

Brownfields to Greenfield\$

A Manual on Brownfields Redevelopment



This manual has been produced by Sustainable Long Island, a not-for-profit organization serving the greater Long Island Area and its affiliate, the Action Committee for the Environment.



811 LEGISLATIVE OFFICE BUILDING
ALBANY, NEW YORK 12247
(518) 455-2390
FAX (518) 426-6975

250 TOWNSEND SQUARE
OYSTER BAY, NEW YORK 11771
(516) 922-1811
FAX (516) 922-1154

MARCELLI@NYSENATE.GOV



THE SENATE
STATE OF NEW YORK
SENATOR CARL L. MARCELLINO
5TH DISTRICT

CHAIRMAN
INVESTIGATIONS AND GOVERNMENT OPERATIONS
COMMITTEE

COMMITTEE MEMBER
BANKS
CONSUMER PROTECTION
CULTURAL AFFAIRS AND TOURISM
EDUCATION
ENVIRONMENTAL CONSERVATION
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RULES

I am pleased that I could partner with Sustainable Long Island and the Department of Environmental Conservation (DEC) to update The Brownfields to Greenfields, A Manual on Brownfields Redevelopment. This step by step document provides answers to questions municipalities, nonprofits organizations, land owners and developers might have regarding the State's Brownfield Clean-up Programs.

The State's Brownfield programs are also economic development programs. The redevelopers of these abandoned properties are not only increasing income tax revenue with the new jobs created by cleaning up and building on the site, but they are also putting more valuable properties back on the tax rolls. Brownfield development helps eliminate the stigma of a blighted area and clearly results in increased property values for nearby sites as well as attracting new investment opportunities for the entire community.

This Manual provides essential information on identifying and redeveloping brownfields in a simple and comprehensive format. The Manual offers a step by step guide on how to apply for state and federal programs and funding. Utilizing an easily understandable format, it speaks to community members, nonprofit organizations, municipalities, developers, property owners and presents information and opportunities to those who may not know about brownfields. At the same time, however, the Brownfield to Greenfields Manual is also a great one-stop resource for professionals.

Now that the State's Brownfield Clean-up Program is seven years old, I am happy that I was able to support a timely revision of this Manual. This allow for its continued use as a resource for our communities and for it to be updated with the latest regulatory changes and other additional necessary information. I am glad my office could participate with the diverse and very well qualified brownfield professionals that Sustainable Long Island and DEC convened. This task force discussed brownfield redevelopment challenges and opportunities. They were instrumental in reviewing and providing recommendations based on their expertise and knowledge. As a result, the revised manual is even more comprehensive and contains new and additional information, including brownfield programs in New York City.

I have always felt that the State's brownfield programs were indispensable in getting these urban eyesores back on the tax rolls and making them community assets rather than letting them eat away at the heart of our cities, towns and villages like a cancer. These programs promote and the Manual enhances the physical, economic and social revitalization of our communities.

Sincerely,

A handwritten signature in black ink that reads "Carl L. Marcellino". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Carl L. Marcellino

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For more information contact Sustainable Long Island at (516) 873-0230

or

visit us online at www.sustainableli.org

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Executive Summary

Brownfields are real property, the expansion, redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant. These sites typically are former industrial or commercial properties where operations may have resulted in environmental impairment. Brownfields often pose not only environmental concerns, but also legal and financial burdens, and are blights on communities. Left vacant, contaminated sites can diminish property values of surrounding sites and threaten the economic viability of adjoining properties.



Federal, state and local governments have come to view the redevelopment of brownfields as a unique opportunity to solve many problems concurrently. Projects that target blighted communities increase employment opportunities, expand the tax base and reduce costs associated with preventing crime in these areas. Redevelopment also reduces exposure to hazardous chemicals on idle properties, curbs sprawl by making more efficient reuse of land resources, improves air quality, reduces traffic congestion, and preserves open space and farmland. In short, brownfield redevelopment offers a cost-effective, environmentally beneficial approach to stimulating economic revitalization in communities throughout New York State.

The purpose of this “roadmap” is to provide an understanding of the brownfield redevelopment process and the opportunities available in New York. It is designed to provide information for local government officials seeking to facilitate brownfield redevelopment in their communities, citizens hoping to understand how the process affects them, developers and investors seeking to participate in this growing marketplace, groups that wish to facilitate the redevelopment process, and end-users of redeveloped property. The ultimate goal is to facilitate full stakeholder participation in the brownfield process.

This manual provides information on: New York State, federal and private funding and financial incentives; technical assistance and liability protection available for the

cleanup and redevelopment of brownfield sites in New York State; and an overview of the various brownfield programs offered by New York State. It should be noted that the information contained in this manual is relative to information available at the time it was prepared. The programs and initiatives involved with the cleanup and redevelopment of brownfields are constantly evolving.

Chapter 1 provides a brief overview of brownfield issues. Chapter 2 provides a step-by-step guide to undertaking a brownfield project. Chapter 3 provides an overview of New York State's brownfield programs. Chapter 4 provides information on community planning. Chapter 5 provides information on managing environmental liabilities. Chapter 6 covers funding opportunities for brownfield projects including federal and New York State tax incentives. Brownfield redevelopment provides opportunities for developers, property owners, professional service providers, local units of government and communities. Through the transfer of information, collaboration among brownfield stakeholders can promote sustainability and smart growth, creating a positive future for New York's environment and economy.

CHAPTER 1

Introduction to Brownfields

A. What are Brownfields?

–*Brownfields*” is a new label for an old ambition: the redevelopment of underused or abandoned industrial sites. The expansion or redevelopment of these sites is complicated by real or perceived contamination and related problems. New York State’s Brownfield Cleanup Program (BCP) defines a brownfield as real property whose reuse or redevelopment may be complicated by the presence or potential presence of contamination.¹



Brownfields can be found in all types of geographic and political settings—in big cities, small towns, sprawling suburbs and the rural countryside. Brownfields affect urban and rural communities by creating health risks and fears, despoiling the environment, and contributing to unemployment, lost revenue, urban sprawl, blight and societal decline. Often these brownfields are found in poorer and older communities and neighborhoods, areas that can benefit the most from economic investment and job creation.

Such sites often seem to be permanent fixtures in the landscape of our daily lives, near where we work, go to school, shop or recreate. They are the boarded-up gas stations on Main Street, the decaying warehouses and printing plants in former industrial areas in urban locations and the vacant industrial facilities surrendering to rust and weeds at the edge of towns. These facilities once were powerful engines for economic vitality, jobs and community pride. But in too many cases, these properties now lay broken and discarded, testaments to changes in economic fortune and what are now recognized to have been flawed environmental practices.

Brownfields can be virtually any contaminated property but are often associated with the following abandoned or former uses:

¹ NY ENVTL. CONSERV. LAW § 27-1401-1435 (2010).

Airplane hangars
Airports and landing strips
Bus facilities
Dry cleaners
Factories
Fuel oil terminals
Heavy machinery storage or repair facilities
Landfills

Marinas
Power generating stations
Railroad switching yards
Railroad Tracks
Service stations
Truck storage and/or repair facilities
Warehouses

B. Why Do Brownfields Exist?

During the past two decades, efforts to return these sites to productive use have been hindered, and often thwarted, by a seemingly ever-increasing environmental regulatory regime, particularly the joint and several retroactive, strict liability of current property owners imposed under the federal Comprehensive Environmental Response, Compensation and Liability Act² (CERCLA, commonly known as *Superfund*) and New York State's counterpart legislation.³

Additionally, the cost to clean up these sites often far exceeds the value of the property, making it more attractive to abandon the sites rather than rehabilitate them. Many times, the potential cleanup costs are not known or are not easily estimated, thus compounding the problem. Brownfield owners can encounter difficulty using the sites as loan collateral, as lenders are tightening their lending requirements and are more circumspect in their lending criteria. In other cases, the owner may not perceive that the property is seen as a problem to the community. Some owners may believe that the levels of contamination are insufficient to present any adverse consequences or are unlikely to cause deleterious effects. Yet, the same sites may be viewed by the surrounding neighbors as an eyesore or the cause of many health and safety problems, even in the absence of data. These are but a few of the myriad reasons that result in the creation of brownfields.

C. What is the Magnitude of the Brownfield Issue?

In passing sweeping brownfield redevelopment legislation in 2003, the New York State legislature found that "...there are thousands of abandoned and likely contaminated properties that threaten the health and vitality of the communities they burden."⁴ In 2004, the United States General Accounting Office estimated that there were between 450,000 and 1 million brownfield sites around the country in need of cleanup.⁵ Currently, there are about 6,800 estimated brownfield sites on Long Island.

² 42 U.S.C. §§ 9601 – 9675 (2006).

³ N.Y. ENVTL. CONSERV. LAW §§ 27-1301 - 1323 (2010).

⁴ *Id.* § 27-1403 (2010).

⁵ John B. Stephenson, Director of the U.S. Gov't Accountability Office, Natural Res. and Env't Testimony Before the Subcommittee on Federalism and the Census, Committee on Government Reform, House of Representatives" (April 5, 2005), available at <http://www.gao.gov/new.items/d05450t.pdf>.

D. Identifying Brownfields in Your Community

While there is no single inventory of brownfield sites in New York, the state does maintain various databases/lists that provide assistance in identifying sites that the state has determined are or have been contaminated. For example, The New York State Department of Environmental Conservation (NYSDEC) maintains various databases of contaminated sites. One of its databases includes sites on the State Registry of Inactive Hazardous Waste Disposal Sites as well as sites participating in the Brownfield Cleanup, Environmental Restoration and Voluntary Cleanup Programs. Additionally, the NYSDEC maintains a database that lists petroleum spill sites. These databases can be accessed on NYSDEC's website at <http://www.dec.ny.gov/chemical/8437.html> (Environmental Site Database Search).

The United States Environmental Protection Agency (USEPA) also maintains various site lists. The Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) Database contains general information on sites across the nation and US territories including location, contaminants, and cleanup actions taken. This list as well as others related to contaminated sites can be found at <http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm>. The USEPA also



maintains a database relative to the grants it has awarded. The USEPA also has a reporting and tracking system for the federal brownfields program sites, called the Assessment Cleanup and Redevelopment Exchange System (ACRES). ACRES is the official USEPA database for the brownfields program, which includes data on grantee activities (assessment, cleanup and redevelopment), funding, job training, and details on cooperative partners and leveraging efforts (see <http://www.epa.gov/brownfields/pubs/acres/index.htm>). In addition, the USEPA maintains a database called Cleanups in My Communities which provides information on all brownfield, Superfund, and RCRA cleanup sites throughout the nation (see <http://iaspub.epa.gov/Cleanups/>). Another list relates to the National Pollutant Discharge Elimination System (NPDES) permit program, which controls water pollution by regulating point sources that discharge pollutants into waters of the United States. Point sources are discrete conveyances such as pipes or man-made ditches. For information on specific facilities with NPDES permits, you can visit USEPA's Envirofacts Warehouse at <http://www.epa.gov/enviro/>.

In addition to the foregoing databases, many local municipalities maintain brownfield databases based on input from community members, retailers, planning and zoning professionals and others who live and work in that area. In many instances, these inventories were undertaken as part of one or more federal or state grants. The appropriate local representatives should be consulted to view these lists.

The fact that a property does not appear on one or more of the foregoing databases or lists does not mean that the site is not a brownfield. A yes answer to these three generic questions would determine that the property may be a brownfield:

1. Is there a property, with or without structures located on it, that is idle, vacant or underutilized?
2. Is contamination present or potentially present?
3. Are environmental contamination concerns, whether present or perceived, complicating the use or development of the property?

E. Uses of Brownfields

Developers can transform brownfields back into a variety of productive uses—from golf courses to mixed-use developments that include housing, offices, shopping, industrial as well as open space areas such as parks. Other properties have been recycled into local businesses such as bakeries and greenhouses. The possibilities are endless.

F. Reasons to Redevelop Brownfields

Brownfields frequently offer excellent opportunities for development due to their proximity to existing infrastructure including highways, water systems, sewage and solid waste facilities. These sites can pose a win-win for developers and the community. Restoring brownfields to productive use creates new jobs, increases the local tax base, improves the value of adjacent property, and mitigates public health and safety concerns. It also reduces sprawl, preserving open space and farmland, or *greenfields*. Redeveloped properties can improve community image, restore an old urban center and revitalize a neighborhood.

When a property owner chooses not to redevelop his/her property because of concerns about perceived or actual environmental contamination, his or her decision may not be based on a full understanding of the situation. An owner may lack critical information about the property, the scope of the contamination, the cost of the cleanup and the available incentives or may have incorrectly analyzed the implications of leaving the contaminated property ~~as-is~~.”

An owner of a brownfield may not fully appreciate that his/her decision to let the property remain idle rather than address the environmental issues does not mean that the owner can avoid having to deal with the cost of remedying the environmental problems. It will also increase the owner’s liability. If the site is on the radar for governmental action, an owner who chooses to do nothing may be inviting fines and penalties in addition to the cost of an expensive cleanup. When this happens, the owner and the community suffer, the cleanup is likely to take longer, cost more and not be related to redevelopment. Even when the cleanup costs appear to be prohibitive, prompt action using brownfield redevelopment incentives makes sense as a way for an owner to address environmental concerns, curtail his/her costs and productively reuse the property.

Community members may be able to demonstrate to an owner that the initial decision not to redevelop the property is not in the owner's best interest, as it may expose the owner to liability for environmental contamination that the owner had failed to consider.

Brownfield redevelopment can benefit owners and developers by:

- Realizing an enhanced return from the property by making it more valuable and marketable
- Avoiding environmental enforcement actions by federal, state and local regulatory agencies that could impose penalties and fines on top of the costs of the actual cleanup
- Receiving tax benefits for cleaning up and reusing the property
- Reducing the likelihood that contamination from the property will migrate off-site or into the groundwater, thereby limiting liability for, and long-term costs of, cleaning up the property
- Creating good will within the community

G. Incentives for Brownfield Redevelopment

In the past decade, federal, state and local governments have begun offering incentives for brownfield cleanup and redevelopment. Some of these incentives are provided directly to communities and local governments, others are offered only to property owners.

Incentives include:

- Federal, state and local tax incentives
- Grants and low-interest loans
- Technical assistance grants
- Liability protection
- Streamlined government oversight of cleanup

As noted in greater detail in Chapter 3 (New York Brownfield Programs) and Chapter 6 (Making the Deal: Securing Funds), New York has developed the most innovative financial and liability incentives in the nation to help municipalities and developers to redevelop properties meeting the definition of brownfields. These existing and evolving incentives offer opportunities to put brownfields back into productive use.

H. Key Players in Brownfield Cleanup and Redevelopment

A variety of private and public sector organizations may play a role in the cleanup and redevelopment of brownfield sites, but not all of these organizations will be involved at each site.

i. Federal

- USEPA - The USEPA Brownfields and Land Revitalization Program provides cleanup and redevelopment incentives and financial support for some brownfield projects. The USEPA's Brownfield Program (further described in Chapter 5) was designed as an alternative to the federal Superfund Program and helps encourage public and private brownfield remediation through funding, tax, and liability release incentives.

- Other Federal Government Agencies - Federal governmental agencies, other than the USEPA, may provide technical and financial support for brownfield redevelopment including the US Department of Transportation, US Department of Housing and Urban Development, and the USEPA partnership (DOT-HUD-EPA partnership) designed to help improve access to affordable housing, more transportation options, and lower transportation costs while protecting the environment in communities nationwide (see <http://www.epa.gov/dced/partnership/index.html>). Other agencies involved in brownfield cleanups include the US Army Corps of Engineers, the US Commerce Department's Economic Development Administration (see <http://www.eda.gov/>) and the Department of Interior's Groundworks USA Program (see <http://groundworkusa.org/>).

ii. State

- **NYSDEC** - The New York State Department of Environmental Conservation (NYSDEC) offers incentives in the form of technical and financial assistance, as well as liability relief, to encourage the cleanup and reuse of contaminated sites. NYSDEC also oversees cleanups of inactive hazardous waste disposal sites and petroleum/chemical spills. To further foster redevelopment of brownfields, partnerships have been established among a number of New York State entities. Provided below are the entities and programs involved in this partnership available at the time of preparation of this manual. The various state agencies involved with brownfields are also committed to working with localities to use smart, sensible planning to create liveable communities, protect our natural resources and promote economic growth as part of New York State's Smart Growth Initiative (see <http://www.smartgrowth.org/>).
- **NYS Banking Department** - Primary regulator for state-licensed and state-chartered financial entities includes domestic banks, foreign agencies, branches and representative offices, savings institutions and trust companies, and other financial institutions operating in New York including mortgage bankers and brokers, check cashers, money transmitters, and licensed lenders, among others. (<http://www.banking.state.ny.us>)
- **NYS Department of Agriculture & Markets** - Fosters a competitive food and agriculture industry that benefits agricultural producers and consumers alike. The remediation and redevelopment of brownfields reduces the need to develop green space or agricultural land. (<http://www.agmkt.state.ny.us>)
- **NYS Department of Health (NYSDOH)** - Coordinates with NYSDEC to ensure cleanups are protective of public health and promotes infrastructure improvements of public and private drinking water systems. (<http://www.health.state.ny.us>)
- **NYSDOS** - Provides technical and financial assistance to municipalities and community based organizations for the preparation of revitalization plans and implementation strategies for areas affected by the presence of multiple brownfield sites. The Division of Coastal Resources through the Local Waterfront Revitalization Program also provides funding and technical assistance to waterfront communities to prepare and implement redevelopment

strategies including the redevelopment of abandoned buildings for urban areas containing brownfield sites. (<http://www.nyswaterfronts.com/index.asp>)

- **NYS Department of Taxation & Finance** - Collects tax revenue and provides associated services in support of government services in New York State. It is responsible for administering the Brownfield Redevelopment Credit, the Remediated Brownfield Credit for Real Property Taxes and the Environmental Remediation Insurance Credit associated with the Brownfield Cleanup Program (BCP). (<http://www.tax.state.ny.us>)
- **NYS Department of Transportation** - Helps to fund transportation projects that facilitate economic development by improving site access. (<https://www.nysdot.gov/index>)
- **NYS Division of Housing and Community Renewal** - Provides technical and financial assistance to communities to prepare sites suitable for affordable housing (hint - use the search term –Brownfields”). (<http://www.dhcr.state.ny.us>) It also administers the federal Community Development Block Grants (CDBG) to small communities to help low or moderate income individuals, revitalize neighborhoods, or address threats to health and safety. (<http://www.nysmallcities.com>)
- **NYS Empire State Development** - Provides funding and redevelopment assistance. (<http://www.empire.state.ny.us>)
- **NYS Energy Research and Development Authority** - Provides funding and technical assistance to promote the development and deployment of innovative and energy-efficient technologies. (<http://www.nyserda.org>)
- **NYS Environmental Facilities Corporation** - Provides funding for water quality improvement projects such as water and sewer infrastructure, land acquisition for water quality protection, and water quality protection components of municipal brownfield projects. (<http://www.nysefc.org>)
- **Governor's Office of Regulatory Reform** - Oversees the regulatory process of all New York State agencies. (<http://www.gorr.state.ny.us>)
- **NYS Insurance Department** - Responsible for supervising and regulating all insurance business in New York State. It provides guidance for insurers on the minimum standards for environmental remediation insurance and the Environmental Remediation Insurance Credit associated with the BCP. (<http://www.ins.state.ny.us>)
- **NYS Office of Parks, Recreation and Historic Preservation** - Funding for land acquisition, water recreation projects, projects that enhance the cultural or historical aspect of water bodies and the acquisition and development of parks. (<http://www.nysparks.state.ny.us>)

iii. Local

- Local Government Agencies - These include counties, towns or villages. Local economic development, planning and tax agencies may provide incentives for brownfield redevelopment to attract investors and businesses into their communities, guide community growth and increase jobs. Local health and environmental agencies may have knowledge regarding environmental concerns from specific properties. In addition, if a property falls into tax arrears, the local county government may pursue taking title to the property. The title or tax lien to these properties may later be sold at auction.
- Local Community Development Corporations (CDCs) - CDCs are nonprofit organizations created to encourage local urban redevelopment and can assist in determining the value of a property as well as redeveloping and marketing a site.

iv. Other Stakeholders

- Real Estate Professionals - Real estate professionals provide advice on the market for a particular property or use and can help bring together sellers, buyers and developers.
- Citizens and Community Groups - Many state and federal cleanup programs require public involvement such as opportunities for notice and comment from the public. In addition, community support can help obtain economic incentives for brownfield redevelopment. Support for brownfield projects by citizens and the community is key to successful brownfield redevelopment.
- Developers - Developers typically prefer to manage the entire process of adapting properties for their proposed new uses, but they may seek cleanup guidance and funding from public sources. They may also seek to form public-private partnerships to ensure that they are able to develop the property for their intended uses.
- Brownfield Developers and Investors - These are a relatively new group of entrepreneurs who specialize in cleaning up and reusing brownfields. They use their expertise to identify and acquire brownfields, then redevelop these properties. They may include a mix of engineering, environmental consulting, legal, real estate and financial backers who can redevelop the property at a discount.
- Commercial Lenders - A number of commercial lenders are willing to provide loans to support the cleanup and redevelopment of brownfields, since at the end of the project the property is safe and productive.
- Technical Consultants - Technical consultants help design and implement the investigation and cleanup of environmental contamination on brownfields. Technical consultants may also help property owners or developers interface with state regulatory agencies and communities surrounding the property.
- Legal Counsel - Lawyers assist in many aspects of the cleanup and redevelopment of brownfields by advising all interested parties from owners and developers to neighbors and community members about regulatory requirements and incentives, negotiating with regulators and prospective buyers, drafting sales agreements and communicating with other groups interested in the project.

- Tax Professionals - Tax professionals can provide advice on tax issues associated with a particular property/deal and are particularly helpful in understanding and navigating the tax incentives provided by New York State and the federal government.

CHAPTER 2

Launching a Brownfield Project: A Step-By-Step Guide to the Process

A. Overview



Urban, suburban and rural communities all have brownfield sites that can be redeveloped. A knowledgeable and active community can identify these sites, prepare the sites and the community for redevelopment, and promote these sites both locally and nationally. A buyer or developer needs information about the physical characteristics of the sites, improvements and infrastructure, environmental conditions, legal status as well as information about the community such as demographics, business climate, and the community's land use vision. A seller can

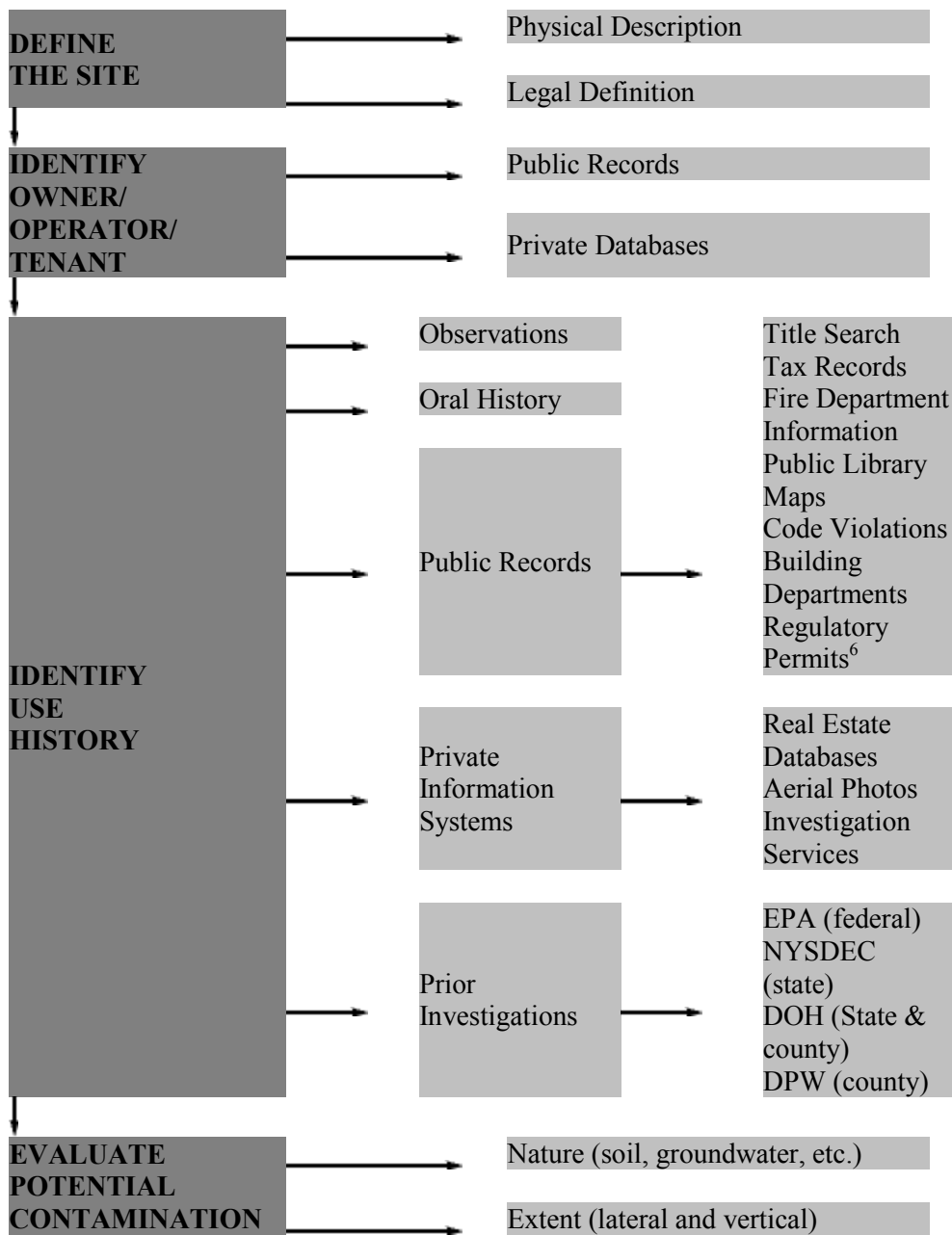
facilitate property transfer by providing some of this information for marketing purposes. Developers or local government officials can draw upon the knowledge of NYSDEC, planning and zoning professionals, real estate brokers, lawyers, appraisers, and others who live and work in the community. Community members can be effective in aiding identification of contaminated sites such as old gas stations or old dumps, especially illegal dumps. Commercial environmental data sources offer additional historical information through a national inventory of environmental data and can provide that data for a fee.

The first stage of any brownfield project should include a brief review of the prior use of the site. This initial historic review process involves reviewing the "paper" history of the site and is a necessary first step in deciding whether the redevelopment project is worth undertaking. It is not as extensive as the Historic Review done as part of a Phase I Environmental Site Assessment (ESA) (see Section 2.F for a detailed discussion of an ESA).

The following is a diagram illustrating the preliminary steps of starting a brownfield project. Professional title search services and consultants can be hired to help in the sometimes intricate and time-consuming process. However, for a community organization of limited resources and ready access to volunteer time, it is worthwhile to at least begin the information gathering process using publicly available information before turning to specialized paid services or consultants. Conducting an Initial Historic Review, and/or Phase I ESA, is essential to building a credible case for redevelopment, especially when seeking brownfield funding or sponsorship. As discussed later, this report is also useful in the application process for one or more of the state brownfield programs.

Information Gathering Steps

(Includes Initial Historic Review and Phase I ESA)



⁶Examples of Regulatory Permits include: Wastewater/Stormwater Discharge Permits also called SPDES Permits, Title V Air Permits, Bulk Chemical Storage Permits, and Petroleum Storage Permits. This is but a small listing of the various permits issued by the EPA, NYSDEC and local governmental agencies.

B. Defining the Site

The first step is to define the site physically and legally. It is important to be precise in defining the boundaries of the site being evaluated. Often what appears to be a single site is in reality a patchwork or assemblage of properties with a complex history of ownership and land uses. The relationships of these various properties must be identified correctly to accurately understand all the activities that took place at the site and to assess the potential contamination and cleanup.



The definition of the site is also important for purposes of applying for and participating in the New York State Brownfield Cleanup Program (BCP), since the benefits (tax credits and/or liability protections) apply to the site as defined in the agreement or contract entered into under those programs.

i. Physical Characteristics of the Site

Valuable data include physical descriptions of the property, buildings, environmental conditions, utilities, telecommunications, transportation, surrounding property characteristics and potential incentives. Begin by walking the perimeter of the site noting the names of the streets, water bodies, or rail lines that define its boundaries. All buildings and structures should be described including piers and waterfront fixtures. In particular, the following should be noted:

- the number of buildings and addresses
- the number of stories in the buildings
- stained or discolored soil
- odors
- the presence of soil gas
- the presence or absence of “stressed” vegetation
- the block numbers or street addresses of the adjacent properties
- existing signs or notices on the property that may offer some indication of past owners and uses
- signs of contamination, such as storage tanks, drums, refuse piles, stained or discolored soils
- patterns of stormwater runoff and drainage
- proximity to surface water bodies

It is important to seek permission of the owner(s) or operator(s) before walking on a property to visually inspect it. If permission is denied, visual observations from beyond the property line may still be helpful in gathering information about the physical characteristics of the property.

ii. Determine the Legal Definition of the Site

The next step is to determine the legal definition of the site, i.e., its official boundaries and parameters: section, block, and lot numbers. Additionally, the latitude, longitude and GIS coordinates are necessary for applying for New York State brownfield programs. The two methods of determining the legal definition of a site is by reviewing the government records or records at a real estate library. If the address of a target property is not readily available, it is important to note the addresses of adjoining properties or other nearby properties.



C. Defining Site Ownership

After the site has been defined, the next step is determining who currently owns the property. Ascertaining ownership of the site will guide the plan for access to the site as well as the strategy for the investigation, cleanup and redevelopment of the site.

For instance, if a municipality owns a brownfield, significant funding may be available exclusively for publicly owned land. Also, if a municipality owns the site, the redevelopment strategy may include a grassroots effort to get the site redeveloped by:

- convincing the municipality to investigate, clean up and redevelop the property;
- making a deal with the municipality by establishing a public-private partnership such as a conservancy;
- acquiring the property and completing the work; or
- having a municipality do the investigation, then acquiring the site for remediation and redevelopment.

If the land is privately owned, other paths may be undertaken to get the site redeveloped such as:

- convincing the private owner to investigate, clean up and redevelop the site;
- making a deal with the private owner whereby the party secures funding and support for the investigation, cleanup and redevelopment but ownership stays with the private owner; or
- acquiring the property from the owner.

If the property is owned by the local County Government, and it was obtained through tax default, it may be possible that the property will become available once the redemption period is over. At such point, the property may be sold at auction or dedicated to public use.

Key ways to determine who currently owns the site include looking through the municipal records, searching in real estate databases, or performing a title search (all are discussed below).

i. Check Public Records

Tax records can be used to determine who owns the property. These documents are found at the county or the local Tax Assessor's Office. Some of this information may be online. For example, the Nassau County Assessor's records can be accessed online. If the property is municipally owned, and the municipality acquired the deed through nonpayment of taxes, a history of tax arrears may provide information about the property.

Another way of researching property ownership is to conduct a title search by checking recorded deeds for the property. While reviewing the deed, make careful notes about the prior owners, since this information will be needed in the next stage of the Phase I assessment. The process of determining legal title to a property may be done by diligent volunteers researching these records. However, a party may choose to hire a professional title search company to do the title search. The average cost for a basic title search is approximately \$500 to \$1,000. Prices vary, depending on the extent of research needed.

ii. Check Private Databases

Sanborn maps and aerial photographs also provide detailed historic site information as to ownership and usage. Sanborn maps are reviewed by urban specialists, social historians, architects, geographers, genealogists, local historians, planners, environmentalists and others. The following information is often found on Sanborn maps: the outline of each building, the size and shape, construction materials, heights, function of structures, and the location of windows and doors. These maps also have street names, street and sidewalk widths, property boundaries, building use, and house and block numbers. These maps can be accessed at <http://sanborn.umi.com/> for a fee and cover various time periods. One limitation of these maps is their focus on fire protection including structures, water lines, and fuel storage. The Library of Congress also has maps which can be accessed without cost at <http://www.memory.loc.gov>. There are 186 maps for New York State cities and villages in that collection.

D. Defining Historic Uses

The next step is to reconstruct the land use history by evaluating the information received from the title records, deeds, and other sources and visiting the site. It is important to learn whether the property was used for industrial, commercial, residential or other uses. A party should consider reviewing the zoning of the site and noting if the zoning has changed from industrial to commercial or residential. It is also important to note if the actual use was consistent with the

zoning. If the site was used for industrial purposes, the type of industry should be identified. The following table⁷ provides some useful resources relative to site information.

Organization/Agency Location of data/Web Site Address	Description of Resource and How to Use the Data
Noth American Industry Classification System - http://www.census.gov/eos/www/naics/	This website offers information on the detailed classifications of manufacturing, commercial, and retail processes, many of which can be readily classified as either clean or at least potentially polluting. This source permits identification of potentially polluting activities that, when combined with data on the locations of individual firms engaged in those activities, can permit identification of potential brownfields.
D & B Small Business Solutions - http://smallbusiness.dnb.com/	This website offers marketing information about the locations of specific firms by industry. Information from this website can be combined with other data sources such as tax delinquency records to identify potential brownfields. This source provides firm-specific address information that is organized by NAICS, allowing one to identify the locations of potentially polluting activities. This source serves as an example of the marketing information that is available on the World Wide Web. An Internet search using the term industrial <i>site location</i> or <i>industrial real estate</i> can reveal other data sources.
Local Property Tax Assessment office - Property valuation books, often mapped, and with identified land use data	Information regarding tax valuations, the basis for assessments, and recent property transactions. Some may also provide data on taxes collected and identified land uses on parcels. Any environmental easements appear here. If a parcel is identified as tax-delinquent and can also be identified as being a potentially polluting firm via NAICS or other identifying source, then the parcel could be a potential brownfield.
Building Permit/Code Enforcement Office and other municipal level offices	Permit data often contains intended uses; code enforcement data will include specialized vents, plumbing, and other installations; dates help identify recent activity. These data add to knowledge about on-site activities that may be contributing to contamination potential on site.
Local Planning Office, if present Property zoning data	Local planning offices generate property specific information about building and redevelopment activity. Additionally, they create the zoning classifications and land use controls such as digging requirements, building setbacks, limits on land use activities, and limits on density of development to which identified land uses should comply. Zoning boundaries identify locations for different land using activities. When combined with property tax data, one could identify all properties within an industrial zone, then compare them with property tax and land use data to identify potential brownfields. Building permit data provides address-specific information about proposed land uses and can signal redevelopment activity should the property also be identified as having existing brownfield potential.
Library or local collection of historical property/community documents such as local business directories, Sanborn Fire Insurance Maps	Most libraries house collections of historical business directories and Sanborn fire insurance maps that offer information on past land using activities. Past land use information is a means for identifying properties with brownfield potential. These sources are especially useful when combined with property tax delinquency information as they can give more definitive brownfield evidence on properties that are currently vacant of building structures.

⁷ CENTER FOR ENVTL. POLICY & MGMT., CLOSING THE BROWNFIELD INFORMATION GAP: PRACTICAL METHODS FOR IDENTIFYING BROWNFIELDS, PRACTICE GUIDE #3 (2002) available at http://cepm.louisville.edu/Pubs_WPapers/practiceguides/PG3.pdf. Table reprinted with permission from the Center for Environmental Policy & Management.

Local Chamber of Commerce Association membership lists	Local chambers of commerce typically collect information on industrial and commercial activity and serve as economic development consultants for cities looking to attract new businesses to the area. Data collected from local chambers of commerce also organize information by firm and can provide information on development activity within a community.
State or local economic development agency	These agencies can provide employment and revenue data that will allow a community to measure outcomes and assess off-site impacts of brownfield redevelopment.
Local environmental or public health agency - if only to file required state/federal reports	This agency will have recorded data on local environmental and public health concerns in addition to records on emergencies associated with fires, floods, etc. They may also help the local governments prioritize attention on sites with recurrent problems.
Private environmental consulting firms	Private consulting firms can provide comprehensive digital environmental data commonly used for Phase I environmental site assessments. They can provide data generated from digitized Sanborn fire insurance maps and an array of topographical and land use data from local sources. Some additional resources might include building and zoning permit data, state environmental spill and hazardous response data. The degree of sophistication in the sorts of information they can provide varies in relationship to the comprehensiveness of the state and local data available. The point to keep in mind is that these firms, while potentially costly, can provide a quicker and easier way to incorporate the more difficult to discover information of potential brownfields. Local agencies might consider pooling resources to obtain a subscription to such a service. One such company is Environmental Data Resources at http://www.edrnet.com . Others can be found through an Internet search using brownfield information as a primary search term.
State and Local Historical Societies	These organizations can provide information and records on ownership and prior use of sites as well as photographs, maps, charts, community records and newspaper articles.

In addition, understanding and considering the prevalent land uses and growth patterns over time is helpful. Below is a timeline summarizing the historic context of brownfields in New York State.

1750 – 1850

Development Highlights: Waterfront development to take advantage of transportation and waterpower.

Impacts: Negligible long term environmental impacts but development patterns set.

1851 – 1900

Development Highlights: Manufactured gas plant (MGP) systems, tanneries, early manufacturing and railroads.

Impacts: Significant environmental impacts begin and contamination starts along waterfronts. Due to rail developments, significant contamination begins along non-waterfront corridors - MGP's, tannery byproducts.

1901 – 1958

Development Highlights: Beginning of interstate highway construction and road network building; major developments occurring off of waterways and rail lines; beginning of suburban sprawl; manufacturing sector vacating historical cities and centers in the northeast and moving south and west; proliferation of small gas stations and petroleum processing and handling industry.

Impacts: Contamination of newer development areas begins - metals, dyeing by-products, PCB's, petroleum-based contamination, heavy metals.

1959 – 1974

Development Highlights: Manufacturing relocates from historic city centers; urban renewal begins; major build-out of road systems; *mom- and-pop* gas stations are abandoned or sold to mini-marts and petroleum handling increases; rural rail declines causing the abandonment of infrastructure.

Impacts: Sprawl and suburban development in full swing; historic centers of manufacturing in decline; magnitude of contamination becomes known and becomes national priority; USEPA established and the National Environmental Policy Act (NEPA) enacted. Plastics, PCB's, PERC, VOC's, insecticides and pharmaceutical by-products soar.

1975 – 1991

Development Highlights: Community Development Act of 1974 and 1977 enacted, interest in historic preservation and downtown redevelopment emerges and becomes mainstream, and cities start to make a comeback; suburban development and edge cities in full swing; brownfield redevelopment begins. Superfund program born; superfund legislation gives birth to brownfields as a remedial – redevelopment strategy. Liability issues involved in identifying brownfield sites becomes major concern in New York State as an outgrowth of the Love Canal matter.

Impacts: Sprawl is rampant, downtowns starting to be redeveloped, interest in waterfront redevelopment is emerging.

1992 – present

Development Highlights: Cities on strong comeback; waterfront development is high priority; gentrification of old urban neighborhoods gaining momentum; first-generation suburbs totally urbanized and suffering from urban problems; ISTEA and TEA 21 pass changing US policy on transportation and development; national brownfield legislation passes; brownfield practice becomes priority; smart growth emerges as a public policy.

Impacts: Development interest in cities and waterfronts is high; brownfield redevelopment is a national priority as a vehicle to reclaim lost heritage and unique development opportunity; competition for waterfront space becomes very fierce.

E. Working with Consultants

Undertaking a brownfield redevelopment project involves negotiating complex and often difficult relationships, and the process of entering into a cleanup agreement, remedial work plans and other environmental aspects of the project may seem overwhelming. Therefore, by the time the planning process for brownfield redevelopment commences, it is advisable to hire an expert to assist in the process. Consultants should be familiar with the federal, state, and local regulations and can assist in navigating the brownfield landscape.

NYSDEC's *DER-10: Technical Guidance for Site Investigation and Remediation*⁸ outlines the required qualifications for consultants overseeing remedial projects in New York State. The two main categories are "Professional Engineer" and "Qualified Environmental Professional." A professional engineer is an individual or firm licensed or otherwise authorized under article 145 of the education law of the State of New York to practice engineering.

NYSDEC's Brownfield and Superfund Regulation (6 NYCRR 375-1.2(ak)) defines a qualified environmental professional as a person, including a firm headed by such person, who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases to the surface or subsurface of a site or off-site areas, sufficient to meet the objectives and performance factors for the areas of practice identified by this guidance. Such a person must:

- hold a current professional engineer's or a professional geologist's license or registration and have the equivalent of three (3) years of full-time relevant experience in site investigation and remediation of the type detailed in this guidance; or
- be a site remediation professional licensed or certified by the federal government, a state or a recognized accrediting agency, to perform investigation or remediation tasks identified by this guidance, and have the equivalent of three (3) years of full-time relevant experience.

Examples of such license or certificate include the following titles:

- Licensed Site Professional, by the State of Massachusetts
- Licensed Environmental Professional, by the State of Connecticut
- Qualified Environmental Professional, by the Institute of Professional Environmental Practice
- Certified Hazardous Materials Manager, by the Institute of Hazardous Materials Management

⁸ N.Y STATE DEP'T OF ENVTL. CONSERV., DEC PROGRAM POLICY: DER-10 / TECHNICAL GUIDANCE FOR SITE INVESTIGATION AND REMEDIATION (2003), available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der10.pdf.

Consultants can be found by asking municipalities, attorneys, leading institutions and real estate brokers to provide references for such experts. The Center for Public Environmental Oversight has a free limited directory of consultants for various aspects of a brownfield project (People Tree: Community Consultant Directory, www.cpeo.org/techtree/resource/people.htm). The Yellow Pages and other directories can also be consulted to identify environmental and engineering consultants.

i. Specific Tasks for Consultants

As the client, a community organization can limit a consultant's roles. For example, the community group can develop much of its own investigative, community organizing and grant development expertise in-house. However, there are a number of specific professionals with whom a community group may want to enter into a consulting arrangement, including the following:

During the Phase I assessment process

Consulting Environmental Scientists
 Geologists and Engineers
 Lawyers
 Real Estate Consultants
 Title Search Companies
 Urban Planning Consultants

While trying to secure funding

Grant Writing Consultants
 Insurance Brokers
 Loan Consultants

During the Phase II assessment process

Consulting Environmental Scientists
 Engineers and Geologists
 Environmental Risk Managers

During BCP negotiations

Consulting Environmental Scientists
 Engineers and Geologists
 Lawyers

During the planning process

Community Organizers
 Urban Planning Consultants

ii. Seven Items to Consider before Hiring Environmental Consulting Firms

- Personnel Mix - number of engineers, environmental scientists, planners, geologists, hydrogeologists, surveys, architects and years of experience generally and in New York.
- Project Basis - number and similarity of projects in New York compared to the brownfield project on which to bid, qualifications and experience package.
- Experience with constructability or revitalization of property in New York as a communities-based project, examples of projects and successfulness of the redevelopment.
- Success in remediation of a brownfield or hazardous waste site within a New York State community.
- Number of citizen participation projects that evidence an understanding of the citizen participation requirements in New York.
- Adequate insurance for environmental damage claims. See “Errors and Omissions Insurance” in the “Environmental Insurance” section for more information.

- Experience with NYSDEC and its remedial programs as evidenced by number of NYSDEC project oversights, familiarity with NYSDEC statutes (e.g., BCP and ERP); regulations (e.g., Part 375) and guidance (e.g., BCP and ERP guidance).⁹

F. Phase I Environmental Site Assessments (ESA)

The purpose of conducting a Phase I ESA is to identify environmental conditions associated with a property. They are typically conducted by environmental professionals in accordance with the USEPA's All Appropriate Inquiries Rule or the standard adopted by the American Society for Testing and Materials (ASTM).¹⁰ A Phase I ESA provides a record of the parties who used the property in the past and present, and who may have caused environmental problems at the site. The Phase I ESA also identifies potential environmental concerns or recognized environmental conditions at the site. USEPA's All Appropriate Inquiries Rule sets out the criteria for evaluating a property's environmental conditions and assessing potential liability for any contamination. Parties who receive grants under the USEPA's Brownfields Grant Program to assess and characterize properties must comply with the All Appropriate Inquiries Rule.¹¹ Many of the inquirer's activities must be conducted by or under the supervision or responsible charge of an individual who qualifies as an environmental professional.¹²



⁹ *Id.*

¹⁰ 40 C.F.R. pt. 312 (2010). USEPA now recognizes both ASTM International's E1527-05 –Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” and ASTM E2247-08 –Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland and Rural Property” as compliant with the All Appropriate Inquiries Regulation. Either of these ASTM International Phase I standards may be used to satisfy the statutory requirements for conducting all appropriate inquiries under the CERCLA.

¹¹ The inquiry of the environmental professional must include: interviews with past and present owners, operators and occupants; reviews of historical sources of information; reviews of federal, state, tribal and local government records; visual inspections of the facility and adjoining properties; commonly known or reasonably ascertainable information; and degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination. Additional inquiries that must be conducted by or for the prospective landowner or grantee include: searches for environmental cleanup liens; assessments of any specialized knowledge or experience of the prospective landowner (or grantee); an assessment of the relationship of the purchase prices to the fair market value of the property, if the property was not contaminated; and commonly known or reasonably ascertainable information.

¹² See the following EPA guidance fact sheet for determining who can qualify as an environmental professional, http://epa.gov/brownfields/aai/ep_defactsheet.pdf.

Many banks require Phase I ESAs for most non-residential property transfers. Banks usually have a list of companies with which they prefer to conduct this assessment. Consult with your banking institution to see if this is a requirement and to obtain the list of approved companies that can be used to generate these reports.

After gathering information about the past uses of the site, it may be possible to take the information on historical use of the site and, from it, narrow the search for likely on-site contaminants. Additional information is collected in a Phase I ESA to accurately describe the environmental setting of the property including: the topographic grade of the site, surface bodies of water, soil classifications, and the percentage of impervious surface (i.e. pavement or concrete) on the site. The environmental setting for a property is needed to generate information about possible environmental migration pathways.

G. Phase II Site Assessments

Depending on the results of the Phase I assessment, a Phase II assessment may be performed to quantify the presence and the extent of any contamination. This type of assessment will usually take place only after a strategic plan for the site has been developed and funding sources have been identified.

A Phase II assessment consists of testing the soils, sediments, air or groundwater at the property. The Phase II assessment should provide data which will be considered in the remedy selection process and/or redevelopment decisions.

A party pursuing a Phase II should contract with one of the numerous private environmental consulting firms. These firms conduct Phase II assessments to uncover quantifiable, objective descriptions of environmental conditions at the site, upon which potential developers and their lenders or insurers rely.

Chapter 3

New York State Brownfield Programs

A. Overview

New York State, in furtherance of its commitment to environmental protection, economic revitalization and growth in the state, has created an array of programs and resources to help clean up and reuse brownfield sites. New York State offers programs that provide financial and technical assistance as well as liability protection for the investigation, remediation and redevelopment of brownfield sites.

Legislation signed into law on October 7, 2003 amended and refinanced the State Superfund Program and created or enhanced the following brownfield-related programs:



- The Brownfield Cleanup Program (BCP)¹³ enhances private-sector remediation of brownfields and reduces development pressure on “greenfields.” This program encourages a cooperative approach among NYSDEC, current property owners, lenders, developers and prospective purchasers to investigate and/or remediate contaminated sites and return these sites to productive use. The BCP addresses the environmental, legal liability and financial barriers that often hinder the redevelopment and reuse of contaminated properties. This program provides brownfield investment incentives, including business and personal tax credits, for remediation and development costs, real property taxes and environmental insurance premiums. Information on this program can be found on NYSDEC’s website at <http://www.dec.ny.gov/chemical/8450.html>.
- The 1996 Clean Water/Clean Air Bond Act’s Environmental Restoration Program¹⁴ (ERP) was amended and enhanced to provide increased financial assistance and incentives to municipalities for investigation and cleanup at eligible brownfield sites. Under the ERP, New York State provides grants to municipalities for reimbursement of a portion (up to 90% on-site and 100% off-site) of eligible costs for site investigation and remediation. A municipal cost share is required. Remediation may include cleanup of contamination in environmental media, such as soil and groundwater, and may also include building demolition and asbestos removal for which reimbursement of up to 50% of eligible costs is available. In addition, the ERP provides liability protection, including an indemnification for any claims and defense by New York State for claims made against the funding recipient and future site owners. Information on this program can be found on NYSDEC’s website at <http://www.dec.ny.gov/chemical/8444.html>.

¹³ N.Y. ENVTL. CONSERV. LAW § 27-1401 - 1435 (2010).

¹⁴ *Id.* § 56-0501 - 0515 (2010).

- The Brownfield Opportunity Areas (BOA) Program¹⁵ is the brownfield redevelopment planning arm of the Superfund/Brownfield Law. The BOA program provides municipalities and community-based organizations with financial and technical assistance to complete area-wide revitalization plans for discrete geographic areas or neighborhoods affected by multiple brownfield sites. Funding for site assessments may also be provided for priority or strategic sites that are catalysts for revitalization.

The program consists of three program steps leading to New York State's designation as a BOA including: Step 1- Pre-Nomination; Step 2 - Nomination; and Step 3 - Implementation Strategy with Site Assessments. Funding is available to cover 90% of the costs associated with each step. Once a BOA is designated by the Secretary of the Department of State, projects in the BOA shall receive priority and preference when considered for financial assistance under the NYSDEC's Environmental Protection Fund and Environmental Restoration Programs and may receive a priority and preference when considered for financial assistance under any other state, federal, or local law.

B. Brownfield Cleanup Program (BCP)

i. Pre-application Meeting

Before scheduling a pre-application meeting, the NYSDEC suggests that an applicant to the BCP request and submit a pre-application questionnaire to help facilitate eligibility determinations and the pre-application meeting process. A copy of the questionnaire follows:

¹⁵ N.Y. GEN. MUN. LAW § 970-r (2010).

Brownfield Cleanup Program Pre-application Project Information Sheet

REQUESTED PROJECT INFORMATION

Project Name: name to be used in future correspondence.

Applicant: names and affiliation; representatives for communication with DEC.

Address: of property.

C/B/L: county (or NYC borough)/block/lot.

Proposed Site End Use: residential, retail, etc.

Site Area: acres.

Current use of Site: vacant land, industrial uses (list), parking lot, etc.; active or inactive use.

Development Plan and Costs: area of buildings, parking areas and open space; total square footage of buildings subdivided into use type (residential, retail, etc.); type of parking (open paved, sub grade, etc.); include total development costs; number of jobs to be created.

Water frontage: frontage on waterway (yes/no); linear distance of frontage; name of waterway.

Ownership: Is the land currently owned by the applicants or planned to be purchased? Is the land leased? Is lease holder a party to the application? Can the applicant enter into an environmental easement for the property?

Past Environmental Study: Phase I complete? Phase II complete? List environmental investigations and dates of field work; list available environmental reports.

Nature of Contamination: description of known environmental contamination issues on site (groundwater contamination, soil contamination, leaking tanks, spills, historical fill, illegal waste dumping, etc.) and involved contaminants (VOAs, metals, PCBs, etc.); include summary of pertinent historical land uses.

Soil/Groundwater samples: number of samples of soil and groundwater collected to date; highlights of sample results for contamination (ranges); percentage of the site that has been investigated.

Enforcement History: has the site ever been subject to a Consent Order or other enforcement action with DEC? Give details.

After submitting this questionnaire, the NYSDEC recommends holding a pre-application meeting with its staff to discuss the necessary procedures, requirements and benefits of entering the BCP. Information regarding NYSDEC staff can be found at their website at <http://www.dec.ny.gov/about/776.html>. The meeting should cover general BCP information, time frames, the agreement process, investigation and fieldwork, remedy selection and action, Certificate of Completion (COC), citizen participation, and tax credits and liability. Additionally, project information should be covered including project sponsor and contact information as well as project timelines (including build-out dates, local approvals, etc). Parties should consider a reverse timeline relative to the project schedule considering when the doors would open, development start date, approvals, variances and permits granted, application and COC needed, etc.

BCP and citizen participation guidance, fact sheets, application and agreement, and technical guidance should all be given out at the meeting. This is a chance for NYSDEC and the party to gain a mutual understanding of their respective interests and goals. Other agencies should attend this meeting if they will play a major role in the project.

The applicant may wish to conduct initial pre-application studies and make every effort to secure all available environmental sampling data for the site, including regional groundwater or soil data. If the available information is limited, the potential applicant may wish to consider performing a Phase I and/or a Phase II (ASTM E1903) Environmental Site Assessment (ESA) of the properties being considered for the application. However, the applicant should keep in mind that only costs incurred after the effective date of the Brownfield Site Cleanup Agreement are eligible for tax credits.¹⁶ To provide a basis for an eligibility determination by the NYSDEC, the information must be sufficient to establish that the site conforms to the definition of a ~~brownfield~~.¹⁷

ii. Eligibility of a Site

NYSDEC will determine whether a proposed site meets the definition of a ~~brownfield site~~ (ECL 27-1407.8.a). This definition 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) there must be a reasonable basis to believe that the contamination or potential presence of contamination may be complicating the development or re-use of the property (ECL 27-1405.2).

In determining whether there is confirmed contamination or a reasonable basis to believe that contamination is likely to be present on the property, NYSDEC will consider the following factors to the extent such factors are relevant to the proposed site:

- the nature and extent of known or suspected contamination;
- whether contaminants are present at levels that exceed standards, criteria or guidance;

¹⁶ N.Y. COMP. CODES R. & REGS. tit. 6, § 375-3.9(e) (2010).

¹⁷ See NYSDEC, DEC PROGRAM POLICY, DER-32/ BROWNFIELD CLEANUP PROGRAM APPLICATIONS AND AGREEMENTS (2010), available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der32.

- whether contamination on the proposed site is historic fill material or exceeds background levels;
- whether there are or were industrial or commercial operations at the proposed site which may have resulted in environmental contamination; and/or
- whether the proposed site has previously been subject to closure, a removal action, an interim or final remedial action, corrective action or any other cleanup activities performed by or under the oversight of the state or federal government.¹⁸

In determining whether there is a reasonable basis to believe that the contamination or potential presence of contamination may be complicating the development, use or re-use of the property, NYSDEC will consider the following factors to the extent such factors are relevant to the proposed site:

- whether the proposed site is idled, abandoned or underutilized;
- whether the proposed site is unattractive for redevelopment or reuse due to the presence or reasonable perception of contamination;
- whether properties in the immediate vicinity of the proposed site show indicators of economic distress such as high commercial vacancy rates or depressed property values; and/or
- whether the estimated cost of any necessary remedial program is likely to be significant in comparison to the anticipated value of the proposed site as redeveloped or reused.¹⁹

The NYSDEC uses the statutory land use criterion in determining whether to accept an application to the BCP, including but not limited to, proximity to sensitive natural resources, proximity to residential areas and cultural resources, current or anticipated future use, and environmental justice concerns.²⁰ The NYSDEC will review the proposed future use of the site to ensure that the requisite cleanup levels are consistent with the zoning laws and a COC can be attained. The developer must generally negotiate the current and future use of the site with the municipality.

There are primarily two types of contaminated sites that may qualify for the BCP: ~~“hazardous waste”~~ (inclusive of hazardous substance sites) and petroleum sites. See 6 NYCRR Part 371 (hazardous waste); 6 NYCRR Part 597 (hazardous substances); and Navigation Law Article 12, Section 172 (6 NYCRR are the rules and regulations for the NYSDEC). However, sites are not eligible for the BCP if they are:

- listed as Class 1 or 2 in the Registry of Inactive Hazardous Waste Disposal Sites in New York State;
- listed on the USEPA National Priorities List (NPL);

¹⁸ NYSDEC DIV. OF ENVTL. REMEDIATION, DRAFT BROWNFIELD CLEANUP PROGRAM GUIDE, at Sec. 2 (2005) available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/bcp_eligibility.pdf.

¹⁹ *Id.*

²⁰ See NYSDEC, DEC PROGRAM POLICY, DER-32/ BROWNFIELD CLEANUP PROGRAM APPLICATIONS AND AGREEMENTS (2010), available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der32.

- subject to a solid waste permit or a hazardous waste treatment, disposal or storage facility Resource Conservation Recovery Act (RCRA) permit. The RCRA exclusion does not apply to interim status sites unless they are subject to a corrective action order;
- currently under order pursuant to: (a) Article 12 (Oil Spill Prevention Control and Compensation) of the Navigation Law; or (b) Title 10 of Article 17 (Control of Petroleum Bulk Storage). This does not preclude eligibility for a site subject to a Stipulation Agreement under Article 12; or
- currently subject to enforcement action by NYSDEC or USEPA.

In the past several years there have been several lawsuits filed by developers against the NYSDEC challenging the NYSDEC's denial of their application to the BCP based upon the eligibility guidelines mentioned above. However, in February 2010, the highest court in New York (the Court of Appeals) handed down a decision²¹ in which it held that the NYSDEC's denial of an application to the BCP was arbitrary and capricious and therefore a reversible error, because the NYSDEC based its decision as to whether the property was "complicated" by the contamination on inconsistently applied subjective eligibility guidelines, which resulted in a narrower interpretation of the BCP than was intended by the New York legislature. However, the decision did not invalidate the NYSDEC's discretionary eligibility guidelines, and therefore there is still uncertainty as to how the guidelines will be applied in the future and how the BCP should be amended in light of the Court of Appeals decision in order to eradicate much of the uncertainty and discretion from the eligibility determinations.



The 2008 amendment to the BCP did not clarify what the eligibility requirements are, and therefore a future amendment is likely in order to ensure the purpose of the BCP is accomplished, namely to generate increased interest in voluntary remediation and to clarify what environmental and economic standards make a brownfield site "complicated." For example, the courts have suggested that a site should be deemed complicated if the soil contaminant levels are higher than the Soil Cleanup Objective (SCO) track level which the remediation process would ultimately have to achieve. Also, the courts have suggested that the difficulty in obtaining and maintaining financing also makes a site "complicated" by the presence of contaminants. There

²¹ Lighthouse Pointe Prop. Assoc. v. N.Y. State Dep't of Env'tl. Conserv., 2010 N.Y. LEXIS 35 (Feb. 18, 2010), available at <http://www.nyenvlaw.com/Data/Documents/Lighthouse%20Court%20of%20Appeals%20Decision.pdf>.

have been legislative proposals to make Class 2 sites, historical fills, and landfill sites eligible for the BCP as well.

iii. Eligibility of Interested Parties

All parties are eligible except those that have an order against them for the contamination at the site (in which case the site would not be eligible either) and those that have an outstanding claim to the Oil Spill Fund (although eligibility would be possible once the outstanding claim was resolved).

An application can also be rejected in the public interest, which is generally used when the applicant has engaged in certain prohibited or illegal acts, or for other public interest reasons.

iv. Applicants

Applicants will have different obligations under the BCP depending on their classification. The first category of eligible applicant is a *volunteer*. This is any person not responsible for the contamination at the site, or who is considered a potentially responsible party (PRP) solely on the basis of its ownership of a site that was contaminated prior to the time the applicant acquired title to the property.²² A volunteer must investigate and clean up contamination at the site but is not required to remediate off-site contamination, which is critical, because under the NY State Superfund the entity would be liable for on-site and off-site cleanup costs.²³ However, a volunteer will be required to perform a qualitative exposure assessment to assess the risk to public health and the environment.²⁴

To obtain and maintain its status as a *volunteer* under the BCP, the applicant will have to use appropriate care in dealing with the contamination.²⁵ A volunteer who fails to exercise appropriate care by not taking reasonable steps will be treated as a participant as defined below.

The second category of eligible applicant is a *participant*. This category includes any applicant that does not qualify as a volunteer, such as a PRP.²⁶ A *participant* must investigate and characterize the nature and extent of contamination both on-site and emanating from the site. In addition, a participant may be required to remediate contamination migrating off-site.²⁷

As noted in the discussion below, both *volunteers* and *participants* are eligible to claim the BCP tax credits; the tax provisions of the BCP law make no distinction between these two kinds of applicants.

²² N.Y. ENVTL. CONSERV. LAW § 27-1405 – 1421.

²³ *Id.*; see also, New York Inactive Hazardous Waste Law, N.Y. ENVTL. CONSERV L. § 27-1301 - 1323 (2009).

²⁴ *Id.*

²⁵ N.Y. ENVTL. CONSERV. LAW § 27-1405(1)(b).

²⁶ *Id.* § 27-1405(1)(a).

²⁷ *Id.* § 27 - 1411(1).

v. Submittal of Application

The BCP requires submission of one paper copy and one electronic copy of the application to the Chief of Site Control²⁸ as well as one paper copy to NYSDEC's Division of Environmental Remediation's Regional Contact in which the site is located. A copy of the application and regional office addresses can be found on the NYSDEC website at <http://www.dec.ny.gov/chemical/8450.html>. A draft investigation or remedial work plan may be submitted with the application. Such applications should not be submitted until the applicant is ready, willing and able to advance the remedial project. An applicant is ready, willing and able when such a person is prepared to enter into a BCA with NYSDEC within 100 days of submitting the application.²⁹ Such applications will include a statement acknowledging and agreeing to the requirement to execute a BCA within 60 days of notice of approval.³⁰

To be considered complete, the application must include the Brownfield Site Contact List (Contact List) and repository in accordance with *DER-23: Citizen Participation Handbook for Remedial Programs* available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der23.pdf, which allows interested parties to review project documents.³¹

Currently, the NYSDEC is only required to use its "best efforts" to accept or reject the application within 45 days of receipt of a complete application (60 days if a final investigation report or draft remedial action work plan is included with the application) or 5 days after the close of the public comment period, whichever is later.³² Therefore, applicants should be mindful that if issues arise with an application, there may be delays in the application process which could complicate financing and timeframes. NYSDEC strongly encourages any party that is considering applying to the BCP to schedule a pre-application meeting with NYSDEC staff in order to address any major issues before submitting a BCP application.

vi. The Brownfield Cleanup Agreement (BCA)

All parties involved in the BCP must sign a Brownfield Cleanup Agreement (BCA). By signing a BCA, the applicant commits to conducting specific remedial activities under NYSDEC's oversight. Obligations under the BCA are dependent on whether the applicant is a *participant* or a *volunteer* in the project. The applicant through written notification can terminate the

²⁸ The address for this person is Chief, Site Control Section, New York State Department of Environmental Conservation, Division of Environmental Remediation, 625 Broadway, Albany, NY 12233-7020.

²⁹ See NYSDEC, DEC PROGRAM POLICY, DER-32/ BROWNFIELD CLEANUP PROGRAM APPLICATIONS AND AGREEMENTS (2010), available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der32.

³⁰ *Id.* Note: generally only one application for a BCA may be submitted, but the NYSDEC will consider multiple applications where: (a.) development project spans more than 25 acres; (b.) approach does not negatively impact the remedial program, including timing, ability to appropriately address areas of concern, and management of off-site concerns; and (c.) approach is not advanced to increase the value of future tax credits (i.e., circumvent the tax credit caps provided under New York State Tax Law Section 21). The BCA treats multiple applicants as one applicant for BCA purposes.

³¹ *Id.*

³² *Id.*

commitment at any time, while NYSDEC can terminate the BCA only for cause, e.g. if the terms and conditions of the agreement are not being followed.

The law contains specific requirements for the BCA. Each BCA will include payment of state costs, dispute resolution, commitments to investigate and (if necessary) remediate the site requirements for citizen participation, and implementation and enforcement of any land use and engineering controls required by NYSDEC.³³ Throughout the life of the project, the BCA serves as a guideline for the applicant and assists in the implementation of a remedial program that follows State procedures.

The BCA is a standardized document set forth in program guidance³⁴ and can be found on NYSDEC's website at <http://www.dec.ny.gov/chemical/8450.html>. Since only the signatories to the BCA and their non-responsible successors and assigns (provided that the COC is transferred in accordance with 6 NYCRR 375-1.9(f)) receive the key benefits of the BCP (namely the liability protections and tax credits), it is important to evaluate fully who should apply for the BCP and enter into a BCA. Recently, the NYSDEC issued a program policy,³⁵ which provides general terms and conditions for BCAs (in addition to the regulatory terms and conditions under 6 NYCRR 375-1.5, 375-3.4 and 375-3.5) as well as the process to amend and terminate a BCA. The application for admission to the BCP will require the applicant to acknowledge and agree to the guidance, but in the event of a conflict between the guidance and the site specific BCA, the BCA will control.

vii. Investigation

The goal of the remedial investigation is to define the nature and extent of the contamination, locate the source of contamination, and provide sufficient data to develop a Remedial Work Plan (RWP), which outlines the remediation program which will be implemented.

The Remedial Investigation Work Plan (RIWP) should be consistent with the *DER-10: Technical Guidance for Site Investigation and Remediation*, a guidance document available on NYSDEC's website at <http://www.dec.ny.gov/regulations/2393.html>. The RIWP should explain the systematic investigation proposed for the site.

viii. Remediation

Remedial work plans are subject to 45-day public comment periods and in some cases public meetings.

³³ N.Y. ENVTL. CONSERV. LAW § 27-1409.

³⁴ *Id.* § 27-1405(1)(a).

³⁵ NYSDEC, DEC PROGRAM POLICY, DER-32/ BROWNFIELD CLEANUP PROGRAM APPLICATIONS AND AGREEMENTS (2010), available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der32. In the rare case where both the Participant (e.g., the seller of real property) and the Volunteer (the buyer of the real property after the contamination was released) each wish to enter into a BCA, the DEC will not provide them with separate BCAs and will not distinguish between their different obligations, and a COC [Certificate of Completion, needed in order to obtain tax credits] will not issue until all work required by the BCA is completed. See DER-32, p. 8, par. E.4.

After completion of a remedial investigation showing the need for site remediation or cleanup of contaminants, a remedial work plan can be developed. The remedial work plan is based upon the level of contamination and may be based upon the proposed site use. The work plan must



include an Alternatives Analysis unless a complete cleanup is being recommended. For large/complex projects, remedial work plans can be given conceptual approval by NYSDEC before detailed plans and specifications are developed. In providing for remedial techniques, various factors are considered including: the type; concentration; extent of contamination; and site properties such as water table depth; type of soils; overall protectiveness of public health and the environment; short term and long term effectiveness and permanence; reduction of toxicity, mobility, and/or

volume of contamination; cost effectiveness; land use; current use and zoning laws; public comments; environmental justice concerns; and the existence of buildings.³⁶ The NYSDEC has issued a program policy setting forth presumptive remedies – in other words, remedies which have been proven to be successful for certain contaminants in certain situations.³⁷ A remedial program that achieves a permanent cleanup of a contaminated site is preferred over a remedial program that does not do so.³⁸ Numerous remedial technologies are available, and often similar results can be achieved by different methods. Typical remedial work plan contents are:

- Introduction and Purpose
- Summary of Site Contamination
- Remedial Action Objectives
- Alternatives Analysis
- Plans and Specifications (can be submitted separately for large/complex projects)
- Institutional/Engineering Controls (IC/ECs) and Periodic Certifications
- Health and Safety Plans
- Quality Assurance/Control Plan
- Schedule
- Reporting
- Project Organization

The Alternatives Analysis is the evaluation of remedial options at a site. A remedy that allows unrestricted site use is always evaluated. If a remedy is proposed that relies upon ICs or ECs, NYSDEC can require the evaluation of additional alternatives. The viability and reliability of any IC/ECs must be evaluated. The main features of an alternatives analysis include a:

- description of alternative(s) and identification of proposed remedy;

³⁶ N.Y. ENVTL. CONSERV. LAW § 27-1415.

³⁷ See NYSDEC, DEC PROGRAM POLICY, DER-15/PRESUMPTIVE/PROVEN REMEDIAL TECHNOLOGIES (2007), available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der23.pdf.

³⁸ NYSDEC, DEC PROGRAM POLICY, DER-10/TECHNICAL GUIDANCE FOR SITE INVESTIGATION AND REMEDIATION (2010), available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der10.pdf.

- detailed analysis: under each of nine remedy selection factors (overall protectiveness, conformance to standards, criteria and guidance, short-term effectiveness/impacts, etc.), each alternative is evaluated against the factor and compared to any other alternative(s) under consideration. The removal/control of source areas and the stabilization of groundwater plumes must be addressed; and
- summary of proposed remedy: the alternatives analysis concludes with a summary of the main factors that led to the selection of the proposed remedy and a listing of the elements of the remedy.

The BCP requires that a remedial program be developed using a multi-track approach. Full use of the multi-track approach depends upon the use of numerical SCOs³⁹ developed by the NYSDEC and the New York State Department of Health (NYSDOH).

Track 1 – Unrestricted Use: Generic Soil Cleanup Objective

- Site can be used for any purpose.
- Generally, land/groundwater use restrictions or IC/ECs cannot be employed to obtain the remedial action objectives for the site.

Track 2 – Restricted Use: Generic Soil Cleanup Objective

- Land use and groundwater use restrictions are allowed.
- Cannot rely upon IC/ECs to prevent exposures to soil contamination at levels exceeding those specified in the corresponding soil cleanup objective table; uses the generic soil cleanup objectives table for the applicable land use scenario; and does not use site-specific soil data.

Track 3 – Restricted Use: Modified Soil Cleanup Objectives

- Land use and groundwater use restrictions are allowed.
- Cannot rely upon IC/ECs to prevent exposures to soil contamination at levels exceeding those specified in the corresponding soil cleanup table.
- Uses site-specific data to generate soil cleanup objectives.

Track 4 – Restricted Use: Site-Specific Soil Cleanup Objectives

- Land use and groundwater use restrictions are allowed.
- Can rely upon IC/ECs to prevent exposures to soil contamination.
- If soil contamination presents exposure risks above specified levels, NYSDEC and NYSDOH must find that the cleanup would be protective.
- Exposed soil must meet the requirements of the generic soil cleanup table for the applicable site use to a depth of:
 - one foot for commercial/industrial uses
 - two feet for residential uses

³⁹ N.Y. ENVTL. CONSERV. LAW § 27-1415.

The remedial program selected must address sources of contamination which are defined by 6 NYCRR Part 375-1.2(a) but in general include: free product, concentrated solid or semi-solid hazardous substances, dense non-aqueous phase liquid, light non-aqueous phase liquid, and/or grossly contaminated soil. The sources are addressed based upon a hierarchy of: 1) removal and/or treatment; 2) containment; 3) elimination of exposure; or 4) mitigation of exposure.

Plume stabilization must be evaluated for all remedies. Further migration of contamination from the site must be prevented to the extent feasible, including any actions necessary to maintain and monitor the stabilization. The *participant* who is remediating a site must address the off-site plume including stabilization to the extent feasible.

The goal of the remediation is to ensure that the site is protective of public health and the environment. The BCP encourages cleanups that are permanent rather than cleanups that rely upon institutional or engineering controls to render them protective.

ix. Certification of Completion (COC)

When the remediation is completed, the applicant submits a final engineering report to NYSDEC. Upon NYSDEC's determination that the remediation requirements have been or will be achieved, NYSDEC shall issue a COC.⁴⁰

NYSDEC may modify or revoke a COC due to a failure to comply with the terms and conditions of the BCA, a misrepresentation of a material fact tending to demonstrate that the cleanup levels were reached, a material misrepresentation of a material fact tending to demonstrate that such party was a volunteer, or for ~~good cause.~~⁴¹

The COC recipient obtains two significant benefits—the liability limitation provided by statute and eligibility to claim BCP tax benefits as noted below.

a. Liability Protections

Upon issuance of a COC, a party is entitled to the statutory liability limitation that will effectively run with the land. The liability limitation will apply to an applicant's successors and assigns as well as to persons who develop or occupy the brownfield site provided they use due care and good faith to adhere to BCA and the COC. The liability limitation that flows from the COC will bind not only the NYSDEC but also all state agencies, the Attorney General, who shares enforcement power with NYSDEC, and the Comptroller, who has concurrent jurisdiction with NYSDEC over petroleum spills.

It is important to note that the COC does not affect an action or a claim including a statutory or common law claim for contribution or indemnification that an applicant has or may have against a third party, nor does it limit the liability of any party to the brownfield site cleanup agreement ~~with respect to any civil action brought by a party other than the state.~~⁴¹ Therefore, parties may

⁴⁰ *Id.* § 27-1419(2)(b).

⁴¹ *Id.* § 27-1419(5)(c).

want to negotiate their own indemnification agreements and get insurance to cover potential risks from third parties.

b. Tax Benefits

As discussed in detail in Chapter 6(D), a holder of the COC is entitled to tax credits under the BCP. These credits are based on cleanup and other site preparation costs, on-site groundwater remediation, depreciable tangible property (including buildings and structural components of buildings placed in service on the site), property taxes assessed on the site, and certain environmental insurance premiums.

x. Public Participation

The applicant is required to prepare a site-specific Citizen Participation (CP) Plan and provide fact sheets to an established site contact list throughout the project. The CP requirements for all of Department of Environmental Remediation's (DER) remedial programs are set forth in *DER-23* and available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der23.pdf. A template for the CP Plan, as well as templates for each required fact sheet, is available from the NYSDEC project manager. In addition, a 30 day public comment period must be met before the finalization of the investigation work plan and a 45 day public comment period must be met before the finalization of the remedial work plan, respectively. The contact list should be composed of the planning board chairperson or chief executive officer of the brownfield's village, town, city and county, adjacent residents, owners or occupants, local news media, the public water supplier, citizens requesting information and local school or day care administrators, at a minimum.

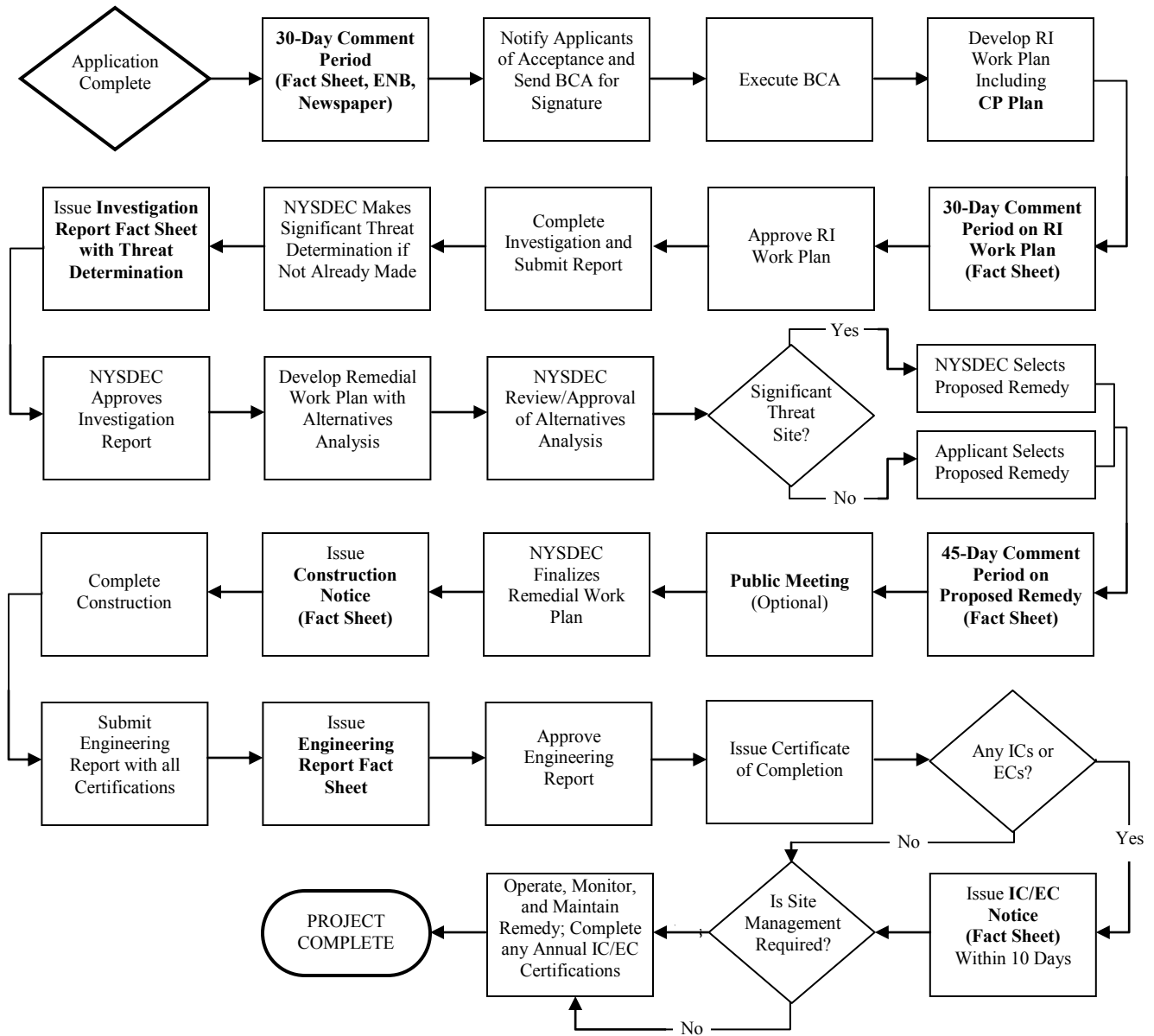
xi. Conclusion

The BCP is able to encourage private development of contaminated land while promoting environmental responsibility, community revitalization, and protection of greenfields. Every year the NYSDEC issues a report—spanning its annual year starting on April 1 and ending on March 31—detailing the progress of the remediation efforts it oversees, which is available online at <http://www.dec.ny.gov/about/53234.html>. According to the report, as of March 31, 2010, 320 sites have been accepted into the BCP statewide (out of 459 applications), 70 of which are significant threat sites.⁴² In the 2009-2010 fiscal year, 26 sites entered the BCP (out of 31 applications). 68 BCP sites have been completed and have received their COC as of March 31, 2010.⁴³ 12 sites received their COC in the 2009-2010 fiscal year. The average time it takes for a BCP applicant to receive a COC is 2.8 years, which is significantly shorter than a remediation pursuant to the New York State Superfund program. Regarding Long Island specifically, in Nassau and Suffolk counties there have been 20 sites approved to the BCP and 12 sites remain active as of March 31, 2010. The chart that follows shows the steps that a BCP project must follow in the NYSDEC's program and indicates the number of steps that are required for Citizen Participation activities and the actual work elements. NYSDEC project managers must follow this chart.

⁴² NYSDEC, Brownfield Cleanup Program - 2009/2010 Progress and Statistics, <http://www.dec.ny.gov/about/53247.html>.

⁴³ *Id.*

Brownfield Cleanup Program Process



Note: CP Activities are in **Bold**

Key	
BCA=	Brownfield Cleanup Agreement
CP=	Citizen Participation
EC=	Engineering Control
ENB=	Environmental Notice Bulletin
IC=	Institutional Control
RI=	Remedial Investigation

C. Environmental Restoration Program (ERP)

i. Overview

As part of the \$1.75 billion 1996 Clean Water/Clean Air Bond Act, a fund of \$200 million was created for the Environmental Restoration Program (ERP). Under the ERP, the state provides grants to municipalities for reimbursement of up to 90% of eligible costs for on-site investigation and remediation activities and up to 100% of eligible costs for off-site investigation and remediation activities if required by NYSDEC. The property may be used after remediation for commercial, industrial, residential or public use. However, applications have not been approved since 2008 and new applications are not being accepted due to lack of funding.⁴⁴

ii. Pre-application Meeting

NYSDEC recommends holding a pre-application meeting with its staff to discuss the necessary procedures, requirements and benefits of entering the ERP. Before scheduling a pre-application meeting, the NYSDEC suggests that an applicant to the ERP request and submit a pre-application questionnaire to help facilitate eligibility determinations and the pre-application meeting process. A copy of the questionnaire follows:

⁴⁴ NYSDEC, Environmental Restoration Program, <http://www.dec.ny.gov/chemical/8444.html>.

Environmental Restoration Program Pre-application Project Information Sheet

REQUESTED PROJECT INFORMATION

Project Name: name to be used in future correspondence.

Applicant: names and affiliation; representatives for communication with DEC.

Address: of property.

C/B/L: county (or NYC borough)/block/lot.

Proposed Site End Use: residential, retail, etc.

Site Area: acres.

Current use of Site: vacant land, industrial uses (list), parking lot, etc.; active or inactive use.

Development Plan and Costs: area of buildings, parking areas and open space; total square footage of buildings subdivided into use type (residential, retail, etc.); type of parking (open paved, sub grade, etc.); include total development costs; number of jobs to be created.

Water frontage: frontage on waterway (yes/no); linear distance of frontage; name of waterway.

Ownership: Is the land currently owned by the applicants or planned to be purchased? Is the land leased? Is lease holder a party to the application? Can the applicant enter into an environmental easement for the property?

Past Environmental Study: Phase I complete? Phase II complete? List environmental investigations and dates of field work; list available environmental reports.

Nature of Contamination: description of known environmental contamination issues on site (groundwater contamination, soil contamination, leaking tanks, spills, historical fill, illegal waste dumping, etc.) and involved contaminants (VOAs, metals, PCBs, etc.); include summary of pertinent historical land uses.

Soil/Groundwater samples: number of samples of soil and groundwater collected to date; highlights of sample results for contamination (ranges); percentage of the site that has been investigated.

Enforcement History: has the site ever been subject to a Consent Order or other enforcement action with DEC? Give details.

Logistical Issues: is the site currently subject to SEQRA or local zoning (or NYC CEQR, ULURP or other NYC Planning review, for areas in NYC)? Provide details and timeframes.

Community/governmental outreach: list governmental agencies, representative entities (including community boards in NYC) that have been subject of past outreach on this project.

The meeting should cover general ERP information, time frames, the contract process, investigation and fieldwork, remedy selection and action, COC, citizen participation and liability protections. In addition, project information should be covered, including project sponsor information, contact information, and project timelines (including build-out dates, local approvals, etc). Parties should consider a reverse timeline relative to the project schedule, considering when the doors would open, development start, approvals, variances and permits granted, application, State Assistance Contract and COC needed, etc.

The ERP and citizen participation handbooks, fact sheets, application, contract, and technical guidance should all be given out at the meeting. This is a chance for the NYSDEC and the party to gain a mutual understanding of their respective interests and goals.

iii. Eligibility



New York State municipalities are eligible. The term *“municipality”* includes counties, cities, towns and villages as well as local public authorities, public benefit corporations, school and supervisory districts, district corporations, improvement districts, and Indian nations or tribes within New York State. Municipalities that own fee title to the property qualify as a *“temporary owner”* as a result of foreclosure on a tax lien as described in ECL 56-0508. The term *“municipality”* also includes a municipality acting in partnership with a community-based organization (CBO). The term *“community-based*

organization” means a not-for-profit corporation that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, whose stated mission is promoting reuse of brownfield sites within a specified geographic area in which the organization is located, and which has 25% or more of its board of directors residing in the community in such area and represents a community with a demonstrated financial need. The municipality, inclusive of a partner CBO, must not be responsible for the contamination at the site. In addition, municipalities cannot indemnify any responsible party when acquiring the property. A municipality is not eligible if the property is listed as Class 1 or 2 on the New York State Registry of Inactive Hazardous Waste Sites.

The New York statutory scheme permits a taxing district that is foreclosing a tax lien, or a taxing district having the right to foreclose, to assume sufficient indicia of ownership of properties that are subject to a tax lien - without actually taking title - to permit the taxing district to enter the property to conduct an environmental restoration investigation project. This may be accomplished by moving for an appropriate order in Special Term of the court in which the foreclosure proceeding is brought on twenty days notice to all parties having a right in the parcel. The resulting order acts as a stay to the foreclosure action until the investigation project is completed and the final investigation report is filed with the court.

The temporary incidents of ownership are sufficient to allow the taxing district to obtain funding from the State for the project, but the law makes clear that the taxing district will not thereby qualify as the owner of such property for purposes of holding it wholly or partially liable for any damages from a release of hazardous material unless the release was caused by the taxing district. Unless lifted earlier by court order, the stay of the foreclosure proceeding ends upon filing the final report with the court, which report must be filed within thirty days of receipt. Nothing precludes the municipality from withdrawing the parcel from foreclosure. All costs associated with the project are added to the taxes owed and the tax lien.

The purpose of an ERP project is to investigate or remediate contamination (defined in statute as hazardous waste and petroleum) on property held in title by the municipality. The one exception to the site ownership requirement is where a municipality obtains *temporary incidents of ownership*⁴⁵ during a tax foreclosure proceeding for a property in order to conduct a site investigation.

Remediation projects are evaluated based upon five criteria:

- benefit to the environment;
- economic benefit to the state;
- potential for public or recreational use of the remediated property;
- real property in a designated brownfield opportunity area; and
- availability of other funding sources to pay for the project.

iv. Submittal of Application

The ERP requires submission of multiple paper copies and one electronic copy of the application to the Chief of Site Control⁴⁶ as well as one copy to the NYSDEC Regional Contact.

v. Use of Funds

The purpose of Investigation Grants is to determine the nature and extent of contamination and then determine the appropriate remedy. It includes public input on selection of the cleanup remedy and ends with a Record of Decision (ROD). Remediation Grants include the design and construction of the cleanup selected in the ROD. Projects are prioritized using a priority ranking score based on the five criteria listed above.

vi. The State Assistance Contract (SAC)

All parties involved in the ERP must sign a State Assistance Contract (SAC). By signing a SAC, the municipality commits to conduct specific remedial activities under NYSDEC's oversight,

⁴⁵ See NYSDEC DIV. OF ENVTL. REMEDIATION, MUN. ASSISTANCE FOR ENVTL. RESTORATION PROJECTS: PROCEDURES HANDBOOK (2004), at Sec.1.2, available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/erp_handbook.pdf.

⁴⁶The address for this person is Chief, Site Control Section, New York State Department of Environmental Conservation, Division of Environmental Remediation, 625 Broadway, Albany, NY 12233-7020.

and the state commits to reimburse the municipality as provided by law (up to 90% for on-site activities and up to 100% for off-site activities). The law contains specific requirements for the SAC. Each SAC will include: an estimate of the cost of the project; a reimbursement agreement relative to eligible costs; provisions relative to adjustments for future responsible party payments; provisions relative to the distribution of sale proceeds; a commitment to proceed expeditiously with the remedial program; a commitment to perform citizen participation; a commitment to institutional and engineering controls and to submit a plan relative to the same; and a commitment to file necessary environmental easements and permit waivers. Throughout the life of the project, the SAC serves as a guideline for the municipality and assists in the implementation of a remedial program that follows State procedures. The SAC is required for all entities that want to participate in the ERP. The SAC is a standardized document and can be found on NYSDEC's website at http://www.dec.ny.gov/docs/remediation_hudson_pdf/erpsac.pdf.

vii. Investigation

The goal of the remedial investigation is to define the nature and extent of the contamination, locate any sources of contamination, and provide sufficient data to develop a Proposed Remedial Action Plan (PRAP), which outlines the proposed remediation. The RIWP should be consistent with the NYSDEC's *DER-10: Technical Guidance for Site Investigation and Remediation* as well as explain the systematic investigation proposed for the site. Other requirements applicable to the RIWP can be found in Section 3 of *DER-10* and in Section 5 of the NYSDEC document titled "Municipal Assistance for Environmental Restoration Projects Procedures Handbook," which is available on NYSDEC's website at <http://www.dec.ny.gov/chemical/8444.html>.

viii. Remediation

After completion of a remedial investigation showing the need for site remediation, a PRAP can be developed and a ROD issued. The ROD represents NYSDEC's selected remedy for the site.

The PRAP is subject to a 45-day public comment period and a public meeting. After NYSDEC issues the ROD, the municipality can elect to implement the ROD or terminate the SAC. If the municipality elects to implement the ROD, it will reapply and implement the ROD under the terms of the SAC. The municipality should carefully consider its options, including private-public partnerships that may be available to leverage the various brownfield programs, e.g. the BCP, prior to committing to the remedial program.

ix. Certificate of Completion (COC)

The process of obtaining a COC under this program is similar to the process for obtaining a COC under the BCP. When the remediation is completed, the municipality submits a final engineering report to NYSDEC. Upon NYSDEC's determination that the remediation requirements have been or will be achieved, NYSDEC will issue a COC.

NYSDEC may modify or revoke a COC due to a failure to comply with the terms and conditions of the SAC, a misrepresentation of a material fact tending to demonstrate that the cleanup levels were reached, or for good cause.

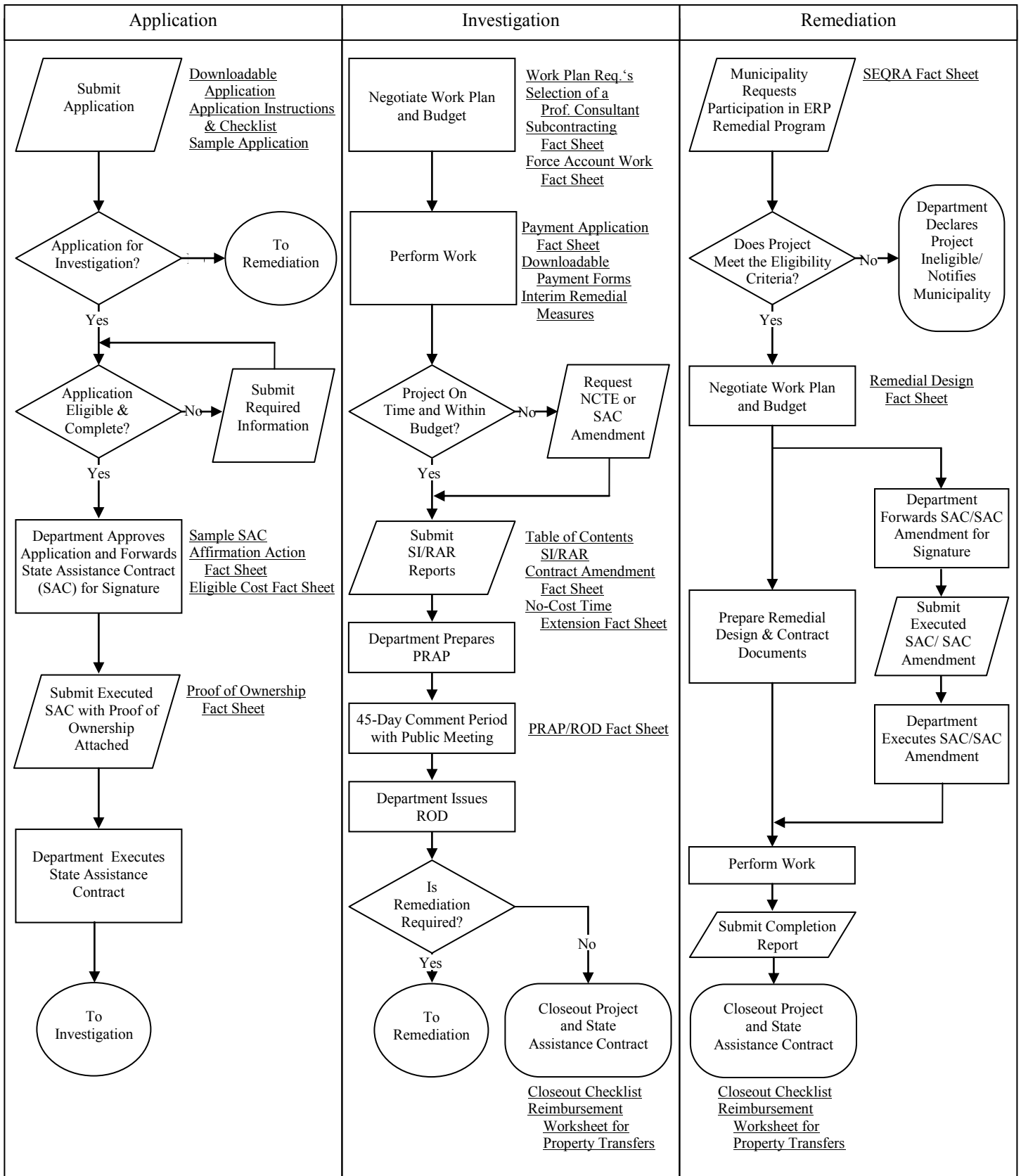
As part of the COC, the municipality receives liability protections including indemnification provided by statute. Specifically, the municipality and all successors in title, lessees and lenders are released from liability by New York State for hazardous substances, including petroleum, that were on the property prior to the grant. New York State indemnifies these same persons in the amount of any settlements/judgments obtained regarding an action relating to hazardous substances that were on the property prior to the grant. These same persons are entitled to representation by the State Attorney General.

x. Public Participation

Under the ERP, the municipality, in cooperation with NYSDEC must provide fact sheets to a contact list throughout the process. The applicant is required to prepare a site-specific CP Plan and provide fact sheets to an established site contact list throughout the project. The CP requirements for all of DER's remedial programs are set forth in *DER-23* and available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der23.pdf. Additionally, a 45-day public comment period must be met before the finalization of the record of decision. The contact list should be composed of the zoning board chairperson or chief executive officer of the brownfield's village, town, city and county, adjacent residents, owners or occupants, local news media, the public water supplier, citizens requesting information and local school administrators, at a minimum.

The chart that follows shows the steps that an ERP project must follow in the NYSDEC's program and indicates the number of steps that are required for Citizen Participation activities and the actual work elements. NYSDEC project managers must follow this chart.

Environmental Restoration Program (ERP) Process



D. Brownfield Opportunity Areas Program (BOA)

i. BOA Program

The Brownfield Opportunity Areas (BOA) Program provides municipalities and community organizations with expertise and financial assistance of up to 90% of the total eligible project costs to complete redevelopment and implementation strategies. Through the BOA Program, more than 100 communities are laying the groundwork to transform brownfields from liabilities to community assets that generate businesses, jobs and revenues for local economies and provide new housing and recreational opportunities. The Department of State administers the BOA Program, and NYSDEC provides relevant technical assistance and advice to the Department of State and BOA grantees, particularly regarding site assessments on strategic brownfield sites in BOA study areas.

Through a community driven process, this program enables community leaders to establish a clear vision and implementation strategy to revitalize and improve areas so they become economically and environmentally sustainable. The BOA Program enables municipalities and community organizations to:

- address a range of problems posed by multiple brownfield sites;
- establish sustainable development goals and objectives;
- build consensus on the future use for the area with an emphasis on redeveloping strategic brownfield sites;
- establish the multi-agency and private-sector partnerships necessary to leverage assistance and investments to revitalize neighborhoods and communities;
- address environmental justice concerns for communities which may be burdened by negative environmental consequences.

Environmental justice is defined as the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.

ii. Area-Wide Approach to Brownfields

The BOA Program emphasizes an area-wide approach, rather than the traditional site by site approach, to brownfield assessment and redevelopment. The area-wide approach enables communities to comprehensively assess existing economic and environmental conditions associated with brownfield blight and impacted areas, identify and prioritize community supported redevelopment opportunities, and to put in motion actions to advance and implement priority projects.

iii. Flexible Planning Framework

The BOA planning framework is flexible and can be adjusted and tailored to meet specific community needs. Within this framework, the BOA Program enables municipalities and community organizations to prepare area-wide revitalization plans and implementation strategies

that include: community visioning; public participation processes; existing conditions analysis; economic and market studies to assist in determining the best use of brownfields and vacant sites; environmental investigations to assess site contamination and environmental conditions; site-specific redevelopment plans; environmental impact assessments and statements; marketing materials to attract developer interest; local law changes; architectural and streetscape design standards and guidelines; and other actions to spur investment, cleanup and redevelopment of brownfield sites. These types of activities are permitted in three program steps:

- **Pre-Nomination Study (Step 1)** - This product enables communities to complete a preliminary analysis of issues and opportunities in the proposed BOA to gain a basic assessment and understanding about existing conditions, brownfields and the area's potential for revitalization.
- **Nomination (Step 2)** - This product enables communities to conduct an in-depth assessment and evaluation of existing conditions and assets in the study area, including an economic and market trends analysis, to determine the best opportunities and reuse potential for strategic sites as well as to identify actions for revitalization.
- **Implementation Strategy (Step 3)** - The Implementation Strategy provides funding for a range of techniques and actions to implement the area-wide plan, advance redevelopment on strategic sites, improve supporting infrastructure, and achieve revitalization objectives.

iv. BOA Designated Areas

Upon a grantee's completion of a BOA Plan (Nomination with Implementation Strategy), the Secretary of State will review and determine the consistency of the BOA Plan with the General Municipal Law (Section 970-r). If the BOA Plan is determined to be consistent with the provisions of the General Municipal Law, the Secretary shall designate the BOA. For implementation assistance, designated areas shall receive priority and preference from the New York State Environmental Protection Fund Programs. Designated areas may also receive priority and preference when considered for other local, state and federal programs.

v. Benefits and Outcomes

Through a community-driven process, BOA Program outcomes include:

- **Effective strategies to achieve revitalization** - BOA Plans establish clear and effective community supported area-wide and site specific redevelopment strategies that specify how areas and sites can be cleaned-up and redeveloped more quickly.
- **Priorities for investment** - Priorities for public and private investment are established that lead to redevelopment and other actions for community renewal.
- **Informing site cleanups** - By conducting site assessments to better understand contamination issues, cleanup options and costs are better understood.
- **Shovel ready sites** - A portfolio of sites that are shovel or near shovel ready and ripe for redevelopment and investment for a range of businesses and uses.
- **Environmental justice** - Environmental justice issues and concerns related to negative environmental consequences are addressed.

- **Marketing to attract investors** - Marketing materials are generated, such as site renderings to illustrate redevelopment potential, descriptive brochures, web displays, requests for proposals and others to attract interest and investment.
- **Public and private partnerships** - Multi-agency and private-sector partnerships are established to leverage investments to redevelop sites, improve supporting infrastructure, and provide needed community facilities.

vi. Eligible Applicants

Funding is awarded on a competitive basis to New York State municipalities, New York City community boards, and CBOs.

vii. Funding Preferences

Funding preferences are directed to areas having one or more of the following characteristics: a concentration of brownfield sites; areas showing indicators of economic distress; project partners and community support; and strategic opportunities to stimulate economic development and community revitalization.

CHAPTER 4

Community Planning: Getting a Brownfield Project off the Ground

A. Overview



To actively remedy the blight of brownfields, one must first formulate a vision for what community residents would like to include in their neighborhoods. A community must decide if it wants more open space for parks, a retail district, residential lots, commercial and industrial areas or a combination of uses. Brownfield sites should be chosen that are compatible with the neighborhoods' redevelopment strategy. For example, communities may want to aim their efforts at identifying brownfield properties that are suitable for residential use if housing is an issue in the community.

Once a site is chosen for potential cleanup, the community or a community organization should gather as much information as possible about the site, develop a plan for what they want to do with it, and strategize how to implement the plan.

B. Sustainable Development and Brownfields

Brownfields harm communities in many ways. Most obviously, the presence of toxic substances poses a potential threat to the health of people who live and work nearby as well as to the environment. Solving the problem of brownfields, however, requires more than just the removal of contaminants from individual sites. Concentrations of brownfields undermine the viability of communities by driving away productive activity and investment, attracting additional harmful uses and lowering the quality of life in entire neighborhoods.

While individual brownfield sites may be successfully redeveloped to address specific community needs, addressing the long-term issues created by brownfields requires a comprehensive vision of the community's future. Without such a vision, decisions about which sites to address, clean, and their new uses will be determined solely by the market. Typically, this results in "cherry-picking," the redevelopment of sites that promise the greatest economic return and often leave small, hard-to-develop sites untouched.

A sustainable approach to brownfield redevelopment asks the question: "Whose needs are met and how?" Community organizing and planning are essential tools for answering that question. A plan created by and for the community can provide a road map to guide future decisions and actions by both public and private entities. The BOA Program, discussed above in Chapter 3, is an excellent tool in creating a community vision and implementing that vision.

C. Community Organizing and Planning

To craft a vision that can address brownfield redevelopment equitably and sustainably, neighborhoods must embrace community organizing and community planning. By organizing,

neighborhood activists send an immediate signal to public/private sector decision-makers (and more importantly, to their neighbors) that their community has an inherent value to protect and the power to exercise that protection. Community organizing provides the political and social benefit of recruiting veteran, emergent leaders and institutions to work together for common goals.

Through community organizing and planning, brownfields can be reclaimed to meet community needs such as housing, open space, and economic development. A vision of a healthy and prospering future allows communities to be proactive rather than simply reacting to proposals initiated by others. Some developers and local governments often put forward brownfield redevelopment proposals with a “take-it-or-leave-it” attitude, and communities are pressured to choose between what they view to be bad development and no development. With a plan on the table, communities can shape the way their brownfields will be reclaimed and can choose from a range of active roles in their development. Plans may be used for comprehensive reform or single site redevelopment.

The process of community organizing and planning involves conducting stakeholder outreach, developing working principles and relationships, and creating decision-making and communication structures. Stakeholders come in many forms at the neighborhood level: residents, religious institutions, community-based organizations, social service agencies, environmental organizations, business and trade organizations, etc. At first glance, some of these entities may have conflicting interests; however, all must be engaged in the planning process for a community plan to withstand charges of elitism or favoritism. In fact, one of the more surprising and educational aspects of community planning is how often shared values and common ground can emerge from the unlikeliest of allies.

i. Organizing

Inclusiveness must be a consistent and central principle for any community plan to ensure that the most marginalized sectors of a neighborhood are stakeholders as well. Empowered community institutions and individuals recognize the value of planning, community development and participate accordingly. Community planning must therefore prioritize outreach to individuals and groups lacking traditional access to resources and information, who are nonetheless impacted (sometimes disproportionately) by brownfields and have a stake in their sustainable reuse. Examples of these groups include:

- community residents
- unfunded block and tenant associations
- grassroots activists
- persons in proximity to brownfield sites
- local business owners and their customers
- local suppliers
- targeted citizens for new redevelopment plans
- creditors or investors

Ideally, organizers should work with these stakeholders to develop communication and decision-making structures to enhance their effectiveness and participation in the community planning process. Considerations should be made for language and cultural barriers, technical backgrounds, literacy and preferred types of communications. Down the line, this kind of capacity building can help community leaders participate in broader, regional policy discussions such as brownfields and Superfund appropriations, smart growth and other anti-sprawl initiatives, and the creation of community development and planning laws.

ii. Land Use Visioning

The creation and implementation of a land use vision requires both community organizing and planning. Once stakeholders have been identified and recruited, and an inclusive planning process and/or structure agreed to, community organizing strategies can adopt community planning techniques. The community's vision must be formed by the community's needs expressed in the planning process. A community planner must work with the stakeholders to articulate those needs. The planner may also need to translate technical language and tools into usable information. Information resources such as land inventories, zoning, demographic, economic, and transportation analyses may initially be intimidating to non-specialists but can be readily understood by participants if they are presented with an adequate explanation. Analyzing these kinds of information can help to identify community assets and clarify community needs.



A community planning process usually requires a process of communication that often unfolds over several months to analyze local conditions and build a community consensus or vision. A common understanding and consensus is developed through neighborhood planning charrettes, educational workshops, networking, meetings, etc. Some discussions may focus on the nitty-gritty of specific issues - such as housing, jobs, or open space. Others may look at the “big picture” and try to integrate many specific concerns into one coherent whole project. Planners can facilitate discussions, suggest ways of addressing key issues, and bring new information such as examples of remediation and redevelopment strategies that have been employed elsewhere.

While community planning as described here may sound technical, in reality the process can be highly emotionally and politically charged. When stakeholders attempt to agree on the plan's vision, tensions may emerge that can sever alliances and break friendships. Why? Discussing a community's needs and the possible remedies cut right to the heart of a person's core beliefs and values. For example, should a site be developed to benefit the largest number of people or the most disadvantaged? The community plan and its attendant vision shows the community priorities and what can or cannot be compromised.

Although difficult, the path to community “visioning” can be made easier if stakeholders can reach consensus on a set of working principles or platform early on in the process. If a workable

set of core principles can be articulated, then choices and decisions can be less personalized. A democratically and sensitively crafted community plan can strengthen relationships, illuminate hidden commonalities, and deepen the political maturity necessary for communities to occasionally compromise to realize their plan. In fact, community planning and coalition-building are almost by definition exercises in compromise.

Once a community plan is complete, the goals of community organizers and planners should be similar: the development of community leadership along with the capacity of community groups to implement their plan and control or influence development in their neighborhoods.

D. Models of Public Partnership

In general, there are few federal and state governmental programs that provide “capital” to community organizations for brownfield redevelopment. Despite this, community groups can nonetheless play crucial roles in the assessment, cleanup and redevelopment processes as developers, watchdogs, advisors, planning partners, instigators and supporters. In cases where a community organization has no control over a brownfield project, they can, at a minimum, play the role of watchdog.

What follows is an assessment of the various roles community groups may take, and relationships they can enter into, during the brownfield redevelopment process:

- Community organization as developer
- Full public control with community as advisor/watchdog
- Community groups partnering with public entities
- Community groups partnering with private entities
- Community organization as catalyst/instigator

Determining the role that community organizations play in this process and which relationships to establish requires careful thought and strategic planning.

Note: Whenever a community organization enters into a partnership with a public or private entity, it may be a good idea at the outset to create and sign a written Memorandum of Understanding (MOU). A properly drafted MOU clearly articulates the expectations and roles of the parties. The writing can be a source to determine whether the parties are abiding by their commitments.

i. Strategy I: Community Organization as a Developer

For certain projects, a community organization may be the actual developer of the brownfield site. To do so, the organization must acquire the property or otherwise obtain control to implement the program and develop plans for the cleanup and redevelopment. The organization will have to work with government agencies to determine what regulatory vehicle is most useful to conduct the work. For example, in New York, oftentimes the developer enters into a Brownfields Cleanup Program (BCP) agreement. The organization may also work with private entities to help raise funds for the various aspects of the project.

This strategy may be very appealing to community organizations. It allows for complete control over the project without substantial interference by other interested parties. However, the mere fact that a community organization has decided to do a project does not mean it will be without controversy. Fewer compromises are expected under this model, encouraging community empowerment.



Many community organizations may find it difficult to acquire property. Site acquisition requires both financial wherewithal and technical and legal expertise. Taking on full responsibility for cleanup and development of a site necessitates a clear vision of the end use of a site. Cleanup or end use planning may be overwhelming if undertaken alone. While the community organization will likely qualify as a volunteer in the BCP, it may have to purchase environmental insurance if unexpected contamination is discovered during the remediation, or if the expected

costs of the cleanup exceed cost estimates. The community organization will not meet the definition of a “taxpayer” for purposes of cashing in on the tax credits under the BCP. The community organization may also have to hire professionals to assist with the cleanup process.

ii. Strategy II: Full Public Control with Community as Advisors/Watchdogs

In this model, a government entity assumes full control over the project, and the community organization concentrates most of its resources on generating support for the project. The community group can also serve as an advisor to the municipality during the planning process and beyond. In addition to any informal advocacy, the community group should take advantage of any formal public meetings, hearings and/or solicitations for public comment to increase the public support for the project and the likelihood of the municipality’s implementation on redevelopment plans.

In some cases, the full government control scenario makes the most sense. Often the land in question is already municipally owned due to tax foreclosure or, if not already owned, then abandoned by its title holder. With most state and federal funding programs available to governmental entities, brownfield restoration is a cost-effective way for a locality to fund sustainable development projects, often in waterfront locations that benefit underserved communities.

A government agency may not be willing or able to clean up and redevelop a site. Managing and maintaining a new project requires more time and expense than allowing the property to stand idle. A new project, therefore, may be perceived as yet another burden on already strained governmental budgets, making government agencies unwilling to commit scarce resources to the expensive and complex task of brownfield redevelopment on a large scale. In these instances, communities may find it extremely difficult to persuade government agencies to engage in the kind of brownfield projects that they desire. Community groups should remind municipalities

that redevelopment often results in more income (taxes), jobs and higher property values, and should be able to back up these statements with examples of successful brownfield projects.

iii. Strategy III: Community Groups Partnering with Public Entities (Public - Private Partnerships)

Many sources of funding for brownfield redevelopment are available only to states, municipalities, governmental agencies, public authorities, and public benefit corporations for publicly owned land. As a result, community groups may choose to partner with public entities for certain brownfield projects. Convincing a public entity to partner with an organization may seem like a daunting task. Coupling community organizing and community education with political pressure may assist negotiations with the municipality.

Much of the federal money allocated for brownfield redevelopment projects is available to *municipalities* only, including the USEPA Brownfields Assessment Grant, which directs funds towards the assessment of brownfield sites. *Municipality* is defined as states, U.S. territories, political subdivisions (including cities, towns, counties), and federally recognized Native American Tribes.⁴⁷ USEPA also offers Revolving Loan Fund and Job Training grants to municipalities, as well as Brownfield Cleanup Grants, which are available to non-profit organizations and municipalities. The more competitive proposals for USEPA's brownfield grants are those that leverage other money, such as Housing and Urban Development (HUD) funds that require financial support from the municipality.⁴⁸ Residents can try to persuade municipalities to join them on the redevelopment effort by approaching or writing to elected officials (i.e. federal, state, county and town).

Given budgetary constraints, municipal and state agencies often seek interagency cooperation as a way of maximizing investments and minimizing expenses. If a proposal has multiple components (such as education, pollution prevention, waterfront revitalization, job training, and local business revitalization), different funding sources may be available, and the project would be more likely to succeed.

Sponsorship of a brownfield cleanup project is costly for a municipality with municipalities often contributing a significant share of costs in the form of matching funds. While such matching funds may consist partially of in-kind contributions from project allies as well as a local legislator's discretionary funds, any major project will inevitably commit a municipality to a significant financial obligation. Brownfield cleanup, however, has the potential to create both short-term and long-term jobs, generate income for contractors, and eventually generate taxes for the municipality. These factors may aid in convincing a reluctant municipality to support a project.

⁴⁷ U.S. EPA, Brownfields and Land Revitalization, Grants & Funding, http://www.epa.gov/brownfields/grant_info/index.htm (last updated Sept. 13, 2010).

⁴⁸ See U.S. Dep't of Hous. & Urban Dev., Community Planning & Development, Brownfields Economic Development Initiative (BEDI), <http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/index.cfm> (last updated Aug. 27, 2010).

a. Formal Partnerships

In addition to advocacy with public entities, a community organization may consider creating a formal partnership with these entities. Over the past 10 years, the public-private partnership model has emerged as a new form of management and control over property.

b. Business Improvement Districts

The creation of a Business Improvement District (BID) may help bring in revenue for management of public spaces. These bodies, chartered by the Town Council or another governing agency, can obtain money from adjoining properties or properties within the statutorily defined zone. These funds are then used for the collective management of the area.

BIDs are being formed in a number of locales on Long Island, notably Greenport, Glen Cove and Port Jefferson. Article 19-A of the General Municipal Law⁴⁹ authorizes the formation of BIDs state-wide.

A BID can take many different steps to promote a community, including:

- forming a Board of Directors which can oversee and implement an annual budget that may be raised through tax assessments
- identifying historical buildings
- erecting lanterns along the main downtown street
- organizing events to be held in the downtown area
- applying for additional grants
- offering reimbursement programs for business owners who improve their buildings or storefronts

Creating a BID provides interesting possibilities as a model for community control in a broader economic revitalization plan. Profit-making businesses are included in larger plans for parks or public spaces, and surrounding businesses are intended to benefit from the overall development. A BID also funnels extra money generated by local businesses into the public spaces of a neighborhood. Community businesses often agree that a healthy environment is not only beneficial to people in the neighborhood, but is good for the businesses as well. Therefore, the BID may be disposed to making decisions that improve the health, environment, and livability of an area.

On a cautionary note, a BID may represent only business interests and may ignore broader community needs or desires for open space, recreation, or control over the nature of for-profit business development. Residents can lose a level of control when the businesses are given the authority to make decisions that impact the whole neighborhood. Therefore, community groups may prefer to avoid situations where private commercial development interests are given priority or outweigh public benefits of the redevelopment. A BID can only be created in areas where there are businesses, so this model is not an appropriate strategy in areas without a business

⁴⁹ N.Y. GEN. MUN. LAW § 980 – 980-q (2010).

presence. In addition, setting up a BID is not a simple task. Community groups will also likely need to hire a consultant to coordinate community outreach to business and neighborhood groups and to oversee the application process.

iv. Strategy IV: Community Groups Partnering with Private Entities

Given both the limited availability of public money and the bias of many programs in favor of proposals that involve the private sector, a successful brownfield redevelopment plan may require a collaborative approach involving not only public support and public end uses, but private investment and private end uses as well.

The goal of a successful public/private partnership should be to balance the interests of the community and the private entity. The plan should meet enough of the needs of private investors to involve them in the plan, while reinforcing the environmental and development goals of the community. In exchange for gaining access to a certain site, or part of a site, a private investor may be willing to invest in the assessment and cleanup of part of the land. A community organization's plan may envision new commercial or retail facilities for which tenants or investors will be necessary. Many brownfield redevelopment projects involve new land uses, such as gardens, parks, housing or commercial space. If a project has the potential to generate significant income, an organization may be better positioned to secure financing for environmental assessment.

The first way to find private investors is to canvass all existing businesses within the area of the brownfield site to assess their needs and get suggestions on potential uses of the proposed site. For example, businesses may want to use part of the land for parking or retail space, or they may simply want to assist in the revitalization of their surroundings. Community groups should then approach lending institutions, banks, corporations and charitable foundations for financial input. The key is to find lending institutions with strong community reinvestment commitments and experience in community development lending (see Chapter 6 for a full discussion of the Community Reinvestment Act (CRA) and what it means for brownfield redevelopment). As soon as a community group starts looking for private partners, it will soon find itself in a larger process, involving both divergent and parallel interests. A plan with the support of a coalition of interests may increase the chances of winning political support and grant money. Getting local businesses or potential investors involved will do a lot to spark the interest in the project of many government agencies.

In some cases, a community group may not hear about the existence of outside investors interested in a site until it receives notice to respond to plans already underway. Even at this late stage, development plans can often be modified to accommodate community needs such as for open space. No matter how the community and private interests ultimately come together, the resulting project(s) should work to everyone's advantage.

If a private entity fully backs the project, it may have the ability to funnel large sums of money into it. In addition, private sector participation may help leverage public funding. Public funding, low-interest loan programs and tax incentives are available to encourage private sector involvement. In particular, financial incentives are available through the Brownfield Cleanup Program tax incentives, existing federal and state empowerment zones, enterprise community

programs, and the USEPA's Revolving Funds (see Chapter 6 for more information on funding sources and tax incentives).

Community organizations may believe that dependence on the private sector and compromising with private interests means too great a loss of control over the project. Also, it may be difficult to locate a private entity or lender willing to take on and finance a brownfield project. Major sources of credit, like financially strong companies, may fear being viewed as “deep pockets,” should any lawsuit over the effects of contamination or adequacy of the cleanup arise.⁵⁰ Moreover, companies are often not interested in financing the return of contaminated properties to the real estate market if there are unacceptable risks involved—and brownfield redevelopments are full of risks.

Many private funding sources are also reluctant to get involved at the early stages of brownfield redevelopment before a scientific assessment has been completed, because (1) the precise total cost of cleanup cannot be determined until the process is well underway; (2) cleanup may open the owner/operator to liability in third party personal injury lawsuits if a cleanup is, for instance, not thorough and harm results; and (3) changes in regulatory standards during the course of cleanup may mean that a different level of cleanup is necessary.⁵¹ These concerns can be addressed in order to make investment more attractive. Public funding (grants, loans and tax credits) coupled with regulatory programs can assist in addressing these concerns and making the investigation of these sites affordable. The investigation will reduce the risk of uncertainty associated with the site contamination. These regulatory programs also address liability concerns (e.g. the BCP provides for release; the ERP provides for an indemnification to the municipality).



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v. Strategy V: Community Organization as Catalyst/Instigator

If a community organization simply wants to get a site redeveloped but does not want to manage the site, it can turn to private investment groups that specifically invest in brownfield sites. Private investment groups generally fall into one of two categories: (1) Vulture Funds, investment groups that purchase, cleanup, and quickly resell brownfield properties at discounted prices;⁵² and (2) Real Estate Investment Trusts (REITs), investment groups that seek out either previously cleaned sites or sites that have minimal contamination. REITs acquire, improve,

⁵⁰ U.S. EPA, POTENTIAL INSURANCE PRODUCTS FOR BROWNFIELDS CLEANUP AND REDEVELOPMENT (1996), available at <http://www.epa.gov/brownfields/insurance/inssvy.pdf>.

⁵¹ See MICHAEL B. GERRARD, BROWNFIELDS LAW AND PRACTICE: THE CLEANUP AND REDEVELOPMENT OF CONTAMINATED LAND § NY.01 (1999).

⁵² *Id.* § 27.02.

manage and sell commercial and residential properties, and in doing so develop management experience and a portfolio of properties.⁵³

It may also make sense to turn to non-profit philanthropic organizations that provide assistance to owners and developers of brownfield projects. Some non-profits will play the same role as the private investment groups described above. For instance, a non-profit could purchase options on contaminated property. The non-profit could then enter into a BCP agreement with the state (which results in the quantification of the cleanup costs). The non-profit could then sell its option to purchase the site and add the developer as a party to the BCP agreement.⁵⁴ Other non-profits may take an equity stake in the property and use it to acquire additional property, conduct environmental assessments and cleanup, and finance environmental insurance premiums.⁵⁵

If the blight of the property is the community group's overriding concern, then this model may be a very good option, since it encourages cleanup and redevelopment, thereby fixing the critical problem.

With this model of development, the community loses a great deal of control. It will have little say about both the level of cleanup undertaken and the end use of the site. Also, developers may be reluctant to devote time and money to a site only to discover that it is not suitable for profitable development.

E. Funding the Planning Process

Planning a brownfield project will take time and resources. Community organizations should develop strategies for funding the planning process from the outset of their work. There are several ways to fund the planning process including grants from the USEPA, the state or funds from private foundations or businesses.

New York State has established technical assistance grants for community-based organizations to increase public awareness, understanding and participation in the remedial program at significant threat sites under the State Superfund and Brownfield Cleanup Programs. See Chapter 6 for information concerning funding for community-based organizations.

Private foundations and businesses may also be willing to provide planning grants to community organizations that are serious about brownfield redevelopment. Foundations may be an attractive option for community groups in cases where investors or lenders require that Phase II assessments be conducted before they will get involved in a brownfield project, or when a development project is culturally valuable but not seen immediately as economically profitable.⁵⁶ Note that brownfield-related grants from foundations are likely to be relatively small and focused on the early research stages of a project. One strategy, therefore, may be to pursue grants that

⁵³ *Id.*

⁵⁴ *Id.* § 27.03(2)(a).

⁵⁵ *Id.* § 27.03(2)(b).

⁵⁶ See *infra* Appendix C for funding information.

encourage or require multiple funding sources as a way of leveraging public and/or private funds.⁵⁷

⁵⁷ For information and assistance on soliciting funds from private foundations, visit the Foundation Center, 79 Fifth Avenue, New York, NY 10003, (212) 620-423, <http://www.fdncenter.org>.

CHAPTER 5

Managing Environmental Liability Concerns

A. Overview



There are federal and state laws, commonly called “Superfund laws,” that regulate the cleanup of contaminated property. These laws designate who is responsible for the cleanup and provide legal recourse if the property is not cleaned up properly. In theory, the ability of governmental agencies to compel the cleanup of private property is one of the more powerful uses of governmental authority. Fear of liability is a main reason why brownfield sites are often not redeveloped. Because of this, it is important that community organizations interested in cleaning up and developing brownfields fully understand laws concerning contaminated property, particularly the liability issues, before taking on a project. Community groups that want to take on other roles in brownfield projects, apart from owner or operator, will also find it useful to understand the legal restrictions and requirements placed on their partners.

It is essential, however, for parties navigating the process of brownfield redevelopment to have some understanding of the allocation of legal responsibility for the cleanup of contaminated sites.⁵⁸ It is important to understand the basics of state remedial statutes as well, particularly as they may set forth cleanup criteria and liability provisions different than what is established by the federal statute (see the next section on the New York State Superfund Program and Navigation Law—Oil Spill Program—for more information).

B. The Federal Programs

The major federal statute involved in the cleanup of contaminated sites is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund),⁵⁹ which is

⁵⁸ 42 U.S.C. § 9607. See GERRARD, *supra* note 51, § 3.01(1) (“In simple terms, CERCLA imposes liability on current and former owners and operators of contaminated property and on parties that arrange for disposal of wastes, and the potential for such liability discourages parties that arrange for disposal of wastes, and the potential for such liability discourages parties from beginning involved with ownership, cleanup, development, and use of Brownfields sites.”)

⁵⁹ 42 U.S.C. §§ 9601-9675.

primarily administered by the USEPA. First enacted in 1980, CERCLA creates a regulatory mechanism for investigation, cleanup, and recovery of costs of polluted sites.

The federal Superfund law contains several categories of entities legally responsible for contamination of property. These include *owners* and *operators* of the site (both past and current), generators of waste deposited at the site also referred to as *arrangers*, and *transporters* which are entities that brought the hazardous waste to the property.

i. The Federal Superfund Program

Historically, property owners were legally responsible for any nuisance including contamination originating on their property.⁶⁰ Modern Superfund laws are founded on this theory and other traditional nuisance principles and considerably expand owners' liability for the remedy or the removal of the nuisance. For instance, under Superfund, former and current property owners or operators are considered Potentially Responsible Parties (PRPs)⁶¹ and may be held "jointly and severally liable" for the costs of cleanup of contamination and pollution on their properties.⁶² "Joint and several liability" means that if there are a number of PRPs, each can be held responsible for the entire cleanup, regardless of their level of participation in the contamination of the property. Also, PRPs are held strictly liable under the Superfund scheme of liability. In other words, PRPs can be held responsible for the cleanup of the contamination even if they were not negligent and obeyed all laws. PRPs are liable for the costs of returning the site to a state that, at minimum, "assures protection of human health and the environment."⁶³ Lastly, PRPs are held liable retroactively; in other words, PRPs are held accountable even though the environmental acts resulting in liability predated the CERCLA statute by years, decades or even a century.

Superfund allows the USEPA to proceed with cleanup and recover the costs from a PRP through a variety of mechanisms including litigation. This usually happens when a cleanup is required and the PRP refuses to respond or cannot be found at the time of the cleanup.⁶⁴ If a situation is threatening the public health or welfare due to hazardous substances released from a facility, the USEPA may seek an injunction or other relief from the District Courts, or the USEPA can issue its own order to the owner to eliminate the danger immediately.⁶⁵ If an owner does not comply with the injunction or other order, the owner may be subjected to onerous fines. In addition, the state, municipal governments and private citizens also have certain rights to sue PRPs in order to recover the costs of cleanup the private citizen incurred under Superfund.⁶⁶

⁶⁰For a discussion of common law doctrines of nuisance and environmental law, see ROBERT V. PERCIVAL, ET AL. ENVIRONMENTAL REGULATIONS: LAW, SCIENCE, AND POLICY 73-77 (1996).

⁶¹GERRARD, *supra* note 51.

⁶²42 U.S.C. § 9607(a).

⁶³*Id.* § 9621 (d).

⁶⁴*Id.* §§ 9604(c)(5), 9607, 9613(f), 9613(k)(D), 9622.

⁶⁵*Id.* § 9606.

⁶⁶*Id.* § 9607.

ii. Site Cleanup under the Federal Superfund Program

Compared to the vast number of contaminated sites located throughout the nation, very few have been cleaned up with Superfund funding. For a site to be cleaned up by the USEPA using federal Superfund money, it must be listed on the National Priorities List (NPL),⁶⁷ which includes those contaminated sites that the federal government has judged in need of cleanup due to potential for harm to human health and the environment. As of June 15, 2010, there were only 1,279 Superfund sites listed on the NPL. The NPL can be accessed at <http://www.epa.gov/superfund/sites/npl/index.htm>. However, in 1996, the United States General Accounting Office estimated that there were some 450,000 brownfield sites around the country still in need of cleanup.⁶⁸

Some environmental contaminants such as petroleum, natural gas, natural gas liquids, liquefied natural gas, and synthetic gas usable for fuel are excluded from Superfund's definition of hazardous substances.⁶⁹ This means that, in general, oil spills and oil pollution are not covered by Superfund. However, they are covered by the Federal Oil Pollution Act and New York State Navigation Law.⁷⁰

In 1986, through the Superfund Amendments and Reauthorization Act (SARA), the Superfund statute was amended and provided rather significant changes to USEPA's scheme of enforcement.⁷¹ Among other actions, the amendment established a separate Superfund Trust Fund for emergency interventions for newly created or discovered illegal toxic waste dumps and "orphan" Superfund sites (a site without an owner who can pay the cost of the cleanup).⁷² The Superfund Trust Fund is financed from continuing source taxes,⁷³ but it is limited in its scope by the size of the reserve that it can maintain. Under SARA, the USEPA is empowered to remove waste from a site on an emergency basis. The removal action stops the release of the hazardous substances causing the emergency; however, additional contamination that must still be cleaned up may be left behind. In order to cleanup any left-over contamination, the responsible party must go through the original Superfund process.

⁶⁷ 42 U.S.C. § 9605(a)(8)(B).

⁶⁸ U.S. EPA, National Priorities List, <http://www.epa.gov/superfund/sites/npl/index.htm> (last updated Oct. 21, 2010).

⁶⁹ U.S. EPA, OFFICE OF THE CHIEF FINANCIAL OFFICER, A GUIDEBOOK OF FINANCIAL TOOLS: PAYING FOR SUSTAINABLE ENVIRONMENTAL SYSTEMS (2008), available at <http://www.epa.gov/efinpage/guidebook/guidebooktp.htm>.

⁷⁰ 42 U.S.C. § 9601(14). *See also* 42 U.S.C. § 9601(33) for a similar exclusion from the definition of "pollutant or contaminant." For EPA regulations that identify characteristics of hazardous wastes and list particular wastes subject to standards regarding generation, transportation, management and disposal *see* 40 C.F.R. pt 261; *see* Oil And Hazardous Substance Liability Act, 33 U.S.C. § 1321 (2006); *see also* New York State Oil Spill Fund Act, N.Y. NAV. LAW. §§ 170 – 187 (2010).

⁷¹ Superfund Amendment and Reauthorization Act Of 1986 ("SARA"), Pub. L. No. 99-499. For complete classification of this Act to the Code, see Short Title of 1986 Amendments note set out under 42 U.S.C. § 9601 and Tables.

⁷² *See* 42 U.S.C. § 9611(a).

⁷³ *Id.* § 9606(a).

iii. Parties Responsible under the Federal Superfund Program

The federal Superfund law contains several categories of entities legally responsible for contamination of property. These were mentioned earlier in the chapter and include *owners* and *operators* of the site (both past and current), generators of waste deposited at the site, also referred to as *arrangers*, and *transporters* which are entities that transfer the hazardous waste to the property (usually for storage or disposal).

Lenders may be liable if they manage the property in certain ways where they exercise substantial control over how the property is operated/managed. In 2002, the federal Superfund law was again amended.⁷⁴ This amendment created certain exemptions from liability including very small contributors, called *de micromis* parties.⁷⁵ In addition, certain contributors of municipal solid waste such as households and small business non-profit generators were also exempted from liability.

It is important to note that Superfund recognizes a liability defense known as the *innocent landowner defense* for current owners that acquire contaminated property but were unaware that the contamination was present.⁷⁶ If that owner can prove it is an innocent landowner (that is, it did not know or had no reason to know that the property was contaminated after having undertaken *all appropriate inquiry* into the site's history (see description of All Appropriate Inquiry Standards in Chapter 2 under Section F *Phase I Environmental Site Assessments*), it may be released from liability for cleanup of the contamination.⁷⁷ However, the courts have broadly interpreted a number of complicated restrictions on the use of the innocent landowner defense resulting in limited use for this defense.⁷⁸ Additionally, Superfund also recognizes a liability defense for a *bona fide* prospective purchaser for current owners that acquire contaminated property after January 11, 2002 and after having undertaken all appropriate inquiry (see above), even if they were aware that the contamination was present. Such an owner may be released from liability for cleanup of the contamination, but the contaminated property itself may be subject to a lien in favor of the United States for its unrecovered response costs.⁷⁹

iv. Impediments to Successful Cleanups under the Federal Superfund Program

Superfund was intended to clean up contaminated sites, but its success over the last 20 years has been modest because of several problems. First, the process takes a long time. PRPs and surrounding communities are required to receive notice of and have ample opportunity to

⁷⁴ Small Business Liability Relief and Brownfields Revitalization Act, Pub L. No. 107-118, 115 Stat. 2356.

⁷⁵ See U.S. EPA & U.S. Dep't of Justice, Memo re: Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties (November 6, 2002), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/wv-exmpt-dmicro-mem.pdf>.

⁷⁶ 42 U.S.C. § 9601(E).

⁷⁷ *Id.* § 9601(35)(B). For purchases before May 31, 1997, the appropriateness of the inquiry is determinable on a case-by-case basis; for purchase on or after May 31, 1997, an inquiry in compliance with American Society for Testing and Materials Standard 1527 is considered to be appropriate, see 40 C.F.R. § 312.2.

⁷⁸ Martin A. McCrory, *Who's on First: CERCLA Lost Recovery, Contribution, and Protection*, 37 AM. BUS. L.J. 3, 18 (1999).

⁷⁹ 42 U.S.C. § 9601(40), 9607(r).

comment on cleanup proposals for contaminated sites.⁸⁰ To safeguard public health and properly identify PRPs, testing and scientific evaluation of the site and contaminants must be thorough and meet the highest standards. The testing and cleanup can be very expensive.

Further, the cost of litigation to the government for recouping expenditures on cleanup is also high. Additionally, New York's Superfund Program is very active, thus limiting the need for federal involvement at many sites. Due to these and other reasons, the number of site cleanups undertaken by the federal Superfund is significantly limited.

v. The Federal Brownfields Program

The 2002 amendment to CERCLA⁸¹ also codified the federal brownfields program. The program was created in the 1995 USEPA Brownfields Initiative as an alternative to the Superfund process. That program strived to get contaminated properties redeveloped by providing seed money to local governments to identify local brownfield sites, begin community planning and form public/ private partnerships. The 2002 law expanded USEPA's efforts by providing for expanded grants to public and private entities and giving liability relief to prospective purchasers of contaminated properties. USEPA brownfield grants can now also address petroleum contamination. The 2002 law expanded USEPA's assistance by providing new tools for the public and private sectors to promote sustainable brownfield site assessment, cleanup and reuse. The law authorizes up to \$200 million per year for brownfield assessment and cleanup.⁸² It includes \$50 million per year or 25% of amount appropriated for brownfields with petroleum contamination. The USEPA is authorized to award grants of up to \$200,000 per site to eligible entities to inventory, characterize, assess and conduct planning at brownfield sites as well as cleanup brownfields owned by the grant recipient. Finally, it is authorized to award grants of up to \$1 million to eligible entities to capitalize revolving loan funds to clean up brownfields. For further information on available grants, visit http://www.epa.gov/brownfields/grant_info/index.htm.

The American Recovery and Reinvestment Act of 2009 (ARRA) provided \$100 million of stimulus funds to the USEPA's Brownfields Program to provide financial assistance to eligible applicants through four types of brownfield grants: the assessment, revolving loan fund (RLF), cleanup, and job training cooperative agreements.⁸³ USEPA staff and Recovery Act fund recipients will work together to collect information about the expected outputs and outcomes of brownfields cooperative agreements. Brownfields cooperative agreements funded under ARRA have some different requirements than those funded with regular program funds.⁸⁴

⁸⁰ *Id.* 9617(a)-(b).

⁸¹ Small Business Liability Relief and Brownfields Revitalization Act, Pub L. No. 107-118, 115 Stat. 2356.

⁸² U.S. EPA, Brownfields and Land Revitalization, Summary of the Small Business Liability, Relief and Brownfields Revitalization Act, <http://www.epa.gov/brownfields/laws/2869sum.htm> (last updated Sept. 13, 2010).

⁸³ For further information, see U.S. EPA, Guidance to Recipients for Implementing the Brownfields Assessment, Revolving Loan Fund (RLF) & RLF Supplemental, Cleanup and Job Training Cooperative Agreements Awarded Under the American Recovery and Reinvestment Act of 2009, available at http://epa.gov/brownfields/pubs/acres/arra_report_guidance.pdf.

⁸⁴ These differences are: (1) No cost share requirement for ARRA cleanup, RLF or RLF supplemental grants; (2) No percentage limitations between loans and sub-grants for RLF and RLF supplemental cooperative agreements; (3)

C. New York State Programs

i. New York State's Superfund Program

The New York State Legislature established the Hazardous Waste Remedial Fund⁸⁵ (often referred to as the New York State Superfund) and authorized NYSDEC to use this fund to cover the costs of inactive hazardous waste disposal site remedial programs. The fund may be used for cleanup of sites, financing the non-federal share of a Superfund cleanup, for emergency response cleanup and abatement, and state costs associated with BCP off-site remedial programs.

NYSDEC maintains a list of contaminated sites called the State Registry of Inactive Hazardous Waste Disposal Sites.⁸⁶ The public can search this list on the Environmental Site Remediation Database on NYSDEC's website at <http://www.dec.ny.gov/chemical/brownfields.html>. NYSDEC has designated five site categories based upon threats to the public based on the site.⁸⁷ Class 1 sites pose imminent risk and require immediate action. Class 2 sites pose significant risk. Class 3 sites do not pose significant risk, but the classification is used only when there is sufficient information available to conclude there is no significant threat. Class 4 is for closed sites with proper management; and Class 5 sites are for properly closed sites. A more detailed definition of the classification can be found at <http://www.dec.ny.gov/chemical/8663.html>. Since the Registry is informational in nature, a site does not have to be on the Registry for NYSDEC to act.⁸⁸

NYSDEC, as with the USEPA, has the authority to enter any inactive hazardous waste disposal site or any nearby areas to inspect the premises and collect samples of waste and environmental media.⁸⁹ 10 days advance notice of sampling involving the substantial disturbance of the ground surface must be provided to the owner, although the notice period may be abbreviated to two days for good cause, and the results of any analyses of such samples must be furnished to



Additional statutory reporting requirement: 10 days after the end of each federal fiscal quarter in www.FederalReporting.Gov; (4) Additional reporting requirement in EPA's Assessment, Cleanup & Redevelopment Exchange System (ACRES): interim measures (assessment/cleanup start; loan/sub-grant signed); (5) Compliance with the 'Buy American' provision of the Recovery Act.

⁸⁵ As with CERCLA, the state Superfund is a limited solution that reaches only the most severely polluted sites. The vast majority of contaminated sites that are called Brownfields remain untouched.

⁸⁶ N.Y. ENVTL. CONSERV. LAW § 27-1305(1).

⁸⁷ *Id.* § 27-1305(2)(b); N.Y. COMP. CODES R. & REGS. tit. 6, § 370-1.8(a)(2).

⁸⁸ N.Y. COMP. CODES R. & REGS. tit. 6, § 370-1.8(b).

⁸⁹ N.Y. ENVTL. CONSERV. LAW § 3-0309, (3)-(5).

the owner or operator. The cost is recoverable from a responsible party.⁹⁰

While New York has a Superfund program, the federal Superfund still applies to sites in the State of New York. The New York State Superfund is an additional program which complements but does not replace the federal program.

a. Responsible Parties under the State Superfund Program

Under State law and regulations, responsible party means any of the following⁹¹ subject to the certain defenses, exemptions, and/or limitations.⁹²

- Any person who currently owns or operates a site or any portion thereof.
- Any person who owned or operated a site or any portion thereof at the time disposal of hazardous waste.
- Any person who generated any hazardous waste disposed at a site.
- Any person who transported any hazardous waste to a site selected by such person.
- Any person who disposed of any hazardous waste at a site.
- Any person who arranged for:
 - the transportation of any hazardous waste to a site; or,
 - the disposal of any hazardous waste at a site;
- Any other person who is responsible according to the applicable principles of statutory or common-law liability pursuant to ECL 27-1313.4.

The owner or other responsible party is liable for the cleanup of the property.⁹³ NYSDEC will order the appropriate person to clean up the property and indicate a time period in which the cleanup must occur. If there is danger of lasting damage to the environment, or a significant threat to human health from the site, NYSDEC may clean it up itself. In such cases, NYSDEC may seek to recover the full cost of the cleanup from the responsible parties.

ii. Oil Spill Program

Each year, thousands of spills of petroleum occur in New York State. The resultant contamination can foul our drinking water below drinking water standards, thereby threatening public health (a single cup of gasoline can foul about 450,000 gallons of drinking water, roughly the amount of water in an Olympic-size swimming pool). Given the seriousness of this threat, the State of New York has enacted laws aimed at preventing spills and, when spills occur, assuring their prompt cleanup.

To prevent petroleum spills from occurring, the state enacted the Petroleum Bulk Storage Act which is found in Title 10 to Article 17 of the Environmental Conservation Law.⁹⁴ The act subjects facilities to state regulation (above ground or underground) if they have a capacity

⁹⁰ *Id.*

⁹¹ N.Y. COMP. CODES R. & REGS. tit. 6, § 375-1.3(u).

⁹² N.Y. ENVTL. CONSERV. LAW. § 27-1323.

⁹³ *Id.* § 27-1313(3)(a).

⁹⁴ *Id.* § 17-1001 - 1017.

greater than 1,100 gallons. Regulations implementing the act impose facility design requirements to prevent spills, containment requirements to assure that a spill will not contaminate the state's waters, monitoring and testing requirements to detect a spill should one occur, and a reporting requirement to assure prompt state response and oversight of cleanup activities.

Article 12 of the Navigation Law forms the framework of the state's Oil Spill Program, various aspects of which are implemented by NYSDEC, the Office of the State Comptroller, and the Attorney General. As discussed more fully below, when a discharge of petroleum occurs, Article 12 assures that the spill is cleaned up and the person(s) responsible are held liable.

Article 12 has three principal features. First, it prohibits the discharge of petroleum into the waters of the state and onto the land from which it might flow into the waters of the state. Persons responsible for a spill are required to notify the NYSDEC within two hours after the discharge occurs. Article 12 holds dischargers strictly liable for all cleanup costs and resulting damages, both direct and indirect, and subjects them to penalties of up to \$25,000 per day.

Second, Article 12 directs that upon the occurrence of a spill, NYSDEC ~~shall~~ respond promptly and proceed to cleanup and remove the discharge..." In most cases, NYSDEC will direct the discharger to do so under its supervision. If the discharger is unable to perform the cleanup or refuses to do so, NYSDEC will hire contractors to undertake the necessary work. Article 12 also authorizes the NYSDEC to allow someone else, such as a volunteer, to perform the cleanup.

Third, in order to provide funds to pay NYSDEC spill cleanup contractors, Article 12 created a non-lapsing, revolving fund called the New York Environmental and Spill Compensation Fund (Spill Fund), which is administered by the State Comptroller. The Spill Fund gets its revenue from a license fee charged on each barrel of petroleum sold in New York State and the reimbursement costs, interest, and penalties from parties that have spilled petroleum. The Spill Fund also is used to pay for any damages resulting from a spill (including property damage) and costs incurred to relocate people imperiled by the spill. Most of the funding for the Spill Fund comes from a licensing fee that the NYSDEC collects from so-called major petroleum facilities – those having a capacity of 400,000 gallons or more. If NYSDEC expends Spill Fund money to perform a cleanup, the Attorney General's Office will represent the state in seeking to recover that money from the responsible party or parties and, where appropriate, penalties. To secure the recovery of those funds, Article 12 authorizes the Administrator of the Spill Fund to impose an environmental lien on the property where the discharge occurred.

a. Parties Responsible under the Oil Spill Program

Article 12 defines the term *discharge* to mean "...any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters . . ." (Emphasis added). The statute does not define the term ~~discharger~~." Nevertheless, it is clear that any person whose actions cause a spill will be deemed to have discharged petroleum and be liable under Article 12 for all cleanup costs, damages, and penalties. Moreover, court decisions involving petroleum spills have interpreted Article 12 to

impose broad liability. The following examples of persons held responsible for petroleum spills illustrate the reach of the statute:

- the owner of leaking tanks (including the company that owns the tanks at a gas station and a homeowner whose heating oil tank leaked);
- the operator of a gas station;
- the driver of a truck that spilled petroleum as the result of an accident he did not cause;
- the company that delivered oil and repaired the tank that leaked;
- the seller and installer of an oil tank that leaked; and
- a company that brokered the delivery of petroleum to a tank that leaked.

The courts have wrestled with the issue of whether liability can be imposed on a landowner who does not own the tank that leaked or who acquires the property after the spill occurred. In 2001, the Court of Appeals provided some clarification when it held a trailer park owner liable for a petroleum spill by one of its tenants in the case of *State v. Green* (96 N.Y.2d 403 (2001)). In that case, the court predicated the landowner's liability on its capacity to take action to prevent a petroleum spill, i.e., the landowner's ability to control activities of tenants occupying on its land.

On October 19, 2004, the Court of Appeals handed down a second important decision addressing landowner liability. In the case of *State v. Speonk Fuel, Inc.*, a purchaser who bought property with knowledge that it was contaminated and who did nothing to facilitate a cleanup was held liable for cleanup costs incurred by the state. In the *Speonk* case, the court imposed liability on the purchaser, even though the spill occurred and the leaking tank was removed before the transfer of title. Speonk knew that the seller's tank had leaked and that a cleanup was needed but did nothing. The court noted that Speonk could have facilitated a cleanup by negotiating terms that required the seller to clean up the site or that put funds in escrow to pay for a cleanup. Although Speonk did not cause the spill, its capacity to facilitate a cleanup and its failure to do so resulted in the court holding Speonk liable.

b. 2003 and 2004 Amendments to the Oil Spill Program

Recent amendments to Article 12 of the Navigation Law (Chap. 1, Laws of 2003 and the technical amendments contained in Chap. 577, Laws of 2004) created protection from liability for petroleum spills. This liability protection takes two forms: for a responsible party, the amendments establish certain defenses to liability; and for lenders, the amendments create an exemption from liability.

The new defenses are contained in N.L. (Navigation Law) § 181.4 and excuse "a person responsible for a discharge of petroleum" from liability, if that person can prove all of the necessary elements of the defense in an administrative enforcement proceeding or in judicial litigation. These defenses proceed from the assumption that the person asserting a defense is otherwise liable for the discharge, and the only way to avoid that liability is to prove the defense.

The courts have not had an opportunity to interpret section 181.4. However, its basic elements can be readily identified. Section 181.4 establishes two categories of defense against liability for a discharge and one exemption from liability.

The first category of defense actually includes three alternative defenses. Under this first category, a ~~person~~ "responsible for a discharge of petroleum" may be excused from liability due to: 1) an act of war (presumably, this could be construed to include a terrorist act); 2) an act of sabotage (presumably, this includes acts of vandalism and possibly terrorism); or 3) government negligence (the statute does not define this term; however, the term negligence applies to both an act or an omission—an omission is a failure to act).

Each of the three defenses requires proving two elements. In order to prevail—to avoid liability—the ~~person~~ "responsible for a discharge of petroleum" must prove both: 1) an act of war; or an act of sabotage; or government negligence; and 2) that the act of war or sabotage or government negligence was the sole cause of the discharge.

The second category of defense is the one that has generated the most interest. In general, it excuses ~~a~~ "person responsible for a discharge of petroleum" from liability, if he/she/it can prove that the discharge was caused solely by an act or omission of a third party. This defense was intended to protect so-called ~~innocent~~ "purchasers" (this term is not used in the statute). The statute does not define the term *third party*, but it does expressly exclude certain persons from that term. A *third party* does not include the responsible person's employee or agent, or one whose act or omission occurs in connection with a contractual relationship with the responsible person. In other words, one cannot avoid liability by claiming that their employee or contractor caused the discharge.

To prevail with this third party defense, ~~a~~ "person responsible for a discharge of petroleum" must prove: 1) that the discharge and the resulting cleanup and removal costs were caused solely by an act or omission of a third party; 2) that the responsible person exercised due care with respect to the petroleum concerned taking into consideration the characteristics of petroleum and in light of all relevant facts and circumstances; and 3) that the responsible person took precautions against the acts or omissions of any such third party and the consequences of those acts or omissions.

Proving all those required elements may be quite difficult. Even where ~~a~~ "person responsible for a discharge of petroleum" demonstrates all of the necessary elements to any of these defenses, liability still may result, if the state proves that the responsible person refused or failed to report the discharge or provide all reasonable cooperation and assistance in cleanup and removal activities undertaken by NYSDEC.

In addition to the defenses described above, the recent amendments to section 181.4 also create an exemption from liability for banks that hold security interests (e.g. a mortgage) on spill sites or foreclose on those security interests. Entities which fall within the definition of *lender* found in ECL 1323(1)(c) will be exempted from liability. However, a lender must not have participated in the management of the site. In addition, if a lender forecloses on the security interest, it must divest itself of the site ~~—~~ "...at the earliest practicable, commercially reasonable time."

iii. New York State Brownfield Programs

As noted in Chapter 3, New York State has various brownfield programs which address liability at contaminated sites. Please see Chapter 3 for information on liability releases under the Brownfield Cleanup Program (BCP) and Environmental Restoration Program (ERP).

D. New York City's Brownfield Cleanup Program

The New York City Brownfield Cleanup Program (NYC BCP) is a new program operated by the New York City Mayor's Office of Environmental Remediation (OER) to help landowners and developers clean up contaminated property and facilitate redevelopment.

It is a program that is part of New York City's response to the problems of numerous smaller brownfields outlined in PlaNYC 2030 – New York City's comprehensive sustainability blueprint. In April 2007, New York City announced PlaNYC, a Plan it developed to meet the challenges of growth over the next 25 years and to create a sustainable New York City. PlaNYC recognizes that the land area within the five Boroughs is finite and that to accommodate the expected increase in population of one million people over the next two decades, this finite land area must be effectively utilized and re-vitalized through brownfields redevelopment.

NYC BCP closely parallels the State's Brownfield Cleanup Program (NYS BCP) but does not replace it. Unlike the NYS BCP, the NYC BCP does not involve issuance of tax credits. Rather, the NYC BCP's intent is to ensure that certain brownfield sites, those with light-to-moderate levels of contamination, have the opportunity to be remediated with governmental oversight utilizing remedies that are protective of human health and the environment and put back into productive use. It is the first municipal Brownfield Cleanup Program in the nation.

The NYC BCP uses several criteria to determine if the proposed remedial plan for a site fits within its program. These criteria include the following factors:

Threshold Criteria - all remedial approaches must satisfy threshold criteria for the intended usage:

- Protection of public health; and
- Protection of the environment.

Balancing Criteria:

- Compliance with standards, criteria and guidance;
- Short-term effectiveness and impacts;
- Long-term effectiveness and permanence;
- Reduction of toxicity, mobility and volume of contaminated material;
- Implementability;
- Cost-effectiveness;
- Community Acceptance;
- Land use; and
- Sustainability of the remedial action.

Remedial plans that include permanent remedies, including complete source removal or treatment are preferred. However, engineering and institutional controls can be used as part of the remedy for a NYC BCP site if potential human health exposure pathways are addressed and off-site migration of any contaminants are controlled. Potential human health exposure pathways are evaluated by the NYC Department of Health and Mental Hygiene (NYC DOHMH).

The NYC BCP provides opportunities for redevelopment and revitalization of contaminated vacant or underutilized urban land and will protect public health and the environment, increase job creation within the affected communities, support the evolution of neighborhoods into the twenty-first century, and generate new revenues. Properties that complete their remedial plans receive a Notice of Completion, (similar to the NYS BCP’s Certificate of Completion), which includes a liability limitation issued by New York City against future environmental claims on the property, and issuance of a New York City Green Property Certification that evidences the City’s confidence that the implemented cleanup of the property is protective of public health and the environment.

i. Program Eligibility

Similar to the NYS BCP, an owner and/or developer looking to enter into the NYC BCP must first determine whether the property is eligible for entry into the program. Although participation is open to all real property located within the five Boroughs of the City of New York, there are several exceptions that are ineligible including:

- Sites already participating in the New York State Programs;
- Sites listed in the NYSDEC Registry of Inactive Hazardous Waste Disposal Sites;
- Sites on the USEPA National Priorities List;
- Hazardous waste treatments, storage, or disposal facilities permitted under ECL 27-0901;
- Sites subject to cleanup under the Navigation Law or the Environmental Conservation Law;
- Sites subject to an ongoing State or Federal enforcement action regarding solid or hazardous waste or petroleum.

Sites that are already subject to an existing New York State Program may still qualify for the NYC BCP if they enroll as a “Coordinated Brownfield Site.” For example, a petroleum spill site being managed under the NYSDEC Spills Program may still be eligible for the NYC BCP. The



portion of the property that has been found to have petroleum contamination is managed under NYSDEC authority, while the remainder of the property is managed under the NYC BCP.

Participation in the NYC BCP requires a fully-executed NYC Brownfield Cleanup Agreement (NYC BCA). Similar to the NYS BCP, the NYC BCP has two different types of applicants, Volunteers and Participants, with different on-site

and off-site obligations. A Volunteer is an applicant that has no responsibility for the disposal or discharge of contaminants at the site, or whose liability arises solely from site ownership acquired after the disposal/discharge of contaminants, provided that the property owner has taken reasonable steps to stop any continuing release, prevent any threatening future release, and prevent or limit human, environmental, or natural resources exposures to any previously-released contaminants. A Participant is an applicant that owned or operated the site during the time of the site contamination or whom is otherwise responsible for the contamination.

Contamination covered by the NYC BCP includes hazardous waste and petroleum contamination in any environmental media including soil, historic fill, surface water, groundwater, soil vapor or indoor air. To render a site protective for its intended land use (e.g. unrestricted, restricted residential, restricted commercial, or restricted industrial), the NYC BCP utilizes the State's recently enacted soil cleanup standards and alternative cleanup tracks found at 6 NYCRR Part 375-3.6.

ii. Brownfield Incentive Grants (BIG)

One of the incentives offered to an applicant entering into the NYC BCP is the availability of the City's Brownfield Incentive Grant (BIG) Program. These grants can be used to pay for the costs associated with transforming brownfields from contaminated, underutilized sites into productive properties.

The BIG Program provides financial assistance for qualifying brownfield properties, preferred community development projects, and applicants for and recipients of Brownfield Opportunity Area (BOA) grants. The BIG Program grants can be used toward funding:

- Pre-Development Design Studies
- Environmental Investigations
- Environmental Cleanups
- Purchase of Environmental Insurance
- Technical Assistance Services for Not-For-Profit Groups
- Technical Assistance Services for Groups Interested in Developing Applications for the BOA Program
- Local Match Funding for an existing BOA Group

The BIG Program also offers bonus grants for achieving more stringent "Track-1" type cleanups, for BOA strategic properties enrolled in the NYC BCP, and for sites that have completed E-Designation or Restrictive Declaration Hazardous Materials cleanups. A complete description of the various grants available is found at <http://www.nyc.gov/BIG>.

The amount of these grants varies but may generally range between \$60,000 to \$100,000 for most projects. The larger grants are aimed at preferred community development projects.

iii. Brownfield Partnership

Another part of the brownfields revitalization effort is the NYC Brownfield Partnership. This innovative ‘Partnership’ is a voluntary association of brownfield industry stakeholders and professionals that actively practice in NYC. It includes developers, environmental consulting firms, law firms, remediation contracting firms, not-for-profit brownfield development firms (Member Firms), academic institutions, and community-based organizations. It is intended to provide services and benefits to NYC communities and residents and to promote sustainable brownfields management. The Partnership offers services that include pro-bono environmental counseling, support for green jobs training programs, brownfield internships and scholarships with environmental consulting firms, and an informative and exciting annual Brownfield Awards Program. This Partnership is not an agency of the City of New York.

iv. Searchable Property Environmental e-Database (SPEED)

This new (2010) on-line application commonly called SPEED is designed to assist users (developers and other brownfields stakeholders) to examine environmental and other site data on properties throughout the five Boroughs. One application in the SPEED portal, the Vacant Property Database (VPD), provides previously difficult-to-access historical land use and related Phase I ESA – type basic information on over 3,000 vacant privately-owned lots. Users can browse by navigating with the map interface or by searching for a desired property or location, print out maps, and create reports.

v. Sustainability

The NYC BCP also introduces the concept of a “sustainability statement” that is to be included in the remedial action work plan and identifies all sustainability efforts to be implemented during the remedial action on the property. Although no specific sustainability effort is required, the OER’s aim in requiring the sustainability statement is to get each applicant to think about implementing green remediation measures. For example, sustainability efforts that may be considered include:

- Reducing waste production, maximizing recycling and the reuse of clean materials.
- Reducing the consumption of virgin and non-renewable resources.
- Minimizing energy consumption and greenhouse gas emissions.
- Improving energy efficiencies.
- Coordinating remediation with sustainable building design.
- Enhancing on-site stormwater management, recharge, and, where appropriate, gray water reuse and/or water conservation.
- Enhancing ecology and biodiversity during restoration and landscaping of remediated sites.

The OER also encourages the applicants to explore additional ways to achieve sustainability goals beyond those listed.

Tremendous potential exists in the redevelopment of brownfield sites throughout New York City, and the NYC BCP provides a mechanism and financial incentives to accomplish this redevelopment.

NYC BCP regulations can be downloaded at http://nyc.gov/html/oer/downloads/pdf/NYC_BCP_final_rule.pdf.

E. Managing Environmental Risk with Insurance

An important component of the brownfield process is insurance, which is an essential part of planning for any developer whether private, public, or a not-for-profit. When parties cleanup contaminated sites, they are understandably concerned about who will pay the bill, if their plans fail or the site turns out to be more polluted than they originally expected. In addition, lenders will most likely require insurance coverage in cases where private financing is part of the redevelopment process.

Private environmental insurance is available to cover the liability gap in voluntary cleanups in the event of: 1) a "reopener" by the USEPA or NYSDEC; 2) new contamination is discovered and additional cleanup is ordered; 3) third party (off-site) liability; and 4) contamination release due to errors by consultants or engineers working on the site.

New environmental insurance products and policies emerge on a regular basis. The leading environmental insurance companies offer complex "menu" policies that can allow the insured to choose coverage based on perceived exposure to risk from contaminants and an assessment of the likely sources of claims. Some of the most important questions about environmental insurance are answered below to help community groups decide what level and type of coverage they need as well as anticipate obstacles in obtaining such coverage.

i. Common Types of Environmental Insurance Coverage⁹⁵

Common policies utilized in brownfield redevelopment include:

- Property Condition Insurance, which covers the on-site cleanup costs of unknown, pre-existing, or new conditions and third party claims for cleanup of adjoining or down-gradient sites, when the contamination stems from the on-site pollution.
- Cleanup Cost Cap/Stop Loss Insurance, which protects against cost over-runs during an engineered cleanup program (for example, if a developer is concerned that the cleanup will be significantly greater than originally estimated).
- Owner-Controlled Insurance, which protects against the actions or omissions of other parties involved in the cleanup. For example, it may cover contractors, consultants,

⁹⁵ U.S. EPA, POTENTIAL INSURANCE PRODUCTS FOR BROWNFIELDS CLEANUP AND REDEVELOPMENT (1996), available at <http://www.epa.gov/brownfields/insurance/inssvy.pdf>.

and subcontractors if these entities make the site contamination worse, or suffer personal injuries during the course of the cleanup.

- Secured lender policies, which protect only the financial or lending institution and their proportional interests.

The following are common Names of Policies:

- Environmental Impairment Liability (EIL) Insurance – coverage includes the discovery of new contamination, property damage, bodily injury, business interruption, and the cleanup costs of on-site and off-site pre-existing and ongoing contamination. EIL policies can extend for several (generally limited to 10) years and include *re-opener* coverage, which protects the owner from future contamination build-up or the passage of stricter governmental regulations regarding contamination.
- Remediation Stop Loss/Cost Overrun Insurance – policy covers excess remediation costs due to off-site cleanup costs, changing governmental requirements, high disposal costs, undiscovered contamination and greater actual contamination. Re-opener coverage is available.
- Errors and Omissions Insurance – policy covers mistakes committed by environmental consultants and engineers in regard to contamination identification, remedial action plan and disposal site, contractors, and transports selection.
- Contractors' Pollution Liability Coverage – coverage includes the release of contaminants caused by the activities of contractors.
- Contractors Operations and Professional Services Coverage – a combination of Error and Omission Insurance and Contractor's Pollution Liability Insurance.
- Pollution Legal Liability Coverage – covers the cost of defense and claims by third parties due to the release of pollutants from a specific site.

ii. Purchasers of Insurance for Brownfield Sites

The developer or potential buyer of the brownfield (e.g., a community group or its partners) should consider purchasing environmental insurance for the site's redevelopment or to offset unknown risks that cannot be quantified by conventional means such as environmental testing.

iii. When to Purchase Insurance for Brownfield Sites

Insurance policies may be purchased during any and all of the following steps of brownfield cleanup and redevelopment:

- site selection
- site purchase
- cleanup
- new construction or rehabilitation (redevelopment)
- site maintenance and operations
- refinancing

Environmental policies can be written to cover first parties (for example, owners of the brownfield) and/or third parties (owners of neighboring lands, others personally injured by the pollution, banks, financial institutions, municipalities, etc.). The terms of an environmental insurance policy can be extremely complex or very broad; the policies contain a lot of fine print. Selecting the appropriate policy for the risk expected will likely necessitate getting assistance from advisors with environmental expertise, such as an experienced broker who understands the degree of risk transfer required to pick the best policy.

iv. Obstacles to Obtaining Environmental Insurance for Brownfield Sites

There are a number of obstacles to ensuring that every brownfield project finds adequate environmental insurance, not the least of which is the cost of these policies. In some cases, the cost of insurance for a site will be out of reach for most community groups, due to a combination of the extent of the site's contamination and the proposed future use.

Underwriting factors, especially the difficulty in assessing the remaining environmental risks at a property and determining the property value of a site, a potential environmental liability, make many insurance companies reluctant to provide coverage for brownfield redevelopment projects. Lack of awareness on the part of developers of the kinds of environmental insurance available also limits the risk pools, raising costs. As a result, the environmental insurance products that are offered at reasonable costs are often geared to large, well-financed projects involving financially sound organizations.⁹⁶

Applying for environmental insurance often requires completing a fair amount of environmental investigation before the policy is issued. This pre-policy investigation may be costly. This obstacle can be minimized by involving potential insurers early in the process, so other necessary investigations of the site can be designed to meet insurance requirements as well. For instance, information gathered during the Phase I Assessment can be used for insurance purposes. A community organization should ask potential insurers which brokers are proficient in designing an appropriate insurance policy for the type of project in mind.

⁹⁶ U.S. DEP'T OF HOUS. & URBAN DEV., ENVIRONMENTAL INSURANCE FOR BROWNFIELDS REDEVELOPMENT 17 (1999), available at <http://www.huduser.org/publications/doc/envins.doc>.

CHAPTER 6

Making the Deal: Securing Funds

A. Overview

Ultimately, a brownfield project will only be successful if some means exist to fund the investigation, cleanup and redevelopment of the property.

Various funding sources are available for cleanup and redevelopment of brownfield sites in New York State. These sources include New York State, the federal government, regional and local entities, and the private sector. Funding is available for planning, environmental site assessment,



investigation and remediation as well as activities such as training, community outreach, and research and development to support redevelopment. There are also programs that, while not providing financial assistance, provide technical assistance and liability protection for brownfield redevelopment.

B. Grants to Fund Technical Assistance

i. Federal Superfund Technical Assistance Grants (TAG)

Community groups often enter into the Superfund process once it is already underway. Superfund Technical Assistance Grants (TAG) are specifically designed for community groups already affected by a National Priorities List site, but not sites that are classified under the federal Brownfields Program (for information on grants available for federal Brownfield Program sites see http://www.epa.gov/brownfields/grant_info/index.htm).⁹⁷ Grants of up to \$50,000 are available to community groups to hire technical advisors to help the community understand the site-related technical information. Though additional funding may be available for unusually large or complex sites, groups must contribute 20% of the total project costs to be supported by TAG funds (cash or donated supplies and volunteered “in-kind” services).

⁹⁷ EPA, Superfund Technical Assistance Grants, <http://www.epa.gov/superfund/community/tag/index.htm> (last update Oct. 1, 2010).

Because only one TAG per NPL site may be awarded at any given time, groups are encouraged to work together. These grants are only available to groups with existing NPL sites, and are not available for potential brownfield sites that are not on the NPL. The information provided by a technical advisor could be used in a future brownfield redevelopment plan.

TAG-funded technical advisors can be used to:

- review site-related documents
- meet with groups to explain technical information
- provide assistance in communicating concerns about the site
- interpret technical information for the community
- participate in site visits
- handle the administrative tasks related to the grant

TAG funds cannot be used to develop or conduct additional sampling of contamination at the site or to pay the costs of legal actions.

ii. New York State Technical Assistance Grant (TAG)

New York State Technical Assistance Grants (TAGs) are authorized pursuant to Environmental Conservation Law, Article 27, Titles 13 and 14.⁹⁸ They are administered by NYSDEC's Division of Environmental Remediation (DER). They are a citizen participation tool that is available to eligible community groups to increase public awareness and understanding of remedial activities taking place in their community."⁹⁹

TAGs, provided pursuant to a State Assistance Contracts (SAC), are available to eligible community groups for the purpose of obtaining independent technical assistance in interpreting environmental information about an eligible site that is being remediated under the state's Superfund Program or Brownfield Cleanup Program (BCP).¹⁰⁰ An eligible site is one that NYSDEC has determined poses a significant threat to public health and/or the environment.¹⁰¹ Specifically, the technical assistance is provided to help the TAG recipient and the community at large understand the nature and extent of contamination at the eligible site as well as the development and implementation of a remedy for the remediation of the eligible site.¹⁰² TAG funding is limited to \$50,000 per eligible site.¹⁰³

NYSDEC encourages community groups that are interested in becoming more involved in the decision-making process and need assistance in understanding the technical aspects associated with the remediation of an eligible site to submit an application for a TAG. Applications and

⁹⁸ N.Y.S. Superfund, N.Y. ENVTL. CONSERV. LAW § 27-1301-1323; Brownfield Cleanup Program, N.Y. ENVTL. CONSERV. LAW § 27-1401-1435.

⁹⁹ See NYSDEC, TECHNICAL ASSISTANCE GRANT GUIDANCE HANDBOOK (DER-24) (2006), available at <http://www.dec.ny.gov/regulations/2630.html>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

detailed information are available on the NYSDEC website at <http://www.dec.ny.gov/regulations/2630.html>.

A community group must meet all the following criteria to be eligible:¹⁰⁴

- be a non-responsible-party community group or non-responsible-party community group in partnership with another non-responsible-party community group;
- be a not-for-profit corporation having section 501(c) (3) status under the Internal Revenue Code;
- be a group whose members' health, economic well-being or enjoyment of the environment may be affected by a release or threatened release of contamination at the eligible site; and
- be a group whose membership represents the interests of the community affected by the eligible site.

Sites that are eligible for a TAG include¹⁰⁵ Class 2 sites on the New York State Registry of Inactive Hazardous Waste Disposal Sites (State Superfund Program significant threat sites) or sites being remediated under the state's BCP that NYSDEC has determined pose a significant threat to public health and/or the environment. Sites that are ineligible for a TAG include¹⁰⁶ sites eligible for TAGs under the federal Superfund Program (e.g. National Priorities List) or sites that do not meet the site eligibility criteria listed above.

Eligible activities are those that will result in the TAG recipient obtaining independent technical assistance in interpreting and understanding environmental and health information generated and/or evaluated under the State Superfund Program or BCP, the nature and extent of contamination at the eligible site, and the proposed and selected remedy and its implementation.¹⁰⁷ A portion of TAG funds also may be used to disseminate information to the community about the environmental and health information and remedial activities. Only costs incurred after the date of the TAG application approval letter are eligible.¹⁰⁸

Activities that are eligible under a TAG include:¹⁰⁹

- Technical assistance provided by qualified environmental professionals. Qualified environmental professional means a person, including a firm headed by such person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases to the surface or subsurface of a property or off-site areas.

¹⁰⁴ *Id.*

¹⁰⁵ NYSDEC, *supra* note 99.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

- Review of all site-related technical documents and information available to the public under the State Superfund Program or BCP (e.g. work plans, remedy selection documents, design documents, health assessments).
- The preparation of public comments on behalf of the TAG recipient about site-related technical documents, including proposed site remedies.
- The interpretation and presentation of site-related environmental information to the TAG recipient and the community at large.
- The dissemination of site-related environmental information to the community through newsletters, meetings, workshops and other forms of community outreach. These activities should not duplicate activities conducted by NYSDEC, the BCP participant/volunteer or the responsible party under the state Superfund Program. Copies of final documents/work products prepared for public consumption by the TAG recipient must be provided to the NYSDEC Project Manager for the eligible site and NYSDEC TAG Coordinator when they become available. NYSDEC will maintain the right to reproduce, translate, and use all such material for its own purposes.¹¹⁰

Activities that are ineligible under a TAG include:¹¹¹

- The collection of new environmental data such as field samples, split samples and lab analyses.
- The collection and/or development of any new medical and health data through epidemiological or health studies.
- Activities associated with determining the re-use of the site following remediation, except to the extent that these issues affect the selection and implementation of the remedy.
- Activities associated with litigation.
- Activities associated with political activity or lobbying.
- Non-site related activities.
- Administrative activities of the community group associated with administering the TAG.

iii. Brownfield Opportunity Area Program (BOA)

New York State created the BOA Program to assist municipalities and community-based organizations, working separately or partnering together, with the completion of revitalization plans and implementation strategies for areas affected by the presence of brownfield sites. See Chapter 3 for more information on BOA.

iv. New York State Technical Advisory Services (TAS)

In addition to TAGs, New York State's Technical Advisory Services (TAS) Program provides businesses and government entities with technical assistance on pollution prevention, waste reduction and project management. For information, contact TAS, New York State

¹¹⁰ *Id.*

¹¹¹ NYSDEC, *supra* note 99.

Environmental Facilities Corporation or visit its website at <http://www.nysefc.org/home/index.asp>. Also, once in the development stage, the New York State Energy Research and Development Authority (NYSERDA) can provide community groups with loans and technical assistance to build energy efficient buildings. See Appendix C for contact information or NYSEFC's website at <http://www.nyserda.org>.

C. The Community Reinvestment Act (CRA)¹¹²

i. The CRA

The Community Reinvestment Act (CRA) is a federal law passed by Congress in 1977 to encourage banks to meet the credit needs of low and moderate-income communities in which they do business.¹¹³ Principally an anti-redlining law, the CRA encourages banks to make affordable housing and small business loans and extend credit for other vital community development needs in low- moderate-income neighborhoods.¹¹⁴ The CRA provides the public, including community groups, with several ways to encourage banks to make community development loans, services and investments available in these communities.

ii. The CRA Process

Groups seeking support from banks for brownfield redevelopment should become familiar with the CRA process. There are three main participants in the CRA process: 1) government banking regulators, 2) banks, and 3) community groups.

Four federal banking agencies are charged with implementing and enforcing CRA compliance regulations for the state and nationally chartered banks they regulate. The federal banking agencies and the types of banks they regulate are as follows:¹¹⁵

- Federal Deposit Insurance Corporation (FDIC), state-chartered banks
- Federal Reserve Board of Governors (FRB), state-chartered banks that are members of the Federal Reserve System

¹¹² For the CRA regulations, *see* Community Reinvestment Act Regulations, 12 C.F.R. pts. 25, 228, 345, and 563e; *see also* NYPLI's Brownfields Basics (2000) (The Neighborhood Economic Development Advocacy Project (NEDAP) drafted the CRA section).

¹¹³ The Community Reinvestment Act, 12 U.S.C. §§ 2901 – 2907 (2006). In passing the CRA, Congress stated that depository institutions have a continuing and affirmative obligation to meet credit needs in communities in which they conduct business, including low and moderate income communities. Low and moderate income are defined as a percentage of the median income for the overall metropolitan statistical area (MSA). The New York City MSA includes the five New York City counties, the Bronx, Kings, New York, Queens, and Richmond, as well as Putnam, Rockland, and Westchester Counties. To date, the National Community Reinvestment Coalition estimates that CRA commitments total more than \$1 trillion.

¹¹⁴ The law requires banks to meet credit needs within bounds of safe and sound banking operations, that is, to meet community credit needs through non-risky banking practices. A common misconception of CRA is that it requires banks to make bad loans in traditionally underserved communities.

¹¹⁵ All banks must have a state or national charter to do business. Most banks have a state charter and are subject to a "dual regulatory system," in which both state and federal regulators oversee their safety and soundness and compliance with a host of laws, including the CRA.

- Office of the Comptroller of the Currency (OCC), nationally-chartered banks
- Office of Thrift Supervision (OTS), federal savings banks and thrifts

All banks that receive federal deposit insurance must comply with the CRA including foreign-owned banks. Under the CRA, federal banking agencies must examine the banks they regulate for their performance in meeting community credit needs, according to a variety of lending services, investment and community development tests.¹¹⁶ There are four possible CRA ratings: Outstanding; Satisfactory; Needs to Improve; Substantial Non-Compliance. In practice, more than 98% of all banks evaluated under CRA receive a satisfactory or better rating. CRA ratings are available at <http://www.ffiec.gov/CRA/ratings.htm>.

Banks seek ways to fulfill their CRA obligations within their declared CRA assessment area. When examined for CRA performance, banks submit documentation of their loans, services, and investments made in low- and moderate-income communities.¹¹⁷ Regulators must analyze and interpret the documentation and determine whether bank activities fall under the CRA. In amending the CRA, regulators specifically refer to brownfield redevelopment as an example of a community development loan.

iii. CRA and Brownfield Loans

The banking agencies have stated that loans for brownfield development fall within the definition of a *community development loan* for CRA purposes.¹¹⁸ Specifically, the agencies' example of a community development loan is for the financing of — environmental cleanup or redevelopment of an industrial site as part of an effort to revitalize the low- or moderate-income community in which the property is located.”¹¹⁹ However, banks have rarely used brownfield work for CRA credit. Therefore, the CRA presents unique potential for groups seeking private

¹¹⁶ The specific test applied depends on the type of bank, including small and large retail banks, wholesale banks, and limited purpose banks. Most banks are evaluated for CRA compliance every eighteen months to two years. Under the Financial Services Modernization Act of 1999, however, small banks will now be evaluated for CRA only every four or five years. A small bank is defined as having less than \$250 million in assets; though this extends the exam schedule for more than two-thirds of the banks in the country.

¹¹⁷ For this context, HUD defines a low-income community as having a median family income less than 50 percent of the median income of the entire area. A moderate-income community is a community in which the median family income is between 50 and 80 percent of the area median income. The area median is typically defined in terms of the Metropolitan Statistical Area (MSA) and by county. New York median incomes are available at <http://www.fanniema.com/tools/hudmedian/index.jhtml?p=Tools+%26+Resources&s=HUD+Median+Income+Limits>.

¹¹⁸ See CRA regulation, 60 Fed. Reg. 22156, at 22160 (May 4, 1995); see also, the Interagency Questions and Answers (Q & A) of the Federal Financial Institutions Examination Council (FFIEC), the consortium of federal banking regulators that issues the interpretative document on CRA on a regular basis.

¹¹⁹ The EPA's Brownfields webpage states: Concern over potential environmental and financial liability for cleaning up these sites has made lenders, developers, and property owners reluctant to finance redevelopment of these properties. Rather than reuse former urban industrial sites, businesses have instead moved to suburban or rural —greenfields,” which carry fewer perceived risks to development. In January 1995, EPA announced its original Brownfields Action Agenda in response to the widespread economic development obstacles posed by urban Brownfields. The (1995-1996) Brownfields Action Agenda encouraged a cooperative approach by EPA, lenders, and prospective purchasers to ease fears of financial liability and regulatory burdens. EPA has coordinated with the [OCC] to create incentives within the CRA regulations for economic revitalization and development. <http://www.epa.gov/swerosps/bf/html-doc/cra.htm>.

sector involvement and funding for brownfield work.¹²⁰ By learning how CRA works, groups can devise creative ways to use the law to encourage banks to play an important financial role in their brownfield redevelopment projects.

iv. Community Organizations and CRA Loans

In general, groups need to make bankers and their regulators aware of the problem of brownfields in low- and moderate-income communities and draw the connection between brownfield redevelopment and the CRA. Community groups that have little or no experience working with banking institutions, in particular, might consider taking the following steps when approaching banks for loans and other support for brownfield initiatives that benefit low - or moderate-income communities:

STEP 1 - Identify Banks That Serve the Community

Find banks that include the community organizations' neighborhood within their CRA service area. This is important, because the CRA obligates banks to meet credit needs of all communities within their assessment area. Be aware that many banks are likely to include communities in their service area even if they have no branches in these neighborhoods.

STEP 2 - Gather Information on Banks

It is important to understand the corporate structure and community reinvestment practices of the banks targeted for potential support of a brownfield project. It is recommended that groups request the following documents from banks considered for contact:¹²¹

- The bank's most recent annual report. Banks' annual reports provide information about a bank's corporate culture, portfolio, programs, and objectives.
- The bank's most recent CRA disclosure report from state and federal banking regulators. The banking agencies issue written CRA reports known as Performance Evaluation (PE) disclosure reports which state the bank's CRA rating and the regulator's basis for assigning that rating. The PE report typically reflects the bank's representations of its CRA activities, so it is hardly an objective document. It will, however, provide insight into the bank's lending programs, community activities, and any perceived weaknesses in CRA performance.
- The bank's home mortgage and small business lending data reports for the New York City Metropolitan Statistical Area (MSA).¹²² Banks will provide their Home Mortgage Disclosure Act (HMDA) and small business data reports at no charge.

¹²⁰ There seem to be no outstanding examples of banks' claiming CRA credit for loans for Brownfields redevelopment or environmental cleanup. Neighborhood Economic Development Advocacy Project interviewed examiners, community affairs officers, and CRA compliance officers at the Federal Reserve Bank of New York, Office of the Comptroller of the Currency, and Federal Deposit Insurance Corporation. All were familiar with the CRA provision regarding Brownfields, but none could cite any banks' claiming CRA credit on the grounds set forth in the provision.

¹²¹ You can request this information from banks' CRA officers, by faxing them a simple written request.

¹²² The New York City MSA is known as "MSA 5600."

These reports are also available on the web at <http://www.ffiec.gov/reports.htm>. A bank's HMDA report provides detailed information on its home mortgage lending activity by county and census tract.

- Other brochures and material on the banks' community reinvestment and development activities. Many banks publish newsletters and brochures describing their community activities. Many banks also have small grant programs for which a brownfield project might be eligible. Ask to be added to their mailing list.

STEP 3 - Contact the Federal Banking Regulators Based in Your Region

Banking regulators need to be made aware of the brownfield issue, and particularly the implications of brownfield cleanup for community revitalization and development. A crucial step in the process is to educate the CRA examiners at the four federal banking agencies about brownfields. Community groups are strongly urged to set up meetings with the banking regulators to discuss CRA treatment of bank loans that support brownfield redevelopment. By educating the regulators, groups will prepare them for questions they will inevitably receive from banks regarding loans for brownfield initiatives. Later, groups will also be able to inform banks as to whether the regulators are prepared to grant favorable CRA consideration to the bank's support of brownfield redevelopment in low- or moderate-income communities (see Appendix D for the New York regional offices of the four federal banking agencies as well as several contacts for groups that can provide technical assistance on the process of meeting with regulators).

STEP 4 - Prepare Redevelopment Needs & Lending Assessment

Before approaching specific banks, make sure to have a well-formulated needs assessment and at least the outline of a financial plan for the brownfield initiative. Answers are not required for every aspect of the project, but groups should have a clear sense of the size and type of bank loan they need. Many banks like to offer technical assistance during the preliminary phase of a project, and groups can ask for the bank's assistance in further developing their financial plan.

STEP 5 - Consider Alliances with Other Groups and a Brownfields Loan Fund

A key strategic decision will be whether to link up with other community organizations to approach banks collectively. One group might, for example, explore the possibility of a community-wide loan fund for brownfield redevelopment. A loan fund would address liability issues and allow banks to pool their risk. Groups might also join together to approach the regulators, as described in Step 3 above. Finally, consider dubbing the brownfield project a pilot. Banks like pilot programs.

STEP 6 - Decide How Many Banks to Approach at One Time

Consider the benefits of either presenting the brownfield project to individual banks, one-on-one, or inviting a group of banks to meet collectively (sometimes called a *roundtable*) to learn about the initiative and to discuss the financial and technical support banks are prepared to offer. The roundtable approach generally works best when a friendly contact has been established at one or

more of the banking institutions. That person can work with a community group behind the scenes to identify other banks that should be at the table and, once at the meeting, urge the other banks to support the group's initiative. The value of the roundtable approach is that funding for a project may be available from more than one bank at a time.

STEP 7 - Contact and Meet with Banks

Banks typically send their CRA officers to meet with community groups. Be aware, however, that most CRA officers lack authority to make decisions on behalf of the banking institution they represent. A common scenario is for the CRA officer to tell a community group that its project sounds good, but that they must take the request for funding back to the bank. If that happens, follow up immediately and often. When setting up the meeting, also request (and perhaps insist) that the bank's community development lending personnel attend the meeting. Groups may ask banks for technical assistance, loans, grants, project investments, or any other bank support considered appropriate.

D. Tax Incentives for Brownfield Redevelopment

This section details the various federal and New York State tax incentives for brownfield redevelopment. Not all of these incentives will be available for all brownfield projects. In addition to the income tax incentives described in this session, there are numerous other federal and state economic development incentives designed to stimulate brownfield redevelopment.¹²³

i. Federal Tax Treatment of Brownfield Cleanup Costs

The federal income tax treatment of costs incurred by a taxpayer for environmental remediation (which of course would include brownfield remediation) is somewhat complex. This section provides a brief overview for the reader, and explains the federal Brownfields Tax Incentive.

a. Acquisition from Third Party

Generally, when a taxpayer acquires a brownfield site from a third party and incurs environmental remediation expenses, the taxpayer must *capitalize* the expenses into the acquisition costs of the property. This means that the taxpayer adds the cleanup costs to the acquisition price, which increases the taxpayer's "basis" in the property. When the taxpayer finally disposes of the property, the taxpayer's basis is subtracted from the amount realized upon the sale in determining the taxpayer's gain (or loss) on disposition.

In other words, when environmental cleanup costs are capitalized, or are added to basis, there is no "recovery" or tax benefit realized from these costs *until the property is disposed of*. Strictly

¹²³ See, e.g., the U.S. Dep't of Hous. and Urban Dev., Brownfields Economic Development Initiative (BEDI), <http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/index.cfm> (last updated Aug. 27, 2010). EPA's website contains detailed information on federal initiatives for brownfields redevelopment (EPA publication number EPA-560-F-04-251), available at http://www.epa.gov/swerosps/bf/partners/bf_fed_pr_gd.htm. Also, NYSDEC's Division of Environmental Remediation provides numerous links to New York State economic development incentives and programs on its website at <http://www.dec.ny.gov/>.

from an income tax perspective, this is undesirable, because the taxpayer is spending money on cleanup without being able to take a current deduction against taxable income for the cleanup costs—instead, cleanup costs reduce taxable gain on disposition of the property possibly many years in the future.

b. Cleanup of Taxpayer-Generated Contamination

The other general rule is that taxpayers that clean up their own contamination (contamination caused by the taxpayer in the conduct of its trade or business) will be entitled to deduct their cleanup costs as part of the “ordinary and necessary” cost of conducting a trade or business.¹²⁴ A special rule applies to manufacturers. In early 2004, the IRS issued two rulings addressing the treatment of cleanup costs incurred by manufacturers to clean up their own contamination.¹²⁵ These companion rulings hold that manufacturers who incur environmental remediation costs to clean up their own contamination are required by cost accounting rules under the Code (Code section 263A) to include or capitalize those cleanup costs as part of their cost of producing inventory. The rulings also indicate that these costs must be included in current inventory costs, as opposed to recalculating inventory costs for the years in which the contamination occurred.

The 2004 rulings mean that manufacturers will recover cleanup costs as their inventory is sold off, because the increased inventory costs will reduce taxable gross margin (sales price less cost of inventory sold). While this may not be as favorable to the taxpayer as deducting cleanup costs in the year they are paid or incurred, it is far more favorable than requiring the taxpayer to capitalize cleanup costs into the acquisition cost of the property, deferring recovery until sale of the property.

ii. Federal Brownfields Tax Incentive

In addition to the forgoing tax treatment, starting in 1998, the Code was amended to allow eligible taxpayers to deduct certain environmental cleanup costs for qualified properties in the year those costs are paid or incurred.¹²⁶ This deduction, known as the “Brownfields Tax Incentive,” is allowed for *qualified* environmental remediation expenditures. An expenditure is *qualified* if it would otherwise be capitalized and if it is incurred in connection with the abatement or control of hazardous substances at a qualified contaminated site.¹²⁷

A qualified site is a site held by the taxpayer for business purposes where there has been a release, threat of release or disposal of any hazardous substance (costs related to petroleum contamination became eligible in 2006). The term *hazardous substance* means any substance defined in §101(14) of CERCLA or designated as a hazardous substance under CERCLA §102.

¹²⁴ See, e.g., Rev. Rul. 94-38, 1994-1C.B.35.

¹²⁵ Rev. Rul. 2004-17, 1994-1 C.B. __; Rev. Rul. 2004-18, 1994-1 C.B. 35.

¹²⁶ I.R.C. §198 (2006).

¹²⁷ *Id.* §198 b(1).

Eligible costs may include site assessment, investigation and monitoring expenses, cleanup costs, operations and maintenance costs, and state remedial program oversight fees.¹²⁸

Sites listed or proposed for listing on USEPA's Superfund national priorities list are not eligible for the Brownfields Tax Incentive (§198 treatment). In addition, to be a qualified site within the meaning of Code §198, the taxpayer must receive a statement from the state environmental agency that there has been a release, threat of release or disposal of a hazardous substance at the site.¹²⁹



Under the Brownfields Tax Incentive, environmental cleanup costs are fully deductible in the year incurred, rather than capitalized and spread over time. Improvements in 2006 expanded the tax incentive to include petroleum cleanup. The Brownfields Tax Incentive is not a tax credit, but reduces the tax burden indirectly by lowering the taxable income. The incentive does this by allowing a taxpayer to claim eligible cleanup costs as a current expense, rather than capitalizing them as long-term

assets. Companies prefer deductions because they substantially reduce their current income, allowing them to capture tax savings now rather than later. The Brownfields Tax Incentive is applicable to properties that meet specific land use and contamination requirements.¹³⁰ To satisfy the land use requirement, the property must either be held by the taxpayer incurring the eligible expenses for use in a trade or business or for the production of income; or, the property must be properly included in the taxpayer's inventory.¹³¹ To satisfy the contamination requirement, hazardous substances or petroleum must be present or potentially present on the property. Sites listed or proposed for listing on EPA's National Priorities List are not eligible for Brownfields Tax Incentive (§198 treatment). Taxpayers must obtain a statement from a designated state agency verifying that there has been a release, threat of release or disposal of a hazardous substance at the site¹³² and that the property is eligible for the tax incentive.

¹²⁸ The EPA website <http://www.epa.gov/brownfields/html-doc/taxfaq.htm> provides a list of frequently asked questions and answers about the Brownfields Tax Incentive. This website also includes information on meeting the geographic, contamination and ownership criteria, determining eligible expenses, and the state certification procedure. Information regarding eligibility for the Brownfields Tax Incentive and Internal Revenue Service (IRS) publications can be obtained from <http://www.irs.gov/pub/irs-pdf/p954.pdf>.

¹²⁹ EPA's website <http://www.epa.gov/brownfields/contacts.htm> indicates that the appropriate contact person for NYS DEC is Ms. Karen Diligent, Environmental Program Specialist, 625 Broadway, Albany, New York 12233-7012; (518) 402-9711; kbdilige@gw.dec.state.ny.us.

¹³⁰ U.S. EPA, Brownfields and Land Revitalization, Brownfields Tax Incentive Frequently Asked Questions, http://epa.gov/brownfields/tax/ti_faq.htm (last updated Sept. 16, 2010).

¹³¹ *Id.*

¹³² EPA's website <http://www.epa.gov/brownfields/contacts.htm> indicates that the appropriate contact person for NYS DEC is Ms. Karen Diligent, Environmental Program Specialist, 625 Broadway, Albany, New York 12233-7012; (518) 402-9711; kbdilige@gw.dec.state.ny.us.

If the taxpayer subsequently disposes of the site and realizes a taxable gain upon disposition, the taxpayer will have to recognize as ordinary income (as opposed to capital gain) a portion of the gain equal to the deduction(s) taken under the federal brownfields tax incentive (I.R.C. §198) with respect to the site. Taxpayers planning to dispose of a qualified, remediated site should consult with their tax counsel or accountants to assess the impact of this provision on the economic benefit of the federal brownfields tax incentive. Please refer to EPA's website for the current status of tax incentives at <http://www.epa.gov/brownfields/tax/index.htm>.

iii. New York State Tax Incentives

a. Brownfield Cleanup Program Tax Credits

As noted above, in October 2003 a comprehensive framework of new laws and statutory amendments designed to stimulate the cleanup and redevelopment of brownfields was enacted in New York State.¹³³ The legislation created a statutory BCP, administered by NYSDEC. A BCP applicant that successfully completes the site remediation work plan described in a written agreement with NYSDEC, known as a Brownfield Cleanup Agreement (BCA), will receive a Certificate of Completion (COC) from NYSDEC.

The COC, in turn, entitles eligible taxpayers to claim three credits against New York income tax. These BCP tax credits are available to taxpayers who receive their COC before April 1, 2015 and may be claimed by BCP volunteers and participants alike (the credit provisions make no distinction between those who are responsible for contamination and those who are not). Project costs for which tax credits may be claimed start to accrue from the date the BCA is signed by the Director of the Division of Environmental Remediation.

The BCP tax credits significantly enhance the return to developers and investors from a brownfield redevelopment project. The initial legislation raised some key points in need of clarification through corrective legislation or published guidance from the New York State Department of Taxation and Finance (DTF). A technical corrections bill that addressed many of these issues¹³⁴ was enacted in October 2004. In 2008, the tax scheme applicable to the BCP was further amended to cap the amount of tax credits developers could receive.

Presently, there are three types of credits available under the BCP. First, the Brownfield Redevelopment Tax Credit covers site preparation costs,¹³⁵ qualified tangible property costs,¹³⁶

¹³³ N.Y. Brownfield Cleanup Act, N.Y. ENVTL. CONSERV. LAW §§ 27-1401 – 1435. The statute was amended by chapter 577 of the 2004 laws. The amendments effected several significant changes, as noted below.

¹³⁴ Chapter 577 of the 2004 New York laws (2004 N.Y. Laws).

¹³⁵ Site preparation costs include –remediation, demolition, excavation, fencing and security, wiring, scaffolding, and other capital account costs, to make the site usable for commercial, industrial, residential, and other purposes, and excludes site acquisition costs. These costs may be claimed for up to five years after the issuance of the Certificate of Completion.”

¹³⁶ *Id.* Qualified tangible property costs include –costs of buildings and improvements (including structural components of buildings) that are placed into service within 10 years after the Certificate of Completion is issued, and must satisfy various pre-conditions.”

and onsite groundwater remediation costs.¹³⁷ The 2008 amendment capped the tangible property tax credit¹³⁸ and created a tiered approach¹³⁹ for setting the amount of the site preparation tax credit based upon the level of remediation performed. The second credit available under the BCP is the Brownfields Real Property Tax Credit which is an annual credit claimable for 10 years after the COC is issued and is based on the number of jobs created, eligible real property taxes, and PILOTS.¹⁴⁰ The 2008 amendment clarified that the credit runs with the land and is transferable to successors or assigns.¹⁴¹ The third category is the Insurance Credit for environmental remediation insurance for the lesser of \$30,000 or 50% of the premium paid after the date of a BCA for qualified sites.¹⁴² The Insurance Credit was unchanged by the 2008 amendment.

Tax Credit Basics

The law provides three New York State income tax credits. Generally, income tax credits allow a taxpayer to reduce income tax liability on a dollar-for-dollar basis, down to the minimum New York State franchise or income tax imposed for the year (zero, for individuals).¹⁴³ Many credits provide that once the credit reduces tax to the minimum (or zero), the excess credit carries over and may be applied against tax in future years. These are known as *carryover* credits.

The new BCP credits, however, are refundable. This means that New York State treats the credit amount as an overpayment of tax, similar to an estimated payment or income tax withheld by an employer.¹⁴⁴ If the credit amount exceeds the total tax owed to the state for the year, the excess is refunded by the State to the taxpayer (without interest) after the return is filed and processed, just like any other tax refund from an overpayment. The cash benefit of refundable credits then is realized when the return is filed by the taxpayer and processed by DTF.

The Brownfield Redevelopment Tax Credit

The first of the three credits, called the Brownfield Redevelopment Tax Credit, is allowed in three components. To be eligible for this credit, a taxpayer must be the holder of a COC and incur costs for the remediation or redevelopment of a brownfield site in New York State that is or will become a qualified site. Each component is determined by multiplying the taxpayer's

¹³⁷ *Id.* Onsite groundwater remediation costs include “costs that are incurred to implement a remediation work plan under the Brownfield Cleanup Agreement, including interim remedial measures. It may be claimed in the year in which the Certificate of Completion is issued, and cost incurred after the Certificate may be claimed in the year incurred for up to five years after Certificate.”

¹³⁸ *Id.* The amendment capped the amount of the tangible property tax credit to the lesser of \$35 million or three times the cost of the cleanup and other site preparation costs (in the case of non-manufacturing properties) or \$45 million or six times the cost of the cleanup and other site preparation costs (in the case of manufacturing projects).

¹³⁹ *Id.* A maximum of 50 percent for soil cleanup to an unrestricted use; 40 percent for soil cleanup to residential use (28 percent for Track 4); 33 percent for soil cleanup for commercial use (25 percent for Track 4); and 27 percent for industrial use (22 percent for Track 4).

¹⁴⁰ *Id.* It is limited to owners of a contaminated property who obtained a Certificate of Completion, but is transferable to subsequent purchasers of the site who take title within seven years of the Certificate. There is a cap imposed on the annual credit equal to \$10,000, multiplied by the average number of full-time employees.

¹⁴¹ *Id.*

¹⁴² N.Y. TAX LAW § 23(a).

¹⁴³ By contrast, a tax *deduction* allows a taxpayer to reduce taxable income. \$100 of tax *deduction* would typically reduce the tax owed to the state by \$7.65 (\$100 x the marginal tax rate of 7.65%). \$100 in tax *credit* would reduce the tax owed to the state by \$100.

¹⁴⁴ N.Y. TAX LAW §§ 210, subd. 33(b), 606(dd)(2), 1456(q)(2), & 1511(u)(2).

applicable percentage by certain allowable capital costs. A taxpayer may also be eligible for the credit if the COC was transferred to the taxpayer by the person originally issued the COC, as a result of a transfer or sale of the brownfield site.¹⁴⁵ The credit is not allowed for a brownfield site for which a COC is issued after March 31, 2015.

Applicable Percentage: The applicable percentage varies according to the kind of taxpayer, the location of the property, and the extent of the cleanup shows this variation. The amount of the brownfield redevelopment tax credit is a percentage of the eligible costs paid or incurred to clean up and redevelop a qualified site.¹⁴⁶ A greater percentage is allowed for sites that are cleaned up to a level that requires no restrictions on use, sites located in designated environmental zones (En-Zones), and sites located in brownfield opportunity areas (BOA).¹⁴⁷ Eligible costs only include those a taxpayer pays or incurs on or after the effective date of the BCA executed by the taxpayer and the NYSDEC, or on or after the date the COC was transferred to the taxpayer.¹⁴⁸ Eligible costs must be reduced by any amount of federal, state, or municipal grants that the taxpayer received and used to pay for any of the qualified costs, if those grants are not included in the taxpayer's federal taxable income or federal adjusted gross income.¹⁴⁹

The 2008 amendment capped the amount of the tangible property tax credit to the lesser of \$35 million or three times the cost of the cleanup and other site preparation costs (in the case of non-manufacturing properties), \$45 million or six times the cost of the cleanup and other site preparation costs (in the case of manufacturing projects).

The 2008 amendments distinguish the tax credit computations between qualified sites accepted into the BCP *before* June 23, 2008 and those qualified sites accepted *after* June 23, 2008.¹⁵⁰ The NYS Department of Taxation guideline¹⁵¹ provides as follows:

Qualified sites accepted into the BCP *before* June 23, 2008:

For corporate taxpayers subject to tax under Article 9, Sections 183, 184, or 185; Article 9-A (other than New York S corporations); Article 32; or Article 33, the applicable percentage is the sum of the following:

- For a qualified site, the base percentage is 12%.
- If the qualified site is remediated to Track 1 (a cleanup level that allows for the site to be used for any purpose without restriction) an additional 2% is allowed.
- If at least 50% of the qualified site is located in an En-Zone, an additional 8% is allowed.

For taxpayers subject to tax under Article 22 (the personal income tax) and New York S corporations the applicable percentage is the sum of the following:

¹⁴⁵ For further information on the transfer process, see NYSDEC's website at <http://www.dec.ny.gov/chemical/54736.html>.

¹⁴⁶ N.Y.S. DEP'T OF TAXATION & FINANCE, NEW YORK STATE TAX CREDITS AVAILABLE FOR REMEDIATED BROWNFIELDS (2010) available at <http://www.tax.state.ny.us/pdf/publications/multi/pub300.pdf>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

- For a qualified site, the base percentage is 10%.
- If the qualified site is remediated to Track 1 (a cleanup level that allows for the site to be used for any purpose without restriction) an additional 2% is allowed (see Glossary for a definition of Track 1).
- If at least 50% of the qualified site is located in an En-Zone, an additional 8% is allowed.

Qualified sites accepted into the BCP *after* June 23, 2008:

For purposes of calculating the site preparation credit component and the on-site groundwater remediation credit component the applicable percentages are:

- 50% for sites that are approved for unrestricted use.
- 40% for sites that are approved for residential use (except those remediated to Track 4).
- 28% for sites that are approved for residential use and remediated to Track 4.
- 33% for sites that are approved for commercial use (except those remediated to Track 4).
- 25% for sites that are approved for commercial use and remediated to Track 4.
- 27% for sites that are approved for industrial use (except those remediated to Track 4).
- 22% for sites that are approved for industrial use and remediated to Track 4 (see Glossary for a definition of Track 4).

For purposes of calculating the tangible property credit component for taxpayers subject to tax under Article 9, sections 183, 184, and 185; Article 9-A (other than New York S corporations); Article 32; and Article 33, the applicable percentage is the sum of the following:

- For a qualified site, the base percentage is 12%.
- If the qualified site is remediated to Track 1 (a cleanup level that allows for the site to be used for any purpose without restriction) an additional 2% is allowed.
- If at least 50% of the qualified site is located in an En-Zone, an additional 8% is allowed.
- If the qualified site is located in a BOA, an additional 2% is allowed.

For taxpayers subject to tax under Article 22 (the personal income tax) and New York S corporations the applicable percentage is the sum of the following:

- For a qualified site, the base percentage is 10%.
- If the qualified site is remediated to Track 1 (a cleanup level that allows for the site to be used for any purpose without restriction) an additional 2% is allowed.
- If at least 50% of the qualified site is located in an En-Zone, an additional 8% is allowed.
- If the qualified site is located in a BOA, an additional 2% is allowed.

Allowable Costs: To determine each of the three credit components, the applicable percentage is multiplied by a cost component. The three cost components that form the credit bases of the components are:

- **Site Preparation Credit Component:** site preparation costs, including all costs incurred by the taxpayer to qualify the site for the COC under the BCA and all other costs associated with preparing the site for construction, other industrial, commercial (including the commercial development of residential housing), or recreational use, but excluding site acquisition costs. Site preparation costs include, but are not limited to, the costs of excavation, temporary electrical wiring, scaffolding, demolition, fencing, and property and services related to security. Site preparation costs do not include the cost of acquiring the site or amounts included in the basis of the tangible property credit component or on-site groundwater remediation component;
- **Tangible Property Credit Component:** the cost or other basis for federal tax purposes of “qualified tangible property”—essentially, all property located on the site with a useful life (for federal depreciation purposes) of four years or more, including buildings and structural components of buildings, provided the property is “placed in service” on the site within three years after the COC is issued, and provided the property is principally used for industrial, commercial (including the commercial development of residential housing), or recreational purposes; and
- **On-site Groundwater Remediation Credit Component:** on-site groundwater remediation costs paid or incurred by the taxpayer under the BCA and costs paid or incurred in connection with the remediation of on-site groundwater contamination and incurred to implement a requirement of the remedial work plan or an interim remedial measure work plan for a qualified site (ECL section 27-1411 (2) and (3)).



Section 21 of the Tax Law creates this credit and defines its parameters. First, all of the above costs must be incurred with respect to a brownfield site for which a COC has been issued by NYSDEC. Second, only costs paid or incurred by the taxpayer after the date of the BCA between the taxpayer and NYSDEC can be taken into account in computing the above credit components.¹⁵² Third, only capital costs can form the basis of the credit. Normal income tax rules should apply in determining whether a cost is capitalized or expensed (meaning that an immediate deduction is allowed in the year the cost is incurred).¹⁵³ The two are mutually exclusive. Finally, the credit base of any of these components must be reduced by the amount of funds obtained from government grants used to finance those costs.¹⁵⁴

¹⁵² N.Y. TAX LAW § 21(a)(6).

¹⁵³ See, e.g., 26 U.S.C. §§ 263, 263A, I.R.C. §§ 263, 263A; see also I.R.C. § 198 (allowing taxpayers to elect expense treatment for certain qualified environmental remediation costs); Rev. Rul. 2004-18 (Feb. 23, 2004); *United Dairy Farmers, Inc. v. U.S.*, 267 F.3d 510 (6th Cir. 2001); Rev. Rul. 94-38, 1994-1 C.B.35.

¹⁵⁴ N.Y. TAX LAW § 21(a)(7).

It is therefore critical that developers consult with their tax advisers to implement procedures to separately track the costs that form the credit base of each of the three components. Procedures should be implemented at the onset of a development project or as soon as the developer applies for participation in the BCP, even though the developer may not file a return claiming the credits until several years later. Failure to track project costs in a manner consistent with these credits could cost the developer dearly in bookkeeping headaches and accounting fees when the time comes to calculate and claim the credits. For additional considerations and requirements such as recapture, please refer to the NYS Department of Taxation and Finance guidance manual at <http://www.tax.state.ny.us/pdf/publications/multi/pub300.pdf>.

Timing: Each component comes with separate, and sometimes confusing, timing rules:

- **Site Preparation Credit Component:** the site preparation credit component requires a taxpayer to separate site preparation costs (defined in the first bullet in b. above) into two buckets. The first bucket (bucket A) contains all costs incurred to qualify the site for the COC—essentially, all costs incurred under the BCA. The second bucket (bucket B) includes any additional costs to prepare the site for the erection of a building or component, or to prepare the site for its qualified use. Tax credits attributable to bucket A costs can be claimed in the tax year the COC is issued. Tax credits attributable to bucket B costs are claimed in the tax year the improvements to which the costs relate are placed in service – typically, when the building is ready and available for use – for up to five years after the COC is issued.¹⁵⁵ The statute is unclear as to whether bucket B costs are allowed for a total of six years (the year the COC is issued plus five additional tax years) or just five, including the year the COC is issued.
- **Tangible Property Credit Component:** The tangible property credit component is allowed in the year qualified tangible property is placed in service.¹⁵⁶ For tax purposes, an asset is placed in service when it is —.ready and available for a specific use.”¹⁵⁷ The tangible property credit component, which would allow a credit equal to the applicable percentage of buildings and other depreciable property located on-site, is only allowed for property that is placed in service within 10 years after the COC is issued.¹⁵⁸ The technical corrections amendments eliminated contradictory provisions stating that this window was limited to three years.
- **On-Site Groundwater Remediation Credit Component:** like the site preparation credit component, this component also requires the taxpayer to divide on-site groundwater remediation costs into bucket A (for costs incurred before the COC is issued) and bucket B (for costs incurred after the COC is issued). The bucket A costs are allowed in the tax year the COC is issued; and the bucket B costs are allowed in the year paid or incurred, but only for the five tax years after the year the COC is issued.¹⁵⁹

¹⁵⁵ *Id.* § 21(a)(2).

¹⁵⁶ *Id.* § 21(a)(3).

¹⁵⁷ *See, e.g.,* Dep’t of the Treasury, IRS Publication 946: How to Depreciate Property, at 7(Oct. 25, 2010). Tax accountants will be familiar with “placed in service” concepts because depreciation deductions are first allowed for an asset in the year the asset is placed in service.

¹⁵⁸ N.Y. TAX LAW § 21(b)(3)(F).

¹⁵⁹ *Id.* § 21(a)(4). The statute appears not to cover costs incurred in the tax year the Certificate is issued, but after the date of issuance. However, a sensible reading of the law would dictate that the credit component in the year the

Tax Credit for Remediated Brownfields (Based on Property Taxes)

The second tax credit is the Tax Credit for Remediated Brownfields, also referred to as the Remediated Brownfield Credit for Real Property Taxes for Qualified Sites.¹⁶⁰ A more accurate name might be the “Credit Based on Brownfield Property Taxes,” because property taxes on a remediated brownfield site are the basis upon which this refundable income tax credit is determined.

a. Eligible Taxpayers. The credit based on brownfield property taxes is allowed to a developer,¹⁶¹ meaning a taxpayer who has received a COC from NYSDEC or has acquired, within seven years of the effective date of the COC, all or some portion of a qualified site.¹⁶² Again, a *qualified site* is one with respect to which a COC has been issued. Owners of pass-through entities such as corporations, partnerships, and most limited liability companies are also deemed to be developers for purposes of this credit. This credit is calculated annually, starting with the year the NYSDEC issues the COC, and is allowed for a period of 10 years.

b. Calculating the Credit. Developers will determine this credit by multiplying three (3) factors:

- eligible real property taxes imposed on a qualified site (a brownfield site with respect to which a COC has been issued), provided the taxes become a lien on the property;
- an employment number factor, described below, based on the number of full-time employees employed at the site by the developer and tenants of the site; and
- a 25% factor, which increases to 100% for taxes imposed on any portion of the site located in an En-Zone.¹⁶³

The credit is limited to \$10,000 multiplied by the average of the number of full-time employees working on the site for the developer and site tenants. This limit is most likely to apply where a redeveloped site is located in an En-Zone, the assessed value of the improved site is very high, and there are relatively few full-time employees on-site. Payments made under a payment in lieu of taxes agreement (PILOT) will also qualify for this credit, but the PILOT is subject to scrutiny by the New York State Office of Real Property Services to determine whether the PILOT satisfies “...generally accepted norms and standards for real property tax appraisals.”¹⁶⁴

Certificate is issued would take into account all costs for that year and prior years, dating back to the date of the Brownfield Cleanup Agreement.

¹⁶⁰ See the title headings of N.Y. TAX LAW §§ 22 & 22(b).

¹⁶¹ A developer also includes a taxpayer subject to tax under Article 9, sections 183 and 184, or section 185, or under Articles 9-A, 22, 32 or 33, who is a partner in a partnership, a shareholder of a New York S corporation, or a beneficiary of an estate or trust provided the partnership, New York S corporation, estate or trust has been issued a COC, or has purchased or otherwise been conveyed all or any portion of a qualified site for which a COC was issued. The term partnership includes a limited liability company (LLC) that is treated as a partnership for federal income tax purposes and partner includes a member of an LLC that is treated as a partnership.

¹⁶² N.Y. TAX LAW. § 22(a)(3).

¹⁶³ *Id.* § 22(b). See also NYS Department of Taxation guidance manual for specifics on calculating the formula at <http://www.tax.state.ny.us/pdf/publications/multi/pub300.pdf>.

¹⁶⁴ *Id.* The definition of “developer” excludes transferees of the site if the transfer is from a “related person” with the meaning of I.R.C. § 465(b)(3)(C). N.Y. TAX LAW § 22(A)(3)(i). Any entity under ten percent common control with the transferee is deemed to be a related person within the meaning of this section.

c. Employment Number Factor. The employment number factor is based on a mathematical average of the number of full-time employees working on the site for the developer or for tenants. The formula excludes general executive officers, although this seems unnecessary, since the statute requires there to be at least 25 employees on the site for any part of the credit to be allowed. Table 1 provides the employment number factor.

Table 1

Employment Number Factor

<u>Full-time Employees</u>	<u>Factor</u>
0-24	0%
25-49	25%
50-74	50%
75-99	75%
100 or more	100%

To calculate the average number of employees, the developer and its lessees must count full-time employees working at the site on the last day of each calendar quarter and take the average of those quarterly totals. Taxpayers familiar with the Empire Zone tax credits will understand the effort necessary to determine employment numbers with accuracy; this calculation will be much easier to manage than the employment calculus under the Empire Zone credit provisions. Some interesting issues remain to be addressed. For example, contractors, plumbers, electricians, and other organizations whose employees work off-site on a daily basis but regularly report to the site will face the additional challenge of determining whether or not such employees are employed at the site.

d. Empire Zone Credit Option. For brownfield sites located in an Empire Zone, the statute provides taxpayers with a one-time option to elect whether to take the QEZE credit for real property taxes or the brownfield credit based on property taxes. The taxpayer cannot claim both credits, but is given the opportunity to elect one or the other in the first tax year the taxpayer is eligible to claim the brownfield credit. This election is irrevocable. This complex choice must be made on a case-by-case basis and will depend on a variety of factors too numerous and complex to describe in this guide.

e. Planning. Taxpayers should avoid the common misconception that this credit abates or reduces property taxes. It does not. The site owner must pay the property taxes to the local taxing authorities. This is an *income tax* credit and is claimed on the taxpayer's New York State income (or franchise) tax return for the year in which the property taxes are paid. The credit will not affect the federal or state deduction for property taxes.

The Tax Credit for Environmental Remediation Insurance

The BCP legislation amended the Insurance Law to authorize the Superintendent of Insurance to issue regulations relating to certification of environmental remediation insurance policies that would qualify policyholders to claim a new environmental remediation insurance tax credit. The credit is based on premiums paid for a qualified policy, and is claimed in the year the COC is issued. To qualify for the credit, the policy must provide the following coverage:

- coverage for the cost of on-site cleanup for existing conditions which are outside the scope of the work plan under the BCA;
- third party claims for onsite bodily injury and property damage resulting from pre-existing pollution outside the scope of the BCA work plan;
- coverage which caps cleanup costs relating to the BCA work plan; and
- coverage for the cost of state reopeners or modifications to the BCA work plan to fill any gaps in the statutory covenant not to sue (under Section 27-1419 of the Environmental Conservation Law).¹⁶⁵

This credit is a one-time credit taken in the year the COC is issued equal to the lesser of \$30,000 or 50% of the premiums paid for environmental remediation insurance under a qualified policy, provided the premiums are paid after the date the BCA has been signed.

Tax Credit Recapture

The taxpayer must repay some or all of the credits if certain things happen. The most obvious trigger event would be the revocation of the COC, and all three credits are subject to repayment (recapture) where the COC is revoked. The NYSDEC is granted the authority to revoke a COC, including for ~~good cause~~.¹⁶⁶ The legislation offers no guidance as to what conduct would constitute ~~good cause~~ and provides no time limit on the NYSDEC's authority in this respect.

Site Transfers

The Environmental Conservation Law provides that a COC ~~may~~ be transferred to the applicant's successors or assigns upon transfer or sale of the brownfield site.¹⁶⁷ This provision allows a buyer of a cleaned-up site to claim tax credits for improvements (for example, new buildings on the site) completed after the site is cleaned up and transferred to the builder.¹⁶⁸

Effective Date

The BCP credits are available for taxable years beginning on or after April 1, 2005.¹⁶⁹ For calendar year taxpayers, this means the credits can be taken beginning in 2006.¹⁷⁰ Taxpayers with cleanup projects that finish before the first tax year the credits can be claimed will be allowed to claim the credits when the credit provisions of the Act take effect (2006 for calendar year taxpayers). DTF confirmed this result in a recent advisory opinion.¹⁷¹ As noted above, the

¹⁶⁵ N.Y. INS. LAW § 3447.

¹⁶⁶ N.Y. ENVTL. CONSERV. LAW § 27-1419, subd. 5(d).

¹⁶⁷ *Id.* § 27-1419, subd. 5.

¹⁶⁸ The ECL also requires recording of a ~~notice~~ of the certificate of completion in the County Clerk's office, so that prospective buyers would know the site had been cleaned up and that the cleanup was accepted by NYSDEC. *Id.* subd. 8. For further information on the transfer process, see NYSDEC's website at <http://www.dec.ny.gov/chemical/54736.html>.

¹⁶⁹ 2003 Laws of N.Y. 1121. Part H, § 33, the effective date provision for the BCP amendments to the tax law, provides, in part: "This act shall take effect immediately, except that sections one through twenty-nine of this act shall apply to taxable years beginning on or after April 1, 2005..." *Id.*

¹⁷⁰ Fortunately, taxpayers can include costs incurred from the date of the Brownfield Cleanup Agreement when calculating the three components of the Brownfield Redevelopment Credit, even if the BCA is signed before prior to the first tax year which the credit is actually allowed.

¹⁷¹ Atlas Park, LLC, Adv. Op. Comm. Tax'n & Fin. (March 10, 2005).

2008 amendments distinguish the tax credit computations between qualified sites accepted into the BCP *before* June 23, 2008 and those qualified sites accepted *after* June 23, 2008. As such, parties will have different tax implications depending on when they entered the BCP.

Conclusion

The BCP offers tremendous financial incentives for the cleanup and redevelopment of New York's brownfields. The legislative amendments made in 2008 set a limit on the tax credits developers could receive, established a tiered system of funding based upon the level of remediation performed, and provided further clarity that the tax credits (available through the Brownfields Real Property Tax Credit) are attached to the land. By making these credits refundable, New York has placed a significant new economic development incentive on the table. Site owners and developers can, and should, begin planning now for the application of these valuable credits to their brownfield remediation projects.

E. Other Funding Opportunities

- **Brownfield Opportunity Area (BOA) Program**

Through the new BOA Program the Secretary of State is directed to provide financial and technical assistance to communities to complete revitalization plans and implementation strategies for areas affected by the presence of multiple brownfield sites and to provide funding for site assessments on strategic sites, if required. See Chapter 3 for more information.

- **Local Waterfront Revitalization Program**

The Department of State Division of Coastal Resources solicits grant applications from local governments for 50/50 matching grants from the New York State Environmental Protection Fund's Local Waterfront Revitalization Program on an annual basis.

Recent application cycles have included several grant categories, including: community visioning; urban waterfront redevelopment; the preparation and implementation of redevelopment strategies, including the redevelopment of abandoned buildings for urban areas containing brownfield sites; and completing or implementing a comprehensive Local Waterfront Revitalization Program.



Grants are available to any municipality located on the state's coastal waters or on a designated inland waterway. Applications from community-based organizations, neighborhood groups, not-for-profit groups and other organizations can be considered if the application involves the

participation of, and is submitted by, an appropriate local government sponsor with jurisdiction over the project area.

Funding preferences are given to grant proposals that plan for the redevelopment of urban waterfronts including projects that advance the reuse of abandoned buildings and sites and include a community-based visioning, participatory planning and design process. This is to ensure that the planning process generates broad community understanding of waterfront issues, creates a community consensus for the future of their waterfront, and develops a strategy for the steps needed to advance the consensus of the community. Funding preferences are also given to community participation programs for rural waterfront communities, urban waterfront neighborhoods and inter-municipal partnerships.

Appendix A

ACRONYMS

ASTM	American Society for Testing and Materials
BID	Business Improvement District
BCP	Brownfield Cleanup Program (New York State)
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act (Federal)
CRA	Community Reinvestment Act (Federal)
EDA	Economic Development Administration (Federal)
ENB	Environmental Notice Bulletin
EPA	Environmental Protection Agency (Federal)
FDIC	Federal Deposit Insurance Corporation
FFIEC	Federal Financial Institutions Examinations Council
FOIA	Freedom of Information Act
GIS	Geographic Information Systems
GSA	General Services Administration (Federal)
HMDA	Home Mortgage Disclosure Act (Federal)
HUD	Housing and Urban Development Agency (Federal)
HWWT	Hazardous Waste Worker Training
LUST	Leaking Underground Storage Tank
MOU	Memorandum of Understanding
MSA	Metropolitan Statistical Area
NEPA	National Environmental Policy Act (Federal)
NFRAP	No Further Remedial Action Planned
NOAA	National Oceanographic and Atmospheric Administration (Federal)
NPL	National Priorities List (Federal)
NPS	National Park Service (Federal)
NYSBA	New York State Bar Association
NYSDEC	New York State Department of Conservation

NYSERDA	New York State Energy Research and Development Authority (New York State)
OCC	Office of the Comptroller of the Currency (Federal)
OPRHP	Office of Parks, Recreation and Historic Preservation (New York State)
OTS	Office of Thrift Supervision (Federal)
PE	Performance Evaluation
PRP	Potentially Responsible Parties
RCRA	Resource Conservation and Recovery Act (Federal)
RCRIS	Resource Conservation and Recovery Information System (Federal)
REIT	Real Estate Investment Trusts
RFP	Request for Proposals
ROD	Record of Decision
SARA	Superfund Amendments and Reauthorization Act (Federal)
SEQRA	State Environmental Quality Review Act (New York)
SIR	Self-Insured Retention
SPDES	State Pollutant Discharge Elimination System
TAG	Technical Assistance Grants
TEA-21	Transportation Equity Act for the 21 st Century (Federal)
USACE	United States Army Corps of Engineers
VCP	Voluntary Cleanup Program (New York State)

Appendix B

GLOSSARY

Abandonment– A cessation of the use of a property by the owner with the intention of neither selling the property nor resuming the use of the property.

Banking Regulators– State and federal banking agencies that, among their numerous supervisory activities, implement and enforce Community Reinvestment Act regulations for the banks they regulate.

Brownfield Cleanup Program (BCP)– New York State Department of Conservation program created in Title 14 of Article 27 of the New York State Environmental Conservation Law to encourage and implement the cleanup and redevelopment of brownfields by addressing the financial, legal and environmental obstacles to redeveloping and reusing contaminated properties.

Brownfields– real property whose reuse or redevelopment may be complicated by the presence or perception of contamination. (ECL 27-1401).

CERCLA (Comprehensive Environmental Response Compensation & Liability Act)– Imposes strict liability on responsible parties for cleanup of sites polluted by hazardous substances. 42 U.S.C. § 9607(a).

Chartered Bank– A financial depository institution that is registered with and chartered by a governmental regulatory agency.

Cleanup– Actions taken to deal with a release or threat of release of a hazardous substance that could cause harm. Used interchangeably with remediation, removal action, or corrective action.

Comfort Letters– Letters issued by the EPA, at its discretion, in order to encourage brownfield redevelopment. Such letters provide potential developers with information as to how polluted the site may be, and whether the USEPA intends to exercise its authority under CERCLA based on current pollution levels. Comfort letters provide no legal protection against future enforcement activity at a site by the USEPA. Nevertheless, comfort letters may be helpful in obtaining financing for a redevelopment project. All USEPA regional offices provide these letters. 62 Fed. Reg. 4624.

Commercial Bank– State or national bank, owned by stockholders, that accepts demand deposits, makes commercial and industrial loans, and performs other banking services for the public.

Community Development Loan Funds (CDLFs)– Unregulated financial intermediaries that bring together capital from individual and institutional social investors at below-market rates and re-lend this money primarily to non-profit housing and business developers in urban and rural lower-income communities.

Community Reinvestment Act of 1977 (CRA)– Federal law that requires insured depository institutions to meet credit needs (including home mortgages and business loans) of all communities they serve, including low and moderate income communities.

CRA Assessment Area– Geographic area that is delineated by a bank and used by the regulatory agency in evaluating the bank's record of helping to meet the credit needs of its community. It must include geographies in which the bank has its main office, branches and deposit-taking ATMs, as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans.

CRA Compliance– The Federal banking agencies evaluate banks for their compliance with CRA under lending, services, and investment tests.

CRA Disclosure Report– A CRA performance evaluation, written by banking agencies, which states a bank's CRA rating and the regulator's basis for assigning that rating. The disclosure report provides information on a bank's lending record, community development programs, community activities, and any perceived strengths or weaknesses in the bank's CRA performance.

CRA Officer– The person a bank designates to serve as its point person on CRA. The CRA officer is typically the first person the bank sends to meet with community groups to discuss CRA matters but often lacks authority to make decisions on behalf of the bank.

Conservancy– A public-private entity whereby the government retains ownership of the property and the private organization is responsible for the daily operations of the property; often used for the management of parks and other open space.

Cost Cap Insurance– A type of insurance that addresses cost overruns, that is, costs above those estimated for cleanup of a contaminated site. Cost cap insurance is, in essence, a *stop loss policy*. It covers the insured for a self-insured retention (SIR), which is the cost of cleanup plus an additional deductible. For example, a \$1,000,000 cleanup may require an additional \$100,000 deductible, before the cost cap insurance policy kicks in. This means that cost cap coverage would begin after \$1.1 million was spent on remediation.

Covenant– A contract (written promise or agreement) relating to real property, entered into by two or more parties. The agreement concerns a pledge by one of the parties that something has been done, shall be done, or shall not be done, or stipulates to the truth of certain facts. Covenants are primarily used in transfers of real property, known as deeds.

Covenant Not to Sue– An agreement granted by a government agency that releases a party from liability. Often in the environmental context, covenants not to sue are qualified with a potential re-opener.

Deed– A written document, signed, delivered, and recorded, by which one person transfers ownership of land to another person.

Deed Restrictions– Limits or restrictions on how property may be used which are written into a deed and are legally enforceable against all subsequent owners.

Due Diligence– The process of evaluating the environmental condition of a piece of property, usually in connection with a real estate transaction.

Easement– A right of use over the property of another. An easement normally benefits adjoining lands---easement appurtenant. The land that is subject to the easement is known as the *servient tenement*. The land having the right to use the land of another is known as the *dominant tenement*. For example, railroad companies have easements for the land where the track runs through private property.

Emergency Removal– An action initiated in response to a release of a hazardous substance that requires immediate on-site activity.

Empowerment Zones– Federally designated areas eligible for development assistance pursuant to Internal Revenue Code 26 U.S.C. § 1391.

Environmental Notice Bulletin (ENB)– A weekly publication by the New York State Department of Environmental Conservation. It includes the following: environmental notices, projects, rules and regulations, and guidance memos. It can be found at <http://www.dec.state.ny.us/website/enb/index.html>.

EPA (Environmental Protection Agency)– The federal agency that implements environmental statutes such as CERCLA and RCRA for cleaning up the environment.

EPA Region 2– Region consists of New York, New Jersey, Puerto Rico, and the Virgin Islands.

Federal Brownfields Tax Incentive Program– A tax incentive to spur cleanup and development of brownfields under the Taxpayer Relief Act (PL 105-34/HR 2014), signed by President Clinton on August 25, 1997. Under the tax incentive, environmental cleanup costs at qualified sites are fully deductible in the year in which they are incurred.

Federal Financial Institutions Examinations Council (FFIEC)– Interagency group of federal banking regulators formed in 1979 to maintain uniform standards for the federal examination and supervision of federally insured depository institutions, bank holding companies, and savings and loan holding companies. FFIEC members include the federal banking agencies, the FDIC, OCC, Federal Reserve, and OTS, and the National Credit Union Administration.

Grant– To confer a gift [of land or money] by one having authority over the land or money.

Grantee– One to whom a grant is made.

Greenfields– Sites that are undeveloped and that require little or no environmental cleanup. Greenfields sites have no previous industrial or commercial use. Greenfields compete with brownfields in offering development incentives. The term was created both in response and in contrast to the characterization of areas as brownfields.

Hazardous Waste– Waste that meets a legally defined characteristic of corrosiveness, ignitability, reactivity or toxicity--or appears on a list of hazardous wastes, pursuant to 42 U.S.C. § 6901 of RCRA. Under New York State Law, waste that --because of quantity, concentration...or infectious characteristics [of the waste]...pose[s] potential hazard to human health or the

environment when improperly treated, stored, transported, disposed, or otherwise managed.” N.Y. Evtl. Conserv. Law § 27-0901(3); see also 42 U.S.C. § 6903(5).

Home Mortgage Disclosure Act of 1975 (HMDA)– Federal law that requires depository institutions to submit detailed annual reports of all home mortgage applications they received for home purchase, home improvement, and refinancing loans, according to race, income and gender of loan applicants and the race and income characteristics of the area in which the property is located.

In-Kind Contribution– A non-cash contribution usually consisting of goods, equipment, and services necessary for a project. It may be used to meet a recipient’s matching funds requirement in accordance with federal Technical Assistance Grants (TAGs) under 40 C.F.R. § 30.307(b), or other grants.

Innocent Purchaser– A purchaser of land polluted by hazardous substances who (1) at the time of acquiring the property did not know and had no reason to know that any hazardous substance was disposed of on the property; (2) exercised due care with respect to the hazardous substances; and (3) took precautions against foreseeable acts or omissions of the third party. 42 U.S.C. § 9607(3) and § 9601(35)(B). One may use this defense to avoid liability under CERCLA. However, this defense to liability under CERCLA is almost never available to purchasers of brownfield sites.

Joint & Several Liability– Responsibility for all cleanup costs and harm may be imposed on one party despite the fact that there is more than one responsible party connected with a site. Thus, each responsible party may bear full costs for cleanup of a site polluted by hazardous substances. The party being sued may, in turn, sue other responsible parties for contribution to the costs.

Lender– The person or institution from whom a thing or money is borrowed, such as a bank.

Liability– Obligation or debt one is bound under law or justice to perform.

Loan Fund– Unregulated financial intermediaries that bring together capital from individual and institutional social investors at below-market rates and re-lend this money primarily to non-profit housing and business developers in urban and rural lower-income communities.

Limited Purpose Bank– A bank that offers only a narrow product line, such as credit card or motor vehicle loans, to regional or broader markets and has received designation as a limited purpose bank from its supervisory agency. Limited purpose banks are subject to the CRA under the regulations applicable to wholesale and limited purpose banks.

Matching Funds– The portion of project costs that a recipient contributes toward completing a project using grant funds.

Mitigation– Actions intended to minimize the significant environmental impacts of a project.

Mortgage– A document that transfers title and is proof of a debt with the property as collateral. Under a mortgage, in the event that the mortgagor does not pay the debt according to the terms of the loan agreement, the mortgagee gets title to the property.

Mortgagee– Lender such as bank.

Mortgagor– One who has title [ownership by written document] to property, and promises that property [to a bank for a loan] as security in case of default of that loan.

Municipality– A municipality is a local public authority or public benefit corporation, a county, city, town, village, school district, district corporation, improvement district within a County, Town, or Village, or an Indian nation...” (and in some instances, a borough of New York City). N.Y. Evtl. Conserv. Law § 56-0502 and the Bond Act.

National Priorities List (NPL)– An USEPA list of serious uncontrolled polluted or abandoned hazardous waste sites. Sites on the NPL are eligible for funds from the Superfund Trust Fund for cleanup activities. As of January 3, 2000, there were 1,216 sites on the NPL.

No Further Remedial Action Planned (NFRAP)– Determination made by the USEPA that a site poses no significant risk, and therefore, there is no future action required under CERCLA.

Office of the Comptroller of the Currency (OCC)– Federal banking agency that regulates nationally-chartered banks for CRA compliance among its numerous supervisory functions.

Owner-Controlled Insurance– Environmental insurance that provides coverage for the cost of harm caused by other parties involved in the cleanup of a site.

Phase I Site Assessment– A general assessment to determine if a site is polluted or may be polluted by hazardous materials without the physical testing of the soil and groundwater. Such an assessment requires thorough review of records relating to the site, personal interviews, and physical inspection of the property.

Phase II Site Assessment– On-site soil and groundwater testing by an environmental engineer in order to determine whether a site is, or may be polluted by hazardous materials. The Phase II Site Assessment determines the type of pollution present, its extent, and location. This assessment provides evidence of a site’s contamination by hazardous substances and/or hazardous waste.

Pilot Program– A program or project, which is in effect for a specific period of time to determine and measure a project’s potential success.

Planning Charrette– A workshop or formal gathering of diverse people to brainstorm planning strategies and principles for a particular community. The process usually involves individual sessions where the whole group is divided into smaller groups to consider portions of the project.

Plume– The extent of the vertical and horizontal expansion or spreading of the contamination from its source.

Potentially Responsible Parties (PRPs)– Persons or entities subject to liability under CERCLA. PRPs may include past, present, and future owners of such sites, and operators; also generators and transporters of hazardous substances. (See Title 42 U.S.C. § 9607(a)). Under CERCLA, PRPs are strictly liable for cleanup costs for a site polluted by hazardous substances because of the abnormally high risk to human health and the environment from hazardous substances. CERCLA allows one PRP to sue another PRP for cleanup costs (actions for contribution). However, a party that has settled its liability with the federal government or state is protected from contribution claims by non-settling parties regarding matters covered by the settlement.

Private Right of Action– An individual’s legal right to bring a claim, action or suit in a court of law or administrative proceeding.

Property Transfer Insurance– Environmental insurance that provides coverage for the cleanup costs of adjoining or downstream sites when the contamination stems from the onsite pollution.

Public Nuisance– A condition dangerous to public health, offensive to community standards or unlawfully obstructive to the public’s free use of property.

Qualified Release– A term in a contract that absolves a party from liability under its specific terms with a condition that the party granting the release can demand compliance later. In the brownfield context, a covenant not to sue usually contains a qualified release relating only to past contamination of the site and contains a re-opener.

RCRA (Resource Conservation and Recovery Act)–Federal law governing treatment, storage, transportation, and disposal of hazardous waste. RCRA requires a ‘cradle to grave’ tracking of hazardous waste to enable either the USEPA or the state to know who handled such waste and where it ended up. 42 U.S.C. § 6901.

Real Estate Investment Trust Fund (REIT)– A mechanism for funding brownfield redevelopment. Pension funds and insurance companies invest in REITs, because they offer a high rate of return. When funding a brownfield redevelopment, the REIT owns the brownfield site, thus limiting each investor’s liability. REITs tend to seek sites that are minimally contaminated, or that have completed the cleanup process, in order to avoid broader liability for cleanup under federal superfund or state law.

Redlining– Illegal discrimination in the form of refusing loans, insurance coverage, or other financial services to people or property in certain areas because of race, poor economic conditions, or high levels of default.

Release– Any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a substance into the environment.

Remediation– Sufficient cleanup of pollution so that, at a minimum, the property is returned to a state that “assures protection of human health and the environment.” 42 U.S.C. § 9621(d).

Re-opener– A contract qualifier that allows the government in a cleanup agreement to demand additional cleanup of a site, which may arise long after completion of the initial, approved cleanup action. If new contamination is found or conditions change, the release from liability may be reopened. Covenants not to sue issued by the government are often subject to re-openers.

Retail Bank– A bank that is in the business of extending home mortgage, small business, farm or consumer loans to retail customers and has received designation as a retail bank from its supervisory agency. Retail banks are in contrast to wholesale banks.

Revolving Fund– A mechanism for funding brownfield redevelopment by providing loans to specific parties. Parties repay the initial loan with interest, making more money available for further loans.

Sanborn Map– A record kept for insurance purposes that shows for a specific property, the locations of buildings and areas where chemicals have been used for certain industrial purposes. Phase I Assessments often rely on these maps.

State-Chartered vs. Nationally-Chartered Bank– State chartered banks are corporations chartered by a state to engage in commercial banking, and are subject to supervision under banking laws in the chartering state. State banks differ from national banks, which are chartered and supervised by the Office of the Comptroller of the Currency.

State Registry of Inactive Hazardous Waste Sites– A New York State registry of sites that contain hazardous waste. The registry is compiled and maintained by the NYSDEC, and can be found online at <http://www.dec.ny.gov/chemical/8437.html>.

a. **Class 1 site**– A site that causes or is in imminent danger of causing irreversible or irreparable harm to the public health or the environment, so that immediate action is required. No site has ever been designated a Class 1 site.

b. **Class 2 site**– A site that poses a significant threat to human health or the environment. Action is required.

Status Letters– Letters issued by the USEPA, at its discretion, describing the status of any environmental investigation of a particular site.

Stop Loss Insurance– Another term for cleanup cost cap insurance.

Strict Liability– Responsibility for harm to the person, land, or property of another, by one engaging in abnormally dangerous activity, even if the one engaging in such activity has exercised utmost care to prevent harm.

Superfund– A trust fund created in 1986 by federal statute known as Superfund Amendments and Reauthorization Act (SARA), through tax on chemical and petroleum industries, primarily. Superfund monies pay for the USEPA’s hazardous waste emergency, long-term removal, and remedial activities that include establishing the National Priorities List (NPL), investigating sites to determine whether they should be placed on the NPL, remediating sites or supervising remediation activity on sites, and other remedial activities.

Sustainable Development– Development that seeks to respond to the following broad requirements: –(1) integration of conservation and development; (2) satisfaction of basic human needs; (3) achievement of equity and social justice; (4) provision of social self-determination and cultural diversity; and (5) maintenance of ecological integrity.” [Note: this is only one of many different definitions].

Tax Record–The official document detailing taxes owed and taxes paid on a particular property.

Technical Assistance Grants (TAGs)– Grants available for hiring technical advisors or consultants. Administered by the USEPA for the benefit of any group of individuals that may be affected by a release or threatened release of hazardous substances from any facility listed on the National Priorities List (NPL) or is proposed for listing on the National Oil and Hazardous Substances Contingency Plan (NCP) and at which a response action has begun. 40 C.F.R. § 35.4025.

Third Party Liability– Legal responsibility of a party who was not subject to the initial action.

Title– Ownership of property by a written document.

Title Search– Investigation into who has owned a property over time. Includes investigation into encumbrances such as easements on the property.

Voluntary Cleanup Program (VCP)– The New York State Program, administered by the NYSDEC for cleanup of contaminated property under private ownership, pursuant to NYSDEC Organization and Delegation Memorandum No. 94-32 (Dec. 1994). The program requires that property be cleaned up to a level that is consistent with its safe use. New York’s VCP includes all sites over which New York State exercises jurisdiction, including those listed on the State Registry of Inactive Hazardous Waste Disposal Sites. The program was surpassed by the Brownfield Cleanup Program in 2004.

Wholesale Bank– A bank that is not in the business of extending home mortgage, small business, farm or consumer loans to retail customers and has received designation as a wholesale bank from its supervisory agency. Wholesale banks are subject to the CRA under the regulations applicable to wholesale and limited purpose banks. Wholesale banks are in contrast to retail banks.

Appendix C

STATE GOVERNMENT

NYSDEC, Environmental Remediation Division

625 Broadway
12th Floor
Albany, NY 12233
(518) 402-9764
derweb@gw.dec.state.ny.us
<http://www.dec.ny.gov/about/776.html>
Dale Desnoyers, Director
(518) 402-9706

Bureau of Program Management

(518) 402-9764

Bureau of Technical Support

(518) 402-9543

Remedial Bureau A (Regions 1 & 5)

(518) 402-9625

Remedial Bureau B (Regions 2 & 4)

(518) 402-9768

Remedial Bureau C (Regions 3 & 6)

(518) 402-9662

Remedial Bureau D (Region 7)

(518) 402-9818

Remedial Bureau E (Region 8 & 9)

(518) 402-9814

NYSDEC Region 1 - (Counties: Nassau, Suffolk)

SUNY Campus Building 40
Stony Brook, NY 11790
Walter Parish
(631) 444-0240

NYSDEC Region 2 - (Counties: Bronx, Kings, New York, Queens, Richmond)

1 Hunter's Point Plaza
47-40 21st Street
Long Island City, NY 11101
Jane O'Connell/Vadim Brevdo
(718) 482-4599/4928

NYSDEC Region 3 - (Counties: Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, Westchester)

21 South Putt Corners Road
New Paltz, NY 12561
Ed Moore
(845) 256-3137

NYSDEC Region 4 - (Counties: Albany, Columbia, Delaware, Greene, Montgomery, Otsego, Rensselaer,

Schenectady, Schoharie)
1150 North Westcott Road
Schenectady, NY 12306
Keitz Goertz
(518) 357-2399

NYSDEC Region 5 - (Counties: Clinton, Essex, Franklin, Hamilton)

Route 86, PO Box 296
Ray Brook, NY 12977
Russ Huyck
(518) 897-1242

NYSDEC Region 6 - (Counties: Herkimer, Jefferson, Lewis, Oneida, St. Lawrence)
317 Washington Street
Watertown, NY 13601
Peter Taylor
(315) 785-2511

NYSDEC Region 7 - (Counties: Broome, Cayuga, Chenango, Cortland, Madison, Onondaga, Oswego, Tioga, Tompkins)
615 Erie Boulevard West
Syracuse, NY 13204-2400
Greg Townsend
(315) 426-7550

NYSDEC Region 8 - (Counties: Chemung, Genesee, Livingston, Monroe, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Yates)
6274 East Avon-Lima Road
Avon, NY 14414-9519
Bart Putzig
(585) 226-5349

NYSDEC Region 9 - (Counties: Allegany, Cattaraugus, Chautauqua, Erie, Niagara, Wyoming)
270 Michigan Avenue
Buffalo, NY 14203-2999
Martin Doster/Greg Sutton
(716) 851-7220

Empire State Development Corporation

Main Offices:

30 South Pearl Street
Albany, NY 12245
Phone: (800) STATE-NY (800-782-8369)
www.empire.state.ny.us/

New York City Region

633 Third Avenue, 32nd Floor
New York, NY 10017-6706
(212) 803-3130
Email: nys-nc@empire.state.ny.us

Western New York Region

95 Penny Street - Suite 500
Buffalo, NY 14203-3030
Phone: (716) 846-8200
E-mail: nys-westernny@empire.state.ny.us

Regional Offices:

Capital Region

Hedley Park Place
433 River Street - Suite 1003
Troy, NY 12180
Phone: (518) 270-1130
Email: nys-capitaldist@empire.state.ny.us

Central New York Region

620 Erie Boulevard West - Suite 112
Syracuse, NY 13204
Phone: (315) 425-9110
E-mail: nys-centralny@empire.state.ny.us

Finger Lakes Region

400 Andrews Street - Suite 710
Rochester, NY 14604
Phone: (585) 325-1944
E-mail: nys-fingerlakes@empire.state.ny.us

Long Island Region

150 Motor Parkway
Hauppauge, New York 11788
Phone: (631) 435-0717
E-mail: nys-longisland@empire.state.ny.us

Mid-Hudson Region

33 Airport Center Drive - Suite 201
New Windsor, NY 12553
Phone: (845) 567-4882
E-mail: nys-midhudson@empire.state.ny.us

Mohawk Valley Region

207 Genesee Street
Utica, NY 13501
Phone: (315) 793-2366
E-mail: nys-mohawkval@empire.state.ny.us

North Country Region

Plattsburgh Office
401 West Bay Plaza
Plattsburgh, NY 12901
Phone: (518) 561-5642
E-mail: nys-northcountry@empire.state.ny.us

North Country Region

Watertown Office
Dulles State Office Building
317 Washington St., 2nd Floor
Watertown, NY 13601
Phone: (315) 785-7940
E-mail: nys-northcountry@empire.state.ny.us

Southern Tier Region

Binghamton Office
State Office Building
44 Hawley Street
Room 1508
Binghamton, NY 13901
Phone: (607) 721-8605
E-mail: nys-southerntier@empire.state.ny.us

Southern Tier Region

Elmira Office
400 East Church Street
Elmira, NY 14901
Phone: (607) 733-6513
E-mail: nys-southerntier@empire.state.ny.us

Metropolitan Transit Authority (MTA)

347 Madison Avenue
New York, NY 10017-3739
(212) 878-7000
<http://mta.info/>

**New York State Energy Research &
Development Authority (NYSERDA)**

17 Columbia Circle
Albany, NY 12203-6399
1-866-NYSERDA
(518) 862-1090
www.nyserda.org

New York Environmental Facilities Corporation

625 Broadway
Albany, NY 12207-2997
1-800-822-9721
(518) 402-6924
info@nysefc.org
www.nysefc.org/home.htm

New York State Office of Parks, Recreation, and Historic Preservation

Empire State Plaza
20th Floor Agency Building #1
Albany, NY 12238
(518) 474-0456
<http://nysparks.state.ny.us/>

Office of the State Comptroller

110 State Street
Albany, NY 12236
(518) 474-4044
www.osc.state.ny.us/

Appendix D

FEDERAL GOVERNMENT CONTACTS

Army Corps of Engineers (USACE)

441 G. Street, NW
Washington, DC 20314
(202) 761-0011
hq-publicaffairs@usace.army.mil
www.usace.army.mil/

Regional Office

Jacob Javits Federal Building
26 Federal Plaza
New York, NY 10278-0090
(917) 790-8700
www.usace.army.mil/

Department of Commerce

Economic Development Administration (EDA)

1401 Constitution Avenue, NW
Suite 7800
Washington, DC 20230
(202) 482-4085
www.eda.gov

Regional Office

The Curtis Center, Suite 140 South
601 Walnut Street
Philadelphia, PA 19106-3821
(215) 597-4603

New York Representative

620 Erie Blvd. West, Suite 104
Syracuse, NY 13204-2442
(315) 448-0938
HMarshal@eda.doc.gov

Department of the Interior

National Park Service (NPS)

Rivers, Trails, and Conservation Assistance Program

1849 C Street, NW, Org. Code 2220
Washington, D.C. 202040
(202) 354-6900

New York City

Rivers, Trails & Conservation Assistance

National Park Service
Theodore Roosevelt Birthplace NHS
28 E. 20th St.
New York, NY 10003
Jerry Willis
(908) 461-7596
jerry_willis@nps.gov

Upstate New York

Rivers, Trails & Conservation Assistance

National Park Service
Roosevelt-Vanderbilt NHS

519 Albany Post Road
Hyde Park, NY 12538
Karl Beard
(845) 229-9115
karl_beard@nps.gov

Environmental Protection Agency (EPA)

Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460
(202) 272-0167
www.epa.gov

National Freedom of Information (FOIA) Officer

401 M Street
Washington, DC 20460
(202) 566-1667
hq.foia@epa.gov
www.epa.gov/foia/

Region 2

290 Broadway
New York, NY 10007-1866
(212)-637-3660
(212) 637-3000
<http://www.epa.gov/region02/>
Regional FOIA
(212) 637-3668
r2foia@epa.gov

Hotlines:

EPA Grants (800) 490-9194
National Response Center (800) 424-8802; (202) 267-2675
Spill Reporting Hotline (800) 424-8802
Superfund Information Hotline (800) 563-2509
Toxic Release Inventory/ Information Center (800) 424-9346
Toxic Release Inventory, General Program (202) 566-1415

General Services Administration (GSA)

GSA Building,
1800 F Streets, NW
Washington, DC 20405
(202) 501-0800
www.gsa.gov

Northeast and Caribbean Office

Jacob K. Javits Federal Building
26 Federal Plaza
New York, NY 10278
(212) 264-9290
www.gsa.gov/portal/content/104728

Housing and Urban Development (HUD)

451 7th Street, SW
Washington, DC 20410
(202) 708-1112
www.hud.gov
www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/index.cfm

Regional Office

Jacob K. Javits Federal Building

26 Federal Plaza
New York, NY 10278
(212) 264-8000
www.hud.gov/local/nyn/index.html

National Oceanic & Atmospheric Administration (NOAA)

1401 Constitution Avenue, NW
Room 5128
Washington, DC 20230
(843) 740-1200
www.noaa.gov
<http://csc.noaa.gov/>

Office of Response and Restoration

1305 East-West Highway
Silver Spring, MD 20910
(301) 713-4248
<http://response.restoration.noaa.gov/>

Appendix E

BROWNFIELD SERVICES

U.S. Geological Survey (USGS)
National Aerial Photography Program (NAPP)
<http://eros.usgs.gov/EarthExplorer/>
<http://www.usgs.gov>

New York State Office of Cyber Security & Critical Infrastructure Coordination
Mailing Address:
30 South Pearl St., 11th Floor
Albany, NY 12207-3425
(518) 474-5212
<http://www.nysgis.state.ny.us/index.cfm>

Physical Address:
Center for Geographic Information
Kenmore Building
74 North Pearl Street
2nd Floor
Albany, NY 12207
(518) 443-2042

Environmental Data Resources, Inc.
440 Wheelers Farm Road
Milford, CT 06461
(203) 783-0300
www.edrnet.com
Sanborn Maps, aerial photos, NEPA reports and more.

National Aerial Resources
385 Jordan Road
Troy, NY 12864
(518) 583-0667
<http://www.aerialsearch.com>

Aero Graphics Corp
1575 Smithtown Avenue
Bohemia, NY 11716
(631) 589-6045

Technical Assistance Resources: CRA Resources

Center for Community Change, Neighborhood Revitalization Project
1536 U Street, NW
Washington, DC 20009
(202) 339-9300
<http://www.communitychange.org>

New York
330 7th Avenue, Suite 1802
New York, NY 10001
(212) 643-3464

National Community Reinvestment Coalition (NCRC)
727 15th Street, NW, Suite 900
Washington, DC 20005
(202) 628-8866

Professor Richard D. Marsico
New York Law School,
Civil & Human Rights Law Clinic
57 Worth Street
New York, NY 10013
(212) 431-2180
<http://www.ncrc.org>

Neighborhood Economic Development Advocacy Project (NEDAP)
176 Grand Street, Suite 300
New York, NY 10013
(212) 680-5100
<http://www.nedap.org>

Federal Banking Regulators: (community affairs contacts in New York regional offices)

Federal Reserve Bank of New York
33 Liberty Street
New York, NY 10045
(212) 720-6130
<http://www.ny.frb.org/regional/commreinvest.html>

Federal Deposit Insurance Corporation (FDIC)
350 Fifth Avenue
New York, NY 10118-0110
(212) 293-1871
<http://www.fdic.gov/consumers/index.html>

Office of the Comptroller of the Currency
340 Madison Avenue
New York, NY 10173-0699
(212) 790-4025
<http://www.occ.treas.gov/index.htm>

Office of Thrift Supervision (OTS)
Jersey City Regional Office
Harborside Financial Center Plaza Five, Suite 1600
Jersey City, NJ 07311
(201) 413-1000

Appendix F

BROWNFIELD PUBLICATIONS

American Society for Testing and Materials (ASTM), Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process. E 1527-00. (2003) (\$53). <http://www.astm.org/Standards/E1527.htm>.

Brownfield Redevelopment Toolbox, A Guide to Assist Communities in Redeveloping New York State's Brownfields, http://www.dec.ny.gov/docs/remediation_hudson_pdf/bftoolbox.pdf.

Center for Public Environmental Oversight, Community Consultant Directory, <http://www.cpeo.org/techtree/resource/people.htm>, (650) 961-8918.

Community Resource Exchange, From Vision to Reality: Launching a Successful Nonprofit Organization. <http://www.crenyc.org>, (212) 894-3394.

Environmental Law Institute, A Guidebook for Brownfields Property Owners. (1999). http://www.elistore.org/reports_Detail.asp?ID=459.

Environmental Notice Bulletin. New York State Department of Environmental Conservation. 4th Floor 625 Broadway Albany, NY 12233-1750. E-mail: enb@gw.dec.state.ny.us, <http://www.dec.state.ny.us/website/enb>, (518) 402-9167.

The Federal Register, <http://www.gpoaccess.gov/fr/>.

The Foundation Center, Literature of the Nonprofit Sector. <http://lnps.fdncenter.org/search.html>.

The Foundation Center, National Guide to Funding for the Environment & Animal Welfare, 7th Edition. (2004) ISBN 1-931923-93-0, Order Code: FIE7 (\$125). http://fdncenter.org/marketplace/catalog/product_directory.jhtml?id=prod10033, (800) 424-9836.

The Foundation Center's Guide to Grantseeking on the Web. (2003). ISBN 1-931923-67-1. Order Code: WEB4 (\$39.95). http://foundationcenter.org/marketplace/catalog/product_monograph.jhtml?id=prod40002&navCount=1&navAction=jump, (800) 424-9836.

The Foundation Center's Guide to Proposal Writing, 5th Edition. (2007). ISBN 1-59542-129-7, (\$39.95). http://foundationcenter.org/marketplace/catalog/product_bundle.jhtml?id=prod3020001&navCount=1&navAction=jump, (800) 424-9836.

The Foundation Center On-Line (quarterly) (\$19.95/month). <http://fconline.fdncenter.org>, (800) 424-9836.

Gerrard, Michael B., Brownfields Law and Practice: The Cleanup and Redevelopment of Contaminated Land (Volumes 1, 2 & 3). (1999).

Jenner & Block and Roy F. Weston Inc. The Brownfields Book. (1997).

The New York City Housing Partnership, Resource Guide to the Land Use and Development Approval Process in New York. (1993). For a copy, call the New York City Partnership, (212) 493-7400.

New York State Department of Environmental Conservation, The SEQR Cookbook: A Step-by-Step Discussion of the Basic SEQR Process. (2004). http://www.dec.ny.gov/docs/permits_ej_operations_pdf/cookbook1.pdf.

Resources for Global Sustainability, Environmental Grantmaking Foundations [a list of environmental grantmakers]. (\$110/print, \$120/cdrom), E-mail: orders@environmentalgrants.com, <http://www.environmentalgrants.com>, (800) 724-1875.

U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Improving Your Waterfront: A Practical Guide. (843) 740-1200.

U.S. EPA, Publications and Other Resources, <http://www.epa.gov/brownfields/publications/index.htm>.

U.S. EPA, Grant-Writing Tutorial. This is no longer available at the EPA site. Please visit <http://www.epa.gov/ogd/> for information regarding grant writing. http://www.epa.gov/region07/citizens/care/pdf/epa_grant_writing_tutorial.pdf.

U.S. EPA, Road Map to Understanding Innovative Technology Options for Brownfields Investigation and Cleanup, Second Edition (2001). <http://www.brownfields/pdfs/roadmap3rded.pdf>.

U.S. EPA, Catalog of Federal Funding Programs for Watershed Protection. <http://cfpub.epa.gov/fedfund>.

U.S. EPA Region 2, Brownfields Resource Directory for NY, NJ & PR.
<http://www.epa.gov/region02/superfund/brownfields/brwmdir.htm>.

Appendix G

BROWNFIELD ASSISTANCE CENTERS

Brownfield News: A Virtual Marketplace for Distressed Land (Internet only)

<http://www.brownfieldnews.com>

Center for Public Environmental Oversight

Bob Hersh, Brownfields Program Director
1101 Connecticut Avenue, NW, Suite 1000
Washington, DC 20036
Phone (202) 452-8043 fax: (202) 452-8095
bhersh@cpeo.org
<http://www.cpeo.org>

Community Resource Exchange

42 Broadway, 20th Floor
New York, NY 10004
(212) 894-3394, fax (212) 616-4994
<http://www.crenyc.org>

Environmental Support Center

1500 Massachusetts Avenue, NW Suite 25
Washington, DC 20005
(202) 331-9700, fax (202) 331-8592
<http://www.envsc.org>

EPA Brownfields Technology Support Center

(877) 838-7220 (toll free)
<http://www.brownfieldstsc.org>

EPA EnviroMapper (Internet only)

<http://www.epa.gov/emefdata/em4ef.home>

The Foundation Center

79 Fifth Avenue
New York, NY 10003-3076
(212) 620-4230, fax (212) 807-3677
<http://www.fdncenter.org>

HUD, U.S. Housing and Urban Development Emaps (Internet only)

<http://www.hud.gov/offices/cio/emaps/>

New York State Bar Association Environmental Law Section

One Elk Street
Albany, NY 12207
(518) 463-3200
http://www.nysba.org/AM/Template.cfm?Section=Environmental_Law_Home&Template=/CustomSource/SectionHome.cfm&SEC=ENVI

Nonprofit Coordinating Committee of New York

1350 Broadway, Suite 1801
New York, NY 10018
(212) 502-4191, fax (212) 502-4776
www.npccny.org

Nonprofit Gateway (Internet only)

<http://www.nonprofit.gov>

**Northeast Hazardous Substance Research Center (NHSRC) EPA Regions 1 & 2
(in connection with the Center for Environmental Engineering and Science, New Jersey Institute of Technology (NJIT))**

NJ Institute of Technology

CEES Building

University Heights

Newark, NJ 07102-1982

(973) 596-5846

<http://www.cees.njit.edu/nhsrc/commenupage.htm>

Philanthropy New York (formerly known as NYRAG)

795 Fifth Avenue, 4th Floor

New York, NY 10003-3076

(212) 714-0699, fax (212) 239-2075

http://www.philanthropynewyork.org/s_nyrag/index.asp

Resources for Global Sustainability

P.O. Box 3665

Cary, NC 27519

(800) 724-1857, fax (919) 363-9841

<http://www.environmentalgrants.com>

Smart Growth Network (Internet only)

<http://www.smartgrowth.org>

Support Center for Nonprofit Management

305 Seventh Avenue, 11th Floor

New York, NY 10001-6008

(212) 924-6744, fax (212) 924-9544

<http://www.supportctr.org>

Sustainable Communities Network (Internet only)

<http://www.sustainable.org/>

Sustainable Long Island

45A Seaman Avenue

Bethpage, NY 11714

(516) 873-0230, fax (516) 873-0706

<http://www.sustainableli.org>