

Overlapping rules confuse many in Brownfields Program

By CHRIS RIZZO
CARTER LEDYARD & MILBURN, LLP

New Yorkers waited years for the state to enact the 2003 Brownfield Statute. It should come as no surprise that some waiting has been required for the recently released *draft* brownfield regulations. The regulations should provide greater certainty about how the Brownfield Cleanup Program created by the Statute will function. Key program elements include reduced cleanup obligations, liability release and lucrative tax credits of 10 to 22 % of remediation and redevelopment costs. These incentives have attracted over 200 applications in just over two years. New accounting standards that require companies to report environmental liabilities are likely to serve as an additional incentive to apply to the program.

At the same time, with just about 100 applications accepted for the program, some questions linger about eligibility. Many hoped that the regulations would address eligibility more directly. Instead, in determining "eligibility" for the program, the New York



State Department of Environmental Conservation (NYDEC) will continue to be bound by a patchwork that includes the original Statute, non-binding eligibility guidelines and, now, the new regulations.

The Draft Regulations and the Eligibility Question

The fundamental eligibility consideration is the definition of brownfield, which the state defines 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." (N.Y. Evtl. Conserv. Law § 27-1405(2)). Beyond that, the Statute defines program eligibility mostly in the negative. The law provide that sites that are the subject of other enforcement proceedings or applicants that have been involved in prior civil or criminal enforcement may not participate. Most opaque was the statutory provision permitting the Department to reject an application if it "determines that the public interest would not be served..." (N.Y. Evtl. Conserv. Law § 27-1407(9)). The eligibility guidance document released in early 2005 was the first attempt to clarify this provision and set forth what the public interest factors really included.

Under the guidelines drawn out in NYDEC's Draft Brownfield Cleanup Program Guide, the Department now considers the following: "(A) whether

the proposed site is idled, abandoned or underutilized; (B) whether the proposed site is unattractive for redevelopment or reuse due to the presence or reasonable perception of contamination; (C) whether properties in the immediate vicinity of the proposed site show indicators of economic distress such as commercial vacancy rates or depressed property values; and/or (D) 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."

When the draft regulations were released for public review, many expected the Department to end the use of these "de-facto" eligibility rules and incorporate them into the regulations. Instead, the draft regulations remind applicants that 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 a request," an acknowledgement of the continued viability of the guidelines. The result is a patchwork that includes the Statute, the Eligibility Guidelines and the new regulations.

Essentially, the eligibility debate is about the lucrative tax credits and whether they will be made available to sites that are likely to be developed

without them anyway. To that end, Governor Pataki's 2006 budget proposal called for the elimination of tax credits for properties in Manhattan between 96th Street and Canal Street.

A New Incentive to Sell or Remediate

At the same time that eligibility is being constricted and redefined, new financial accounting standards are likely to make it more difficult for corporate owners to hold onto contaminated land and buildings without reporting the steep cleanup costs associated with that property. The March 2005 Financial Accounting Standards Board's "Accounting for Conditional Asset Retirement Obligations" will make accounting practices for contaminated properties more uniform. It interprets the prior "FASB Standard No. 143" and requires the reporting of an obligation (e.g., remediation of contaminated land) when a reasonable estimate of the "fair value of an asset retirement obligation" (e.g., remediation costs) can be made. The practical result is that a contaminated site that must one day be remediated must be accounted for immediately, a significant change for many companies. Increased efforts to get those liabilities off corporate books, through sale or remediation, are likely to result. The Brownfield Cleanup Program will be a key tool in those efforts.