



BOUSQUET HOLSTEIN PLLC

Alert

Brownfields Practice Group

Brownfield Cleanup Program Changes in the 2015-16 Executive Budget

Syracuse, New York

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On Wednesday, January 21, Governor Andrew Cuomo released his proposed executive budget for the 2015-16 fiscal year. As anticipated, the budget bill addresses the Brownfield Cleanup Program (BCP) tax credits in detail. The BCP credits are scheduled to sunset for sites that do not receive a certificate of completion (CoC) from the NYS Department of Environmental Conservation (DEC) by December 31, 2015. An extension of that date until March 31, 2017 was passed by the Legislature in June 2014 but was vetoed by the Governor on December 29th.

The brownfield provisions of the bill are similar in many respects to the provisions proposed in the 2014-15 budget – a "two-gate" eligibility structure for the BCP tax credits, major curtailment of the credits for new BCP sites, and deadlines for sites currently in the BCP to obtain a CoC in order to preserve their credits. This year's version addresses a few of the most serious concerns raised in last year's Alert ¹, but not all of them. This year's proposal includes different "gates" through which an applicant must pass in order to obtain the tangible property credit component, clarifies the "grandfathering" provisions for sites accepted into the BCP before the April 1st budget deadline, and modifies some of the credit calculations proposed last year.

Under current law, a taxpayer may earn refundable New York State income/franchise tax credits for remediation and redevelopment activities, property taxes and on-site employment, and environmental insurance premiums for their BCP site. The credit for remediation and redevelopment activities, known as the Brownfield Redevelopment Tax Credit (BRTC), is the focus of the proposed changes. The BRTC has three components that are calculated based on whether the site was accepted into the BCP before, or after, the BCP credits were overhauled in June 2008. The 2008 law change limited the BRTC component for redevelopment costs (including buildings) to a multiple of eligible cleanup costs and an overall limit of \$35 million, or \$45 million for sites primarily used in manufacturing.

Effective Dates, Sunsets, and Grandfathering

The bill would make significant changes to the tax credits available to sites accepted into the BCP after April 1, 2015. Unlike last year's proposed changes, this year's bill would more clearly exempt ("grandfather") sites accepted prior to that date from the proposed tax credit changes.

The bill contains strict new sunsets. Current law denies tax credits to sites that do not receive a CoC by December 31, 2015. The bill would provide that sites which have entered into a brownfield site cleanup agreement prior to April 1, 2015 must receive a CoC on or before December 31, **2017** to preserve the tax credit structure they were accepted into (pre-2008 or post-2008). Otherwise, the tax credit calculations and eligibility criteria set forth in the bill for post-April 1 2015 sites (see below) would apply, including the requirement to seek eligibility for the modified tangible property credit component under one of the three "gates" described below. Last year's bill would have simply terminated sites from the BCP that did not receive a CoC by a target date, forcing the applicants to start a new application process. This year's proposal would eliminate the termination/re-application process and shift the site into the new tax credit structure.

Finally, sites accepted into the BCP after April 1, 2015 would have to receive a CoC by December 31, 2025 to qualify for any BCP credits. No sites accepted after December 31, 2022 would be eligible for BCP credits.

Comment: Compared to last year's proposal, this year's BCP credit grandfathering provisions would provide far greater certainty for taxpayers, although the 2017 CoC deadline may be too soon for some recently accepted sites.

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¹ <http://bhlawpllc.com/publication/governors-budget-curtails-brownfield-cleanup-program-tax-credits/>



BCP Credit changes affecting sites accepted on and after April 1, 2015

The bill includes several changes that would take effect for sites that receive notice of acceptance from NYSDEC on or after April 1, 2015. Many of the changes are similar to changes that the Governor proposed in his 2014-2015 Executive Budget during the 2014 Legislative Session, but some elements are new.

- **Separate Eligibility for the Tangible Property Credit Component (TPCC).** Like the 2014 Executive Budget, this year's proposal would establish separate and more restrictive eligibility requirements for the tangible property credit component, or TPCC—the so-called "second gate" for the TPCC. In order to be eligible, the bill would require an applicant to demonstrate to the satisfaction of NYSDEC that the site meets one of three tests:

- *Gate 1: $\geq 50\%$ In EnZone.* The applicant would need to demonstrate that at least half of the site is located in an Environmental Zone ("EnZone"), which the bill would also re-define;
- *Gate 2: Upside Down Sites.* The applicant would need to demonstrate that the site is economically "upside down" (i.e., the projected cost of the investigation and remediation exceeds the appraised value of the site without contamination); or
- *Gate 3: Affordable Housing.* The applicant would need to demonstrate that the site will be developed as an "affordable housing project." For rental housing, this would be a project offering at least 30% of its rental units to tenants whose incomes do not exceed 130% of the area median income ("AMI") and at least 20% of the units to tenants whose incomes do not exceed 90% of AMI. There are other tests for determining whether a cooperative or condominium project, and a single-family home project, would qualify as an "affordable housing project."

Comment: The proposal would preserve the two-gate approach to increase "targeting" of the TPCC. The Brownfield Task Force of the Environmental Law Section of the NYS Bar Association proposed an alternative to this approach in its January 8, 2015 memorandum². (Note: Phil Bousquet and Julia Martin contributed to the tax credit analysis and recommendations in the Task Force's report).

Last year's gates were for vacant or abandoned sites, upside down sites (same definition), and "priority economic development projects" as determined by the Department of Economic Development. This year's gates would provide more up-front certainty for taxpayers than the vacancy and PED project gates, although it is puzzling why the gates leave out other "targeted" sites or projects, such as manufacturing sites (which would receive a credit bump-up and already have higher credit limits), agribusiness, technology, and other job-creating activities. Regarding the affordable housing gate for single family homes, a further change would be required to enable those projects to be eligible for the TPCC.

- **New Applicable Percentage for Tangible Property Credit Component.** For sites meeting these new eligibility requirements, the TPCC would have an across-the-board base of 10% of eligible costs (curtailed as noted below), and new "bump-ups" to the applicable percentage—not to exceed 24%, in the aggregate—calculated as follows:

- An additional 5% for sites used primarily for manufacturing activities.
An additional 5% for qualified tangible property placed in service on brownfield sites located in an EnZone. Within 90 days of enactment of the bill, EnZones would be redrawn based the 2009-13 American Community Survey (ACS). At the request of NYSDEC, EnZone designations could be updated based on the most recent five-year ACS. Determination of whether a site is in an EnZone would be based upon the EnZone designations in effect as of the date NYSDEC notifies the BCP applicant that its application is complete.

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² <http://bhlawpllc.com/wp-content/uploads/2015/01/NYS-Bar-Environmental-Memorandum-1-8-15.pdf>



- o An additional 5% for qualified tangible property placed in service on brownfield sites located in a Brownfield Opportunity Area (BOA). Sites located in a BOA must provide a NYS Department of State certification of conformity with the BOA plan in order to be eligible for the bump-up.
- o An additional 5% for qualified tangible property developed as an affordable housing project (see requirements in Gate 3, above). The TPCC would be allowable only for the affordable housing units, based on a prescribed allocation formula.

The bill would not change the applicable percentage for the site preparation and on-site groundwater remediation credit components, but the calculation of those components (as well as the tangible property credit component) would change due to the exclusions and adjustments to the credit bases noted below.

Comment: The increased applicable percentage for manufacturing sites would be consistent with the higher TPCC limits available under current law (6X site preparation costs or \$45M), but because the proposal does not provide TPCC eligibility for these sites through an additional gate, only manufacturing projects located in Environmental Zones or on "upside down" sites would be eligible for this incentive. That seems counter to New York's long-standing desire to retain and import manufacturing jobs and capital investment.

Similarly, the increased TPCC applicable percentage proposed for sites located in a BOA also lacks a "gate" allowing BOA projects to claim the TPCC. If a site meeting one of the three proposed "gates" also happens to be in a BOA, then the applicant for the TPCC must certify that the site's development will conform to the BOA plan. To claim the TPCC after project completion, the taxpayer would have to include the Secretary of State's certification of BOA plan conformance with the tax return claiming the TPCC.

The new EnZones should only apply to sites for which BCP applications are submitted after the new EnZones are published (90 days after enactment of the bill). Otherwise, an applicant might not know whether the site is in the EnZone. Similarly, the EnZone update process should be more transparent and predictable than simply having NYSDEC request the EnZones to be updated. Public notice should be given, and EnZone changes should be effective only with respect to BCP applications submitted after a set date following publication by NYSDOL of the new EnZone census tract lists and maps (such as the first day of the following calendar quarter after publication).

- **Limitations on Eligible Tangible Property.** The bill would limit the costs eligible for calculating the TPCC only to those "costs associated with actual construction of tangible property incorporated as part of the physical structure" as well as "foundation costs constructed as part of the site cover that are not properly included in the site preparation component." Additionally, the bill would exclude costs paid to related parties (parties with 10% or more common ownership) and costs paid more than six months after being incurred.

Comment: These curtailments mirror last year's proposals, and would significantly cut back the TPCC for brownfield projects that manage to get through one of the three TPCC gates.

Taxpayers would have to dissect federal tax basis of each asset into costs that are or are not associated with actual construction, and then eliminate costs paid to related parties and costs paid more than 6 months after they were incurred. As we noted last year, these new calculations depart significantly from well-established federal tax rules relied on by both taxpayers and the New York State Department of Taxation and Finance in determining and auditing BCP credit claims. The ambiguity and lack of precedent surrounding the proposed language creates unnecessary uncertainty and could well lead to prolonged disputes over a broad spectrum of potentially eligible costs.



The sweeping exclusion of related party costs from the TPCC calculation is overbroad and unnecessary, as is the exclusion of costs paid more than six months after accrual. To the extent that the Executive branch is concerned with above-market and deferred service fees paid to insiders, sharply focused solutions could be crafted which would not have the sweeping and unintended consequences of the proposed language (see, for example, recommendation 7 in the January 2015 NYSBA memorandum³).

- **Timing Rule for the Tangible Property Credit Component.** The bill proposes to reduce the window for placing qualified tangible property in service (which triggers the tangible property credit component for that property) from 10 tax years after issuance of the CoC, to a 5-year window commencing with the "start of redevelopment," and all TPCC claims must be made within 10 years of the CoC issuance. This is very similar to last year's proposed change to the TPCC credit window.

Comment: The proposed changes to the TPCC window would generate considerable uncertainty, particularly as to the "start of redevelopment" and the 10-year window for claiming the TPCC. Other than effectuating a reduction of TPCC claims, it is not clear what this provision is intended to accomplish. Clarity could be obtained by defining the TPCC window as a fixed period of time (say, 120 months) starting from the first month in which qualified tangible property (QTP) is placed in service, and providing that that fixed window could not begin more than 24 or 36 months after the month in which the CoC is issued.

The bill would also allow TPCC claims for property placed in service prior to the issuance of the CoC. This codifies current administrative practices of the NYS Tax Department.

- **Changes to the Site Preparation and On-Site Groundwater Remediation Credit Components.** In addition to the sweeping changes proposed for the tangible property credit component, the bill also proposes changes to the other credit components of the Brownfield Redevelopment Tax Credit.

The bill would change the costs eligible for inclusion in the calculation of the site preparation credit component as follows:

- **Expand** eligible site preparation costs to include costs arising from NYS Department of Labor oversight related to asbestos, lead, and PCBs in buildings that will remain on the site;
- **Clarify** that site preparation costs would include building foundation costs up to an amount "equivalent to the cost of a site cover" for the same area covered by the foundation;
- **Limit** eligible site preparation costs only to those "directly associated with actual site preparation-related construction, including costs associated with all requirements of site remediation and easements required [under the BCP];"
- **Exclude** costs paid to related parties (10% or more common ownership); and
- **Limit** site preparation costs only to those paid within six (6) months of being incurred.

The bill also includes limitations to the costs eligible for the on-site groundwater remediation credit component similar to the last three changes in the above list.

Comment: The first two changes would likely be welcomed by developers. Regarding building foundations, many taxpayers would enjoy a more predictable calculation of the site preparation component when building foundations are part of an engineering control to address contaminated soil, groundwater, or soil vapor remaining after the CoC is issued (which can be the case for sites not attaining Track 1 cleanups). The third change, limiting site preparation costs to those directly associated with construction, appears to eliminate indirect costs from the calculation of this component, while preserving several typical costs associated with site remediation. The last two changes on the list would raise the same issues noted in the above comment to the TPCC changes as to payment timing and related party payments.

The bill would also require a licensed professional engineer to certify in the final engineering report (FER) as to the costs paid to implement the remedial measures. This would require the engineer to conduct a financial audit of the developer's books and records to prepare this cost certification, a task that is outside the professional license of the engineer, and which the developer must do in filing the tax return(s) to claim the site preparation credit component.

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³ <http://bhlawpllc.com/wp-content/uploads/2015/01/NYS-Bar-Environmental-Memorandum-1-8-15.pdf>



- **Elimination of the BCP Credits for Property Taxes and Insurance.** The bill would eliminate the BCP credits based on property taxes and environmental insurance premiums for all sites accepted into the BCP after June 30, 2014.

Comment: The credit based on real property taxes and on-site employment has been a powerful driver for some projects to bring jobs to the site through construction of commercial space. The reasons for the removal of these two incentives are not clear.

Other changes to the BCP

The proposed budget includes many other non-tax BCP changes not discussed above, including:

- **New definition of "brownfield."** The bill would redefine "brownfield" as a site with contamination in excess of cleanup standards issued by NYSDEC, and would permit volunteer applicants (non-responsible parties) to seek acceptance for class 2 listed sites. The same change was proposed in last year's bill.
- **BCP-EZ Program.** The bill reintroduces a proposed BCP-EZ Program, which would allow volunteer applicants to waive their right to all BCP tax credits and enter into a modified remedial program exempt from procedural requirements (as specified by NYSDEC) relating to investigation and remediation.
- **CoC transfers.** The bill would further clarify that a certificate of completion can be transferred to a successor to a real property interest in all or a portion of a brownfield site, including legal title, equitable title, or leaseholds. The bill would further provide that the CoC could not be transferred to a responsible party.
- **Oversight costs.** The bill would eliminate DEC oversight costs for volunteers, and permit negotiation of flat-fee arrangements with participants.

Next Steps

The proposed budget was introduced on January 21. The Governor may propose changes for up to 30 days after introduction (February 20). The budget will then be submitted to the Legislature, which may make amendments subject to the Governor's veto power. Typically any differences in the budget are negotiated among the Governor and legislative leaders. Under New York's Finance Law, the 2015-16 fiscal year begins on April 1, and the Governor and legislative leaders will likely endeavor to obtain passage of the budget on time for the fifth consecutive year.

Bousquet Holstein's Brownfield Practice Group is closely monitoring these proposed changes. Please do not hesitate to contact us with any questions you may have regarding these BCP developments and how they may impact your brownfield projects.



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