

State Environmental Regulation

Expert Analysis

Cuomo Budget Proposal Threatens Brownfield Cleanup Program

Tucked into the fiscal year 2019 budget released on Jan. 16 by Gov. Andrew Cuomo is a proposal that, if adopted by the Legislature, could have a devastating effect on the state's brownfield cleanup program (BCP).

The governor is proposing to defer brownfield tax credits (as well as a variety of other tax credits, such as the historic tax credit) for three years to the extent a particular credit for a taxpayer exceeds \$2 million. If enacted into law as part of the budget package, the change would affect brownfield projects now in progress—even though they had been promised tax credits and undoubtedly had relied on them.

Moreover, it very well could hamper enthusiasm about the BCP well into the future because it would throw the economics of brownfield cleanups—and the state's willingness to support the BCP—into ques-

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tion. The proposal is of even greater concern now than it might otherwise have been because the state's Voluntary Cleanup Program (VCP), discussed on the website of the New York State Department of Environmental Conservation (NYSDEC), is terminating on March 31. Sites in the VCP can apply to transition into the BCP.

At least two state senators from the western part of New York, Chris Jacobs and Robert Ortt, and other interested parties are attempting to shed light on the proposal, and whether the legislature ultimately decides to approve the idea remains to be seen. This column briefly explores the tax credits available under the BCP; reviews an idea similar to the governor's current proposal that became law in 2010, during the Great

Recession, and the legal battle that resulted; and discusses the current proposal.

The BCP

The BCP was enacted in 2003 to encourage private parties to develop property that otherwise would not be developed or used because of the presence or potential presence of contamination. Operating under the BCP yields a number of important benefits, including a brownfield redevelopment tax credit for a party that enters into a brownfield site cleanup agreement with the NYSDEC.

The specific terms of the brownfield redevelopment tax credit, and the sites that qualify, have changed over the years, but generally the tax credit consists of a site preparation credit component, a tangible property credit component, and an on-site groundwater remediation credit component. As the New York State Department of Taxation and Finance explains, the tax rules and rates used to calculate the brownfield redevelopment tax credit depend on the date the NYSDEC accepts a

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brownfield site into the BCP. In particular, the rates and rules to use are based on the date of acceptance into the BCP occurring in one of the following three time periods: prior to June 23, 2008; on or after June 23, 2008, but prior to July 1, 2015; and on or after July 1, 2015.

The brownfield redevelopment tax credit can be very valuable, and it certainly has been a large incentive for property owners and developers to tackle redevelopment of brownfield sites since the BCP became law.

As noted above, the governor's current proposal is reminiscent of a 2010 deferral of the brownfield redevelopment tax credit. In 2010, Tax Law §33, entitled "Temporary deferral of certain tax credits," was added by Laws of 2010 (ch. 57, §1, part Y, §1) and Tax Law §34, entitled "Temporary deferral payout credits," was added by Laws of 2010 (ch. 57, §1, part Y, §2). These two provisions (together, the 2010 Tax Credit Deferral Provisions), which took effect on Aug. 11, 2010, were challenged on constitutional grounds, and were upheld by the Supreme Court, Albany County, in *Empire Gen Holdings v. Governor of the State of New York*, 40 Misc.3d 984 (Sup. Ct. Albany Co. 2013).

'Empire Gen Holdings'

Plaintiffs in this case—Empire Gen Holdings, which owned all of the membership interests in Empire Generating Co., formerly known as Besicorp-Empire Power Company—entered into a brownfield site

cleanup agreement (BSCA) in June 2004 with BASF Corporation, which owned polluted property in the city of Rensselaer, and the NYSDEC in order to remediate and redevelop the Rensselaer property. Plaintiffs planned to build a 65 megawatt electric generating plant on the property.

In March 2008, the NYSDEC approved plaintiffs' final engineering report of remediation and issued a certificate of completion. Plaintiffs claimed a site preparation tax credit

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under the BCP, which they received in tax year 2008.

Plaintiffs then focused on the tangible property tax credit component, which they referred to as the full redevelopment tax credit. The electric generating plant was placed into service in September 2010, at which time it began generating electricity. Plaintiffs claimed they were due, for tax year 2010, a BCP redevelopment tax credit of \$86,951,916.

The 2010 Tax Credit Deferral Provisions, however, prohibited plaintiffs from claiming the entire \$86,951,916 in tax year 2010. Instead, the 2010 Tax Credit

Deferral Provisions significantly reduced plaintiffs' 2010 tax credit to \$1,663,633 and deferred the remainder of the tax credit to future years.

Plaintiffs sued, asserting a variety of constitutional claims, all of which the court rejected. First, the court found that plaintiffs' Takings Clause challenges failed to state a claim because plaintiffs had no "vested property right" to the tax credit. The court explained that, under Tax Law §21(a)(3), the full redevelopment tax credit was allowed for the taxable year in which qualified tangible property was "placed in service on a qualified site with respect to which a certificate of completion has been issued to the taxpayer." The court observed that plaintiffs had satisfied the elements of this law in September 2010, and that at that point their right to the full redevelopment tax credit had "vested."

However, the court pointed out, by September 2010, plaintiffs' full redevelopment tax credit already had been deferred as a result of the 2010 Tax Credit Deferral Provisions, which had taken effect on Aug. 11, 2010. The court ruled that because plaintiffs' Tax Law §21(a)(3) tangible property tax credit had been deferred in August 2010, prior to its vesting, the credit was "nothing more than an expectancy interest, ... an insufficient basis upon which to find a takings clause violation."

For the same reason—that is, because plaintiffs lacked a vested property right when the 2010 Tax Credit Deferral Provisions were

enacted—they failed to state a substantive due process/anti-retroactivity cause of action, according to the court.

Significantly, the court also ruled that plaintiffs had not stated a viable cause of action for violation of the constitution's Contracts Clause resulting from the deferral of the tax credit. The court rejected plaintiffs' assertion that they had contracted with the state for the full redevelopment tax credit by entering the BSCA, remediating the property, receiving a certificate of completion, and nearly placing the facility into service. Those events, the court said, did "not clearly indicate the legislature's intention to bind the State to paying the full redevelopment tax credit without deferral." Indeed, the court next ruled, the BCP and its related tax credit provisions also did not include a "clear indication" that the redevelopment tax credit could not be deferred. The court also pointed out that the New York constitution provides that tax exemptions are "freely repealable."

Finding that plaintiffs had asserted no valid constitutional claims, the court dismissed their action.

The Current Proposal

Perhaps with that court ruling in mind, the governor felt confident to propose another BCP tax deferral.

There was not a great deal of detail about the proposal in the budget announcement. For instance, in the nearly 7,500-word press release, the only reference is in the "Highlights"

section, indicating that the proposed budget "Defers Large Corporate Tax Credits." Governor Cuomo Outlines FY 2019 Budget: Realizing the Promise of Progressive Government (Jan. 16, 2018).

The 161 page budget briefing book ("Stand United to Fight for New York," FY 2019 Executive Budget), contains slightly more information. A paragraph in the "Revenue Actions" section explains that the budget proposes "several revenue actions," including "deferral of most business credits for tax years 2018 through 2020, where such credits exceed \$2 million."

Then, a few pages later, the proposal to defer business related tax-credit claims is made somewhat clearer: "Taxpayers must defer their usage of most business credits for tax years 2018 through 2020, where such credits exceed \$2 million. They can begin to use deferred nonrefundable credits in full starting in 2021, and may use 50 percent of refundable credits in 2021, 75 percent of the remainder in 2022, and the remainder in 2023."

That the governor is proposing to alter brownfield tax credits is somewhat perplexing, given that the governor himself has recognized the success of the BCP to date. Specifically, more certificates of completion were issued under the BCP in 2017—62—than in any other year, and the 62 issued last year comprise a large proportion of the 364 certificates that have been issued since the program was established

in 2003. See Governor Cuomo Announces Reforms to Brownfield Opportunity Area Program in FY 2019 Executive Budget (Jan. 22, 2018). Clearly, the tax credits under the BCP waiting to be collected over the next three years amount to substantially more than the \$2 million in state funding the proposed budget would provide in fiscal year 2019 for the state's Brownfield Opportunity Area Program, to be used for grants to local governments and community-based organizations to address brownfields and vacant and underutilized properties in downtowns and in neighborhoods.

Conclusion

In 2015, the last time the Legislature made significant changes to the BCP (also as part of a budget), I wrote that after a "period of uncertainty," there was "clarity for the BCP." See Charlotte Biblow, "Significant Changes to New York Brownfield Cleanup Program," N.Y.L.J. (May 28, 2015). If the Legislature agrees to defer brownfield tax credits for the purpose of raising revenue as the governor has proposed, it will bring uncertainty back to the BCP, perhaps diminishing its usefulness in New York for years to come.