



## Brownfield Tax Credit Update: BCP Sunset Looms Closer

Syracuse, New York

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The 2013 NYS legislative session ended last week with no agreement by Governor Cuomo and Legislative leaders about how to address the looming sunset date for tax credits available under New York's Brownfield Cleanup Program (BCP). Under current law, the BCP tax credits are only available to taxpayers who complete their site remediation activities and receive a Certificate of Completion from the New York State Department of Environmental Conservation (DEC) on or before December 31, 2015.

The BCP "sunset" is unusual – taxpayer eligibility for most other financial incentives is based on the date of program *acceptance*, rather than program *completion*.

Although the 2015 sunset appears at first glance to offer plenty of time for future consideration, the New York State Department of Environmental Conservation (DEC) has indicated that the average BCP site takes well over 2 years from acceptance to completion, and the most contaminated sites in the program have taken much longer.

Prospective applicants considering a contaminated site for redevelopment will have to think very hard about taking on the risks of a cleanup, with no certainty of the tax incentives that counterbalance those risks. A great deal of brownfield risk comes from conditions below the ground, which may not be fully understood when the cleanup begins and which can lead to unforeseen delays. In addition, the BCP is a complex regulatory program with many steps and long time frames which can further delay completion of site cleanups. The pending sunset now means that investors and developers – even those already in the program – can no longer be certain that the BCP credits will be there to offset that risk.

As the sunset approaches, it seems inevitable that some projects won't make the deadline despite good faith efforts by developers, consultants, and the DEC. The pressure on these parties to push sites to completion will increase exponentially as the sunset date approaches. Investors and lenders counting on the credits who are left out in the cold after the sunset may look anywhere to assign blame for losing their tax credits, dragging DEC and others into costly litigation that could have been easily avoided.

The failure of the Governor and the legislature to come to terms with the sunset – despite ample opportunity to do so in 2012 and this year – is certain to disappoint many brownfield stakeholders. And far worse for the people living near these blighted contaminated sites, this failure could well drive private sector investment (nearly \$6 billion from 2007 to 2011) to greener – and more certain – pastures.

### About the BCP Tax Credits

The BCP tax credits are based on cleanup costs, site improvements, property taxes, and environmental remediation insurance premiums, paid in connection with the remediation and redevelopment of contaminated sites in New York. Changes to the BCP credits in 2008 limited credits for site improvements and linked them to the amount of site cleanup costs. The BCP credits are "refundable" – to the extent taxpayers cannot use them to reduce NYS tax liability, they are treated as a tax overpayment and refunded.

The BCP credits have been remarkably successful in drawing capital investment to some of New York's most contaminated industrial sites. According to Tax Department reports, \$5.97 billion of private sector capital was invested in the cleanup and redevelopment of New York's brownfield sites from 2007 - 2011, yielding \$852 million of tax credits, or \$7.01 of capital investment for each tax credit dollar.



## Bousquet Holstein Brownfield Practice Group

New York's Brownfield Cleanup Program ("BCP") provides valuable tax incentives and liability relief for the cleanup and redevelopment of contaminated or blighted sites, or "brownfields." We assist brownfield stakeholders, including developers, municipalities, brokers, financial institutions, and consultants, in understanding the benefits of the BCP and other economic development incentives available for brownfield redevelopment. Our attorneys bring years of transactional, real estate, tax, and accounting experience to project planning, structuring and implementation.

We help our clients evaluate and obtain various brownfield incentives, including the powerful BCP tax credits, based on each project and each client's goals. Working hand-in-hand with other brownfield redevelopment professionals, we have successfully brought dozens of clients through the BCP, structuring brownfield transactions and projects with sharp focus on the BCP tax credits, consulting on project budgets and accounting, planning for and filing BCP credit claims, and defending desk audits by the New York State Department of Taxation and Finance.

We have provided support and analysis to developers of some of the largest brownfield redevelopment projects in New York State, including projects in Manhattan, the Bronx, Brooklyn, Queens, Westchester, Long Island, the Catskills, Hudson Valley, and throughout upstate New York, including projects in Syracuse, Utica, Buffalo, Ithaca, Binghamton, and northern New York. The estimated construction value of these projects exceeds \$2.5 billion, which will generate BCP tax credits well over \$350 million.

Our Brownfields Practice Group collaborates with our colleagues in the Business Growth and Development, Real Estate, Environmental, Land Use and Zoning, and Business Transactions Practice Groups to advance development projects from the planning phase through construction to full operations.

### **Philip S. Bousquet, Esq.**



Phil is a member of the law firm Bousquet Holstein PLLC and serves on its Board of Managers. In addition to handling a broad range of business matters, his practice concentrates in the areas of tax planning and advocacy and mergers and acquisitions.

Phil helps clients understand the financial incentives under New York's Brownfield Cleanup Program (BCP) legislation. He has lectured on the tax aspects of this legislation throughout New York on behalf of many groups, including NPCR, the Environmental Business Association (EBA), the New York State Bar Association, the Practicing Law Institute, and local municipalities and associations.

His recent work includes advising developers regarding Brownfield Cleanup Program tax matters for pending and completed projects with an aggregate value of more than \$3 billion; representing taxpayers with respect to NYS Department of Taxation & Finance "desk audits" of Brownfield Cleanup Program and Empire Zone tax credits; negotiation and closing of acquisitions and sales of closely-held businesses and professional practices; and negotiation and preparation of LLC operating agreements and shareholders' (buy-sell) agreements for owners of closely-held businesses.

He is an active member of the New York City Brownfield Partnership, NYS Brownfield Coalition, and New Partners for Community Revitalization.

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