

Also available...

**Bridge Tolls:
Who Would Pay
& How Much?**

...at www.ibo.nyc.ny.us

Will New State Law Help Reclaim New York's Brownfields?

SUMMARY

In October 2003, New York State passed a long-awaited bill to promote cleanup of the state's brownfields—abandoned or idle property contaminated by benzene and other industrial pollutants that inhibit redevelopment. Proponents hope that the new law will finally spur remediation and redevelopment of the state's brownfields. There are an estimated 3,000 acres to 4,000 acres of brownfields in the city.

The law includes several new provisions to assist local governments in remediating municipally owned sites, including a higher state reimbursement rate for brownfield cleanup costs and technical assistance grants. The law opens up new opportunities for partnerships between the city and community organizations. Together these provisions should now make it easier to use roughly \$175 million in funds available statewide that previously had been allocated for brownfield cleanups.

The new law also can boost the viability of existing city programs, such as the Department of Housing Preservation and Development's New Venture Incentive Program. Additionally, the law for the first time codifies a remediation program for privately owned brownfields, provides grants and tax credits for remediation and redevelopment to owners, and offers some liability protection.

Because needs and circumstances are different in New York City and elsewhere in the state, however, some aspects of the law will limit its effectiveness in the city. Notably:

- Under the new law, contaminated groundwater must generally be cleaned up to drinking-water standards. This is very expensive but provides little benefit to public health in the city, which obtains nearly all its drinking water from from upstate reservoirs rather than wells.
- The law favors sites with high potential for economic development, principally measured by the number of jobs created. This could place the city at a disadvantage, because brownfield sites here are typically quite small compared to upstate, thus limiting any given site's job-creation potential.
- The tax credits offered as an incentive for brownfield remediation are increased for neighborhoods that meet specific poverty benchmarks, and many New York City neighborhoods with brownfields may not qualify.

The new law represents a major step forward that will help spur remediation and development of both privately and publicly owned brownfield sites that would previously have been unprofitable. While it does not address all of New York City's particular needs and circumstances, the new law is a beginning to reclaiming the city's brownfields.

**New York City
Independent Budget Office
Ronnie Lowenstein, Director
110 William St., 14th floor
New York, NY 10038
Tel. (212) 442-0632
Fax (212) 442-0350
e-mail: ibo@ibo.nyc.ny.us
<http://www.ibo.nyc.ny.us>**

INTRODUCTION

In October 2003, Governor Pataki signed legislation which refinanced the state's Superfund Program, and for the first time, codified a brownfield cleanup program that may make it easier to access roughly \$175 million in already available funds and authorizes new tax credits to encourage private owners to clean up their contaminated property. This legislation has been widely anticipated for many years, and proponents hope that this new law will finally spur remediation and redevelopment of the state's brownfields.

A brownfield is any idle, abandoned, or underused real property, the redevelopment of which is complicated by the presence of one or more environmental contaminants. Classic examples of brownfields are former industrial sites in urban areas. In New York City there may be an estimated 3,000 acres to 4,000 acres of brownfields, many of them along the waterfront.

Although brownfields are generally less contaminated than the better-known federal and state Superfund sites, they can still pose significant threats to public health and the environment. Contaminants can leach into the groundwater, and from there can flow into surrounding waterways. Depending on the level of contamination, the presence of hazardous materials in a neighborhood can cause long-term health problems.

Moreover, the presence of contaminants inhibits the development of the site, which means the city collects only a fraction of the potential property tax revenue from owners. Cleaning up the land can restore it to productive use and generate tax revenue. Around the country, for example, many such sites have been redeveloped by big-box retailers, producing jobs and revenues from sales and property taxes.

Lack of land is a major impediment to all forms of development in New York City. Environmental, community development, housing, and economic development organizations have long hoped that brownfields legislation would lead to extensive clean up of land, thus allowing significant investments in open space, housing, or commercial or industrial facilities.

The new law was written to address statewide needs. It clearly represents a significant step forward for New York State, and in many respects, for New York City. By itself, however, the new law may fail to adequately address some of the particular challenges of brownfield remediation in New York City.

Previous Brownfields Programs. Even prior to the new legislation, there were ways to clean up contaminated sites—

both brownfields and more heavily contaminated sites.

The federal government maintains the National Priorities List; sites on this list are included in the federal Superfund Program. There are 90 such sites in New York State, including the Hudson River, because of PCB contamination upstate. The state also has a Superfund Program, the Inactive Hazardous Waste Disposal Site Remedial Program. Sites on the Inactive Hazardous Waste Disposal list can include both those on the federal list and somewhat less contaminated sites on the state registry. The state, along with responsible parties and the federal government, funds clean up of the Inactive Hazardous Waste Disposal sites, and will continue to do so under the new law.

In 1994, New York State established an administrative Voluntary Cleanup Program for brownfields, which are generally not as contaminated as those sites on either the federal or state Superfund lists—although a high level of contamination does not necessarily bar a site from the Voluntary Cleanup Program. The program—which was established administratively by the state Department of Environmental Conservation (DEC)—was designed to promote cleanup of privately owned brownfields.

In November 1996, state voters approved the \$1.75 billion Clean Water/Clean Air Bond Act. The bond act provided funding for protection and restoration projects across the state, falling under five main categories: clean water, safe drinking water, solid waste, municipal environmental restoration, and air quality. Through the municipal environmental restoration component, local governments were eligible for funding to clean up municipally owned brownfields through the state's Environmental Restoration Program (ERP). Statewide, \$200 million of the \$1.75 billion was to be used for ERP.

Under ERP, the state would reimburse local governments for 75 percent of the eligible costs of investigating and/or cleaning up contamination on eligible sites. After the clean up occurred, the municipality could choose to either sell the property for redevelopment or dedicate the property to public use. Any profits from a sale had to be shared with the state.

THE NEW LAW

The new legislation refinances the state Superfund program, makes some enhancements to ERP, and codifies the new Brownfield Cleanup Program (BCP). The legislation also makes available new technical assistance grants, grants for clean up of off-site contamination, and tax credits for private developers of brownfield sites. The Environmental Restoration Program and Brownfield Cleanup Program are the two programs with the

greatest impact on brownfields, and are discussed in more detail below.

Environmental Restoration Program. The balance of the funding for ERP from the 1996 bond act—between \$175 million to \$180 million—is still available under the revised ERP provisions. Under both the original and revised versions of the bond act, municipally owned sites being remediated through the program must meet the cleanup standards of the state’s Superfund Program. Municipalities applying for ERP funding will have their projects prioritized based on the benefit to the environment, the economic benefit to the state, the opportunity for the property to be used for public or recreational purposes, and the availability of other funding sources to remediate the property.

Financial Incentives. The new legislation made several changes to the Environmental Restoration Program that increased the financial incentives to municipalities entering the program. In order to receive any funding under the program in the past the municipality had to hold clear title to the land in question before entering the program. That requirement has been relaxed. The state’s reimbursement share is increased from 75 percent to 90 percent of eligible on-site project costs. In addition, a municipality can tap federal and/or other state assistance to fund its 10 percent share. In addition, a municipality can now receive an assistance grant equal to 100 percent of costs for clean up of off-site contamination originating at a brownfields site.

Eligible costs include costs of remediation, appraisal, surveying, engineering and architectural services, plans and specifications, consultants, and legal services necessary for conducting the approved project. Ineligible costs include lead abatement projects, costs to redevelop the property that are not necessary to remediate the property, and costs incurred prior to state approval of the ERP application.

After the cleanup has occurred, the municipality no longer has to share profits from the sale of the property with the state and can recoup all costs from responsible parties before reimbursing the state for costs for oversight of the cleanup. If the municipality were to sell the property back to a party that caused some or all of the contamination, the responsible party must reimburse the state with interest—these payments are placed in the state’s cleanup fund.

Finally, the definition of “municipality” has been broadened to include a city or town acting in partnership with a “community-based organization,” meaning a nonprofit entity that promotes the reuse of brownfields within the area in which the

organization is based, but did not cause any of the contamination.

Liability Protection. One of the key issues in the brownfields arena is liability. Under both the original and current versions of the Environmental Restoration Program, the municipality is not liable to the state or any third party for claims arising from the contamination of the site. This liability protection transfers to a lessee or successor in title unless it was in any way responsible for the contamination of the site. In addition, if the municipality or successor is sued because of contamination existing prior to the remediation of the site under the ERP program, the state will defend the site owner and pay any assessed judgment.

Cleanup Standards. Under the original bond act and the new law, sites entering the ERP program must meet the state Superfund Program’s cleanup standards. Under these requirements, the remedy selected must eliminate or mitigate all “significant”—as defined by law—threats to public health and the environment through the use of engineering and scientific principles. The standards and criteria must meet the more stringent of either the state or federal cleanup criteria for each pollutant—the remedy will be based on its overall protectiveness, short- and long-term effectiveness, feasibility, community acceptance and overall reduction of toxicity, mobility, and volume.

Brownfield Cleanup Program. For the first time, New York State law now includes policies and procedures for voluntary cleanup of privately owned brownfield sites and financial incentives to encourage businesses and individuals to do so. This Brownfield Cleanup Program will eventually replace the state’s Voluntary Cleanup Program (sites already in the voluntary program may remain but no new sites will be added).

Program Description. Under this new program, companies and individuals can enter into cleanup agreements with the state to remediate privately owned land. Essentially any contaminated sites identified in the future will be eligible for participation in BCP, unless it is on the federal Superfund list, is subject to an enforcement action or cleanup order, or is already on the state Inactive Hazardous Waste Disposal Site List, and is considered a “Class One” (imminent danger) site.

Current “Class Two” Inactive Hazardous Waste Disposal Sites (significant threat) are eligible if the owner—who cannot be responsible for the contamination—applies to participate before July 1, 2005.

For sites that are not currently on the Inactive Hazardous Waste Site Registry, property owners petition to participate in the cleanup program, and if successful, are considered “applicants.” An applicant who bears responsibility for the contamination is considered a “participant,” while an applicant who is not responsible for the pollution is considered a “volunteer.” After the application is approved by DEC, the landowner will develop a plan to investigate the extent of the contamination, will conduct the investigation, and will report to DEC on the results of that investigation.

DEC will then determine if, based on state standards, the site poses a significant threat to public health and the environment. If the site is deemed to be a significant threat, DEC will approve a remediation strategy, and the landowner is required to implement this plan. If the site is considered not to be a significant threat, the owner can choose among remediation strategies. In this case, an applicant signs an agreement that includes a remedial process but the applicant can terminate this agreement at any time.

The new law establishes timelines for each of these steps under the Brownfields Cleanup Program. For example, DEC has 45 days to approve or reject an application to participate in the program.

The extent to which a site is cleaned up can depend on its end use. In addition to the planned end use of the property, the need for ongoing control mechanisms—institutional or engineering—to prevent further contamination or leachate will direct the applicable level of cleanup, referred to as “tracks.” Finally, feasibility—including cost considerations—of the required level of cleanup is taken into consideration when designing the overall remedial strategy.

There are four tracks:

- Track One: using standardized formulas for allowable contaminants, the land is cleaned so that it can be used for any purpose (residential, commercial, or manufacturing). A remedial plan requiring ongoing controls is not permitted.
- Track Two: using the same standardized formulas, the land is cleaned so that it can be used for commercial or manufacturing purposes. Ongoing controls are not allowed for soil conditions, but are permitted for groundwater.
- Track Three: standardized formulas are adjusted to reflect site-specific factors, such as actual depth of groundwater. Cleanup standards are based on these adjusted formulas. End use may be unrestricted, or

limited to commercial or manufacturing, depending on formulas used.

- Track Four: the cleanup standards are negotiated with the landowner and DEC, and are entirely site specific. End use may be unrestricted, or limited to commercial or manufacturing, depending on the standards used. Ongoing controls are permitted.

Once the remediation work is done, DEC will issue a certificate of completion. At this point, the applicant has met their obligation to the state, is eligible for tax credits, and development can proceed. In some cases, the landowner will be required to maintain either institutional controls—such as a deed restriction—or engineering controls, which physically block exposure to any remaining contaminants. In other cases, redevelopment is unrestricted.

Planning and Community Participation Grants. DEC can give up to \$50,000 per site for technical assistance to a nonprofit organization, as long as the site has been designated a significant threat. Grants are also available to nonprofit organizations and municipalities for planning and site assessment in “Brownfield Opportunity Areas.” These are economically distressed areas where there are clusters of brownfields—both privately and publicly owned—in which brownfield redevelopment can serve as a catalyst for community and economic development. Municipalities and community groups can get grants for up to 90 percent of their planning and site assessment costs in the opportunity areas.

Paying for Remediation. If DEC has deemed a site to be a significant threat, the state will pursue the parties responsible for the contamination, and when possible, will recover cleanup costs from these responsible parties. But if the site is not a significant threat, the responsible party cannot be identified, or costs cannot be recovered, the applicant must pay for the on-site cleanup costs. The only upfront state funds available for cleanup are for remediation of off-site contamination (i.e. pollutants that spread from the site covered by the brownfield agreement to other property) although the state will not pay for off-site contamination caused by a “participant” in the BCP.

While grants are limited, there is now an array of tax credits available for remediation costs. The Brownfield Redevelopment Tax Credit reduces an applicant’s corporate or personal income tax or corporate, banking, or insurance franchise tax liability by up to 22 percent of the cost of cleanup, redevelopment, and on-site groundwater remediation. The tax credits are available to any taxpayer granted a certificate of completion by DEC—which includes both participants and volunteers. These tax

credits are for the year in which the certificate of completion is issued.

The credit value depends on the extent to which contamination is removed, and whether the site is located in an “environmental zone,” an area in which at least 20 percent of the population lives below the poverty line and with an unemployment rate at least 25 percent higher than the statewide average. While Brownfield Opportunity Areas and environmental zones are both designed to promote remediation in low-income communities, they are designed for different purposes and may or may not overlap.

The tax credits are refundable, so if the value of the credit exceeds the applicant’s tax liability, the individual or corporation will receive the remaining value from the state. The applicant must have some tax liability in order to qualify for these benefits, so a nonprofit applicant will not be eligible for any of these remediation or redevelopment tax credits, although a for-profit developer partnered with a nonprofit would be eligible for the benefits.

Brownfield Redevelopment Income Tax Credit		
<i>Percentage of cost</i>		
Credit Value	Corporate Taxes	Personal Taxes
Standard	12%	10%
Remediation to Track 1 Standards	2%	2%
Located in “Environmental Zone”	8%	8%
Maximum Credit	22%	20%

SOURCE: IBO.
NOTE: Applicants may be eligible for the Environmental Zone additional credit without receiving the Track 1 Remediation

Site owners are also eligible for property-tax credits, worth up to 25 percent of real property taxes paid, depending on the number of people employed on the site. Unlike the income-tax credits, which are for a single year, it appears that the property-tax credits will continue as long as the site is in compliance with the brownfield agreement.

The law provides little incentive for local governments to adopt the property tax. Property taxes are locally established and administered, so New York State cannot legally require that a municipality implement a property-tax credit. If a local government fails to pass implementing legislation, the law allows the property tax-credit to be applied to state income tax liability. Applicants will continue to pay local property taxes, but will have their state income taxes reduced by the value of the property-tax credit. Again, these tax credits are refundable, so if the tax credits bring an applicant’s tax liability below zero, the

business or individual will receive the difference from the state.

Liability Protection. The law provides some new liability protections for private developers. After a certificate of completion has been issued, the owner is protected from any legal action by the state, barring failure to comply with the on-going terms of the cleanup agreement, changes in the use of the land, fraud, or a select number of other issues. This protection from state lawsuits applies to both participants and volunteers, and carries over if the site is leased or sold.

The law does not provide third-party liability protection; a property owner may still be sued by private parties.

THE BROWNFIELDS LAW AND NEW YORK CITY

In the past, New York City has not taken advantage of available state resources for environmental cleanup. Nor is this uniquely a city phenomenon—of the \$200 million made available through the 1996 bond act for municipal brownfields cleanup, approximately \$175 million to \$180 million remains. To date, the city has been awarded about \$1 million. New York City has also made some use of federal funding streams such as Environmental Protection Agency brownfields pilot programs and various Department of Housing and Urban Development grants.

Advocates and local and state officials point to a variety of reasons why New York City and other local governments have not done more to take advantage of DEC’s programs in the past, including the difficulty of navigating the agency’s regulations, conflicts between state and federal cleanup standards, and title restrictions.

The private sector also is currently involved in brownfield remediation in New York City. Of the 332 Voluntary Cleanup Agreements that DEC has entered into, 51 sites are located in New York City. In addition, sites are remediated as part of private real estate transactions in cases in which anticipated rents or sale prices will cover cleanup costs. In other instances, environmental contamination does inhibit private development, as many of the same issues that in the past have hindered municipal brownfield remediation have also prevented private cleanups. Liability and cost issues have also deterred private landowners from cleaning up sites.

The new law has made some progress in addressing at least some of these issues. In other respects, however, it falls short in addressing some of the city’s difficult brownfield remediation challenges.

Benefits of the New Law. Under the new law, municipalities are no longer required to have full title to a property prior to entering the Environmental Restoration Program, and do not have to split profits from the sale of a cleaned up site with the state. These changes may increase the incentive for New York City to participate in ERP.

Simply by codifying the process for new brownfield site clean ups and adding a timeline, the law takes away some of the uncertainty that has surrounded brownfields redevelopment, and therefore may encourage participation in the program.

One substantial change in the ERP program is the increase in the state reimbursement rate from 75 percent to 90 percent. While most observers feel that cost has not been the major obstacle preventing municipal brownfield remediation in New York City, the change in reimbursement rate is likely to lead the city to undertake some new projects. One example is the redevelopment of brownfields as parks—the city is currently examining the availability of land for potential use as open space using the increased reimbursement share. In upstate communities with smaller capital budgets the increase in the reimbursement rate may have an even more decisive impact on the choice of projects.

The law also opens up new opportunities for partnerships among private landowners and developers, municipalities, and community groups. The public and private sectors can potentially work together so that a single site can generate redevelopment tax benefits and stronger liability protections for private-sector developers while also meeting community development needs and goals.

Limitations of the Law for New York City. Other factors have posed particular challenges for brownfield remediation in New York City.

Size Matters. Many brownfield sites in New York City are small—often less than 1 acre. Small, noncontiguous sites make development less profitable and more complicated. Big-box retail, manufacturing plants, and most housing development generally require larger sites. While DEC points out that no site has been denied ERP funding solely because of its size, the allocation criteria for awarding ERP funds emphasize a site’s potential for economic development, and generally a multi-acre upstate site presents a greater opportunity for economic growth than a small New York City site. In addition, property tax credits are based on the number of employees working on a site, and large sites clearly can accommodate more people.

The law does place new emphasis on remedial activities in communities with large numbers of brownfields—for example, by creating the Brownfield Opportunity Areas planning process—but there is no provision permitting clustering of smaller sites in a single application: each site will continue to be evaluated individually. Since, in general, a single large site will yield greater development benefits than a single small site, site size may continue to be an impediment to brownfield remediation in New York City.

Groundwater. The law represents a step backward for New York City regarding groundwater contamination. Under the law, DEC must favor remediation plans that clean groundwater to drinkable standards. Less than 5 percent of New York City’s water supply comes from groundwater sources, however. Requiring remediation to drinking water standards will significantly increase costs without appreciably improving public health and safety in New York City. While there is some recognition that this might not be feasible in all cases, there are no specific statutory criteria for making an exception.

Tax Credit Eligibility. The maximum income tax credit under the new law is 22 percent of cleanup and development costs. In order to receive the maximum credit, the property must be located in an “environmental zone.” Because many of New York City’s brownfields are on abandoned waterfront properties, they generally do not satisfy the characteristics required of environmental zones. This means that the maximum tax credit for many city sites will be 14 percent of remediation and redevelopment costs. For some projects, this may spell the difference between remediation and continued abandonment.

Lack of Financial Incentives for Nonprofits. The availability of tax credits is one of the major changes in the legislation, but these do not apply to nonprofit organizations, which have no corporate income tax liabilities. Nonprofits have traditionally been major players in the community development arena in New York City, but because they cannot benefit from the tax benefits, their role in brownfield redevelopment may remain limited. Two possible routes around this limitation will be the creation of community organization partnerships with the city, which under the new law will qualify for ERP program benefits, or partnerships with private developers to take advantage of the tax credits.

Private-Sector Liability. The law does not fully address liability concerns of private owners. BCP applicants are protected from state lawsuits, but continue to be open to third-party lawsuits.

The Brownfields Law and Other New York City Programs. In the last year, there has been an increased interest in brownfields in New York City, which has given rise to new and proposed programs to spur cleanup. In conjunction with these other programs, the law might have a greater effect in New York City.

For example, Mayor Bloomberg's "New Marketplace" housing plan, announced in December of 2002, included the New Venture Incentive Program, a loan program that will provide financing for land acquisition and cleanup. Through 2009, the city's housing department will provide \$200 million in loan funds to private developers building housing affordable to households earning no more than 165 percent of area median income. The combination of this funding with the liability protections and the new legal framework provided through the legislation may help the New Venture Incentive Program and brownfields cleanup programs work more effectively together than either would alone.

The city is also a partner in the recently established New York Metro Brownfields Redevelopment Fund, which is using public financing to leverage private investment in a revolving loan fund for brownfields cleanup. Unlike the New Venture Incentive Program, eligible projects for this fund will not be restricted to

housing. Borrowers will be provided with technical assistance.

The Waterfronts Committee of the City Council is working on a proposal to create a program that would pull environmentally contaminated sites out of tax lien sales, and transfer them to a new owner who would be responsible for cleanup. This program is modeled after the Third Party Transfer program for housing. If this proposal becomes law, it could provide another avenue for the city to take advantage of the new legislation.

CONCLUSION

The brownfields legislation has some limitations in its applicability for New York City, but even its strongest critics maintain that the law represents a major step forward. In some neighborhoods in New York City and around the state, the tax credits and other benefits provided by this new legislation will make the difference between losing money on a development project, and making a profit. In these neighborhoods and on these sites, this law can potentially have a significant impact on environmental conditions and community development. Even in more challenging neighborhoods and sites, the city can use its own programs to enhance the usefulness of the new brownfields legislation.

Written by Merrill Pond and Molly Wasow Park