

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

State Brownfield Cleanup Program amendments passed

By **GEORGE S. VAN NEST**
Daily Record Columnist



The Brownfield Cleanup Program (BCP), enacted in 2003 to foster private development of former brownfield parcels, has been the subject of extensive discussion in the last few years regarding amendments to key provisions.

On June 24, at the close of the state legislative session, the Legislature adopted amendments addressing a few of the concerns.

The main areas of concern in the BCP since its enactment have been how to determine site eligibility for acceptance into the program; the treatment of background contamination for eligibility; the issuance of substantial tax credits to a small number of mega-projects Downstate in exchange for modest remediation expenditures and theneed to foster greater development of multiple brownfields throughout Upstate urban areas.

Restrictive site eligibility decisions by the Department of Environmental Conservation (DEC) have led to multiple lawsuits challenging denial of applications. Two recent examples of note include the Lighthouse Point project in Irondequoit and Pyramid's Destiny Park in Syracuse, in which the courts held the DEC must accept the projects into the BCP. However, the issue of excessive tangible property tax credits has been the subject of most scrutiny and discussion. In a June 13 report issued by the Comptroller's Office, it was estimated that tax credits for projects now in the BCP will cost the state \$3.1 billion.

As with any legislative amendment, the BCP amendments are not perfect and they certainly will not please everyone; however they do provide some certainty to the program and lift the 90-day moratorium instituted as part of the 2008 Budget Bill. As a result, BCP applications on hold now will proceed and new applications can be accepted.

The BCP provides a three-part brownfield redevelopment tax credit — a site preparation credit (ranging from 10 to 22 percent based on corporate status and the site's location); a tangible property credit and an on-site groundwater remediation credit. The site preparation credit has been significantly increased based on the future use and level of cleanup. Track 1 is the highest cleanup, down to Track 4. The credit ranges from 50 percent for unrestricted use (Track 1); 40 percent for residential use; 33 percent for commercial use; and 27 percent for industrial use. However, if a Track 4 cleanup is performed, the applicable tax credit is reduced.

In addition, the tangible property tax credit was capped to avoid excessive credits for individual brownfield projects. At general commercial brownfield sites, the credit is capped at \$35 million of the calculated tangible property credit, or three times the site preparation costs and groundwater remediation costs, whichever is less. Manufacturing sites have a tax cap of \$45 million, or six times the site preparation costs and groundwater

remediation costs, whichever is less.

Although the maximum tax credit appears to be significant, by enacting a "lesser of" test based on the preparation and groundwater costs, the Legislature significantly limited potential tax credits for any site. In addition, the amendments create a definition of manufacturing activities entitled to the tax credits. Interestingly, the generation and distribution of electricity is excluded, so wind power generation projects such as those at Buffalo's Bethlehem Steel site apparently are no longer acceptable under the BCP program. For grandfathering purposes, the amendments will not apply to brownfields accepted into the program prior to June 23.

Since the certificate of completion granted to a BCP party may be transferred, the amendments also clarify that subsequent property owners may obtain tangible property credits for additional improvements, but not on improvements for which credits already were claimed by the original owner.

The amendments make a few additional changes to the program. A developer and lessees now are required to submit a brownfield redevelopment report to the DEC within one year of signing the Brownfield Cleanup Agreement and 11 years thereafter, setting forth the amount of local taxes generated by the brownfield project. The commissioner of the DEC is required to prepare and publish an annual Brownfield Credit Report that includes the names of corporate taxpayers claiming credits, the amount of credits earned, project details and the number of credits claimed at each site. A new 15-person Brownfield Advisory Board also will be established to provide comments and recommendations to the governor and Legislature.

Given the amount of commentary on the proposed amendments since the original budget proposal in January, it is worth noting that two matters were not addressed. There is no change to the definition of "brownfield site" to conclusively include sites with historic fill such as those existing in Upstate urban areas. The site eligibility standards remain unchanged to include those with contamination or a reasonable basis to believe contamination exists, and a basis to believe the contamination or potential presence of contamination may complicate redevelopment of the parcel. Although the tax credit revisions may alleviate some of eligibility controversy, it is likely to be subject to further contest at sites with low levels of contamination.

The BCP amendments certainly are not all inclusive, but they have resolved critical tax credit issues and should allow the BCP program to move forward with some degree of certainty.

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.