

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Environmental **LAW**

# Proposed brownfield cleanup program amendments

The Brownfield Cleanup Program was enacted in 2003 to foster private development of former brownfield parcels. The program was amended in June 2008 to cap tax credits, and those tax credits are scheduled to expire in December 2015. Unfortunately, significant state concerns exist about the scope of the available tax credits.

As part of the budget proposal, the governor recommended sweeping changes to the program and an extension of the tax credits. While the BCP changes were not incorporated into the final budget legislation, they remain subject to discussion and may receive action prior to the legislative session ending in June.

The main areas of concern in the BCP since its enactment have been the following: determination of site eligibility for acceptance into the BCP; treatment of background contamination for eligibility; issuance of substantial tax credits to a perceived small number of mega-projects in downstate in exchange for modest environmental remediation expenditures; and a need to foster additional development of multiple brownfields across upstate urban areas.

The BCP currently provides a three-part brownfield redevelopment tax credit: a site preparation credit (ranging from 10 percent to 22 percent based on corporate status and the location of the site); tangible property costs; and on-site groundwater remediation costs. The site preparation credit may be increased based upon the future use and level of cleanup (Track 1 is the highest cleanup; Track 4, the lowest) and ranges from 50 percent for unrestricted use, 40 percent for residential use; 33 percent for commercial use, and 27 percent for industrial use. However, if a Track 4 cleanup is performed, it reduces the applicable tax credit.

The tangible property tax credit was capped in 2008 to avoid excessive credits for individual brownfield projects. At non-manufacturing brownfield sites, the tax credit is capped at \$35 million of the calculated tangible property credit, or three times the site preparation cost and groundwater remediation costs, whichever is less. Manufacturing sites have a tax cap of \$45 million, or six times the site preparation cost and groundwater remediation costs, whichever is less.

Although the maximum tax credit appears to be significant, by enacting a “lesser of” test based on the site preparation costs and groundwater costs, the Legislature significantly limited the potential tax credits for any site. In addition, the 2008 amendments created a definition of “manufacturing activities” that are entitled to the tax credits.

The governor’s 2014 budget proposal included a variety of modifications to the BCP program. In order to qualify as a “brownfield,” a site would be required to have documented contamination above NYS soil cleanup standards for the proposed future use of the site. The governor proposed a new “BCP-EZ” program that allows for expedited remediation of sites, but without access to tax credits.

For the site preparation tax credit available for remediation work, the proposal kept the tax credits in the existing range of 22 percent to 50 percent of the costs, depending on the scope of the cleanup. However, the governor proposed granting tax credits based on a NYS DEC approved remedial work plan. This could exclude tax

credits for necessary tasks such as site investigation and IRM work that might pre-date DEC’s approved work plan. The site preparation credits were also clarified to include remediation of asbestos, lead and PCBs.

The governor also proposed significant new deadlines and criteria for the tangible property tax credits. This tax credit applies to the value of buildings and improvements put in service on the brownfield. The governor proposed a bar date of July 1, 2014, so that parcels admitted into the BCP after that date would not obtain tangible property tax credits unless they seek and obtain DEC approval at the time of the application and the site meets specific criteria.

The site would need to be one of the following to qualify: 1) vacant — the property and buildings have been vacant for 15 years or more, or have both been vacant and tax delinquent for 10 years or more; 2) financially underwater — the estimated cost of the investigation or remediation for the proposed future use of the site exceeds the appraised value of the property without construction;

*Continued ...*



By **GEORGE S. VAN NEST**

Daily Record  
Columnist

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

---

*Continued ...*

or 3) a priority economic development project — the project has been determined to meet certain criteria by the Department of Economic Development, including locating specific types of businesses at the parcel and the creation of 50, 100 or 300 net new jobs based on the type of business.

The proposal would also exclude tangible property tax credits if the site is subject to contamination from off-site sources, or if the DEC determines that the parcel has previously been remediated so that it can be developed for its intended use.

Assuming that a site qualifies for tangible property tax credit, the credit would be capped under the proposal at 24 percent based on the following components: 10 percent base credit; 10 percent if the site is in an environmental zone; 5 percent if the site is in a Brownfield Opportunity Area and the project is certified to be in conformance with the plan; and 5 percent if the site is developed as affordable housing.

The governor's proposal also set deadlines for BCP completion. Initially, sites admitted prior to June 23, 2008, would be removed if no Certificate of Completion is issued by Dec. 31, 2015. Sites admitted after July 23, 2008, but prior to July 1, 2014, would be removed if no COC is issued by Dec. 31, 2017. Further, sites accepted into the program after July 1, 2014, must obtain a COC by Dec. 31, 2025, to apply for BCP tax credits. The proposal would also preclude sites accepted after Dec. 31, 2022 from tax credit eligibility.

The BCP program has provided significant economic development benefits to New York state, but particularly upstate communities. Hopefully the governor and Legislature will take action prior to the end of the legislative session to renew the tax credits and provide long-term certainty for the BCP.

*George S. Van Nest is a partner in Underberg & Kessler LLP's Litigation Practice Group and chair of the firm's Environmental Practice Group. He focuses his practice in the areas of environmental law, construction and commercial litigation.*