

# Implementing the State's New Brownfield Law

## Careful and Balanced Approach Is Key to Program on Redeveloping Contaminated Sites

BY JEFFREY GRACER  
AND MIROSLAV FAJT

**A**FTER YEARS of debate New York recently joined most other states by enacting comprehensive brownfield legislation. Brownfields are properties whose redevelopment or reuse may be complicated by the presence of contaminants. The new law, signed by Governor George E. Pataki in early October 2003, is designed to encourage and facilitate redevelopment of contaminated sites by providing clearer protections and greater regulatory certainty. The new law is based on the Voluntary Cleanup Program (VCP) previously created by the New York State Department of Environmental Conservation (DEC), but includes several new provisions. Some of those provisions are likely to present challenges for parties involved in contaminated site redevelopment, but, with sensible implementation by DEC, the promise of increased brownfield investment in New York may well be realized.

**Eligible Parties.** The law creates a statutory Brownfield Cleanup Program (BCP) within DEC that will replace DEC's administrative program. All parties (including parties that are responsible for site pollution) are eligible to participate unless court or agency action is pending against them with respect to the site or they are subject to a pending Spill Fund claim.

Applicants will fall into two categories established under the law: (1) "volunteers" who did not cause site pollution, provided they exercise "appropriate care," and (2) "participants," whose liability arises from disposal or discharges that took place during their period of ownership. Consistent with prior practice under the VCP, "participants" will have broader obligations with respect

to off-site contamination. Volunteers that have VCP applications under review or who have entered the VCP will have until March 31 to decide whether they want to switch to the newly created BCP. All other parties must now proceed under the new program.

**Eligible Sites.** A site is eligible for the BCP unless it is (1) listed on the federal Superfund's national priority list (NPL), (2) is a Class 1 or Class 2 site on the state Superfund registry (other than Class 2 sites owned by a "volunteer" through July 1, 2005), (3) is a permitted treatment, storage or disposal facility under the hazardous waste laws (other than an interim status facility), (4) is subject to a DEC enforcement action, (5) is subject to a cleanup order or stipulation under Article 12 of New York's Navigation Law (governing petroleum spills), or under Article 10 of the Environmental Conservation Law (governing petroleum bulk storage), or (6) is subject to any other federal or state environmental enforcement action.

DEC strongly encourages applicants to have a preapplication meeting before they submit a request to participate. The new law then requires DEC to use "all best efforts" to determine eligibility within 45 days. Following such a determination, the applicant and DEC enter into a Brownfield Site Cleanup Agreement (BCA) that governs investigation and, as applicable, remediation of the site.

**Investigation.** All volunteers and participants are required to prepare a Remedial Investigation Work Plan (RIWP) to investigate and characterize the nature and extent of on-site contamination. Volunteers and participants have different obligations with respect to off-site issues. Volunteers must perform a Qualitative Exposure Assessment for contamination emanating from the site, whereas participants must fully investigate and characterize off-site contamination. Upon submission of a final investigative report, DEC must determine within 30 days whether the site poses a "significant threat" to public health or the environment pursuant to criteria used for listing a site as a Class 2 site on the state Superfund registry. This determination impacts remedy selection for the site. Parties may rely on prior site investigation data, but DEC retains discretion to determine whether such investigations meet BCP standards or whether additional work is required.

**Cleanup Tracks and Standards.** Within one year of enactment (by Oct. 9, 2004), DEC is required to propose and thereafter timely adopt regulations that create "look-up tables" with generic soil cleanup standards for three types of current or future land uses: unrestricted (residential), commercial, and industrial. These look-up tables are intended to streamline and simplify remediations by creating published standards that

would apply statewide — without the need to engage in time-consuming negotiation of site-specific cleanup standards. DEC's publication of officially promulgated cleanup standards will provide greater certainty and can be expected to expedite cleanups, at least where the look-up standards can be met in a cost-effective manner.

The new law also provides remediating parties with flexibility to utilize the look-up standards or to apply site-specific criteria, as appropriate, based on four different cleanup tracks:

- A Track 1 cleanup would remediate soils to levels appropriate for unrestricted residential use (as published in the look-up tables) — without reliance on any institutional or engineering controls.

- A Track 2 cleanup would remediate soils to commercial or industrial standards (as published in the look-up tables). Future site use would be restricted to commercial or industrial purposes.

- A Track 3 cleanup would allow remediating parties to take site conditions (such as depth to groundwater) into account to develop site-specific soil cleanup standards — without relying on institutional or engineering

controls.

- A Track 4 cleanup would allow site-specific cleanup standards to be developed that rely on use restrictions and engineering controls (thus allowing soils contaminated at certain levels to remain in place). However, for residential sites, the top two feet of fill would have to meet residential look-up standards; similarly, for commercial and industrial sites, the top one foot of fill would have to meet commercial or industrial look-up standards.

These cleanup tracks are designed to provide remediating parties with options. Parties can clean up to published standards, or pursue site-specific standards. These decisions will be based on trade-offs between speed of completion and potential cost savings associated with site-specific analysis. In each case, the ultimate cleanup decision must be consistent with stringent target risks and other requirements specified in the statute.

**Alternatives Analysis/Remedy Selection.** While brownfield laws in other states allow remediating parties to propose any cleanup strategy that meets statutory and regulatory requirements, the New York law requires analysis of remedial alternatives whenever anything other than an unrestricted Track 1 (residential level) cleanup is proposed. When a Track 2, 3 or 4 cleanup is proposed, the remediating party must analyze at least two remedial alternatives that have been approved for consideration by DEC. If DEC concludes that the site poses a significant threat,

DEC is required to select the ultimate remedy. Otherwise, the remediating party may select the remedy from among DEC-approved alternatives (although even then DEC retains discretion to mandate a Track 2 cleanup).

The statute requires "due consideration" of 25 statutory criteria for remedy selection that relate to cleanup objectives set forth in prior law, as well as additional land use and community considerations, adding another potential layer of complexity to the process. Some observers also have expressed concern that the law's stringent cleanup targets and stated preference for remedial programs that achieve a complete and permanent cleanup will skew decisions toward non-economic remedies. However, the statute also explicitly authorizes reliance on institutional and engineering controls and creates cleanup tracks that permit contaminants to be left in place when appropriate controls are recorded in an "environmental easement." Accordingly, the law should provide enough flexibility for sensible implementation by DEC.

**Citizen Participation.** The new law requires notice and an opportunity for public comment throughout the Brownfield process. Remediating parties will be required to formulate a citizen participation plan to implement these provisions. The new law also provides for technical assistance grants to community groups to facilitate their participation. As a result, community groups can be expected to play an increased role in brownfield projects.

**Certificate of Completion/Liability Limitation.** Upon submission of a Final Engineering Report and DEC's satisfaction that applicable remediation requirements have been achieved, DEC will issue a Certificate of Completion, which insulates the applicant from liability to the state with respect to any common law or statutory cause of action arising out of the presence of any hazardous waste in, on or emanating from the site that was the subject of the Certificate. Unlike releases issued under DEC's prior administrative program, this statutory liability limitation binds the Attorney General's office. Volunteers (but not participants) will also receive a release for natural resource damages.

The liability limitation is not absolute. DEC may modify or revoke the Certificate if the applicant fails to comply with the terms and conditions of the Brownfield Cleanup Agreement, if the applicant misrepresented a material fact, or if there is "good cause" for modification or revocation. Liability also can be "reopened" by DEC if the site is "no longer protective of public health or the environment" (including a change in environmental standards), if there is a change in the site's use that changes the risk profile, or if the applicant fails to make "substantial progress toward completion of its proposed development of the site within three years."

The experience in most states is that regulators resort to such reopeners only in the rarest of cases, and parties typically rely on indemnities and/or environmental insurance to cover these

*The new Brownfield law and its related statutory amendments provide ... new tools to stimulate economic development in environmentally and economically distressed areas.*



Jeffrey Gracer and Miroslav Fajt are environmental and real estate partners, respectively, in the New York office of Torys. Matthew Nichols, an associate at the firm, assisted in the preparation of this article.

contingencies. The liability limitation will be recorded as a declaration of covenant in the chain of title and its benefits will extend to the applicant's successors and assigns, as well as other persons who develop or otherwise occupy the site, provided they are not responsible for the disposal or discharge of contaminants.

**Change of Use.** Sixty days advance notice to DEC is required before a Change of Use can be undertaken at a brownfield site. A Change of Use is broadly defined to include a transfer of title to all or a portion of the property, erection of any structure, creation of a park or other public or private recreational facility, or any activity that is likely to disrupt or expose contaminants or significantly interfere with an ongoing or completed remedial program. DEC has the authority to deny authorization for such Change in Use if the change presents a significant threat to public health or the environment.

**Protection for Lenders, Municipalities and Trustees.** A separate amendment to the Environmental Conservation Law adds state law protections for lenders, municipalities, and trustees that track similar safe harbors in federal law, filling a gap in prior state law. These provisions confirm, among other things, that banks do not become liable merely because they hold a security interest in contaminated property, or even when they foreclose on such property, provided they meet certain statutory requirements.

**Tax Incentives to Owners/Developers.** In an effort to provide economic incentives for brownfield development, the new law introduces three new tax credits for tax years beginning on or after April 1, 2005, to encourage the acquisition, cleanup and development of brownfield sites. The new tax credits are available to owners, tenants or purchasers of brownfield sites and allow deduction of certain remediation costs in the tax year in which they are incurred.

A new Brownfield Redevelopment Tax Credit includes a Tangible Property Credit (determined by a certain applicable percentage of the taxpayer's federal tax basis in qualified tangible property), a Site Preparation Credit (based on costs incurred by the taxpayer to obtain a remediation certificate or to prepare a site for construction, including capital costs), and an On-Site Groundwater Remediation Credit (equal to an applicable percentage of certain costs incurred by the owner/developer to remediate on-site groundwater contamination). These credits are only applicable to costs incurred by a developer after it has entered into a cleanup agreement with the DEC. The taxpayer is not permitted to claim double credit on overlapping costs.

A separate Remediated Brownfield Credit for Real Property Taxes is applicable to sites that have already received a certificate of completion from the DEC. It provides direct tax credits to developers for application against future real property taxes or payments in lieu of real property taxes. The credit is generally determined by taking 25 percent of the product of (i) a percentage of the average number of employees working at a site in a given tax year and (ii) the amount of real property taxes and/or payments in lieu of taxes imposed on the site in the same tax year.

An additional Environmental Remediation Insurance Credit provides tax-



payers with a tax credit on account of environmental remediation insurance costs. This credit is equal to the lesser of (i) \$30,000 or (ii) 50 percent of the premiums paid for environmental remediation insurance on or after the date a cleanup agreement is executed with the DEC. The credit must be claimed in the same year that a remediation certificate is issued. There is a limit of one insurance credit per remediation certificate per site.

**Financial Grants to Municipalities.** Finally, the new law provides financial and technical assistance through grants to municipalities and certain other qualifying community-based organizations to identify and create Brownfield Opportunity Areas. These grants can cover up to 90 percent of the costs associated with (i) preparation and performance of area wide studies, site assessments and/or development of remediation strategies and (ii) preparation of information required to nominate an area for designation as a Brownfield Opportunity Area. These grants also could stimulate cooperation among municipalities, community organizations and private developers in the redevelopment of environmentally contaminated and economically distressed brownfield areas.

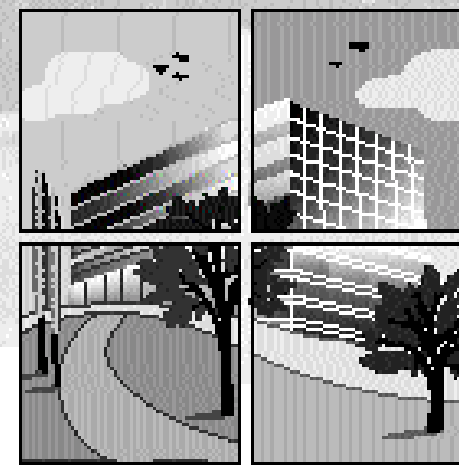
**Implementation Challenges.** The new Brownfield law and its related statutory amendments provide DEC, the private sector, municipalities and community groups with new tools to stimulate economic development in environmentally and economically distressed areas. Many waterfront and former industrial areas in and around New York City and throughout New York State are prime candidates for Brownfield development. Careful and balanced implementation by DEC will be a critical ingredient to the program's success, as will be the ability of private sector landowners, developers, municipalities, and community organizations to work together constructively to stimulate sustainable development within New York's communities.

The new law is the result of intense political compromise, and is far from perfect. The ultimate success of New York's brownfield program will depend in large part on DEC's ability to propose and adopt clear regulations that minimize regulatory burdens and stimulate economic activity, while also protecting public health and the environment. The program's success also will depend on the ability of the private sector, municipalities and community organizations to work together to craft responsible, protective and cost-effective solutions to environmental challenges.

Where success comes naturally

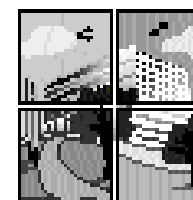
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