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November 19, 2004

BY HAND DELIVERY AND UPS OVERNIGHT DELIVERY

Robert W. Schick, P.E.
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Albany, NY 12233-7014


Re: *Revisions to Draft Brownfield Cleanup Program Guide*

Dear Mr. Schick:

Attached please find the comments dated today developed by the Environmental Law Section of the New York State Bar Association regarding the proposed revisions to the Department's draft Brownfield Cleanup Program Guide.

If you have any questions, please call me at 315-218-8182. Thank you for your time and consideration of these comments.

Sincerely,


Virginia C. Robbins

VCR/sm
Attachment

cc: Section Cabinet (w/attachment)

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**ENVIRONMENTAL LAW SECTION OF THE
NEW YORK STATE BAR ASSOCIATION**

**Comments on Proposed Site Eligibility Revisions to
The Draft New York State Brownfield Cleanup Program (BCP) Guide
November 19, 2004**

The Environmental Law Section of the New York State Bar Association thanks the Department of Environmental Conservation for the opportunity to comment on the proposed site eligibility revisions to the draft Brownfield Cleanup Program Guide. The Section's Brownfields Task Force developed these comments, and they were subsequently provided to the Section's Executive Committee and Cabinet for review and comment. The Section's Executive Committee requests the Department to give these comments serious consideration.¹

Comment # 1 –Statutory Authority

The proposed new restrictions on site eligibility do not have a clear basis in the statute itself. Section 27-1407(9) does state that the Department may reject the application if “the public interest would not be served” by the site’s acceptance into the program. However, the only enumerated “public interest” components to NYSDEC’s decision-making regarding site acceptance focus on the applicant’s identity and prior acts – e.g., whether the applicant has been convicted of violating environmental laws, been convicted of a criminal offense, or falsified or concealed a material fact. There is no indication that the Legislature intended that the “public interest” standard be stretched to include issues with respect to the nature of the site or the site’s development potential. In fact, the “including but not limited to” phraseology, followed by factors reflecting the *identity of the applicant*, suggest the contrary. Site-based eligibility criteria are spelled out by other sections of the statute (e.g., the definition of “brownfield” in Section 27-1405 and the exclusions in Section 27-1405(2)). If the Legislature intended to have NYSDEC include an examination of economic development and financial criteria in determining the “public interest” component of site eligibility, it could easily have so provided in the statute or in the recently enacted Senate Bill 7627 (Chapter 577).

Comment # 2 –Constitutional and Due Process Issues

Comment 2.1

If the statute were construed to allow NYSDEC to define “public interest” without clear guidelines as to what that phrase means, it would constitute a standardless delegation of power of a type that has been found to violate both New York State and federal constitutional requirements. Moreover, the proposed factors would require evaluations outside of NYSDEC’s expertise in determining “the public interest,” for example, in making decisions based on economic development criteria. The draft revisions to the Guide are objectionable because they

¹ The members of the Executive Committee of the Environmental Law Section who are attorneys in federal and state agencies have recused themselves from consideration of these comments.

suggest an extremely broad scope of the public interest inquiry, thereby creating a lack of predictability in the program.

Comment 2.2

The revisions do not indicate in any meaningful way how NYSDEC will apply the proposed factors, or which ones the agency will apply, in any particular situation. The factors seem to create an opportunity for unfettered discretion to “pick and choose” among projects, based on subjective criteria. There is a risk that neither proponents nor opponents of a project will have any realistic opportunity to subject NYSDEC’s determination on site eligibility to judicial review, raising serious due process concerns. There is no indication as to how the factors would be weighed one against the other, or how many together would be enough to be fatal to an application.

Comment 2.3

NYSDEC is attempting to accomplish major changes to the BCP by guidance rather than a regulation which would be subject to statutory procedural requirements and judicial review.

Comment 2.4

When finalized, the proposed revisions should not be applied to applications filed prior to their promulgation. Such an ex post facto application of these criteria would create serious equity and due process issues. Moreover, NYSDEC should not be holding pending applications in limbo while it considers these proposed revisions. NYSDEC must satisfy the statutory provisions requiring it to use “all best efforts” to make eligibility determinations within 45 days of receiving applications.

Comment # 3 –Adverse Impact on the BCP

Comment 3.1

The complex and detailed inquiry on site redevelopment issues that is implied by the proposal’s criteria is likely to prevent NYSDEC from adequately reviewing and reaching a decision on site eligibility within 15 days after the close of the public comment period, a deadline which the statute requires the Department to use “all best efforts” to accomplish. The rapid turnaround required by the statute for eligibility decisions is yet another basis for believing that the Legislature could not possibly have intended NYSDEC to conduct this kind of inquiry when making threshold eligibility decisions.

Comment 3.2

A major goal of the Act was to eliminate ad hoc determinations and improve the predictability of NYSDEC’s decision-making process for cleaning up contaminated sites. The proposed revisions will introduce unpredictability into the application process. Predictability is crucial to site owners and developers, and potential applicants will not commit substantial upfront time or money to prepare and pursue an application if they are uncertain as to whether NYSDEC will admit their site into the program, how long such a decision will take, and at what

cost. A lack of predictability will have a detrimental impact on the attractiveness of the state's program, particularly in comparison to the programs of other states.

Comment 3.3

By limiting the number of sites in the BCP, NYSDEC is also limiting applicability of other reforms that the Legislature perceived were important to site cleanup, including public notice and participation, transparency of the decision-making process, and cleanups based on intended site usage. Cleanups of sites determined not to be eligible for the BCP will apparently not have the benefit of these provisions.

Comment # 4 –Harm to the Public Interest

Comment 4.1

With the elimination of the Voluntary Cleanup Program, the BCP is the only mechanism by which a hazardous-waste contaminated property can be voluntarily cleaned up under NYSDEC supervision. Restricting eligibility for the BCP may result in the purported remediation of many sites contaminated with hazardous waste by site owners, at risk, without NYSDEC oversight or public involvement. Such sites may not be cleaned up to levels that adequately protect human health or the environment.

Comment 4.2

Restrictions on eligibility for the BCP will leave developers and site owners who might need state signoff on a cleanup for reasons other than tax credits (e.g., a requirement of another governmental agency, a qualification for insurance reimbursement or a requirement of a lender), without any avenue to obtain regulatory approval for their cleanups.

Comment 4.3

If NYSDEC considers the use of a short form order or other instrument to provide an alternative to the BCP to site owners or operators, it should so in a way that minimizes the enforcement nature of such an opportunity to obtain the Department's signoff on work performed. Any alternative should be established with the objective of encouraging participation.

Comment # 5 – Definition of a Brownfield

Section 2.1.1 of the Draft BCP Guide states:

The definition of "brownfield site" has two elements: (1) there must be confirmed contamination on the property or a reasonable basis to believe that contamination is likely to be present on the property; and (2) the contamination or potential presence of contamination may be complicating the development or re-use of the property (ECL 27-1405.2). For purposes of the Brownfield Cleanup Program, the Department may determine that only a portion of any overall project meets the

definition of “brownfield.” The entire area subject to the overall project may or may not be eligible to be a “brownfield site.”

Comment 5.1

There is no need to require “a reasonable basis to believe” that contamination is present at a “brownfield” because a standard Phase I Environmental Site Assessment should contain sufficient information to satisfy the Department’s concerns regarding whether the site at issue does or does not have “perceived” contamination sufficient to make it a brownfield under the statutory definition.

Comment 5.2

NYSDEC’s subdivision of developments, at the agency’s discretion, into brownfield and non-brownfield portions may hinder a developer from proceeding with the necessary financing and project scheduling for a site as a whole. Additionally it is not clear how any such subdivision(s) would impact tax credits and Certificates of Completion, as both of those items were legislated in a manner that takes the entire site into contemplation.

Comment 5.3

As an alternative to the use of the “public interest” criterion to limit site eligibility, NYSDEC should consider enunciating specific and clear standards for when it believes that the contamination or potential presence of contamination “may be complicating” the development or reuse of a property. This approach has the benefit of being consistent with the statutory definitions and NYSDEC’s expertise. It would be prudent for NYSDEC to focus on the relationship between environmental conditions and any complications they may present to development or reuse. This approach avoids inquiries into areas unrelated to the environment.

Comment # 6 – Public Interest Criteria

Section 2.1.2 of the Draft BCP Guide states:

A determination that the public interest would not be served by granting a request for participation in the Brownfield Cleanup Program should also be made on a case by case basis, considering the following factors in addition to the statutory criteria:

1. whether the proposed project will reduce contaminant exposure or threat of exposure;
2. whether contaminants are present at levels that exceed guidance values, standards or criterion;
3. whether contamination on the proposed site exceeds historic/background levels;
4. whether the proposed site is idled, abandoned, or underutilized;
5. whether the proposed site is unattractive for redevelopment or reuse due to the presence or reasonable perception of contamination;

6. whether participation in the program is likely to spur redevelopment or reuse of surrounding areas;
7. whether the area of the site shows indicators of economic distress including low resident incomes, high unemployment, high commercial vacancy rates, or depressed property values;
8. whether a health advisory has been issued for the site;
9. whether the estimated cost of any necessary environmental cleanup is likely to be disproportionate to the value of the property/project;
10. whether there were industrial or commercial operations at the site which may have resulted in environmental contamination; and
11. whether the proposed project is likely to re-contaminate the site.

Comment 6.1

The need for a project to “reduce contaminant exposure or threat of exposure” (criterion 1) should be addressed as part of the work plan process, not as an eligibility criterion. Moreover, this determination can reliably be made only in connection with a exposure assessment, which is generally not performed until after a complete investigation of the site. Complete site investigations are clearly not a prerequisite under the statute for entry into the BCP.

Comment 6.2

The criterion of “whether contaminants ... exceed guidance values” (criterion 2) does not take into account that the definition of “brownfield” specifically contemplates that a site can qualify even if there is only a “perception” of contamination (even if no contamination is actually found to exist). Moreover, this criterion cannot be investigated prior to the completion of a Phase II Environmental Site Assessment, which is clearly not statutorily required for entry into the BCP.

Comment 6.3

The criterion of whether contamination “exceeds historic/background levels” (criterion 3) could eliminate from consideration many urban sites that need to be cleaned up because of historic fill, if historic fill were to be deemed a “historic/background” condition. Moreover, the Legislature specifically contemplated that entire localities might be ubiquitously contaminated and thus eligible for brownfield treatment. This criterion creates the potential for all such sites to be deemed ineligible because of such ubiquitous contamination.

Comment 6.4

The criterion of whether a proposed site is “idled, abandoned or underutilized” (criterion 4) is not justified by the statutory definition of “brownfield” and could eliminate eligibility for sites that are currently in use (e.g., as scrap yards), but whose redevelopment for a different use

would benefit the community. Furthermore, there may be a strong public interest in the remediation of occupied brownfield sites where vapor intrusion or other issues may be putting occupants at risk.

Comment 6.5

The criterion of whether a site is “unattractive for redevelopment or use” due to the presence of contamination (criterion 5) appears to contemplate decisions based on either aesthetics or economics, neither of which is in NYSDEC’s area of expertise.

Comment 6.6

The criterion of whether the site’s participation is “likely to spur redevelopment or reuse of surrounding areas” (criterion 6) is neither a statutory criterion nor a subject matter as to which NYSDEC has any expertise. Moreover, a contaminated site in the middle of an otherwise fully developed area may be worthy of redevelopment, irrespective of the impact on neighboring sites.

Comment 6.7

The criterion of whether the area has “indicators for economic distress” (criterion 7) artificially penalizes the eligibility of sites in higher income areas (e.g., the Anaconda site in Hastings-on-Hudson).

Comment 6.8

The criterion of whether a health advisory has been issued for the site (criterion 8) is largely irrelevant, since health advisories are generally reserved for highly contaminated sites rather than brownfields.

Comment 6.9

The criterion of disproportionality of cleanup cost to value of the property/project (criterion 9) is not only statutorily unauthorized, but vague and standardless (e.g., when would a disparity be considered “disproportionate”?) At a very minimum, NYSDEC should enunciate clear and explicit standards for what it considers “disproportionate”.

Comment 6.10

The criterion of requiring a history of industrial or commercial operations at the site (criterion 10) is not statutorily authorized and could preclude eligibility of sites affected by historic fill.

Comment 6.11

The criterion of whether a proposed project is likely to recontaminate the site (criterion 11) is not an eligibility question, but rather an issue that should be addressed in the work plan through engineering or institutional controls or in an environmental easement.

Comment # 7 –Alternative to Proposed Revisions

We infer that at least one reason for these proposed revisions to the draft BCP Guide is NYSDEC's concern for the fiscal implications of the tax credit provisions in the Act.

We respectfully submit that this issue is one for the Legislature—and not NYSDEC—to address. There are many possible ways of changing the tax credit formula so that brownfields redevelopment is appropriately incentivized without providing undue benefits to certain projects. Members of the Section would be pleased to meet with appropriate representatives of NYSDEC, the Governor's office, the Legislature and other state officials to craft such a formula. In the meantime, however, we strongly believe that these proposed revisions, in their current form, would jeopardize the viability of the BCP.