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January 25, 2019

# New York State and New York City Brownfield Cleanup Programs Incentivize Redevelopment with Different Approaches

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New York was one of the last states to adopt a statutory brownfield program but the wait was worth it for developers because the state Brownfield Cleanup Program (BCP) offers the most generous financial incentives in the country. <sup>1</sup>

<sup>[1]</sup> As a result, the New York Department of Environmental Conservation (NYSDEC) has at times adopted fairly restrictive criteria for BCP eligibility. In addition, the New York legislature has amended the BCP twice to restrict the amount of tax credits available to applicants.

Developers in New York City also have the option of enrolling in the voluntary cleanup program (VCP) administered by the Mayor's Office of Environmental Remediation (OER). The VCP is designed for minimally contaminated sites that may not be eligible for the BCP and applicants may be eligible for modest reimbursements of their cleanup costs.

## What Is a Brownfield Site?

Under BCP Version 3, a brownfield site is any real property with contamination that requires remediation. An applicant must demonstrate that a site has



contamination in excess of applicable NYSDEC standards based on the reasonably anticipated use of the property. Generally, this means that contamination must exceed track 2 cleanup track. Applicants will have to include at least a Phase 2 assessment (e.g., soil or groundwater samples) to establish the presence of contamination requiring remediation.

Sites may be accepted into the BCP where the contamination is from a source on the property or where the groundwater beneath the property or contaminated vapors in the soil are migrating from an off-site source. However, sites are not eligible for the tangible property tax credits, though they will be able to claim the site preparation costs tax credit. 2

Sites will not be eligible for the tangible property tax credit where the property was previously remediated under a NYSDEC remedial program, and the site could be developed for its then-intended use. It is unclear how this provision will be interpreted in circumstances where, for example, a prior cleanup achieved a commercial level of cleanup and the applicant would like to enroll the site in the BCP to perform an unrestricted residential cleanup to support a multifamily development. The site could be eligible for a site preparation costs tax credit.

Sites that are already subject to an enforcement order are not eligible for the BCP. This prohibition does not apply to petroleum-contaminated sites that are subject to a stipulation agreement issued by the NYSDEC under the Oil Spill program. However, a consent order issued under the petroleum spills program will render a site ineligible for the BCP.

Sites on the state Registry of Inactive Hazardous Wastes Sites (state superfund list) or that are subject to the federal Resource Conservation and Recovery Act (RCRA) may be eligible for the BCP where the site is owned, or under contract to be purchased at the time of the application, by a volunteer, and the NYSDEC has not identified a responsible party with the ability to pay for the investigation or cleanup of the site.

### **Eligible Applicants**

BCP applicants may include current property owners, prospective purchasers,

developers, and tenants. An applicant does not have to own the property to submit a BCP application. Parties who are subject to a federal or state civil or criminal proceeding or action involving the property, a recipient of an order to investigate or remediate the property, or an outstanding claim for reimbursement by the New York State Oil Spill Fund are not eligible for the BCP.

There are two types of BCP applicants. The BCP applicant category influences the potential scope of the cleanup.

A “volunteer” is an applicant that is not responsible for the contamination. 3

This could include purchasers, new tenants and developers. It could also include existing owners or tenants, provided that they did not cause or contribute to the contamination. Applicants that would be considered “responsible parties” would be accepted as “participants.” 4 The key distinction between a “volunteer” and a “participant” is that the volunteer is required only to clean up on-site contamination, while participants have to remediate off-site, as well as on-site, contamination. The ability to confine the cleanup to the brownfield site is an extremely important benefit since it not only limits the cleanup costs but also helps eliminate uncertainty about the ultimate costs of cleanup (i.e., parties can develop worst-case scenarios on the volume of soil that would have to be removed from a site).

Sometimes the property owner wants to be added to the brownfield cleanup agreement (BCA) so it can benefit from the liability protections provided by a certificate of completion (COC), which is the New York version of a no further action letter. If the NYSDEC considers the seller or lessor (when the applicant is a lessee) to be a responsible party, this could expand the scope and complexity of the cleanup that the applicant would need to implement. The reason is that if an application is jointly submitted by a “volunteer” applicant (i.e., the tenant or purchaser) and a participant (seller/lessor), the application will be treated as one submitted by a participant and the BCA would identify the applicants as participants. This means that the applicants would have to address any off-site contamination that may be emanating from the site. Thus, the status of a seller/lessor should be considered and discussed with the NYSDEC before including them in the application or on the BCA.

## **BCP Applications**

Applicants usually attend a pre-application meeting to review site environmental history, the proposed project and timing. The NYSDEC strongly encourages

applicants to attend a pre-application meeting. Indeed, these meetings can be very helpful particularly where the applicant is operating under time constraints because of a planned transaction. The NYSDEC representative often provides valuable feedback on what additional information may be needed to enhance BCP acceptance.

When an application is submitted, the NYSDEC has 30 days to determine that the application is “complete.” Often, the NYSDEC will identify additional information that should be included. Once the application is deemed complete, a notice of the application will be published in the Environmental Notice Bulletin (ENB), which is published every Wednesday. The ENB notice starts a 30-day public comment period (45 days if the application is accompanied by a remedial investigation work plan).

At the close of the public comment period, the NYSDEC will issue a letter advising the applicant if it has been accepted into the BCP. If the application is accepted, the NYSDEC will send a BCA to the applicant for execution. The site will officially be enrolled in the BCP when the applicant returns a signed BCA and NYSDEC executes the BCA.

Applicants do not have to own the property to enroll in the BCP but applications involving leased parcels can pose a number of complications. Moreover, the challenges are different for a new lease, where the parties contemplate submission of a BCP application, as opposed to an existing lease, where the tenant may want to take advantage of the BCP to help finance building renovations or expansions.

When the applicant does not own the land, the NYSDEC will require that the applicant have access to the site to implement all requirements of the BCP. The tenant can demonstrate access by either having the access set forth in the lease or through a separate access agreement. Obviously, the standard environmental contingency clause that prohibits the tenant from notifying the NYSDEC of the sampling results will be inadequate. For existing leases and long-term ground leases that were executed before the potential for a BCP application was contemplated, a separate access agreement is likely the easiest route for satisfying this requirement.

Since a Phase 2 assessment will have to be included in the BCP application, a new tenant considering applying to the BCP will have to negotiate the right to collect soil and groundwater samples before it takes possession of the premises. If acceptance into the BCP will be a condition of entering into the lease, this work may have to be scheduled several months before the commencement date of the lease because of the time it takes for an application to be accepted by the NYSDEC.

If the cleanup does not achieve an unrestricted residential standard, the NYSDEC will require the use of institutional and engineering controls. These controls will be memorialized in an environmental easement that must be executed and recorded by the lessor. The environmental easement must be recorded before the NYSDEC issues its COC. If the lessor refuses to execute or record what amounts to use restrictions on its fee, the lessee/BCP applicant will have to implement a costlier unrestricted cleanup to obtain a COC. Thus, the lease should contain a covenant requiring the lessor to cooperate and execute any documents required by the NYSDEC in connection with the BCP.

### **BCA Amendments**

The BCA may be amended to add new parties by submitting an application to amend the BCA. Only those parties who are named on the BCA will be identified as a certificate holder on the COC and only certificate holders may claim the BCP tax credits. As a result, it is important for clients to keep their counsel informed if new partners should be added (or existing applicants removed) from the BCA.

The BCA may also be amended to change property descriptions such as when there is a zoning lot change or to add additional parcels to the BCP site. A minor addition to or subtraction from the BCP site can be accomplished by filing an application to amend the BCA. <sup>5</sup>

However, significant changes may require a separate application. <sup>6</sup>

### **COC Deadlines**

Applicants who were accepted into the BCP prior to June 23, 2008 (BCP Version 1), had to obtain their COCs by December 31, 2017. If the applicant failed to obtain

a COC by this date, it can remain in the BCP but is subject to the more restrictive tax credit framework that became effective on July 1, 2015.

Applicants accepted after June 23, 2008 and before July 1, 2015 (BCP Version 2) will have until December 31, 2019, to receive COCs. Applicants who fail to obtain COCs by this date will not be terminated from the BCP, but will be treated as though the application was accepted after July 1, 2015, and will be subject to the new tax credit framework.

Applicants that receive a notice of acceptance between July 1, 2015 and December 31, 2022 (BCP Version 3) will have until March 31, 2026, to obtain their COCs. DEC has issued 363 COCs under the BCP.

Purchasers of BCP sites must determine which version of the BCP the site was accepted into to evaluate the potential financial benefits as well as the applicable COC deadline.

### **Liability Protection**

An important benefit of the BCP is that applicants receive a no further action letter known as a COC after they complete a NYSDEC-approved cleanup. The COC contains a covenant not to sue from the State of New York that runs with the land and will also provide contribution protection for cleanup costs. <sup>7</sup>

The contribution protection does not extend to third party claims for bodily injury or property damage.

### **Brownfield Tax Credits (BTCs)**

In addition to liability protections, the BCP offers the most generous tax credits in the country. The brownfield tax credits (BTCs) are refundable so that if the credits exceed the applicant's tax liability, the credit is treated as a tax overpayment and the state will issue a check. Applicants can claim three types of tax credits.

The first tax credit is known as the "site preparation cost" (SPC) credit. Applicants accepted into the BCP prior to July 1, 2015, are entitled to two categories of SPC credits. The first category includes those costs necessary to qualify the site for a

COC, while the second category includes those costs incurred to prepare the property for development. Thus, for BCP Version 1 and 2 sites, the SPC includes not only cleanup costs but also demolition, soil excavation, scaffolding, support of excavation and dewatering expenses. Depending on the cleanup track achieved and type of development (e.g., residential, commercial or industrial), applicants may claim between 23 percent and 50 percent of their SPCs and five years of groundwater remediation costs.

Because of the perception that excess SPCs were being claimed for excavation and foundation costs unrelated to contamination (e.g., excavating clean dirt to make room for subgrade parking), the 2015 amendments to the BCP program severely curtailed the eligible SPCs to only those expenses necessary to implement a site investigation or remediation, or to otherwise qualify for a COC. These changes apply to sites accepted into BCP Version 3 (applications accepted on or after July 1, 2015). Furthermore, eligible SPCs will include only foundation costs required to construct a cover system (e.g., engineering controls). The change in the SPC definition not only reduces the amount of SPC tax credits that an applicant may claim but also has the potential to reduce the tangible property tax cap.

The second, and most generous BTC that is available is the qualified tangible property (QTP) tax credit, which ranges from 10 percent to 24 percent of the value of the improvements constructed on the brownfield site, subject to a cap of \$35 million or three times the SPC, whichever is less. 8

For BCP Version 3 sites, the QTP begins with a 10 percent base. Applicants can qualify for an extra 5 percent for affordable housing projects as defined by the NYSDEC, sites located in Environmental Zones (En-Zones), 9 sites located within a Brownfield Opportunity Area (BOA) where the development conforms to the plan for a BOA certified by the Department of State, and sites used primarily for manufacturing activities. QTP-eligible costs include demolition and foundation costs that are not included in the SPC component, as well as costs associated with non-portable equipment, machinery, and associated fixtures and appurtenances used exclusively on the site, regardless of their depreciable life for federal income tax purposes. Applicants (or their transferees) have up to 120 months after the issuance of a COC to place a building into service (i.e., obtain a certificate of occupancy) and claim the QTP credit.

The 2015 BCP amendments eliminated the QTP as an “as of right” credit for BCP sites in New York City. For sites accepted into BCP Version 3, applicants for NYC sites have to satisfy one of the following criteria to be eligible for the QTP credit:

- at least half of the site is located in an En-Zone;
- the property is an “affordable housing” project;
- the property is “upside-down”—the projected remediation costs are at least 75 percent of the appraised value of the property at the time of the application. The appraised value must be based on an “as if” hypothetical assumption that the property is not contaminated. It should be noted that while there are a variety of ways to calculate property value (e.g., income stream, cost to repair and comparison sales), the law does not specify which approach is to be used; and,
- the property is “underutilized.” <sup>10</sup>

The final tax credit available for post-COC groundwater monitoring costs is at the same percentage as the SPC credit. This credit may be claimed annually for the five-year period following the issuance of the COC. <sup>11</sup>

## **New York City Voluntary Cleanup Program**

The OER Voluntary Cleanup Program (VCP) <sup>12</sup>

can be used to address moderately contaminated sites such as contaminated fill sites, the E-designation program, and oil spills that are confined to the property. OER has entered into a memorandum of understanding with the NYSDEC so that the NYSDEC will honor cleanups supervised by OER under its VCP.

The OER VCP does not offer significant financial incentives but is a popular tool for moderately contaminated sites because of OER’s streamlined approach that allows sites to complete remediation fairly quickly. Approximately 500 sites have enrolled in the VCP.

Sites that are eligible for VCP are those where redevelopment of real property is complicated by the presence or potential presence of detectable levels of contamination. <sup>13</sup>

Properties that are remediated through the VCP receive a notice of completion, <sup>14</sup> which includes a New York City liability release and a statement from the NYSDEC that it has no further interest and does not plan to take enforcement action or require



remediation of the property. Applicants also receive a Green Property Certification that symbolizes the city's confidence that the property is protective of public health and the environment. 15

In addition, applicants may be able to tap a modest suite of investigation/cleanup grant programs offered by OER that can help plug the funding gap caused by the need to perform remedial actions. Sites enrolled in the VCP are eligible for the Brownfield Incentive Grants (BIG) program, which funds four types of grants, including pre-enrollment investigation costs, remediation, technical assistance to non-profit developers of Preferred Community Development Projects, and purchase of pollution liability insurance or cleanup cost cap insurance. BIG grants may also be used for the Hazardous Materials E-Designation and Restrictive Declaration Remediation programs (see below). 16

Grant awards currently range from \$25,000 to \$50,000 for most projects.

OER also recently embarked on a brownfield “jump start” program for affordable housing and certain industrial site expansion projects that were contemplating applying to the NYSDEC BCP. For qualifying sites, OER will provide up-front refundable grants of up to \$125,000 for investigation and \$125,000 for site remediation costs. The funds are repaid to the city after the project receives BCP tax credits.

VCP applicants can also utilize the OER Clean Soil Bank, which can help with soil management costs. An applicant can be either a generator of soil or receive clean fill.

One of the key challenges facing purchasers of contaminated property is that the landowner liability protections under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) and similar state laws are self-implementing. 17

While the Environmental Protection Agency (EPA) may occasionally enter into a prospective purchaser agreement or issue a comfort letter, EPA and state environmental agencies do not have the resources to routinely review the thousands of Phase 1 reports generated annually in commercial real estate or financing transactions. Thus, a purchaser will not know if it has qualified for one of these defenses until the purchaser has been sued or a defendant files a counterclaim in a contribution claim filed by the purchaser, and a court issues a final ruling.

To facilitate redevelopment, OER is willing to issue several types of letters. The most commonly requested letter is a pre-VCP enrollment “comfort letter.” Frequently, when a consultant recommends further sampling or cleanup, lenders may require a borrower to enroll in a voluntary cleanup program prior to the closing and require the borrower to covenant to obtain a “no further action” letter from the appropriate regulatory agency. Unlike other remedial programs, the OER voluntary cleanup program does not accept applicants until after a site has been characterized and documented in a remedial investigation report. Thus, a borrower may not be able to actually enroll in the VCP until after the closing. To provide assurance to a lender, OER will issue a pre-enrollment letter indicating that the borrower is making progress toward acceptance into the VCP. OER interprets this sentence very broadly and will write letters to satisfy the concerns of lenders.

Another type of OER letter is known as an “acceptance letter.” This type of letter is particularly useful when a Phase 2 report identifies contaminants slightly above the standards established by the NYSDEC, but there are not any completed pathways because of the existence of a building foundation, paved surfaces, and the like. OER will review Phase 2 reports and if it agrees that no further action is required, OER will issue a letter indicating it accepts or agrees with the conclusions of the report.

OER also may agree to issue an Environmental Review and Assessment (ERA) letter, which may be used where the presence of contamination may complicate a real estate or financing transaction. 18

OER will issue an ERA letter where it determines that existing conditions at a property are protective of public health. OER does not anticipate issuing a letter where contamination requires further action beyond that contemplated under the transaction to render a property protective for its intended use. To obtain an ERA letter, a party will meet with OER to discuss the nature of the transaction, prior and current site uses and operational history of the property, the proposed development, known site contamination, and how the ERA letter will facilitate the transaction. As part of the process, OER will review available data on the property, including a Phase 1 and all Phase 2 reports, and compare the identified contamination against the state soil cleanup objectives 19 to determine if the existing or proposed property conditions are protective of the property’s future use. If as a result of this review OER determines further environmental investigation or remedial action is warranted, OER will consider issuing an ERA letter to identify those additional studies and remedial actions if requested by both parties.

OER has also developed a “standstill letter,” which can be used when a seller seeks

to sell property but environmental issues have complicated a transaction. In such a case, the seller can investigate the site and develop a generic remedy with OER. The site would then be enrolled in VCP but would be in a “standstill” mode with no requirement to proceed with the remedy. It is hoped the existence of an approved remedy will provide comfort to a prospective purchaser and its lender since the buyer will be able to estimate the cleanup costs. After the purchaser acquires title, it can then implement the pre-approved remedy—provided the proposed reuse is consistent with the approved remedy.

All is not lost if you have learned about the VCP after construction has started or is significantly completed. OER has developed a “look back” track where projects may be able to obtain liability protection if the remedial action conforms to the OER program requirements. If the applicant enrolls a project in the VCP to perform the additional remedial work that is required, it is eligible for grants and other OER VCP incentives.

The OER VCP may also be used to satisfy requirements of the National Environmental Policy Act (NEPA) <sup>20</sup>

or the State Environmental Quality Review Act (SEQRA) for projects being funded by the New York City Department of Housing Preservation and Development (HPD). The federal Department of Housing and Urban Development (HUD) has established regulations implementing NEPA <sup>21</sup> when HUD staff performs environmental reviews and when local governments assume HUD responsibility. <sup>22</sup> In New York City, HPD has assumed responsibility for environmental review that would normally be performed by HUD.

All property proposed for use in HUD programs must be free of hazardous materials, contamination, toxic chemicals and gases, and radioactive substances where the hazard could affect the health and safety of occupants or conflict with the intended use of the property. <sup>23</sup>

As a result, developers of affordable projects receiving funding from HUD or HPD often have to perform environmental reviews for the presence of hazardous materials to comply with NEPA.

HPD must have an Environmental Assessment (EA) prepared to identify all potential environmental impacts, whether beneficial or adverse, and the conditions that would change as a result of the project. <sup>24</sup>

Environmental reviews are generally conducted for new construction, major rehabilitation, leasing, acquisition and change in use under a range of HUD programs. The most common programs for which HPD performs environmental reviews are HUD's HOME Investment Partnership Program (HOME) and the Neighborhood Stabilization Program (NSP). HPD utilizes federal HOME funds to finance the construction of new homes and rehabilitation of existing housing, including vacant and occupied single room occupancy buildings (SROs), small homes (buildings with fewer than 12 units), and multifamily buildings. The reviews must be completed before the release of funds and acquisition of property.

The developer will be required to conduct a Phase 1 review. If the Phase 1 identifies Recognized Environmental Conditions (RECs), the developer will have to propose a Phase 2 work plan for approval by the New York City Department of Environmental Protection (DEP). Note that sometimes HUD or HPD may disagree with the Phase 1 findings and require a Phase 2 even if the Phase 1 review did not identify RECs. If the investigation confirms the presence of contamination above applicable levels, the developer will need a remedial action plan (RAP) for review and approval by the DEP.

The existence of an approved RAP enables HPD to issue a Notice of Finding of No Significant Impact (FONSI) certifying that the project will not have a significant impact on the environment and therefore will not require preparation of an environmental impact statement (EIS). HPD will then also issue notice of intent to request a release of funds (NOI/RROF). The developer would normally implement the RAP and submit a remedial action report to the DEP for final approval.

The DEP approval will simply confirm that the developer has satisfactorily completed the RAP. The certification will not confer any liability protection under CERCLA or the state Environmental Conservation Law (ECL), nor provide contribution protection. Moreover, the HPD funding often does not cover remediation costs, which can create a funding gap for a project that already has very tight margins.

When facing the prospect of implementing a remedial action, developers should consider enrolling the project in the NYC VCP. Developers can enter the VCP even after the DEP has approved a RAP. Frequently, all that a developer will have to do is convert the DEP-approved RAP into the template form used by OER. This is because OER has adopted the NYSDEC's remedial program regulations. 25

## New York City E-Designation Program

OER also administers the E-designation program, [26](#)

which began as a land use program but has evolved into an important source of cleanup obligations in New York City. An E-designation is a NYC zoning map designation that indicates the presence of an environmental requirement pertaining to potential hazardous materials contamination, window/wall noise attenuation, or air quality impacts on a particular tax lot. The E-designation is assigned to property lots as part of a zoning action under the City Environmental Quality Review (CEQR) Act. If the CEQR review process indicates that development on a property may be adversely affected by noise, air emissions, or hazardous materials, then the lead agency may assign an E-designation on the property lot to ensure that the E-designation requirements are satisfied prior to or during a new development or new use of the property. [27](#)

A hazardous materials (HazMat) E-designation may be assigned for a variety of reasons including that the property contained:

- Incinerators;
- Underground and/or above ground storage tanks;
- Active solid waste landfills;
- Permitted hazardous waste management facilities;
- Inactive hazardous waste facilities;
- Suspected hazardous waste sites;
- Hazardous substance spill locations;
- Areas known to contain fill material;
- Petroleum spill locations; and
- Any past use identified in Appendix A to the CEQR Technical Manual.

[28](#)

The Department of Building (DOB) incorporates the E-designations in its Building Information System (BIS). The DOB examiner cannot issue a building permit for

new development, changes of use, enlargements or certain other alterations to existing structures until DOB receives either a Notice to Proceed (NTP) or Notice of No Objection (NNO) from OER. 29

To obtain an NTP from OER for a HazMat E-Designation, the applicant usually has to submit a Phase 1 environmental site assessment. If RECs are identified, a Phase 2 work plan is also required. After implementing the Phase 2 report, OER will determine if a RAP is required. If OER determines that a RAP is not required, OER will issue a notice of no objection to the DOB. 30 OER may issue NNOs for actions that do not raise potential exposure to hazardous materials, or air quality or noise impacts. Indeed, approximately 50 percent of the E-designation projects OER reviews result in NNOs. If OER determines a RAP is required, the applicant must submit an acceptable RAP before OER will issue an NTP.

When the applicant wants to obtain a certificate of occupancy from DOB, it must obtain a Notice of Satisfaction (NOS) from OER demonstrating that the applicant has complied with OER requirements. To obtain the NOS, the applicant must submit a remedial closure report after completion of the RAP. In issuing an NOS, OER may require the execution of a declaration of covenants and restrictions by the title holder for the tax lot(s) subject to the E-designation or the Environmental Restrictive Declaration, which shall be recorded against the property prior to the issuance of a NOS. 31

OER is now requiring all projects in the VCP and E programs that have an active sub-slab depressurization system (SSDS) to manage soil vapor to record a deed restriction as part of OER approval that the site remedy has been completed. This deed restriction provides notice to a future buyer that it will be required to operate an active SSDS system and report annually to OER that it continues to perform as intended.

If an applicant wants to remove a Haz-Mat E-designation from the property and not have to record a Declaration of Covenants and Restrictions, it would have to achieve Track 1 (unrestricted) or Track 2 residential soil standards without an active remedial system. 32

OER has removed E-designations on 100 projects to date.

Parties can also comply with or remove the E-designation by enrolling the site in the state BCP as well as the NYC VCP. It is important to note that when lots with an E-designation are merged or subdivided, the E-designation will apply to all portions of the merged lot or to each subdivided lot. Because remediation done under the E-designation program is not eligible for the state hazardous waste

program fee, developers of sites with HazMat E-designations should consider enrolling the site in the VCP. 33

A similar approach is used for Restrictive Declarations (RD) that impose an institutional control against a property to ensure that environmental mitigation or requirements that were imposed as a condition of a land use approval are implemented. The RD runs with the land so that it binds current and future owners to comply with certain investigative and remedial requirements that may be required by OER.

Historically, RDs were used when private applicants who owned or controlled a property sought a rezoning or other action under section 11-15 of the Zoning Resolution of the City of New York. This proved to be a cumbersome process because all parties with an interest in an affected property, including lenders, had to execute an RD. Moreover, the DEP and a city agency approving the discretionary action had to expend resources reviewing the RD.

An amendment to the Zoning Resolution authorized lead agencies to assign E-designations for any actions, including those sought by private applicants, such as rezoning, special permits or variances. The E-designation can be imposed based on visual or historical documentation for lots not under the ownership or control of the person seeking the zoning amendment or zoning action. When the applicant owns or controls the lots, a Phase 1 may be required. 34

Because of the zoning resolution amendments, RDs will no longer be used to impose environmental conditions on properties. However, owners and developers have to comply with existing RDs.

### **Hazardous Waste Program Fee Waiver**

Urban fill material often contains metals and other contaminants that are unrelated to any on-site spills but are associated with the source of the fill material (e.g., coal ash). New York State law imposes a program fee on parties that generate and dispose of hazardous waste, 35

which can be substantial, running into the hundreds of thousands of dollars. The program fee is in addition to the costs for disposing of the hazardous fill material.

The hazardous waste program fee was intended to incentivize manufacturers to reduce the use of hazardous substances in their operations. However, the NYSDEC has applied the fees to parties that have excavated contaminated urban fill material that qualifies as hazardous waste. While there was an exemption for cleanups conducted under the state superfund program or the BCP, many development projects excavating fill material had not enrolled in any NYSDEC remedial programs when they learned the soil had to be managed as hazardous waste since they thought the site was not contaminated. As a result, they unexpectedly found themselves having to pay a significant program fee.

Over the years, the New York legislature has adopted waivers from the hazardous waste program fee for hazardous wastes generated as a result of cleanups implemented under one of NYSDEC's remedial programs. 36

The 2015 BCP amendments extend the hazardous waste program fee waiver for waste generated in connection with cleanups enrolled in the OER VCP. However, the hazardous waste program fee waiver does not apply to sites generating hazardous waste as part of cleanups to comply with the E-designation program.

## Conclusion

The tax credits available under the BCP have not only been a powerful incentive for redeveloping brownfield sites that have been idle for decades but are also popular with affordable developers. Because change has been a constant feature of the BCP, it is important for applicants to select environmental consultants and counsel who are familiar with the NYSDEC's evolving BCP policies as well as to be prepared for the remedial process to take longer than originally contemplated. The NYSDEC is currently in the process of substantially revising its BCP regulations. The revised regulations are anticipated to be proposed in early 2019.

In contrast, the OER VCP is perhaps the nimblest remedial program in the country. The OER staff is very responsive to the needs of applicants and the program is suitable for projects with tight construction schedules and to obtain regulatory sign-off to facilitate financing.

## End Notes





1. ECL §§ 27-1401 et seq.
2. The tangible property tax credits are based on the value of the improvements that are constructed on the brownfield site, subject to certain caps. The site preparation tax credit is a percentage of the cleanup costs, which vary depending on the cleanup standard that is achieved. A more detailed explanation of the tax credits is discussed later in the article.
3. ECL § 27-1405(1)(b). New York does not have a bona fide prospective purchaser defense. However, parties that would qualify for the federal bona fide defenses will be considered “volunteers” for purposes of the BCP.
4. ECL § 27-1405(1)(b).
5. Any parcel to be added to the BCP site has to meet the definition of a brownfield site.
6. In such a situation, the new parcel would be enrolled under BCP Version 3 even if the current site is accepted into BCP Version 2.
7. ECL § 27-1421(1).
8. For BCP sites involving manufacturing projects, the QTP cap is \$45MM and the cap is based on six times the SPC cost.
9. An En-Zone is a census tract with a poverty rate of at least 20 percent and an unemployment rate of at least one and one-quarter times the statewide unemployment rate based on the most recent five-year American Community Survey (ACS) or areas with a poverty rate of at least two times the poverty rate for the county in which the areas are located based on the most recent five-year ACS.
10. The NY legislature tasked the NYSDEC with developing a definition of “underutilized.” The NYSDEC proposed a definition that was extremely narrow and inconsistent with how that term is commonly interpreted in other state and federal programs, including in other New York state programs. Not surprisingly, the overwhelming number of comments submitted to the NYSDEC were highly critical. The agency retained what the author feels is an unnatural interpretation of the plain meaning of the term when it published the final definition. See 6 NYCRR 375-3.2(l).
11. Applicants accepted into BCP Versions 1 and 2 were eligible to receive two additional types of tax credits: (1) credits against eligible real property taxes based on the number of jobs at a brownfield site and (2) environmental remediation insurance credits. These two credits are no longer available for BCP Version 3 sites. However, applicants and purchasers of grandfathered sites can still claim these tax credits.
12. 43 Rules of the City of New York §§ 1401 et seq. (RCNY).
13. 43 RCNY § 1402(uu).

14. 43 RCNY § 1408.
15. 43 RCNY §§ 1428–1434. More information about the NYC VCP is available at <http://www.nyc.gov/html/oer/html/voluntary-cleanup-program/vcp.shtml>.
16. 43 RCNY §§ 1415–1423. More information about the BIG program is available at <http://www.nyc.gov/html/oer/html/brownfield-incentive-grants/grant-types.shtml>.
17. See Larry Schnapf, *Environmental Laws Affecting Commercial Leasing Transactions—The Federal Law*, N.Y. ST. BUS. J. (May 2015) p. 38.
18. 43 RCNY §§ 1450.
19. 6 N.Y.C.R.R. § 375-6.8.
20. 42 U.S.C. §§ 4321 et seq.
21. 24 C.F.R. pt. 50.
22. 24 C.F.R. pt. 58.
23. See 24 C.F.R. pts. 50.3(i), 58.5(i)(2).
24. 24 C.F.R. 58.40(b).
25. 6 NYCRR Part. 375.
26. 15 RCNY §§ 24-02 et seq. The “E” rules are authorized by § 1403 of the New York City Charter and § 11-15 of the Zoning Resolution of the City of New York.
27. The “E” requirements for individual properties are available at <http://www.nyc.gov/html/oer/html/e-designation/ceqr-documents.shtml>.
28. 15 RCNY § 24-04.
29. Approximately 80 percent of E-designation sites receive NNOs.
30. 15 RCNY § 24-06.
31. 15 RCNY § 24-07.
32. 15 RCNY § 24-08.
33. Information about NYC sites qualifying for the hazardous waste program fee is available at <http://www.nyc.gov/html/oer/html/voluntary-cleanup-program/hazardous-waste.shtml>.
34. 15 RCNY § 24-04.

35. ECL § 72-402.

36. ECL § 72-402.

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*Published: January 25, 2019*

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