

STATE ENVIRONMENTAL REGULATION

Expert Analysis

Brownfields Cleanup Program At a Crossroads

In January 2014, Governor Andrew M. Cuomo proposed a 10-year reauthorization of the state's Brownfield Cleanup Program (BCP),¹ with new limits on available tax credits. The state Legislature, however, passed a bill in June to extend the BCP—with its existing, generous tax credits—only until March 31, 2017. Although the governor initially indicated that he would sign the bill, in late December he unexpectedly vetoed it, claiming that it was a budget buster.²

The governor and the Legislature very well may reach an agreement this year to extend the BCP, which originally was created in 2003, beyond its current sunset date of Dec. 31, 2015. Yet, given the uncertainty in the program resulting from the governor's veto, it seems to be an appropriate time to examine whether the BCP actually has boosted brownfield redevelopment throughout the state,

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or whether the program has been more about the tax credits than the cleanup. After discussing that issue, this column will explore other options for turning brownfields³ into usable property, and how a practitioner now might advise clients in light of the governor's unexpected veto.

The BCP Program

For tax years beginning on or after April 1, 2005, a taxpayer participating in the BCP who entered into a brownfield site cleanup agreement with the New York State Department of Environmental Conservation (DEC) can be eligible for three tax credits relating to the cleanup and redevelopment of a brownfield site. The first is the brownfield redevelopment tax credit, which consists of the sum of three separate

credit components involving costs related to site cleanup, groundwater cleanup, and development on a brownfield site. The second is the remediated brownfield credit for real property taxes, which is based on real property taxes paid for qualified sites. The third is the environmental remediation insurance credit, which is based on premiums paid for environmental remediation insurance.⁴

Under current law, in order for a BCP site to be eligible for any of these credits, the DEC must issue a certificate of completion (COC) for the site on or before Dec. 31, 2015.

The dollar value of these credits can be quite substantial. For example, the amount of the brownfield redevelopment tax credit is calculated as a percentage of the eligible costs paid or incurred to clean up and redevelop a qualified site; a greater percentage is allowed for sites that are cleaned up to a level that requires no restrictions on use, for sites located in designated environmental zones (EN Zones),⁵ and for sites located in so-called

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“brownfield opportunity areas.” For sites accepted into the BCP on or after June 23, 2008, as much as 50 percent of the eligible costs can be used for calculating the site preparation credit component and the on-site groundwater remediation credit component.

In a 2013 report,⁶ the New York State Comptroller’s Office found that, in the first decade of the BCP, 128 sites had been cleaned up through the program, at an average tax credit cost to the state of \$9.4 million per site. Moreover, based on tax credit information prepared by the New York State Department of Taxation and Finance, the report projected a potential outstanding tax credit liability to the state of \$3.3 billion for the 389 sites then enrolled in the BCP. It is worth noting that, as the comptroller’s report pointed out, when the BCP was created in 2003, the DEC estimated that the value of the tax credits associated with the BCP would be \$135 million annually when the program was fully operational. However, the actual annual cost of the program for tax years 2008 through 2012 averaged \$188 million—and, in 2011 alone, eligible parties claimed \$279 million in BCP tax credits.

Interesting information about the BCP tax credits that have been granted to date can be gleaned from the annual “Brownfield Credit Reports” issued by the Tax Department. Based on returns received by the Tax Department from Jan. 1,

2012, through Dec. 31, 2012, fewer than half of the properties that received the brownfield redevelopment tax credit (17 of 42) were located in economically deprived EN Zones.⁷ The numbers were similar (20 of 45) for the next year.⁸

Has the purpose of the program, to revitalize blighted sites, become overshadowed by the available tax credits?

Indeed, over the life of the BCP, credits—many in excess of \$1 million per year—have been awarded to hotels, condos, and other projects in locations that probably would have been developed even without the BCP tax credits. This is quite a legacy of tax credits. One justifiably might ask two questions. Has the purpose of the program, to revitalize blighted sites, become overshadowed by the available tax credits? Has the BCP turned into a subsidy from taxpayers to profitable enterprises that do not need and should not receive these tax benefits, instead of a program to revitalize blighted sites and to put back into use smaller sites that have remained vacant for decades because of environmental contamination?

The comptroller’s report offered various suggestions to reform the BCP, drawing on recommendations from sources including the New York City Environmental Justice Alliance, the New York City Office of Environmental Remediation, the

New York Public Interest Research Group, and the New York State Bar Association. They ranged from capping the total value of credits and moving toward a needs-based structure to adding new factors (e.g., the likelihood of reuse or redevelopment absent the credits; the economic status of the community in which the site is located; and whether the project is consistent with established development plans) before the brownfield redevelopment tax credit could be claimed. Other suggested options included the use of grants or low-cost loans (as in Massachusetts) or the evaluation and approval of each application for a tax credit by a senior state official (as in Connecticut).

It will be worth watching how the Legislature and the governor approach the reauthorization of the BCP this year, as the deadline gets closer and closer.

Now What?

Given the uncertainty about the fate of the BCP, how should practitioners advise clients? In large measure, that depends on what a developer wants to do with a particular site and whether tax credits (such as those under the BCP), potential post-development environmental liability to the state government (which is limited under the BCP upon a party’s receipt of a COC), or the developer’s proposed timing for the project (for example, a longer time frame could allow for a delay until

the status of the BCP becomes clearer) is the paramount factor.

There are risks for developers seeking to participate in the BCP now because credits are available only for a project that receives a COC by Dec. 31, 2015. That deadline is a major risk because, as the comptroller observed in his 2013 report, the average time for completion of BCP projects is three years.⁹ Without more clarity about the likelihood of an extension of the BCP, new entrants into the program would be operating on the expectation (or hope) that state lawmakers would agree to continue the BCP in a form acceptable to the governor, and includes generous tax credits.

A developer may find it advisable to consider alternatives to the BCP. In fact, the DEC itself has other brownfield-related programs, such as the Environmental Restoration Program,¹⁰ which provides financial assistance and incentives to municipalities for investigation and cleanup at eligible contaminated brownfield sites, and the Brownfield Opportunity Areas Program,¹¹ which can result in payment of up to 90 percent of eligible costs to complete revitalization plans and implementation strategies for areas or communities affected by the presence of brownfield sites and site assessments for strategic brownfield sites. These programs, however, can be time-consuming to get through.

Finally, some developers may

decide to proceed completely outside the scope of the BCP and look for other tax-incentive programs. In addition, given the availability of environmental insurance, the need for liability protection from the state under the BCP may be less important to developers than it was in the past when such insurance was either not available or was cost-prohibitive.

The proposed redevelopment tax credit will only be applicable if a site: (1) is located in an "economically distressed" area of the state; (2) has affordable housing as a core component of the site's re-use; or (3) the cleanup cost is greater than the property's value.

Conclusion

Prior to giving his State of the State address on Jan. 21, 2015, Governor Cuomo indicated that he wanted the BCP to continue and was going to propose legislation that would limit the BCP tax credits to blighted areas and abandoned industrial sites, rather than applying them to all BCP projects. The governor's proposal is expected to include two types of tax credits: a remediation credit and a redevelopment credit, both of which will have significant restrictions. The proposed remediation tax credit will be limited to the actual clean-up costs and will

not include construction costs, as is currently allowed.

The proposed redevelopment tax credit will only be applicable if a site: (1) is located in an "economically distressed" area of the state; (2) has affordable housing as a core component of the site's re-use; or (3) the cleanup cost is greater than the property's value. Given what happened in 2014, whether the Legislature will pass the governor's proposal to extend the BCP with these tax credit restrictions is uncertain. If the governor's proposal is enacted, it will be interesting to see if projects that are not eligible for tax credits will opt for inclusion in the BCP.

1. See, Title 14 of Article 27 of the Environmental Conservation Law ("ECL").

2. See, http://assembly.state.ny.us/leg/?default_fld=&bn=A10135&term=2013&Summary=Y&Actions=Y&Text=Y&Votes=Y.

3. A "brownfield site" is defined as "real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant," i.e., hazardous waste or petroleum. ECL §27-1405(2).

4. See, New York State Tax Credits Available for Remediated Brownfields, available at http://www.tax.ny.gov/pdf/publications/multi/pub300.pdf?_ga=1.264550023.921342550.1403005086.

5. The legislation creating the BCP directed the Empire State Development to designate EN Zones throughout the state. EN Zones are limited to eligible census tracts with a poverty rate of at least 20 percent according to the 2000 census and an unemployment rate of at least 125 percent of the New York State average, or a poverty rate of at least double the rate for the county in which the tract is located. See, New York State's Empire State Development, "Brownfield Cleanup Program," available at <http://esd.ny.gov/businessprograms/brownfieldcleanup.html>.

6. See, Brownfield Restoration in New York State: Program Review and Options (April 2013) (the Comptroller's Report), available at http://www.osc.state.ny.us/reports/environmental/brownfields_restoration13.pdf.

7. See, Brownfield Tax Credit, available at http://www.tax.ny.gov/pdf/stats/policy_special/brownfield_credit_reports/brownfield_credit_report_cy2012.pdf.

8. See, Brownfield Tax Credit, available at http://www.tax.ny.gov/pdf/stats/policy_special/brownfield_credit_reports/brownfield_credit_report_cy2013.pdf.

9. See, Comptroller's Report, at 23-24.

10. See, Environmental Restoration Program, available at <http://www.dec.ny.gov/chemical/8444.html>.

11. See, Brownfield Opportunity Areas Program, available at <http://www.dec.ny.gov/chemical/8447.html>.