

Notes for the BCONE Panel: Breakout 1A: Stakeholder Response to the NY State Brownfield Cleanup

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Program Objective: Where we were, where we are, where we are going with the law that was just passed.

The Brownfield Cleanup Program (BCP) tax incentives were set to expire for sites that had not yet received a Certificate of Completion (CoC) from the NYSDEC by 12/31/2015. After a multi-year effort – led by many (including all of our panelists), the legislature and Governor reached an agreement on sweeping reforms of the BCP. The panel presented key elements of the Amendments – and provided honest and insightful thoughts regarding some these changes.

Key Dates for the Amendments

The effective date of the Amendments will be the later of either July 1, 2015, or the date when the New York State Department of Environmental Conservation (NYSDEC) defines “underutilized” for Tangible Property Tax Credit Eligibility purposes.

Eligibility for the Tax Credits turns on a series of deadlines. There are deadlines established for sites currently in the Program to obtain a Certificate of Completion (CoC) by a certain date – otherwise, these sites will be subject to the new amendments:

- Projects prior to 2008 – need to receive CoC by 12/31/2017 or will lose “grandfather” status
- Projects after 2008 – need to receive CoC by 12/31/2019 or will lose “grandfather” status
- Projects accepted after 7/1/2015 – and before 12/31/2022 will subject to new Amendments – provided that CoC is received before 3/31/2026, or NO tax incentives

- No Tax incentives will be available for sites accepted into the BCP after 12/31/2022

Interesting statement by one of the panelists: “This structure is better than terminating sites out of program, or terminating the tax credits”

Change to the Definition of “Brownfield Site”

As explained by the panelists – the original definition of “Brownfield Site” in the 2008 statute was modeled after the EPA definition. Over the years, and after various interpretations of the EPA definition, the legislature decided on a change to eliminate ambiguities.

The Amendments clarified this definition, which now requires applicants to demonstrate (through sampling data) that sites are contaminated above cleanup levels and will require remediation.

“Brownfield Site” will now be defined as “any real property where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by [DEC] that are applicable based on the reasonably anticipated use of the property.”

Some very interesting observations raised by the panel include:

- The amendment is silent as respects who determines the use of the site. What if the site is being cleaned up to a certain standard and then later sold?
- Up until now – getting Brownfield into a program you only needed to do a Phase I, or a minimal Phase II – it was easier to convince the seller to let you do investigations. Going forward this change may complicate transactions. Sellers want to sell the sites as is – and not have the buyer poking holes.
- The environmental investigation has to demonstrate that remediation is required – what about historic fill sites?
- The “other health-based or environmental standards, criteria or guidance adopted by DEC” – what does this mean as respects vapor issues?
- New legislation eradicates the historic use standards that applied since the program in 2003 – because you now need to demonstrate actual exceedances of the soil standards

- Given a requirement that there be a contaminant needing remediation – what does remediation mean? (cap, dig and haul, engineering control) – if you have any remedy that would appear in a RAP it qualifies as remediation. What about an institutional control? Going forward– if a site only needs an institutional control then it does not get into a program.

Inclusion of Class 2 Sites: The amendments extend the BCP to volunteers at Class 2 sites who own the site or are under contract to purchase the site – where DEC cannot identify viable responsible parties.

Previously, such sites were deemed ineligible even if the party seeking to remediate the site had no role in the contamination.

Observations raised by the panelists:

- Where there is an Operations and Maintenance (O&M) obligation – can the O&M costs be passed to a developer
- There were different ways to handle the senate bill didn't include a viable RP point; It could have been better because many sites will sit idle as most of the sites have a viable RP.
- Can DEC just NOT make a determination of whether there is a viable RP and allow a site into the program?
- Would the seller of the property now be a viable RP because of proceeds from the sale?

Gates Approach for Cities with more than 1M in population (NYC)

All sites that meet the new Brownfield Site definition will be eligible for both the Site Preparation and Tangible Property Tax Credits – HOWEVER, for sites located in New York City, there is now an additional requirement for the site to meet BOTH the Brownfield Site definition and to pass through one of the 4 Gates:

- 50% of the site must be located in an “Environmental Zone” (EN-Zone) based on 5 year American Community census survey (high poverty/high unemployment – where people live versus where brownfield is located).
- Upside Down (where the cleanup cost is 75% of the clean property value)
- Site will be used for affordable housing – not defined

- Underutilized – to be defined by the NYSDEC by October 1, 2015

Observations from the panelist regarding site Eligibility:

- Definition of underutilized is critical – if NYC site doesn't meet one of the other 3, it complicates the transactional decisions with buyer/seller;
- If site has been previously remediated for intended use at that time – no eligibility for the Tangible Property Tax Credit. This creates a disincentive for closed spill sites (not clean, minimal remediation) – the sites can still get in for the site prep, but not for the bigger tax credit. Sites previously cleaned as a gas station - received closure; but now a developer wants a higher/better use – this site is penalized and is NOT eligible for the TPTC.
- MGP sites scenario: most MGP sites are subject to consent orders; generally, under the CO – the private sector party has agreed to clean up site to industrial or commercial standards (depending on where the site is located); If the site is removed from the CO because the neighborhood is being gentrified – if a developer wants to develop the site for a better use, the TPTC is not available because the MGP site was partially cleaned up.
- There are County EN-Zones: A and B qualifications: Poverty / unemployment; B: one of these components is %greater; The County EN-Zones expired in 4/2006; There was an amendment which extended the expiration to 4/2010 (the 2008 brownfield amendment didn't take into account the County M-Zone). The amendment brought back for En-Zones for County – but not retroactive. This should be corrected
- There is concern that based on census track – a wealthy area might bump out sites in a particular “pocket” – even though the sites are in an environmental justice program
- A site is not eligible for tangible property tax credits if the contamination from ground water or soil vapor is solely emanating from property other than the site.
- Regarding whether or not a property is upside down - who will pay for the appraisal? What kind of appraisal (evidently there are 3). In NYC the property values are so elevated that the 75% ratio is not realistic.
- All costs incurred prior to being in the program (Phase II and Appraisal) are not included for the Tax Credits
- Affordable Housing Gate: if you qualify, then the credit is a fraction; numerator of fraction = # of square feet for affordable housing / denominator: total building square footage. Problem is if you want to create first floor retail (creating jobs). The developer will be penalized by creating the first floor retail space. What about Commercial Condos?

Changes to the Definition of Site Preparation Costs
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Site preparation costs definition has changed. Moving forward, there is a long laundry list of costs that provide clarity to what is included for consideration.

Comments from the panelists:

- Lead, PCBs, Asbestos Abatement is now clearly in the definition
- Foundations: Typically part of remedy for Track 4 to prevent exposure pathways, IC – tax department has taken an issue with this; the law – you have to take foundations out and put in a cost of a soil cover for a substitute dollar amount. How tax department will deal with that cost at audit is up in the air.
- Post CoC costs incurred within 5 years for compliance. Old Law – costs incurred to prep the building (site grading, etc.) as long as costs incurred in 5 years. Now these costs are OUT. Impact is that there is a smaller basis for site eligible preparation costs

What is no longer available?

- Real property tax credit tied to job creation was removed from the program
- Environmental Insurance tax credit was removed from the program