

STATE ENVIRONMENTAL REGULATION

Expert Analysis

Governor Proposes Sweeping Changes to Brownfield Program

The budget proposed by Governor Andrew Cuomo includes significant changes to the state's Brownfield Cleanup Program (BCP). Among other things, the governor is proposing to extend the program for a decade, limit the availability of certain of the tax credits provided by it, and change the eligibility rules for participating in the program. If adopted, the proposed changes would become effective July 1, 2014.

A Brief History

Over a decade ago, the New York Legislature enacted the Brownfield Cleanup Program Act to encourage voluntary remediation of brownfield sites for reuse and redevelopment.¹ The act currently defines a brownfield site as "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant."² The act defines the term contaminant as "hazardous waste and/or petroleum."³

Participation in the cleanup program is subject to the approval of the New York State Department of Environmental Conservation (DEC).⁴ The Environmental Conservation Law (ECL) lists grounds that mandate exclusion from the program,⁵ including the failure of "real property [to] meet the requirements of a brownfield site."⁶

There are at least two significant benefits of admission to the BCP: Successful applicants are entitled to significant tax credits⁷ and, upon completion of remediation, successful applicants are entitled to a release from liability to the State of New York "arising out of the presence of any contamination in, on or emanating from the brownfield

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site."⁸ The release from liability is a critical feature of the act and critical to the ability of property owners to finance brownfield projects because lenders are wary of becoming responsible for environmentally compromised real property in the event of a payment default by a borrower.

Once accepted into the BCP, participants are required to enter into a site cleanup agreement with the DEC.⁹ As required by the statute,¹⁰ the DEC has developed soil cleanup objectives (SCOs) considering various uses of land and scores of specific contaminants.¹¹ The SCOs are "remedial action objectives"¹² and, according to the DEC, are intended to act as benchmarks for sites within a remedial program, not as guidelines for admission.

In 2008, the law governing the BCP was amended. The primary changes related to restructuring the available tax credits. Generally speaking, projects accepted into the BCP after June 23, 2008, could qualify for site preparation tax credits (for example, remediation costs) ranging from 22 to 50 percent and tangible property tax credits (for example, redevelopment costs) ranging from 10 to 24 percent with specified caps, whereas projects accepted prior to June 23, 2008, could qualify for site preparation tax credits ranging from 10 percent to 22 percent and tangible property tax credits ranging from 10 to 22 percent with no caps.¹³ In October 2012, the sunset of BCP tax credits was extended to Dec. 31, 2015 for a party

obtaining a so-called Certificate of Completion (COC) by that date.¹⁴

Now, Cuomo is proposing new, significant changes to the BCP.¹⁵

Overview of the Proposals

First, Cuomo's budget includes legislation to extend the BCP for 10 years. Thus, projects accepted into the program before Dec. 31, 2022 that receive a COC before Dec. 31, 2025 would be eligible to receive the available tax credits.

Moreover, under the governor's proposal, remediation tax credits only would cover actual cleanup costs, and redevelopment tax credits only would cover sites that have been vacant for over a decade, are worth less than the cleanup costs, or are priority economic development projects.

The governor is proposing to limit the availability of certain of the tax credits provided by the Brownfield Cleanup Program.

In addition, the proposed budget includes a new \$100 million appropriation to extend the New York State Superfund cleanup program, including \$10 million through the state's Environmental Restoration Program to address municipally owned brownfields.

The Specifics

The governor is proposing to change the definition of a brownfield site. The current definition utilizes a broad description and encompasses sites where reuse is complicated by the presence or potential presence of contamination. The governor's proposed definition would limit brownfields to real property where a contaminant "is present at

levels exceeding the soil cleanup objectives or other health-based or environmental standards promulgated by the [DEC] that are applicable based on the reasonably anticipated use of the property, as determined by the [DEC].”¹⁶

This proposed change is likely to increase the use of phase II environmental reports and to permit so-called “Class 2” environmental sites to participate in the program, where they typically have not been eligible. Class 2 sites owned by or to be transferred to a “volunteer” (generally, an applicant who is not liable for disposal of hazardous waste or discharge of petroleum at the brownfield site), where the DEC is unable to identify a responsible party for that property with the ability to pay for the investigation or cleanup of the property, would be eligible.¹⁷

Another significant change proposed by the governor relates to the eligibility for the “tangible property tax credit” component of the BCP tax credit. The governor is proposing that the tangible property tax credit be available only where an applicant is able to demonstrate certain elements:

- (i) The site has been a vacant lot for 15 years or more, or has a building or buildings that have been vacant for 15 or more years, or a lot or buildings have been both vacant and tax delinquent for 10 or more years,
- (ii) The projected cost of the investigation and remediation that is protective for the anticipated use of the site exceeds the certified appraised value of the property absent contamination, or
- (iii) The project is a “priority economic development” (PED) project that has received a resolution from the municipality within which the site is located stating the proposed project is consistent with the municipality’s local revitalization plan.

The New York Department of Economic Development would determine whether a site is a PED for purposes of the program based on the number of “net new jobs” to be created in the state; the required number depends on the specific industry. For example, manufacturers, agricultural firms, and scientific research and development firms would have to create at least 100 net new jobs while financial services firms, distribution centers, or back office operations would have to create at least 300 net new jobs in the state. Interestingly, software development or new media businesses would need to create at least 50 net new jobs in the state. They all are also required to make a “significant capital investment” in New York, which would be further defined in regulations.

The governor’s proposal also provides that sites would not be eligible for tangible property tax credits where contamination is “solely emanating” from property other than the site itself or where the DEC has determined that the property has previously been remediated such that it may be developed for its then-intended use.¹⁸

In addition, under the proposal, the tangible property tax credit component would not include costs paid to a related party and specifically would limit costs to those associated with “actual construction of tangible property incorporated as part of the physical structure.” Moreover, costs associated with the preparation of the site for erection of a building or a component of a building that were not properly included in the site preparation component could be included, but they could not be included if they had been incurred for site preparation.¹⁹

The rules applicable to tax credits issued under the Brownfield Cleanup Program are being tightened, which will limit both the amount of the tax credits and the projects for which such tax credits are available.

The tangible property tax credit also would authorize additional credits in various amounts and circumstances. For instance, a site within an environmental zone would be entitled to an additional 10 percent credit. The proposal also would permit a site within a designated Brownfield Opportunity Area an additional 5 percent credit if the proposed development is certified to be in conformance with a Brownfield Opportunity Area Plan, and a site to be developed as affordable housing would be entitled to an additional 5 percent credit if at least 20 percent of its residential units are restricted to qualified residents.²⁰

The tax credit provisions relating to the costs of preparing a BCP site for development also would be changed under the governor’s proposal. For example, the law specifically would alter the provisions relating to site preparation costs to include costs paid that are attributable to remediation of asbestos, lead, or polychlorinated biphenyls in buildings that remain on the site.²¹

Another notable proposed change relates to the creation of a “BCP-EZ Program” which would allow the DEC to exempt a volunteer from certain procedural requirements of the law. The DEC would be authorized to grant waivers under this program where it determines that the brownfield site does not pose a “significant threat,” the applicant has waived a claim for tax credits, in writing, and the development satisfies all substantive technical requirements applicable to similar activity.

Conclusion

The bottom line is that the proposed changes, if enacted, will materially alter the BCP. On the one hand, tax credits will still be available as part of the incentive for conducting and completing remediation under the BCP. On the other hand, the rules applicable to tax credits issued under the BCP are being tightened, which will limit both the amount of the tax credits and the projects for which such tax credits are available. Property owners, developers, and local municipalities need to carefully review the proposed changes and determine whether the existing BCP program or the proposed BCP program is the best deal for their project. If their assessment is that the current BCP program is more appropriate for their project, the time to act is now.

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1. See Environmental Conservation Law (ECL) §27-1403.
2. ECL §27-1405(2).
3. ECL §27-1405(7-a).
4. See ECL §27-1407(1); 6 NYCRR 375-3.4(c).
5. See ECL §27-1407(8); see, also, 6 NYCRR 375-3.3.
6. ECL §27-1407(8)(a).
7. See Tax Law §§21-23; 6 NYCRR 375-3.9(e).
8. ECL §27-1421(1).
9. See ECL §27-1409(8).
10. See ECL §27-1415(6)(a).
11. See 6 NYCRR 375-6.1, 375-6.8(b).
12. ECL §27-1415(6)(a).
13. See “Brownfields Legislation: Summary of the 2008 Amendments to the Brownfield Cleanup Program,” available at <http://www.dec.ny.gov/chemical/45734.html>.
14. See, e.g., Division of Environmental Remediation 2012/2013 Annual Report, at 3, available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/derannualreport.pdf (includes summary of recent significant brownfields cleanup developments).
15. A report from the New York State Tax Reform and Fairness Commission last fall suggested revisions to the BCP that seem to have been favorably received by the Cuomo Administration. See New York State Reform and Fairness Commission, Final Report, November 2013, available at <http://www.governor.ny.gov/assets/documents/greenisland-andreportandappendicies.pdf>.
16. 2014-15 New York State Executive Budget Revenue Article VII Legislation, at 387, available at <http://publications.budget.ny.gov/eBudget1415/fy1415artVIIbills/REVENUEArticleVII.pdf>.
17. Id.
18. Id., at 389-90.
19. Id., at 405.
20. Id., at 409.
21. Id., at 410-11.