

SECTION 2 ELIGIBILITY

2.1 Eligible Sites

The determination of whether a particular piece of real property is eligible for participation in the Brownfield Cleanup Program must be made on a case by case basis. As every project presents a unique set of circumstances, the eligibility determination must be made following review of all pertinent facts and considering the totality of the circumstances.

The Legislature enacted Article 27, Title 14 because “ ... there are thousands of abandoned and likely contaminated properties that threaten the health and vitality of the communities they burden it is appropriate to adopt this act to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment.” (ECL 27-1403). A “brownfield” or “brownfield site” is defined as “... any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant.” (ECL 27-1405).

2.2 Brownfield Definition

1. In reviewing applications, the Department must determine whether the proposed site meets the definition of a “brownfield site.” (ECL 27-1407.8.a). This definition has two elements:

- (A) 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
- (B) there must be a reasonable basis to believe that the contamination or potential presence of contamination may be complicating the development or re-use of the property. (ECL 27-1405.2).

2. In determining whether there is confirmed contamination or a reasonable basis to believe that contamination is likely to be present on the property, the Department will consider the following factors, to the extent such factors are relevant to the proposed site:

- (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 under the oversight of the State or Federal government.

3. In determining whether there is 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, the Department will consider the following factors, to the extent such factors are relevant to the proposed site:

- (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.

4. If the Department determines that only a portion of any proposed site meets the statutory definition of "brownfield site," the application may be approved in part and rejected in part. In the event that the boundaries of the property accepted into the brownfield cleanup program do not coincide with the boundaries of the real property tax map, the applicant must provide a metes and bounds description of the portion that has been accepted.

2.3 Public Interest

1. The Department may reject a request to participate in the Brownfield Cleanup Program, even if the real property meets the definition of "brownfield site," upon a determination that the public interest would not be served by granting such request. The statutory criteria generally attempt to prevent the unjust enrichment of a party based on the party's past conduct or associations. In making a determination as to whether the public interest would be served by accepting the application, the Department must consider, but is not limited to, the following statutory criteria:

- (A) whether the person requesting participation has been determined in any administrative, civil, or criminal proceeding to have violated any provision of ECL Article 27, any order or determination issued thereunder, any regulations promulgated thereunder, or any similar statute, regulation, or order in another jurisdiction;
- (B) whether the person requesting participation has previously been denied entry into the Brownfield Cleanup Program based upon one of the provisions of ECL 27-1407.9, or a similar provision of federal or other state law;
- (C) whether the person requesting participation has been found in a civil proceeding to have committed a negligent or intentionally tortious act or been convicted of a

criminal act involving contaminants;

- (D) whether the person requesting participation has been convicted of a criminal offense under Federal law or the law of any State which involves a violent felony offense, fraud, bribery, perjury, theft, or an offense against public administration;
- (E) whether the person requesting participation has knowingly falsified or concealed a material fact or knowingly submitted or made use of a false statement on or in connection with any document or application submitted to the Department;
- (F) whether the person requesting participation is an individual or a corporation, partnership, association or organization, or an individual who had a substantial interest in or acted as a high managerial agent or director for any legal entity, which committed an act or failed to perform an act that could be the basis for denial of a request for participation.

2.4 Ineligible Sites

1. Real property in any of the following categories is ineligible (ECL Section 27-1405.2) regardless of whether it otherwise meets the definition of brownfield site:

- (A) Sites listed in the *Registry of Inactive Hazardous Waste Disposal Sites in New York State* as a Class 1 or Class 2 (Class 2 sites are eligible through July 1, 2005 if the person requesting participation is a Volunteer);
- (B) Sites listed on the *National Priorities List* (“NPL”) established by the federal Environmental Protection Agency under the authority of CERCLA;
- (C) Sites that are subject to an enforcement action or a permit issued pursuant to ECL Article 27, Title 7 (“Solid Waste Management and Resource Recovery Facilities”) or ECL Article 27, Title 9 (“Industrial Hazardous Waste Management”). Sites that have interim status under 6 NYCRR Part 373 will be eligible if the proposed site would otherwise meet the eligibility criteria;
- (D) Sites that are the subject of an order issued pursuant to Article 12 of the Navigation Law (“Oil Spill Prevention, Control, and Compensation”) or ECL Article 17, Title 10 (“Control of the Bulk Storage of Petroleum”). Sites subject to a stipulation agreement will be eligible if the proposed site would otherwise meet the eligibility criteria; and
- (E) Sites that are subject to any other on-going State or Federal environmental enforcement action relating to the contamination which is at or emanating from the proposed site.

2.5. Ineligible Parties

1. A person in any of the following categories is ineligible for participation in the Brownfield Cleanup Program (ECL Section 27-1407.8) regardless of whether the proposed site itself otherwise meets the definition of brownfield site:

- (A) a person subject to a pending action or proceeding relating to the proposed site in any court or administrative agency in any jurisdiction wherein the state or federal government seeks the investigation, removal, or remediation of contamination or penalties;
- (B) a person subject to an order providing for the investigation, removal, or remediation of contamination relating to the proposed site; and
- (C) a person subject to an outstanding claim for cleanup and removal costs under Article 12 of the Navigation Law (“Oil Spill Prevention, Control, and Compensation”).