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Environmental LAW

New policies on brownfield eligibility

The Brownfield Cleanup Program enacted in 2003 to foster private development of former brownfield parcels provides lucrative tax credits and liability protection for parties that investigate, remediate and redevelop brownfields.

The BCP provides a three-part brownfield redevelopment tax credit — a site preparation credit (ranging from 22 to 50 percent based the level of remediation); a tangible property credit (ranging from 10 to 24 percent of costs based on a site's location) and an on-site groundwater remediation credit.

Because of the significant tax credits available, developers and property owners have attempted to place a large number of parcels in the program. Although statutory revisions were passed in 2008, one area that was not addressed was eligibility. A key complaint was that the state's Department of Environmental Conservation was slow to review applications and, more significantly, denied applications for properties some developers thought should be included. Some of those denials resulted in legal challenges.

The DEC issued a new draft policy Nov. 4 — captioned DER-30 Real Property Eligibility Opinions for the BCP — to establish criteria by which the DEC will issue advisory opinions on a property's qualification as a "brownfield site" under the Environmental Conservation Law. Pursuant to the ECL, a brownfield site is one where confirmed contamination is present, or there is reasonable basis to believe contamination is present, and where there is a reasonable basis to believe the property's reuse or redevelopment may be complicated by the presence or potential presence of contamination.

In order to qualify for an eligibility determination, the property must be located within a Brownfield Opportunity Area, created in 2003 as a subset of the state's brownfield program.

Municipalities may create or designate areas with a high density of potential brownfield properties, perform area-wide planning, site-specific investigations and marketing in order to facilitate re-development of properties within the BOA. The 2008 BCP amendments enhanced the available tax credits for brownfield parcels within BOAs, thus the DEC views the BCP as a mechanism to advance development of the BOA program.

In accordance with the draft eligibility policy, a party may submit a written request to the DEC with supporting information about the subject property. The requester may be the property owner or a party acting with the owner's consent. The DEC requires that the party requesting the opinion must, at a

minimum, submit all available environmental reports and a Phase II Environmental Site Assessment. The DEC determines whether the request is complete within 30 days of the submission and, if so, publishes a public notice in the Environmental Notice Bulletin.

The policy requires DEC to use its best efforts to issue an eligibility opinion within 60 days of receipt of a request. Opinion letters will expire one year from issuance. Under the policy, DEC deems them as informal opinions as to the application of the BCP statute, namely whether the property is a brownfield and eligible for participation.

A number of questions are not addressed in the new policy or the DEC's press releases, however. To the extent the opinion is "non-binding," it appears the statutory process for BCP application review and DEC decisions still must be followed for sites subject to the policy even though the DEC would have already considered the same issues in rendering the initial eligibility opinions — in effect replicating the eligibility review process.

The draft policy also requires more information to be submitted for an eligibility opinion than currently required under the BCP statute for a standard application, namely a completed Phase II site assessment. Depending on the nature and size of the property, the cost of a Phase II could be significant. Although the policy does not require it, DEC lately has been requiring a discussion of the cost of the development compared to the cost of remediation as a factor in determining eligibility.

Finally, although it's certainly not the last issue, the one-year expiration of the opinion letter may be too short of a time period given the extensive lead times, market conditions and analysis required to develop brownfields.

The DEC issued three other policies related to brownfields and the state's remediation programs on the same day. The draft DER-32 policy — captioned Brownfield Site Cleanup Agreements — sets out the standard terms and conditions for the agreements required for BCP sites. A second — captioned CP/Soil Cleanup Guidance — provides the framework and procedures for determining soil cleanup levels for each of the state's remedial programs. The final policy — DER-10 Technical Guidance for Site Investigation and Remediation — provides a summary of the site investigation and remedial process for the remedial programs.



By **GEORGE S. VAN NEST**

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Columnist

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Continued ...

The draft eligibility policy has the potential to streamline the eligibility review process and give developers valuable insight on DEC's position regarding a potential brownfield. As with all new policies, however, a variety of potential issues exist that may

need to be addressed in the implementation phase.

George S. Van Nest is senior counsel in Underberg & Kessler LLP's litigation practice group and co-chairman of the firm's environmental practice group. He focuses his practice in the areas of environmental law, construction and commercial litigation.