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NEW YORK PROPOSAL COULD PROVIDE CLEANUP COST PROTECTION MODEL

A New York City proposal to implement a first-of-a-kind municipal brownfields program could provide potentially responsible parties (PRPs) who cleanup and redevelop contaminated properties protection from some cost-recovery lawsuits and could spur other cities to pursue similar proposals, one legal expert says.

Lawrence Schnapf, special counsel for Schulte, Roth & Zabel, on April 8 told attendees of a trade conference sponsored by RTM Communications in Washington, DC that if New York officials reference language from the Supreme Court's landmark 2003 ruling in *Cooper Industries v. Aviall Services* in a memorandum of understanding with EPA they could provide PRPs protection from so-called contribution lawsuits from other PRPs.

Schnapf explained that in *Aviall*, the court ruled PRPs could not sue for contribution under section 113 of the Superfund law unless they themselves were either sued by the government or had entered into a settlement agreement with the government. However, one of the impacts of the ruling is that PRPs who do enter into settlement agreements with the government are also eligible for contribution protection, Schnapf says.

"Some courts have gone on to say that if the plaintiff had entered into a 'cooperation agreement,' they could have pursued contribution," Schnapf notes. "It seems that these courts thought a cooperation agreement was like a settlement agreement."

Therefore, New York or other cities could potentially enter into memorandums of understanding with EPA under section 104(d)(1)(a) of the Superfund law, which allows a "state or political subdivision thereof" to enter into cooperative agreements with PRPs, Schnapf says. Such an agreement could not only ensure that EPA would not pursue the PRPs, but also would provide protection from other parties.

In addition, such a move would have the added benefit of avoiding a potentially required act of Congress to amend section 128 of the Superfund law, which allows EPA to make delegate brownfield authorities to states, but not cities.

New York City Council approved on April 22 legislation that would implement a state-approved brownfields program, placing the city on a path to seek a first-time agreement with EPA that the agency will not pursue parties who clean up sites under the city's program.

If EPA signs such an agreement, it would be the first time officials have done so with a municipal government, and Schnapf, along with other brownfields experts, have suggested that the program could be a model for the rest of the country (*Superfund Report*, April 6). "Any city that has a major league baseball team has the resources" to establish such a program, Schnapf says.