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BROWNFIELDS

2015 AMENDMENTS TO NEW YORK LAW

After a number of failed attempts over the past several years, the New York State Legislature and Gov. Andrew Cuomo (D) reached agreement as part of the 2015-16 state budget on sweeping amendments to the New York State Brownfield Cleanup Program (BCP). This achievement is of great significance in light of the scheduled expiration, on Dec. 31, 2015, of tax credits under the program. This article reviews the key elements of the amended statute, evaluates their significance and identifies some of the important unresolved issues that will need to be addressed in implementing the new law.

Analysis of the 2015 Amendments to the New York Brownfields Cleanup Program

By David J. Freeman and Larry Schnapf

1. Extensions for Certificates of Completion; Grandfathering of Existing Sites

Under the Brownfield Cleanup Program prior to its amendment, all sites in the program needed to obtain Certificates of Completion (COCs) of cleanup from the New York State Department of Environmental Conservation (DEC) prior to Dec. 31, 2015, in order to receive tax credits earned for qualifying cleanup and development expenses. These tax credits can be quite substantial; over the life of the program, they have averaged over $10 million per site.[1]

[1] See B. Hersh, New York State Brownfield Cleanup Tax Analysis (New York University Schack Institute of Real Estate, 2014). The study indicates that the average tax credit for sites

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The amended statute[2] extends the eligibility for tax credits to all sites that are accepted into the program[3] by Dec. 31, 2022, and obtain their COCs by March 31, 2026. However, as noted below, the BCP amendments revise the tax credit scheme to make it less generous. Sites currently in the program are grandfathered into the existing tax credit scheme, but only if they receive their COCs by certain intermediate deadlines. Sites that entered the program[4] prior to June 23, 2008, must obtain their COCs by Dec. 31, 2017. Sites entering the program between June 23, 2008, and the later of (a) July 1, 2015, or (b) the date by which DEC proposes a rule—required by the new amendments—defining the term ''underutilized'' must obtain their COCs by Dec. 31, 2019.

To the great relief of program participants, these deadlines are relatively feasible and should allow most sites making reasonable progress toward cleanup to remain eligible for tax credits. By contrast, the legislation proposed last year by Gov. Cuomo not only would have denied tax credits for sites that had not obtained their COCs by Dec. 31, 2017, but would also have terminated those sites from the program, thereby denying them even the release and covenant not to sue that accompanies a COC. The governor's bill proposed in January would have grandfathered sites in the program prior to June 23, 2008, only if they obtained their COCs by the end of 2015; all other sites in the program as of April 1, 2015, would have had only until Dec. 31, 2017, to obtain COCs.

As reasonable as these new deadlines are for most sites, they may still create problems for some of the older and more complicated ''legacy'' sites, which now must complete their cleanups relatively promptly or lose the benefits of the more generous tax credit provisions for which they originally qualified.

2. Definition of Brownfield Site

The current definition, based on federal law, is a site ''which may be complicated by the presence or potential presence'' of a contaminant. That definition has proved problematical for two reasons: (1) what ''may complicate'' the development of a site is far from clear, and in any event DEC does not have the real estate expertise necessary to make that determination; and (2) the ''potential presence'' component means, at least theoretically, that a site can qualify based on the *possibility* that it is contaminated even if later testing shows that it is not.

The new definition is much more straightforward: a site that has contamination in excess of standards, criteria or guidance adopted by DEC that are applicable based on the reasonably anticipated use of the property. Since DEC has already adopted standards that are protective of public health and the environment based on proposed end uses,[5] the new definition should be a relatively bright-line test as to which sites will qualify for admission to the Program.

One important feature of the new definition is that it makes obsolete DEC's rule of thumb that contamination must be due to an on-site source for a site to qualify for the Brownfield Cleanup Program. DEC has for years used this standard to deem ineligible sites contaminated by ''historic fill'' brought in from off-site or contaminated solely by vapors or groundwater migrating from off-site sources. These sites should now qualify, as long as the contaminants are in excess of DEC standards. However, sites accepted into the program based on the presence of groundwater contamination or vapor intrusion from off-site sources will not be eligible for tangible property tax credits.

Another feature of this definition is what it doesn't say: who gets to decide the ''reasonably anticipated site use,'' which in turn determines what cleanup standards will apply. The governor had proposed that reasonably anticipated use be determined by DEC. The Senate bill provided that the reasonably anticipated use be determined by the BCP applicant. The amendments, as enacted, are silent on this issue. In our view, this resolution favors the applicant: If the applicant states that it intends to develop the site for a specific purpose, that should presumptively be the ''reasonably anticipated use'' of the site.

A third aspect of the new definition is elimination of the ''maybe'' (suspicion of contamination) component: Applicants will have to demonstrate, by submission of a Phase II report or other sampling data, that the site is actually contaminated above DEC standards. This change comports with DEC's current procedures but will cause difficulty for prospective purchasers who cannot obtain the existing owner's permission to perform intrusive testing prior to closing.

3. New Categories of Eligible Sites

The amended BCP law now allows Class 2 sites[6] that are owned by or under contract to be purchased by a party that qualifies as a volunteer[7] to be eligible for the program where, at the time of the application, DEC has not identified a responsible party with the ability to pay for the investigation or cleanup of the site. In addition, the legislation allows interim status or permitted Resource Conservation and Recovery Act facilities that are owned by or under contract to be transferred to a volunteer to be eligible for the BCP where, at the time of the application, DEC has not identified a responsible party with the ability to pay for the investigation or cleanup of the site.

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admitted after the statute was amended in 2008 were much lower—averaging about $1 million per site as of the date of the report—than the pre-2008 sites, whose tax credits averaged about $14 million per site.

[2] S. 2006B/ A. 3006—B Part BB; signed by Gov. Cuomo April 13 (72 DEN A-20, 4/15/15).

[3] For purposes of determining tax credit eligibility, the key date is that on which DEC issues a letter advising a site that it is accepted into the Program.

[4] For purposes of determining which category a site falls under for purposes of grandfathering, the key date is the effective date of the Brownfield Cleanup Agreement between DEC and the applicant, which can be several weeks after the site's acceptance into the Program.

[5] See 6 NYCRR § 375-6.

[6] A Class 2 Site is one that is listed on the State Registry of Inactive Hazardous Waste Disposal Sites as being a ''significant threat to the public health or environment - action required''.

[7] A Volunteer is a Program applicant whose liability for site contamination arises solely as a result of its involvement with the site subsequent to the disposal of hazardous waste or discharge of petroleum and who otherwise exercises appropriate care with respect to such substances at the site. N.Y. Env. Cons. Law § 27-1405(1)(b).

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The RCRA exemption should be particularly useful for abandoned RCRA-regulated properties in upstate or western New York, and for the redevelopment of downsized RCRA-regulated facilities, by allowing portions of these sites subject to RCRA permits to be sold to developers.

4. Eligibility for Tangible Property Tax Credits

Under current law, all program applicants are entitled to claim tangible property tax credits (known as the Tangible Property Credit Component or TPCC) based on the cost of constructing a new development on a brownfield site. Such credits are subject to a cap of $35 million for non-industrial projects or three times the site preparation costs, whichever is less. These caps were added in 2008 to address concerns about the overall costs of the Brownfield Cleanup Program.

Despite studies that indicate that the caps have achieved this goal, the governor's budget proposal would have eliminated the TPCC as an ''as of right'' feature. Instead, all applicants would have been required meet a second set of criteria to be able to claim tangible property credits: (i) at least half of the site is located in an Environmental Zone (En-Zone)[8], (ii) the property is utilized for affordable housing, or (iii) the property is ''upside-down''—i.e., remediation is projected to cost more than the value of property if it were uncontaminated.

The legislation as enacted included a modified version of these criteria, or ''gates,'' to qualify for TPCCs. The most significant change was that the gates apply only to properties in New York City. Outside of New York City, eligibility for TPCCs will remain available to all developers that otherwise qualify under the BCP, as per existing law. The upside-down gate was also modified so that a property can qualify if remediation is projected to cost over 75 percent (rather than 100 percent) of the appraised value of the property at the time of the application. The appraised value must be based on an ''as if'' hypothetical assumption that the property is not contaminated. It should be noted that there are a variety of ways to calculate property value (e.g., income stream, cost to repair and comparison sales), and the law does not specify which approach is to be used.

To soften the impact on New York City brownfield sites in that might not meet the upside-down test, the legislation adds what amounts to a fourth gate: that the property is ''underutilized.'' Representatives of the governor and the Legislature were unable to agree on a definition of ''underutilization'' prior to the April 1 budget deadline. Consequently, the law instructs DEC to propose a definition by July 1, 2015, after consultation with New York City and the business community. If DEC fails to publish the draft rule by July 1, the effective date of certain of the new tax credit provisions is delayed until such time as the definition is published. The rule must be finalized by Oct. 1, 2015 (although the statute does not specify what happens if the Oct. 1 deadline is not met).

Another casualty of the budget deadline was that no agreement was reached on a definition of ''affordable housing.'' Instead, DEC is required to publish a definition of that term by June 8.

The amendments specify that sites are not eligible for tangible property tax credits where the property was previously remediated under the Brownfield Cleanup Program, the state superfund program, the Environmental Restoration Program for municipal sites, the Oil Spill Program of the Navigation Law or RCRA, such that the site could be developed for its then-intended use. It is unclear how this provision will be interpreted in circumstances where, for example, a prior cleanup achieved a track 4 cleanup qualifying the site for restricted residential use, and the applicant would like to perform a track 1 or track 2 cleanup to support a multifamily development.

5. Tangible Property Tax Credit Changes

Under current law, the base percentage for TPCCs was either 10 percent (for individual taxpayers) or 12 percent (for corporate taxpayers), but applicants could qualify for a TPCC percentage of up to 24 percent depending on certain site-specific criteria. The legislation reduces the base percentage for all applicants to 10 percent and retains the 24 percent cap, but changes the formula for the TPCC bonus. Applicants will now be eligible for an extra 5 percent for affordable housing projects as defined in the regulations to be promulgated by DEC, sites located in Environmental Zones; sites located within a Brownfield Opportunity Area (BOA)[9] where the development conforms to the plan for a BOA certified by the Department of State, and sites used primarily for manufacturing activities.

The amendments also limit TPCCs to tangible property with a useful life of at least 15 years. This change was adopted to exclude costs of artwork and furniture that applicants were claiming for hotels or rental property. TPCC-eligible costs now expressly include demolition and foundation costs that are not included in the site preparation cost component, as well as costs associated with non-portable equipment, machinery and associated fixtures and appurtenances used exclusively on the site regardless of their depreciable life for federal income tax purposes.

6. Site Preparation, Groundwater Costs

Under the current law, applicants are entitled to two categories of site preparation costs (SPCs). The first category includes those costs necessary to qualify the site for a Certificate of Completion, signifying actual or anticipated site cleanup to the satisfaction of DEC. The second category of SPCs are those costs to prepare the property for development. Thus, the SPC includes not only cleanup costs but also demolition, soil excavation, scaffolding, support of excavation and dewatering expenses. Depending on the cleanup track achieved, ap-

[8] An En-Zone is a census tract with a poverty rate of at least 20 percent and unemployment rate of at least one and one-quarter times the statewide unemployment rate based on the most recent five-year American Community Survey (ACS) or areas with poverty rate of at least twice the poverty rate for the county in which the areas are located based on the most recent five-year ACS.

[9] The BOA Program, established in the original BCP legislation, provides municipalities and community-based organizations with assistance, including up to 90 percent of the eligible project costs, to complete revitalization plans and implementation strategies for designated areas or communities affected by the presence of brownfield sites, and to perform site assessments for strategic brownfield sites in those areas.

plicants may claim between 28 percent and 50 percent of their SPCs and five years of groundwater remediation costs.

Because of the perception that SPCs were being earned by excavation and foundation costs unrelated to contamination, the new legislation restricts SPCs to those expenses necessary to implement a site investigation or remediation, or to qualify for a COC. For example, if a site has five feet of contaminated soil but the soil is excavated to a depth of 15 feet to accommodate the development, it is conceivable that DEC (and, therefore, the New York State Department of Taxation and Finance, which audits tax credit applications) will take the position that only the expenses related to excavating the first five feet of contaminated soil will be eligible for SPCs. Furthermore, eligible SPCs will not include foundation costs in excess of those required for cover systems required by regulations applicable to the site.

The amendments also expand, in certain respects, the types of remedial costs that qualify for SPCs. It is now clear that applicants may claim costs for abatement of asbestos-containing building materials, lead-based paint or Polychlorinated biphenyls for existing buildings that will remain onsite. In addition, SPCs can be claimed for up to five years after issuance of a COC for costs of implementing institutional and engineering controls, an approved site management plan, and an environmental easement.

7. Real Property, Insurance Premium Credits

BCP tax credits based on property taxes and environmental insurance premiums will no longer be available to sites entering the program after the later of July 1, 2015, or the date by which DEC proposes regulations defining ''underutilized.''

8. Payments to Related Parties

It is not unusual in real estate development projects for work to be performed through entities that have common ownership with the developers and contractors whose services are critical to the organization, financing and construction of the project. Concerned that applicants were artificially inflating service fees to increase their SPCs, the governor proposed eliminating all ''related party'' (10 percent or more common ownership) payments from the calculation of tax credits.

The law as enacted is far less Draconian, restricting only related party service fees (defined as fees calculated as a percentage of project or acquisition costs) from being claimed for SPC or groundwater remediation cost tax credits. However, they may be claimed as TPCCs to the extent to which they are earned and actually paid.

9. BCP-EZ Program

The new amendments satisfy a longstanding call to establish a streamlined cleanup program for sites that are willing to waive tax credits. Such a program, DEC's Voluntary Cleanup Program, existed prior to the Brownfield Cleanup Program but was never statutorily authorized and was closed to new applications when the BCP was established. The legislation authorizes but does not require DEC to promulgate rules that would govern administration of the BCP-EZ program. However, cleanups under BCP-EZ must still satisfy the requirements of sections 27-1415 and 27-1417 of the Environmental Conservation Law. These sections specify the major elements of the BCP, including the submissions required, cleanup tracks and requirements for citizen participation. DEC is expressly permitted to waive certain public participation requirements and to allow applicants to petition the DEC for more permissive cleanup standards under certain circumstances. However, given the remaining statutory requirements, it is unclear how much the DEC will be able to streamline the existing BCP requirements, and whether those changes will be enough to make it worthwhile for sites to forgo the tax credits to which they would otherwise be entitled under the BCP.

10. Waiver of State Oversight Costs

The requirement to reimburse DEC for its oversight costs has been a sore subject among some BCP applicants. The amendments address this issue by providing that, after July 1, 2015, oversight fees will be waived for volunteers. Other participants will still be required to pay oversight costs, but DEC can negotiate a flat fee based on projected future costs of negotiating and implementing the site cleanup agreement.

11. Waiver of Waste Disposal Taxes, Fees

New York state law imposes both a program free and a special assessment tax on those who generate and dispose of hazardous waste. Designed originally to incentivize manufacturers to reduce the use of hazardous substances in their operations, these taxes and fees have been, counterintuitively, construed also to apply to those who are excavating hazardous waste in the context of site cleanups. The taxes and fees can be substantial, sometimes running into the hundreds of thousands of dollars.

Exemptions are provided for cleanups conducted under specific state programs, including the Brownfield Cleanup Program, or under a written agreement with the DEC. However, sites cleaned up under municipal programs such as the New York City Voluntary Cleanup Program (VCP) are not covered by those exemptions.

The amendments address this anomaly by providing an exemption for state hazardous waste taxes and fees for materials generated in connection with cleanups overseen by a municipality which has a memorandum of agreement (MOA) with the DEC governing such cleanups as of Aug. 5, 2010. This date happens to be the effective date of the MOA between the DEC and the New York City Office of Environmental Remediation regarding the VCP. Thus, it appears that this exemption applies retroactively to remediation waste generated by projects enrolled in the VCP since Aug. 5, 2010.

12. Additional Program Changes

The legislation makes a number of ''fixes'' to the Brownfield Cleanup Program that are not headline-grabbing but will affect certain sites, eliminate statutory glitches, and/or conform the statute to current DEC operating practices. These changes include:

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■ Extending the time, from 10 to 30 days, by which the DEC must inform the applicant that its application is deemed complete, and trigger the time frame for an eligibility determination from the receipt of a ''complete application'';

■ Requiring every report to include a schedule for the next submission;

■ At sites where an environmental easement is needed, mandating execution of the easement at least three months prior to the anticipated date of COC issuance;

■ Authorizing issuance of COCs where remediation has not yet been completed but will be achieved in accordance with schedules provided to the DEC;

■ Clarifying that COCs can be transferred by either the original or subsequent holder of the COC, to a successor having any real property interest (including a leasehold interest) in all or a portion of the site;

■ Authorizing the DEC to require that it be provided site access for inspection, monitoring, maintenance or sampling;

■ Allowing TPCCs to be earned for up to 120 months (rather than 10 tax years) after the issuance of a COC, to address the situation where an applicant may have one or more tax years shorter than 12 months;

■ Allowing expenses deducted under the now-expired Internal Revenue Code Section 198, rather than capitalized, to be counted in computing limitations for TPCCs; and

■ Clarifying that TPCCs are available for sites ''placed in service'' before the issuance of a COC.

Conclusion

The BCP amendments, as enacted, preserve much of what is valuable about the state's Brownfield Cleanup Program, while providing additional certainty and clarity to both the environmental community and developers. The main accomplishments are the extension of deadlines for obtaining COCs, with relatively reasonable grandfathering provisions, and the maintenance of the structure of the site preparation credits while cutting back on some areas where there was a potential for excess credits. The creation of a BCP-EZ program for sites for applicants willing to waive tax credits could be significant, provided that the DEC is able to make the program sufficiently streamlined.

New restrictions on the ability of New York City sites to obtain TPCCs is more problematic. While some limitation on these credits was inevitable, the specific provisions enacted may go too far in restricting their availability. Much will depend on the regulations to be promulgated by the DEC regarding sites that qualify for such credits because they are ''underutilized.''

On the whole, however, the amendments represent a thoughtful and well-designed extension of a program that has proven to be of significant benefit in the cleanup and redevelopment of New York State's many brownfield sites.

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