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Brownfield Cleanup Act Reform: The Saga Continues

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April 14, 2014

Brownfield Cleanup Act reform did not survive the crush of last-minute negotiations over New York State's 2014-15 budget. The governor's office, the Senate and the Assembly each introduced their own proposals for accomplishing needed reforms, but while they narrowed their differences, they were not able to reach consensus on a path forward. So negotiations on these issues will continue, hopefully during this legislation session and well in advance of the expiration at the end of 2015 of tax credits under the Brownfield Cleanup Program (BCP).

This article reviews the differences among the governor's, Senate's and Assembly's proposals and makes suggestions as to how these differences might be resolved.

Extension of Brownfield Tax Credits—A key driver for amending the BCP is the looming expiration of the tax credits. The governor's bill proposes a selective extension:

- Projects accepted into the BCP prior to June 23, 2008, would be terminated unless they receive Certificates of Completion (COC) by the current sunset date of Dec. 31, 2015;
- Projects accepted into the BCP between June 23, 2008, and June 30, 2014, would be terminated unless they obtain COCs by Dec. 31, 2017;
- Projects accepted into the BCP between July 1, 2014, and Dec. 31, 2022, would have until Dec. 31, 2025 to obtain COCs.

Notably, the sanctions for missing the cutoff date is not just losing the tax credits: The site would be terminated from the BCP and therefore not even be able to obtain a COC and the accompanying liability protection for a cleanup completed after the deadline.

Both the Senate and Assembly bills contain blanket extensions of eligibility for tax credits to all sites obtaining COCs by Dec. 31, 2025, (although the Assembly proposes a Dec. 31, 2022, cutoff date for site entry).

Revised 'Brownfield Site' Definition. All three proposals would revise the definition of a "brownfield site" for purposes of BCP eligibility. Under current law, a "brownfield" is "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a

hazardous waste..." The governor's and Assembly's bills would simplify this definition by treating as a brownfield any site that has documented contaminant levels exceeding cleanup standards (for example, those established in 6 NYCRR Part 375) based on reasonably anticipated use. Cleanup standards are

The Senate bill would require, in addition, that the site also show economic distress based on vacancy, underutilization or functional obsolescence. These are the types of tests proposed by the governor and Assembly for eligibility for tangible property tax credits (see below) but not for eligibility for the BCP itself.

Class 2 Site Eligibility. The governor proposes allowing Class 2 sites on the Registry of Inactive Hazardous Waste Sites (the state Superfund list) to be eligible for the BCP where the applicant is a volunteer (an entity whose liability arises solely as a result of its ownership or operation of the site subsequent to disposal) and the New York State Department of Environmental Conservation (DEC) has been unable to identify a financially viable party responsible for the contamination.

The Senate bill would allow any of the statutorily excluded sites to be eligible for the BCP when the applicant is a volunteer. The Assembly bill declines to make any changes to the BCP site eligibility.

Expansion of Track 1 Cleanup definition. BCP projects which require long-term institutional or engineering controls are not eligible for Track 1 cleanup status and the higher level of site preparation (unrestricted residential cleanup) tax credits (SPCs).¹ The legislation proposed by the governor and the Senate would allow sites to qualify for Track 1 status where long-term engineering or institutional controls are required solely to address vapor intrusion, as well as continued groundwater monitoring where contaminant concentrations have been reduced to asymptotic levels. The Assembly bill does not make any changes to the Track 1 definition.

New BCP-EZ Program. The governor proposes a streamlined "BCP-EZ" process for volunteers seeking liability relief but not tax credits. The Senate bill proposes a similar, but less flexible, New York Remediation Accelerated Performance Interim Design (NY-RAPID) program, which would be available for minimally contaminated sites or properties where the contamination is primarily historic fill. The DEC would be required to promulgate regulations that allow for expedited cleanup and liability waiver.

The Assembly bill provides simply that an applicant can waive tax credits using a form developed by the state DEC.

Oversight Costs. The governor and Senate bills propose that a volunteer would no longer be required to pay oversight costs starting July 1, 2014, regardless of when its site is accepted into the BCP. Oversight costs are administrative costs such as personal salaries, fringe benefits, travel costs, etc., that are allocated to a particular site based on hours billed by DEC personnel monitoring the implementation of the remedial program for the individual site. However, parties accepted into the BCP as "participants" would still be required to pay DEC for past costs incurred prior to the effective date of BCP acceptance. DEC would be authorized to negotiate a "reasonable" flat rate fee for future oversight costs. The Assembly bill does not provide any oversight cost reduction.

Hazardous Waste Fee Exemption. Urban sites often contain significant areas of fill material that must be managed as hazardous waste because of constituents such as heavy metals, semi-

volatile organic compounds, petroleum, and lead-based paint. Excavation and disposal of such material can trigger significant state hazardous waste tax assessments and fees unless exempted by being performed under an agreement with DEC.

The governor and the Senate propose to extend this exemption to parties remediating sites under the supervision of the Environmental Protection Agency or in a municipal cleanup program like the New York City Office of Environmental Remediation's Voluntary Cleanup Program. The Assembly bill declines to change the current limited fee exemption.

Restriction of Tangible Property Tax Credit. The governor's bill proposes to restrict the tangible property tax credits (TPCs)² for sites entering the BCP after July 1, 2014, to those (1) that have been vacant for 15 years or more; (2) that have been vacant and tax delinquent for 10 years or more; (3) where the cost of investigation and cleanup exceeds the appraised property value in a clean condition; or (4) which are priority economic development projects, as determined by the state's Economic Development Corporation.

The Assembly bill has similar—but somewhat better defined—eligibility requirements for sites that apply to the BCP after Jan. 1, 2016:

- **Vacancy:** a vacant lot for at least four years; or vacant lot with a building or buildings vacant for two years;
- **Underutilization:** a site with buildings containing no more than 50 percent of the permissible floor area under applicable zoning utilized; or a value of equal to or less than 70 percent of the average valuation of the land in the county or city where the site is located; or certification by a municipality as underutilized as defined above;
- **Functionally obsolescent:** sites that are intermittently or irregularly occupied, or that have structures that can no longer be functionally or economically used for their original intended purpose because of defects, configuration, or obsolescence;
- **"Upside Down":** the projected cost of the remediation is more than 33 percent of the certified appraised value of the property absent contamination;
- **Affordable Housing:** at least 70 percent of the floor area will be for affordable housing, and
- **Priority Economic Development Projects:** projects that generate certain quantity of jobs based on type of business and that are certified to be consistent with local revitalization or development plan.

The Senate bill is largely similar to the Assembly's but, as noted above, adopts these as eligibility tests for BCP eligibility and not just for qualifying for the tax credits.

Definitional Changes to Qualifying Site Preparation and Tangible Property Credit Costs. The governor proposes to restrict the kinds of costs that would be eligible for the SPCs (site preparation (cleanup) tax credits) to those that are "attributable to" activities specified in a DEC decision document and "directly associated with actual preparation-related construction." This change could have the effect of excluding costs like excavation and various soft costs that many developers claim for SPC treatment.

These provisions appear to apply to sites currently in the BCP, so that expenses after July 1, 2014, (and possibly even those before that date) will be deemed ineligible for the SPCs. The governor also proposes a similar tightening of expenses qualifying for the TPC (tangible property (development) tax credits) and an exclusion for costs paid to "related parties."

The Senate bill would cap the total SPCs for any project at \$15 million but would otherwise retain the current definitions of eligible costs. The Assembly bill makes no changes to the current law.

Discussion

These proposed changes adopt many of the suggestions that have been made by a broad spectrum of community groups, environmental activists, real estate and business interests and the Environmental Law Section of the New York State Bar Association. As such, they represent a major step forward in the debate surrounding BCP reform.

However, they raise a number of significant issues, including the following:

Definition of brownfield. The governor's and Assembly's bills simplify the current subjective definition of "brownfield site" and are favored by most observers. The Senate bill, counterintuitively, attempts to reinvent the definition entirely. It would exclude from the BCP, and therefore from the eligibility for SPCs and COCs, many sites that would currently qualify for the BCP. It would create greater complexity and uncertainty in the application process and could lead to a situation where certain sites that are not contaminated enough to qualify for the BCP, and are too contaminated to be eligible for the NY RAPID program, would have no option of being cleaned up under DEC supervision.

Eligibility for TPCs. The governor's proposed eligibility tests have been criticized by many commenters as far too stringent and would result in very few sites actually being able to qualify for TPCs, especially in New York City. The Senate criteria—if used for purposes of eligibility for TPCs instead of the BCP itself—are a good starting point for modifying the governor's proposal. The Assembly bill's acceptance of many of these tests in its bill is a hopeful sign of an emerging consensus on this issue.

Deadlines for completion of cleanup. Both the Assembly and Senate bills have blanket extensions, to Dec. 31, 2025, of the time by which sites must obtain COCs to qualify for tax credits. This approach has broad support within the brownfield community.

The governor's proposal is much more restrictive, both in terms of time frames and in terms of consequences for sites not meeting the applicable deadlines. Requiring sites that have been in the BCP since mid-2008 to receive COCs by the end of 2015 is not unreasonable. But setting a deadline of December 2017 for sites that have entered the BCP as late as mid-2014 is not, since by DEC's own estimate the average BCP takes more than three years to complete a cleanup and obtain a COC.

Even more unfair is the governor's proposal that sites not achieving COCs by the applicable deadlines be automatically "terminated" from the BCP entirely. Such an approach seems contrary to public policy, and its punitive nature is exacerbated by the fact that it would apparently apply to sites already in the BCP. The provision also seems unnecessary in light of DEC's existing authority

to terminate sites that it determines are not adequately progressing toward cleanup completion.

Limiting the types of project costs eligible for SPCs and TPCs. The Senate and Assembly bills leave current law unchanged. However, the governor's bill would create new eligibility criteria for these expenses. While an understandable attempt to curb the zeal of some developers in claiming BTCs, the governor's proposal would cause serious administrative problems by creating inconsistency between accounting for these expenses under federal and state law. Moreover, the types of expenses eligible for capitalization under federal law are well defined, having been subject to decades of IRS interpretations and rulings, as well as case law. By contrast, state tax authorities would be starting from scratch in determining which expenses are eligible. And, given the proposed definitions, those decisions will have to be made on a site-specific basis. This is a recipe for years of uncertainty, confusion and litigation. These problems will be exacerbated if these new definitions are applied retroactively to already-incurred expenses for sites currently in the BCP.

Conclusion

The governor's office, the Senate, and the Assembly have each laid down their markers in the debate over revising the BCP. In many respects, the three current proposals are not that far apart. Some of the proposed changes could do real damage to the program. However, there appears to be consensus around many of the proposals, and there is ample room for compromise on the remaining issues.

However, time for making these revisions is growing short. As the clock ticks inexorably toward the expiration of the tax credits at the end of 2015, many site owners and developers are concerned about the continued viability and relevance of the program. Now that BCP reform has been divorced from the budget process, it will take a determined effort by those who care about brownfield redevelopment in New York State to push the Legislature and the governor's office to resolve their differences and enact BCP reform legislation in the coming months. Failure timely to accomplish this task, or to extend the brownfield tax credits, could be a fatal blow to a program that is consistently producing robust cleanups and attracting significant investment for urban redevelopment in New York State.

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Endnotes:

1. The Site Preparation Credit may be claimed for cleanup costs and all costs that prepare the site for redevelopment including but not limited to demolition, excavation, dewatering, sheeting, shoring, security, etc). BCP applicant may claim a tax credit of 28 percent to 50 percent of their SPCs depending on the level of cleanup.

2. The TPC is based on the value of the improvements constructed on the BCP site. Applicants may claim 10 percent to 24 percent of the improvements subject to a cap of \$35 million or three times the amount of the SPCs, whichever is less.

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