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# Alert

**Brownfields Practice Group**

## **Governor's Proposed Budget Curtails Brownfield Cleanup Program Tax Credits**

**Syracuse, New York**

**January 2014**

On Tuesday, January 21, Governor Andrew Cuomo released his proposed executive budget for the 2014-15 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.

The bill would curtail the BCP credits for new and existing BCP sites and apply stringent eligibility tests for the tangible property credit component for sites accepted after June 30th. Applicants already in the BCP will face firm deadlines to obtain a CoC and a new sunset would apply to sites accepted after June 30th. This alert highlights key changes that the Governor has proposed for the BCP tax credits.

Sites already in the BCP may earn tax credits that are calculated based on whether they were accepted into the BCP before, or after, the BCP credits were overhauled in June 2008. Both categories of sites are eligible for credits based on cleanup and redevelopment costs, property taxes and employment, and premiums paid for environmental insurance premiums. The BCP credit for redevelopment costs on sites accepted after the June 2008 credit change are limited based on a multiple of cleanup costs and cannot under any circumstance exceed \$35 million.

### **Effective Dates and Sunsets**

The bill would make certain changes effective for sites accepted into the BCP after June 30, 2014; other changes would take effect on July 1, 2014, and would apply to all sites including those currently in remediation or which have received their CoCs.

The bill contains strict new sunsets. Current law simply denies tax credits to sites that do not receive a CoC by December 31, 2015. Instead of retaining this model, the bill would terminate sites currently in the BCP that have not received a CoC by a target date. A site for which a Brownfield Cleanup Agreement (BCA) was entered into before June 23, 2008 will be terminated from the BCP if it does not obtain a CoC by December 31, **2015**. A site with a BCA dated after June 23, 2008 and before July 1, 2014 will be terminated unless the CoC is issued by December 31, **2017**. Terminated sites may reapply, subject to new eligibility criteria.

Finally, sites accepted into the BCP after July 1, 2014 must 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.

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### BCP Credit changes effective July 1, 2014

The bill includes several changes that would take effect July 1, 2014, potentially altering how the BCP credits would be calculated for *all* sites in the BCP, without regard to the date of acceptance into the BCP. These changes would narrow the range of costs eligible for the three components of the brownfield redevelopment tax credit (the site preparation component, the on-site groundwater remediation component, and the tangible property component), change the required method of accounting for those costs, and alter the timeframe for claiming the tangible property credit component.

### Effective July 1, 2014, the bill would:

- Limit eligible basis of qualified tangible property (including buildings) to "*... costs associated with actual construction of tangible property incorporated as part of the physical structure ....*" This change would require taxpayers to segregate federal tax basis into costs *associated with* actual construction and those that are not.
- Limit eligible site preparation costs to only those costs paid to implement a remedial work plan approved by NYSDEC. In addition to reducing the cost base used to calculate the site preparation credit component, this would also drive down the "3X/6X" limits to the tangible property credit component.
- Eliminate from the credit base (for all components) any costs paid to a "related party" (10% or more common ownership).
- Permit use of remediation expenditures deducted under Code section 198 (which expired in 2011) in calculating the "3X/6X" limits for the tangible property component.
- Require taxpayers to account for all costs on a cash basis, regardless of their method of accounting for federal tax purposes.
- 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" as long as redevelopment starts within 10 years of the CoC issuance.

The current BCP credit structure rests firmly on federal tax accounting practices for development projects, and the NYS Tax Department has looked to taxpayers' federal tax treatment for verification of BCP credit claims. If enacted, the bill would force both taxpayers and NYS auditors to follow a very different array of rules when calculating and verifying the BCP credits.

These changes would significantly curtail the site preparation and tangible property credit components for existing and new brownfield projects. Projects that have been counting on these tax credits should analyze the impact of these proposed changes to understand how their projects and their investors and lenders could be affected.

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**BCP Credit changes affecting sites accepted after June 30, 2014**

- **Separate Eligibility for the Tangible Property Credit Component (TPCC).** The proposal would establish new, more restrictive eligibility requirements for the tangible property credit component. In order to be eligible, an applicant must demonstrate to the satisfaction of NYSDEC that the site meets one of three tests:
  - **The Vacancy Test.** The applicant must demonstrate that the site has been vacant for at least 15 years, or has been both vacant and tax delinquent for at least 10 years;
  - **The Under Water Test.** The applicant must demonstrate that the site is economically "under water" (*i.e.*, it is worth less in the absence of contamination than the projected cost of remediation); or
  - **The PED Project Test.** The applicant must (1) obtain certification from the local municipality that the project is consistent with the local development/revitalization plan, and (2) also obtain certification from the NYS Department of Economic Development ("DED") based on a demonstration that it will meet the criteria to qualify as a Priority Economic Development Project ("PED Project") between the time of application and three years after CoC issuance. A PED Project must fall into one of the categories noted below, must create more than a prescribed number of "net new jobs" in NYS, must make "significant capital investments", and must meet other requirements that DED is to prescribe in regulations. Eligible PED Projects would be:
    - software development or new media businesses creating 50+ net new jobs in NYS;
    - manufacturers, agribusiness, scientific R&D, or corporate HQs creating 100+ net new jobs in NYS;
    - financial service, distribution, or back office operations creating 300+ net new jobs in NYS; and
    - other businesses creating 300+ net new jobs in NYS and determined by DED to be a PED Project.
- **New Applicable Percentage for Tangible Property Credit Component (TPCC).** For sites meeting these new eligibility requirements, the TPCC has an across-the-board base of 10% of eligible costs (see above), and new "bump-ups" to the applicable percentage – not to exceed 24%, in the aggregate – calculated as follows:
  - An additional 10%, for qualified tangible property placed in service on brownfield sites located in an Environmental Zone. En-Zones would be redrawn based on the most recent (2010) federal census.
  - An additional 5%, for qualified tangible property placed in service on brownfield sites located in a Brownfield Opportunity Area (BOA).
  - An additional 5% for qualified tangible property that consists of affordable housing units, applicable only to the affordable units (based on a square footage calculation).



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 base noted above.

- **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.

#### Other changes to the BCP

- **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.
- **BCP-EZ Program.** The bill would allow volunteer applicants to waive their right to all BCP tax credits and enter into a modified BCP exempt from procedural requirements specified by NYSDEC relating to investigation and remediation.

#### Next Steps

The proposed budget was introduced on January 21st. The Governor has a 21-day window to submit corrections and revisions to the budget. When the budget is then submitted to the Legislature, it may make amendments (subject to the Governor's veto power). Typically any differences in the budget are negotiated among the Governor and legislative leaders. The NYS Constitution calls for the budget to be adopted before the 2014-15 fiscal year begins on April 1st.

Bousquet Holstein's Brownfield Practice Group is closely monitoring these proposed changes. We will attend the Joint Legislative Public Hearing on the budget proposal (Environmental Conservation) held in **Albany at 10:00 am on Wednesday January 29th**, and **Phil Bousquet** will be on a panel discussing the proposed budget at a **Brownfields Forum hosted by New Partners for Community Revitalization on Thursday January 30th**. Please do not hesitate to contact us with any questions you may have regarding these developments regarding the BCP and how they may impact your brownfield projects.

#### **Philip S. Bousquet**

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 Practising 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.

