

1998

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Recommended Citation

Michael B. Gerrard, *New York State's Brownfields Programs: More and Less than Meets the Eye*, 28 ENVTL. L. REP. 10444 (1998).

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New York State's Brownfields Programs: More and Less Than Meets the Eye

by Michael B. Gerrard

Editors' Summary: As the number of brownfields increase, state and federal governments have begun to encourage voluntary efforts to clean up those underused and contaminated properties. This Article examines the status of voluntary brownfields remediation in New York State. It begins by exploring three important New York programs that specifically address voluntary brownfields remediation. The structure, mechanics, and necessary qualifications for each program are described in detail. It then discusses several less prominent New York programs that address site cleanup in New York. The Article concludes with an assessment of New York's brownfields programs and their possibilities for success.

New York, as the nation's second most populous state, and one of its oldest and most urban, has an abundance of brownfields—slightly contaminated properties that were formerly used for industrial purposes, but that are now unused or underused, and ripe for redevelopment if they can be cleaned up. Thus, it may be surprising that New York is one of the few states without a comprehensive statute or regulation for the voluntary cleanup of brownfields.

There is, however, more here than meets the eye. New York has three important programs and several smaller ones that provide procedures, money, or incentives for cleanups. But there is also less than meets the eye, because these programs have so many gaps and overlaps that, in many situations, wholly satisfactory results still cannot be achieved.

This Article begins with an exploration of the three main programs: the 1996 Clean Water/Clean Air Bond Act, the voluntary remedial program, and the Title 13 program. It then discusses the less important programs, including the petroleum spill cleanup system and various economic incentives. It concludes with an assessment of what all these programs add up to.

1996 Bond Act

Currently, the program with the highest ratio of prominence to actual importance is the Clean Water/Clean Air Bond Act of 1996.¹ Its \$1.75 billion in bonding authority included

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1. N.Y. ENVTL. CONSERV. LAW §§56-0101-0611 (McKinney 1997). See generally David L. Markell, *Some Overall Observations About the 1996 New York State Environmental Bond Act and a Closer Look at Title 5 and Its Approach to the "Brownfields" Dilemma*, 60 ALB. L. REV. 1217 (1997); Schulz v. New York State Executive, No. 47, 1998 WL 297752 (N.Y. June 9, 1998) (upholding the constitutionality of the Bond Act).

\$200 million, called the Environmental Restoration Project Fund, allocated to brownfields cleanups. This is a very substantial sum—the largest brownfields grant program in the country—and it should be able to fund quite a few cleanups. However, a major impediment stands in the way, the eligibility restrictions written into the statute.

Class 1 and Class 2 state Superfund sites (described below) are ineligible.² Additionally, in order for a site to be eligible for this money, title to the site must be held by a municipality, and the municipality must not have been responsible for the contamination.³ Thus, the eligibility requirements eliminate the most contaminated sites, which are likely to be Class 2 state Superfund sites, all privately owned sites, and such common municipally owned sites as former municipal landfills.⁴ The eligibility requirements may well spark the transfer of some properties from private into municipal hands, but this does not seem to have occurred. In addition, the Bond Act requires the state to make "all reasonable efforts" to recover the state funds expended from responsible parties⁵ so that a property owner cannot unload its liability simply by transferring the land to a municipality.

For those sites that can squeeze through this eligibility keyhole, a detailed process awaits.⁶ Applicants must complete a detailed application, and if their applications are granted, they must sign a similarly detailed contract with the state, under which the New York State Department of Environmental Conservation (DEC) will exert very close supervision over every aspect of the cleanup process.⁷ The public

2. N.Y. ENVTL. CONSERV. LAW §56-0505(2).

3. *Id.* §56-0101(7).

4. *Id.* §§27-1313, 52-0303. *But see* N.Y. ENVTL. CONSERV. LAW §54-0501 (creating the Non-Hazardous Municipal Landfill Closure Project, which provides assistance for municipal landfills).

5. *Id.* §56-0507(4).

6. N.Y. STATE DEP'T OF ENVTL. CONSERVATION, DIVISION OF ENVTL. REMEDIATION, MUNICIPAL ASSISTANCE ENVIRONMENTAL RESTORATION PROJECTS "BROWNFIELD PROGRAM" PROCEDURES HANDBOOK (Dec. 1997) (describing the process and containing printed versions of the pertinent forms and standard contracts).

7. *Id.*

must be given the opportunity to comment on the proposed remedial plan, and a public hearing will be held if sufficient adverse comments are received. Once the cleanup is completed, the site owner must give the DEC 60-days' advance notice before changing the use of property that has been remediated with Bond Act money.⁸

In exchange for all this, municipalities receive up to 75 percent of their costs of cleanup. They also receive a liability release from the state. This release extends to successors-in-title, lessees, and lenders, provided they are not potentially responsible parties (PRPs) with respect to the property.⁹ The municipality and any successors-in-title can be back on the hook, however, if it turns out that conditions at the site are not sufficiently protective of human health for its current use, or additional contamination is discovered.¹⁰

Above and beyond the release, the Bond Act gives the municipality, successors-in-title, lessees, and lenders an indemnification against common-law causes of action arising out of the presence of hazardous substances on the property.¹¹

At present, the DEC has entered into 77 site investigation agreements under the Bond Act and issued 4 grants for actual site cleanup. The four grants, for projects in Irvington, Rochester, Rome, and Syracuse, totalled \$7.6 million.¹² Another 40 applications—mostly for site investigation—are now pending.¹³

Voluntary Remedial Program

The second important brownfields program in New York, and the one that may have the greatest potential, is the voluntary remedial program (VRP). The VRP is not founded upon any particular statute or regulation. It is entirely an administrative construct whose terms are found in various articles written by DEC officials.¹⁴

Eligibility for the VRP program is much broader than for the Bond Act program. Eligible parties, called volunteers, may include private and public parties, site owners and operators, PRPs, prospective purchasers, lenders, and others. However, parties responsible for contamination may not participate if the site is listed as a Class 1 or 2 Registry site, if the party is already subject to a DEC or U.S. Environmental Protection Agency (EPA) enforcement action, or if the site has certain classifications under the federal Resource Conservation and Recovery Act.¹⁵

To enter the program, the volunteer signs a "commitment document."¹⁶ This can take the form either of an agreement

or a consent order. An agreement is less formal, but less likely to afford contribution protection under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁷ Either kind of commitment document will require the volunteer initially to conduct a thorough site investigation, at the end of which the volunteer can either walk away with no further duty imposed by the agreement, or can enter into a further commitment for the cleanup of the site.¹⁸

The nature of the cleanup required will depend in part on the volunteer's legal relationship to the site's environmental problem. A volunteer who is not a PRP (or who is a PRP only because of site ownership) need not address off-site contamination, while other volunteers must address such contamination.¹⁹

Once the cleanup requirements of the agreement are met, the DEC will issue a qualified release. The DEC formally declares that it does not contemplate further action at the site, subject to various reopeners, among them:

- if the response action proves to be not sufficiently protective to allow the contemplated use of the site to proceed safely;
- if the volunteer, or its successor, changes the site's use to one requiring a lower degree of residual contamination;
- if the volunteer fraudulently obtains the release; and
- if environmental conditions are found at the site that were unknown at the time the commitment document was signed.²⁰

This qualified release binds only the DEC, not private parties, the state attorney general, or EPA. However, neither the state attorney general nor EPA has instituted enforcement action against any sites that have received such a DEC release, though EPA has not entered into a memorandum of agreement with New York State (as it has with some states) pledging not to proceed against those who have received state releases.

The DEC requires that public notice be given before the commitment document is signed.²¹ A total of 120 such documents have been signed to date.²²

Title 13 Program

The third important program is variously called the Title 13 program, the state Superfund program, or the inactive hazardous waste site registry program.²³ It began when Title 13 was enacted in 1979 in the wake of the controversy over New York's most famous contaminated site, Love Canal, and a year before Congress reacted with the enactment of CERCLA.

8. N.Y. ENVTL. CONSERV. LAW §56-0511(1).

9. *Id.* §56-0509(1)(a).

10. *Id.* §56-0509(4).

11. *Id.* §56-0509(3).

12. Telephone Interview with Christine Costopoulos, New York State Department of Environmental Conservation (May 28, 1998) [hereinafter Costopoulos Interview].

13. *Id.*

14. E.g., Charles E. Sullivan Jr., *The Department of Environmental Conservation's Voluntary Remedial Program*, 8 ENVTL. L. IN N.Y. 23 (1997). See also *Outlook on Brownfields: Urban Cure or Fields of Dreams?* ALB. L. ENVTL. OUTLOOK, Summer/Fall 1996; and the summaries of voluntary agreements that appear in most issues of *The New York Environmental Lawyer*, a publication of the Environmental Law Section of the New York State Bar Association.

15. See Sullivan, *supra* note 14 and *Outlook on Brownfields: Urban Cure or Fields of Dreams?*, *supra* note 14.

16. *Id.*

17. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

18. Sullivan, *supra* note 14.

19. *Id.*

20. *Id.*

21. *Id.*

22. Costopoulos Interview, *supra* note 12.

23. N.Y. ENVTL. CONSERV. LAW art. 27, tit. 13.

Title 13 operates much like CERCLA: sites are identified, ranked in a priority list, and—it is hoped—cleaned up under governmental supervision. The rankings are from most to least serious, on a scale of 1 to 5,²⁴ but no site has ever been given a Class 1 ranking and, thus, the only rankings of major significance are Class 2, which are sites that pose a significant threat to the public health or the environment, or Class 2a, which is an administrative category with no explicit basis in statute or regulation for sites that must be investigated to determine if they pose such a threat. At the present time, there are 528 Class 2 sites, 58 Class 2a sites, and 263 sites in the lower categories.²⁵

The principal method that the DEC uses to clean up sites on the priority list is the consent decree. For Class 2 sites, the DEC orders owners or operators to prepare remedial investigation/feasibility studies, and then to carry out DEC-ordered remedial programs.²⁶ For Class 2a sites, detailed site assessments are ordered so that the DEC can determine whether the contamination warrants an upgrading to Class 2 listing.

A practice has evolved for Class 2a sites in which site owners conduct site assessments, find "hot spots" or other limited areas of contamination, clean them up under DEC supervision through the use of what the DEC calls "interim remedial measures,"²⁷ and then secure delisting. This amounts to one species of voluntary cleanup. For sites that do not escape the state Superfund list in this fashion and are given Class 2 listing, the path to cleanup and ultimate delisting is likely to be long, tortuous, and expensive. The negotiation and approval of consent orders, workplans, sampling reports, and other necessary documents are so involved and so subject to delays because of the DEC's budgetary constraints that five years or more can easily pass between a site's listing and delisting, and much longer periods are not uncommon.

Unlike EPA's practice under CERCLA, the DEC does not tend to proceed against long lists of responsible parties. If the owner or primary operator is still viable, the DEC will threaten that entity with administrative action, in the usually successful effort to persuade it to sign a consent order and undertake the cleanup.²⁸ Those who are subject to consent orders will often institute their own private contribution actions in federal court under CERCLA to recover some of their cleanup costs.²⁹

For orphan sites—those with no viable owner or operator—or sites where PRP-implemented cleanup is taking too long, the DEC can use state Superfund money to fund the cleanup.³⁰ The DEC will then, in conjunction with the state attorney general's office, typically try to recover these costs under CERCLA in federal court. Because New York's li-

ability statute³¹ is available only to the state itself and is not as sweeping as CERCLA, it is seldom used, even by the DEC. The state Superfund program, funded by \$1.1 billion from a 1986 bond act, is expected to run out of money in 2000, well before all the sites in the state have been remediated. The outlook for new funding for the program is highly uncertain,³² and some leading officials have called for the state to delay refinancing until Congress has reauthorized CERCLA.³³

The Title 13 program is narrower than CERCLA's national priorities list program in one important respect: Title 13 only applies to "hazardous waste" sites, while CERCLA uses the more encompassing term "hazardous substances." The DEC has identified several hundred sites that are contaminated with hazardous substances but not hazardous wastes, and the sites may create public health or environmental risks but do not fall within Title 13. In 1998, the state legislature appropriated \$15 million for the cleanup of hazardous substance sites, but Gov. George Pataki vetoed these funds as part of a broader package of budget vetoes.

Smaller Programs

In addition to the three major programs described above, there are several less prominent programs that address site cleanup in New York. The most important of these is the New York State Oil Spill Law, enacted in 1977.³⁴ It primarily applies to leaking underground storage tanks and to spills associated with the use of such tanks.³⁵ Under the statute, dischargers may voluntarily clean up spills, under the DEC's supervision, or the DEC may undertake the cleanup itself.³⁶ This statute makes dischargers strictly liable,³⁷ gives injured parties a private right-of-action against dischargers,³⁸ and creates an Oil Spill Fund for the reimbursement of injured parties.³⁹ The Oil Spill Law is administered with far less red tape than the other brownfields programs, and parties may enter into short form "stipulations" under which they agree to undertake cleanups with minimal paperwork and oversight (though some recent DEC actions suggest that the expedited procedure may not continue). A DEC

24. *Id.* §27-1305.

25. Telephone Interview with Dennis Ferrar, New York State Department of Environmental Conservation (May 27, 1998).

26. James J. Periconi, *State Superfund: Cleaning Up Sites on New York State's Hazardous Waste Registry*, 1 ENVTL. L. IN N.Y. 1 (1989).

27. N.Y. COMP. CODES R. & REGS. tit. 6, §375-1.11 (1995).

28. The DEC lacks the authority, such as EPA has under CERCLA §106, to issue unilateral cleanup orders; instead, the DEC would have to drag a recalcitrant party into an administrative hearing—a rare event in the history of the DEC program.

29. Mark A. Izman, *New York Superfund Enforcement Strategies*, 3 ENVTL. L. IN N.Y. 1 (1992).

30. N.Y. ENVTL. CONSERV. LAW §§27-1305, -1313; N.Y. STATE FIN. LAW §97-b (McKinney 1997).

31. N.Y. ENVTL. CONSERV. LAW §27-1313(4); *see also* N.Y. COMP. CODES R. & REGS. tit. 6, §375-1.3(u) (definition of "responsible party" under the state Superfund program); *id.*, tit. 6, §375-2 (procedures for assessing responsible parties for state costs of investigation and cleanup).

32. STATE SUPERFUND MANAGEMENT BD., REPORT TO THE GOVERNOR AND THE LEGISLATURE: NEW YORK STATE HAZARDOUS WASTE SITE REMEDIATION PROGRAM (Jan. 1, 1998); Laura D'Angelo, *Going Broke: The State Superfund Runs Dry in the Year 2000*, EMPIRE ST. REP., Mar. 1998, at 29.

33. *Boehlert Issues Call for Patience to New York on State Superfund*, SUPERFUND REP., Apr. 15, 1998, at 14.

34. N.Y. NAV. LAW art. 12 (McKinney 1997).

35. In fact, the New York Oil Spill Law probably pertains to more sites, numerically, than the three major programs combined, but the cleanups tend to be far less expensive.

36. N.Y. NAV. LAW §176.

37. *Id.* §181.

38. *Id.* §181(5); *see Snyder v. Newcomb*, 603 N.Y.S.2d 1010 (N.Y. App. Div. 1993); Thomas J. Fucillo & Julian B. Modesti, *Petroleum Discharges and the New York State Navigation Law*, 6 ENVTL. L. IN N.Y. 113 (1995).

39. N.Y. NAV. LAW §§179-186; N.Y. COMP. CODES R. & REGS. tit. 2, §§402-404.

guidance document sets forth the agency's policy on how, and to what extent, oil spills should be cleaned up.⁴⁰

The New York City Industrial Development Agency has several financial assistance programs to aid brownfields redevelopment. These include tax-exempt industrial revenue bonds; the Industrial Incentive Program, which gives tax benefits to industrial companies seeking to construct, renovate, or acquire facilities in New York City; and New York City Capital Access, which provides term loans and lines of credit. Additionally, the city's Economic Development Zone program provides income and real estate tax benefits and low-cost financing for commercial and industrial development in areas designated economically disadvantaged.⁴¹ Several smaller cities in the state also have their own programs.⁴²

EPA has awarded more than 150 grants of \$200,000 each to municipalities around the country to explore new approaches to redevelopment and to overcome regulatory barriers.⁴³ In New York, these grants have gone to the cities of Buffalo, Elmira, Glen Cove, New York, Niagara County, Niagara Falls, Ogdensburg, Rochester, and Rome.⁴⁴

Cleanup Standards

The level of cleanliness that must be achieved in a site cleanup can be a contentious issue. The Title 13 program does not specify cleanup levels, but the regulations provide that remedy selection "must not be inconsistent with the National . . . Contingency Plan,"⁴⁵ so the DEC often looks to EPA for guidance. The DEC's regulations present general guidelines on remedy selection,⁴⁶ and the DEC has released a guidance document⁴⁷ with proposed soil cleanup objectives, but it is not a formal regulation and it is not binding.

When the Bond Act was first proposed by Governor Pataki, it provided explicitly for the use of risk assessments in setting cleanup standards.⁴⁸ However, environmental groups opposed this provision.⁴⁹ As a result, the Bond Act as finally enacted provides that cleanups under its program "shall meet the same standard for protection of public health and the environment that applies to" Title 13 cleanups.⁵⁰

Thus the Bond Act circles back to the ambiguous Title 13 standard, even though the Title 13 program is designed for much more seriously contaminated sites than the Bond Act program.

The VRP, in contrast, proclaims its flexibility. The DEC is willing to allow less stringent cleanups if institutional controls, such as deed restrictions, will prevent incompatible land uses. The Bond Act also endorses the use of institutional controls,⁵¹ but how such controls will play out in practice can only be determined after more sites have received Bond Act cleanup money. The state Department of Health also plays an important role in reviewing proposed remedies to ensure that they protect public health.

For the cleanup of underground storage tanks and other sites with petroleum contamination, the DEC is moving in the direction of utilizing the Risk Based Corrective Action (known as Rebecca) method developed by the American Society for Testing and Materials.⁵²

Assessment

The central fact of political life in New York is that the state senate is controlled by the Republicans; the state assembly is controlled by the Democrats; and the governor's office changes hands from time to time, but is currently held by a Republican. Relations between the senate Republicans and the assembly Democrats are frequently antagonistic. Because no legislation can be passed without the approval of both houses, major environmental statutes are rarely enacted. The most important exception in the brownfields context was the 1996 Bond Act, which passed because it offered something for members on both sides of the aisle. This general legislative stalemate is a major reason why no brownfields legislation, other than the Bond Act, has been adopted.

The VRP was launched under New York's last Democratic governor, Mario Cuomo, in 1994, shortly before he was defeated by Republican George Pataki. Once Pataki took office in 1995, after a period of uncertainty he directed the DEC to embrace the program. As a result, the senior levels of the DEC are enthusiastic supporters of brownfields development. This enthusiasm has not uniformly filtered down to every level within the DEC, and new staff has not been added to DEC to implement the VRP. As a result of both factors, the speed and flexibility promised by the voluntary cleanup program are not always automatically realized. Of the brownfields developments that have moved through the DEC process, the fastest tend to be those with active support from high levels within the DEC or from the governor's office. The promise of significant job creation has proven to be a major impetus for such high-level support.

The state Superfund program has been around since 1979, and lawyers who have represented clients who own sites that fall under the program know that it is maddeningly

40. NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, SPILL TECHNOLOGY AND REMEDIATION SERIES MEMORANDUM No. 1, PETROLEUM-CONTAMINATED SOIL GUIDANCE POLICY (n.d.).

41. U.S. EPA REGION II, BROWNFIELDS QUARTERLY COMMUNITY REPORT 2 (1997-1998).

42. *Id.*

43. U.S. EPA OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *Brownfields Pilots* (last modified May 6, 1998) <<http://www.epa.gov/swerosps/bf/pilot.htm>>.

44. U.S. EPA OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *Brownfields Region 2 Pilots* (last updated May 6, 1998) <<http://www.epa.gov/swerosps/bf/reg2.htm>>.

45. N.Y. COMP. CODES R. & REGS. tit. 6, §375-1.10(c).

46. *Id.* §375-1.10.

47. NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, TECHNICAL AND ADMINISTRATIVE GUIDANCE MEMORANDUM No. 4046, DETERMINATION OF SOIL CLEANUP OBJECTIVES AND CLEANUP LEVELS (1994).

48. Jonathan S. Karmel, *Title 5 of New York's Clean Water/Clean Air Bond Act Authorizes Risk Assessment to Clean Up Brownfields*, 63 BROOK. L. REV. 469, 488 (1997).

49. *Id.*

50. N.Y. ENVTL. CONSERV. LAW §56-0505(3).

51. *Id.* §56-0503(2)(g).

52. Cheryl L. Cundall & Michael J. Lesser, *Risk-Based Corrective Action in ADMINISTRATIVE PRACTICE BEFORE THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION* 381-85 (New York State Bar Association ed., 1998); NEW YORK ST. DEP'T OF ENVTL. CONSERVATION, DRAFT: INTERIM STANDARDS FOR INACTIVATION OF PETROLEUM-IMPACTED SITES (Jan. 2, 1997); AMERICAN SOC'Y FOR TESTING AND MATERIALS, E1739-95, STANDARD GUIDE FOR RISK-BASED CORRECTIVE ACTION APPLIED AT PETROLEUM RELEASE SITES (1995).

sluggish. Its pace is simply incompatible with what is required for an economically driven brownfields project, and the best thing that counsel can try to do is keep sites off the list—often through the use of interim remedial measures. Although the VRP and the 1996 Bond Act are too new for much accumulated experience, the VRP seems to hold great promise for relatively speedy cleanups, but the Bond Act has such restrictive eligibility requirements that it

will likely benefit only a limited number of sites. Whether the VRP lives up to its promise will depend on whether the DEC can make the entry of voluntary agreements a matter of swift routine, as has happened with petroleum cleanup stipulations, rather than individualized micromanagement, as occurs with the state Superfund program, and whether EPA continues to defer to DEC judgments about cleanup levels and procedures under the program.