

STATE OF NEW YORK

8472

IN SENATE

May 8, 2018

Introduced by Sen. MARCELLINO -- read twice and ordered printed, and when printed to be committed to the Committee on Environmental Conservation

AN ACT to amend the environmental conservation law, in relation to the "Brownfield cleanup program" exceedances of the track 1 soil cleanup objectives, to clarifying the operative documents that describe the approved remedial action for a brownfield site, and to incorporating provisions related to soil vapor intrusion; and to amend the tax law, in relation to the brownfield redevelopment tax credit

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 27-1405 of the environmental conservation law is
2 amended by adding two new subdivisions 32 and 33 to read as follows:

3 32. "Remedial work plan" or "remedial action work plan" shall mean a
4 document that describes all components of a remedial action plan
5 selected by the volunteer or participant and approved by the department
6 in consultation with the department of health.

7 33. "Remedial action cover systems" shall mean engineering controls
8 comprised of physical barriers employed to actively or passively
9 contain, stabilize, or monitor contamination, restrict the movement of
10 contamination to ensure the long-term effectiveness of the remedial
11 program, or eliminate exposure pathways to contamination, and may
12 include:

13 (a) soil cover systems in landscaped or exposed soil areas, which
14 must:

15 (i) be comprised of soil or other unregulated material as set forth in
16 6 NYCRR Part 375 and otherwise complies with applicable regulations; and

17 (ii) not exceed the applicable soil cleanup objectives for use of the
18 site pursuant to applicable regulations; or

19 (b) hardscape cover systems defined as physical layer of solid imper-
20 vious material such as concrete, asphalt, or other hard surfaces, on the
21 exterior, such as sidewalks or asphalt or interior, such as foundation
22 slabs or sidewalls of a building, which is designed to serve a remedial

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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purpose notwithstanding that the hardscape cover system may also serve another purpose for building construction or end use of the site.

§ 2. Section 27-1409 of the environmental conservation law is amended by adding a new subdivision 9-a to read as follows:

9-a. One stating that the remedial party or parties executing the agreement shall receive the applicable tax credits provided in section twenty-one of the tax law, as added by section one of part H of chapter one of the laws of two thousand three, and section twenty-two of the tax law, subsequent to receipt of a certificate of completion pursuant to section 27-1419 of this article;

§ 3. Section 27-1411 of the environmental conservation law is amended by adding a new subdivision 7 to read as follows:

7. The department may, at its option, prepare a decision document to summarize the major components of the selected and approved remedy described in the remedial work plan or the remedial action work plan to assist the public in understanding the remedy; provided however, that such decision document shall not supersede the requirements for the remedy under the remedial work plan or the remedial action work plan and shall not represent a complete or final description of the remedy.

§ 4. Subdivision 4 of section 27-1415 of the environmental conservation law, as amended by section 7 of part A of chapter 577 of the laws of 2004, is amended to read as follows:

4. Tracks. The commissioner, in consultation with the commissioner of health, shall propose within twelve months and thereafter timely promulgate regulations which create a multi-track approach for the remediation of contamination, and, commencing on the effective date of such regulations, utilize such multi-track approach. Such regulations shall provide that groundwater use in Tracks 2, 3 or 4 can be either restricted or unrestricted. The tracks shall be as follows:

(a) Track 1: The remedial program shall achieve a soil cleanup level that will allow the site to be used for any purpose without restriction and without reliance on the long-term employment of institutional or engineering controls[~~, and shall~~] to achieve the contaminant-specific remedial action objectives for soil which conform with those contained in the generic table of contaminant-specific remedial action objectives for unrestricted use developed pursuant to subdivision six of this section. Provided, however, that volunteers whose proposed remedial program for the remediation of groundwater or soil vapor may require the long-term employment of institutional or engineering controls after the bulk reduction of groundwater contamination to asymptotic levels has been achieved or, if residual soil vapor remains present from an on-site or off-site soil vapor source, but whose soil cleanup program would otherwise conform with the soil remediation requirements necessary to qualify for Track 1, shall qualify for Track 1. In the event the soil vapor source entirely emanates from an off-site source onto the Track 1 remediated site, the long-term employment of institutional or engineering controls can remain part of the approved long-term remedy while still maintaining the site's Track 1 status, provided: (i) the Track 1 remediated site's owner shall be responsible for maintenance of the soil vapor mitigation remedy, whether in the form of a vapor barrier system or a passive or active sub slab depressurization treatment system, either ex-situ or in-situ; and (ii) the Track 1 remediated site remains in compliance with the terms in an environmental easement created and recorded pursuant to title thirty-six of article seventy-one of this chapter. In the event the planned land use of the site includes any residential use, and the projected remediation plan is to achieve the

Track 1 soil cleanup objectives pursuant to this subdivision, exceedances of the Track 1 soil cleanup objectives can be used to determine Brownfield site eligibility.

(b) Track 2: The remedial program may include restrictions on the use of the site or reliance on the long-term employment of engineering and/or institutional controls to address residual contaminated soil above bedrock still present above the Track 1 soil cleanup objectives, or to address contaminated groundwater or soil vapor, but shall achieve the contaminant-specific remedial action objectives for soil which conform with those contained in one of the generic tables developed pursuant to subdivision six of this section without the use of institutional or engineering controls to reach such soil cleanup objectives. The requirement to achieve contaminant-specific soil cleanup objectives is for all soils above bedrock.

(c) Track 3: The remedial program shall achieve contaminant-specific remedial action objectives for soil which conform with the criteria used to develop the generic tables for such objectives developed pursuant to subdivision six of this section but may use site specific data to determine such objectives.

(d) Track 4: The remedial program shall achieve a cleanup level that will be protective for the site's current, intended or reasonably anticipated residential, commercial, or industrial use with restrictions and with reliance on the long-term employment of institutional or engineering controls to achieve such level. The regulations shall include a provision requiring that a cleanup level which poses a risk in exceedance of an excess cancer risk of one in one million for carcinogenic end points and a hazard index of one for non-cancer end points for a specific contaminant at a specific site may be approved by the department without requiring the use of institutional or engineering controls to eliminate exposure only upon a site specific finding by the commissioner, in consultation with the commissioner of health, that such level shall be protective of public health and environment. Such finding shall be included in the draft remedial work plan for the site and fully described in the notice and fact sheet provided for such work plan.

§ 5. Section 27-1415 of the environmental conservation law is amended by adding a new subdivision 5-b to read as follows:

5-b. (a) Remedial action cover systems shall be included in the remedial action for:

(i) a Track 3 or 4 site if residual soil exceeds any applicable soil cleanup objectives; or

(ii) a Track 1, 2, 3 or 4 remedial action site if the remedial action cover system is required for monitoring or to prevent exposure to residual contaminated groundwater; or

(iii) a Track 1, 2, 3 or 4 remedial action site if soil vapor mitigation is required due to an exceedance of an applicable soil vapor level, and therefore, soil vapor mitigation methodologies such as a vapor barrier or a passive or active sub slab depressurization treatment system, either ex-situ or in-situ, is required to be covered by or integrated into the hardscape cover system.

(b) The thickness of a hardscape cover system that meets the remedial action cover system requirements must:

(i) be at least one foot thick at sites where the hardscape cover system is being constructed in native soil post remediation; or

(ii) two feet thick for sites where structurally unsound soil, such as historic fill or sand, remains present post remediation; and

1 (iii) otherwise meet the requirements of the New York building and
2 construction codes in effect at the time of the remediation and the
3 requirements of the New York state department of transportation standard
4 specifications, if applicable, and be certified by a licensed profes-
5 sional engineer.

6 § 6. The opening paragraph of subdivision 2 of section 27-1419 of the
7 environmental conservation law, as added by section 1 of part A of chap-
8 ter 1 of the laws of 2003, is amended to read as follows:

9 A final engineering report shall describe the final and completed
10 remedy that was implemented during the remedial action work necessary
11 for the site's qualification for the certificate of completion, which is
12 approved by the department in consultation with the department of health
13 with respect to public health impacts of the remedy and shall include,
14 at a minimum:

15 § 7. Paragraph 2 of subdivision (b) of section 21 of the tax law, as
16 amended by section 23 of part BB of chapter 56 of the laws of 2015, is
17 amended by to read as follows:

18 (2) (A) Site preparation costs. [~~The~~]

19 (i) With respect to qualified sites for which the department of envi-
20 ronmental conservation has issued a notice to the taxpayer on or after
21 July first, two thousand fifteen that its request for participation has
22 been accepted under subdivision six of section 27-1405 of the environ-
23 mental conservation law, the term "site preparation costs" shall mean
24 all amounts properly chargeable to a capital account, which are paid or
25 incurred and which are necessary to implement a site's investigation,
26 remediation, or qualification for a certificate of completion, and shall
27 include costs of: excavation; demolition; activities undertaken under
28 the oversight of the department of labor or in accordance with standards
29 established by the department of health to remediate and dispose of
30 regulated materials including asbestos, lead or polychlorinated biphe-
31 nyls; environmental consulting; engineering; legal costs; transporta-
32 tion, disposal, treatment or containment of contaminated soil; remedi-
33 ation measures taken to address contaminated soil vapor; remedial action
34 cover systems consistent with applicable regulations; physical support
35 of excavation; dewatering and other work to facilitate or enable remedi-
36 ation activities; sheeting, shoring, and other engineering controls
37 required to prevent off-site migration of contamination from the quali-
38 fied site or migrating onto the qualified site; and the costs of fenc-
39 ing, temporary electric wiring, scaffolding, and security facilities
40 until such time as the certificate of completion has been issued. Site
41 preparation shall include all costs paid or incurred within sixty months
42 after the last day of the tax year in which the certificate of
43 completion is issued that are necessary for compliance with the certif-
44 icate of completion or subsequent modifications thereof, or the remedial
45 program defined in such certificate of completion including but not
46 limited to institutional controls, engineering controls, an approved
47 site management plan, and an environmental easement with respect to the
48 qualified site. Site preparation cost shall not include the costs of
49 ~~[foundation systems that exceed the cover system requirements in the~~
50 ~~regulations applicable to the qualified site]~~ remedial action cover
51 systems pursuant to subdivision five-b of section 27-1415 of the envi-
52 ronmental conservation law.

53 (ii) With respect to qualified sites for which the department of envi-
54 ronmental conservation has issued a notice to the taxpayer before July
55 first, two thousand fifteen that its request for participation has been
56 accepted under subdivision six of section 27-1405 of the environmental

1 conservation law, "site preparation costs" shall mean all amounts prop-
2 erly chargeable to a capital account, (1) which are paid or incurred in
3 connection with a site's qualification for a certificate of completion
4 and may include, but may not be limited to, costs for remediation meas-
5 ures taken to address contaminated soil vapor, remedial action cover
6 systems, and other engineering and institutional controls as described
7 in section 27-1415 of the environmental conservation law, and (2) all
8 other site preparation costs paid or incurred in connection with prepar-
9 ing a site for the erection of a building or a component of a building,
10 or otherwise to establish a site as usable for its industrial, commer-
11 cial (including the commercial development of residential housing),
12 recreational or conservation purposes. Site preparation costs shall
13 include, but not be limited to, the costs of excavation, temporary elec-
14 tric wiring, scaffolding, demolition costs, and the costs of fencing and
15 security facilities. Site preparation costs shall not include the cost
16 of acquiring the site.

17 (B) Site preparation costs which are properly includible in the cost
18 or other basis for federal income tax purposes of qualified tangible
19 property, as described in paragraph three of this subdivision, shall be
20 allowable for purposes of the calculation of the site preparation credit
21 component under paragraph two of subdivision (a) of this section, but
22 any such costs shall be excluded from such qualified tangible property
23 basis for purposes of calculating the tangible property credit component
24 under paragraph three of subdivision (a) of this section.

25 § 8. This act shall take effect immediately. Effective immediately,
26 the addition, amendment and/or repeal of any rule or regulation neces-
27 sary for the implementation of this act on its effective date are
28 authorized and directed to be made and completed on or before such
29 effective date.