



## National Brownfield Association

Headquarters  
5440 North Cumberland Avenue, Suite 155  
Chicago, IL 60656  
773-714-0407 • 773-714-0989 Fax  
[www.brownfieldassociation.org](http://www.brownfieldassociation.org)

November 19, 2004

Mr. Robert W. Schick  
NYS Department of Environmental Conservation  
Environmental Remediation, Remedial Bureau C  
625 Broadway  
Albany, NY 12233-7014

VIA Fax: 1-518-402-9679  
E-Mail: [rxschick@gw.dec.state.ny.us](mailto:rxschick@gw.dec.state.ny.us)

Re: Comments on Draft Brownfield Program Eligibility Guidance (Proposed Revisions To Subsections 2.1, 2.2 and 2.3 of the BCP Guide)

Dear Mr. Schick:

The following comments are submitted on behalf of the Legislative and Policy Committee (LPC) of the New York State Chapter of the National Brownfield Association (NBA-NY). The NBA, established in June 1999, is a 501(c)(3) nonprofit organization dedicated to stimulating responsible redevelopment of brownfields by providing information resources, educational programs, and a forum for members to exchange ideas.

The membership of NBA-NY includes an array of thoughtful people who care deeply about the brownfields issue. These members have a variety of views on DEC's Draft Eligibility Guidance, ranging from endorsement of DEC's approach to the strong view that issues with the tax credit program should be addressed through interpretation or modification of the tax credit program and not by restricting access to the BCP. The LPC has sought out and tried to assimilate its members' diverse views (and has attached one example), in the belief that this will help to inform DEC in the finalization of its guidance. However, in the end, these comments reflect the views of the LPC, which are not necessarily shared by all members of NBA-NY or of the organizations they represent (for example, representatives of the City of New York played no role in their drafting) and they do not supersede any separately submitted comments by those organizations or individuals. Also, as comments on proposed agency guidance, Executive Team members who are state employees did not participate in their development.

The Department (DEC) has solicited comments on draft revisions to subsections 2.1.1, 2.1.2 and 2.1.3 of the draft Brownfield Cleanup Program (BCP) Guide, dealing with eligibility for entry into the BCP. The present comments address the first two of these subsections. (We have no comment on the third.)

Subsection 2.1.1 (elements of brownfield definition) clarifies that DEC will reject any request for participation in the BCP if it determines that the property does not meet either of the two elements of the statutory definition (ECL 27-1407.8): (1) "confirmed contamination... or a reasonable basis to believe that contamination is likely to be present..." and (2) the presence or potential presence of contamination "may be complicating the development or re-use of the property" (ECL 27-1405.2).

Subsection 2.1.2 (public interest test) proposes to expand the six statutory public interest criteria under ECL 27-1407.9 for rejecting on public interest grounds an applicant's request to participate in the BCP, even where the property meets the "brownfield site" definition. These six statutory criteria authorize DEC to exclude from participation in the BCP, applicants who have previously violated environmental requirements, been denied participation into the BCP (or its counterpart in another state), been convicted of certain types of Federal or state criminal offenses, knowingly falsified or concealed a material fact in connection with a submittal to DEC, or committed an act that serve as the basis for permit denial.

DEC is proposing to add eleven new public interest factors that could be used to eliminate a party or site from participation in the BCP, even if a site meets the "brownfield site" definition and is not deemed ineligible based on the six statutory criteria. These criteria relate to the nature and extent of the contamination threat, attractiveness of the site for redevelopment or reuse, the anticipated benefits of BCP participation (promoting redevelopment of surrounding areas, reinvigorating a depressed area, protecting public health, potential for re-contaminating the site), proportionality of cleanup costs to property (or project) value, and the site's industrial or commercial history.

The third subsection addresses the statutory categories of ineligible sites and will not be addressed in these comments.

#### Background of the Proposed Changes

Although not discussed in the notice of the proposed revisions, the changes are believed to be motivated by the desire to avoid abuses of the Brownfield Tax Credit program, whereby very costly redevelopment projects would qualify for huge tax credits, even in cases where (a) contamination is limited, (b) the site had no industrial (or commercial petroleum) history, (c) redevelopment would clearly have occurred even in the absence of Brownfield Tax Credits, and (d) the magnitude of potential Tax Credits is disproportionately large in relation to the level of contamination at the site and the expected cost of remediating it.

Although the initial projects that raised these concerns were located in New York City, where real estate values and redevelopment costs (and, therefore, the Brownfield Redevelopment Tax Credit) can be very high, the problem with a few very costly projects that provide only marginal brownfield cleanup benefits is potentially of statewide significance. The overriding goal should be to have a program that encourages as many voluntary cleanups as possible, and a tax credit program that encourages these cleanups in a fiscally responsible manner.

The LPC applauds DEC's effort to try to address this problem. However, we encourage DEC to structure its approach in a way that is true to program goals (including maximizing voluntary cleanups), while avoiding fundamental changes without a more extensive public dialogue among affected stakeholders.

#### Specific LPC Comments

1. *We support proposed Subsection 2.1.1, requiring both a likelihood of contamination and an inhibitory impact on redevelopment or re-use of the property.* The definition adopted by the Legislature of a "brownfield site" clearly intended that these elements be present and the BCP

Guide, as revised, merely seeks to make this clear.

2. *Proposed Subsection 2.1.2 (expanded public interest test) is a bit more problematic. We see two problems. First, the attempt to expand the “public interest” test as proposed—by nearly tripling the number of factors considered—could leave the program in limbo if, as is likely, it were challenged in court after being finalized. The six statutory criteria have the common feature of not allowing would-be BCP applicants to benefit from past misdeeds. The additional criteria DEC seeks to add, by contrast, relate to the nature and extent of the contamination threat (not a misdeed or unjust enrichment issue), the inhibitory effect of contamination on redevelopment (a threshold definitional issue—not a public interest issue), anticipated benefits of BCP participation (a public interest issue—but not in the same sense as the statutory criteria), and proportionality of cleanup costs to property or project value (an unjust enrichment issue—but not in the same sense as the statutory criteria). A challenger could, thus, argue that the expanded DEC criteria are *ultra vires* because they go beyond anything the Legislature could reasonably be said to have intended.*

*Second, more than half of the proposed new “public interest” factors (contaminants that cause exposure or are present in excess of SCGs? contaminants in excess of historical or background levels? status of site as abandoned, idled, or underutilized? inhibition of redevelopment due to perception of contamination? role of BCP participation in spurring offsite redevelopment? health advisory has been issued for the site? prior industrial or commercial operations which may have resulted in environmental contamination? ) really go to the definitional issue of whether the site meets the “brownfield site” definition or to detailed investigation results that may not be known at the time of the initial BCP application. (Perhaps these factors are better addressed, if at all, in proposed Subsection 2.1.1.)*

However, much of this information will often not be available when the BCP application is submitted and the initial eligibility determination is made. Applicants need prepare only a Phase 1 Environmental Site Assessment with their application—which should address the status of the site as abandoned, idled or underutilized, and identify prior industrial and/or commercial uses that could have caused contamination. Beyond that, many applicants simply will not have information about exposure conditions or standard exceedances until a full site investigation is complete. Similarly, “background” is not defined in the statute or in DER-10, and “historic fill” soils are deemed contaminated unless proven otherwise. Finally, NBA members can attest to the reality that offsite redevelopment is generally spurred by the first brownfield project in the neighborhood. But the last brownfield site in an area should not be excluded from the program simply because it will not spur additional development.

The remaining factors DEC proposes to add to the “public interest” Subsection, while they are criteria the Legislature *could* reasonably have included in the statute, were *not* added by the Legislature, and should be deleted from DEC’s proposal.

Also, most of these additional factors either add little to DEC’s authority to screen marginal projects out of the program, or require information that may not be available during the application phase. For example:

- *Whether the proposed project will reduce contaminant exposure or threat of exposure ... (if contamination is or is perceived to be present, BCP participation will, at a minimum reduce any stigma; the Legislature only required that perceived*

contamination operates to complicate redevelopment. In addition, exposure information is not likely to be known at the time of application.)

- *Whether the area of the site shows indicators of economic distress ... (brownfields exist in all types of neighborhoods. While some NBA members would like to see tax credits focus on low income neighborhoods and might favor changes to the tax credit program to further promote the application of credits to such sites, the income level of the community is not relevant to whether a particular site is a “brownfield site.”)*
- *Whether the estimated cleanup cost is likely to be disproportionate to the value of the property/project... (the absolute or relative cost of a cleanup is not the only factor that can discourage the cleanup and redevelopment of a brownfield site; the time-consuming process required to complete a DEC-supervised cleanup is no less compelling a consideration. Even if this were a legitimate factor for DEC to consider, it is unclear that DEC has the institutional expertise to make such economic judgments.)*
- *Whether the proposed project is likely to re-contaminate the site ... (this is something DEC can address through institutional and engineering controls, environmental easements, and ongoing OM&M; and applying this criterion would inherently discourage industrial redevelopment. In any case, it is not a criterion the Legislature gave DEC the authority to apply as an eligibility factor)*

3. *The most direct ways to ensure that brownfield redevelopment tax credits are not applied in inappropriate cases, i.e., where the credits are out of all proportion to the brownfield cleanup and/or economic revitalization benefits of the project, probably transcend DEC’s authority to address administratively and would—if such more direct measures were needed—appear to require legislative action. LPC hopes that DEC would consider a new public forum, similar to the collaborative process that led to enactment of the Brownfields Law, to discuss the true problems with the program, if any, and how most effectively to resolve them. Until such a process takes place, it is not clear that legislative action is necessary. In the interim, we believe that adequate (albeit less direct) statutory authority currently exists to allow DEC to screen out of the BCP the vast majority of potential projects that don’t need or deserve brownfield tax credits. We hope the Legislature will not run the risk of destabilizing the current program by even raising the specter of a rollback in the availability of brownfield tax credits.*

Direct approaches, which have been raised by various stakeholders—but require considerably more discussion and analysis—might take the form of one or more of the following:

- *Set a maximum dollar cap on the size of the potential brownfield redevelopment tax credit. (Downside: an across-the-board cap—unless set at a very high level—without regard to the *bona fides* of the project in relation to statutory objectives, could be viewed as arbitrary and counter-productive)*
- *Prevent the redevelopment tax credit from being disproportionately large in relation to the contamination problem, by capping the credit at some multiple of brownfield investigation and cleanup (and other relevant site preparation) costs—or by tying the credit directly to the costs of remediation, as is done in many other states. (Downside: while the multiplier approach is arguably preferable to a fixed cap, coming up with a fair multiplier that did not penalize and would still incentivize worthy projects, would be difficult. Applying the credit directly to remediation rather than redevelopment costs would eliminate one of the unique features of the New York Brownfield Law—the*

strong incentive to not only clean up brownfield sites, but to make them engines for economic revitalization by promoting redevelopment.)

- *Limit the cost of the brownfield tax credit program, if this is a concern, by scaling down the magnitude of the credit as redevelopment costs (and potential returns on investment) get progressively larger.* For example, the first \$50 million in redevelopment costs might receive the full tax credit, while the next \$50 million increment might receive only 75% of the otherwise available credit, etc. (Downside: this approach could diminish the feasibility of the largest, most desirable brownfield redevelopment projects that might be too risky to undertake without the full increment of tax credits)
- *Link the tax credits to the level of "need" of the applicant or project.* (Downside: the program was not designed to be only a low-income brownfield site program; as long as the new BCP process remains a very expensive and difficult one, more broadly available tax credits will be necessary if the program's brownfield cleanup and redevelopment aspirations are to be met.)

### Conclusions

1. DEC's existing statutory authority is sufficient to prevent abuse of the current brownfield program's generous tax credits—while continuing to encourage as many voluntary cleanups as possible. If there are residual problems, DEC should initiate a new collaborative process to find the fairest possible solutions.
2. Implementation of the Guidance, as proposed (i.e., without adjustment), may destabilize the program and encourage litigation.
3. Most of the factors DEC proposes to establish BCP eligibility relate to the "brownfield site" definition. DEC should adjust its draft revisions to the BCP Eligibility Guidance, to rely more heavily on Subsection 2.1.1 ("brownfield site" definition) in updating the Draft BCP Guide.
4. These comments on BCP Eligibility Guidance take no position on the content or appropriateness of separate interpretive guidance by DEC or the Tax Department on tax credit implementation.

Thank you for the opportunity to submit these comments. For further information or clarification, please feel free to contact the undersigned (see below).

Sincerely,



Kenneth S. Kamlet, Co-Chair  
Legislative and Policy Committee,  
New York State Chapter

Contact Information:

Director of Legal Affairs  
Newman Development Group, LLC  
3101 Shippers Road, P.O. Box 678  
Vestal, NY 13851-0678  
Phone: (607) 770-1010, ext. 229  
Fax: (607) 770-3482  
E-Mail: [kkamlet@hotmail.com](mailto:kkamlet@hotmail.com)