

SECTION 2 APPLICATION AND AGREEMENT PROCESS

2.1 Eligibility

The determination of whether a particular piece of real property is eligible for participation in the Brownfield Cleanup Program must be made on a case by case basis. As every project presents a unique set of circumstances, the eligibility determination must be made following review of all pertinent facts and considering the totality of the circumstances surrounding the project.

1. Brownfield:

The Legislature enacted Article 27, Title 14 because “... there are thousands of abandoned and likely contaminated properties that threaten the health and vitality of the communities they burden it is appropriate to adopt this act to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment.” (ECL 27-1403). A “brownfield” or “brownfield site” is defined as “... any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous waste, petroleum, pollutant, or contaminant.”

In reviewing applications, the Department shall reject any request for participation in the Brownfield Cleanup Program if the Department determines that the property does not meet the definition of a “brownfield site.” (ECL 27-1407.8). The definition of “brownfield site” has two elements: (1) there must be confirmed contamination on the property or a reasonable basis to believe that contamination is likely to be present on the property; and (2) the contamination or potential presence of contamination may be complicating the development or re-use of the property. (ECL 27-1405.2).

For purposes of the Brownfield Cleanup Program, the Department may determine that only a portion of any overall project meets the definition of “brownfield.” The entire area subject to the overall project may or may not be eligible to be a “brownfield site.” Thus, there may be a development, redevelopment or other project which includes a brownfield site or sites, but which may extend beyond such site or sites.

Once the project is determined to have met the environmental criteria of a brownfield, staff must next determine whether the public interest would be served by accepting the project into the Brownfield Cleanup Program.

2. Public Interest:

Under ECL section 27-1407(9), the Department may reject a request to participate in the Brownfield Cleanup Program, even if the real property meets the definition of “brownfield site,” upon a determination that the public interest would not be served by granting such request. In making this determination, the Department must consider the following statutory criteria:

1. whether the person requesting participation has been determined in any administrative, civil, or criminal proceeding to have violated any provision of ECL Article 27, any order or determination issued thereunder, any regulations promulgated thereunder, or any similar statute, regulation, or order in another jurisdiction;
2. whether the person requesting participation has previously been denied entry into the BCP or a similar program in another state;
3. whether the person requesting participation has been found in a civil proceeding to have committed a negligent or intentionally tortious act involving hazardous waste or petroleum, or been convicted of a criminal act involving hazardous waste or petroleum;
4. whether the person requesting participation has been convicted of a criminal offense under Federal law or the law of any State which involves a violent felony offense, fraud, bribery, perjury, theft, or an offense against public administration;
5. whether the person requesting participation has knowingly falsified or concealed a material fact or knowingly submitted or made use of a false statement on or in connection with any document or application submitted to the Department;
6. whether the person requesting participation is an individual or a corporation, partnership, association or organization, or an individual who had a substantial interest in or acted as a high managerial agent or director for any legal entity, which committed an act or failed to perform an act that could be the basis for a permit denial.

The statutory criteria generally attempt to prevent the unjust enrichment of a party based on the party's past conduct or associations. However, the Department is not limited to a consideration of the enumerated statutory factors when considering the public interest criteria (ECL 27-1407.9). A determination that the public interest would not be served by granting a request for participation in the Brownfield Cleanup Program should also be made on a case by case basis, considering the following factors in addition to the statutory criteria:

- whether the proposed project will reduce contaminant exposure or threat of exposure;
- whether contaminants are present at levels that exceed guidance values, standards or criterion;
- whether contamination on the proposed site exceeds historic/background levels;
- 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 participation in the program is likely to spur redevelopment or reuse of surrounding areas;

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

3. Ineligible Sites:

In accordance with ECL Section 27-1405.2, real property in any of the following categories is ineligible, regardless of whether it otherwise meets the definition of brownfield site:

1. Sites listed in the *Registry of Inactive Hazardous Waste Disposal Sites in New York State* as a Class 1 or Class 2 (Class 2 sites are eligible through July 1, 2005 if the person requesting participation is a Volunteer);
2. Sites listed on the *National Priorities List* (“NPL”) by the United States Environmental Protection Agency (the NPL is posted at <http://www.epa.gov/superfund/sites>);
3. Sites that are the subject of an ongoing enforcement action pursuant to ECL Article 27, Title 7 or Title 9 involving solid or hazardous waste;
4. Sites that are the subject of an order issued pursuant to Article 12 of the Navigation Law (“Oil Spill Prevention, Control, and Compensation”) or ECL Article 17, Title 10 (“Control of the Bulk Storage of Petroleum”); and
5. Sites that are subject to any other on-going State or Federal environmental enforcement action relating to hazardous waste or petroleum.