# ELIGIBILITY FOR THE NEW YORK STATE BROWNFIELD CLEANUP PROGRAM

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Only a "brownfield site" is eligible for the Brownfield Cleanup Program ("BCP"), created by Title 14 of Environmental Conservation Law ("ECL") Article 27 (the "BCP Act"). The statute defines "brownfield site" as "real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant," ECL §27-1405(2), and in turn defines "contaminant" to include "hazardous waste and/or petroleum." ECL §27-1405(7-a).

The BCP Act defines "hazardous waste" by incorporating the definition under Title 13 of ECL Article 27 (the "State Superfund Law"), stating that "'[h]azardous waste' shall mean a hazardous waste as defined in section 27-1301 of this article." ECL §27-1405(17)." ECL §27-1301 in turn defines "hazardous waste" as follows:

> "Hazardous waste" means a waste which appears on the list or satisfies the characteristics promulgated by the commissioner pursuant to section 27-0903 of this article and any substance which appears on the list promulgated pursuant to section 37-0103 of this chapter...

ECL §27-1301(1).

Accordingly, for purposes of not only the BCP Act (Title 14), but also the State Superfund Law (Title 13), there are two types of "hazardous waste": (1) a "waste" meeting the requirements of ECL §27-0903 [*i.e.* hazardous wastes regulated pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901, *et seq.*]; and (2) a "substance" on the list promulgated pursuant to ECL §37-0103 [akin to hazardous substances covered by the the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601,

*et seq.* (also known as "Superfund")]. The first category was the original definition of "hazardous waste" when the State Superfund Law was enacted in 1979. However, when the Legislature enacted the BCP Act in 2003, it amended ECL §27-1301(1) by adding the second category of "substances" to broaden the definition for not only the BCP, but also the State Superfund program.

## 1. INTERPRETATION OF ELIGIBILITY BY NYSDEC

On its face, the "brownfield site" definition is broad, covering sites where redevelopment which "may be complicated" by even the "potential presence of a contaminant." ECL §27-1405(2). Where the "operative word" in an environmental statute is 'may,'" all that must be shown is "that there is a potential," *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004), and there is a "low threshold." *Chemical Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 397, 626 N.Y.S.2d 1, 9 (1995). This intent is evidenced by the history of both the brownfield phenomena and the legislation resulting in the BCP.

Initially, the New York State Department of Environmental Conservation ("DEC" or "NYSDEC"), which administrates the program, encouraged participation in the BCP, and even automatically allowed all Voluntary Cleanup Program ("VCP") sites to opt in, without even applying the statutory "complication" test. However, following publicity regarding payout of large tax credits to developers through the BCP, DEC began to tighten eligibility and slow down processing applications. *See* Freeman & Schnapf, *Brownfield Cleanup Program's Final Site Eligibility Criteria*, 25 N.Y. Environmental Lawyer 2 at 13 (Spring/Summer 2005). Former Governor Spitzer actively campaigned to limit eligibility to the program to avoid payment of tax credits, and proposed new legislation to "redirect state tax dollars," in order to "protect against financial windfalls." Governor Spitzer, Press Release, *Brownfields Bill Key to Economic Revitalization* (June 5, 2007). This motivation was evidenced when the Governor's chief environmental advisor, Judith Enck, stated:

> There are massive concerns about the lucrative tax credits that go along with brownfields. Brownfields is [sic] a very big issue that needs a tremendous amount of attention from both the Legislature and the administration, and we're working on it. We have a program bill in that would reform the brownfields program. We would like to have better cleanups quicker, without breaking the bank. We have been focusing on stopping the fiscal hemorrhaging of the program.

Benjamin, "It Ain't Easy Being Green," *New York Daily News* (Dec. 4, 2007).

In January 2008, after the lower court decision in *Lighthouse Pointe Property Associates v. NYSDEC*, Index No. 2007/9731 (Sup. Ct. Monroe Co., December 2, 2007, Taddeo, J.), *rev.* 2009 N.Y. Slip Op. 00878, 872 N.Y.S.2d 766 (4th Dep't 2009), *lv. grt'd* 2009 WL 1107875 (4th Dep't 2009), which ordered a site into the BCP based upon multiple exceedances of the Soil Cleanup Objectives ("SCOs"), Deputy DEC Commissioner Val Washington announced that the BCP had

been "stalled" due to recent court decisions. Assistant Commissioner Washington, *Presentation at the New York Law School's Real Estate Brownfield Conference* (Jan. 11, 2008).

On April 23, 2008, the State Legislature enacted a 90-day moratorium on "acceptance" of BCP applications so it could stop new Article 78 proceedings from being filed and consider proposed legislation to amend the BCP Act. *See* Chapter 55 of the Laws of 2008. While the Legislature proceeded, by Chapter 390 of the Laws of 2008 (signed into law July 24, 2008), to amend the BCP Act and cap the associated brownfield tax credits provided under Tax Law §§21-23, the language regarding eligibility for the BCP was left untouched. Although DEC has gradually resumed processing BCP applications, it has been liberally denying applications to limit participation in the BCP.

Currently, numerous Article 78 proceedings are pending challenging DEC's eligibility determinations. On April 24, 2009, the Fourth Department granted leave for *Lighthouse Pointe* to be heard by the Court of Appeals.[1] Unless the Legislature acts, the Court of Appeals decision in *Lighthouse Pointe* may be the final word on the issue.

## 2. HISTORICAL BACKGROUND

Federal environmental laws like RCRA, enacted in 1976, and CERCLA, enacted in 1980, created strict liability for those purchasing real estate contaminated with hazardous wastes and substances. *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985). Similarly, in 1979, New York enacted State Superfund, which addresses remediation of "Inactive Hazardous Waste Disposal Sites." State Superfund gives NYSDEC "the authority to order a responsible party to develop and implement a remedial program for any site contaminated with hazardous waste that presents a significant threat to human health or the environment." Cahill, *New York State's Superfund Program*, 4 Alb. L. Envtl. Outlook 11 (1999).

As a result of the liability imposed by these environmental statutes, lenders became reluctant to place mortgages on contaminated properties, and developers were slow to purchase them and pay for remediation of environmental problems they did not cause. The term "brownfield" was coined to describe these properties. According to Buffalo Law School Professor Berger:

> As a result of Superfund liability, banks were concerned for their own potential liability, known as lender liability. Consequently, they were extremely nervous about any financial involvement in transactions where contamination was a concern. No one wanted to fall victim to the "Superfund Net" and bear the costs of clean-up. The result was recognition of a new problem, relating to properties which were not Superfund sites, but which many claimed flowed from the liability

[1] The authors of this article represent the petitioner in *Lighthouse Pointe*.

> scheme of the Superfund program. [Since 1993] we have referred to these properties as "brownfields."

Berger, *Public Policy and Law Since Love Canal: Unintended and Unforseen Consequences of Love Canal and the Superfund Legislation*, 8 Buff. Envt'l. L.J. 251 (2001).

A realization developed that environmental laws were not only discouraging development of contaminated properties, but in turn encouraging sprawl, and the development of woodlands and other "greenfields." Thus, CERCLA and other environmental laws spawned a "'brownfields crisis'

– the proliferation of abandoned or underdeveloped sites where the threat of potential liability... has scared off developers and lenders." Cohn, *The Brownfields Revitalization and Environmental Restoration Act: Landmark Reform or a "Trap for the Unwary,"* 12 N.Y.U. Envtl. L.J. 672, 674 (2004).

> A brownfield is defined by the U.S. Conference of Mayors as "an abandoned or underutilized property where expansion or redevelopment is complicated by either real or perceived environmental contamination." Though the risk of a Superfund cleanup is often remote because such cleanups are so costly, buyers and developers have often shied away from involvement with properties where even a small amount of contamination is present. Instead they have sought "greenfields," which are "pristine and undeveloped lands," for development.

*Id.* at 676. While the "worst properties" were being addressed by the Superfund laws, "sites that do not rise to the level of contamination required by Superfund still sit abandoned because the risks imposed by ownership," and are "commonly known as brownfields." Watkins, *Not My Brownfield: Municipal Liability for Acquiring Title to Brownfields at the Federal and New York State Level*, 9 Alb. L. Envtl. Outlook 275, 277 (2004). According to DEC Commissioner Grannis:

> ...it was becoming evident that there were many other contaminated sites that did not qualify for the Superfund and Spill Response Programs, but, because of fear of possible health impacts or other liabilities, were being abandoned with no hope of either cleanup or reuse. The fact that the cost of cleanup can approach that of Superfund sites, ranging into the tens of millions of dollars, further discourages redevelopment. Some cities have done a rough count of the number of contaminated sites within their borders, but there is not complete or accurate inventory of these sites – now known as brownfields – although it is clear that they number in the thousands.

Commissioner Grannis, *Testimony Before the New York State Senate and Assembly Standing Committees on Environmental Conservation Regarding New York State's Brownfield Cleanup and Opportunity Area Programs* (Aug. 27, 2007) at 2.

As a result, by the 1990's, a movement began among environmental professionals and regulators to encourage remediation and redevelopment of brownfields, which were often situated in prime locations, as evidenced by their past use. Although many states passed legislation to encourage remediation of brownfields, like the 1995 Pennsylvania Land Recycling Program, 35 Pa. Cons. Stat. §6026.101, *et seq.*, New York and the federal government lagged behind. *See* Capuano, *Silent Blight: New York's Brownfields & Environmental Justice*, 20 Pace Envtl. L. Rev. 811 (2003). It was "surprising that New York [was] one of the few states without a comprehensive statute or regulation for the voluntary cleanup of brownfields." Gerrard, *New York State's Brownfields Programs: More and Less than Meets the Eye*, 4 Alb. L. Envtl. Outlook 18 (1999).

While the Voluntary Cleanup Program was created in 1994 by Governor Cuomo in his last month in office by Organization and Delegation Memorandum #94-32, *Policy: Voluntary Cleanup Program*, the VCP neither had the force of law nor regulation. However, the *ad hoc* VCP did provide a liability release to parties from NYSDEC (not the State) that voluntarily remediated brownfield sites. By 1997, DEC was giving speeches at conferences and handing out written material explaining eligibility for the program was very broad, and only certain listed sites were excluded:

> Covered Contamination: The program covers ***any contaminated property located in the State*** the remediation of which the federal government does not have lead responsibility.

The official VCP Guidance Document, which was finally developed in May 2002 (only one year before the BCP Act was enacted), stated that "[a]ll sites are eligible for the VCP" except a list of sites that were specifically ineligible, including essentially the same list that was promulgated into the BCP Act "brownfield site" definition in ECL §27-1405 the next year. It is also important to note that as early as 1996, when the state passed the 1996 Bond Act to help municipalities access grants to investigate brownfield sites, DEC used the following working definition of "brownfield site":

> What is a brownfield site? Brownfields are abandoned, idled or underused properties where expansion or redevelopment is complicated by real or perceived environmental contamination. Brownfield sites can pose environmental, legal and financial burdens on a community and its taxpayers. Contaminated sites that are left vacant can diminish the property value of surrounding sites and threaten the economic viability of adjoining properties.

## 3. LEGISLATIVE HISTORY

Finally in 2003, the New York Legislature took "long awaited" action on brownfields. Watkins, *Not My Brownfield: Municipal Liability for Acquiring Title to Brownfields at the Federal and New York State Level*, 9 Alb. L. Envtl. Outlook 275, 277 (2004). It addressed brownfields by

enacting Laws of 2003, Ch. 1, which created the BCP enacting the BCP Act as Title 14 of ECL Article 27, which addressed "brownfield sites."

The Bill Jacket for the BCP sheds some light on the meaning of the "brownfield site" definition:

> Brownfields are abandoned, idled, or under-used properties where redevelopment is complicated by real or perceived environmental contamination. They typically are former industrial or commercial properties where operations may have resulted in environmental contamination. Brownfields often pose not only environmental, but legal and financial, burdens on communities. Left vacant, contaminated sites can diminish the property value of surrounding property and threaten the economic viability of adjoining properties. The impediments to brownfield redevelopment are complex. Some of these may be addressed administratively, and are being addressed through the current DEC Voluntary Cleanup Program. However, certain barriers to brownfield redevelopment require statutory amendment. The existing liability scheme, which holds all owners of contaminated property liable for cleanup costs, regardless of when or how the property was acquired relative to the contamination, contributes to the reluctance of developers to purchase even ***minimally contaminated*** sites. So, too, does the potential cost of cleanup, which may not be known at the time of purchase. In addition, ***lenders are often reluctant to extend credit for the purchase and cleanup of brownfield sites***, fearing future liability or diminution of the value of the property held as collateral should the site provide to require ***more extensive and costly cleanup than initially thought***. Consequently, financing such a purchase may be more difficult than financing a purchase of a greenfield site.

N.Y. Bill Jacket, 2003 A.B. 9120, Ch. 1, 38 (2003) (Division of the Budget Report on Bills) [emphasis added].

In the statute itself, the Legislature stated that its intent was to encourage development of "thousands" of "likely contaminated" brownfields in order to spur economic development and improve environmental quality:

> The legislature hereby finds that there are thousands of abandoned and likely contaminated properties that threaten the health and vitality of the communities they burden, and that these sites, known as brownfields, are also contributing to sprawl development and loss of open space. It is therefore declared that, to advance the policy of the state of New York to conserve, improve, and protect its natural

> resources and environment and control water, land, and air pollution in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social wellbeing, it is appropriate to adopt this act to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment by establishing within the department a statutory program to encourage cleanup and redevelopment of brownfield sites.

ECL §27-1403.

The State Legislature made a conscious decision to borrow the brownfield definition found in the ECL from the new federal Small Business Liability Relief and Brownfields Revitalization Act of 2002, and put it into the BCP Act, so that the standards under federal and state law would be the same. As a result, the state definition at ECL §27-1405(2) is nearly identical to the federal definition, contained at CERCLA §101(39)(A), 42 U.S.C. §9601(39)(A), which defines "brownfield site" as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." The Senate Report for the Committee on Environment and Public Works regarding the federal brownfield legislation states:

> A brownfield site is a parcel of real property at which expansion, redevelopment, or reuse by be hindered by the presence, or potential presence, of hazardous substances, pollutants, or contaminants. The
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> U.S. Conference of Mayors and others have estimated that there are more than 450,000 brownfield sites nationwide that blight our communities, pose health and environmental hazards, erode our cities' tax base, and contribute to urban sprawl and loss of farmland. The cleanup and redevelopment of brownfield sites presents the opportunity [to] reduce the environmental and health risks in our communities, particularly those which are disproportionately affected by these sites, capitalize on existing infrastructure, create a robust tax base for local governments, attract new businesses and jobs, and reduce the pressure to develop open spaces.
>
> The fear of prolonged entanglement in Superfund's liability scheme has been reported by some to be an impediment to the cleanup of even ***lightly contaminated sites***, today known as brownfields. . . . With many brownfield sites, the extent of the contamination is unknown, and there is no entity available to assess the site conditions or pay for cleanup. Therefore, at abandoned sites, ***even those with little or no contamination,*** the fear that cleanup costs could exceed the property value can reduce incentives for redevelopment. The perceived risk associated with purchasing and developing ***lightly***

> ***contaminated properties*** can drive parties away from these former industrial or commercial sites and toward less risky green and open spaces. . . .
>
> In addition, even if there are parties willing to take the risk, ***they are sometimes unable to bring the necessary resources to the site because lenders may be unwilling to issue loans*** on properties with unknown contamination, and which therefore provide uncertain collateral for the loan.

Senate Report 107-2 [emphasis added].

## 4. REGULATION AND GUIDANCE

Following enactment of the statute, DEC revised the Part 375 regulations to cover the BCP. By regulation at 6 N.Y.C.R.R. §375-3.3(a)(1), DEC addressed eligibility for the BCP, *i.e.* the definition of "brownfield site." The Department split the statutory definition into two distinct elements, a "Contamination Factor," and a "Complication Factor," providing that a "brownfield site has two elements":

> (A) 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
>
> (B) there must be a reasonable basis to believe that the contamination or potential presence of contamination may be complicating the development or re-use of the property.

6 N.Y.C.R.R. §375-3.3(a)(1).

Moreover, the regulation provides that in determining eligibility, DEC "shall consider only contamination from on-site sources." 6 N.Y.C.R.R. §375-3.3(a)(2). This exception was upheld in *Citizens' Envtl. Coalition, Inc. v. NYSDEC*, 57 A.D.3d 1279, 871 N.Y.S.2d 435 (3d Dep't 2008).

In addition, the regulations prohibit DEC from considering:

> (i) contamination of structures located at the site, due to stored materials, electrical appurtenances, lead paint or asbestos, etc.; or
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> (ii) material not constituting a "contaminant" as defined in subdivision 375-1.2(g) (e.g. construction and demolition debris, abandoned consumer goods or other solid waste present on the site).

6 N.Y.C.R.R. §375-3.3(a)(3). Further, in determining eligibility, the regulations authorize DEC to only approve a portion of a site, add in contiguous parcels, or to request a Phase II investigation to gather more information. 6 N.Y.C.R.R. §375-3.3(a)(4).

DEC's Eligibility Guidance ("Guidance"), released in March 2005, more fully fleshes out the meaning of the brownfield definition, and includes factors DEC considers when determining whether a site is a "brownfield site," and thus eligible for the BCP. The Eligibility Guidance is available at: www.dec.ny.gov/docs/remediation_hudson_pdf/bcp_eligibility.pdf. The Guidance includes various factors which will be used to evaluate the Contamination Factor and the Complication Factor.

Guidance §2.2(2) sets forth factors for DEC to consider in determining whether the Contamination Factor has been satisfied:

> In determining whether there is confirmed contamination or a reasonable basis to believe that contamination is likely to be present on the property, the Department will consider the following factors, to the extent such factors are relevant to the proposed site:
>
> (A) the nature and extent of known or suspected contamination;
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> (B) whether contaminants are present at levels that exceed standards, criteria or guidance;
>
> (C) whether contamination on the proposed site is historic fill material or exceeds background levels;
>
> (D) whether there are or were industrial or commercial operations at the proposed site which may have resulted in environmental contamination; and/or
>
> (E) whether the proposed site has previously been subject to closure, a removal action, an interim or final remedial action, corrective action or any other cleanup activities performed by or under the oversight of the State or Federal government.

Guidance §2.2(2).

Guidance §2.2(3) sets forth what DEC will consider when evaluating the Complication Factor:

> In determining whether there is a reasonable basis to believe that the contamination or potential presence of contamination may be

complicating the development, use or re-use of the property, the Department will consider the following factors, to the extent such factors are relevant to the proposed site:

(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 high 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.

Guidance §2.2(3).

In addition to developing these "evaluation criteria," the DEC has indicated in the Guidance that they will consider the "public interest" in determining a site's eligibility for the BCP. While the Guidance specifically lists statutory criteria which would make a site and/or requestor ineligible, it also indicates that "[t]he Department may reject a request... even if the real property meets the definition of a 'brownfield site,' upon a determination that the public interest would not be served by granting such a request" and that "in making a determination as to whether the public interest would be served by accepting the application, the Department must consider, but is not limited to," the list of statutory criteria. Guidance §2.3. As such, by the Guidance, the DEC has left itself a great deal of leeway in determining whether the "public interest" has been met.

## 5. EXEMPTIONS

The statute specifically excludes a number of categories of sites and persons from eligibility. ECL §§27-1405(2) and 27-1407(8). These exemptions are also addressed by the regulations at 6

N.Y.C.R.R. §375-3.3(b,c), and Guidance §§2.4 and 2.5. The exemptions are as follows:

a. **Class 1 and 2 State Superfund Sites.** Sites listed on the Registry of Inactive Hazardous Waste Disposal Sites under the State Superfund Program and given classification 1 or 2, *see* ECL 27-1305, are excluded. ECL §27-1405(2)(a); 6

N.Y.C.R.R. §375-3.3(b)(1). There was a narrow window for volunteers to gain entry with Class 2, but that expired July 1, 2005. ECL §27-1405(2)(a).

b. **NPL Sites.** Sites listed on the National Priorities List under CERCLA are not eligible for the BCP. ECL §27-1405(2)(b); 6 N.Y.C.R.R. §375-3.3(b)(2).

c. **Solid or Hazardous Waste Sites Subject to Enforcement Action.** Under the statute, a facility subject to "an enforcement action" under Title 7 (governing solid waste) or Title 9 (governing hazardous waste) of ECL Article 27 is not eligible, except for a hazardous waste treatment, storage or disposal facility ("TSDSF") "subject to a permit," or a TSDF "having interim status" under 6 N.Y.C.R.R. Part 373-3. ECL §27-1405(2)(c); 6 N.Y.C.R.R. §375-3.3(b)(3). DEC's regulations contain the same exclusion for solid or hazardous waste sites subject to "ongoing enforcement action," but in contrast to the statute, does not contain the exception for TSDFs having a permit or interim status. *See* N.Y.C.R.R. §375-3.3(b)(3). Guidance §2.4(1)(C) only recognizes the interim status exception.

d. **Petroleum Spill Sites Subject to Cleanup Order.** Sites subject to an order for cleanup under Navigation Law Article 12 (the "Oil Spill Law") or ECL Article 17, Title 10 ("Control of the Bulk Storage of Petroleum") are not brownfield sites. ECL §27-1405(2)(d); 6 N.Y.C.R.R. §375-3.3(b)(4). However, this exception does not cover sites only subject to a stipulation agreement. ECL §27-1405(2)(d); 6 N.Y.C.R.R. §375-3.3(b)(4).

e. **Other Enforcement Action For the Site.** Sites that are subject to other "on-going state or federal environmental enforcement action related to the contamination which is at or emanating from the site" are ineligible. ECL §27-1405(2)(e); 6 N.Y.C.R.R. §375-3.3(b)(5).

In addition, three categories of applicants are disqualified from eligibility:

a. **Pending Enforcement Action Against the Applicant.** Persons subject to a pending administrative or court enforcement action related to the site brought by the state or federal government where "investigation, removal, or remediation of contamination or penalties" are sought are not eligible. ECL §27-1407(8)(b); 6 N.Y.C.R.R. §375-3.3(c)(1).

b. **Applicant Subject to Enforcement Order.** Persons subject to an order requiring investigation, removal, or remediation of contamination relating to the brownfield site are not eligible. ECL §27-1407(8)(c); 6 N.Y.C.R.R. §375-3.3(c)(2).

c. **Pending Oil Spill Fund Claim.** A person is not eligible if they are subject to an outstanding claim by the New York Environmental Protection and Spill Compensation Fund for cleanup and removal costs for the site under the Oil Spill Law. ECL §27-1407(8)(d); 6 N.Y.C.R.R. §375-3.3(c)(3).

## 6. CASE LAW

While there has been much legislative activity surrounding the tax credits associated with the BCP, the language related to eligibility for the BCP remains basically the same as when it was originally enacted in October of 2003. This has not, however, prevented the filing of litigation across the State challenging DEC's interpretation of the eligibility language found in the ECL.

### *377 GREENWICH, LLC*

The first reported decision regarding the BCP was *377 Greenwich LLC v. New York State Department of Environmental Conservation*, 14 Misc.3d 417, 827 N.Y.S.2d 608 (Sup. Ct. N.Y. Co. 2006). In *377 Greenwich LLC*, a developer applied to the BCP due to minor contamination found on the site that allegedly required an excavation of 14 feet. However, rather than waiting for the application to be decided, the "entire site was dug to a depth of 25 feet in order to permit the pouring of a foundation for the hotel project," and the developer proceeded to build the hotel. Furthermore, while the *377 Greenwich* developer contended that the remediation cost was $1 million, not only was that a cost that included the excavation for the foundation, but given the location as a hotel site in lower Manhattan, the real estate value was likely many times that amount.

DEC contended that the excavation was necessary for the hotel project, and did not complicate development. In addition, not only was the contamination at 377 Greenwich relatively minor contamination that was typical of historic fill in Manhattan, but the site already had an approved remedial plan under the DEC Spill program that was followed. In upholding the DEC's decision, the court pointed out that:

> [w]hile the legislation is broadly drawn, it is clear from the actual language of the BCPA, that all contaminated sites that are not expressly excluded are not necessarily intended to be included or accepted to the BCP. The statutory definition of "brownfield site" expressly conditions qualification upon the presence of contaminants that make the development of the site more "complicated." The BCPA includes a non-exclusive, discretionary list of reasons to deny participation in the program, clearing signifying that other reasons can justify the denial of an application by the DEC. Given the broadly drawn statute, which contains words, like "complicated" without precise and exact meaning, this court can look to the legislative history in order to determine whether the agency's interpretation of the law is consistent with the legislative intent. In this case the DEC's interpretation of the definition of the brownfield site is perfectly consistent with the legislative history. In enacting the BCPA, the legislature rejected other versions of the bill which did not contain the qualifying requirement of complication, but would have allowed all contaminated sites to participate in the BCP. Clearly the version of

> the BCPA enacted requires analysis and determination of whether the limiting criteria in the statute are met.

14 Misc.3d at 423, 827 N.Y.S.2d at 614 [citations omitted]. As such, the court ultimately held that the DEC's denial into the BCP was justified, and denied the petition in its entirety.

### *JOPAL ENTERPRISES, LLC*

In *Jopal Enterprises, LLC v. Sheehan*, Index No. 803-06 (Sup. Ct. Suffolk Co., July 31, 2006, Emerson, J.), the applicant challenged DEC's determination that "minimal" contamination did not complicate redevelopment. In an unreported decision, the court deferred to the agency's judgment, and upheld the denial. It also rejected a challenge to the Guidance, and held that it did need not be subjected to SAPA formal rulemaking procedure.

### *LIGHTHOUSE POINTE PROPERTY ASSOCIATES, LLC*

In another unreported decision, *Lighthouse Pointe Property Associates vs. NYSDEC*, Index No. 2007/9731 (Sup. Ct. Monroe Co., December 2, 2007, Taddeo, J.), the petitioner sought a reversal of DEC's denial of entry into the BCP of two adjacent sites at the Port of Rochester, which encompassed the former City of Rochester Landfill, the Town of Irondequoit sewage treatment plant, and buried lead waste failing the TCLP test. The sites had been used for historic rail yard and marina operations, and the disposal site for industrial waste and dredged river sediments, and are presently utilized for boat storage and parking, or else vacant.

> An investigation of the sites revealed 188 exceedances exceeding the SCOs set forth in 6 N.Y.C.R.R. Subpart 375-6, as well as explosive methane and other vapors, and groundwater contamination in 9 of 9 wells in excess of applicable standards, including heavy metals, volatile organic compounds (VOCs), and semi-volatile organic compounds (SVOC's). The estimated costs for environmental remediation is $4 to $8 million. In contrast, the property value assessments totaled about $1.3 million. The petitioner proposed a $200 million development, including condominiums, a pedestrian waterfront promenade, retail shops, water taxi stop, and a hotel. Without entry into the BCP and the resulting approval of remediation by DEC and a release of liability, the petitioner was unable to obtain financing for the project, and the Monroe County Department of Health refused to approve permits due to its concern regarding health impacts from toxic chemicals at the site.

DEC ruled that it "must deny the applications" because although there were exceedances of SCOs, the contamination originated from solid waste, rather than disposal of hazardous waste or petroleum, so it would not be eligible for the BCP. It denial letter stated:

> it is likely that exceedances of SCO's or other standards are attributable to solid waste disposal. Pursuant to 6 NYCRR 373-

> 3.3(a)(3)(ii) [sic], the Department does not consider material other than contaminants as defined in Article 27, Title 14 in making a determination as to eligibility for the BCP.

Nonetheless, DEC admitted in its denial letter that they "recognized that large portions of this property were used as solid waste landfills, and that redevelopment of these properties complicated by such prior usage, given that methane gas is present and that odors, leachate seeps, and soil stability present engineering concerns." In court however, DEC argued not that solid waste was exempt, but that the remediation was unnecessary because contamination was widely dispersed and minimal.

In granting the petitioner's application and ordering the Lighthouse sites into the BCP, the lower court noted:

> The Court can find no rational basis to conclude that the levels of contamination at this site were "minimal." 6 NYCRR 375-6 sets forth the standard for [re]mediation of Brownfields by detailing various soil cleanup objectives (SCO's). These SCO's are the maximum allowable levels of various contaminants that can be present at a BCP site after cleanup is completed.
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> According to [the petitioner's] data, the samples taken at the project site exceeds the SCO's for numerous contaminants. . . . While DEC questioned the validity of some of Petitioner's data, its main argument was that the SCO's are standards set by the state to determine if a Brownfield site has been satisfactorily cleaned up, not whether it is contaminated in the first place.
>
> This argument flies in the face of logic. Respondents would have this Court rule that the SCO's should have no bearing whatsoever in determining whether a site is initially admitted into the BCP, yet these same standards should be the ultimate factor in determining whether an applicant receives a liability release after completion of the remediation. The Court can find no legal authority to support this position. The SCO's are stated promulgated standards and as such they should be used as a benchmark; soil samples that exceed the limited promulgated in 6 NYCRR §375-6.8 should be, by law, designated as contaminated. Moreover, the statute does not require a specific combination of contaminants in order to be admitted into the BCP; ECL §27-1405(2) only requires the "presence or potential presence of more than *a* contaminant" (emphasis added.) . . . .
>
> The legislature's use of qualifying language such as "*may* complicate" and "*potential* presence" indicates that they intended a low threshold for admission into the BCP. An applicant must only

> show that the development of the property *may* be complicated by the presence of a contaminant. Using a standard rule of statutory construction, the Court must find that the controlling word in the statute is "may." As argued by Petitioner in its reply memorandum of law, "the question is not whether Petitioner has proven the hazardous wastes at the site *actually* pose a significant threat to the environment, but rather whether there *might* be hazardous wastes that may complicate the development" (emphasis added.) . . . .
>
> By failing to provide any rational basis for their determination that the development of this site would not, or could not, be complicated by the possible presence of even minimal levels of contaminants, the DEC has failed to demonstrate that their actions were anything but arbitrary and capricious.

In the only appellate level decision regarding the BCP thus far, the Appellate Division, Fourth Department, reversed the lower court, relying exclusively on deference to agency discretion, without analyzing the meaning of the statutory definition. *Lighthouse Pointe Property Associates, LLC v. NYSDEC*, 872 N.Y.S.2d 766, 2009 N.Y. Slip Op. 00878 (4th Dep't 2009). The majority opinion in *Lighthouse* did not even discuss the complication factor, but rather deferred to DEC's judgment that the contamination did not require remediation:

> It is beyond dispute that reasonable minds may differ in the interpretation and analysis of the data collected at the site, and it therefore cannot be said that the rejection by the DEC of petitioner's BCP applications was unsupported by the evidence, nor can it be said that the DEC acted in an arbitrary and capricious manner in rejecting those applications. The determination of the DEC was premised upon the results of a thoughtful analysis performed by an environmental engineer who considered and based his opinion on the testing conducted on behalf of the DEC, as well as the data submitted by petitioner. Inasmuch as it is not the province of the courts to second-guess a reasoned agency determination or to invade the process by which such a conclusion is reached, the petition should have been dismissed. The DEC's well-reasoned analysis of the BCP applications of petitioner, coupled with the mandate that we must not substitute our judgment for that of the DEC, compels the conclusion that the court erred in granting the petition and directing the DEC to accept petitioner into the BCP.

872 N.Y.S.2d at 770-771 [cites omitted].

Justice Nancy Smith wrote a lengthy dissent, challenging the rationale that DEC can disregard confirmed exceedances of the SCOs, or that the Eligibility Guidance has any merit:

> . . . there is no indication that the Guidance bears any of the imprimatur of law because the DEC has not promulgated it as a regulation, and it is not included in the BCP statutes. Finally, the Guidance is so vague that it can be used to justify the approval or denial of any application. For instance, the Guidance indicates that the DEC should consider, inter alia, whether the proposed site is idled, abandoned or underutilized; [or] whether the proposed site is unattractive for redevelopment or reuse due to the presence or reasonable perception of contamination (Guidance, 2.2[3][A], [B]).
>
> …
>
> I further conclude that the DEC's failure to promulgate any viable regulation for evaluating applications for admission into the BCP is, of itself, arbitrary and capricious. The DEC has implemented no regulatory standards to enable a court to conduct any meaningful review of its determinations. The only existing standard for judicial review of the contamination of polluted properties is the DEC's soil cleanup objectives, which set forth the goals for the maximum amounts of contaminants remaining after remediation (see 6 NYCRR 375-6.8). The DEC contends that those standards may not be used to ascertain whether a property is eligible for participation in the program, however, because they are goals for the completion of remediation, not the standards for determining whether a property is in fact contaminated. That contention flies in the face of the DEC's reliance upon those same standards in calculating the presence of contaminants on a property. More importantly, if we accept the DEC's contention, then there is no objective guideline for evaluating the presence and levels of contaminants on a property. Stated differently, if the soil cleanup objectives are not the standard for determining whether a property is contaminated, then there is no standard at all.

*Id.* at 773-774.

Leave to Appeal to the Court of Appeals in the *Lighthouse* case was granted on April 24, 2009, and thus, the Fourth Department's current decision is not the last word on the issue. *Lighthouse Pointe Property Associates vs. NYSDEC*, 2009 WL 1107875 (4th Dep't 2009).

## *DESTINY USA DEVELOPMENT, LLC*

In *DestiNY USA Development, LLC v. New York State Dept. of Environmental Conservation*, 19 Misc.3d 1144(A), 2008 WL 2368085 (Sup. Ct. Onondaga Co. 2008, Cherundolo, J.) the petitioner was seeking to annul the denial by DEC of admission of the "Carousel Parcel" and the "Oil City Parcel" in Syracuse into the BCP, and a declaration that the Eligibility Guidance was illegal. Other portions of the site that were the subject of the same BCP application were admitted.

The Oil City Parcel is a series of plots of land comprising approximately 72 acres, which formerly housed petroleum bulk storage and distribution facilities and other industrial properties all located south of Hiawatha Boulevard and east of the Barge Canal. The Carousel Parcel is approximately 80 acres, was originally a salt marsh used in connection with salt mining and production in the early 1900's, and then used as a disposal site for mixed fill up until approximately 1930. Portions of the Carousel Parcel were also used for disposal of waste from Solvay Process Company. Immediately prior to 1988 it was the site of the Marley Scrap Yard (a scrap metal junk yard), Clark Concrete (a concrete batch plant), Amerada Hess (a petroleum bulk storage facility), and a rail yard. *Id.* at *2. It is now the site of the Carousel Mall (although the petitioner apparently removed the mall building from the application, so the application was limited to the parking lot).

The petitioner plans to redevelop the Oil City Parcel and the Carousel Parcel to create "DestiNY USA." The development is designed to be a major research, retail, entertainment, dining, hospitality and tourism venue, including, the expansion of the existing shopping mall. *Id*. at *4.

DEC claimed that since the Carousel Parcel was already developed as a mall and parking lot, and the DestiNY project was proceeding even without the BCP, redevelopment was not complicated. Further, the Oil City Parcel was subject to various consent orders or agreements requiring remediation, and in one case contaminants had been remediated by enclosure in a containment cell.

Judge Cherundolo annulled the DEC decision, and ordered the Oil City Parcel and the Carousel Parcel into the BCP. The court held: "[t]he clear and unambiguous purpose of the BCP was to expand the availability of cleanup of Brownfields, while at the same time allow municipalities to take advantage of opportunities for redevelopment, job creation, and overall economic growth." *Id.* at *10. Even though the Carousel Parcel was already developed as the parking lot for a mall, the court found that the remaining contamination complicated development. Further, prior consent orders for remediation of portions of the Oil City Parcel were not "enforcement actions" that barred eligibility, and disturbance of the containment cell would pose complications. The court rejected the efforts of DEC to make new arguments to defend its determination that were not contained in its administrative decision.

The *DestiNY* court went on to note that:

> The statute was clear and unambiguous. The statutory purpose of was pointedly stated in the statute itself (27-1403) and the legislative history speaks volumes about the statutory intent that the legislature had in passing the statute. Indeed, the BCP was designed to be a statute of invigoration. It was designed to be a statute that would

> promote development in urban decayed areas where contamination was present, and development was expensive. Indeed, the statute was a statute designed to take not only abandoned properties, but older properties that had been used for retail, residential or commercial use and allowed developers to develop them in a way that was modern, cost-worthy and effective. The statute itself created a vehicle whereby potential developers could go to financial institutions and seek financing on projects without the institutions worrying about the ultimate liability of ownership and financing. Indeed, the tax credits available and the limited liability provisions that become effective upon completion show that the overall intent of the statute was clear, unambiguous, and designed to be applied liberally throughout the State of New York.

*Id.* at *11.

In determining that the Eligibility Guidance was illegal, the court held:

> When pressed, it was clear that there is no real "guidance" dealing with the criteria that DEC purports to define the "complication" component of the statute. The DEC has promulgated in "guidance factors", which clearly lead to decisions being made arbitrarily and without grounded reason. The "guidance" that has been drafted and used by the DEC profoundly limits and blunts the desired effect of the statute in a myriad of ways and, at the same time, vests unlimited authority and unfettered discretion with DEC personnel on issues dealing with the BCP.
>
> This Court scoured the record to see under what plausible theory the DEC can simply choose to limit the clear and unequivocal language and legislative intent of the statute. This Court has been unable to find a single basis upon which the DEC could possibly justify the addition of such significant limitations placed upon the clear meaning of the statute. Clearly, in deciding to adopt the "guidance factors", the DEC has opted to make itself a fiscal watchdog without legislative authority. Moreover, by adopting the so called "guidance factors" the DEC has chosen to rewrite the statute that was clearly written by the legislature, the effect of which is to not only dull, but to emasculate the clear intent of the statute, by administrative agency fiat. Such activities cannot-and should not-be condoned.

*Id.* at *12. The court went on to note that : [t]hese "guidance factors" do not provide "guidance" but rather become "eligibility" factors which are substantive requirements for eligibility that cannot be inferred from the plain reading of the statute or any recognizable interpretation of legislative intent. Indeed, the use of such "guidance factors" or "eligibility" factors were never authorized or contemplated by the legislature, and instead of furthering the legislative purpose, they castigate such

purpose, and serve not to support the "needs" of New York State citizens, but to usurp such needs.

*Id.* at *21.

The court ultimately held:

> that the respondent, Department of Environmental Conservation, acted arbitrarily, capriciously, in a way not authorized by statute or regulation, in a way that has been effected by an error of law, in violation of lawful procedure, and in excess of its jurisdiction when it failed to include the affected "Carousel Parcels" and "Oil City Parcels" into the BCP. In doing so, this Court finds that the respondent violated the Equal Protection Cause of the New York State Constitution and the Fourteenth Amendment of the United States Constitution, which provides equal protection to all citizens under the laws. This Court also finds that the actions of the DEC in this case were otherwise arbitrary, capricious and without rational basis and has, as a result, discriminated against the petitioner in this matter without promoting a rational, legitimate state interest in so doing.

*Id.* at *28.

The state's appeal of the *DestiNY* decision was argued before the Appellate Division, Fourth Department on April 8, 2009. Only one member of the panel, Judge Centra from Syracuse, was on the *Lighthouse Pointe* panel. A decision may be released on June 5, 2009.

## *HLP PROPERTIES, LLC*

In *HLP Properties, LLC v. New York State Department of Environmental Conservation*, 21 Misc.3d 658, 864 N.Y.S.2d 285 (Sup. Ct. N.Y. Co. 2008), the petitioner sought to redevelop a 1.75 acre parcel of property located in the West Chelsea section of Manhattan, into two residential and commercial high-rise towers. It was

> undisputed by the parties that the more than sixty years of unabated gas production deposited significant quantities of environmental contaminants into the surrounding land. The primary byproduct of MGP gas production, and, in fact the primary Site contaminant, is coal tar, a complex mixture of organic chemicals, some of which have been identified as being extremely hazardous. Multiple studies conducted on the Site between 1994 and 2002 have additionally revealed the presence of volatile organic compounds (VOCs), semi-volatile organic compounds ("SVOCs") and heavy metals.

21 Misc.3d at 661, 864 N.Y.S.2d at 287.

In annulling the DEC decision, the court held that courts should not defer to the unreasonable statutory interpretation of the BCP by DEC, but rather should interpret the plain words of the law in light of the legislative intent:

> When however, the focus of the challenged determination turns on the language of the statute itself, the court's primary objective becomes the legal interpretation of the statute, thereby requiring consideration of both the purpose of the enacted legislation and its objectives. The legislative intent becomes the controlling interest in the analysis, and the reliance placed upon the special competence or expertise of the administrative agency charged with the statute's enforcement and promulgation of interpretive regulations is dramatically reduced.

21 Misc.3d at 667, 864 N.Y.S.2d at 292 [cites omitted]. Further, the *HLP* court held that the use of the Eligibility Guidance was inconsistent with the law:

> Perhaps most tellingly, to date, not only has the Legislature declined to adopt the DEC's "guidance factors" in the ECL, the guidance factors are conspicuously missing from the DEC's own regulations with regard to the BCP.
>
> This court is also not in agreement with the result reached in *377 Greenwich*. Although the court agrees that use of "eligibility guidance factors" to implement the BCP Act is not inconsistent with the statutory scheme, it disagrees with the conclusion that the DEC acted rationally in adopting and imposing economic regulations not contained within the statute. To conclude otherwise defeats the legislative intent of the statute. The DEC's use of "guidance factors" as set forth in the August 2, 2007 letter denying petitioners' BCP application is erroneous in that it constitutes an impermissible attempt to legislate, and is inconsistent with the Legislature's intent to encourage remediation. The denial of petitioner's BCP application must therefore be, and is hereby, reversed, and respondent is directed to accept petitioners' property into the BCP program as it existed under the 2007 version of the statute.

21 Misc.3d at 670, 864 N.Y.S.2d at 294 [cites omitted].

## *EAST RIVER REALTY COMPANY, LLC*

In *East River Realty Company, LLC v. New York State Department of Environmental Conservation*, 22 Misc. 3d 404, 866 N.Y.S.2d 537 (Sup. Ct. N.Y. Co. 2008), Supreme Court Justice Lewis Bart Stone annulled denial of parcels of land located between East 36th Street and East 41st Streets on both sides of First Avenue in Manhattan into the BCP. The sites had been used for industrial purposes for many years, including a coal gasification facility, an electric generating facility and the former Kips Bay Fuel Terminal, leading to contamination. *Id.* at 539. The parcels are now being developed for multi-use residential developments. *Id.* The site was originally in the VCP, but in 2004 the petitioner submitted an application to have the sites transferred to the BCP. *Id.* DEC originally confirmed that the four sites were eligible for the BCP, but later reversed its determination and denied entry into the BCP. *Id.*

DEC contended that "the statutory eligibility criteria of "complicated"... include[s] a "but-for" test, so that the sites were not eligible unless remediation would have occurred without the benefits of the BCP. *Id.* at 540. Judge Stone undertook a detailed review of the legislative history behind the term "complicated" as it appears in the ECL, and noted that:

> [t]he Bill Jacket for Laws 2003, ch.1 is silent on the origin of the term "complicated" in this context. However, from the history surrounding the adopting of the BCP, it is clear that the term was adopted from Federal environmental law.... The Report on the United States Senate report on the bill which enacted [the brownfield definition] noted that the definition of brownfield was drafted to be consistent with the Federal Environmental Protection Agency's ("EPA") traditional working definition of a brownfield, which as early as 1997, defined a brownfield as an "abandoned, idle or underused industrial or commercial site where expansion or redevelopment is complicated by real or perceived contamination that can add cost, time or uncertainty to a redevelopment project.

866 N.Y.S.2d at 541. After summarizing the back and forth between the New York State Senate and Assembly over what definition of "brownfield" would be included in the ECL, Judge Stone determined that:

> [t]he fact that the quite different Senate and Assembly approached were resolved by the adoption of the CERCLA definition is compelling evidence that the Legislature had clearly focused on the issue and that the language as finally adopted was not inadvertent. Further, the fact that the definition selected arose from a "settlement" between the two legislative houses evinces a strong legislative intent that the compromise reached should stand and not be subjected to material variance by DEC interpretation or regulation, as it would make no sense for either house to agree to a compromise solution

> where such compromise could be countermanded by DEC. Thus, the fact of the compromise is compelling evidence of a legislative intent that the statutory definition was intended to be effective and binding unless and until it was changed by further action of the Legislature. Accordingly, "complicated" must be construed as having the same meaning it has under CERCLA, and thus under the Federal EPA working definition of a brownfield, where "***complicated" means where contamination "can add cost, time or uncertainty to a redevelopment project.***"

866 N.Y.S.2d at 541 [emphasis added].

The court ultimately decided that:

> [t]he construction of ECL Title 14 and case law as applied to this proceeding, from a textual analysis, and case law analysis all make it clear that the Decision as it applied to East Rivers' three Sites was arbitrary and capricious and in violation of law by adding a condition not found in or authorized by the statute. Legislative history, a relevant area of reference for the construction of a statute to the extent of any ambiguity or confusion (of which in this case there was none), yields the same conclusion.

*Id.* at 550.

### *BUFFALO DEVELOPMENT CORP.*

In *Buffalo Development Corp. v. NYSDEC,* Index No. 4350-2008 (Sup. Ct. Erie Co. Jan. 7, 2009, Marshall, J.), the site of a former dry cleaning operation has been admitted into the BCP, and the petitioner sought admission of two adjoining parcels. DEC denied the application, finding that neither site was the source of the contamination, only one parcel had contamination that required remediation, and remediation of the site that had already been admitted into the program would address any contamination issues on both sites. The court upheld the denial based on the source being off-site, relying on the Third Department decision in *Citizens' Envtl. Coalition, Inc. v. NYSDEC*, 57 A.D.3d 1279, 871 N.Y.S.2d 435 (3d Dep't 2008) upholding the regulatory exception for off-site sources set forth at 6 N.Y.C.R.R. §375-3.3(a)(2).

## *CONCORD ASSOCIATES, L.P.*

In *Concord Associates v. NYSDEC*, Index No. 3206-08 (Sup. Ct. Sullivan Co. March 31, 2009, Ledina, J.),[1] the petitioner sought to expand the 14-acre Concord Hotel BCP site by an additional 20 acres where underground tanks and additional contamination had been found. While initially DEC wrote a letter in April 2008 indicating the site would be expanded, it later reneged and denied the application, claiming there had been an "intra-Departmental miscommunication." At the invitation of DEC, the petitioner then filed a new application in July, 2008 for the additional acreage but DEC failed to act, in spite of the requirement that DEC use "best efforts" in making a decision within 45 days. ECL §27-1407(6).

Initially, Dale Desnoyers, the Director of the Division of Environmental Remediation, submitted an Affidavit on September 18, 2008, stating the application was at the "top of the pile." When he failed to act in the next six months, the court granted a *mandamus* order, directing that a decision be made within 30 days on both the new application, and the expansion request (which the court ruled was not finally decided).

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[1] The authors represent the petitioner in *Concord*.