

11 Ways To Reform NY's Brownfield Cleanup Program

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Law360, New York (January 23, 2015, 12:18 PM ET) -- On Jan. 8, 2015, the New York State Bar Association's Environmental Law Section issued a "Memorandum and Recommendations Regarding Proposed Extension and Reform of the Brownfield Cleanup Program." The memorandum is the product of a task force, co-chaired by the authors, that included a wide spectrum of stakeholders.^[1] These stakeholders provided valuable input, which was taken into consideration by the Section in crafting the memorandum's recommendations.

The memorandum was issued in anticipation of Governor Andrew Cuomo's budget proposal, issued on Jan. 21, to amend and extend the New York State Brownfield Cleanup Program ("BCP").^[2] Currently, sites in the BCP must receive their certificate of completion of site cleanup ("COC") by Dec. 31, 2015, in order to be able to claim the substantial tax credits available under the program.



The memorandum supports many of the governor's proposed changes to the program but differs as to others. This article discusses the areas of agreement and disagreement, as well as how the recommendations compare with proposals made last year by the New York State Assembly and Senate on these issues.

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The Section's Recommendations

The key recommendations in the memorandum are as follows:

1. Definition of "Brownfield Site"

The current statutory definition is a site "which may be complicated by the presence or potential presence" of a contaminant. This definition, based on federal law, has proved problematical insofar as there is no reliable way of determining when a site's contamination "may complicate" development.

The Section's recommendation, which is consistent with the governor's proposal and that of the Assembly last year, is to streamline the definition so that a site would be considered a "brownfield" if it is contaminated at levels that exceed health-based or environmental standards applicable in light of the site's expected use. The proposed definition would also eliminate distinctions based on where the contamination originated (e.g., an onsite vs. an off-site source, such as historic fill). The governor also proposes that applicants "shall" submit an investigation report sufficient to demonstrate that the site requires remediation.

The major difference between the memorandum's recommendations and the governor's (and the Assembly's earlier) proposal is that the determination of anticipated site use would be made by the BCP applicant rather than the New York State Department of Environmental Conservation ("DEC").

2. Extending the Deadline for Obtaining COCs; Grandfathering Existing Sites

The Section recommends that the deadline for obtaining COCs for sites in the program be extended until the earlier of 10 years after admission to the BCP (as long as that date is no earlier than Dec. 31, 2015) or Dec. 31, 2025. It further recommends that (a) all sites in the program as of the law's amendment be grandfathered as to the applicable amount of, and methods of determining, tax credits, and (b) on a going-forward basis, eligibility for and methods of computing tax benefits be based on the date of a site's admission to the program, not the date of issuance of the COC.

The governor's proposal would allow sites to apply for the BCP until Dec. 31, 2022, and would extend the deadline for obtaining COCs to Dec. 31, 2025. However, sites in the program as of April 1, 2015, would have only until Dec. 31, 2017, to obtain COCs to maintain eligibility for the current tax credit scheme. Unlike the governor's 2014 proposal that would have terminated sites that did not obtain a COC by end the of 2017, the governor's current proposal provides instead that such sites would lose their grandfathered status and be subject to the new limits on tax credits discussed in paragraphs 3 and 4 below.

3. Adjusting Calculation of the Tangible Property Tax Credit

Currently, a BCP applicant may claim up to \$35 million in tangible property (i.e., development) tax credits for a non-industrial project or three times its site preparation (i.e., cleanup) costs, whichever is less. These caps were added in 2008 to address concerns about the overall costs of the BCP.

Despite several independent studies that indicate that the caps have achieved this goal[3], the governor's proposal would eliminate the tangible property credits as an "as of right" feature; instead, applicants would be required meet a second set of criteria to be able to claim tangible property credits.[4] NYSDEC would notify the applicant upon acceptance into the BCP if the project meets the criteria for qualifying for the tangible property tax. The governor's proposal reduces the base percentage for all applicants to 10 percent but would award an extra 5 percent tax credit, up to a total of 24 percent, for meeting any of the following criteria: affordable housing projects as defined in the bill; sites located in Environmental Zones; sites located within a Brownfield Opportunity Area ("BOA") that conform to the plan for that BOA; and sites used primarily for manufacturing activities.

This so-called "two-gate" approach is controversial, not only because of the particular criteria proposed by the governor but also because such an approach would inject more complication, delays and uncertainty into the BCP application process. Moreover, the subjectivity of the proposed criteria raises the specter of future litigation over which sites qualify for these additional credits.

The Section concluded that the goals of the two-gate approach could be better achieved by (a) retaining the "as-of-right" eligibility for tangible property credits for all projects admitted into the program; (b) lowering the \$35 million cap for these credits; and (c) providing for higher caps,

and increasing the “three times” multiplier, for certain categories of projects that address well-defined public priorities — e.g., affordable housing, green construction, transit-oriented development, or location in areas with depressed economic activity.

4. Adjusting the Definition of Costs Eligible for Site Preparation Tax Credits

Under existing law, recoverable site preparation costs are broadly defined. The governor’s proposal would restrict eligible costs to those directly tied to remediation-related construction and would further limit eligible building foundation costs to the cost of a site cover. The costs would also have to be paid within six months after the expense is first incurred. However, the governor proposes to allow costs to abate asbestos and lead-based paint or address PCBs within buildings to be eligible for the site preparation tax credit cost where the work is done in accordance with state requirements.

The Section recommends retaining the current broad definition but agrees with the concept of limiting eligibility for costs associated with constructing the foundation of a building.

5. Creation of a Non-Tax Credit, Voluntary Cleanup Program

The governor proposes, as did the Assembly and Senate last year, to create a liability-release-only cleanup program that would allow parties to waive tax credits in exchange for a more expedited cleanup process. The governor also proposes to allow DEC to accept BCP applications from parties currently enrolled in the old administrative Voluntary Cleanup Program, but such applicants would not be eligible for brownfield tax credits.

The Section agrees that there is value to creating a new, streamlined program but believes that further clarity is required as to what procedural requirements would be waived in any such program. The memorandum suggests that the streamlined provisions include a reduction in cleanup and review timeframes; placing greater reliance on simplified templates and presumptive remedies; and elimination of detailed evaluation of alternative cleanup strategies.

6. Making “Class 2” Sites Eligible for the BCP

Current law makes sites classified on the state Superfund list as “Class 2” (representing a significant threat to public health or the environment) ineligible for entry into the BCP. The governor’s proposal would allow Class 2 sites into the program if they were being sold to a party not responsible for the original contamination, and there were no responsible parties available to pay for the cleanup.

The Section supports program eligibility for Class 2 sites being purchased and cleaned up by nonresponsible parties. However, it is concerned that the requirement of there being no financially viable party is too restrictive and, in some cases, too difficult to establish. Instead, the memorandum recommends providing that entry into the program does not extinguish the right of the applicant or DEC to pursue responsible parties for cleanup costs, or for cleanup if the site is not remediated properly.

7. Eliminating Hazardous Waste Program Fees and Special Assessments for Sites Remediated Under Municipal Authority

New York State imposes both program fees and special assessments on generators of hazardous waste. These fees and assessments, which can total hundreds of thousands of

dollars, have been interpreted to apply not only to wastes generated by manufacturing operations, but also to materials disposed of in the course of cleanups. There are statutory exemptions for sites remediated under specific state programs. However, there is no such exemption for cleanups conducted under other state programs or under the supervision of municipal authorities — e.g., under the New York City Voluntary Cleanup Program.

The Section agrees with the governor's proposal that any cleanups done under programs run by municipalities that have a memorandum of agreement with the DEC be exempted from these taxes and fees.

8. Clarification on Eligibility of Expenditures Paid to Related Parties

It is not unusual in real estate development projects for work to be performed through entities that have common ownership with the developers and contractors whose services are critical to the organization, financing and construction of the project. However, payments for such services may be deferred long after they are "incurred" for tax credit purposes, and they are sometimes waived entirely.

The governor proposes eliminating all "related party" (10 percent or more common ownership) payments from the calculation of brownfield tax credits. Because doing so would run counter to well-established federal tax law and real estate development practices, the Section recommends an alternative: that the tax credits attributable to services by related parties be earned only when and to the extent that those fees are actually paid.

9. Limiting State Oversight Costs

State oversight costs sometimes represent a significant proportion of BCP project expenses and are often difficult to predict. The governor's proposal would eliminate oversight fees incurred after the effective date of the legislation for parties not responsible for the original contamination. It also provides authority to DEC to negotiate "a reasonable flat-fee" for oversight costs for other participants.

The Section supports the governor's proposal.

10. Clarification on Municipal Access for Environmental Investigations at Tax Foreclosure Sites

Municipalities that foreclose on tax liens may enter such sites to perform environmental investigations without incurring cleanup liability. However, some municipalities do not directly foreclose on such properties but instead sell tax liens to third parties who then foreclose on the property.

The memorandum recommends that the tax law be amended expressly to allow municipalities to enter tax lien sale sites to perform environmental investigations without incurring cleanup liability for those sites.

11. Brownfield Opportunity Area Reform

The Brownfield Opportunity Area ("BOA") program has great potential but has been hampered by structural and funding issues.

The Section recommends that sites in a designated BOA be eligible for enhanced brownfield tax credits. Designation of BOAs should be far more transparent and simple than the current process, and information developed in relation to BOAs should be made publicly available, so that developers know the locations of BOAs. Sufficient funding should be provided so that all of the existing BOAs can be designated as eligible for tax credits, and that money should be available for implementation of pre-development activities, including the marketing of brownfield sites.

Conclusion

It is acknowledged by all stakeholders, including the governor, both houses of the Legislature, and the environmental and business communities, that the Brownfield Cleanup Program has been a significant driver for the cleanup and redevelopment of contaminated properties in New York state. There is also a broad consensus that the program should be extended, but with changes to better target tax credits to sites that need them most.

The Section's recommendations attempt to synthesize the best elements of the governor's proposal, and the Senate's and the Assembly's 2014 proposals, as well as creative ideas from other stakeholders, into a package that could form the basis for a revision of the BCP that all parties can support. Whether the recommendations are successful in this regard remains to be seen. In any event, they represent a worthwhile contribution to debate that will take place in Albany over the next several months on extending and reforming this important program.

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[1] The participants in this process included the New York League of Conservation Voters, the Environmental Defense Fund, the New York State Business Council, New Partners for Community Revitalization, the New York City Office of Environmental Remediation, the Real Estate Board of New York and the New York City Brownfield Partnership. No inference should be drawn that each organization has endorsed the specifics of each of the Section's Recommendations.

[2] Part R of Revenue Article VII of the 2015-16 Budget Bill

[3] See B. Hersh, New York State Brownfield Cleanup Tax Analysis (New York University Schack Institute of Real Estate, January 28, 2014); New York State Brownfield Cleanup Program: An Assessment of the Economic, Fiscal, and Environmental Impacts (Redevelopment Economics, February 2014)

[4] The governor's proposal would limit the tangible property tax credits to the following categories (i) sites that are 50 percent or more located in an Environmental Zone, (ii) sites where the projected cost of the investigation and remediation which is protective for the anticipated use of the site exceeds the certified appraised value of the property absent contamination, and (iii) projects that meet the definition of "affordable housing."