

Responsiveness Summary

Riverview Innovation & Technology Campus (former Tonawanda Coke Facility) Site Number: C915353

Brownfield Cleanup Program (BCP) Application
Submitted by
Riverview Innovation & Technology Campus, Inc.

February 2020



Department of
Environmental
Conservation



Prepared by
Division of Environmental Remediation
New York State Department of Environmental Conservation

RESPONSIVENESS SUMMARY

**Riverview Innovation & Technology Campus
(former Tonawanda Coke Facility)
Site No: C915353
Tonawanda, New York**

Brownfield Cleanup Program Application submitted by Riverview Innovation & Technology Campus, Inc.

A Brownfield Cleanup Program (BCP) application for the Riverview Innovation & Technology Campus site was submitted to the New York State Department of Environmental Conservation (NYSDEC) by Riverview Innovation & Technology Campus, Inc. on September 9, 2019. The application was deemed complete on December 3, 2019 and it was noticed for an extended 45-day public comment period.

The public comment period for the application by Riverview Innovation & Technology Campus, Inc. began on December 4, 2019 and concluded on January 18, 2020. The NYSDEC received close to 70 comment letters, emails and phone messages from elected officials, business leaders and community members. The majority of comments received were in support of the BCP project, noting a preference for an expedited cleanup and redevelopment timeline and stringent cleanup standards.

The following is a summation of comments and questions received and the NYSDEC's response to those comments and questions.

COMMENT 1: The site is ineligible for the BCP because there is an ongoing enforcement action regarding the site that bars the site from entry into the BCP.

RESPONSE 1: The site is not the subject of any ongoing enforcement action related to contamination at or emanating from the site that would bar entry of the site into the BCP. There is no litigation pending before any civil or criminal court nor any action pending before a state or federal administrative agency regarding the site. At this time, there is also no judicial or administrative order requiring an entity to perform remedial activities for the contamination that is the subject of the BCP application.

COMMENT 2: The site is ineligible for the BCP because the Environmental Protection Agency's (EPA) recent emergency removal action is an enforcement action under CERCLA that bars the site from entry into the BCP.

RESPONSE 2: The performance by EPA of certain emergency response work at the site does not, by itself, constitute an enforcement action under CERCLA. See Response 1 above. Immediately following Tonawanda Coke Corporation's abandonment of the site in October 2018, NYSDEC led the effort to oversee the safe shutdown of the coke production operations. DEC contacted EPA's Region 2 Removal Action Group to take steps to eliminate potential short-term immediate

risks and to ensure public safety. Since the site is not listed on the National Priorities List, EPA has not performed a comprehensive remedial investigation on the site nor performed any remedial work that is the subject of the BCP application. Further, EPA has not commenced a federal enforcement action under CERCLA against any entity to recover the costs for its emergency response work related to the site that is the subject of the BCP application. The filing of proofs of claim in the Tonawanda Coke Corporation bankruptcy proceeding is not an enforcement action under CERCLA. Rather, a proof of claim is only a bankruptcy form that is routinely filed by a creditor to seek reimbursement of funds when the assets of the bankruptcy estate are liquidated.

COMMENT 3: The site is ineligible for the BCP because the site would otherwise be eligible for the National Priority List (federal Superfund) or State Superfund.

RESPONSE 3: Sites that are listed, at the time of application to the BCP, on the NYS registry of inactive hazardous waste disposal sites as Class “2” sites (for which a viable responsible party exists) or on the National Priorities List are not eligible to participate in the BCP. There are currently three areas of the site that are listed as Class “2” on the NYS registry of inactive hazardous waste disposal sites, including areas designated 108, 109 and 110. None of these areas are included within the proposed BCP site boundary (see attached figure showing the boundaries of sites 108, 109, 110 and the proposed BCP boundary). The proposed BCP site is not on the registry of inactive hazardous waste disposal sites or on the National Priorities List.

COMMENT 4: The BCP application should be rejected because it includes sites 108, 109 and 110 which are currently NYS Superfund sites.

RESPONSE 4: See the response to comment 3 above. Areas 108, 109 and 110 are listed as Class “2” sites on the NYS registry of inactive hazardous waste disposal sites, however, none of these areas are included in the proposed BCP site boundary. Completion of investigation and cleanup activities at areas 108, 109 and 110 will be completed by Honeywell International under a separate order with NYSDEC.

COMMENT 5: The BCP application should be rejected because it does not include a recent investigation report documenting current environmental conditions at the site and therefore the application is insufficient to demonstrate the site is eligible for the BCP.

RESPONSE 5: The BCP defines a brownfield site as “any real property where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by the Department that are applicable based on the reasonably anticipated future use of the property, in accordance with applicable regulations.” Environmental Conservation Law Section 27-1405(2). The purpose of an investigation report is to document exceedances of soil cleanup objectives and other relative guidance. Based on information contained in the application, there are exceedances of soil cleanup objectives from the presence of coal and coke fines across the surface of the site. Also, known pockets of subsurface coal tar are present on the proposed BCP site. Therefore, contamination at the site is sufficient to allow entry into the BCP. The completion of a comprehensive remedial investigation is required upon entry into the BCP.

COMMENT 6: The applicant's failure to describe the nature and extent of contamination at the proposed BCP site and failure to take 'appropriate care' with respect to contamination at the site makes the applicant ineligible as a volunteer.

RESPONSE 6: An applicant's status as a volunteer or a participant is defined by statute and depends on the applicant's association to past polluters and its liability for cleaning up that contamination. For instance, a participant is defined as the owner of the site at the time of the disposal or discharge of contaminants or is otherwise responsible for the contamination according to statutory or common law liability. Environmental Conservation Law Section 27-1405(1)(a). Presently, Riverview Innovation and Technology Campus, Inc.'s only association with the property is related solely to its recent purchase of the site in October 2019, after the contamination occurred. Riverview Innovation and Technology Campus, Inc. has no affiliation with Tonawanda Coke Corporation or Honeywell International. Promptly after its purchase, the applicant supported EPA's emergency response activities and applied to the BCP to address contamination at the site. Therefore, the applicant is taking reasonable steps to work with EPA and NYSDEC to stabilize the site and prevent any threatened future releases.

COMMENT 7: The BCP application should be rejected because it allows primary polluters, also known as responsible parties, to avoid financial and environmental responsibility.

RESPONSE 7: Tonawanda Coke Corporation filed for bankruptcy protection and is no longer financially viable to perform the required cleanup. As part of the liquidation of Tonawanda Coke Corporation's assets, the Bankruptcy Court authorized the sale of the property to Riverview Innovation & Technology Campus, Inc. who voluntarily agreed to perform the remediation that Tonawanda Coke Corporation was responsible to perform. In addition, Honeywell International (formerly known as Allied Chemical Corporation, Allied Corporation and Allied Signal Inc.) recognizes its status as a potential responsible party, due to its former ownership and operation of a facility at the site, and agreed to complete the required remaining investigation and cleanup at the three operable units of the New York State superfund site (referred to as areas 108, 109 and 110) under a separate order with NYSDEC. Honeywell International will also be responsible for cleanup of all off-site contamination that has migrated from those operable units and the potential BCP site. Combined, the BCP cleanup and remediation by Honeywell International will result in a comprehensive cleanup of the full former Tonawanda Coke property. Also, the BCP does not provide direct State funding for cleanup of the site. Applicants in the BCP are eligible to receive tax credits only after the site has been fully investigated and remediated at the applicant's expense.

COMMENT 8: The BCP is not adequate to address the extent and level of contamination at the site. The Superfund program has more stringent cleanup requirements.

RESPONSE 8: The level of investigation and cleanup required by the Superfund program and the BCP are essentially identical. Both programs require the cleanup of all sources of groundwater contamination, all grossly impacted soils/fill and all soil/fill with concentrated chemical contamination. The Superfund program and BCP must also prevent the off-site migration of contaminants. In addition, both programs require the filing of environmental easements and the implementation of a site management plan to monitor and maintain the effectiveness of the final remedy into the future. Accordingly, both programs require cleanups that involve stringent cleanup

standards to ensure the remediation is fully protective of public health and the environment. The BCP has effectively been implemented on multiple large-scale industrial sites across New York State, including local sites such as the former ExxonMobil refinery site and former Buffalo Color sites on Elk Street in the City of Buffalo, and has often spurred redevelopment and reuse of more sites and more often than the Superfund program.

COMMENT 9: BCP cover remedies are not appropriate for this site due to the level of contamination and size of the site.

RESPONSE 9: The remedy for any BCP site is only selected after a comprehensive remedial investigation is completed, an alternatives analysis of potential cleanup options performed, and comments on the proposed remedy are solicited from the public. If a cover system is ultimately chosen as a component of the site remedy, it would be installed to prevent direct contact to residual contamination after all subsurface source areas, grossly impacted soil and soil with significant chemical contamination is removed or treated. Cover systems are equally applied to both BCP and Superfund sites in New York State.

COMMENT 10: The applicant, Riverview Innovations and Technology Campus, Inc., is associated with East Delevan Properties (EDP), the owner of the former American Axle site. EDP has not effectively implemented the superfund program or BCP at the American Axle site, therefore, Riverview Innovation and Technology Campus, Inc. should not be allowed to participate in the BCP at the former Tonawanda Coke facility.

RESPONSE 10: While Jon Williams is an officer of EDP and Riverview Innovations & Technology Campus, Inc., the two companies are separate corporate entities. As outlined in Section VII of the BCP application, the applicant meets the eligibility criteria outlined in ECL Section 27-1407. Further, given the continued progress occurring on the former American Axle sites in the past two years, NYSDEC does not have a basis to prevent the applicant from participating in the BCP based on neglect or ‘bad actor’ provisions. The American Axle site is comprised of both a superfund site and a BCP site. After lengthy negotiation, EDP and NYS executed an order for remediation of the superfund portion of the property and a Brownfield Cleanup Agreement to address remaining portions of the former manufacturing property. These agreements put in place a comprehensive plan for addressing site contamination. In addition, EDP has recently completed surface soil and groundwater sampling on the BCP site (aka 1001 East Delavan Avenue Site) and this data, along with data collected during and after installation of the pump and treat system on the superfund site, will be used to prepare a comprehensive draft remedial investigation work plan scheduled to be submitted this spring. The public will have an opportunity to comment on this investigation work plan prior to final approval. The comprehensive investigation is scheduled to take place this summer.

COMMENT 11: The applicant’s intention is to remediate the property to Industrial Cleanup Objectives but is proposing a commercial use of the site.

RESPONSE 11: The application states the future use of the property will be commercial redevelopment. This requires the site to meet commercial cleanup standards, at a minimum, to be fully protective of public health. While the application does compare existing data to Industrial

Soil Cleanup Objectives, the NYSDEC's eligibility review was based upon commercial re-use of the site. The BCP cleanup program will be required to achieve standards for commercial use of the site.

COMMENT 12: The application should be rejected because the project will continue to discharge contaminated stormwater.

RESPONSE 12: EPA is and has been maintaining and monitoring the stormwater collection and management system at the site. EPA and NYSDEC have recently begun discussions with Riverview Innovation & Technology Campus, Inc. on these efforts as part of the transition of work following the company's purchase of the site. The BCP will also facilitate further investigation and evaluation of stormwater conditions and management strategies and a final cleanup plan will be developed that will include robust stormwater controls fully protective of the Niagara River.

COMMENT 13: Application should be deemed incomplete because it fails to acknowledge the site was a manufactured gas plant (MGP).

RESPONSE 13: The NYSDEC has no information that an MGP operated at the former Tonawanda Coke facility. The NYSDEC has also inquired with Honeywell International regarding the potential for an MGP to have historically operated on the site. Honeywell International confirmed that it has no record of an MGP operating at the facility during its ownership of the property. The coking process is very similar to that of an MGP but there are differences in the waste streams produced. Furthermore, the comprehensive remedial investigation that will be performed at the site will be designed to fully understand the nature and extent of site contamination and the remedy, when selected, will be designed to address that contamination, regardless of past use of the site.

COMMENT 14: The application does not acknowledge the proposed cleanup area includes 41.3 acres of NYS DEC Jurisdictional wetlands in the southern extent of the property. These wetlands serve as rare critical habitat in this industrial corridor and should be fully remediated and protected from future development.

RESPONSE 14: The majority of the referenced wetlands do not lie within the boundary of the proposed BCP site (See attached Figure). Approximately 0.30 acres of wetlands are mapped within the BCP site boundary, with the remaining wetlands immediately south of the proposed BCP site and former Tonawanda Coke property. The remedial investigation will account for the potential of regulated wetlands within the footprint of the proposed BCP site and evaluate potential impacts to the off-site wetlands from contaminants that may have migrated from the site.

COMMENT 15: The application should be rejected because there is a viable responsible party that could perform the cleanup.

RESPONSE 15: The presence of a viable responsible party is not a factor that would render the site ineligible for the BCP. In fact, a party liable for contamination at the site could apply for the BCP program as a participant. A participant is responsible for all on-site and off-site contamination

that has migrated from the site. A party that is not liable for contamination at the site can apply to the BCP as a volunteer. A volunteer is only responsible to investigate and clean-up contamination on the BCP site. Any and all responsible parties would then be required to address all off-site contamination that has migrated from the site. In this instance, Riverview Innovation and Technology Campus, Inc. applied to the BCP as a volunteer and Honeywell International will be responsible to address all off-site contamination that has migrated from the BCP site.

COMMENT 16: The public must be provided any investigation results and be involved in the remedy selection process.

RESPONSE 16: The BCP includes a robust public participation process including public review and comment on the remedial investigation work plan and on the proposed site remedy. Details on public participation in the BCP can be found: <https://www.dec.ny.gov/chemical/8450.html>. Work plans and reports may be viewed by the public at the document repositories, the Region 9 DEC office, or online via the DEC Info Locator (<https://www.dec.ny.gov/data/DecDocs/C915353/>).

COMMENT 17: All construction work on the site should be put to public bid and require prevailing wage.

RESPONSE 17: NYSDEC does not have authority to require sites in the BCP to put work out to public bid or require that workers be paid prevailing wage.

COMMENT 18: Approval of the BCP application will prevent and delay cleanup of the Tonawanda Coke facility.

RESPONSE 18: The BCP has a proven track record for expediting thorough, comprehensive cleanups at sites across New York State. An average site in the BCP program is cleaned up in approximately 2.7 years. The anticipated timeline for cleanup and redevelopment of this proposed BCP site is approximately 5 years due not only to the nature and extent of contamination, but also the significant infrastructure (industrial buildings and appurtenances) that will be demolished and removed from the site. Alternately, the Federal Superfund program has a track record of cleanups that can take up to 20 years or more for sites of similar magnitude, and often leave behind the remnants of industrial buildings that are no longer needed and act as a deterrent to future development of the site.

Legend

(all locations are approximate)

- State Superfund Program
- Brownfield Cleanup Program
- NYS Regulatory Wetlands
- FEMA Flood Hazard**
- 1% Annual Chance (100 year)
- 0.2% Annual Chance (500 year)
- Undetermined Flood Hazard
- Area Not Included

National Wetlands Inventory

- Estuarine and Marine Deepwater
- Estuarine and Marine Wetland
- Freshwater Emergent Wetland
- Freshwater Forested/Shrub Wetland
- Freshwater Pond
- Lake
- Riverine
- Other



Site Location Figure
 Tonawanda Coke Corporation, #915055
 Riverview Innovation and Technology Campus, #C915353
 3800 and 3875 River Road
 Tonawanda, NY 14150
 January 2020