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STATE ENVIRONMENTAL REGULATION

Expert Analysis

Brownfields Regulation Reaches Critical Stage in New York

The law in New York relating to brownfields is moving forward on two tracks right now, both relating to the practices of the New York State Department of Environmental Conservation (DEC) in determining whether particular property falls within the definition of a "brownfield site." First, the DEC is expected to finalize guidance shortly that will allow it to issue opinions on eligibility for participation in the Brownfield Cleanup Program (BCP). In addition, the New York Court of Appeals is expected to issue a decision within weeks in the appeal in *Matter of Lighthouse Pointe Prop. Assoc. LLC v. New York State Dept. of Envtl. Conservation*,[1] relating to the standard the DEC should use to accept participants into the BCP.

The stakes are quite high. The final version of the DEC eligibility guidance, and the Court of Appeals decision in the *Lighthouse Pointe* case, may lead, finally, to significant brownfields redevelopment in New York, or may continue to pose practical impediments to the environmental cleanup and use of brownfield properties.

By **Charlotte A. Biblow**

Background

The Brownfield Cleanup Program Act was enacted in 2003 to encourage voluntary remediation of brownfield sites for reuse and redevelopment.[2] Generally speaking, a brownfield site is defined as "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant."[3] The term contaminant is defined as "hazardous waste and/or petroleum."[4]

Participation in the BCP is subject to DEC approval.[5] The Environmental Conservation Law (ECL) lists grounds that mandate exclusion from the program,[6] including the failure of "real property [to] meet the requirements of a brownfield site."[7]

The benefits of admission to the BCP are at least twofold: successful applicants are entitled to significant tax credits[8] and, upon completion of remediation, also are entitled to a release from liability to the State of New York "arising out of the presence of any contamination in, on or emanating from the brownfield site."[9] The release from liability is critical to financing brownfield projects, given that lenders are obviously wary of becoming responsible for toxic land in the event of a debtor's default in payment.

Once accepted into the BCP, participants are required to enter into a site cleanup agreement with the DEC.[10] As required by statute,[11] the DEC has developed soil cleanup objectives (SCOs) considering various uses of land and 85 specific contaminants.[12] The SCOs are "remedial action objectives"[13] and, according to the DEC, are intended to act as benchmarks for sites within a remedial program, not as guidelines for admission.

Proposed guidance by the DEC and a Court of Appeals decision expected soon could give a significant boost to brownfields redevelopment in New York.

The Draft Guidance

Several months ago, the DEC issued a draft guidance[14] outlining the procedures and the circumstances under which it would issue early eligibility opinions for entry into the BCP with respect to real property located within a designated Brownfield Opportunity Area (BOA) or a BOA study area.[15] Now that the deadline for written comments has passed, it can be expected that the DEC will soon finalize the guidance policy and property owners and developers will be able to rely upon it to seek those opinions early in the process.

The draft guidance sets forth the requirements for a "requestor" to submit a request for such an opinion. According to the draft guidance, a requestor must submit the information on the prescribed form,[16] including property information (such as the property's location and environmental history) and the names and addresses of current and past property owners. Significantly, the requestor also must provide all environmental reports and data available to it, including at a minimum a Phase II environmental site assessment (ESA) that includes information regarding the potential presence of a range of contaminants as defined in ECL §27-1405(8), including hazardous wastes within the scope of the State Superfund Program and petroleum products within the scope of Article 12 of the Navigation Law.

The draft guidance also states that, within 30 calendar days after the receipt of a request, the DEC will mail a notice to the requestor indicating that the request is either complete for purposes of review or incomplete because of certain missing information, which the DEC will identify. The draft guidance also provides that the DEC will use its best efforts to issue an eligibility opinion within 60 calendar days of the receipt of a complete request for such opinion. The opinion will state whether the real property is a brownfield, and therefore eligible for participation in the BCP, in that its reuse or redevelopment may be complicated by the presence or potential presence of a contaminant and participation in the BCP is not precluded pursuant to ECL §27-1405(2)(a)-(e).

The draft guidance states that the DEC may decline to issue an opinion on any of the following grounds:

(1) the request raises issues that are, have been, or should have been the subject of DEC review pursuant to a previous application for admission into the BCP;

(2) the request does not contain sufficient information or the requestor has not adequately responded to the DEC's request for additional information needed to render an opinion;

(3) the request proposes alternative courses of proposed transactions or hypothetical situations;

(4) all parties involved are not sufficiently identified and described;

(5) there is pending enforcement relating to the property; or

(6) a response to the request is not in the public interest.

Moreover, the draft guidance notes that an opinion letter stating that a site is eligible for the BCP will expire in one year from the date of

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the letter. It also states that the opinion is a "non-binding opinion" of the DEC as to whether the real property is a brownfield, and is therefore eligible for participation in the BCP, although it also provides that the opinion "may be relied upon" to the extent that the request "fully and accurately contains all the material facts and representations necessary to the issuance of the opinion, and there have been no subsequent changes in material facts or site conditions."

There are a number of potential concerns with the draft guidance that may be addressed by the DEC when it finalizes the guidance policy. One concern is the requirement for a Phase II ESA. That type of study, which entails invasive testing, is costly and may be overly burdensome in certain cases. Another concern involves the time frames provided in the draft guidance for early eligibility determinations (30 days for notice of a complete or incomplete application; 60 days for a decision on a complete application), which conflict with comparable time frames applicable to the BCP application process set forth in the ECL (10 days and 45 days, respectively).

It is also not completely clear what is intended by the statements in the draft policy that a DEC eligibility opinion is "non-binding" but that it can "be relied upon." Finally, the one-year expiration date applicable to the DEC determination may not be sufficient for most brownfields projects, which may involve many other facets that cannot be completed in that time frame. For example, it may take more than one year to obtain financing or obtain zoning changes or site plan approvals for a project.

Perhaps most important, at least as a practical matter, is the standard that the DEC will use to determine BCP eligibility. That issue is at the heart of the appeal in the *Lighthouse Pointe* case. The New York Court of Appeals heard argument on Jan. 5 on that appeal and is expected to issue a decision this spring.

The 'Lighthouse Pointe' Case

Lighthouse Pointe concerns the efforts to develop contiguous 22-acre and 25.4-acre parcels of real property located in the upstate Town of Irondequoit as a mixed-use neighborhood, including residential complexes, a marina, restaurants, and a hotel. The massive project is estimated to cost between $150 million and $250 million.

The petitioner filed two applications (one per parcel) with the DEC seeking admission into the BCP. The DEC denied both applications on the ground that there was "no reasonable basis to believe that contamination or the potential presence of contamination" was complicating the redevelopment or reuse of the property. Thus, the DEC determined that the parcels were ineligible for the BCP because they did not meet the definition of a "brownfield site." The petitioner brought an Article 78 proceeding to challenge the DEC's decision. The Supreme Court, Monroe County, annulled the DEC's determination. That court concluded that "[b]y failing to provide any rational basis for [its] determination that the development of [the parcels] would not, or could not, be complicated by the possible presence of even minimal levels of contaminants, the DEC has failed to demonstrate that [its] actions were anything but arbitrary and capricious."

The DEC appealed that decision, and the Appellate Division, Fourth Department, in a split decision, reversed the trial court's ruling. The majority found that the DEC had not acted irrationally or in an arbitrary and capricious manner in determining that the redevelopment of the parcels would not be complicated by the presence or potential presence of contaminants. The majority declared that the DEC's "well-reasoned analysis" of the petitioner's BCP applications, coupled with the well-established principle that a court may not substitute its judgment for the agency responsible for making the decision, required it to affirm the DEC's determination.

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The dissenting opinion from the Fourth Department distinguished between a matter that permitted judicial deference to an agency decision from a matter that raised an agency's interpretation of legal statutes, which is not entitled to such deference. The dissenting opinion concluded that the DEC's decision fell into the latter category in that it had "misinterpreted the statutes" when it decided to exclude the petitioner's properties from the BCP.

In the dissent's view, the DEC's decision hinged upon the fact that the contaminants of concern were not of sufficient magnitude to prevent redevelopment and that a majority of the remediation costs would arise from disposal of solid waste rather than from the disposal of hazardous waste. The dissent noted that this eligibility distinction was not found in the statute.

According to the dissent, the DEC's exclusion of solid waste disposal sites from consideration for inclusion in the BCP usurped the legislative function. Moreover, the dissent rejected the DEC's contention that its determination comported with the "Eligibility Guidance" that it had prepared for evaluating applications for the BCP, explaining among other things that there was no indication that the Eligibility Guidance had any of the imprimatur of law because the DEC had not promulgated it as a regulation, and it was not included in the BCP statutes.

The dissent declared that it found that the petitioner's parcels "unquestionably" fit within that language, and concluded that the Supreme Court had properly granted the petition and directed the DEC to accept the petitioner into the BCP.

The appeal to the Court of Appeals followed thereafter.

Conclusion

There are thousands of abandoned and likely contaminated properties in New York that threaten the health and vitality of the communities they burden. New York law encourages participation in the BCP and the cleanup of contaminated real property for reuse and redevelopment, especially property located within BOAs.

The DEC's proposed guidance on early eligibility decisions is a step forward to getting such sites remediated. Another step forward will be the Court of Appeals' decision in *Lighthouse Pointe*, which is likely to clarify the general standard that the DEC should use to determine the eligibility criteria for its BCP. Both steps should further boost the redevelopment of contaminated land in New York.

1. 61 A.D.3d 88 (4th Dep't 2009).
2. See Environmental Conservation Law (ECL) §27-1403.
3. ECL §27-1405(2).
4. ECL §27-1405(7-a).
5. See ECL §27-1407(1); 6 NYCRR 375-3.4(c).
6. See ECL §27-1407(8); see also 6 NYCRR 375-3.3.
7. ECL §27-1407(8)(a).
8. See Tax Law §§21-23; 6 NYCRR 375-3.9(e).
9. ECL §27-1421(1).
10. See ECL §27-1409(8).
11. See ECL §27-1415(6)(a).
12. See 6 NYCRR 375-6.1, 375-6.8(b).
13. ECL §27-1415(6)(a).
14. See http://www.dec.ny.gov/docs/remediation_hudson_pdf/der30.pdf.
15. See General Municipal Law Section §970-R.
16. Drafts of the forms are available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der30boaforminstr.pdf and http://www.dec.ny.gov/docs/remediation_hudson_pdf/der30consentform.pdf.