



LEGAL ALERT

January 2022

Ten-Year Brownfield Cleanup Program, Tax Credit Extender & Other Program Amendments Included in Gov. Hochul's FY 2023 Executive Budget

On January 18, New York Governor Kathy Hochul issued proposed legislation to implement the Governor's Fiscal Year 2023 Executive Budget. The Transportation, Economic Development, and Environmental Conservation bill included in the Executive Budget would extend the tax incentives available for remediation and redevelopment of contaminated sites under New York's Brownfield Cleanup Program ("BCP") for ten years and would extend eligibility and enhance incentives for sites in targeted areas.

Over 1,000 contaminated sites have been accepted into the BCP since its enactment in 2003, and over five hundred of these sites have been successfully remediated. The remaining 500+ cleanups are ongoing and NYSDEC data show a steady influx of applications statewide. Published reports show that, through 2019, the BCP's tax incentives have incentivized over \$17 billion in private sector investment in remediation costs and bricks-and-mortar development from Buffalo to Long Island, making the BCP one of the nation's most robust and successful brownfield programs.

The BCP was last modified in 2015 to extend the tax incentive sunset built into the original 2003 law. The 2015 extension modified the Brownfield Redevelopment Tax Credit ("BRTC") while limiting its availability to sites accepted into the BCP on or before December 31, 2022 and which complete remediation by March 31, 2026. The 2022 sunset date looms large for brownfield investors, developers, planners, and communities afflicted by contaminated sites, creating considerable uncertainty about the viability of taking on risky cleanups for uncertain returns. In that respect, the Governor's proposal to extend these deadlines by ten years would provide welcome certainty as to the long term availability of the tax incentives.

Below is a summary of the key provisions in the Executive Budget relating to the BCP and the BRTC extender:

- **Ten-Year Extension.** The Governor's proposal would extend for ten years the deadlines for acceptance and completion of remediation for sites to qualify for the BRTC. Under the Executive Budget, the BRTC would be available for sites accepted into the BCP by December 31, 2032 (extended from December 31, 2022), for which NYS Department of Conservation ("NYSDEC") issues a Certificate of Completion ("COC") on or before December 31, 2036 (extended from March 31, 2026).
- **New Categories of Eligibility for the Tangible Property Credits.** For BCP sites located in a city having a population of one million or more (currently only New York City), eligibility for the tangible property credit component of the BRTC (the "TPCC") is not automatic. In addition to keeping four existing eligibility criteria, the Executive Budget adds two new TPCC eligibility pathways (or "gates") for sites accepted into the BCP on or after January 1, 2023:
 - **Conforming BOA Sites.** BCP sites located in a Brownfield Opportunity Area ("BOA"), as designated by the Secretary of State, that have obtained an affirmative conformance determination from the Secretary that the site will be developed in conformance with an approved BOA plan.



- “Renewable Energy Facility Sites.” This new category refers to a BCP site that meets any one of the following criteria:
 - Primarily used for any renewable energy system, defined as systems that generate 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; or
 - Any standalone system storing energy interconnected into NY’s bulk transmission system or an Investor-Owned Utility’s (“IOU”) transmission or distribution system providing distribution services, wholesale market energy, ancillary services, and/or capacity services, including all associated appurtenances to electric plants as defined under Section 2 of the Public Service Law.

Under the Executive Budget, a BCP Applicant relying on either of the new proposed criteria must make an application with NYSDEC seeking an eligibility determination prior to the issuance of a COC for the site.

Comment: This aspect of the Governor's proposal may create timing issues for sites that may not be able to meet the requisite criteria for eligibility prior to COC issuance. Remediation is often completed, and a COC issued, well before the overall project is completed and placed into service. A more practical approach would be to require the applicant to submit proof that the qualification criteria have been satisfied (in addition to the COC) with their tax form claiming the TPCC.

- New 5% "Bump-Ups" for the TPCC (only for sites accepted in and after 2023). The TPCC is calculated by multiplying a designated applicable percentage by the amount of eligible costs. The applicable percentage for the TPCC begins with a base of 10%, with 5% increases if the site has certain characteristics (up to a maximum of 24%). The Executive Budget adds two new site characteristics that would allow for a 5% increase to the TPCC, as follows:
 - Sites located in “Disadvantaged Communities.” This term is defined with reference to the 2019 Climate Leadership and Community Protection Act (“CLCPA”). Under the CLCPA, responsibility for identifying the criteria for disadvantaged communities is placed with the Climate Justice Working Group, a body comprised of representatives from environmental justice communities, NYSDEC, the Department of Health, NYS Energy Research and Development Authority (“NYSERDA”) and the Department of Labor. As of the date of this alert, the criteria have not been finalized under the process required under CLCPA. NYSERDA has identified the following characteristics on its website as interim criteria:
 - Sites located within census block groups that meet the Department of Housing and Urban Development (“HUD”) 50% Area Median Income (“AMI”) threshold, and are also located within a NYSDEC Potential Environmental Justice Area; and
 - Sites located within a New York State Opportunity Zone.
 - This “bump-up” would be added as an alternative to the existing bump-up for sites located in an Environmental Zone (a designated census tract characterized by high poverty and/or high unemployment, also known as “En-Zones”). The additional 5% would be available if the brownfield site is in either an En-Zone or a Disadvantaged Community but would not be doubled to 10% if the site's census tract is in both an En-Zone and a Disadvantaged Community. This would effectively increase the geographic areas for which a 5% TPCC bump-up is available without creating another eligibility “gate” for New York City applicants.
 - “Renewable Energy Facility Site.” Sites meeting the definition of renewable energy facility site described above would also be eligible for a 5% increase to the TPCC, subject to the 24% cap, irrespective of where in the state the site located.



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

Comment: While the Executive Budget would open a new TPCC eligibility gate for renewable energy facility sites in New York City, the Governor's proposal would not open a separate TPCC eligibility gate for sites in Disadvantaged Communities.

- **Post-COC Site Preparation Costs.** For BCP sites that received a COC between March 20, 2015, and June 24, 2021, the Executive Budget would allow the site preparation credit component and on-site groundwater remediation credit component to be claimed for costs incurred up to seven taxable years after the COC is issued. Under current law, all sites have five years to claim these credit components for certain costs incurred after issuance of the COC.
- **Institution of Program Fee** – As a method of funding staffing for the program, the Executive Budget requires a \$50,000 program fee paid upfront upon submission of the executed Brownfield Cleanup Agreement. An applicant may obtain a waiver of this requirement if the payment of such fee would cause economic hardship. The fee is ineligible to be included in the calculation of the BRTC.

Comment: The up-front program fee may be problematic for smaller projects and sponsors of affordable housing projects, who would have to advance this cost long before closing on project financing. It may be more practical to charge a low application fee up front and then impose the balance of the fee (or bill for NYSDEC oversight costs subject to a \$50,000 limit) in connection with issuance of a COC.

What's Next.

The Governor may amend or supplement the Executive Budget until February 17th (30 days after introduction). It will then be submitted to the Legislature. The New York State Senate and the New York State Assembly will each introduce their own proposed budget legislation, and representatives of the Governor, the Senate, and the Assembly will then enter into discussions, with the objective of reaching agreement on final budget legislation by April 1, the first day of the State's fiscal year.

For brownfield stakeholders, the Executive Budget marks the beginning of an interesting and eventful 2022. NYSDEC issued proposed amendments to regulations governing the BCP which likely will be the subject of considerable comment and discussion in the coming months. We will be sending out a separate alert about those proposed regulations in the next few days, and we look forward to hearing your feedback about these proposals to extend and modify the law and regulations governing New York's brownfields.

Bousquet Holstein's Brownfield Practice Group is closely monitoring these proposed changes. 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.



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Brownfields Practice

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 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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