



LEGAL ALERT

April 2022

Brownfield Cleanup Program Tax Credits Extended for Ten Years

Amendments also include a \$50,000 BCP program fee, other changes

On Saturday, April 9, 2022, New York State Governor Kathy Hochul signed into law a ten-year extension of the tax incentives for the Brownfield Cleanup Program (BCP) as part of the 2022-23 NYS Budget (Budget). The BCP's incentives were to sunset for sites accepted after 2022, generating uncertainty for project financing in which the incentives play a crucial role. The extension provides welcome assurance as to the future of the BCP. The extension comes with a cost – BCP applicants will now be charged a \$50,000 application fee, payable upon entering into a cleanup agreement under the BCP, although applicants can seek a waiver of the fee for "hardship" under regulations to be drafted by the Department of Environmental Conservation (NYSDEC). The extension also brought increased tax credits for sites in disadvantaged communities and renewable energy facility sites, provides a limited expansion of the kind of property eligible for tax credits and provides a limited class of sites more time to complete their projects. This alert provides you with the details on these important changes.

Over 1,000 contaminated sites have been accepted into the BCP since its enactment in 2003, and over 500 of these sites have been successfully remediated. The remaining 500+ cleanups are ongoing and NYSDEC data indicate a steady flow of applications statewide. Reports published by NYS show that through 2020, the Brownfield Redevelopment Tax Credit (BRTC) has incentivized over \$2.6 billion in cleanup costs alone, and over \$16.6 billion in bricks-and-mortar development from Buffalo to Long Island, making the BCP one of the nation's most robust and successful brownfield programs. In 2015 the BRTC was enhanced to attract development to distressed census tracks and affordable housing. This is working - of 84 post-2015 sites that were cleaned up and claimed some tax credits by 2020, 51 are in distressed census tracks and 32 include affordable housing, generating over \$1.2 billion in capital investment thus far.

1. Ten-Year Extension of the BRTC

The Budget extends for ten years the deadlines for acceptance and completion of remediation for sites to qualify for the BRTC. The BRTC will now be available for sites accepted into the BCP by December 31, 2032 (extended from December 31, 2022), for which NYSDEC issues a Certificate of Completion ("COC") on or before December 31, 2036 (extended from March 31, 2026).

Comment: With the 2022 sunset looming, BCP stakeholders have been closely watching legislative developments for the BCP and its key tax incentive, the BRTC. We worked closely with the New York State Bar Association, affordable housing advocates, developers, and clients as the 2022 BRTC sunset drew closer and as proposals for extension and revision began to take shape. The ten-year extension has been long hoped-for, and stakeholders will welcome another ten years of continued site cleanup and redevelopment under the BCP.



2. Addition of a Program Fee with the BCA

Applicants who are accepted into the BCP must enter into a "brownfield cleanup agreement" (BCA) with NYSDEC. Project costs may be included in calculation of the credit components of the BRTC once the BCA is signed by the applicant and countersigned by NYSDEC. The Budget added a nonrefundable \$50,000 "program fee" onto this process, so that when an applicant returns their signed BCA to NYSDEC, this program fee must accompany the application. Like the rest of the BCP changes, this change takes effect immediately - that is, when Governor Hochul signs the budget legislation into law.¹

Applicants may seek a waiver of this requirement on demonstration of "financial hardship." To demonstrate hardship, the applicant must demonstrate that "but for the program fee, remediation of the brownfield site would not be economically viable." In evaluating an applicant's hardship request, NYSDEC must consider a number of factors, including: (1) whether the applicant has waived rights to tax credits, (2) whether the site is located in a Disadvantaged Community, (3) whether the site will be developed as an affordable housing project, (4) the assets and income of the applicant, and (5) "other factors deemed relevant." NYSDEC is to draft regulations governing the hardship demonstration, although the budget does not impose any timetable on NYSDEC to do so. The program fee is ineligible to be included in the calculation of the BRTC.

Comment: The fee will put an up-front strain on smaller projects throughout the State, where financial returns can be razor-thin, and will burden sponsors of affordable housing, many of which are tax-exempt organizations already stretching budgets with pre-application costs for investigation, environmental due diligence, and legal advice about contaminant risk. Adding to the burden, the program fee cannot be included in the calculation of the BRTC components.

The fee takes effect immediately. Applicants and pending applicants who have not yet signed a BCA will now have to add \$50,000 to their short-term budgets. This lack of notice is plainly unfair – the Budget should have established a future date after which new applicants would be subject to the fee. In addition, any such fee should be includable in the site preparation credit component of the BRTC, because by definition, the "program" fee relates entirely to the applicant's activities under the BCP after the BCA is entered into.

3. New "gates" for NYC sites seeking tangible property credits

For BCP sites located in a city having a population of one million or more (New York City), eligibility for the tangible property credit component of the BRTC (the TPCC) depends on the site or project meeting one of four established criteria, or eligibility "gates." The Budget amended the "affordable housing" gate (discussed below), preserves the other three gates now in effect, and added two new gates:

¹The new program fee will be credited to the "oversight and assistance" account of the hazardous waste remedial fund, into which NYSDEC's BCP oversight costs charged under pre-2015 law were deposited. This account is dedicated for use by NYSDEC, the Department of Health, and the Department of Law for various remedial programs, including the BCP, the brownfield opportunity area (BOA) program, and the State's "superfund" program (among other uses). The Budget does not expressly set aside the fee to fund staff and resources dedicated to the BCP.



- **“Disadvantaged Community/BOA Sites.”** The first new eligibility "gate" will be for BCP sites that meet all three of these criteria:
 - The site is located in a "disadvantaged community" (DAC) as identified under criteria being specified by the [Climate Justice Working Group](#) under the Climate Leadership and Community Protection Act (more on this below);
 - The site is located within a BOA, as designated by the Secretary of State, AND
 - The Secretary of State has determined that the site will be developed in conformance with the approved BOA plan.

Comment: Some BOAs in New York City are not located in EN-Zones and BCP sites in those BOAs therefore are not eligible for tangible property credits, even if certified as conforming to the BOA plan by the Secretary of State. The Budget addresses this by allowing tangible credit eligibility for conforming BOA sites located in a DAC. This may further incentivize municipalities and community-based organizations to seek BOA designation for areas located in DACs.

- **“Renewable Energy Facility Sites.”** The second new eligibility gate will be for a "renewable energy facility site" defined as BCP site that is primarily used for either:
 - A renewable energy system that generates electricity or thermal energy through use of the following technologies: solar thermal, photovoltaics, on land and offshore wind, hydroelectric, geothermal electric, geothermal ground source heat, tidal energy, wave energy, ocean thermal, and fuel cells which do not utilize a fossil fuel resource in the process of generating electricity; or
 - Any co-located system storing energy generated from such a renewable energy system prior to delivering it to the bulk transmission, sub-transmission, or distribution system.

A BCP applicant seeking eligibility for the tangible property credit component under either of these new gates must submit an application to NYSDEC prior to the issuance of a COC for the site. This means that DAC/BOA sites must obtain their certificate of BOA conformance from the Secretary of State before the COC is issued, a requirement that may prove difficult in practice.

- **Changes to the "Affordable Housing" gate.** Under current law, NYC sites are eligible for tangible property credits if the site is developed as an "affordable housing project" as defined in NYSDEC regulations. NYSDEC's 2015 regulations define an affordable housing project as one on a site that is subject to a government housing program, regulatory agreement, or other legally binding restriction that prescribes a percentage of residential units to be rented or owned by those at a defined maximum percentage of area median income. The Budget preserved this eligibility gate (which we will call "category (a) projects").

The Budget added a second category of projects (category (b) projects) to this definition. These projects must qualify for one or more benefits under an affordable housing program, including (but not limited to) tax benefits, tax credits, property tax exemptions, bond financing, subsidy financing, and zoning variances or waivers. NYSDEC may by regulation, after consulting with the NYS Division of Housing and Community Renewal, exclude specific benefits from qualifying as a "benefit" under the new definition. Therefore, sites developed under affordable housing programs that do not have qualifying benefits (under NYSDEC regulations) would have to meet the criteria in NYSDEC's current regulations for category (a) projects, or they will not be eligible for the tangible property credit component.



Comment: The Budget does not require NYSDEC to issue regulations for "category (b)" projects. It therefore remains unclear how this change will affect the burgeoning development of affordable housing on remediated BCP sites.

4. Additional 5% "bump-ups" for the TPCC (for sites accepted in and after 2023)

The TPCC is calculated by multiplying a designated applicable percentage by the amount of eligible costs. The 10% base applicable percentage for the TPCC can be increased in 5% increments (up to 24%) based on criteria specified in the Tax Law. The Budget adds two new 5% "bump-ups."

- Sites located in Disadvantaged Communities. The first would be for brownfield sites located in a disadvantaged community (DAC). The 2019 Climate Leadership and Community Protection Act created the Climate Justice Working Group to identify DACs to ensure that underserved communities benefit from the State's transition to cleaner energy, reduced pollution, and the economic opportunities arising from that transition. (See <https://climate.ny.gov/Our-Climate-Act/>) On March 9th the Working Group issued [draft criteria](#) for [public comment](#), together with this [interactive map of communities that would meet the draft criteria](#).
- The 5% DAC increase will be an alternative to the existing bump-up for sites also located in an Environmental Zone (also referred to as an EN-Zone – a designated census tract characterized by high poverty and/or high unemployment). The additional 5% would be available if the brownfield site is in either an EN-Zone or a DAC but would not be doubled if the site is in both an EN-Zone and a DAC. As noted above, the Budget does create a narrow eligibility "gate" for BOA conforming sites in NYC that are in a DAC. Those sites would benefit from the 5% "BOA bump-up" as well as from the new 5% DAC bump-up.
- Renewable Energy Facility Sites. Sites anywhere in the State that meet the new definition of "renewable energy facility site" described above will be eligible for a 5% increase to the TPCC, subject to the 24% cap.

These additional "bump-ups" to the TPCC applicable percentage would only be applicable to sites accepted into the BCP on or after January 1, 2023.

Comment: While the FY 2023 Budget does open a new TPCC eligibility gate for renewable energy facility sites in New York City, the Budget does not open a separate TPCC eligibility gate for sites in Disadvantaged Communities unless they are also located within a BOA and have obtained an affirmative conformance designation from the Secretary of State.

5. Extended time to claim credits for post-COC environmental costs

For BCP sites that received a COC from July 1, 2015, to June 24, 2021, the Budget extends the time to claim credits for post-COC site preparation and on-site groundwater remediation costs to seven years. For sites that were accepted into the BCP from July 1, 2015, to June 24, 2021, site preparation costs include costs incurred to comply with the COC and related documents for 84 months after the COC. However, it is unclear whether such sites that receive their COCs after June 24, 2021, would have the ability to claim credits more than five taxable years after the COC is issued, because the seven-year extension would not apply to those sites. This may be the result of a drafting error.



6. Athletic facility property on Track 1 sites eligible for credits

The Budget expands the definition of "buildings" and "structural components" in order to ensure eligibility for the tangible property credit component for sports complexes built on "Track 1" sites (sites with no residual contamination). To accomplish this, starting with the 2022 tax year, for Track 1 sites only:

- stadiums, baseball parks, basketball courts, and other athletic facilities shall be considered to be "buildings"; and
- components of stadiums, baseball parks, basketball courts, and other athletic facilities, including sports field turf, site lighting, sidewalks, access and entry ways, and other improvements added to land, "... shall be considered structural components of buildings under the Internal Revenue Code and shall be included in the definition of tangible property under this section."

7. Extension of time to place property into service

Under current law, taxpayers have ten years after a COC is issued in which to place into service their "qualified tangible property" – buildings and certain other depreciable assets. Last year's amendment would allow sites which were demonstrably affected by the Governor's COVID-19 "shutdown" orders to request an extension of their "QTP Window" to 12 years, but only sites with COCs issued between March 20, 2010, and December 31, 2011, could seek this relief.

This year, the Budget added on an additional extension of the QTP Window to 180 months after the date of the COC for all sites with COCs issued between March 20, 2010, and December 31, 2015.

Next Steps

Bousquet Holstein's Brownfield Practice Group continues to analyze the Budget and how these changes may affect our clients and their projects. We will be monitoring and anticipating the practical, real-world application of these changes, and will issue additional alerts as and when NYSDEC issues regulations in the areas discussed above. 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.



Bousquet Holstein



Bousquet Holstein PLLC



Brownfields Practice

New York's 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 evaluate and obtain various brownfield incentives, including the powerful BCP tax credits, to maximize our clients' after-tax return on investment in brownfield redevelopment projects.

We have provided support and analysis to developers of some of the largest brownfield redevelopment projects in New York State, including projects in Manhattan (Harlem), Queens, Yonkers, White Plains, Long Island, the Catskills, the upper 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 \$3.5 billion, which will generate BCP tax credits well over \$500 million.



Philip S. Bousquet



Julia J. Martin



Michael W. Tyszko



Christy Vouri-Misso



Casey A. Johnson



Aaron C. Records



Kevin M. Sayles