



New York Lawmakers Agree on 10-Year Extension of Brownfield Law

Changes to Tax Credits are Less Drastic than Previously Anticipated

In a departure from his budget proposal, the Legislature negotiated changes with the Governor to extend the tax credits for New York's Brownfield Cleanup Program (BCP) with relatively modest changes to BCP eligibility requirements. The Governor's budget proposal would have limited the lucrative "tangible property" tax credit, which is the credit based on a percentage of the cost of constructing a new development on a Brownfield site, to (i) properties located in an environmental zone, (ii) properties to be utilized for affordable housing, or (iii) "upside down" properties – where the remediation of the property is projected to cost more than the value of the remediated property. Under the bill agreed to with the Legislature, however, those limits (with modifications) will apply **only** to properties located in New York City. In other words, outside of New York City, eligibility for the tangible property tax credit will remain available to all developers that otherwise qualify under the BCP, as per existing law.

The news for New York City-based developments is also not all bad. The final bill adds a fourth category of properties eligible for the tangible property tax credit for "underutilized" properties – to be defined by regulation, and the criteria for upside down properties were loosened so that a property can qualify if the remediation is projected to cost over 75 percent – rather than 100 percent – of the value of the remediated property. Despite these revisions, the New York BCP will continue to provide significant tax incentives to developers seeking to clean up and redevelop contaminated sites and the extension will resolve the uncertainty over the future of the program that existed for several years.

Other changes include:

- > **“Grandfathering” of Existing Tax Credits.** Amendments to the law as they relate to all eligible tax credits are tied to the dates by which a Brownfield site is accepted into the BCP and obtains a Certificate of Completion (COC) from the Department of Environmental Conservation (DEC).
 - Existing provisions related to the tax credits would remain applicable to those sites that either (i) were admitted into BCP prior to June 23, 2008 and obtained their COC by Dec. 31, 2017, or (ii) were admitted into the BCP between June 23, 2008 and July 1, 2015 (or the date by which DEC proposes regulations defining “underutilized,” whichever is later) and obtained a COC by Dec. 31, 2019.
 - Amendments related to the tax credits are applicable to those sites that are accepted into the BCP between July 1, 2015 (or the date by which DEC proposes regulations defining “underutilized,” whichever is later) and Dec. 31, 2022, so long as they obtain a COC on or before March 31, 2026.
- > **Definition of “Brownfield Site.”** The amendments redefine “Brownfield Site” to mean “any real property where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by [DEC] that are applicable based on the reasonably anticipated use of the property.” This is a welcome change which ties eligibility to cleanup objectives and moves away from the prior vague definition that required the presence of contamination that “complicates” redevelopment.
- > **Creation of a New EZ Program.** The amendments empower DEC to adopt regulations to implement a program for “the expedited investigation and/or remediation” of brownfield sites (BCP-EZ program) provided the developer agrees to take no tax credits associated with the program. The EZ Program, however, appears to provide a minimal departure from existing remediation and public notice requirements, and thus may not actually provide for an expedited investigation as advertised. One area where a more expedited process may work is for Track 4 – restricted use – cleanups where the applicant would be allowed to use site-specific data to demonstrate that the concentration of the contaminant in the soils reflects background conditions and, in that case, a contaminant-specific action objective for such contaminant equal to such background concentration may be established.
- > **Inclusion of Class 2 Sites.** The amendments allow in class 2 Superfund sites that are being remediated by non-culpable volunteers. Previously, such sites were deemed ineligible even if the party seeking to remediate the site had no role in the contamination.
- > **Change in DEC Oversight Costs.** The amendments eliminates the payment of DEC oversight costs for volunteers, and permits a flat fee charge to participants.
- > **Related Service Fee.** The amendments address a perceived problem related to the computation of service fees charged to the Brownfield applicant by a related party and the calculation of tax credits. The concern was that these service fees could be inflated as a way to increase the remediation or site preparation costs, and result in associated increases in the ceiling of eligible tangible property credits. The amendments provide that such service fees cannot be claimed as eligible site preparation or remediation costs until they are earned and actually paid, and the

portion of the tax credits related to such fees cannot be claimed until the taxable year when the subject property is placed into service. This limits the use of such fees as a way to inflate costs that are used to calculate the ceiling for tangible property credits. That ceiling is deemed to be *the lesser of \$35 million for residential/commercial projects (\$45 million for industrial projects) or three times the amount of eligible site preparation and onsite groundwater remediation costs.*

- > **Definition of Eligible Site Preparation Costs and Groundwater Remediation Costs.** The definition of eligible “site preparation” and “onsite groundwater remediation” costs is critical because these costs are eligible for tax credits that range from 28 to 50 percent of such actual costs, and, as noted, those costs are often used as the basis for calculating the ceiling for a project’s tangible property tax credits. The amendments provide a more specific and detailed description of eligible costs, requiring such costs to be necessary to implement a site investigation or remediation, or to qualify for a COC. Eligible costs include those related to excavation, demolition, engineering and environmental consulting costs, legal costs, transportation and disposal of contaminated soil, physical support of excavation, and dewatering.
- > **Increased Tangible Property Tax Credit Percentage and Changed Definition.** The amendments limit the tangible property credit to only costs for tangible property with a useful life of at least fifteen years. Certain projects, however, will be eligible for a higher percentage tangible property credit, which in a general sense is a tax credit calculated based on a percentage of the cost of constructing the building on the Brownfield site. Under existing law, that percentage is either 10 or 12 percent. Under the amendments, that percentage can be increased in five percent increments, and total as much as 24 percent of the development costs, with five percent bonuses for sites that are cleaned up to Track 1 standards (highest level of cleanup), located in En-zones or a Brownfield Opportunity Area (BOA), or developed for manufacturing or affordable housing.

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