

Environmental Law

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City, State Reach Agreement on City Role in Brownfield Cleanups

New York City's Brownfield Cleanup Program is now up and running at full speed. On August 6, 2010 the City's Office of Environmental Remediation ("OER") signed a Memorandum of Agreement ("MOA") with the New York State Department of Environmental Conservation ("DEC").¹ The agreement is the final missing piece enabling the City's Local Brownfield Cleanup Program. The program encourages remediation and redevelopment of lightly- to moderately-contaminated properties in the five boroughs. It provides an attractive alternative to state Brownfield Cleanup Program, to which the State has narrowly restricted entry and which takes longer to complete.

The City had already enacted legislation² and promulgated final regulations³ to implement its cleanup program. Under the program, participating parties may receive a transferable certificate of completion and liability release from the City after completing a remedial action in compliance with DEC's cleanup standards. In addition, the City had developed regulations and procedures for a Brownfield Incentives Grant program ("BIG") (see below), and had already begun accepting applications

for certain simpler grants under that program.⁴

The MOA removes most of the uncertainty around whether the State will take independent enforcement action at properties enrolled in the City's program. Not unexpectedly, DEC reserves many rights, but the ground rules for achieving finality are much clearer. The MOA establishes procedures for coordinated oversight of remedial actions by OER and DEC. It includes a declaration that DEC "does not plan or anticipate" bringing enforcement actions against parties who are remediating sites through the City's program under the oversight prescribed by the MOA.

Details of the MOA

OER will coordinate with DEC in evaluating the eligibility of sites for the City program. The eligibility criteria are the same threshold eligibility criteria set out in the City's regulations. However, heightened scrutiny will be given to sites from which groundwater contamination is migrating. These sites have long been a high enforcement priority for DEC. Formal DEC concurrence may be required for the enrollment of those sites. Groundwater migration sites may qualify for the City program if: (i) off-site migration of chlorinated solvents is at low levels that do not represent a significant threat as defined in DEC's Inactive Sites program (state "superfund") and does not

affect sensitive community receptors; (ii) off-site migration of petroleum will be managed under the terms of the MOA; and (iii) off-site migration of metals is at low levels that do not represent a significant threat as defined in DEC's inactive sites program. OER agrees not to admit sites that do not meet these additional qualifying criteria, and DEC retains its rights to pursue enforcement against parties associated with them.

For all sites except petroleum spill sites, OER is empowered to oversee cleanups and select remedies pursuant to the remedy selection criteria of the New York State Brownfield Cleanup program, to approve plans, to ensure that cleanup levels under the state program are achieved and that appropriate use restrictions (if applicable) are recorded.

For petroleum spill sites, DEC retains full authority, but OER may provide "technical assistance" with DEC's approval, to ensure that cleanups follow DEC's Petroleum Spill Guidance Manual and DER-10 Technical Guidance for Site Investigation and Remediation (May 3, 2010) (see below). DEC will continue to manage all petroleum spills without OER assistance, unless DEC approves OER's involvement for the site in one of two "paths": (1) Maximum OER Assistance (heating oil spills, older spills, viscous petroleum like No. 4 or No. 6 oil, provided the impacts are limited to the site); and (2) Intermediate Technical Assistance by OER (non-aqueous phase liquid limited to the site, soil vapor limited to the site, spills with limited off-site impacts). Addenda to the MOA define OER's role in these two paths.

The MOA and its addenda also contain interagency coordination procedures for situations where DEC is managing

¹ Available on the web [click here to read](#)

² New York City Brownfield and Community Revitalization Act, signed by Mayor Bloomberg on May 11, 2009. [Read Here](#)

³ The rules were proposed and published on September 17, 2009. A public hearing was held on October 19, 2009. Title 43 of the Rules of the City of New York was amended by adding a new Chapter 14. [Read Here](#)

⁴ The rules were proposed and published on March 16, 2010. A public hearing was held on April 16, 2010. Chapter 14, Title 43 of the Rules of the City of New York was amended to add new Subchapter 2. Information about BIG Grant eligibility and procedures can be found at <http://www.nyc.gov/BIG>.

Environmental *Law*

Page 2

remedial projects in the vicinity of a project admitted to the City program and where migration is migrating on to an enrolled City site.

DER-10 Technical Guidance for Site Investigation and Remediation

On May 13, 2010, DEC issued extensive revisions to its “cookbook” guidance document for site investigations and remediation. Many of the changes conform the guidance to changes in the law, including the enactment of the New York State Brownfield Cleanup Program and changes to the state superfund statute and regulations. Other key changes include specific reporting and document requirements keyed to the program in which the site is enrolled, changes in who can certify various plans and reports, and certification language for periodic reviews of completed cleanups. In tandem with the revisions, DEC rescinded thirteen of the Technical and Administrative Guidance Memoranda (TAGMs) that previously governed various aspects of remediation and remediation planning.⁵ DER-10 and its appendices now supersede these rescinded guidances.

Brownfield Incentive Grant Program (“BIG”)

To encourage remediation of brownfield sites, the City has opened a grant program that will make over \$9 million available over the next several years year for various planning, investigation, and cleanup related activities in the City (\$5 million this year). These incentives are different in nature and in scale from those in the state’s brownfield cleanup program, which provides generous tax credits. (Because of the generosity of those tax credits, sites enrolled in the State Brownfield Cleanup program do not qualify for BIG grants.) The City grant process is non-competitive. Grants are

issued to all projects as long as money is available in the grant year. It is a rolling program, so projects that are not funded because funds are exhausted this year can apply next year.

Grant applicants can submit applications for reimbursement of costs they have previously incurred. Over 100 environmental and land development services are reimburseable under the program, at rates that will not cover the full cost of those services, but instead are intended to offer applicants meaningful incentives. To be awarded, the services must be rendered by qualified vendors and meet minimum industry standards identified in the application materials. Grant money goes to the applicants, not the vendors. The City aims to send reimbursement checks within 6 weeks of receiving a complete application.



Applicants may pick and choose from a menu of grant types according to what is easiest for them to document or helps them most strategically. Most projects qualify for up to \$60,000 in grant funding. Higher levels of funding (up to \$100,000) are available for Preferred Community Development Projects (affordable housing developments, brownfield redevelopment projects in a Brownfield Opportunity Area, and projects that provide amenities like open space and community facilities). On top of these amounts, there are also bonus grants of up to \$25,000 for Track 1 cleanups (which involve complete removal of site contamination), and up to \$10,000 for projects in strategic areas.

The grants fall into three broad categories: pre-enrollment, enrollment, and special.

Pre-enrollment grants can be used for sites that have not yet enrolled in the City brownfield cleanup program. They help fund activities like pre-development design, Phase I environmental site assessments, title searches, and zoning analyses. They are not contingent on future enrollment in the City program. However, an applicant who uses pre-enrollment grant money and performs a self-directed cleanup without enrolling in the program will not be eligible for grants in the future. Enrollment grants include environmental investigation, cleanup and environmental insurance grants. Special grants include matching grants and technical assistance for Brownfield Opportunity Areas, and grants for E-Designation sites.

For questions or assistance with the New York City Local Brownfield Cleanup Program, please contact Mark Pennington (mpennington@osbornlaw.com; 212-576-2670).

Mark Pennington, a graduate of Yale University and New York University School of Law, has practiced environmental law for over 20 years. His practice concentrates on hazardous waste remediation, brownfield redevelopment, compliance management, enforcement proceedings, business transactions, and open space preservation. Mark began his environmental law career with the Washington D.C. office of Bryan Cave, where he developed an in-depth knowledge of hazardous waste law and regulation, representing trade associations and corporations in rulemaking, permitting, and compliance matters.

Subsequently, he practiced in the New York office of Morgan Lewis, where he handled a broad array of projects, including cleanups before local, state and federal agencies; multi-party Superfund proceedings; proactive compliance counseling (solid and hazardous waste, clean air, clean water, community right-to-know); compliance audits; environmental management systems; permitting and enforcement proceedings; litigation of insurance recovery and tort cases; and due diligence and contract negotiation in business transactions.

⁵ See New York DEC Environmental Notice Bulletin, June 23, 2010.