

## STATE ENVIRONMENTAL REGULATION

## Expert Analysis

# New York Adopts Significant Changes To Brownfield Cleanup Program

**A** little more than one year ago, Governor Andrew M. Cuomo proposed a state budget that included significant changes to New York's Brownfield Cleanup Program (BCP).<sup>1</sup> Those proposed changes did not become law. In June 2014, the New York Legislature passed a bill to extend the BCP beyond its sunset date of Dec. 31, 2015. That, too, did not become law, as late last year, the governor unexpectedly vetoed that bill, claiming it was a budget buster.<sup>2</sup> At that point, the future of the BCP was uncertain. Equally uncertain was the fate of properties already in the BCP that were unlikely to complete the required remediation before the sunset date.

Now, with the adoption of this year's budget on April 1, the BCP has been extended and given renewed life. This extension, however, also includes new rules. After briefly discussing the background of the BCP, this column will highlight the major changes to the program and their practical impact on New York's brownfield sites, property owners, and developers.

### Background

In 2003, the Legislature enacted the Brownfield Cleanup Program Act in an effort to encourage the private sector to voluntarily remediate brownfields, defined as real property that otherwise would not be developed or used because of the presence or potential presence of hazardous waste or petroleum.<sup>3</sup> The 2003 law provided generous tax credits to an entity that entered into a brownfield site cleanup agreement with the New York State Department of Environmental Conservation (DEC).

The 2003 law provided for a brownfield redevelopment tax credit, consisting of three separate components: (i) the site preparation credit component; (ii) the tangible property credit component; and (iii) the on-site groundwater remediation credit component. The 2003 law

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also provided for two other brownfield redevelopment tax credits: (i) a real property tax credit; and (ii) an environmental remediation insurance credit based on premiums paid for environmental insurance.<sup>4</sup>

Initially, BCP projects could qualify for site preparation tax credits (for example, remediation costs) ranging from 10 percent to 22 percent and tangible property tax credits (for example, redevelopment costs) ranging from 10 to 22 percent. Prior to June 23, 2008, there were no caps on the dollar amounts of these tax credits. The law was amended in 2008, principally to address the extraordinary tax credits available to BCP projects. The 2008 amendment created a dual track program for tax credits, those accepted into the program before June 23, 2008, and those accepted on or after that date.

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The pre-June 23, 2008, sites remained eligible for tax credits without caps. Projects accepted into the BCP on or after June 23, 2008, still could qualify for significant tax credits, including site preparation tax credits ranging from 22 to 50 percent and tangible property tax credits ranging from 10 to 24 percent, but they were subject to specified caps.<sup>5</sup>

These tax credits can be quite valuable regardless of whether the site entered the BCP before, on, or after June 23, 2008, and undoubtedly are a major reason that over 190 sites have been cleaned up across the state under the BCP.<sup>6</sup> The amount of the brownfield redevelopment tax credit is determined as a percentage of eligible costs paid or incurred to clean up and redevelop a qualified site; a greater percentage is allowed for sites cleaned up to a level that requires no restrictions on use, for sites located in designated environmental zones with high poverty or unemployment levels (EN-Zones), and for sites located in so-called "brownfield opportunity areas." For sites accepted into the BCP on or after June 23, 2008, as much as 50 percent of the eligible costs could be used for calculating certain tax credit components.

These tax credits were subject to the BCP's sunset provision and were a key reason for the governor's 2014 proposed changes to the BCP and the Legislature's action in June 2014 to extend the BCP. In order to be eligible for any of the tax credits, if the BCP was not extended before the sunset date, a site needed to obtain a certificate of completion (COC) from the DEC on or before Dec. 31, 2015. The adoption of this year's budget and the changes to the BCP agreed to in that process extended that deadline for another decade.

### Key Changes to the BCP

The significant changes made to the BCP in April 2015<sup>7</sup> can be divided into several categories. These include new deadlines applicable to BCP projects; changes to the tax credits; extra requirements applicable to properties located in New York City to be eligible for certain tax credits; changes to DEC oversight costs; and changes to key definitions and site eligibility.

**The Deadlines.** As noted above, the BCP tax credits were subject to the Dec. 31, 2015, deadline. Under the 2015 amendment, there is a complex formula for tax credits that depends upon when a site enters the BCP. A site that enters the BCP on or after the effective date of the 2015 amendment<sup>8</sup> has until March 31, 2026, to receive

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a COC to be eligible for tax credits.

A site that entered the BCP before the 2015 effective date may be able to use the older, more lucrative, tax credit calculation, if the site meets certain deadlines for the issuance of the COC. Otherwise, it is subject to the tax credit requirements applicable to sites that enter the BCP on or after the effective date of the 2015 amendment.

A site that entered the BCP before June 23, 2008, can use the 2003 unlimited tax credit formula if it is issued a COC by Dec. 31, 2017. Approximately 90 sites started in the BCP before

credits covered more than cost of remediation—any costs associated with preparing a site were eligible for the credit. In turn, site preparation costs were the basis for calculating a cap on the redevelopment credit.

The changes move costs not associated with investigation, remediation, or qualification for a COC for the site from the site preparation credit to the redevelopment credit, including certain costs of foundations.<sup>9</sup> This aligns the credit with cleanup costs and reduces the maximum redevelopment credit because the cap is based on the site's eligible site preparation costs.

The 2015 amendment changes many key definitions. For one thing, it changes the definition of 'brownfields' and requires the site to actually be contaminated and makes that determination more objective. It will be based upon comparisons to cleanup standards established by the DEC for a property's particular use.

2008 but have not completed cleanup. A site that entered the BCP between June 23, 2008, and the effective date of the 2015 amendment can use the tax credit formula from the 2008 amendment, provided the COC is issued no later than Dec. 31, 2019. These new deadlines very well may prompt sites already in the BCP that have not yet completed their cleanup to do so faster in order to be able to claim the larger grandfathered tax credits.

**New York City Properties.** BCP projects located in New York City have an additional hurdle to be eligible for certain tax credits under the 2015 amendment. In order to qualify for the tangible property tax credit in New York City, a site must be: (i) located in EN-Zones; (ii) "upside down," meaning that the cleanup cost is 75 percent or more of the property value as if uncontaminated, or "underutilized," a term that the DEC will define by regulation; or (iii) redeveloped as affordable housing projects. All sites outside of New York City are eligible for the tangible property credit without being subject to this additional criterion.

**Definitional Changes.** The 2015 amendment changes many key definitions. For one thing, it changes the definition of "brownfields" and requires the site to actually be contaminated and makes that determination more objective. It will be based upon comparisons to cleanup standards established by the DEC for a property's particular use.

There also are significant definitional changes to the costs that are eligible to be included in the calculation of the tax credits. First, the 2015 amendment limits the eligible costs for the site preparation credit to those needed for remediation, which also will reduce the redevelopment credit cap. Under the old rules, site preparation

The 2015 amendment also limits eligible costs for the redevelopment (tangible property) credit and restructures credits. The redevelopment credits under the 2015 amendment are limited to property with a useful life of at least 15 years and non-portable equipment, machinery, associated fixtures, and appurtenances. Payments for related party service fees (for example, developer fees) only can be claimed when they are actually paid and cannot be claimed under the site preparation or groundwater credits.

In addition, the tangible property credit has a lower baseline rate under the 2015 amendment. The baseline credit for existing projects ranges from 10 to 12 percent, provided they get their COCs by the applicable December 2017 or 2019 deadlines. The 2015 amendment drops that baseline rate for projects accepted after the effective date to 10 percent. Another notable change is the rate for sites in EN-Zones. That drops from 8 percent to 5 percent under the 2015 amendment.

**Other Changes.** The 2015 amendment creates a BCP-EZ option, which, if enacted by the DEC, is supposed to streamline the BCP program for lightly contaminated properties. Sites going through the BCP-EZ program have to waive the right to receive tax credits in exchange for a liability release from the state.

The budget also authorizes an additional \$1 billion over 10 years in bond authorization for the New York Superfund, with up to \$100 million per year able to be appropriated. Up to 10 percent of these funds can be used for the Environmental Restoration Program, which funds investigation and remediation of municipally owned brownfield sites. The DEC may undertake such a project at the request of and on behalf of a municipality.

The 2015 amendment waives reimbursement of DEC oversight costs for "Volunteers" and allows the DEC to negotiate flat-fees for these oversight costs for "Participants."<sup>10</sup> In addition, class 2 state superfund sites now are eligible for the BCP if the party to the BCP agreement is a Volunteer and the DEC is unable to identify a viable responsible party for that site.

## Conclusion

After a period of uncertainty, there now is clarity for the BCP. Property owners and developers interested in the program can evaluate the benefits and drawbacks of participation with a longer horizon than was available in recent years. That is a welcome development for New York.

## Update

My prior column<sup>11</sup> discussed a case in which the New York Court of Appeals had to decide whether the federal Clean Water Act was violated when a general permit governing discharges from municipal separate storm sewer systems (known as MS4s) was approved by the DEC under the ECL. In a 4-3 decision, the court affirmed the decision of the Appellate Division, Second Department, upholding the DEC's general permit and rejecting the NRDC's federal and state law challenges to the general permit.<sup>12</sup>

1. See, Charlotte A. Biblow, "Governor Proposes Sweeping Changes to Brownfield Program," NYLJ (March 27, 2014).

2. See, Charlotte A. Biblow, "Brownfields Cleanup Program at a Crossroads," NYLJ (Jan. 25, 2015).

3. See, Environmental Conservation Law (ECL) §27-1403.  
4. See, New York State Tax Credits Available for Remediated Brownfields, available at [http://www.tax.ny.gov/pdf/publications/multi/pub300.pdf?\\_ga=1.264550023.921342550.1403005%20086](http://www.tax.ny.gov/pdf/publications/multi/pub300.pdf?_ga=1.264550023.921342550.1403005%20086).

5. See, "Brownfields Legislation: Summary of the 2008 Amendments to the Brownfield Cleanup Program," available at <http://www.dec.ny.gov/chemical/45734.html>.

6. See, New York DEC, "2015 Enacted Budget Brownfield Cleanup Program Reforms," available at <http://www.dec.ny.gov/chemical/101350.html>.

7. *Id.*  
8. The effective date of the 2015 amendment is the later of July 1, 2015, or the date the DEC publishes proposed regulations defining "underutilized," which regulations must be adopted by Oct. 1, 2015. *Id.*

9. The credit under the 2015 amendment includes costs associated with remediating asbestos, PCBs, and lead in structures that will remain on site. *Id.*

10. There are two categories of BCP applicants—volunteers and participants. In essence, a volunteer is not responsible for the contamination, whereas a participant is responsible for the contamination.

11. See, Charlotte A. Biblow, "Court of Appeals Considers Challenge to Storm Water Discharge Permits," NYLJ (March 25, 2015).

12. *Matter of Natural Resources Defense Council v. N.Y. State Dep't of Env. Conserv.*, No. 48 (N.Y. May 5, 2015).