

# DER-32 / BROWNFIELD CLEANUP PROGRAM APPLICATIONS AND AGREEMENTS

New York State Department of Environmental Conservation

## DEC Program Policy

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### I. Summary

This Program Policy provides guidance on the application process and the general terms and conditions for Brownfield Site Cleanup Agreements (BCAs) under the New York State Department of Environmental Conservation (DEC) Brownfield Cleanup Program (BCP), as well as the process to amend and terminate a BCA. The terms and conditions herein are in addition to the regulatory terms and conditions at 6 NYCRR 375-1.5, 375-3.4 and 375-3.5, and such other terms and conditions as may be set forth in the BCA. Further, in the event of a conflict between the general terms and conditions herein and the site-specific BCA, the terms in the BCA shall control. The application for inclusion into the BCP will require the party to acknowledge and agree to the general terms and conditions provided in this guidance.

### II. Policy

Legislation establishing the BCP (see Article 27, Title 14 of the Environmental Conservation Law [ECL]) sets forth application provisions and requires DEC to execute a BCA prepared in accordance with ECL 27-1409 for the purpose of completing a brownfield site remedial program. The statute does not prescribe the detailed steps of the application process, except that DEC will use its best efforts to either accept or reject the BCA within 45 days after receipt of a complete application. In recognition of the benefit of guidance on the application process, the benefit of timely execution of the BCA, and subsequent amendments, and the overall legislative intent of timely advancement of the remedial program, DEC has established an application and BCA development process that is predictable for applicants.

The procedures in this policy are intended for the use and guidance of both DEC staff and those seeking to participate in the BCP. The policy is not intended to create any substantive or procedural rights enforceable by any party in administrative or judicial litigation with DEC unless, or until, such terms are incorporated into a site-specific BCA. DEC reserves the right to depart from these procedures to address site-specific circumstances, and to revise them as it deems appropriate based on changes in law or its experience in implementing this policy.

### **III. Purpose and Background**

It is the policy of New York State to have processes in place which facilitate the timely implementation of remedial programs. DEC is able to advance these policies, by adopting procedures that encourage timely participation in the BCP and the cleanup of contaminated real property for reuse and redevelopment. Defining the application process and the terms of participation in the BCP will advance these policies and provide greater certainty and predictability.

### **IV. Responsibility**

The responsibility for maintaining and updating this policy lies with the Bureau of Program Management in the Division of Environmental Remediation (DER). DER program staff are responsible for implementing this policy, with input from other involved DEC Divisions (e.g., Office of General Counsel).

### **V. Procedure**

#### **A. Application Process**

- 1. Pre-Application meeting.** DEC strongly encourages any party that is considering applying to the BCP to schedule a pre-application meeting with DEC staff to discuss the program's benefits, obligations and procedures. The pre-application meeting:
  - a. is designed to provide an overview of the BCP and to help parties understand the application process;
  - b. is intended to assist in the development of an application that is complete and establishes a clear basis for acceptance into the program, including limitations on tangible property tax credits;
  - c. includes a discussion of site characteristics, development plans, existing data defining environmental conditions and possible remedy scenarios;
  - d. includes a discussion of eligibility requirements for tangible property tax credits, if applicable; and
  - e. should be attended by the party applying, and the party's legal counsel and environmental consultant.
- 2. Scheduling a Pre-Application Meeting.** The meeting can be scheduled by contacting the DER Regional Contact for the DEC region in which the site is located.

[Regional Contact information](#) can be found on DEC's website. DER recommends that the party considering an application fill out and submit a [Pre-Application Worksheet](#) to DEC prior to holding the meeting.

- 3. Pre-application studies.** Parties should make every effort to secure all available environmental sampling data for the site, including groundwater and soil data. If there is limited available information, the party should collect soil, groundwater, and soil vapor data in order to show that applicable cleanup objectives or guidance criterion are exceeded for the intended use of the site. To provide a basis for an eligibility determination by DEC, the information must be sufficient to establish that the site conforms to the definition of a brownfield and that the site requires remediation.
- 4. Application completion.** A party who seeks to participate in the BCP (the requestor) shall submit an application pursuant to ECL 27-1407 and 6 NYCRR 375-3.4. The [BCP application](#) is available on DEC's website. An application should not be submitted until the requestor is prepared to enter into a BCA with DEC within 100 days<sup>1</sup> of submitting the application. The application will include statements acknowledging and agreeing: (1) to the requirement to execute a BCA within 60 days of notice of application approval; (2) to the general terms and conditions set forth in this policy; and (3) that in the event of a conflict between the general terms and conditions of participation and the terms contained in a site-specific BCA, the terms in the site-specific BCA shall control.
- 5. Multiple applications.** Typically, only one application can be submitted, and one BCA executed, for a development project. This may result in non-contiguous parcels being eligible for a single BCA. In limited circumstances, DEC may consider multiple applications/BCAs for a development project where the:
  - a. development project spans a larger geographical area, typically more than 25 acres;
  - b. approach does not negatively impact the remedial program, including timing, ability to appropriately address areas of concern, and management of off-site concerns; or
  - c. approach is not advanced to increase the value of future tax credits (i.e., circumvent the tax credit caps provided under New York State Tax Law Section 21).

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<sup>1</sup> "Days" refers to calendar days throughout this policy unless otherwise stated.

**6. Application submittal.**

- a. The requestor should submit one complete paper copy of the application (excluding all supporting documentation) with original signatures and one complete electronic copy of the application with all supporting documentation in Portable Document Format (pdf) on an electronic storage device to:

Chief, Site Control Section  
New York State Department of Environmental Conservation  
Division of Environmental Remediation  
625 Broadway  
Albany, NY 12233-7020

- b. The requestor should submit the same information required by 6a (above) to the appropriate DER Regional Contact. A list of [Regional Contacts](#) is available on DEC's website.

**7. Land use.** In addition to eligibility information, site history, and environmental data/reports, the application requires information regarding the current, intended and reasonably anticipated future land use. This information consists of responses to the "land use" factors to be considered relative to the "Land Use" criterion (section IX of the BCP application).

**8. Tangible Property Credit Limitations.** Tangible property tax credits for applications approved after July 1, 2015 have limitations as follows:

- a. Instances where contamination present at a property located statewide is solely the result of an off-site source, or where a property was previously remediated under one of the DEC remedial programs.
- b. Properties located in New York City are subject to additional eligibility criteria for tangible property tax credits. Those properties must demonstrate one of the following: (1) they are located in Environmental Zones (En-Zones), which are areas with high poverty and/or unemployment levels; (2) they are "Upside down" properties, where the cost of cleanup is 75 percent or more of the property value as if the property were uncontaminated; (3) they are "underutilized" properties as defined in 6 NYCRR 375-3.2; or (4) they are properties that will be redeveloped for affordable housing projects, as defined in 6 NYCRR 375-3.2.
- c. Properties located in New York City must identify on the application whether or not eligibility for tangible property tax credits are being requested at the time of application. If tangible property tax credit eligibility is requested,

sufficient documentation must be included with the application to enable DEC to make this determination.

- d. If eligibility pursuant to the Upside Down criterion is anticipated at any time in the future, an independent appraisal of the value of the property under the hypothetical condition that the property is uncontaminated must be submitted with the application.

**9. Contact List and Document Repository.** To be considered complete, the application must include the Brownfield Site Contact List (Contact List) in accordance with [\*DER-23 Citizen Participation Handbook for Remedial Programs\*](#) (DER-23). The application must also identify a document repository in accordance with DER-23. The document repository is a place where interested parties can conveniently review the project documents, such as the applications and work plans (e.g., a local library). The repository is to be established at the time of application submittal so it can be utilized during the public comment period.

## **B. Determination of Complete Application**

1. The first step in the application review and approval process is an evaluation to determine if the application is complete. To help ensure that the application is determined complete, requestors should review the list of [common application deficiencies](#) and carefully read the [BCP application instructions](#), both available on DEC's website.
2. DEC will notify the Administrator of the New York Environmental Protection and Spill Compensation Fund (Oil Spill Fund) upon receipt of the application to determine if there is an outstanding claim against the requestor. The Administrator of the Oil Spill Fund will notify the requestor and DEC of any outstanding claim within 30 days of receipt of the application.
3. DEC will send a notification to the requestor within 30 days of receiving the application, indicating whether such application is complete or incomplete.
4. If the application is found to be incomplete the requestor will:
  - a. be notified via email or phone call regarding minor deficiencies. The requestor must submit information correcting the deficiency to DEC within the 30 day review time frame; or
  - b. receive a formal Letter of Incomplete Application (LOI) if an application is substantially deficient or if a response to a minor deficiency is not received within the 30 day period. The LOI will detail all of the missing information and request submission of this information within 30 days. If the information is not submitted within 30 days from the date of the LOI,

the application will be considered to be withdrawn. In this case, the requestor may resubmit an application without prejudice in accordance with section A.6 above.

5. If the application is determined to be complete, DEC will send a Letter of Complete Application (LOC) that includes the dates of the public comment period. The LOC will:
  - a. include an approved public notice to be sent to all parties on the Contact List included with the application;
  - b. provide instructions for publishing the public notice in the newspaper on the date specified in the letter, and instructions for mailing the notice to the Contact List;
  - c. identify the need for a certification of mailing form to be returned to DEC along with proof of publication documentation; and
  - d. specify the deadline for publication of the newspaper notice, which must coincide with, or occur before, the date of publication in the Environmental Notice Bulletin (ENB).
    - DEC will send a notice of the application to the ENB. The ENB is only published on Wednesdays, and to ensure publication DEC must submit the notice by the Wednesday before it will appear in the ENB.
    - The mailing to parties on the Contact List must be completed no later than the Tuesday prior to ENB publication. If the mailings, newspaper notice and ENB notice are not completed within the time-frames established, the public comment period on the application will be extended to ensure that the required comment period occurs.
    - Marketing literature or brochures are prohibited from being included in mailings to the Contact List.

### **C. Submission of Reports and Draft Work Plans with the Application**

1. When a requestor is considering submitting draft work plans and/or reports with the application, it is strongly recommended that this be discussed with DEC at the pre-application meeting. In preparing documents, [\*DER-10 Technical Guidance for Site Investigation and Remediation\*](#) must be used by the requestor to guide preparation of work plans and/or reports.

2. If reports and/or work plans are submitted with the application, these documents must be placed in the document repository along with the application. An appropriate fact sheet must be sent to the Contact List to announce the availability of any draft work plans/reports for public comment along with notice of the application. All required notifications may be combined by the requestor. DEC and public review of work plans/reports run concurrently. This expedites the review process and can shorten the time required to complete the BCP project.
3. If a draft remedial investigation work plan is submitted with the application, the public comment period for the application package will be 30 days. If a final investigation report or draft remedial work plan is submitted with the application, the public comment period for the application package will be 45 days. If DEC determines that the remedial investigation report is not sufficient to support the remedial work plan, DEC may request a work plan for additional investigation. Additionally, if the initial application has a 30 day public comment period, there will be a second 45 day public comment period for the remedial work plan.
4. If a draft work plan, after review by DEC, is changed significantly such that the final proposed work plan is not generally consistent with the draft that was publicly noticed, a second public comment period may be needed. See DER-23 for more details on fact sheets and preparation of a citizen participation plan.

#### **D. Application Approval/Disapproval**

1. DEC will use best efforts to notify the requestor whether the application has been accepted or denied within 45 days of receipt of a complete application (60 days if a final investigation report or draft remedial action work plan is included with the application) or 5 days after the close of the public comment period, whichever is later. Items which could require additional submissions or could result in the denial of an application include, but are not limited to, the following.
  - a. The site is not a “brownfield site,” as defined in Article 27 Title 14, or insufficient information has been provided to demonstrate that the site requires remediation.
  - b. If the application does not contain a clear and sufficient geographic description of the “brownfield site,” DEC may request the following additional information such as tax map identifiers, site latitude and longitude, a site location map, and/or a site plan drawing required by the application (note that these items were required in the application).
  - c. If DEC determines the site or the requestor is subject to any enforcement action that would disqualify it from the program.

- d. If there is insufficient information in the application to determine if the applicant meets the definition of a “volunteer.”
  - e. If there is insufficient information to determine whether the site is eligible for tangible property tax credits, if requested.
  - f. If there is insufficient information in the application to determine if the site is ineligible pursuant to 6 NYCRR 375-3.3(b)
2. DEC will consider the public comments received on the application. While no formal response to the comments is required, DEC may elect to respond to substantive comments or may respond to specific commenters.
  3. DEC will send an approval/denial letter to the requestor in the time frame described above. If the application is:
    - a. approved, in whole or in part (pursuant to 6 NYCRR 375-3.3), three originals of a Brownfield Cleanup Agreement (BCA) will be enclosed with the approval letter for execution on behalf of the requestor. If more than one requestor is subject to the BCA, additional originals may be executed. “Applicant” herein refers to any party to the BCA; or
    - b. denied, DEC will include in the denial letter sufficient explanation relative to DEC’s rationale for denying the application.

**E. BCA Overview**

1. The BCA will provide for the investigation and cleanup of the site. A BCA signed by a Participant will also provide for the investigation and cleanup of contamination which has migrated from the site and impacts off-site locations.
2. The BCA will provide for the terms and conditions set forth in ECL 27-1409, 6 NYCRR 375-1.5 and 6 NYCRR 375-3.5, and such other terms and conditions as DEC determines appropriate.
3. DEC will issue one Certificate of Completion (COC) for the property identified in the BCA. No “partial” or “early” COCs will be issued.
4. Where two or more Applicants enter into the BCA, one of which is a Participant, the BCA:
  - a. will not be drafted to distinguish between the roles and responsibilities of the individual Applicant;
  - b. will require on-site and off-site remedial work;



- c. will provide for the reimbursement of state costs; and
  - d. will provide for a COC to be issued only upon completion of all on-site and off-site remedial work (only one COC per BCA).
5. The effective date of the BCA is the date signed by the Director of the Division of Environmental Remediation. Project costs, for which tax credits may be claimed, start to accrue from the effective date of the BCA.
  6. The model BCA, provided on DEC's website, will be used by DEC to satisfy the statutory (ECL 27-1409) and regulatory (6 NYCRR 375-1.5 and 375-3.5) requirements.
  7. The BCA, once signed, is returned by the Applicant to the Director of the Division of Environmental Remediation and must be received no later than 60 days after the date of DEC's approval letter unless an extension is requested by the Applicant and granted by DEC. In the event the BCA is not signed and returned to DEC within this timeframe, DEC will consider the Applicant withdrawn without prejudice and the offer to enter the BCP will be considered rescinded.
  8. DEC will use best efforts to execute the BCA within 5 business days of receipt. DEC will return one fully executed agreement to each Applicant.

**F. Amendments to a BCA**

1. Modifications to BCAs may be necessary during a BCP project for various reasons, included but not limited to: to add or change applicants, to modify property included in the BCA and certain minor corrections.
2. Since its inception in 2006, the BCP has been substantially revised twice – in June of 2008 and in July of 2015. Thus, there are three “generations” of the BCP (2003-2008 [Generation 1]; 2008-2015 [Generation 2]; and 2015-present [Generation 3]), which are subject to different definitions of a brownfield site, and different eligibility provisions for, and levels of, remedial and tangible property tax credits for certain sites.
3. Because there are three generations of the BCP, amendments to BCAs can impact how the site will be treated going forward. Depending on whether the application to amend is a major or minor amendment will determine which generation of the BCP's requirements should apply to the site.
4. Major v. Minor modifications to a BCA
  - a. DEC will consider several factors in determining whether an amendment

to a BCA represents a major or minor modification. Typically, major modifications to BCAs occur when Applicants seek to add or subtract a more than insignificant acreage of property to a BCA, or seek to add property that would otherwise not be eligible due to contamination levels or anticipated future land use.

Property previously excluded from entering the BCP due to the lack of documented contamination, where DEC formally offered the option for inclusion pending the discovery of eligible contamination during subsequent investigation, may be added to an existing BCP site as a minor amendment. Following the amendment, the entire site would be subject to the rules governing the original BCA.

Additionally, under the current Generation 3 of the BCP, sites are subject to different eligibility requirements for, and levels of, tangible property credits. Thus, requests to amend a Generation 1 or 2 BCA may be considered major depending on the criteria described in this guidance.

- b. Typically, modifications to BCAs to add, substitute, or remove an applicant on the BCA will be considered minor modifications. An exception would be where the Applicant under the BCA is a Participant and it is proposed to replace that Applicant with a party meeting the definition of a Volunteer. In that situation, DEC will require that the Participant sign an order to address off-site conditions, where appropriate, as a condition amending the existing BCA.
- c. DEC will determine whether an application to amend a BCA is major or minor on a case-by-case basis, taking into consideration the public interest and the factors described in this guidance.

#### 5. Process for Amending a BCA

- a. To amend a BCA, an Applicant must submit an amendment request using the form developed by DEC entitled “[BCP Application to Amend Brownfield Cleanup Agreement and Amendment](#)” which is available to DEC’s website. This form has streamlined the amendment process by including both the requested amendment and the amendment itself on the same form. There are very few instances where an Application to Amend in order to modify a BCA is not required, and they are listed in paragraph 7 below.
- b. Once DEC receives an application to amend, it determines whether or not the amendment is major or minor. If the amendment is considered a minor amendment to the BCA, DEC will strive to notify the parties of its decision on the requested amendment within 45 days of receipt of the

request.

- c. If the application to amend is determined to be a major amendment, DEC will require submission of a new BCA application. The application will be: (1) submitted to DEC in the same manner as the original application to participate and (2) noticed to the public in the same manner as the original application. DEC will strive to notify the parties of its decision on the application within 5 days after the close of the public comment period.

6. Major Amendments of Generation 1 or 2 BCAs

- a. Major amendments to Generation 1 or 2 BCAs will result in either: (1) the entire amended site participating as a Generation 3 BCP site; or (2) a new Generation 3 BCP site will be created for the area that is the subject of the amendment, while the original property remains a Generation 1 or 2 BCP site. While DEC will consider an Applicant's preference for how to effectuate these major modifications, DEC will make the final determination.

7. Corrections to a BCA that do not require an Amendment

- a. Corrections relative to name. DEC will not require an application to make corrective changes to the name of an Applicant (e.g., if the name of the Applicant is incorrect on an Agreement; the name of Applicant changes but the ownership of the entity remains unchanged). An Applicant should submit a letter to the DEC project manager with a copy to the DEC project attorney containing a request to make the change and explaining the basis for such change.
- b. *De Minimus* corrections relative to site size. DEC will not require an application to request *de minimus* corrective changes to the description of the property set forth in the BCA that are not significant (e.g., if the boundaries and/or acreage were not sufficiently defined in the BCA and the change become clear after a survey of the site). An Applicant should submit a letter to DEC's project manager with a copy to DEC's project attorney containing a request to make the change and documenting the basis for such change.

8. Amendments for failure to meet statutory deadline for a Certificate of Completion (COC)

- a. Any site that entered into the BCP in Generation 1, which has not received a COC by December 31, 2017 or any site that entered into Generation 2, which has not received a COC by December 31, 2019, will remain eligible for the BCP, but will become subject to the Generation 3 requirements of

the BCP through an amendment to the BCA.<sup>2</sup> It should be noted that the site's En-Zone status is considered locked-in as of the date of the original application acceptance.

- b. For BCP sites that fail to meet these statutory deadlines, DEC will transmit to the Applicant a BCA amendment containing the Generation 3 program terms and conditions. For sites without automatic eligibility for tangible property credits under the Generation 3 program, applicants will need to indicate whether they are requesting eligibility for those credits. It should be noted that the site's En-Zone status is considered locked-in as of the date of the original application acceptance.
- c. For BCP sites that fail to meet these statutory deadlines, DEC will maintain the effective date of the original BCA to allow costs incurred from that date to be eligible for tax credit purposes, although all such costs will be subject to the Generation 3 BCP eligibility tax credit criteria. However, the Department of Taxation and Finance will have the final determination on receipt of tax credits.

#### **G. Termination of a BCA**

1. The Applicant or DEC may terminate the BCA consistent with the provisions of 6 NYCRR 375-3.5(b), (c), and (d) by providing written notification to the parties identified in the BCA or subsequent amendments.
  - a. If the BCA is terminated by either party, a Volunteer remains responsible for payment of the remaining costs due to the State pursuant to the BCA until July 1, 2015; while a Participant remains responsible for payment of the remaining costs due to the State pursuant to the BCA until the date of termination.
  - b. Once the BCA for a site is terminated, any deferral of site listing on the New York State Inactive Hazardous Waste Disposal Site Registry ends and an appropriate site classification may be assigned by DEC.
2. DEC may terminate the BCA for cause. Failure to substantially comply with the BCA's terms and conditions constitutes cause to terminate. The terms and conditions of the BCA include the schedule(s) in approved work plans. Accordingly, the failure to initiate, proceed with, or complete the remedial program in accordance with its schedule is cause to terminate the BCA. [See 6 NYCRR 375-3.5(c)].

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<sup>2</sup> To clarify, the controlling date under the law for determining the mandatory dates for achieving Certificates of Completion (COCs) at both Generation 1 and Generation 2 sites are dictated by the date in which a BCA was signed by DEC. For Generation 1 sites there do not appear to be any sites in this situation, for Generation 2, there appear to be 38 sites meeting this definition.

3. Prior to DEC terminating a BCA, DEC will:
  - a. notify the Applicant in writing of its intention to terminate the agreement and the reasons for the intended termination; and
  - b. provide the Applicant with a reasonable opportunity of not less than 30 days from the date of the notification letter to correct deficiencies.

## **VI. Related References**

- [ECL Article 27, Title 14](#) [scroll to ENV then to Article 27, and click on Title 14]
- [New York State Tax Law, Article 1, Sections 21-23](#) [scroll to TAX and click on Article 1 for links to Sections 21-23]
- [6 NYCRR Part 375, Environmental Remediation Programs](#)  
[Link to Westlaw website]
- [ECL Section 71-4003](#) [scroll to ENV then to Article 71, and click on Title 40]
- [BCP Application and Instructions](#)
- [BCP Application to Amend Brownfield Cleanup Agreement and Amendment](#)