REVISITING NEW YORK’S BROWNFIELD CLEANUP PROGRAM: AN ANALYSIS OF A VOLUNTARY CLEANUP PROGRAM THAT LOST ITS WAY

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INTRODUCTION

New York State has a strong record of adopting highly effective environmental cleanup programs. Therefore, one may be surprised to learn that New York currently has one of the least effective brownfield cleanup programs in the nation. New Yorkers are paying a steep price for this. Despite anticipated expenditures of well over $1 billion, only forty-four contaminated sites have been cleaned up.1 Meanwhile, over 10,000 brownfields lie vacant or abandoned throughout the state.2

Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act in 2001.3 The goal was to clean up pervasive industrial pollution while bolstering local economies by encouraging small business growth in urban areas.4 The Act authorized each state to adopt its own Brownfield Program.5 The New York State Legislature enacted the Brownfield Cleanup Program Act (BCPA) in 2003, and authorized the Department of Environmental Conservation (DEC) to administer the Program.6 The new Brownfield Cleanup Program (BCP) encouraged voluntary cleanups by offering financial incentives and limited

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liability relief to participants.\(^7\) Both environmental advocates and developers, whose interests so often conflict, were equally optimistic that the BCP would benefit both groups: contamination cleanups and urban revitalization would benefit communities, and generous program funding would help developers to offset building costs.

Now, almost six years after its inception, it is time to ask what exactly went wrong with New York’s BCP. Why has New York cleaned up fewer than four dozen brownfield sites, while neighboring states have cleaned up well over 4,000 brownfield sites?\(^8\) Why is the Program poised to sink the state budget, when it should be adding hundreds of new businesses to the tax rolls? The unfortunate reality is that the Program has significantly burdened an already faltering state economy. Moreover, it has minimally impacted cleanups and small-business growth in contaminated urban locations.

This paper will discuss what the author believes are two primary reasons for the Program’s failure to achieve its objectives: first, the Legislature’s financial incentive strategy has been ineffectifve; and second, DEC has denied funding to polluted sites that do not meet its narrow eligibility criteria. Part I provides background on brownfields. Part II describes the major Federal and New York State programs that led up to the passage of the BCPA. Part III examines the tax credit structure established under the BCPA and the 2008 Amendments, and argues that overly generous tax credits for high-cost developments have resulted in few cleanups, little small-business growth in cities, and massive debt. Part IV analyzes recent court rulings against the Department, which have underscored the intent of the Legislature to mandate a low threshold for acceptance into the BCP. This part further argues that the brownfield definition should be interpreted expansively to include sites with minimal contamination.


\(^8\) Massachusetts, for example, has reported over 19,000 cleanups under its voluntary cleanup program, which began in 1993. DiNAPOLI, supra note 1, at 5.
I. BACKGROUND

A. New York’s Definition of Brownfield

New York’s Environmental Conservation Law defines a “brownfield site” as “any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant.”\(^9\) Brownfields typically consist of former industrial and commercial property where business operations created environmental contamination.\(^{10}\) The “complications” impeding the reuse of the land include high cleanup costs and potential liability.\(^{11}\) For this reason, brownfield owners often prefer to abandon their properties rather than incur the expenses and risks associated with redevelopment. Potential buyers are just as loathe to assume the risks of ownership. Thus, these dilapidated, polluted properties often lay abandoned for years, contributing to urban blight and decay rather than to the tax rolls.

B. Scope of the Problem

Brownfields are a national problem. There are an estimated 450,000 brownfield sites across the nation,\(^{12}\) over 10,000 of which pockmark the New York landscape, “threaten[ing] the health and vitality of the communities they burden, and . . . contributing to sprawl development and loss of open space.”\(^{13}\) Brownfields may comprise as much as 7,600 acres in New York City alone.\(^{14}\)

\(^9\) N.Y. ENVTL. CONSERV. LAW § 27-1405(2). The definition for brownfield varies from state to state. New Jersey, for example, defines a brownfield as “any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or is suspected to have been, a discharge of a contaminant.” N.J. STAT. ANN. § 58:10B–23.2(c) (West 2006). As will be shown, the addition of the word “complicates” in the New York definition, and its interpretation by the DEC, has been the subject of some controversy.

\(^{10}\) N.Y. State Department of Environmental Conservation, Brownfields FAQ’s, http://www.dec.ny.gov/chemical/8642.html (last visited Jan. 9, 2010) [hereinafter Brownfield’s FAQ’s].

\(^{11}\) Id.


\(^{13}\) N.Y. ENVTL. CONSERV. LAW § 27-1403. Statistics vary. President Bush has noted that there may be as many as a million brownfields nationwide. Bush, \textit{supra} note 4, at 53.

Most states have adopted their own voluntary cleanup programs, with varying degrees of success. New York had high expectations for its new program. In January 2004, DEC announced that “the new Brownfield Cleanup Program (BCP) will foster cleanup of thousands of contaminated properties while encouraging new investment and redevelopment of these sites across New York State.”\(^{15}\) New York has clearly fallen well short of that mark. Since 2004, New York has received only 394 applications, admitted a total of 260 sites (of which 200 enrolled), and completed remediation of only forty-four sites under the BCP.\(^{16}\) Going back a little farther, New York remediated only 153 sites under its Voluntary Cleanup Program (VCP) from 1994–2003.\(^{17}\) In stark contrast, according to a 2008 U.S. Environmental Protection Agency (EPA) survey of state brownfield programs, Massachusetts has enrolled a total of 35,927 sites, and completed remediation of 30,757 of them under its VCP, since its inception in 1993.\(^{18}\) Indeed, Massachusetts has completed roughly 10,000 cleanups within the last three years alone.\(^{19}\) As a testament to that program’s success, beginning in 2002, the number of cleanups each year surpassed the number of new applicants.\(^{20}\) Given the scope of New York’s brownfield problem, one may assume that a herculean effort is required to fix it. But as Massachusetts has shown, it can be done. Nonetheless, the agonizingly slow cleanup rate in New York indicates that DEC’s 2004 prediction will probably not come to pass any time soon.

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\(^{16}\) DINAPOLI, supra note 1, at 3.

\(^{17}\) Id.

\(^{18}\) U.S. ENVIRONMENTAL PROT. AGENCY, STATE BROWNFIELDS AND VOLUNTARY RESPONSE PROGRAMS: AN UPDATE FROM THE STATES, REGION ONE 17 (2008), http://www.epa.gov/brownfields/state_tribal/update2008/bf_states_r1.pdf [hereinafter STATE BROWNFIELD PROGRAMS]. It is important to note that in Massachusetts, sites contaminated by oil spills are eligible for inclusion in BCP, whereas in New York they are not. This may account to a small degree for the wide disparity in numbers of cleanups in the two neighboring states. Compare MASS. GEN. LAWS ch. 21E, §§ 4, 5 (2007), with N.Y. ENVTL. CONSERV. LAW § 27-1405 (McKinney 2007 & Supp. 2009) (providing that oil spills are governed by Article 12 of New York Navigation Law).

\(^{19}\) See DINAPOLI, supra note 1, at 5 (showing that under EPA’s 2005 survey, Massachusetts had completed 19,513 cleanups).

\(^{20}\) See STATE BROWNFIELD PROGRAMS, supra note 18, at 17.
C. Benefits of Brownfield Cleanups

The optimism expressed at the inception of the BCP suggests that legislators intended the Program to be a cornerstone of its broader environmental conservation efforts, and to serve as an example for other states to follow. In addition to the obvious health and safety benefits for community members from cleanup of polluted sites, DEC noted further benefits. Redevelopment would revitalize communities by bringing in new businesses, which would increase both tax revenues and opportunities for employment.\(^{21}\) The new businesses would utilize existing infrastructure systems such as “streets, water lines, [and] sewage systems,” reducing or eliminating the need for public and private investments in new infrastructure.\(^{22}\)

Also, this would reduce the number of greenfields used for new business sites.\(^{23}\) By one estimate, every acre of redeveloped brownfields saves four and a half acres of open space.\(^{24}\) According to the Center for Clean Air Policy, brownfield policies, which focus on development within urban centers rather than outlying greenfields, also “address local air quality and greenhouse gas concerns by reducing the number of vehicle miles traveled and allowing for easier access to transit and pedestrian facilities.”\(^{25}\) There are even further benefits, as brownfields have also been successfully converted into greenspace such as public parks, in an effort to “heighten active-living opportunities and provide health benefits.”\(^{26}\)

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\(^{21}\) Brownfields FAQ’s, supra note 10.

\(^{22}\) Id.

\(^{23}\) Id.

\(^{24}\) Bush, supra note 4, at 54.


\(^{26}\) Juha Siikamaki & Kris Wernstedt, Turning Brownfields into Greenspaces: Examining Incentives and Barriers to Revitalization, 33 J. HEALTH POL’Y & L. 559, 568 (2008). The authors note that conversion of brownfields into parks and open spaces may account for 5% of all brownfield “redevelopments in major cities.” Id. at 560.
II. Lead-up to the Brownfield Cleanup Program Act

A. Federal Comprehensive Environmental Response Compensation and Liability Act: Using Strict Liability to Enforce Cleanups

The Love Canal disaster in the late 1970s prompted the federal government to develop an aggressive environmental cleanup program. In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in an effort to enforce the remediation of properties contaminated by hazardous substances.\(^{27}\) CERCLA, also known as Superfund, authorizes the EPA to clean up contaminated sites, identify all potentially responsible parties, and recover cleanup costs from those parties.\(^{28}\) CERCLA attaches strict liability both to people who owned and operated a facility at the time contamination occurred, and to current site owners and operators.\(^{29}\) Strict liability also extends to persons who arrange for the disposal of hazardous substances at the facility where there is contamination, and to persons who transport hazardous substances to the facility where there is contamination.\(^{30}\) The Act further established a National Priorities List, on which were placed the very worst contaminated sites in the country.\(^{31}\)

CERCLA was effective at cleaning up the worst contaminated sites, but it did little to reduce the number of brownfields. Owners of contaminated properties, faced with high cleanup costs and potential liability, found it to be more cost effective to abandon their properties altogether. Meanwhile, developers had no incentive to risk incurring liability by taking possession of the land themselves. A new approach was needed to curtail a rising number of brownfields nationwide.

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\(^{29}\) Id.

\(^{30}\) Id.

\(^{31}\) § 9605(a)(8)(B).
B. Small Business Liability Relief and Brownfields Revitalization Act

Whereas CERCLA wielded the club of strict liability against “potentially responsible parties” to enforce cleanups of contaminated sites, the Small Business Liability Relief and Brownfields Revitalization Act of 2001 dangled the carrot of federal dollars to encourage voluntary cleanups. The Act was the result of growing awareness that “limited state and federal resources, coupled with trepidation in the private sector for taking on expensive cleanup obligations, led to a paucity of cleanups at brownfields and other contaminated sites.” That is to say, enforcement actions were not getting the job done. The new Act encouraged developers to take possession of contaminated properties by shielding owners not responsible for the contamination from CERCLA liability. Further, the Act provided much-needed funding to state brownfield programs, as well as grants to redevelopment agencies and local governments.

C. New York Superfund and Voluntary Cleanup Program

New York created its own “Superfund Program” in 1979. Even though it covered fewer sites than CERCLA, it was nonetheless effective in cleaning up over four hundred sites. Given the high number of brownfields throughout the state, however, it was clear that other programs would be needed to supplement the Superfund Program. In 1994, New York State created the VCP, implemented under DEC’s discretionary powers, but not codified by statute. The VCP was New York’s first attempt to address the brownfield problem by limiting the liability of parties who were determined not to be potentially

33 42 U.S.C. § 9607(q).
34 §§ 9628(a)(1)(A), 9604(k)(1).
36 See id. (noting that the “Superfund Program” applies only to ‘hazardous waste sites,’ . . . while CERCLA applies to [sites contaminated by] all hazardous substances except for petroleum”).
37 Id.
38 Id. at 293.
responsible parties under CERCLA. While a step in the right direction, the program was slow in reducing the number of existing brownfields, accepting 762 sites into the program and completing remediation of only 153 of them, or about eleven per year.

III. REFUNDABLE TAX CREDITS CONTINUE TO UNDERMINE BROWNFIELD CLEANUP PROGRAM ACT OBJECTIVES

A. 2003 Brownfield Cleanup Program Act Tax Credit Structure Favors High-Cost Developments

The VCP was codified in the BCPA, which was created “to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment.” This would be accomplished by providing liability relief and tax credit incentives. Under the 2003 statute, tax credits were closely tied to redevelopment costs. Rather than cap the amount a party could receive, the tax credit would constitute a percentage of the redevelopment costs. A developer could expect to recover up to 22% of the construction costs, and 22% of the remediation costs.

The tax incentives had the unintended effect of turning the cleanup program into an economic development program that primarily benefited high-cost developments. A number of participants are building extravagant waterfront condos and hotels, costing anywhere from several hundred million dollars, to upward of several billion dollars. Some have accrued credits of more than $100 million each. These participants discovered that they could receive a windfall profit by developing minimally...

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39 Id. at 293, 303.
40 See Greene & McIntyre, supra note 32, at 47.
41 DiNAPOLI, supra note 1, at 3.
42 N.Y. ENVTL. CONSERV. LAW § 27-1403 (McKinney 2007 & Supp. 2009); see Greene & McIntyre, supra note 32, at 47.
43 N.Y. ENVTL. CONSERV. LAW § 27-1421; N.Y. TAX LAW § 21(a) (McKinney Supp. 2009).
44 N.Y. TAX LAW § 22(b).
46 See, e.g., id. (noting that a mall complex by builder Destiny USA will cost between $2 billion and $6 billion, potentially costing taxpayers over $1 billion).
47 DiNAPOLI, supra note 1, at 2. For example, a $500 million development, including that of a Ritz-Carlton hotel, in White Plains, is expected to cost the state $110 million despite cleanup costs of merely $1.5 million. Jay Gallagher, State Fights Three Developments that may Drain Brownfields Program, J. News (Westchester, N.Y.), Jan. 21, 2009, at A13.
contaminated brownfield sites in areas of high economic growth. They would spend just enough to meet minimum cleanup standards, and receive refundable tax credits to offset colossal building costs.

This has apparently caught state officials by surprise. At the inception of the BCPA in January of 2004, DEC announced that “[i]n full effect, BCP tax credits are estimated at $135 million annually.” The New York State Comptroller now estimates that the “outstanding tax credit liability for all projects currently enrolled in the BCP . . . [could be] as high as $3.1 billion.” A mere fifty-four brownfield projects alone will cost taxpayers more than $1 billion.

B. Attempting to Fill the Loophole: Tax Incentives Under the 2008 Amendments

Upon signing the 2008 Amendments to the BCPA, Governor Paterson stated, “[t]he purpose of the Brownfields law was to clean up the environment, not clean out the state treasury. . . . We will now be able to break down barriers to economic development in struggling neighborhoods across New York.” The New York State Legislature attempted to do this by increasing tax credits for cleanups and capping the amount offered for redevelopment.

The new tax incentives provide for a refundable tax credit of up to 50% of the cleanup costs, more than double the amount a participant could recover under the old law. Additionally, for qualified non-manufacturing projects, the “tangible property credit component” is not to exceed $35 million, or three times the site preparation and on-site groundwater remediation costs, whichever is less. For sites intended to be used for manufacturing activities, the “tangible property credit component” is not to exceed $45 million, or six times the costs for “site preparation . . . and . . . on-site groundwater remediation,”

48 DEC Cleanup Program, supra note 15.
49 DiNAPOLI, supra note 1, at 9.
50 Id.
52 Id.
53 Brownfields Legislation Summary, supra note 7.
whichever is less. 55

1. How Does it All Work?

To get a better idea of how the tax credit structure now operates, and who will benefit most, it may be useful to consider as examples both a high-cost project and a low-cost project. Take, for instance, a high-cost condominium construction. Assume that it will cost $200 million to build and $10 million to remediate the site, which is a former industrial waste storage facility (a factor of 20:1). Under the old tax structure, the developer could receive a total of $46.42 million (22% of $200 million, plus 22% of $10 million). Under the new structure adopted in 2008, the same developer would receive a total of $35 million (three times the $10 million remediation cost, plus an additional 50% of the $10 million remediation). This is a comparative difference of $11.42 million, or 24.6%.

Next, consider a low-cost project to construct a $1 million community park located on the site of a former gas station, which will cost $100,000 to remediate (a factor of 10:1). Under the 2003 statute, the developer would receive a total of $242,000 (22% of $1 million plus 22% of $100,000). Under the 2008 Amendment, the developer would receive $350,000 (three times the $100,000 remediation, plus 50% of $100,000), a difference of $108,000, or 44.6%.

The benefit to the developer is closely tied to the proportion of remediation costs to redevelopment costs: the higher the proportion, the greater the benefit. Thus, the hypothetical above suggest that low-cost projects will be the big winners, because cleanup costs will tend to be proportionally high, whereas cleanup costs will tend to be proportionally lower in high-cost projects.

This is clearly a step in the right direction because it will save taxpayer dollars while attracting brownfield redevelopments in areas that most need them. Low-cost urban projects, driven by small businesses and coordinated by community organizations and municipalities, will likely have the greatest impact in turning New York’s brownfields green again, as they would likely constitute a majority of economic development projects in struggling neighborhoods. Fortunately, as demonstrated by the examples above, low-cost projects would enjoy the greatest benefit of the new tax credit system.

Further, developers in the poorest, most blighted urban areas will find additional reasons to consider building on brownfield sites. Those who participate in the state’s Brownfield Opportunity Areas (BOA) program are now afforded an additional 2% tax credit.\textsuperscript{56} Other provisions under the 2003 Act that address economically distressed areas will remain in place. Properties located in low-economy “EN-zones”\textsuperscript{57} will continue to receive an added 8% tax credit\textsuperscript{58} and a 2% credit for a “Track 1” cleanup.\textsuperscript{59}

Despite these improvements, however, large-scale developments of the sort that have been crippling the New York State budget will continue to thrive. This has several implications. It is unclear in today’s harsh economic climate whether New York can afford to reimburse developers sums as high as $35 million. It is possible that tying incentives more to cleanup costs will encourage the remediation of highly polluted areas that may not have received attention under the 2003 credit structure. However, given the vast number of brownfields across the state, it is the quantity, more than the quality, of the cleanups that will be the hallmark of an effective brownfield program. It remains to be seen whether the new tax structure will have the desired effect of encouraging cleanups in significant numbers.

2. Cost of Urban Redevelopment Continues to Outweigh Benefits

It remains unlikely that the BCP will become a viable option for urban developers any time soon. Thus far, there have been very few proposals for developments in low-income urban communities, where need is the greatest. The reason for this is deceptively simple: developments in blighted communities have a low profit-margin and the benefits of participation, as of yet, do

\textsuperscript{56} § 21(a)(3-a)(D).
\textsuperscript{57} § 21(b)(6) (defining an EN-zone as a census tract with either a poverty rate of at least 20% and an unemployment rate of at least 1.25% the New York State average, or a poverty rate of at least double the rate for the county in which the tract is located); Empire State Development Corporation, Brownfield Redevelopment, http://www.empire.state.ny.us/Brownfield_Redevelopment/Default.asp (last visited Jan. 9, 2010) (providing a list of EN-zones in New York State).
\textsuperscript{58} N.Y. TAX LAW § 21(a)(5); see DINAPOLI, supra note 1, at 15 (noting that the Governor’s Program Bill proposed, but ultimately rejected, an additional 10% tax credit for projects located in EN-zones).
\textsuperscript{59} N.Y. TAX LAW § 21(a)(5); see Brownfields Legislation Summary, supra note 7 (stating that Track 1 refers to an “unrestricted soil and groundwater cleanup”).
not outweigh the significant costs. The benefits, which include reimbursements for cleanup costs and redevelopment, have been described above. Participation in the BCP has its downside, however, by adding time and expense to the development process. The environmental assessment, permitting, and hearing processes can add months, or even years, to the development timeline. Further, because incentives are in the form of refundable tax credits, the developer must incur all expenses up front. Expenses are not insignificant and include hiring environmental specialists to assess the property and attorneys to protect legal interests. Cleanup alone can cost in the millions. Raising capital to meet these necessary costs may be more difficult for developers in blighted communities, because the investment carries with it higher risk than does investment in a waterfront property in a neighborhood experiencing economic growth. Indeed, once inside the umbrella of the BCP, participants are now subject to ongoing reporting requirements, which again can be both costly and time consuming.

Developers face even more challenges when building on contaminated sites in blighted communities. Locating sites with access to existing infrastructure, such as roads, power lines, and sewer systems, is crucial to avoid the considerable expense of creating new infrastructure. Many brownfield sites lack a robust infrastructure and may require additional investment. Further, brownfield sites are typically surrounded by other brownfield sites—it is often necessary to develop not just one property, but a group of properties together in order to spark economic growth sufficient to support business and make building ventures profitable. This significantly complicates the situation, as involvement of the community and the municipality in the planning process becomes crucial both to the success of the business venture and to the welfare of the community as a whole.

There are even more challenges. The BOA program was created under the 2003 BCPA precisely to deal with the challenges of revitalizing entire contaminated communities. The program “provides municipalities and community based organizations with assistance, up to 90 percent of the eligible project costs, to complete revitalization plans and implementation strategies for areas or communities affected by the presence of brownfield sites, and site assessments for strategic brownfield

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60 Brownfields Legislation Summary, supra note 7.
The BOA program, while a vital piece of the larger BCP, has only been marginally effective: a relatively small number of the sites enrolled in the BCP have thus far opted to participate in the BOA program.\textsuperscript{62} Even though the 2008 Amendments offered participants an additional 2% tax credit for participation in the BOA program, it is unlikely that this will significantly increase the total number of cleanups.

Overall, the sum of these challenges—the up-front costs, the delays, and the general headaches involved—have to this point outweighed the potential financial benefits and liability waivers in the eyes of many developers. Despite the small but vital improvement in the refundable tax incentive plan, the Legislature has simply not made urban building projects attractive enough or feasible enough for developers. The sad reality is that developers in New York continue to buy up and build on greenfields, such as farm land, avoiding all of the pitfalls that accompany brownfield development. As a result, abandoned properties continue to burden urban communities, while once productive farm land continually gives way to suburban sprawl.

Indeed, the fact that the most successful state brownfield programs have not used refundable tax credits as the primary means of driving brownfield redevelopment suggests that this approach should be rethought. Thus far, New York State has been seen as a leading example of how offering generous tax credits merely results in a dearth of cleanups and a staggering budget deficit.

IV. A DEVIL’S BARGAIN: EXCLUDING HIGH-COST SITES

The previous part addressed the question of why, despite the high burden on taxpayers, there have been so few applicants to the BCP, especially those proposing low-cost developments in contaminated urban communities. Yet despite shortcomings with


the tax credit structure described above, there are still considerably more applicants than those that actually gain entry into the program: over the last five years, roughly 17% of the paltry 380 applicants have been rejected. 63 This part will review the recent court rulings that considered whether DEC properly excluded contaminated sites on the basis that redevelopment was not “complicated” by the presence, or potential presence, of on-site contamination. The author will argue in support of broad inclusion into the BCP, and suggest that—despite public policy concerns—high-cost polluted sites should nonetheless participate in the BCP.

A. Who May Participate in the Brownfield Cleanup Program?


A “brownfield site” is “any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant.” 64 This definition does not include property subject to an on-going enforcement action related to the contamination, nor Superfund sites. 65 The BCPA delegates authority to DEC to accept applications and to determine eligibility. 66 The Act does not impose a limit on the number of sites that may participate, but does provide specific categories for exclusion. Indeed, with the exception of the broad definition of “brownfield site,” the Legislature construed eligibility largely in the negative.

Environmental Conservation Law section 1407(8) specifies four circumstances where DEC “shall” exclude requests. 67 For example, sites shall be excluded where the property does not meet the requirements of a “brownfield site”; where there is a pending legal action against the applicant relating to the site; where there is already an order providing for the investigation, removal, or remediation of contamination relating to the site; and where the person requesting participation is subject to an outstanding claim under Article Twelve of the Navigation Law. 68

Further, DEC “may” exclude a site if DEC determines that

63 See Brownfield Cleanup Program Progress and Statistics, supra note 62.
65 Id.
66 § 27-1407(8).
67 Id.
68 Id.
granting admission would not serve the public interest. DEC may also find in some instances that only a portion of a proposed site meets the statutory definition of a “brownfield site,” in which case DEC may approve inclusion of that portion, and reject the rest of the site. Thus, on the face of the statute every site that DEC classifies as a “brownfield site” should be granted admission into the BCP once the applicant has followed the proper procedural steps, so long as the applicant does not fall under one of these narrow exceptions.

2. Accompanying Regulations

DEC construed the definition of a “brownfield site” to encompass two broad elements:

(i) 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
(ii) there must be 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.

Noting that “every project presents a unique set of circumstances . . . [requiring] review of all pertinent facts and consideration of the totality of the circumstances,” in 2005 DEC created guideline factors to determine whether a proposed project meets each element. DEC considers the following factors for the “contamination” element:

(A) the nature and extent of known or suspected contamination;
(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

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69 § 27-1407(9). Incidentally, DEC never argued to the courts that inclusion of high-cost developments in itself would harm the public interest. Courts would most likely reject this argument, as this is more a matter of policy best left to the Legislature.


under the oversight of the State or Federal government.\textsuperscript{72} The following factors apply to the “complicating” element:

(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.\textsuperscript{73}

This delineation of factors further restricts the range of sites that can be admitted into the BCP. The question now is whether DEC properly exercised its discretionary power to interpret a vague statutory term, or whether these factors run contrary to the Legislature’s intentions. The courts have recently considered this issue, and have overwhelmingly ruled against DEC.

\textbf{B. Court Rulings Undercut Department of Environmental Conservation’s Interpretation of the Brownfield Statute}

This section briefly discusses four court decisions—including the recent New York Court of Appeals decision in \textit{Lighthouse Pointe Property Associates v. New York State Department of Environmental Conservation}\textsuperscript{74}—that have rejected DEC’s interpretation of “complicated” in the definition of a “brownfield site.” The case law stands for the proposition that DEC has limited discretion in determining eligibility.\textsuperscript{75}

For instance, DEC has excluded sites where the expected development costs far exceed the cost of remediation. Courts,

\textsuperscript{72} \textit{Id.} § 2.2(2).
\textsuperscript{73} \textit{Id.} § 2.2(3).
\textsuperscript{74} No. 3, 2010 N.Y. Slip Op. 01377 (Feb. 18, 2010).
\textsuperscript{75} In a rare showing of deference, however, the New York County Supreme Court upheld DEC’s denial of a BCP application in \textit{377 Greenwich v. New York State Department of Environmental Conservation}, 827 N.Y.S.2d 608, 617 (Sup. Ct. 2006) decided on November 15, 2006. This was the first Article 78 proceeding to consider whether DEC rationally construed the guidance factors that interpreted the term “complicated.” \textit{Id.} at 611, 614–15. \textit{Greenwich} involved a 10,080 square foot parcel of land in Manhattan, which was to be converted from a parking lot to a luxury hotel and restaurant. \textit{Id.} at 611, 613. The court held that DEC acted rationally in finding that the contamination did not “complicate” redevelopment, because the property was going to be redeveloped and re-used “regardless of the presence of contaminants,” which was found to be minimal. \textit{Id.} at 614–15.
however, have rejected cost considerations in eligibility determinations. In Destiny USA Development v. New York State Department of Environmental Conservation, the Supreme Court of Onondaga County reversed DEC’s determination excluding contaminated properties from the BCP. The Department asserted that the cost of development, estimated at upward of $6 billion, far surpassed the cost of remediation, estimated at around $100 million. This is a factor of 60:1, and New York would be paying for up to 22%, or over $1 billion. DEC did not make a policy argument that the program should not support high-cost developments of this type. Rather, DEC asserted that cost was not a complicating factor in redevelopment. The court rejected this argument, ruling that DEC had “opted to make itself a fiscal watchdog without legislative authority.” The guidance criteria appeared to be elements for eligibility, and thus DEC was found to be making law rather than interpreting it. DEC was, in effect, ordered not to consider the financial implications of accepting an applicant, on the grounds that neither the statutory text nor legislative history authorizes cost considerations.

On appeal, the Appellate Division, Fourth Department, affirmed as modified. The court held that “DEC’s reliance on the comparative cost of remediation to the total project cost was unwarranted,” and that the denial of Destiny USA’s application was arbitrary and capricious. The court further held that DEC improperly applied guideline factors as preconditions to admission into the BCP. The court was unwilling, however, to declare the guidance factors null and void on constitutional grounds and modified the order of the Supreme Court accordingly.

In the next case, HLP Properties v. New York State Department of Environmental Conservation, decided on September 12, 2008,

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77 Id. at *8; see Rick Moriarty, Judge Reverses Decision Denying Destiny USA Millions in ‘Brownfield’ Tax Credits, POST STANDARD (Syracuse, N.Y.), June 14, 2008, at A1.
78 Moriarty, supra note 7.
79 Id.
80 Destiny USA Dev., No. 08-1015, 2008 WL 2368085, at *12.
81 Id. at *21.
82 Id. at *19.
84 Id. at 869.
85 Id. at 870.
the New York County Supreme Court reversed a DEC determination denying entry into the BCP.\textsuperscript{86} Here, there was a proposal to build two residential and commercial high-rise towers in West Chelsea, in Manhattan.\textsuperscript{87} DEC offered four arguments against granting BCP funding to HLP Properties. First, DEC argued that this was not a “brownfield site”; second, redevelopment was not “complicated” by the presence of contamination; third, the site was not currently idle or abandoned; and fourth, West Chelsea was not in an “economically distressed” area.\textsuperscript{88} The court rejected all of these arguments, holding that the guidance factors relied upon were unsupported by the plain language of the statute, which clearly provided a low threshold for inclusion into the BCP.\textsuperscript{89}

About one month later, on October 21, 2008, the same court that decided \textit{HLP Properties} again reversed a determination in \textit{East River Realty v. New York State Department of Environmental Conservation}.\textsuperscript{90} Here, DEC excluded four sites in downtown Manhattan owned by East River Realty from the BCP on the grounds that the redevelopment of the property was not “complicated” by the presence or potential presence of contamination.\textsuperscript{91} DEC applied a “but-for” test, arguing that an applicant must show that “but-for” the benefits of the BCP, the property would not be reused.\textsuperscript{92} DEC argued that the Plaintiff would have redeveloped the property anyway, without the benefits of the BCP.\textsuperscript{93} The court held that DEC was making an arbitrary and capricious cost-saving decision that had been rejected by the Legislature.\textsuperscript{94} The court reasoned that the purpose of the “but-for” test was really to prevent overpayment in the form of refundable tax credits to high-cost developments.\textsuperscript{95} The court further ruled that the presence or potential presence of contamination “\textit{per se} ‘complicates’ redevelopment . . . by adding ‘cost, time or uncertainty.’”\textsuperscript{96}

Most recently, the New York Court of Appeals ruled against

\textsuperscript{86} 864 N.Y.S.2d 285, 295 (Sup. Ct. 2008).
\textsuperscript{87} Id. at 286.
\textsuperscript{88} Id. at 292.
\textsuperscript{89} Id. at 295.
\textsuperscript{90} 866 N.Y.S.2d 537, 552 (Sup. Ct. 2008).
\textsuperscript{91} Id. at 539–40.
\textsuperscript{92} Id. at 540.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 552. While the Legislature had considered adding the “but-for” test in the 2008 Amendments, the final version excluded it. \textit{Id.} at 548.
\textsuperscript{95} Id. at 549.
\textsuperscript{96} Id. at 550.
DEC in *Lighthouse Pointe*, confirming that the question of BCP eligibility is one of “pure statutory reading,” reviewable by the courts, rather than a matter solely within the discretion of DEC.⁹⁷

This case involved a proposal to develop two parcels along the Genesee River as a mixed-use neighborhood at a cost ranging between $150 to $250 million.⁹⁸ The site had previously served as a landfill and housed a wastewater treatment plant for sixty years.⁹⁹ A remedial investigation report revealed the presence of contaminants in quantities that exceeded soil and groundwater standards, which would cost from $4 million to $8 million to remediate.¹⁰⁰ The petitioner argued that these contaminants significantly complicated its plans to redevelop the area.¹⁰¹ DEC’s environmental engineer, however, found that the exceedances were “relatively few and not in great magnitude,” and therefore did not confirm the presence of a health risk necessitating remediation.¹⁰² On the basis of the engineer’s findings, DEC denied entry to the applicant, concluding that contamination did not complicate redevelopment of the property.¹⁰³ The Appellate Division, Fourth Department, deferred to DEC’s judgment and denied the petitioner’s motion for Article 78 relief, stating that “reasonable minds may differ” in interpretation of the report’s data.¹⁰⁴

The Court of Appeals reversed the Appellate Division and reinstated the judgment of the Supreme Court, granting the petitioner’s motion. The court held that the petitioner’s property fit squarely within the broad statutory definition of a “brownfield site”: first, it was undisputed that multiple contaminants were present in levels exceeding a variety of environmental standards; moreover, the contamination frustrated the petitioner’s efforts to develop the largest portion of the Inland Site and receive financial backing. The court rejected DEC’s interpretation of a “brownfield site” as encompassing only those properties where “redevelopment or reuse may be complicated by the need for a cleanup.”¹⁰⁵ Thus, the court sent a clear message that the

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⁹⁹ *Id.* at 767–68.
¹⁰⁰ *Id.* at 768.
¹⁰¹ *Id.* at 768–69.
¹⁰² *Id.* at 769.
¹⁰³ *Id.* at 768.
¹⁰⁴ *Id.* at 770.
Legislature intended a low eligibility threshold to apply, and that
contaminated properties—even those that DEC determines are
not polluted enough to warrant cleanup—will nonetheless qualify
for eligibility to the BCP as a matter of right, so long as the
contamination is shown to complicate redevelopment or reuse of
the property.\footnote{Id.}

The rulings above raise several questions, the first being
whether the courts in \textit{Destiny USA, HLP Properties, East River
Realty,} and \textit{Lighthouse Pointe} should have shown greater
deference, and accepted DEC’s interpretation of “complicated.”
After all, the Legislature never defined this term. DEC could
make a strong case that the disparity in redevelopment and
remediation costs, as well as other considerations, such as
location in an “economically distressed” area, are indicators of
whether contamination complicated redevelopment. It is
doubtless true that some applicants to the BCP, such as those
intending to build high-rises in downtown Manhattan, would
most likely proceed with development regardless of receiving BCP
benefits. Nonetheless, recent court decisions have made clear
that such arguments will fail to justify exclusion of BCP
applicants.

More compelling, however, is whether the State, as a matter of
policy, should be funding building projects that could bankrupt
the brownfield fund, and which typically have little impact on
economically distressed communities. It is quite revealing that
each of the cases described above involves a multi-million dollar
development. It cannot be said that the Legislature ever
intended for these types of projects to be the primary
beneficiaries of state brownfield funding. Therefore, it may strike
one as odd that the Supreme Court of Onondaga County coined
the $6 billion Destiny USA project, a “Poster Child” for a
brownfield cleanup.\footnote{Destiny USA Dev. v. N.Y. State Dep’t of
Env’tl. Conservation, No. 08-1015, 2008 WL 2368085, at *4–*5 (Sup.
2009).}

The reality is that New York is in the midst of a crippling
recession, and simply cannot afford to subsidize expensive
developments with billions of dollars in refundable tax credits.\footnote{According to Thomas DiNapoli, the New York State Comptroller, the BCP
“may pose a significant financial risk to the state.” DiNAPOLI, \textit{supra} note 1, at 2.}
Legislators have allocated a mere $255 million in the 2009 budget
for the entire Program.\textsuperscript{109} Although Governor Paterson has proposed raising this to $355 million next year, the $100 million increase would still leave the Program under-funded.\textsuperscript{110} Even if the BCP were to end today, the state would still be hard-pressed to cover payments owed to current and former participants.

Despite these concerns, I would suggest that the courts were nonetheless correct to include the properties at issue in each of the cases discussed above. The plain language of the statute and legislative objective to extend the Program to a wide range of contaminated sites clearly point toward a low threshold for eligibility.

\textit{C. The Legislature Should Remove the Term “Complicated”}

The court rulings, described above, rejected in large part DEC’s interpretation of the key term “complicated” in the brownfield definition. The \textit{Lighthouse Pointe} decision leaves a key question unresolved, however: given the low eligibility threshold, exactly how much discretion does DEC have in making eligibility determinations?\textsuperscript{111} This paper will not speculate as to what measures DEC may take to extend BCP benefits only to deserving applicants, while at the same time avoid judicial review. I will respectfully argue, however, that the Legislature should further amend the brownfields statute not only to patch the tax incentives loophole, but also to ensure the participation of more polluted properties—even those with minimal contamination.

To that end, I will suggest that the Legislature strike the term “complicated” from the definition altogether, as other states have done.\textsuperscript{112} Inclusion of the term has only muddied the waters, while failing to provide clarification. Moreover, the term is redundant. The court in \textit{East River Realty} correctly reasoned that pollution always complicates redevelopment by adding “cost, time or

\begin{footnotesize}
\textsuperscript{109} Gallagher, \textit{supra} note 47.
\textsuperscript{110} Id.
\textsuperscript{111} The New York Court of Appeals indicated in \textit{Lighthouse Pointe} that the “common English usage [of the word ‘complicate’] means ‘to make complex, involved, or difficult.’” \textit{Lighthouse Pointe}, 2010 N.Y. Slip Op. 01377 (citation omitted). This does not, however, provide insight into what guideline factors, if any, DEC may consider in determining eligibility of BCP applications.
\textsuperscript{112} See, \textit{e.g.}, N.J. STAT. ANN. § 58:10B–23(d) (West 2006) (defining a brownfield as “any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant”).
\end{footnotesize}
uncertainty.”[^113] Moreover, pollution does not even have to be actually present to add cost, time or uncertainty. The crux of the brownfield problem is that contamination burdens property with added liability and financial concerns; the mere supposition of on-site contamination will often make it more difficult not only to attract developers, but also for those developers to secure financial backing from banks and private investors who fear incurring CERCLA liability. Many, if not most, of these sites require both the liability shield and financial support from the state brownfield program.

Use of the term “complicated” has narrowed the applicant field, while its removal would broaden it. The Court of Appeals has confirmed that the Legislature intended a low threshold for inclusion. The definition of a “brownfield site” is expansive: “any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant.”[^114] The word “any” is itself a broad term, “as inclusive as any other word in the English language.”[^115] Next, the word “complicated” is preceded by the word “may.” This suggests that the mere hint of complication due to contamination transforms the site in question into a “brownfield site,” thus categorically qualifying the site for inclusion. Lastly, “potential,” is also a broad term. The Legislature probably included potentially contaminated sites because it recognized that the stigma of pollution can be as powerful a deterrent to redevelopment as the actual pollution itself. Removing the term “complicated” will open the door to polluted sites that deserve to receive BCP benefits, but which might otherwise be barred under one of DEC’s guidance factors.

**CONCLUSION**

This note examines why New York’s BCP has remediated so

[^113]: E. River Realty Co. v. N.Y. State Dep’t of Envtl. Conservation, 866 N.Y.S.2d 537, 550 (Sup. Ct. 2008). The court noted that the Legislature intended to adopt the federal CERCLA definition of “complicated,” and thus EPA’s interpretation of the term, as a compromise between the two houses. *Id.* at 541. EPA defines “complicated” as meaning “where contamination ‘can add cost, time or uncertainty to the redevelopment project.’” *Id.* at 542.


few contaminated properties, and at such a high cost. It has become clear that the BCP has strayed from its roots as a voluntary cleanup program, and has turned into something entirely different: an economic development program seemingly more concerned with lining the pockets of big developers than restoring contaminated properties to the tax rolls. The Legislature will have a vital role to play in boosting BCP participation: first, by sealing the loophole that still allows substantial payouts to lavish developments; next, by further increasing incentives to lower-cost urban projects so that the benefits of BCP participation outweigh the significant costs; and additionally by providing clearer statutory guidance for eligibility. Concurrently, it will also be important for DEC to construe the statute broadly, and strive to include contaminated sites wherever feasible.

Although the 2008 Amendments offered some improvements, it will likely take several years and further reform to see any significant increase in cleanups. Now that developers have reaped the extraordinary benefits of state funding, they will resist giving it up. Given the role money often plays in political decision-making, there may be genuine cause for concern that the Legislature will not stand up to the pressure posed by powerful constituents and reverse course before the Program bleeds the state coffers dry.

Despite these obstacles, there is reason for hope. The Legislature has taken the small—albeit significant—step toward reform by capping the refundable tax credits any one project can receive, and by offering marginally greater incentives to developers to participate in the BOA program who site their building projects in polluted low-income communities. While this is a move in the right direction, much more reform is needed to clean up the thousands of brownfields that plague communities state-wide, and to make the BCP a cornerstone of New York’s broader environmental initiative.