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NEW YORK STATE ENACTS COMPREHENSIVE BROWNFIELDS LAW

By David J. Freeman

Governor George Pataki signed legislation today comprehensively amending the state's 1979 Superfund law and creating a statutory brownfields program. The bill was passed by the State Assembly on June 19th and the State Senate on September 16th. The legislation will have an impact on the cleanup of contaminated properties in New York State in at least six major respects:

1. It establishes a statutory Brownfield Cleanup Program (BCP) for hazardous substance and petroleum-contaminated sites, with prescribed procedures and timetables and a release of liability at the conclusion of the cleanup.
2. It expressly authorizes cleanups that do not achieve "pre-release" (i.e., background) levels of contamination by providing different levels of cleanup geared to site conditions and current, or reasonably anticipated, future site use.
3. It imports into state law a variety of exemptions and defenses available under federal Superfund law.
4. It requires a rigorous program of monitoring and enforcement of engineering and land use controls imposed as a condition of allowing hazardous materials to remain in place.
5. It mandates an extensive program of public involvement and participation in decisions on hazardous waste cleanups.
6. It provides for grants, tax credits, and other forms of financial assistance to encourage the cleanup of contaminated properties.

I. Voluntary Cleanup Program

Prior to the Act, the New York State Department of Environmental Conservation (NYSDEC) ran an administratively-created Voluntary Cleanup Program (VCP) which had enrolled over 400 sites and was considered modestly successful.

However, its lack of statutory authorization created significant problems both for NYSDEC and for participants in the program in terms of both procedural matters and legal finality of the results. The Act gives statutory underpinning to much of what NYSDEC has already been doing. However, while increasing NYSDEC's powers, it adds a significant number of procedural steps to which both NYSDEC and BCP applicants must comply.

Most sites are eligible for enrollment in the Program—exceptions include certain sites already on the State's Inactive Hazardous Waste Site List, the National Priorities (federal Superfund) List, or sites already subject to enforcement actions. A site owner or other entity willing to undertake cleanup must submit an application to NYSDEC, setting forth sufficient information to determine the applicant's eligibility as well as the reasonably anticipated reuse of the site. DEC must notify the potential applicant within ten days if the information is complete and, if not, specify what additional information is needed. If accepted into the program, the participant must then perform an investigation of site contamination, and conduct any necessary remediation of the site to the satisfaction of NYSDEC.

The Act distinguishes between "volunteers"—those who did not cause or contribute to contamination and who are statutorily liable only because of having become site owners after the disposal of contaminated materials—and "participants". Participants are applicants other than volunteers—in other words, responsible parties. They are required to investigate and clean up all contamination on site as well as contamination emanating from the site. Volunteers, by contrast, are responsible for site cleanup but only for evaluation (as opposed to cleanup) of offsite conditions.

At the conclusion of any required cleanup, the applicant must submit a final engineering report to NYSDEC. NYSDEC is to issue a certificate of completion (COC) if it determines remediation requirements at the site have been, or will be,

achieved. The certificate effects a liability release from any state actions with respect to hazardous materials on, or emanating from, the site. Unlike prior law, the release will bind all State agencies and officials, including the Attorney General and the Comptroller. The release is transferable to the applicant's successors and assigns through acquisition of the site, as well as any entity who develops or otherwise occupies the site.

As is typical under the federal Superfund law and the programs of other states, there are certain circumstances under which the release can be revoked. Among them are a subsequent determination by NYSDEC that the site is no longer of protective of public health and the environment; non-compliance with BCA or the COC; fraud; change in use; change in standards; and failure to make substantial progress toward developing the site. This latter provision, as well as the expansive definition of "change in use" (which includes transfer of the property and erection of buildings) may well be problematic in terms of the program's attractiveness to potential applicants.

II. Cleanup Standards

The Act expressly endorses-for the first time in New York State-differential cleanups based on site conditions and site use. NYSDEC is required to develop regulations establishing three generic tables of cleanup standards: unrestricted (e.g., residential), commercial and industrial. There is a laundry list of considerations NYSDEC must take into account in establishing these standards and the tables must be updated every five years.

The bill established four tracks for cleanup. Track 1 is cleanup that will allow any unrestricted use without reliance on institutional engineering controls-essentially, cleanup to background levels. Track 2 cleanups will need to achieve cleanup levels set by the NYSDEC regulations for the reasonable anticipated use-be it residential, commercial or industrial-without reliance on institutional controls. Track 3 cleanups achieve an equivalent level of protection as the NYSDEC tables but use site-specific characteristics (rather than the tables) to set those levels. Track 4 cleanups are ones that achieve the requisite level of protectiveness only through the use of engineering or land use controls.

The Act also creates a hierarchy of cleanup strategies that NYSDEC must use in evaluating proposed remediation approaches. The most favored is removal and/or treatment of contamination, Containment, elimination of exposure, treatment at point of exposure, and plume stabilization are progressively less favored alternatives.

III. Institutional Controls

The Act signals the emergence of institutional controls from forgotten step-child to a major focus in the state's implementation of its hazardous site cleanup program. Historically, such controls were provided for in the course of cleanup plans but were then ignored or forgotten about by both governmental and private parties. The Act dramatically changes this approach by providing for significant constraints on their use and aggressive monitoring of their continued implementation.

Engineering controls (e.g., physical controls) and land use controls (e.g., legal restrictions) are expressly authorized by the statute as a means of allowing contamination to remain in place and still qualify the site for a COC. However, the Act mandates a very explicit set of requirements for both applicants and NYSDEC to follow in approving and implementing them. The applicant must describe, evaluate and analyze such controls and describe how they will be implemented over the longer term. A licensed engineer must annually certify the continued effectiveness and viability of such controls. Every five years, the applicant must certify that the assumptions underlying those controls remain valid.

The controls must be entered in the various databases already existing and/or established under the Act. They must also be contained in an "environmental easement" held by NYSDEC and enforceable by NYSDEC and other affected parties.

IV. Liability Exemptions

One of the criticisms of New York State law has been its failure to incorporate the same types of liability exemptions available under federal Superfund law. The statute addresses that criticism by incorporating into state law exemptions for lenders, fiduciaries and municipal corporations that involuntarily acquire ownership or control of land. However, municipalities can lose that exemption by developing the site in question, and there are new requirements, comparable to the CERCLA 2002 amendments, to exercise "appropriate care" with respect to the site contamination.

The Act also establishes Act of God, Act of War, third party and innocent purchaser defenses similar to those in the federal Superfund law.

Finally, the Act requires NYSDEC to institute a rulemaking, similar to the EPA's, to determine the standards for "all appropriate inquiry" that will allow site owners to claim the benefits of the innocent purchaser defense.

Disappointingly, the statute does not track the new Superfund amendments in extending liability protections to bona fide purchasers who under-

take appropriate inquiry, or to "contiguous landowners" (those whose sites are adversely affected by contamination emanating from adjacent sites).

V. Public Information and Participation

The Act requires NYSDEC to establish a public database for each brownfields site, containing a significant amount of information that will generally be available for public review. Moreover, each county must undertake a survey to inventory hazardous waste sites in its jurisdiction.

Public participation in the BCP is provided for in at least seven different stages of the application and cleanup process: When an original application is filed; before finalizing a remedial investigation work plan; before NYSDEC approves a proposed remedial investigation report; before the agency finalizes a remedial work plan; before the applicant commences construction at a brownfields site; before NYSDEC approves a final engineering report; and within ten days of issuance of a certificate of completion.

NYSDEC can provide technical assistance grants of up to \$50,000 to facilitate a citizen group's participation. Participants (i.e., responsible parties) can be required by NYSDEC to underwrite the cost of such grants.

The extensiveness of these public participation requirements, and their potential for burdensomeness and slowing the cleanup process, is likely to be a focus of significant criticism from site owners and developers.

VI. Financial Incentives

The Act establishes a program of financial incentives for municipalities and certain qualifying community-based organizations to undertake studies to facilitate redevelopment of qualifying areas and sites.

Assistance is available to such entities for up to 90% of the cost of studies that would assist an area being designated a brownfield opportunity area (BOA). In addition, the state will provide up to 90% of the cost of nominating an area for designation as a BOA, including the preparation, creation and development of the information to be included in the nomination package. Municipalities and qualifying community-based organizations also can obtain up to 90% of the

cost of conducting site assessments in BOAs. Tax credits are provided for eligible applicants for the cost of investigating and remediating brownfields sites. Up to 12% of such costs are eligible for the tax credit, and that percentage rises to 22% for sites in a BOA. Site developers can receive credits against certain real property taxes based on employment and taxes paid, as well as the number of jobs added by the development. Tax credits are also provided for the lesser of \$30,000, or 50% of the premium, for environmental insurance paid with respect to qualifying brownfields sites.

Assistance from the heralded but underutilized 1996 Bond Fund is made somewhat more attractive by increasing the state matching fund from 75% to 90%, and 100% for contamination not on-site. Municipalities are also expressly given statutory immunity from liability for site contamination. However, the program is still generally available only to municipalities rather than private parties, and cleanup must still meet the most stringent state standards.

The new Brownfields Act is the most significant piece of environmental legislation enacted in New York State in many years. It represents the resolution of a longstanding stalemate among the Senate, the Assembly and the Governor's office that resulted in New York State's being one of the last major states to have a statutorily authorized program of this type.

The statute breaks major new ground in terms of cleanup standards and procedures, as well as the implementation of institutional controls and the development of financial incentives for brownfield revitalization.

However, the statute has a number of problem areas, including internal inconsistencies (due to hasty draftsmanship) and substantive issues, such as overly broad re-openers and potentially burdensome public participation requirements.

Many site owners and developers are heartened by the passage of this new statute. It remains to be seen, however, whether it will be implemented in a way that truly facilitates the type of brownfields development that its supporters hope to achieve.

David J. Freeman is partner and Chair of the Environmental Practice Group for the Firm's New York office. He is Co-Chair of the Hazardous Waste/Site Remediation Committee, and Co-Chair of the Brownfields Task Force for the Environmental Law Section of the New York State Bar Association.

Should you have any questions regarding the law or Brownfields redevelopment in New York State, please contact any of the members of the Paul Hastings Environmental Practice Group listed below:

New York

David J. Freeman (212) 318-6555
davidfreeman@paulhastings.com

Suzanne M. Avena (212) 318-6755
suzanneavena@paulhastings.com

Desiree C. Giler (212) 318-6262
desireegiler@paulhastings.com

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