



### DEC Issues Much Anticipated Regulations for Brownfield Cleanup Program

Syracuse, New York

June 2015

On June 9, 2015, the New York State Department of Environmental Conservation (DEC) released proposed regulations that define certain terms for purposes of the Brownfield Cleanup Program (BCP). These regulations are significant for sites located in New York City and for sites that are applying or have applied to the BCP but have not yet received notice of acceptance into the program.

#### Impact on Effective Date

As we indicated in our April 2015 Alert (*which can be found on our website at [www.bhlawpllc.com/brownfields](http://www.bhlawpllc.com/brownfields)*), many of the BCP changes contained in the brownfield extension and modification amendments (BEMA) in the 2015-16 enacted NYS Budget are to take effect on the later of July 1, 2015, or the date the DEC publishes proposed regulations called for in BEMA. The regulations issued on June 9 are those regulations. As a result, the effective date will be July 1, 2015.

BCP changes effective for sites accepted into the BCP after July 1, 2015 ("Post-BEMA Sites") include:

- A deadline of March 31, 2026 to obtain a Certificate of Completion ("CoC") in order to be eligible for the BCP tax credits;
- A new definition of "site preparation costs";
- Post-BEMA Sites located in New York City will be subject to a separate eligibility test for the tangible property credit component (more on that test below);
- A new applicable percentage formula and new limits on the kinds of property eligible for the tangible property credit component; and
- Elimination of the BCP credits based on environmental insurance premiums and on real property taxes and on-site employment.

*Comment: It comes as no surprise that DEC's proposed regulations were issued well before the July 1 deadline; the administration clearly signaled its intent to do so in order to ensure that the new BCP credit structure take effect on July 1, the earliest date provided for under BEMA. DEC received a large number of applications in April and May for sites seeking to be "grandfathered" into the pre-BEMA credit regime, and DEC may have been eager to close off the stream of new applications as soon as possible.*

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### Impact on Tangible Property Credit Component Eligibility for Sites in NYC

The substance of the regulations will impact sites located in cities with a population of one million or more persons (*i.e.*, New York City). BEMA requires that sites located in such a city must pass one of the following tests in order to be eligible for the tangible property credit component:

- at least 50% of the site area is in an Environmental Zone (newly defined);
- The site is "upside down" (costs more to remediate than it is worth in clean condition) or is "**underutilized**"; or
- The site will be developed as an "**affordable housing project**."

BEMA instructed DEC to define the terms "underutilized" and "Affordable Housing Project" by regulation. The DEC's June 9 proposed regulations provide such definitions.

#### **1. Definition of "Underutilized"**

The proposed regulations would define "underutilized" to mean only a site that meets **all** of the following requirements:

- The site is real property on which a building or buildings can be certified by a municipality in which the site is located to have (for at least five years) used no more than 50% of the permissible floor area under applicable base zoning immediately prior to the application which has been in effect for at least five years;
- The proposed development on the site is for a use *other than* residential or restricted residential;
- The municipality has certified that the site could not be developed without "substantial government assistance." That term is defined for non-industrial sites as "a substantial loan, grant, land purchase subsidy, or land purchase cost exemption or waiver, from a governmental entity," and similarly for industrial sites except that tax credits and low-cost loans from an industrial fund managed by the municipality and partner financial institutions may also constitute government assistance;

#### **and**

- The site is subject to at least one of the following conditions (as certified by the applicable municipal departments):
    - Property taxes have been in arrears for at least 5 years prior to the BCP application;
    - A building on the site is condemned or exhibits documented structural deficiencies (as certified by a professional engineer), which present a public health or safety hazard;
- or**
- The proposed development on the site is, in whole or in "substantial" part, for industrial uses.

Whether a site meets this definition of "**underutilized**" is determined as of the date of the BCP application.

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*Comment: The definition would effectively bar market-rate housing development from obtaining the tangible property credit component unless at least half of the site is in an Environmental Zone or the site is "upside down," as that term is defined in BEMA. In addition, the regulation appears to favor "industrial" use for brownfield sites. The regulations don't define "industrial" uses, and it is unclear whether this was intended to match up with "manufacturing" uses eligible for enhanced tangible tax credits under BEMA and prior law. The emphasis on industrial use seems anomalous for New York City sites, where so much development is being directed to residential and commercial uses. BEMA required the DEC to consult with the City of New York and the business community there in developing this definition. The extent of this consultation is not clear from the proposed regulations, and the public comments will be interesting to follow. Final regulations are to be adopted by October 1, 2015.*

*Finally, the requirement that the municipality (i.e., New York City) certify that the site could not be developed without substantial government assistance could be problematic. It is not clear what evidence the City would need to review in order to certify that substantial government assistance is necessary. As a practical matter, this requirement could give the City an effective veto of any development that the City decides does not need substantial government assistance (or the tangible property credit component). Developers whose requests for certification are refused would be forced to choose between giving up on the tangible property credit component and starting a protracted dispute with the City over its refusal.*

## **2. Definition of "Affordable Housing Project"**

The proposed regulations would define "Affordable Housing Project" as one that is developed for residential or mixed residential use and includes either/both affordable residential rental units and affordable home ownership units. Such units must be subject to a federal, state, or local government affordable housing program or legally binding agreement that sets a percentage or number of units that must be dedicated to tenants or buyers at a defined maximum percentage of area median income.

*Commentary: Unlike the definition of "underutilized," this definition is very broad. There is no requirement for a minimum percentage of the units or square footage to be devoted to affordable units. It appears that any project subject to an affordable housing agreement with U.S. Department of Housing and Urban Development, NYS Homes and Community Renewal, and/or NYC Housing Preservation and Development would be eligible as an affordable housing project under these regulations. Consequently, such a project would be eligible for the tangible property credit component.*

***Bousquet Holstein's Brownfield Practice Group works extensively with investors, developers, consultants, and other stakeholder in connection with New York's Brownfield Cleanup Program. Please do not hesitate to contact us with questions you have regarding these developments and your brownfield projects.***



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