JOHN E. OSBORN, P.C.
ATTORNEYS & COUNSELORS AT LAW

Environmental Law

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In this newsletter, Mark Pennington, Esq. provides information and views on developments affecting the remediation and redevelopment of contaminated properties in New York, with particular focus on recent developments in New York City.

John E. Osborn, PC Enhances Environmental Law Practice

John E. Osborn, PC is pleased to announce that it has enhanced its environmental law capabilities through the addition of Mark C Pennington, Esq. as Of Counsel. Mark brings over 20 years' experience as a full-time environmental lawyer at noted firms in New York City. Mr. Pennington's practice concentrates on hazardous waste remediation, brownfield redevelopment, compliance management, enforcement proceedings, business transactions, and open space preservation.

Prior to entering private practice, Mr. Pennington was a law clerk to U.S. District Judge Barbara Crabb in Madison, Wisconsin. He began his career in environmental law 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. He has extensive experience assisting clients with building on contaminated property.

New York City's New Brownfield Cleanup Program

Given the high costs of preparing a state brownfield program application and the uncertainties about its acceptance, developers may be interested in a new city cleanup program. The City is pursuing authority to administer a cleanup program under which lightly and moderately contaminated sites can be cleaned up to state standards under City supervision. The City program is geared towards petroleum spill sites, contaminated fill sites, and sites affected by an E-designation (not substantial threat sites). The program will be administered by the City's Office of Environmental Remediation, led by Dan Walsh, former director of DEC's hazardous waste remediation program and is planned to be up and running in early 2009.

The City is proposing an open eligibility, fee-per-milestone program under which parties can remediate sites and receive a clean property certificate and a formal state liability release. The City's goals are to streamline the remedial process and make it more predictable. The City will provide extensive guidance and template documents for all milestones of the process. Applicants would be expected to have completed a remedial investigation prior to entry into the program. The City would act as the interface with the DEC, the spills program, the New York City Department of Environmental Protection, and the New York State Department of Health to help move sites through the process to completion. The City seeks to move applicants through the program in three to four months. Sustainability in remediation and construction methods will be encouraged. The City is working to provide $3 million a year in incentive funding to

encourage development of brownfield sites. The city plans to provide grants for Phase 1 and Phase 2 investigations, to develop a City-financed bulk insurance policy with commercial insurance carriers; and to offer pre-development grants to assist applicants with zoning analysis and title searches. The city will post more information about the program in mid-November at http://www.nyc.gov/brownfields

NYS Brownfield Reforms

In recent months, the New York State Department of Environmental Conservation's Brownfield Cleanup Program had ground to a virtual standstill. DEC has been rejecting applications for large urban projects out of concern that allowing them into the brownfield cleanup program would exhaust limited funds for generous tax credits tied to the value of new construction.

In doing so, DEC has relied on unpromulgated eligibility criteria that examine economic factors. (For example, given market conditions, would the site have been developed without the credits?

Is the project in a distressed area? What is the relationship between cleanup and development costs?) These criteria have generated controversy, litigation, and cries for legislative reform. Little progress occurred while reform proposals developed.

Limited reform arrived in July.
On July 23, 2008, Governor Patterson signed legislation that changes the tax credits available under state law. Among other things, these changes attempt to target cleanup efforts on blighted areas, to curtail redevelopment credits, to create incentives for more thorough cleanups, and to promote re-use of brownfield sites for industrial purposes. They increase tax incentives tied to site preparation costs (including cleanup and other capital account costs incurred to make sites usable for redevelopment). Credits are now available for up to 50% of the site remediation and site preparation costs for projects that remediate sites to unrestricted use criteria. The changes limit the tax credits tied to the value of new construction (the "tangible property" credit) by capping them at the lesser of a fixed dollar amount or a factor of the site preparation and remediation costs ($35 million cap for non-manufacturing projects, or 3x the site preparation and remediation costs; $45 million cap for manufacturing projects, or 6x the site preparation and remediation costs). Developers who build in "brownfield opportunity areas"(areas with multiple brownfield sites) get a 2% bonus on the tangible property credit.

Both DEC and program applicants will have new reporting obligations, intended to help the state assess program performance. Beginning in 2009, and for 11 years following execution of their brownfield cleanup agreement, applicants must disclose the taxes generated by the project (actual or estimated), the businesses operating at the site, the number of employees, and the real estate taxes. DEC, in consultation with the Commissioner of Taxation and Finance, must publish an annual Brownfield credit report describing, among other things, the tax credits granted.

Judicial Decisions on Eligibility
Despite early court decisions deferring to DEC's use of economic criteria to keep sites

out of the brownfield cleanup program, there have been some promising recent decisions that reject use of these criteria as unlawful. See, e.g., Lighthouse Pointe Property Associates LLC v. DEC, Index No. 9731/07 (Sup. Court, Monroe Co. 2007); Destiny USA Development, LLC v. NYSDEC, 19 Misc. 3d 114(A), 2008 N.Y. Misc. LEXIS 3345 (Sup. Ct. Onondaga Co. 2008). In a strongly worded opinion handed down on September 12, the State Supreme Court rejected DEC's use of economic eligibility factors as an impermissible instance of legislation by guidance that "is inconsistent with the Legislature's intent to encourage remediation." HLP Properties, LLC v. NYSDEC, Index No. 115969/07 (Sup. Ct. N.Y. Co. 2007)(slip op. at 17-20). The court directed DEC to admit an applicant who plans to build luxury high rise apartments on a property in West Chelsea situated over manufactured gas plant contamination.

Since the brownfield amendments fail to revise or clarify eligibility criteria, applicants for the foreseeable future must grapple with the fact that entry into the program may continue to hinge on economic factors like the relationship between remediation costs and project costs. Applicants must be prepared to incur substantial costs for site characterization, and to cite chapter and verse regarding the extent and source of site contamination, the increased costs and logistical challenges caused by contamination, and the difficulties in obtaining financing.

Tenant Notification of Indoor Air Contamination

Concerns about exposure to indoor air contamination have prompted the state legislature to impose notification requirements on real property owners. The new statute was prompted by concerns for residents of upstate homes situated above plumes of groundwater contamination containing volatile organics. The requirements are not limited to residential situations, but they are restricted to specific situations where test results have been received through a formal enforcement or regulatory proceeding.

Effective December 3, 2008, owners of real property who have received air contamination test results from specific entities at concentrations over specified thresholds must submit information about those results to building tenants and occupants.

Notification requirements are triggered if the test results exceed Department of Health indoor air guidelines or occupational safety and health guidelines. For brownfield cleanup program sites, the notification applies to results received from a program "participant" with legal responsibility for the contamination, and does not apply to results received from who have undertaken cleanup voluntarily.

Owners of structures where contamination is left in place with engineered controls and ongoing monitoring must provide prospective tenants with information about the test results, and place a formal notification in the lease regarding availability of test results. In this situation as well, notifications are required only if test results have been received from the listed entities. Owners are required to provide fact sheets and, if requested, actual test results.