

Brownfield Cleanup Program's Final Site Eligibility Criteria

On March 9, 2005, the New York State Department of Environmental Conservation (NYSDEC) published final eligibility criteria (BCP Eligibility Criteria) to its draft Brownfield Cleanup Program (BCP) Guide.¹ The final BCP Eligibility Criteria will be incorporated into the draft BCP Guide as Section 2, entitled "Eligibility."

The Brownfield/Superfund Act of 2003 (the Brownfield 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. 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.² 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.

Critics coined the draft BCP Eligibility Rule as the "New York City Rule". While the final BCP eligibility criteria is an improvement over the draft,³ the final BCP Eligibility will have the effect of not only disqualifying many sites in New York City but also other cities such as Yonkers, Rochester and Buffalo. Compounding this problem is the fact that NYSDEC eliminated the Voluntary Cleanup Program (VCP). Thus, site owners, developers and municipalities who are prevented from enrolling in the BCP under the new criteria may have no practical alternative for voluntarily remediating sites.

Revised Brownfield Definition

The statutory definition of "brownfield" is quite broad, and refers to any real property whose redevelopment or reuse is complicated by the presence or potential presence of contamination. The NYSDEC's final amendments to the BCP Guide 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

¹ The draft BCP Guide was published on May 12, 2004 and was subject to public comments through July 12, 2004. A revised version of the guide incorporating such comments has yet to be published.

² 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.

³ See, New York Law Journal, "Brownfield Cleanup Program's Draft Eligibility Criteria," November 16, 2004, p. 4.

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 will 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.*

Perhaps the third and fourth factors are the most troublesome for potential brownfield applicants. 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 used to deny acceptance into the BCP.

With respect to the second element, the NYSDEC will consider the following criteria to determine whether there is a reasonable basis to believe that contamination or the potential presence of contamination may be complicating the development, use or re-use of the property:

- *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 as 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.*

The NYSDEC will use these criteria to evaluate each proposed site “on a case-by-case basis.” The NYSDEC has indicated that no single criterion will be sufficient to disqualify a site from the BCP, but it is not clear how the agency will weigh the individual factors. Whether the NYSDEC has impermissibly narrowed the statutory definition of a brownfield will depend on how these criteria are applied.

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 are 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.

This narrow reading of a "brownfield site" will not only will reduce the value of the tax credits generated by the project but could also limit the liability relief provided by the BCP. Because the covenant not to sue that will be limited to the contamination addressed at the "brownfield site", a developer will not receive any liability protection for remediation of contaminated fill material or other contamination that was not located within the "brownfield site"

The NYSDEC also made some minor changes to the categories of sites that would be automatically ineligible for the BCP. In addition to the sites that are subject to an ongoing enforcement action pursuant to Environmental Conservation Law (ECL) Article 27, Title 7 (Solid Waste Management and Resource Recovery Facilities) or Title 9 (Industrial Hazardous Waste Management), the final BCP Eligibility Criteria exclude sites subject to an enforcement action *or a permit issued* pursuant to these sections of the ECL.

NYSDEC did adopt the proposed exception for petroleum sites that are subject to an order issued pursuant to either Article 12 of the Navigation Law (Oil Spill Prevention, Control and Compensation) or ECL Article 17, Title 10 (Control of the Bulk Storage of Petroleum). The BCP Guide now provides that sites subject to a stipulation agreement under either statutory provision are eligible if the proposed site would otherwise meet the eligibility criteria.

Potential Implications of the BCP Eligibility Criteria

Overall, the NYSDEC's eligibility amendments to the BCP Guide are inconsistent with the broad intent of the statutory definition of a brownfield site. For example, some of the site eligibility criteria concern issues that would be more appropriately addressed during the BCP work plan process, and not during the BCP enrollment process. Information relating to the extent and level of contamination often is not available during the application phase of the BCP process, and the statute does not contemplate an intrusive site investigation as a prerequisite to enrollment into the BCP. Applicants cannot be asked to prove a negative. Will the NYSDEC reject sites if insufficient information to evaluate these factors is not available at the application stage or if it turns out later on that the site was not as contaminated as originally thought?

Additionally, some of the eligibility factors relating to whether there is a reasonable basis to believe that contamination or the potential presence of contamination may be complicating the reuse of a site require the NYSDEC to make economic and demographic judgments for which the agency does not have the institutional expertise (e.g., whether a proposed site is "unattractive" for redevelopment or evaluating the economic vitality of the surrounding a proposed site).

Most significantly, the final eligibility amendments to the BCP Guide reintroduce unpredictability and uncertainty into the voluntary cleanup process, which the BCP statute was designed to eliminate. Consistency and transparency in the decision-making process may succumb to unwanted ad-hoc determinations. Site owners and developers may be disinclined to commit substantial upfront time or money to prepare and pursue an application into the BCP if they are uncertain as to whether a particular site meets the definition of a brownfield.

Imposing restrictive eligibility criteria may also have the unintended consequence of harming the public interest. By artificially tightening BCP eligibility, and not creating another mechanism for voluntarily cleaning up sites, NYSDEC may force site owners to remediate properties without NYSDEC oversight or public involvement. Consequently, such sites may not be cleaned up to levels that adequately protect human health or the environment. Moreover, restricting eligibility into the BCP will leave developers and site owners who might otherwise need state signoff (e.g., closure letters and releases) on a cleanup for reasons other than tax credits (e.g., a qualification for insurance reimbursement or a requirement of a lender), without any avenue to obtain regulatory approval for their cleanups.

Conclusion

As we have expressed in the past, the NYSDEC has done a respectable job implementing the BCP. Unfortunately, the agency has been placed in a position of artificially restricting BCP eligibility to minimize the potentially mammoth tax credits that could be generated by the problem. We feel that this is not only unfair for the NYSDEC to be put

in this position but also that it is not an appropriate response to this concern. The uncertainty created by the changing administrative interpretations has had a detrimental effect on the BCP. Many developers and site owners no longer view the BCP as a useful effective tool or incentive for developing contaminated sites.

The concern over tax credits that NYSDEC attempted to fix with the revised BCP Eligibility Criteria is intrinsically one that is within the purview of the State Legislature, which can address the funding problem by statutorily modifying the formula for calculating the tax credits under the BCP. We urge the legislature to address this issue before the legislative term expires so that the BCP is not further damaged. Until then, only time and practice will reveal whether the criteria will be applied in a consistent and fair manner.