

New York Governor Proposes to Extend Brownfield Tax Credit With Major Revisions

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The New York Governor proposed to extend the most significant tax credits associated with New York's **Brownfield Cleanup Program (BCP)** as [part of his Executive Budget](#). The proposal tries to take a middle ground between the cheerleaders of the program, who contend that it has been a widely successful economic development and environmental cleanup program, and the critics, who assert that the tax credits, especially the "tangible property credit," is an unnecessary giveaway to real estate developers.

Background – New York's BCP

[New York's BCP](#), which was enacted in 2003, is intended ["to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment."](#) To gain eligibility under the BCP, an applicant must show that redevelopment or reuse of its property "may be complicated by the **presence or potential presence of a hazardous waste, petroleum or other contaminant**." A party permitted into the program is required by the **Department of Environmental Conservation (DEC)** to conduct an investigation to assess the nature and extent of contamination, and to devise and implement a "remedial program" that DEC has found to be "protective of public health and the environment." Once the applicant certifies that it has implemented the remedial program and DEC is satisfied with the remediation, the Commissioner issues a written certificate of completion (COC), which triggers two major benefits to the applicant: (i) **tax credits under [Tax Law §§ 21-23](#)**; and (ii) **a release from liability under [ECL § 27-1421\(1\)](#)**.

There are two significant tax credits offered to an eligible applicant: (i) the *site remediation* credit equal to the "applicable percentage" of the site preparation and groundwater remediation costs incurred by the taxpayer with respect to the site; and (ii) the tangible property credit equal to the "applicable percentage" of the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings; i.e., related to actual development costs. [Tax Law § 21\(a\)\(2\), \(3\), \(4\)](#). The "applicable percentage" of the costs accrued is dependent on the type of tax credit that is sought and the level of cleanliness that is to be achieved. For example, the Remediation Tax Credit, which includes credit for costs incurred for remediation, demolition, excavation, fencing, security and other capital account

costs to make the site usable for redevelopment, ranges from 25% to 50% of remedial costs, depending on the level of cleanup achieved. The Tangible Property Tax Credit typically ranges from 10% to 12% of eligible costs, with an additional 8% added if at least 50% of the eligible site is located in an area meeting certain low-income criteria. Under a 2008 amendment, this credit component was capped to the lesser of \$35 million or three times remedial costs; or, for sites used for manufacturing activities, to the lesser of \$45 million or six times remedial costs.

The Proposed Amendments

The proposed revisions are intended to address a number of complaints about the existing program besides the scope of the Tangible Property Tax Credit, including the oft-litigated eligibility standard requiring the showing that redevelopment or reuse of the property is “complicated” by contamination, and the request by the regulated community for a non-tax credit streamlined BCP process for sites simply seeking a COC and liability release. Here are some of the highlights:

- **Modified Definition of Brownfield Site:** The bill would delete from the definition of “brownfield site” the “complicated by the presence or potential presence” of a contaminant language, and replace it with a standard based on whether a site contains a contaminant “at levels exceeding the soil cleanup objectives or other health-based environmental standards promulgated by the department.” DEC’s soil cleanup objectives or SCOs have been in existence since 2006. This change should bring more certainty to developers seeking entry into the program by directly tying eligibility to whether contaminants exceeding SCOs are found at the site.
- **Limitation on Eligibility for Tangible Tax Credit:** Under existing law, eligibility for the tangible tax credit is open to all sites that enter the program. The bill would create a new ECL § 27-1407(1-a) to limit eligibility based upon whether the site meets certain criteria. Eligibility would be determined by the Commissioner of Economic State Development. The criteria are as follows:
 - Has been a vacant lot for at least 15 years;
 - Consists of a building or buildings that have been vacant for at least 15 years; or
 - Constitutes a lot or contains buildings that have been both vacant and tax delinquent for at least 10 years.
- **Vacancy Condition:** Limited to whether the site:
 - Has been a vacant lot for at least 15 years;
 - Consists of a building or buildings that have been vacant for at least 15 years; or
 - Constitutes a lot or contains buildings that have been both vacant and tax delinquent for at least 10 years.
- **Upside Down:** The projected cost of the investigation and remediation exceed the certified appraised value of the property absent the contamination.
- **Economic Development:** The Project is a “priority economic development project” that has received a resolution from the applicable municipality stating that the project is consistent with the municipality’s local revitalization or development plan.
 - The term “priority economic development project” is defined to include (i) a manufacturing facility, agricultural-related business, scientific research and development firm, or corporate headquarters of a firm that would create at least 100 net jobs and make a significant capital investment in the state; (ii) a software

development firm that would create at least 50 net jobs and make significant capital investment in the state; or a financial services or similar firm that would create at least 300 net jobs and make significant capital investment in the state

- **Modification of “Applicable Percentage” for Tangible Tax Credit:** Tax Law § 21(a)(5) would be amended to provide that, effective on July 1, 2014, all persons accepted into the BCP would be eligible for 10% of development costs, irrespective of tax category. Add-ons would apply as follows:
 - 10% for a site within an environmental zone.
 - 5% for a strategic site located within a designated brownfield opportunity area.
 - 5% for sites developed as affordable housing.
 - The “applicable percentage” for the tangible tax credit would be capped at 24% subject to the existing monetary caps under Tax Law § 21(a)(3-a).
- **Grandfathering Provision:** An unconsolidated law enacted in 2003 would be amended to specify that existing tax credits would remain in effect for any site accepted into the program prior to July 1, 2014. However, projects that entered the program prior to July 1, 2008 would need to obtain a COC by December 31, 2015 or be removed from the BCP. Projects that enter the program after July 1, 2008 would have until December 31, 2017 to obtain a COC. The tax credits as amended by the bill would apply to any site accepted into the program between July 1, 2014 and December 31, 2022, so long as the site receives a COC by December 31, 2025.
- **Schedule:** ECL § 27-1411 would be amended to require the applicant to commence implementation of the work plan within 90-days of approval and to otherwise comply with the schedule set forth in the work plan.
- **New BCP-EZ Program:** A new ECL § 27-1437 would be added to authorize DEC to exempt a volunteer from certain procedural requirements of the BCP in the event the applicant was not seeking tax credits, but only a COC and liability release.

Issues Raised By The Proposed Amendments

There is no question that the proposed amendments would substantially cut back on the Tangible Property Tax Credit. The law is not clear on how an applicant would go about showing that a cleanup would exceed the value of the property in advance of a site investigation. Indeed, it would appear difficult to make such a showing without first undertaking the site investigation outside the BCP. The State’s Economic Development Corporation would be charged with issuing regulations governing the eligibility requirements to obtain the tangible property credit. The amended two-step process – Brownfield eligibility and then Tangible Property Credit eligibility – would add a cumbersome and potentially time consuming step to the process. It also adds uncertainty that could doom projects where an applicant needs to know that it will obtain the tangible property credits prior to spending substantial sums on a site investigation. The minimum job creation numbers also make it extremely unlikely that most redevelopments would qualify for these credits, effectively killing the Tangible Property Credit component of the BCP.

The deadlines placed in the proposed amendments are clearly intended to give DEC greater latitude to remove sites from the BCP that are not making progress toward cleanup, a laudable goal. However, these aggressive time lines ignore the reality that market conditions often drive site redevelopment, and it is difficult to discern how aggressively removing sites from the program would encourage development of these underutilized sites, a goal of the program.

The simplification of the eligibility criteria from the inchoate “complicated” standard to exceedance of established numerical cleanup standards is a welcome change. A new streamlined BCP for less complicated sites not seeking tax credits is also a promising development. However, without tax credits, DEC would need to ensure that the projects in the streamlined program undergo a faster and less cumbersome review than what has come to be expected under the current BCP.

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