State Budget Amends and Extends Brownfield Cleanup Program

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New York state finally has a budget. Buried among hundreds of pages of text, and overshadowed by high-profile issues like sentencing reform and a new stadium for the Buffalo Bills, are provisions of great importance for developers, environmental advocates, and community groups: an extension and revision of the state's Brownfield Cleanup Program (BCP).

New York state has one of the most robust and successful brownfield programs in the country. Over the course of its 19 years, over 1,100 moderately- to severely-contaminated sites have been accepted into the BCP. Through the end of 2021, cleanups have been completed at 506 sites in 40 counties across New York state, with the sites being repurposed for businesses, housing, schools and other uses. 50% of completed BCP projects have been in low-income or environmental justice communities and Brownfield Opportunity Areas (areas with a large number of brownfield sites, as determined by the Department of State). Another 518 projects are in various stages of the cleanup process.

The BCP is not an inexpensive program for the state, having generated nearly $2.8 billion in tax credits for BCP applicants. It has, however, paid big dividends, not only in cleaning up and transforming contaminated sites, but also in economic activity. A recent New York University study estimated that the BCP has generated over $17.2 billion in private investment, for a return on investment of $6.63 of cleanup and redevelopment for every dollar of tax credit. The BCP also has been a critical tool for the development of affordable housing, with over 6,400 affordable housing units constructed on brownfield sites.

The tax credits, which in many respects drive the BCP, were scheduled to expire at the end of 2022. Thus it was of great importance to supporters of the BCP that it be extended during this legislative session. There were also a large number of modifications that had been proposed by the Legislature and other groups to significantly streamline and improve the program. Some of those suggestions were adopted, but many others were not.

Key Elements of the Revised Brownfield Cleanup Program. The major provisions of the 2022 BCP amendments include the following:

- Extending various deadlines under the BCP, including a 10-year extension for sites to be admitted into the Program and qualify for tax credits;
- Adding opportunities to obtain tax credits for New York City sites in "disadvantaged communities" and sites used for renewable energy production;
- Providing additional tax incentives for sites in disadvantaged communities and renewable energy sites across the state;
- Clarifying eligibility provisions for affordable housing tax credits; and
- Adding a $50,000 fee for sites admitted into the BCP.

Extension of Deadlines. The most critical feature of the amendments is a 10-year extension of the deadline for sites to be entered into the BCP and to qualify for tax credits. Without the extension, the BCP would have gradually ended. The deadline for admission is now Dec. 31, 2032. A Certificate of Completion (COC), signifying cleanup has been completed to the satisfaction of the New York State Department of Environmental Conservation (NYSDEC) and providing eligibility for tax credits, must be obtained by Dec. 31, 2036.

Additional deadline extensions are available for sites with COCs issued from July 1, 2015 to July 24, 2021. For these sites, tax credits for "site preparation" costs (*i.e.*, the costs of a cleanup) may be claimed for seven (rather than five) tax years after a COC is issued. For post-COC site preparation costs, the extension is 84 months. Tax credits for groundwater cleanup costs can also be claimed for seven tax years rather than five years after a COC is issued.

Certain sites also have additional time after receiving COCs to claim tax credits for "tangible property" (*i.e.*, construction/development) costs. Sites receiving COCs between March 20, 2010 and Dec. 31, 2015 now have 180 months, rather than 120 months, to claim tangible property credits. And if NYSDEC determines that a delay in receiving a COC was due to the COVID pandemic (for sites receiving COCs between March 20, 2010 and Dec. 31, 2011), the credits may be claimed for 144 months instead of 120 months.

New Eligibility Criteria for Tax Credits for Sites in New York City. Sites in most areas of the state automatically qualify for both site preparation and tangible property tax credits when they are admitted into the BCP. Since 2015, however, sites in New York City can obtain tangible property credits only if they are "underutilized," "upside down," at least half of the site is located in an "Environmental Zone," or the site will be devoted to affordable housing.

The 2022 amendments provide that New York City sites now can also qualify for tangible property credits if they are (1) within a "disadvantaged community" in a "brownfield opportunity area" (areas with a high concentration of brownfield sites), or (2) if they will be developed as a "renewable energy facility site." Qualification for tangible property credits using these new criteria is subject to NYSDEC review and approval. Notably, the definition of "disadvantaged community" appears to be very narrowly drawn.

Additional Tax Credits for Sites in Disadvantaged Communities and Renewable Energy Sites. The amendments allow sites in "disadvantaged communities" and "renewable energy facility sites" to claim tax credits for an additional 5% of tangible property costs. As noted above, the definition of a disadvantaged community is quite restrictive. It remains to be seen whether the additional tax credit for renewable energy sites will be sufficient to spur significant renewable energy projects.

Affordable Housing. For New York City BCP sites to qualify for as affordable housing for tangible property tax credit purposes, an affordable housing regulatory agreement must be submitted to NYSDEC before a COC is issued. This requirement is problematic because of changes in the affordable housing program, pursuant to which such agreements are no longer finalized until after a project is constructed, which is well after the NYSDEC issues the COC. This timing issue puts affordable housing tangible property tax credits at risk.

As a result, a coalition of affordable housing, environmental, and brownfield advocates urged that the BCP legislation be amended to clarify that projects that receive affordable housing agreements after COCs are issued would still be eligible to claim affordable housing tangible tax credits. Unfortunately, the statutory revisions did not address this issue.

Separately, the Legislature amended the definition of an "affordable housing project" to include a new category of projects that would qualify as affordable housing for BCP tax credit purposes. The revised definition also now authorizes NYSDEC, after it consults with the State Division of Housing and Community Renewal, to exclude certain projects from qualifying for affordable housing tax credits.

This provision appears to be directed at certain affordable housing projects that are occupied by residents earning between 100% and 130% of area median income (AMI). NYSDEC now has the power to limit eligibility for affordable housing tangible property tax credits to those portions of projects reserved for residents earning below 100% of AMI.

Application Fee. To fund staffing at NYSDEC to administer the BCP, the statute adds an upfront fee of $50,000 to be paid by applicants once a site is admitted into the program. The fee does not qualify for tax credits. When first proposed, the fee attracted significant opposition, primarily from developers of affordable housing and smaller and upstate developers, who might not be able to afford this cost before they obtain construction loans after a cleanup is complete and are ready to begin building.

As a result, the statute provides that a fee waiver is available upon demonstration of "financial hardship," and NYSDEC is required to adopt regulations regarding how financial hardship may be demonstrated. It is hoped that the regulations will provide for fee waivers or reductions for affordable housing projects and projects located in disadvantaged communities.

Issues Left Unaddressed by the New Statute. Many stakeholders in the program and other organizations, including the New York State Bar Association, had hoped that the opportunity to amend the statute would encourage the Legislature and the governor to make additional changes to the BCP to improve its effectiveness and streamline its administration. These proposed changes included:

- Expanding the effectiveness of the BCP in addressing soil vapor issues;
- Clarifying of the types of soil vapor-related expenditures that qualify for tax credits;
- Revising and expanding the definition of "underutilized" to allow more sites in New York City to qualify for tangible property tax credits; and
- Making certain technical amendments to the BCP tax provisions to clarify existing ambiguities and streamline the tax audit process.

None of those proposed changes were included in the 2022 amendments.

Conclusion

The 10-year extension of this important program is a win for developers, environmental advocates, and community groups that would like to see the many remaining brownfield sites in New York state cleaned up and made usable again. To those who were hoping for more far-reaching changes in the program, the 2022 amendments are somewhat of a disappointment.

NYSDEC has the opportunity to remedy some of these shortcomings through its pending proposals to change the Part 375 regulations, which govern state cleanup programs, and through the new regulations that the 2022 amendments require NYSDEC to draft. The extent to which NYSDEC will address problems administratively remains to be seen.

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