

State Environmental Regulation

Expert Analysis

Brownfield Cleanup Program Guidance Is Nearly Final

The New York State Department of Environmental Conservation (NYSDEC) appears close to finalizing revisions to important guidelines for the state's brownfield cleanup program (BCP). This is good news for property owners, developers, and local government officials because once these revised guidelines are approved, there will be a clearer roadmap for the application process, often a significant stumbling block for applicants.

Background

A brownfield site is real property where a contaminant, such as hazardous waste or petroleum, is present at levels exceeding what is permitted based on the reasonably anticipated use of the property. Typically, the NYSDEC uses the soil cleanup objectives found in 6 NYCRR Part 375 for this assessment. The NYSDEC also may use other health-based or environmental standards, criteria, or guidance. For example,

CHARLOTTE A. BIBLOW, a partner in the environmental, land use and municipal law and litigation departments of Farrell Fritz, can be reached at cbiblow@farrellfritz.com.

By
Charlotte A. Biblow



if the site has a soil vapor issue, the NYSDEC is likely to rely on the New York State Department of Health's guidance for soil vapor intrusion. The NYSDEC's Division of Environmental Remediation (DER) oversees the BCP and the forthcoming "BCP-EZ" program, as well as the state's petroleum and chemical spill response and prevention programs and Superfund program.

The BCP statute, found at Article 27, Title 14 of the Environmental Conservation Law (ECL), contains application provisions but they are general in nature. ECL 27-1407 requires an applicant to submit a request for entry into the BCP on a form provided by the NYSDEC. The statute gives the NYSDEC wide discretion on the specific information that will be required on the form. Similarly, ECL 27-1409 requires the applicant to execute a brownfield site cleanup agreement

(BCA) that contains certain provisions, such as the payment of state administrative costs, indemnification of the state, and dispute resolution, but that provision also leaves much of the content of the BCA up to the NYSDEC. Although ECL 27-1407 contains a framework for the application process and expressly requires that once the NYSDEC is in receipt of a

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complete application package, it must use its best efforts to either accept or reject an application within 45 days, the statute lacks a detailed step-by-step application process.

To fill that gap, and to make the application process predictable, the DER put forth "Program Policy DER-32: Brownfield Cleanup Program Applications and Agreements" as guidance on the application process and the general terms and conditions for BCAs together with the process for amending and terminating BCAs.

Last month, on April 20, the NYSDEC proposed revisions to DER-32;

the comment period expired on Friday, May 19. A revised DER-32 is likely to be adopted in short order with few, if any, additional changes from what the NYSDEC made available in April. The balance of this column discusses the highlights of that proposal.

Proposed DER-32 contains six sections. The important section for applicants is Section V, which contains the procedures. This section is broken into seven sub-parts: (1) the application process; (2) the determination of completeness; (3) submission of reports and draft work plans; (4) application approval/disapproval; (5) BCA overview; (6) BCA amendments; and (7) BCA termination.

Application Process

The application process starts with a pre-application meeting. Although this is not mandated, proposed DER-32 “strongly encourages” anyone considering applying to the BCP to schedule a pre-application meeting with NYSDEC staff. At these meetings, the applicant (called a “requestor” at this stage) and staff will discuss the program, eligibility requirements, available tangible property tax credits, draft work plans, site reports, and site characteristics including environmental conditions and possible ways to remediate them.

In the pre-application stage, proposed DER-32 encourages a requestor to obtain all environmental sampling data for the site. A requestor should be looking for soil, groundwater, and soil vapor data to be able to demonstrate that the site meets the eligibility criteria for a brownfield.

The pre-application subsection also comments about the number

of applications that can be submitted for a development project. In general, a requestor can submit only one application and can execute only one BCA for a particular project, even if the parcels are non-contiguous or the project covers multiple tax lots. A primary reason for this limitation is the tax credit caps provided under New York State Tax Law §21 and preventing these caps from being circumvented. Proposed DER-32 recognizes the possibility of multiple applications and BCAs for a particular development in certain circumstances, such as a project that spans more than 25 acres.

According to proposed DER-32, in addition to eligibility information, site history, and environmental data and reports, an application must include information about the current, intended, and reasonably anticipated future land use. An application for a site located in New York City must specify if the requestor is seeking tangible property tax credits; if so, the application must include sufficient documentation to enable the NYSDEC to decide whether the property meets the extra tax credits criteria for such sites. For example, if BCP eligibility is based upon the “upside down” criteria, where the cost of cleanup is 75 percent or more of the property value as if the property were uncontaminated, the application must include an independent appraisal of the property’s value.

Application Completeness

After an application is submitted, the NYSDEC will determine if it is complete. The NYSDEC has 30 days after receipt to let the requestor

know if it is incomplete or complete. If it is incomplete, the NYSDEC will explain the deficiencies and the requestor has 30 days to provide the missing information or otherwise fix the deficiencies, or the application will be considered withdrawn. Once the NYSDEC determines the application is complete, it will so advise the requestor and let it know about the deadline for the public comment period and how to publish and distribute the required public notice, among other things.

There are many reasons an application will be found to be incomplete by the NYSDEC. Common reasons include misidentification of the site, information missing about previous owners or operators, and incomplete contact list information. Another common deficiency is the signature page—the signature must be an original, not a copy.

The NYSDEC also will contact the administrator of the New York Environmental Protection and Spill Compensation Fund to determine if the fund has any outstanding claims against the requestor when it receives an application. The fund is supposed to notify the NYSDEC and the requestor of any outstanding claim within 30 days of receipt of the application.

Reports and Draft Work Plan

The next step in the process is the requestor’s submission of reports and draft work plans. Proposed DER-32 points out that if a draft remedial investigation work plan is submitted with an application, the public comment period for the application package will be 30 days. If the application instead is accompanied by

a final investigation report or draft remedial work plan, the public comment period for the application package will be 45 days.

The NYSDEC is not obligated to accept the investigation report. If it finds the report is not sufficient to support the remedial work plan, it can request a work plan for additional investigation. That can add to the public comment period as the initial application has a 30-day comment period and a second 45-day public comment period may be needed for the remedial work plan.

Approval/Disapproval

This part requires the NYSDEC to use “best efforts” to notify a requestor whether its application has been accepted or denied within 45 days of receipt of a complete application. That time frame is 60 days if a final investigation report or draft remedial action work plan is included with the application. In addition, these notification deadlines can be lengthened by the public comment period. The NYSDEC’s notice period ends five days after the close of the public comments if that occurs later than the 45 days or 60 days. The NYSDEC is not required to formally respond to the public comments it receives, but it must take them into consideration.

If the NYSDEC approves an application, it will send a letter to the requestor enclosing three originals of a BCA to be executed. The signed BCA must be returned to the NYSDEC within 60 days.

If the NYSDEC denies an application, it will send a letter to the requestor explaining its reasons. Common reasons include the site does not meet the eligibility criteria

to be a brownfield site, the application does not contain sufficient information demonstrating that the site requires remediation, or the site or the requestor is subject to any enforcement action that would disqualify it from the BCP.

BCA Overview

This part of proposed DER-32 provides a summary of what to expect if the site and requestor are accepted into the BCP and sign a BCA. It notes a requestor who enters the BCP as a “Participant” has to investigate and remediate off-site impacts of the con-

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tamination. A requestor who enters the BCP as a “Volunteer” has limited off-site responsibilities. The NYSDEC makes the determination as to the category that applies to a requestor. This part also explains the certificate of completion. It also explains that the effective date of a BCA is the date it is signed by the DER’s director and that project costs, for which tax credits may be claimed, start to accrue from the effective date of the BCA.

Amendments to a BCA

Proposed DER-32 recognizes that a BCA may need to be modified during a BCP project for a variety of rea-

sons and this part contains a detailed explanation of the process to amend a BCA.

There can be major modifications to a BCA, such as might occur when a significant acreage of property is proposed to be added to or subtracted from the project. There also can be minor modifications, such as when a new applicant is proposed to be added to, or removed from, a BCA.

Termination of a BCA

The seventh part explains the process for terminating a BCA. It also discusses when the NYSDEC may terminate a BCA for cause. Before the NYSDEC terminates a BCA for cause, it must provide notice and allow at least 30 days for deficiencies to be corrected.

Conclusion

The final version of DER-32, when adopted, will be an excellent summary of the steps necessary to gain entry into the BCP. Anyone interested in participating in the program will find it a valuable resource and it may help avoid some common problems encountered by applicants. However, it is a guidance tool and not a substitute for following the BCP statute and regulations.