



LEGAL ALERT

April 2022

Under Review: New York State Department of Environmental Conservation Draft Brownfield Cleanup Program Regulations

This has already been an eventful year for stakeholders interested in the New York Brownfield Cleanup Program (BCP). The recently enacted NYS budget included a ten-year extension of the tax credits under the BCP, as detailed in our [recent alert](#). NYSDEC first announced in May 2017 (and then every year since) that it would issue proposed regulations to reflect changes enacted in the 2015 NYS budget. Last December, on the eve of the tax credit sunset, NYSDEC issued long-anticipated [proposed amendments](#) to its regulations governing three environmental remediation programs, including the BCP.

Based on our experiences with the BCP, NYSDEC has been implementing the proposed regulations in practice since at least 2018, without making them public. As many BCP applicants know from experience, NYSDEC has consistently sought to use its regulatory authority to curtail BCP tax credits. The draft regulations bear this out. Several provisions in the proposed regulations focus directly on expanding NYSDEC's authority to control and/or curtail BCP tax credits. The draft would narrow BCP site eligibility, broaden work plan submission and approval for steps now governed by "change of use" notice procedures, curtail allowable site preparation costs by creating a fictional cover system in lieu of actual site-specific engineering controls, and change long-standing practices for track eligibility for sites with ongoing groundwater or vapor treatment. The proposed "cover system" rule would require applicants to conjure up a cost they will not incur – a hypothetical amount to cover the entire site with one or two feet of clean dirt; the project would then be bound to use this imagined cost instead of its actual costs when calculating site preparation costs for tax credit purposes. Finally, the proposed regulations seek to expand the circumstances prescribed by law for a brownfield cleanup agreement can be terminated or a certificate of completion revoked – unforeseen changes which if adopted could result in significant disruption to BCP project financing and development.

We have been working closely with several stakeholders submitting comments, including the Environmental and Energy Law Section of the New York State Bar Association, and many other commentators are expressing concerns similar to those noted above. The period for submitting comments to NYSDEC's proposed regulations expires on Thursday. We will continue to monitor the status of these draft regulations and report back to you as the process moves forward. Please do not hesitate to [contact us](#) if you would like to discuss the above or if you have any questions regarding the potential effect of the draft regulations or this year's law change on your projects.



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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.



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