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ENVIRONMENTAL LAW

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N.Y. Brownfields Program Buffeted by Legislature, Courts

New York was one of the last industrialized states to adopt a comprehensive statute for the cleanup and redevelopment of moderately contaminated land, known as "brownfields." After years of studies, conferences and negotiations, in 2003 the Legislature finally adopted the Brownfields Cleanup Program (BCP).

Unfortunately serious flaws in the new law quickly became apparent. Several more years of debate ensued, the courts weighed in (not always consistently), and in June 2008 the Legislature adopted new amendments.

Whether they got it right the second time around is very much an open question.

Background

Several federal programs address the cleanup of seriously contaminated sites, most notably the National Priorities List (Superfund) program of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Less seriously polluted sites do not fall under those programs, but their contamination raises such liability concerns that it is difficult to redevelop them. Thus many states adopted brownfield programs in the 1990s with expedited approval processes, flexible remediation standards, and financial incentives to encourage the cleanup of land and return blighted areas to productive use.

In 1979, New York adopted what was variously called the state Superfund program, the Title 13 program, and the inactive hazardous waste site registry program. It addresses sites that are not under the federal Superfund program but that nonetheless pose a significant threat to health or the environment. The state Superfund program has very complex, time-consuming procedures, and the presence of a site on the list carries a serious stigma. Thus the program is not well-suited to returning sites to use quickly and economically.

In 1996, New York voters approved the Clean Water/Clean Air Bond Act, which included $200 million for the Environmental Restoration Project Fund. At the time it was the largest brownfields grant program in the country, but eligibility was limited to certain municipally owned properties.

In the mid-1990s the New York State Department of Environmental Conservation (the DEC) adopted the voluntary cleanup program (VCP). No statute specifically authorized the VCP, and the DEC never adopted formal regulations, but it evolved into a well-recognized way for property owners to obtain official sanction for their cleanups. However, the VCP offered no financial incentives, and its lack of explicit statutory basis limited the comfort that could be derived from participation.

The oil spill program under the Navigation Law, and several financial assistance programs administered by the New York City Industrial Development Agency, also addressed some sites.

This was a patchwork of limited, specialized programs. The real estate and environmental communities both clamored for something more comprehensive.

2003 Statute[1]

In 2003, the Legislature passed and Governor George Pataki signed a bill creating the BCP. The statute is long and complex, but in a nutshell it provides that property owners or operators must apply to the DEC for inclusion in the program. For those sites the DEC accepts, detailed studies ensue, leading to a DEC decision on the cleanup required. A major factor in these decisions is the current and anticipated future uses of the property. After the cleanup is completed, the DEC issues a certificate of completion, which carries with it certain liability protections.

The statute also provides for various tax benefits. Most important is the Brownfield Redevelopment Tax Credit, which has three components: credit for site preparation costs (all costs to get the site prepared for remediation and redevelopment, except for acquisition); tangible property costs (the cost of erecting industrial, commercial or recreational buildings on the site); and on-site groundwater remediation costs. These are refundable credits, meaning that if they exceed the taxpayer's tax liability, the state writes a check for the difference. The amount of these credits varies depending on whether the taxpayer is an individual or a corporation; whether the property was cleaned to the maximum level (allowing for unrestricted use); and whether the site is located in an "Environmental Zone." Applying these factors, the tax credits can range from 10 to 22 percent of covered costs.

With the adoption of the BCP, the DEC phased out the VCP. In late 2006 the DEC promulgated detailed regulations implementing the 2003 statute, and also revised the rules under the state Superfund program.[2] The aspects of these regulations dealing with cleanup standards led to two lawsuits, and to decisions from two different judges in New York State Supreme Court, Albany County, in 2008. Each of these decisions upheld certain portions and struck down other portions of the 2006 regulations. The DEC plans to appeal both decisions.

Litigation Over Cleanup Standards

In *Citizens' Environmental Coalition Inc. v. DEC*,[3] several environmental groups argued, in essence, that the soil cleanup objectives and certain other aspects of the BCP regulations were too lax. Justice Christopher E. Cahill rejected most of these claims but upheld one. That concerned the cleanup of Track 4 sites (those where site-specific soil cleanup objectives are adopted). The DEC regulation provided that exposed surface soils need be remedied only if they exceed site background levels of contamination. Justice Cahill found that provision contravened the statute, and he ordered it vacated.

The other lawsuit was brought by an industrial coalition that argued the cleanup and liability provisions of the new regulations were too stringent. The suit was primarily aimed at the revised rules under the state Superfund program, but portions affected BCP cleanups as well. In *New York State Superfund Coalition v. DEC*,[4] Justice Robert A. Sackett struck down two aspects of the regulations. First,

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he found that provisions (applicable to both the state Superfund and BCP programs) that required sites to be returned to "pre-disposal conditions" went too far, because the Legislature had recognized that significant threats and imminent dangers might be eliminated by cleanups that fall short of achieving such conditions. Second, a portion of the regulation that applies only to the state Superfund program defined "responsible party" as anyone who is "responsible according to the applicable provisions of statutory or common law liability pursuant to [Environmental Conservation Law] 27-1313(4) and/or CERCLA." Justice Sackett ruled that the words "and/or CERCLA" should be deleted because the state statute specifically omitted reference to federal law.

Tax Credits and Eligibility

Cleanup standards aside, the 2003 statute had a major problem: there was no cap on how much money could be obtained through the new tax credits, either per project or cumulatively. Moreover, the formula for the credits was based mostly on the cost of preparing the site and constructing the building, without regard to the cost of cleaning up the contamination. Thus the credits could far exceed the cost of the cleanup. This was far more than a theoretical possibility. To pick one of several examples, at one 2.6-acre site in downtown White Plains, the cleanup cost was estimated at $1.5 million, but because the eligible costs of the new high-rise building that was built there were $500 million, the estimated state tax credits were $110 million.[5]

Credits of this magnitude quickly add up. The New York State Comptroller has found that "[t]he outstanding tax credit liability for all projects currently enrolled in the BCP is estimated to be potentially as high as $3.1 billion."[6] The comptroller also found that, as of June 2008, 394 sites have applied to the BCP, 260 have been admitted, and cleanup is complete on 44 sites.

To guard the state's treasury from this uncapped exposure, the DEC began making it difficult for sites to enter the BCP. Some applications seemed to languish at the DEC, and in March 2005 the DEC issued guidance on eligibility determinations. In this document, the DEC gave itself a considerable amount of discretion in whether to admit sites into the BCP. Among the factors that the DEC is to consider are "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 "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."

Additionally, the guidance allows the DEC to reject an application, even if the property meets the definition of a "brownfield site," "upon a determination that the public interest would not be served by granting such request." The factors listed chiefly relate to whether the applicant has been the subject of enforcement proceedings or otherwise might be deemed a bad actor.

These restrictions on eligibility, not unexpectedly, led to considerable unhappiness in certain quarters. Some companies very much wanted the tax credits. Others focused on the official blessing and liability protection that came with the BCP. Some of this unhappiness blossomed into litigation.

Litigation on Eligibility

Decisions have been issued in five lawsuits challenging the DEC refusal to admit sites into the BCP. the DEC won two; the applicants won two; and in the fifth, a motion to dismiss was denied but the merits were not reached.[7]

The two oldest decisions both upheld the DEC's actions. In *Jopal Enterprises LLC v. Sheehan*,[8] the court found substantial evidence supporting the DEC's determination that the contamination on the site was minimal and did not complicate its redevelopment. The court also declared that the DEC's eligibility guidance did not have to go through the state Administrative Procedure Act's rule-making process. In *377 Greenwich LLC v. DEC*,[9] the property owner had already taken significant steps towards its redevelopment as a hotel, and the court found the DEC rationally concluded that brownfields assistance was unnecessary.

The two later decisions went the other way. In *Lighthouse Pointe Property Associates LLC v. DEC*,[10] the agency had found that the level of contamination was so minimal that it would not complicate redevelopment. The court disagreed, since soil cleanup objectives were exceeded for several substances, and it directed the DEC to accept the site into the BCP. Most recently, in *Destiny USA Development, LLC v. DEC*,[11] the court ordered the DEC to admit several parcels in the Syracuse area into the program, harshly criticized the agency for taking 27 months to make a decision on the application, and declared the DEC's eligibility guidance to be null and void because it gave the DEC "unfettered discretion [that] is self-created" so as "to severely cripple and limit a clear and unequivocal statutory intent and purpose" to redevelop contaminated land. (The DEC is appealing these two rulings.)

2008 Legislation

Into this chaotic situation, the Legislature stepped twice in 2008. On April 22, the Legislature adopted a budget bill that declared a 90-day moratorium on DEC acceptance of any site into the BCP.[12] Then on June 24, shortly before recessing, both houses of the Legislature adopted extensive amendments to the 2003 statute.[13] Governor David Paterson signed the bill into law on July 23.

The most important provisions of the new legislation cap the tax credits available per site and increase the percentages. For residential and commercial properties, the tangible property credit is capped at the lower of $35 million or at three times the site preparation credit plus the on-site groundwater remediation credit; for manufacturing sites, the new caps are $45 million or six times the credits. The tax credit percentage is increased to 50 percent for sites that meet the unrestricted use criteria, with the percentages decreasing for sites that meet lower cleanup levels. These changes only apply to sites that were admitted into the program before June 23, 2008.

The legislation allows the tangible property credit to be transferred upon the sale of the property, subject to certain limitations. The legislation also transfers the administration of the Brownfield Opportunity Area Program from the DEC to the Department of State; establishes a Brownfields Advisory Board; and requires that various reports be prepared and published.

Conclusion

In June 2007 and again in January 2008 Governor Eliot Spitzer had proposed a more comprehensive set of amendments to the statute. Many others also had hoped that the Legislature would directly tackle the eligibility criteria and adopt a number of other reforms to the BCP, including separating the eligibility issue from the tax credits.[14] The amendments adopted by the Legislature are much narrower. Time will tell whether the changes to the statute, and the recent court rulings, will induce the DEC to relax the eligibility restrictions while at the same time providing sufficient inducements to redevelop contaminated properties.

1. N.Y. Laws 2003 ch. 1.
2. 6 NYCRR Part 375. Subpart 375-1, "General Remedial Program Requirements," is applicable to the BCP and several other remedial programs; Subpart 375-3 specifically concerns the BCP.
3. Index No. 2505/07 (N.Y. Sup. Ct. Albany Co., Feb. 22, 2008).
4. Index No. 2537/07 (N.Y. Sup. Ct. Albany Co., June 24, 2008).
5. Environmental Advocates of New York, "Wa$ted Green: How Lost Revenue & State Spending Shortchange New York Taxpayers & the Environment" (February 2008), Appx. A Table 2.
6. Thomas P. DiNapoli, New York State Comptroller, "Overview of the New York State Brownfields Cleanup Program" (June 2008), p. 9.
7. The case in which the merits were not reached is *Fogelman v. DEC*, 2007 N.Y. Misc. LEXIS 1249 (Sup. Ct. Suffolk Co. Feb. 20, 2007). The case was later withdrawn and, following further the DEC action, refiled. It is now sub judice.
8. Index No. 00803/06 (N.Y. Sup. Ct. Suffolk Co., July 31, 2006).
9. 14 Misc3d 417, 827 NYS2d 608 (Sup. Ct. N.Y. Co. 2006).
10. Index No. 9731/07 (N.Y. Sup. Ct. Monroe Co. Dec. 20, 2007).
11. 2008 N.Y. Misc. LEXIS 3345, Index No. 1015/08 (N.Y. Sup. Ct. Onondaga Co. June 10, 2008).
12. S6807/A9807, Part VV-1.
13. S8717/A11768.
14. E.g., New York State Bar Association, Environmental Law Section, "Comments Regarding Brownfield Cleanup Act Reforms," Jan. 18, 2008.