiguous brownfields in their former industrial areas. State and federal brownfield programs have demonstrated that addressing brownfield sites on an area-wide basis can result in more efficient cleanups and generate redevelopment synergies. Building on this experience, the Brownfield/Superfund Act established a BOA strategy that is distinct from the ERP program. The BOA program will be administered by the DEC and the Department of State (DOS).

Sites located in BOAs as defined by General Municipal Law § 970-r shall receive a funding priority and preference over other sites. Municipalities and CBOs may receive up to 90% of the cost of studies that would assist an area being designated as a BOA. In addition, the state will provide up to 90% of the cost of nominating an area for designation as a BOA, including the preparation, creation and development of the information to be included in the nomination package. Municipalities and qualifying CBOs can also obtain up to 90% of the cost of conducting site assessments.

Brownfield Tax Credits Among 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 COCs. The DEC estimates that the value of the tax cred-

its will be approximately $135 million when they become fully effective. Like any tax provision, the brownfield tax credits are extremely complex.

Many of the key terms and definitions refer to the Internal Revenue Code. Moreover, at this time, 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 specialists to determine the credits' applicability to a particular project, or consider obtaining advisory opinions from DTF.

Brownfield Redevelopment Tax Credit The first category of tax credit is the Brownfield Redevelopment Tax Credit (BRTC).[80] It is important to note that costs incurred prior to the execution of a BCA are not eligible for the BRTC. Costs incurred after the DEC executes the BCA, however, may be accrued until the COC is issued. The tax credit may not be claimed until after a COC is issued and then only for COCs issued after April 1, 2005. There had been some confusion as to whether a taxpayer could claim a BRTC for costs incurred prior to April 1, 2005, where the COC is issued after that date. The technical amendments clarify that eligible costs incurred prior to that date will be deemed to have been incurred in the first taxable year occurring on or after April 1, 2005.

The BRTC is a refundable tax credit, but it 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.

The "site preparation" credit includes costs that can be chargeable to a "capital account." This cost component may not only include remediation costs but also costs of excavation, temporary electric wiring, scaffolding, demolition costs, costs for fencing and security, and other costs to make the site usable for commercial, industrial, residential, recreational and environmental conservation purposes. Site acquisition costs, however, may not be used in determining the amount of the credit.[81] Applicants may claim credits for site preparation costs for up to five years after the issuance of the COC.

The Qualified Tangible Property Credit (QTP Credit) cost component is available for costs of buildings and improvements that are placed into service within three years of the issuance of a COC. To qualify for the QTP Credit, a property must satisfy the following conditions:[82]

- The property is depreciable pursuant to IRC § 167;
- The property has a useful life of four or more years;
- The property was purchased pursuant to IRC § 179(d);
- A COC has been issued for the property;
- The property is used for a business, recreational or environmental purpose; and
- The property is placed in service within three years of the COC.

The QTP Credit may be claimed for up to 10 years after the property is placed into service. An applicant need not own the property to claim the credit. Thus, a tenant may claim the credit for the cost of leased improvements, provided the tenant is not responsible for disposal or discharge of hazardous wastes or petroleum.[83]

As originally drafted, the QTP Credit had another recapture event when the property was sold within 12 years of the COC.[84] 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 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 Credit.

The QTP Credit may be claimed for up to 10 years after the property is placed into service. An applicant need not own the property to claim the credit.

Taxpayers who seek to claim the QTP Credit will not be able to claim the Investment Tax Credit or the Empire Zone Investment Tax Credit.[85] However, the BRTC may be larger in many cases than the Investment Tax Credit and the Empire Zone Investment Tax Credit and may be available for broader uses than the other credits.

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 work plans. For on-site groundwater remediation costs incurred prior to the issuance of the COC, the credit may be claimed in the year in which the COC is issued. Costs incurred after the COC is issued may be claimed in the taxable year in which the costs are incurred, for up to five years after the issuance of the COC.[86] This component presumably

includes both capital and 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.

Significantly, either a volunteer or a participant may claim the BRTC so long as it incurs eligible costs pursuant to a BCA and receives 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.[87]

The percentage of the tax credit varies depending on whether the party is an individual or corporate taxpayer and whether the site is in an Environmental Zone.[88] The base tax credit is 12% for a corporate taxpayer and 10% for a non-corporate taxpayer.[89] If a site is in an Environmental Zone, the taxpayer may be eligible for another 8% tax credit. The taxpayer may add another 2% for unrestricted cleanups. Thus, the maximum BRTC for a corporate taxpayer is 22%, while non-corporate taxpayers may be eligible for a tax credit of up to 20%.

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 technical amendments attempted to address this concern by providing that COCs were transferable. In any event, where the applicant is an LLC, a partnership or a corporate entity, the BRTC should be available by transferring an ownership interest in the entity that received the COC.

Some timing issues will also need to be resolved. For example, 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? Similarly, can a purchaser acquiring the property after a COC, but before the certificate of occupancy, claim the BRTC for the costs of the improvements constructed by the seller?

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").[90] 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 and 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 10 years after issuance of the COC.

Unlike the Brownfield Redevelopment Tax Credit (BRTC), the Brownfield RPT Credit is limited to owners of the contaminated property who obtained a COC. However, also unlike the BRTC, the Brownfield RPT Credit is transferable to subsequent purchasers of the site who take title within seven years of issuance of the COC.[91] 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.[92]

The Brownfield RPT Credit is calculated by applying a complicated formula. First, the amount of the eligible real property taxes is multiplied by either 25%, or 100% if at least one-half of the site is within an Environmental 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) as follows:

- For sites with at least 25 but fewer than 50 employees, the employment number factor is 25%.
- For sites with at least 50 but fewer than 75 employees, the employment number factor is 50%.
- For sites with at least 75 but fewer than 100 employees, the employment number factor is 75%.
- For sites with at least 100 employees, the employment number factor is 100%.[93]

The maximum credit allowed is $10,000, multiplied by the average number of employees over the taxable year.[94] Owners of property located in an Empire Zone may be able to take advantage of either an Empire Zone 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.[95]

Because this tax credit is geared toward the creation of jobs, it does not provide much incentive for residential development. Other states, such as New Jersey, provide tax credits that are based on the occupancy rate for residential developments built on brownfield sites. 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 on brownfield sites.

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.[96] This one-time credit is allowed in the year in which the COC is issued.[97]

Technical Assistance Grants The DEC is authorized to provide technical assistance grants (TAGs) of up to $50,000 to facilitate participation of a citizen group in the cleanup decision-making process for a site.[98] The source of the TAGs may be the $15 million appropriation and BCP participants (*i.e.*, responsible parties).

Title 13 Liability Reforms

New York was one of the first states to adopt a state superfund program when it enacted the Inactive Hazardous Waste Disposal Site Law in 1979.[99] Because the law predated CERCLA,[100] the New York program differed in some significant respects from the federal act.

One limitation was that the state superfund applied only to releases of hazardous wastes, which is a much narrower category than CERCLA hazardous substances. Under the state superfund law, the DEC can order the owner of the site and/or any other person responsible for the disposal of the hazardous wastes to develop a remedial program acceptable to the DEC and to implement the remedial program when the agency determines that a site poses a "significant threat" to the environment.[101] However, unlike the EPA's authority under section 106 of CERCLA,[102] the DEC cannot issue a cleanup order until after the alleged responsible party is provided with a hearing. Moreover, a party who has been issued an order after an administrative hearing can seek judicial review of that decision.[103] The DEC's inability to order a PRP to clean up a site without first conducting an administrative hearing substantially limited the usefulness of the state superfund program.[104] The DEC often relied on CERCLA to seek cost recovery from PRPs.

The innocent purchaser defense is available only to owners who had no reason to know that their property was contaminated.

Expanded Definition of Hazardous Wastes The state superfund applies to hazardous wastes. The Brownfield/Superfund Act expands the definition of "hazardous waste" to include hazardous substances.[105] The DEC estimates that this change will bring approximately 300 new sites under the jurisdiction of the state superfund program.

New Landowner Defenses The legislation adds act of God, act of war, third-party and innocent-purchaser defenses to the state superfund program[106] that are modeled after those in CERCLA.

The innocent purchaser defense is available only to owners who had no reason to know that their property was contaminated.[107] Since sites are brownfields because there is at least the perception of contamination, the innocent-purchaser defense will not be available to most brownfield developers. Because of this limitation, the U.S. Congress added a bona fide prospective purchaser (BFPP) defense to CERCLA as part of the Small Business Liability Relief and Brownfield Revitalization Act of 2002 (the "2002 CERCLA Amendments") to allow purchasers to knowingly acquire contaminated property without incurring CERCLA liability.[108]

Unfortunately, the New York Legislature did not include a BFPP defense in the Brownfield/Superfund Act, presumably because the Legislature preferred to have BFPPs remediate sites rather than receive immunity from liability. The absence of a BFPP defense is somewhat mitigated by the fact that COCs may be relied upon by subsequent purchasers, but the legislative decision to not include a BFPP defense was disappointing to environmental practitioners and their clients.

The Legislature also failed to enact a contiguous property owner's defense that would protect landowners whose property has been impacted by releases of hazardous substances migrating onto their property from an off-site source. This omission was not as important because of the differences between CERCLA and the state superfund program. Under CERCLA, a "facility" is a site where hazardous substances have come to be located; under the state superfund program, the DEC has historically interpreted a hazardous waste site to be the source of the contamination. Nevertheless, it would be comforting to purchasers and lenders if the DEC could develop guidance similar to that recently developed by the EPA for contiguous property owners.

All Appropriate Inquiry The Brownfield/Superfund Act adopted the new post-closing "appropriate care" requirements that were added to the CERCLA innocent purchaser defense in 2002, and also required the DEC to institute an "all appropriate inquiry" (AAI) rulemaking identical to that required of the EPA under the 2002 CERCLA Amendments. Until the DEC issues its AAI rule, the ASTM E1527 standard for Phase I Environmental Site Assessments will serve as the interim standard.[109]

Many in the private bar believe that the DEC should not simply adopt the AAI rule that will be promulgated by the EPA but instead review it for consistency with the state superfund program. For example, will the "appropriate care" requirements set forth in the AAI be consistent with the obligations contained in Title 14 of the ECL? Will the requirements for investigating adjacent properties be consistent with the public participation requirements of Title 14? In addition, the DEC may want to adopt a different definition of "environmental professional" or different procedures for filling data gaps.

Lender and Fiduciary Liability The Brownfield/Superfund Act also adds statutory liability exemptions for lenders and fiduciaries for claims filed under state law. These provisions are identical to the CERCLA

exemptions.[110] A lender will not be liable as owner or operator of contaminated property if it holds indicia of ownership primarily to protect its security interest and does not otherwise participate in the management of the property. Lenders may also foreclose on property without forfeiting their immunity from liability, provided they attempt to sell the property in a commercially reasonable manner.

Title 13 also now provides limited liability protection to fiduciaries.[111] The liability of fiduciaries is limited to the assets being held in its fiduciary capacity unless there is an independent basis for holding the fiduciary liable, including, but not limited to, the fiduciary negligently causing or contributing to the release or threatened release of hazardous waste at the site.

Because these exemptions use the same terminology as CERCLA, EPA guidance and CERCLA case law can presumably be relied upon to provide direction to lenders and their counsel.

Municipal and IDA Liability Exemptions The Brownfield/Superfund Act also creates 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. Municipalities must provide notice to the DEC within 10 days of learning of a release or lose their exemption.[112]

This defense can be particularly useful to local governments to help them assemble parcels of smaller brownfield sites into a larger site that has greater development potential. It is unclear, however, what "participation in development" means. The DEC needs to clarify the scope of this term in its implementing regulations.

Navigation Law

The vast majority of contaminated sites in New York State are affected by petroleum contamination. The Oil Spill Prevention, Control and Compensation Law[113] prohibits the discharge of petroleum into the waters of the state or onto land from which the petroleum might drain into state waters.[114] Dischargers of petroleum are strictly liable without regard to fault for all cleanup and removal costs as well as direct and indirect damages.[115] Cleanup liability extends to discharges that occurred before the 1977 enactment date of the statute.

The Navigation Law does not expressly define who is liable as a "discharger." The term has been broadly construed to include not only operators of a facility where a release has occurred but also, in some cases, landowners who did not actively operate the source of contamination. In 2001, the New York Court of Appeals ruled in *State v. Green*[116] that, while the Navigation Law does not impose liability based solely on ownership of contaminated land, a landowner that can control activities occurring on its property, and who has reason to believe that petroleum products will be stored there, could be liable for cleanup costs as a discharger. Moreover, while the owners or operators of a "major facility" could assert defenses to liability based on acts or omissions solely caused by an act of war, sabotage, or government negligence,[117] owners or operators of smaller facilities could not assert these defenses.

Further complicating the lives of prospective purchasers of petroleum-contaminated sites was the fact that the release under the VCP included a reopener for off-site migration of petroleum, so that the purchaser might be required to remediate petroleum contamination that migrated from the site.

The Legislature added to the Navigation Law a third-party defense similar to that of CERCLA.[118] The recent technical amendments now clearly also establish a lender liability exemption in the Navigation Law that tracks CERCLA.

The Brownfield/Superfund Act did not enact the RCRA secured creditor exemption for owners and operators of underground storage tanks (USTs) regulated under the Bulk Petroleum Storage Act. However, the clarification of the secured creditor exemption in the technical amendments should provide comfort to lenders of brownfield sites contaminated with releases of petroleum from USTs.

Conclusions

The new Brownfield/Superfund Act, perhaps the most significant piece of environmental legislation enacted in New York State since 1979, brings the state's superfund program more in line with those of its neighboring states. The legislation provides the DEC with enhanced tools to implement an effective brownfield program. The incentives provided both to municipalities (through grants, liability relief and reduction of matching requirements) and private entities (through tax credits) could prove very helpful to certain projects.

Whether the legislation provides sufficient incentives to spur the development of contaminated sites in New York may well depend on how the DEC implements this new law. By all accounts, the agency appears committed to interpret its new authority in a manner that will promote the re-use of brownfields.

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1. The recent amendments will make a number of technical changes and corrections. S. 7726, 227th N.Y. Leg. Sess.
2. These funds would be provided by the sale of bonds sold by the Environmental Facilities Corporation (EFC). Approximately $33 million will continue to be appropriated to fund the state's Petroleum Spill Program.

3. N.Y. Environmental Conservation Law § 27-1405(2) ("ECL"). The DEC recently published draft guidance on the BCP. The guidance is available from the DEC Web site.
4. ECL § 27-1405(1)(b).
5. ECL §§ 27-1411(1), 27-1415(2)(b).
6. Unfortunately, the BCP Guide states that a volunteer must "characterize" contamination and evaluate "fate and transport" mechanisms. Some in the environmental bar are concerned that, because these are terms of art under existing remediation programs, volunteers could be asked to fully investigate off-site contamination.
7. ECL § 27-1405(1)(b).
8. ECL § 27-1411(6).
9. ECL § 27-1405(1)(a).
10. 40 C.F.R. § 300.425(b).
11. 42 U.S.C. §§ 6901–6992k.
12. N.Y. Navigation Law §§ 170–197 ("Nav. Law").
13. DEC's regulations define an "inconsequential" amount as an amount of hazardous waste that could never constitute a significant threat to the environment under any foreseeable exposure scenario. 6 N.Y.C.R.R. § 375-1.8(a)(1).
14. *See* ECL § 27-1405(2).
15. *See* ECL § 27-1405(2)(a).
16. The BCP Guide expanded the exclusion to include orders or STIPs issued under the Control of Petroleum Bulk Storage (ECL §§ 17-1001–17-1017).
17. ECL § 27-1415(7)(d).
18. ECL § 27-1303(1).
19. ECL § 27-1407.
20. ECL § 27-1409.
21. ECL § 27-1417(3).
22. ECL § 27-1417; *see* ECL § 27-1405(3).
23. *Compare* ECL § 1417(3)(e) *with* ECL §§ 27-1407(7).
24. *See* 6 N.Y.C.R.R. § 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. 6 N.Y.C.R.R. § 375.1-4(a).
25. ECL § 27-1411(6).
26. ECL § 27-1411(4).
27. ECL § 27-1415(6)(c).
28. ECL § 27-1415(4). The cleanup tables must be in draft form by the fall of 2004. The DEC published for public comment a series of information sheets to describe the considerations that will be used for developing the tables of contaminant-specific Soil Cleanup Objectives (the "ASCO Guidance"). Once the soil cleanup numbers are proposed, public participation events will be held. Until the rulemaking is completed, approvals will continue to be made on a case-by-case basis by the DEC in consultation with the DOH.
29. *Id.*
30. *Id.*
31. *Id.*
32. ECL § 27-1415(8).
33. ECL § 27-1413(4).
34. The DEC must consider (1) existing standards, criteria and guidance (*e.g.*, the TAGM 4046 guidance document, the STARS guidance document); (2) the behaviors of children; (3) the protection of adjacent uses; (4) the toxicological, synergistic and/or additive effects of certain contaminants; and (5) the feasibility of achieving more stringent remedial action objectives based on experience under existing remedial programs, particularly where toxicological data are lacking. Based on this last criterion, the DEC may have to analyze historic cleanup levels achieved in the state superfund program, VCP and Oil Spill programs to develop the new table of numbers. ECL § 27-1415(6)(b).
35. ECL § 27-1415(6)(b).
36. ECL § 27-1415(5)(a)(i).
37. ECL § 27-1415(5)(a)(ii).
38. ECL § 27-1415(5)(a)(iii).
39. ECL § 27-1415(5)(a)(iv).
40. ECL § 27-1415(5)(b).
41. ECL § 27-1415(4).
42. ECL § 15-3109.
43. ECL § 27-1415(7)(b), (c).
44. *See* ECL § 71-3605.
45. *Id.*
46. ECL § 71-3607(2).
47. ECL § 27-1419(3).
48. ECL § 27-1421.
49. ECL § 27-1421(1).
50. ECL § 27-1419(5)(c).
51. ECL § 27-1421(6).
52. ECL § 27-1421(5).
53. ECL § 27-1421(2)(a)(i).
54. ECL § 27-1421(2)(a)(ii).
55. ECL § 27-1421(2)(a)(iii).
56. ECL § 27-1421(2)(a)(iv).
57. ECL § 27-1421(2)(a)(v).
58. ECL § 27-1421(2)(a)(vi). The technical amendments will lengthen the time period from three to five years. The BCP Guide provides that the DEC will consider the size, scope and nature of the proposed development in evaluating whether an applicant has engaged in unreasonable delay.
59. ECL § 27-1421(2)(a)(v).
60. ECL § 27-1425.
61. ECL §§ 27-1421(2)(a)(v), 27-1425(2).
62. *See* ECL § 27-1421(2)(a)(vi). 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.
63. ECL §§ 56-0101–56-0611. DEC regulations implementing the Bond Act are codified at 6 N.Y.C.R.R. §§ 375-4.1–375-4.9.
64. ECL § 56-0503(1).
65. The CWSRF is jointly administered by the Environmental Facilities Corporation ("EFC") and the DEC.
66. For example, municipalities can apply for low-interest loans from the CWSRF to satisfy the 25% cost share. The CWSRF can also be used for pre-finance design and construction costs incurred prior to reimbursement of the state share and costs that are ineligible for reimbursement under the Brownfield/Superfund Act.
67. ECL § 56-0503(2)(h).
68. ECL § 56-0505(3). This has caused some confusion because the state superfund does not address petroleum while the ERP does include petroleum-contaminated

sites. Some have asked how can a municipality remediate a site with petroleum contamination to the state superfund standards when the state superfund does not address petroleum? Senior DEC officials have indicated that the reference is simply to the pre-disposal remediation goal of the state superfund program.

69. ECL § 56-0502(5).
70. ECL § 56-0101(7).
71. ECL § 56-0503.
72. ECL § 56-0503(2)(c).
73. The local government would have to retain title to the property to be eligible for the SAG investigation grant but could lease or convey title to the property after the SAG-funded investigation is completed to maximize tax credits to the private developer. However, the developer would not have to hold title or even lease the property to claim the brownfield redevelopment tax credit (discussed below).
74. *Id.*
75. ECL § 56-0507.
76. ECL § 56-0505(4).
77. ECL § 56-0508.
78. ECL § 56-0509.
79. ECL §§ 56-0509(2), 56-0511.
80. N.Y. Tax Law § 21.
81. Tax Law § 21(b)(2).
82. Tax Law § 21(b)(3).
83. Tax Law § 21(a)(3).
84. Tax Law § 21(d). 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.
85. Tax Law § 21(c).
86. Tax Law § 21(a)(4).
87. Tax Law § 601(f).
88. 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 1.25% of the statewide unemployment rate as of the 2000 census. Tax Law § 21. This is generally the same definition as that of an "economic development zone" under General Municipal Law Article 18-B.
89. Tax Law § 21.
90. Tax Law § 22(b).
91. Tax Law § 22(a)(3)(i).
92. Tax Law § 22(a)(3)(ii).
93. Tax Law § 22(b)(3).
94. Tax Law § 22(b)(6).
95. Tax Law § 22(b)(7).
96. Tax Law § 23(a).
97. Tax Law § 23(c).
98. ECL § 27-1417(4).
99. ECL §§ 27-1301–27-1323. The state superfund regulations are set forth in 6 N.Y.C.R.R. pt 375-1.
100. 42 U.S.C. §§ 9601–9675.
101. ECL § 27-1313(3)(a).
102. 42 U.S.C. § 9606.
103. ECL § 27-1313(4).
104. The DOH may also order a responsible party to cleanup a significant threat under the Public Health Law, which will supercede any order issued by DEC. ECL § 27-1313(3)(a).
105. ECL § 27-1301(1). This is opposite to the approach used in CERCLA, where the term "hazardous substances" includes "hazardous wastes." 42 U.S.C. § 9601.
106. ECL § 27-1323(4).
107. ECL § 27-1323(4)(b)(i).
108. 42 U.S.C. § 9607(r).
109. ECL § 27-1323(4)(c).
110. ECL § 27-1323(1).
111. ECL § 27-1323(3).
112. ECL § 27-1323(2).
113. Nav. Law §§ 170–197.
114. Nav. Law § 173.
115. Nav. Law § 181.
116. 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001).
117. Nav. Law § 181(4).
118. *Id.*