



New York State Bar Association

One Elk Street, Albany, New York 12207

Environmental & Energy Law Section Brownfield Working Group

Brownfield Cleanup Program Extender and Omnibus Bill Report

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The New York State Brownfield Cleanup Program ("BCP") is one of the most successful programs of its type in the country. As of July 2021, it has facilitated the remediation of over 500 sites adversely affected by contaminated waste through receipt of a Certificate of Completion, with 900 additional sites still in progress. The program has generated over \$17.6 billion in economic development, leveraging approximately \$2.7 billion in tax credit incentives and generating a return of more than \$6.60 for every dollar of tax credit earned. Increasingly, the cleanup and development has been targeted to those geographic areas that need it most – economically disadvantaged environmental zones – based on amendments to the law in 2015. The program has also increasingly been targeted to the types of projects that New York needs most: affordable housing and revitalizing New York State's industrial base.

However, the tax credit incentives which support this program are about to expire. Projects which have not been accepted by the New York State Department of Environmental Conservation ("NYSDEC") into the BCP by December 31, 2022, will not qualify for the tax credits, which have been driving the success of the program.

Members of the Section of Environmental & Energy Law ("Section") have seen first-hand the importance of the BCP to environmental cleanups and the revitalization of our communities. Therefore, we are proposing our own bill to extend this program.

At the same time, our members—many of whom are "in the trenches" on a day-to-day basis on BCP projects—have identified a number of issues that have interfered with the fair and efficient implementation of the BCP. We believe that these issues should be addressed in connection with the extension of the BCP tax credits.

Once such issue is the lack of staffing at NYSDEC, and, to a lesser extent, the New York State Department of Health ("NYSDOH"), to properly implement this program. Both agencies have been adversely affected by retirements of senior personnel and have not been able to hire adequate replacement staff. Our bill proposes a solution to this problem.

Similarly, there has been confusion and inconsistent application of certain aspects of the BCP – particularly with respect to certain contaminated media, such as soil vapor, which was not considered an environmental issue at the time the original BCP was enacted in 2003.

While the BCP is appropriately targeted to economically disadvantaged areas called “en-zones”, the Section believes its targeting could be strengthened further by increasing the incentives for projects in environmental justice areas, projects that are certified to be in compliance with Brownfield Opportunity Area plans, and renewable energy projects.

The Section is proposing the attached bill, which we believe would, if enacted, accomplish these goals. The proposal builds on legislation (S. 7120) introduced during the 2021 legislative session by Senator Tim Kennedy. It also contains provisions from a bill introduced in the 2019 legislative session, authored by Senator Carl Marcellino. Members of the Section have discussed the provisions of this bill extensively with staff members of NYSDEC, as well as staff in the NYS Assembly and executive branch. Thus, the majority of the provisions of this bill do not come out of the blue. They have been introduced by the Senate or have recently been developed based on discussions with the NYSDEC, the executive branch and Assembly.

The provisions of the proposed bill can be categorized generally as follows:

A. Extending Time for Entry of Sites into BCP and Claiming the Tax Credits

Section 21 of the bill extends from December 31, 2022 to December 31, 2032 the deadline for sites to be accepted to the BCP to qualify for tax credits. Similarly, the deadline for sites in the BCP to receive their Certificate of Completion (COC) is extended from March 31, 2026 to December 31, 2036 (a December date being substituted for March to more closely align with the end of the tax year for most BCP applicants and NYSDEC’s process for issuing COCs by the end of the year).

Other time periods extended by this proposed bill are found in Sections 11 and 16, which would extend the five-year period to claim the site preparation costs after issuance of a COC to seven years, and addresses a drafting oversight in the 2015 Brownfield Cleanup amendments to clarify the year in which certain tax credits can be claimed. Section 12 would amend the tax law to provide that tangible property credits can be claimed for site improvements completed up to 180 months after the date of the COC rather than the current 120 months, because experience since the enactment of the BCP has shown that development on these sites is difficult and often takes a significant amount of time. There are still 44 projects that have received a COC but have not been able to construct their buildings during the current 120 month timeframe. These are often difficult projects in areas that may require extensive rezoning, or involve other complicating factors. The 2008 real estate crash and the 3- to 5-year deferral of the tax credits between 2010-2012 also slowed or stopped financing of many projects, and the COVID-19 pandemic has also slowed projects. The proposed changes would therefore allow developers who took on the risk of site remediation to have additional time to place their remediated sites back into productive reuse.

B. Provision of Dedicated Funding for NYSDEC and NYSDOH to Administer the BCP

Discussions with representatives of NYSDEC indicate that a major problem with administering the BCP is the lack of adequate staffing. Because NYSDEC is short-handed, staff time spent on the BCP must be pulled from enforcement matters. At the same time, brownfield projects—many of which need to meet deadlines set by lenders, joint venture partners or other third parties—are delayed because staff has no time to review submissions or otherwise implement the program. Sections 4 and 10 address this issue by establishing a fee to be paid by both Volunteers and Participants, as defined in the BCP (with Participants

paying a higher amount) and those funds being deposited in a dedicated account which would fund adequate NYSDEC and NYSDOH staffing to implement the BCP.

Prior to the 2015 amendments to the BCP, all applicants to the BCP were required to pay oversight costs to offset the expense of administering the program. The 2015 amendments to the BCP eliminated oversight costs for Volunteers (those who have no prior relationship to the site or the contamination thereon), but retained those payments for other applicants (Participants) to the BCP. However, both before or after the 2015 Amendments, those payments did not fund NYSDEC or NYSDOH. Rather, they were deposited in the State's General Fund. Under our proposed bill, these payments will be directed to a special revenue account already set up for receipt of fees.

C. Extending the BCP to Economically Disadvantaged and Environmental Justice Areas and Increasing Incentives for Renewable Energy Projects

The BCP already provides extra incentives for sites in Environmental Zones, as defined by the New York State Department of State. The Omnibus Bill would add Potential Environmental Justice Areas (PEJAs), which have already been defined by the NYSDEC's Office of Environmental Justice on state-wide maps, to qualify for all of the tax credits, to incentivize remediation and redevelopment of contaminated sites within these underserved areas.

Additionally, the BCP provides a very limited percentage increase to sites in Brownfield Opportunity Areas (BOAs) as defined by the New York State Department of State, but only four sites have been able to take advantage of this "bump up". The Omnibus Bill extends all the tax credit benefits to those sites certified by the Department of State as conforming to designated BOA plans.

The need for renewable energy has become increasingly apparent since the last amendments to the BCP. However, based on the current tax credit formulas, the tax credits cannot offset the costs sufficiently to attract these projects to landfills or brownfield sites, where they should be located. The Omnibus Bill changes the formula to provide the sufficient incentives needed to attract renewable energy projects to these sites and address remediation issues.

D. Addressing Soil Vapor Issues

Soil vapor intrusion was not considered a matter of concern at the time of initial enactment of the BCP in 2003. It has become an increasingly significant issue in the ensuing years. However, the provisions of the BCP have not kept up with that development. The Omnibus Bill contains a number of provisions which would ensure that appropriate tax credits be given for those portions of site remedies that address soil vapor intrusion issues.

E. Preserving Tax Credits for Certain Affordable Housing Projects Whose Eligibility for Credits May Be Adversely Affected by Recent Legislative Changes

For sites in New York City to qualify for tangible property credits as affordable housing projects, a regulatory agreement must be submitted to NYSDEC in advance of the site's obtaining a COC. However, because of changes in the affordable housing program, such agreements are no longer finalized until after the project is constructed, which is well after the NYSDEC issues the COC. As a result, such projects may no longer qualify for such credits based on a technicality of when a qualifying regulatory agreement is signed.

This result is inconsistent with legislative intent and would arbitrarily deny tangible property credits for sorely needed affordable housing projects in New York City. The Omnibus Bill would address this anomaly by providing that a project will qualify for such tax credits if a regulatory agreement is signed at any time prior to the site's applying for tangible property tax credits.

F. Other Technical Corrections/ Clarifications of Qualifying Costs

There are also a number of other technical corrections or clarifications being made to the BCP provisions in the Environmental Conservation Law and Tax Law in relation to the costs that should or should not count toward the site preparation costs, since often there is an overlap between some construction costs and costs that also serve a remedial purpose.

In sum, this bill largely preserves the existing BCP program and tax credits but further targets certain sites and projects still in need of these incentives. The Section looks forward to working with the Bar Association Executive Committee to facilitate the Bar Association's endorsement of this important piece of legislation.