

# Why Are There So Many Brownfield Cleanup Program Lawsuits?

**Will Agency Discretion Win or Will the Court of  
Appeals Conclude DEC's Actions have been Illegal?**

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# DEC's Strict Interpretation of the "Brownfield Site" Definition Has Led to Multiple Lawsuits

A Brownfield Site is "any real property the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant."



## At First, DEC Won Based on Standard Administrative Precedent & Bad Facts

- *Jopal Enterprises vs. Commissioner Sheehan & DEC* (2006) – Site was an Illegal Dump – Phase II 24 Boring Investigation revealed Chromium, Lead and Arsenic GW Contamination above Drinking Water Standards in 8 wells but only 2 soil samples revealed mercury and benzo(a)pyrene above TAGM 4046 SCO
- DEC said - “Contamination is not complicating the property’s development or reuse” [Key Fact: Developer Built Anyway]

## *Jopal Industries v. DEC* Continued...

- Court said – “[t]here is substantial evidence in the record to support ... determination that the contamination was minimal”
- “The judgment of the administrative agency must be accorded great weight and judicial deference, when, as here it involves factual evaluations in the area of the agency’s expertise and is supported by the record.”  
*Flacke v. Onondaga Landfill Systems Inc.*, 69 NY2d 355, 363 (1987).

## *Flacke* Court of Appeals Precedent

- Irony – SW Landfill Case where DEC was **Fighting to Remediate Site** because “**risk of contamination from the ... facility was great**”
- “Yet, it is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether *there is a rational basis for the decision or whether it is arbitrary and capricious.*”

## *377 Greenwich LLC v. DEC (2007)*

- Manhattan Site was an “E” Designated Former Fill Parking Lot with Two Suspect USTs & Existing Bldgs. Phase II investigations (total 12 borings) revealed mercury and SVOCs exceeding TAGM 4046 SCO in Soil only down to 14’ (unclear # of exceedances – DEC affidavit says only 5)
- DEC said – “the real property does not meet the definition of a ‘brownfield site’” since contamination was “in the aggregate, relatively low”, costs were low & “past uses did not generated hazardous substances” relying on factors in the new March 2005 Guidance.

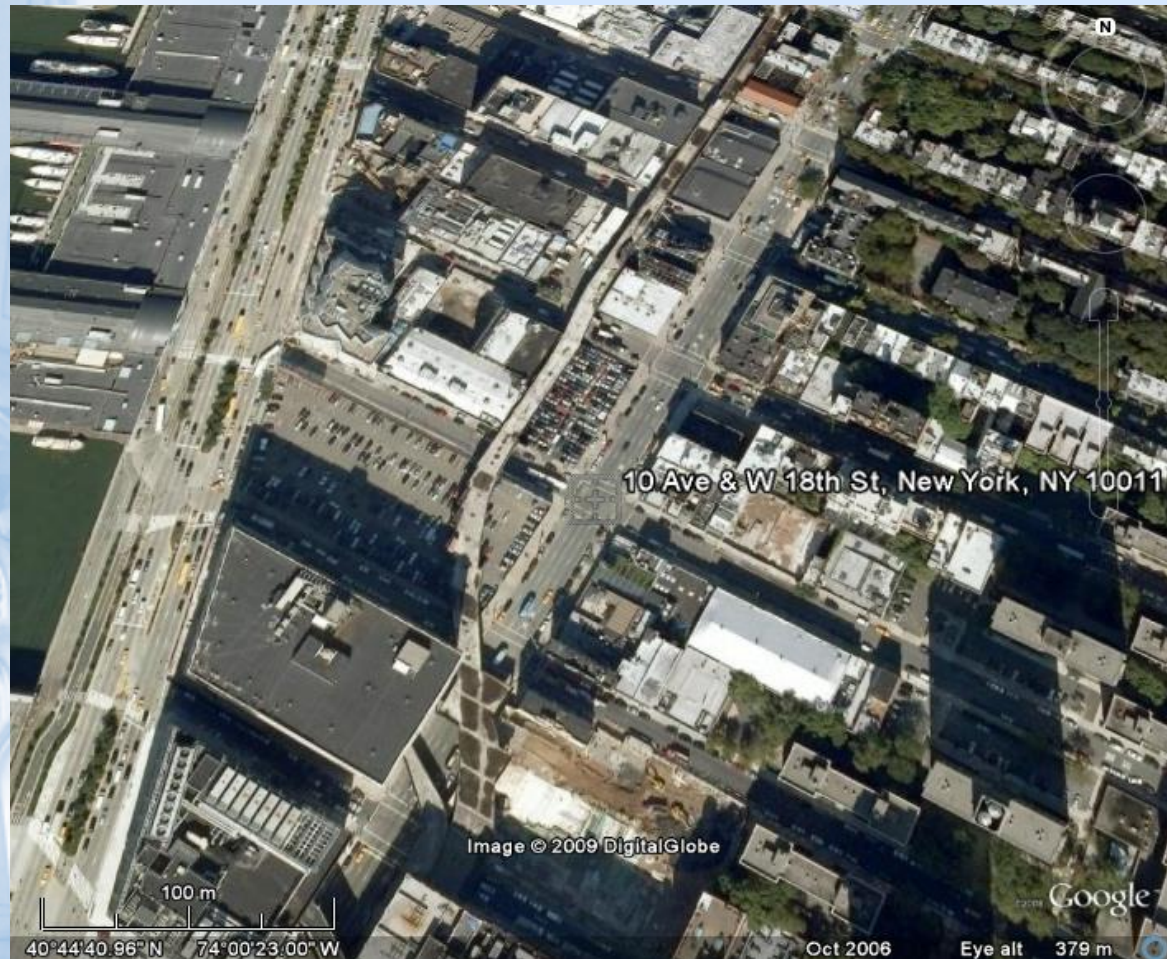
## *377 Greenwich LLC Continued*

- Developer – Received all financing, removed all contamination for \$1 million “at risk” & built hotel before Article 78 decision
- Court said – “If the real estate ...is going to be restored to productive use, regardless of contaminants, then it is entirely rational for the agency too conclude that the ‘complication’ statutory requirement has not been met.”
- **BAD FACTS MAKE BAD LAW** – What if this developer had not cleaned up site and built?

## *Fogelman v. NYSDEC (2008)*

- PRP Owner applies to BCP on LI Class 2 Site since portion of site did not contain hazardous waste per a prior denied delisting petition
- DEC denies application because a Class 2 site is an excluded, uneligible brownfield
- Court said –DEC rationally interpreted the statutory exclusion.
- Class 3, 4 and 5 sites can participate!

# *HLP Properties et al v. NYSDEC (2008)*



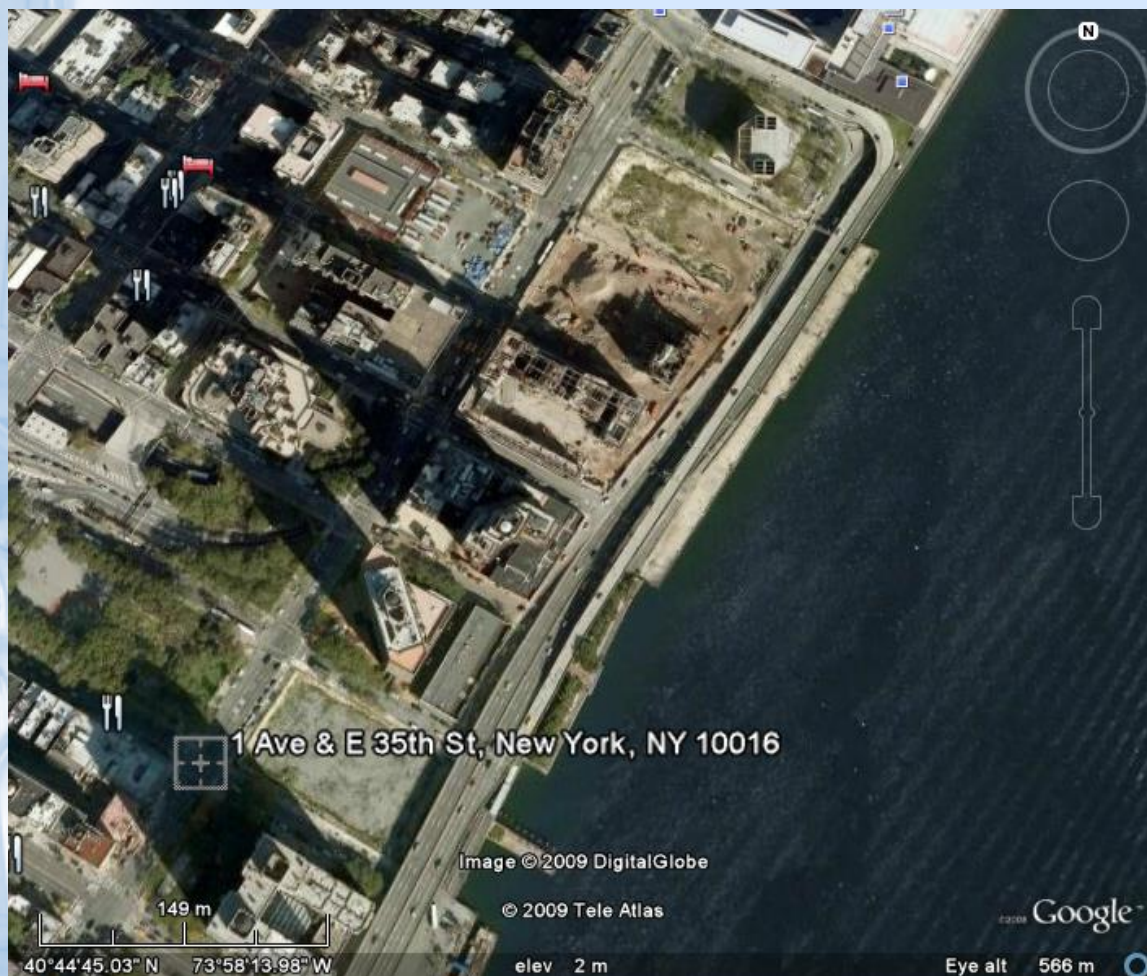
## *HLP Properties Continued*

- Site is 1 Sq. Block in Manhattan between 17-18<sup>th</sup> St. and 10<sup>th</sup> – 11<sup>th</sup> Avenue on West Side & on former Con Ed MGF Site now parking lot; undisputed coal tar contamination is present
- Site entered VCP by Con Ed in 2002 but Owner wanted to apply to BCP in 2004; Both parties applied to BCP in 2007;
- DEC denied applications 8 months later stating “there is not a reasonable basis to believe that the Parcel is unattractive for redevelopment or reuse, or that such redevelopment or reuse may be complicated by the presence of contamination” since Con Ed has agreed to cleanup the site in the VCP, the site is not idle or abandoned (i.e. it has been a parking lot), & rezoning has eliminated economic distress and is now attractive for reuse, citing *377 Greenwich* decision

## *HLP Properties Continued*

- Court said –377 *Greenwich* is wrong; Denial was “not made based on a demonstrated ineligibility under the statute”, but rather its own “interpretation of the statute” via guidance. “[A]n agency, by law, is not allowed to ‘legislate’ by adding ‘guidance requirements’ not expressly authorized by the statute.” Further, “contaminants found ...are present at levels exceeding those deemed ‘safe’ by State standards”. [Note: Court reviewed Bar Assoc.’s comments] DEC Appealed 10/24/08

# *East River Realty Company et al. v. NYSDEC*



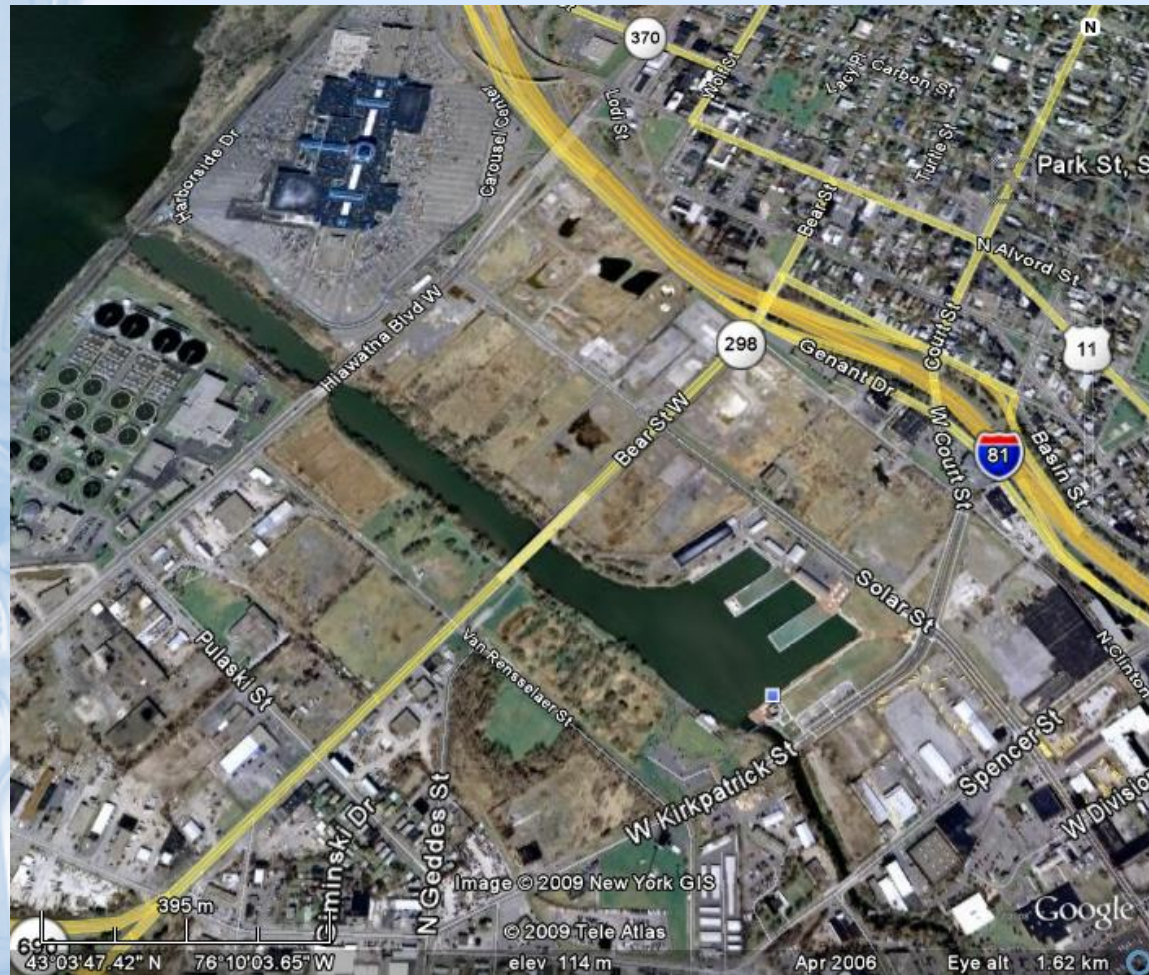
## *East River Realty Company LLC v. NYSDEC*

- 3 sites former Con Ed MGP/Power/Fuel Plant from East 35-41<sup>st</sup> Street & First Avenue entered VCP in 2001; 2004 - DEC allowed BCP transfer
- BCA sent in 2005, was signed, but held in escrow until deal reached with env'l insurer AIG while remediation continued with DEC approval & *without* tax credits for remediation
- BCA sent to DEC 2007; DEC sent denial based on a “but for” test claiming cleanup occurred & site was being redeveloped w/o need for credits despite projected \$100M cleanup cost

## *East River v. DEC* Continued

- Court distinguishes *377 Greenwich* concluding DEC's decision was rational due to low contamination but went too far in upholding the Guidance; Contamination is "extensive", "subject to significant monitoring & oversight of DEC", therefore, "the development process will be far more difficult and complicated and subject to more delays..."
- There is "no legislative history to support any contention that it was the intent of the Legislature to include a 'but for' question on the entrance exam for the BCP" analyzing the 2008 amendments. DEC Appealed 11/21/08

# *Destiny USA Development, LLC v. NYSDEC*



## *Destiny USA Development et al. v. NYSDEC*

- Large “Oil City” (72 acres/Carousel Mall (80 acres) Site Syracuse, NY; original Mall cleanup in late 80’s involved soil consolidation and capping under parking lot where new construction will take place; minor cleanup in Oil City by Oil Companies
- 6/28/05 application to DEC for \$100M cleanup; a total of 27 months go by & then...
- DEC denied the Carousel parcel because it is “in productive use” and remedial activities are “likely to be minimal in relation to the overall cost of Mall expansion” and most of Oil City is subject to enforcement “actions”.

## *Destiny USA Development Continued*

- Supreme Court said – The “‘guidance factors’ ...clearly lead to decisions being made arbitrarily and without grounded reasons” ... “vests unlimited and unfettered discretion with DEC personnel “, “enabl[es] ... DEC to make decisions at their whim” and “frustrate[s] the very purpose of the statute”.
- “DEC has completely ignored the ramifications of their decisions *vis a vis* the ‘needs’ of the citizens of the State”
- Guidance is “illegal” Nav Law stips were not “actions” – Full Site is in – DEC appeals and...

## Loses Again! June 5, 2009 Decision

- App. Div. said DEC acknowledged that there was contamination but based on guidance excluded the site rather than on a “factual determination within the expertise of DEC”
- “[T]he categorical application by the DEC of its ‘guidance’ ... conflicts with the intent of the Legislature and constitutes an impermissible attempt to legislate.”
- Guidance is not void but “explanatory and advisory” DEC Motion to Appeal DENIED!

## Lighthouse Pointe Site - Rochester 50 Acre Former Landfill/Sewage Treatment Plant/ Rail Yard/Marina

- BCP Attracted Denver Investors to Rochester to build a \$250M Project
- Extensive \$8M remediation would include hot spot removal and capping, methane & vapor intrusion remedy (explosive methane is present)
- Site was rejected for a new reason – “although there were exceedances of SCOs, the Contamination originated from solid waste”; site does not “need remediation”



PHOTO 11: VIEW LOOKING EAST ALONG SOUTH PROPERTY BOUNDARY (NORTH OF PATTONWOOD DRIVE).





PHOTO 1: VIEW LOOKING SOUTHEAST SHOWING SOUTHERN PORTION OF PROPERTY.





PHOTO 5: VIEW LOOKING NORTHWEST SHOWING POND IN SOUTHERN PORTION OF THE SITE.



## *Lighthouse Pointe Associates v. NYSDEC*

- DEC said 600+ exceedances of Track 1 SCOs & 200+ exceedances of restricted residential SCOs does not require remediation (143 borings; avg. 4 exceedances per boring; DEC counted all 25,000 sample results for each chemical to minimize contamination)
- Compare with minimal exceedances in 377 *Greenwich* and *Jopal* cases
- DEC also let DOT dump hazardous waste back on private property (only 6 out of 93 samples exceeded TCLP results)

## *Lighthouse Pointe vs. NYSDEC* cont'd

- Supreme Court said it “can find no rational basis to conclude that the levels of contamination at this site were minimal. 6 NYCRR 375-6 sets forth standards for the [re]mediation of brownfields by detailing various soil cleanup objectives.” DEC’s argument that the SCOs are only remedial goals and “do not determine if the site is contaminated in the first place” ... “flies in the face of logic”. DEC Appealed but ...

## *Lighthouse Pointe Loses!*

- App. Div. – reversed based on affidavit from DEC engineer who concluded the exceedances were “relatively few” and the site needed no remediation. Soil vapor exceedances present could not be evaluated since there are no buildings present. Haz. Lead no big deal!
- The decision does not address Monroe DOH statements the site cannot be redeveloped without remediation
- Ironically, court cites *Flacke* to hold the “court cannot substitute its judgment for that of the agency” – Engineer made an factual decision

## *Lighthouse Case Up to Court of Appeals*

- Lighthouse Motion to Appeal was granted
- Lighthouse will argue App. Div. misunderstood intent of Tracks and SCOs.
- DEC's Reply Brief says we have the power to tell a party which Track and SCOs they can select in the BCP; this is inconsistent with law
- Lighthouse contends DEC has once again gone too far in asserting power not delegated by the statute. If a party wants to select Track 1, remainder of statute says DEC must let them into the BCP to perform that cleanup

# Lighthouse Project on Hold...



# Atlas Terminals Site in Queens



**Site of 44 Industrial Underutilized Buildings is Now NYC's First Life Center  
Retail / Entertainment Complex**



## Tax Revenues from this Project Will Far Exceed BCP Tax Credit Costs

- NYC EDC Economists Independently Concluded Taxes to City will be 6.3 times tax credits received not including State revenues
- Taxes to State will be about half (3 times)
- Without this Program, this large, old industrial park would have remained contaminated and a drain on NYC's economy rather than a \$ & job maker (780 full-time jobs)
- Not a VCP site and no other economic development benefits used

*Atlas Phase II—Now its Not a Brownfield!*



## BCP Projects Lead to Economic Revitalization/ Green Development and New Jobs

- DEC admits 400 applications; 25% or 100 rejected, which means 100 projects were killed by DEC
- First 25 BCP Projects generated about 2,000 new permanent jobs
- Steel Winds Project on Bethlehem Steel Site was first reuse of a brownfield for green energy project but 2<sup>nd</sup> application was rejected
- No other NY economic development program has been this successful but it is being destroyed



## NYSERDA Likes the Program

- NYSERDA has brochures to encourage projects and energy efficiency improvements, such as Combined Heat & Power (CHP), on brownfields
- NYSERDA could be working with NYSDEC to attract new green industry seeking sites in NY for development
- Instead, these projects hit a brick wall when the parties ask NY what it has to offer and the projects go to NJ, PA, Mass, where they are welcome & incentives are being offered