

## **Brownfield Cleanup Program Extender and Omnibus Proposal**

### **MEMO IN SUPPORT**

**TITLE OF BILL:** An act to amend the environmental conservation law (ECL) and the tax law to extend the Brownfield Cleanup Program tax credits set to expire in 2022, and amend certain applicable provisions.

**PURPOSE OF THE BILL:** To continue to encourage brownfield redevelopment across the state of New York. The bill extends the very successful Brownfield Cleanup Program (BCP) tax credits set to expire at the end of 2022. The BCP has resulted in over \$16 billion in investment on New York contaminated real estate in return for an expenditure, in tax credits, of approximately \$2.5 billion, which is a return on investment of more than 6-to-1 without even factoring in new tax revenue from the projects. There is concern that the program may be not extended due to staff shortages at the departments of environmental conservation (NYSDEC) and health (NYSDOH), which administer the BCP due to many recent retirements of seasoned staff and the inability to hire new staff due to the Covid pandemic hiring freeze. This bill will provide a new revenue stream in the form of new fees to be directed into a special pre-existing revenue account, as opposed to the state's general fund, so that the departments of environmental conservation and health each have sufficient staff to administer the program. Second, the bill extends the BCP tax credit program for an additional ten years. Third, the bill expands the BCP to support projects in environmental justice communities and those involving renewable energy. Finally, the bill clarifies certain BCP provisions that have hampered the efficient administration of the program. These changes will promote predictability for program applicants and would further advance the program's environmental cleanup and urban revitalization goals by incentivizing the remediation, strategic reuse and redevelopment of contaminated land throughout the State, including environmental justice areas and brownfield opportunity areas and by encouraging renewable energy projects on brownfield sites.

### **SUMMARY OF PROVISIONS:**

**Section 1** clarifies that the 2015 amended definition of "Brownfield Site" in ECL § 27-1405(2) was not intended to exclude application of the Track 1 soil cleanup objectives in the event the site's intended use is any form of residential housing and the planned remediation is to achieve the Track 1 soil cleanup objectives. There was confusion that only the Track 2 residential soil cleanup objectives could be used to deem a multi-family housing residential project eligible for the program, however, this could result in fewer Track 1 brownfield remediation projects, which was not the intent of the legislature. In addition, these provisions clarify that if a brownfield site consists of multiple tax lots or is one large tax lot, provided at least 50 percent of the site is contaminated, not every lot or area on the site has to be contaminated for the entire brownfield site to qualify for the program because this is not only a cleanup program but an economic development program.

**Section 2** amends several definitions in ECL § 27-1405 and adds two new definitions. Subparagraph 29 of subdivision 2, which is the "affordable housing project" definition, has been amended to clarify eligibility for the tangible property tax credits for affordable housing projects that are subject to binding restrictions, which may not arise until the building is placed into service, and which typically occurs well after the Certificate of Completion for the remediation is provided by NYSDEC. Current language in the statute requires written documentation in order to make a request to NYSDEC for an eligibility determination

before the Certificate of Completion is issued. However, as a result of post 2017 amendments to the 421-a affordable housing program, these projects no longer receive a regulatory agreement until after the affording housing building is constructed. The bill amends the statute to clarify that these projects can claim the tangible property tax credits as long as affordable housing restrictions are imposed on the site before the tax return is filed for these credits and that the documentation can be provided to the Department of Tax & Finance rather than NYSDEC. Subparagraph 30 of subdivision 2 is also amended to codify into law the definition of “underutilized” that the department has promulgated by regulation but liberalize it to provide that a site may qualify as “underutilized” if it meets any of the criteria, rather than having to meet all of them. The current definition has, as we had predicted at the time, proven almost impossible for sites to meet and, as such, is contrary to legislative intent because it effectively forecloses the ability of underutilized sites in New York City to claim tangible property credits. The bill also eliminates the requirement that "underutilized" determinations need to be sought at the time of the BCP application because it is sometimes impossible to provide the analysis required to meet this test at the time of the application. A new conforming brownfield opportunity area (BOA) Site definition is added in a new subparagraph 32 for projects on sites certified by the Secretary of State as conforming to an approved BOA plan, so that these sites will be eligible for tangible property tax credits similar to eligibility afforded to sites in Environmental-Zones. Finally, a new renewable energy facility site definition has been added in a new subparagraph 33 to encourage renewable energy projects on brownfield sites.

**Section 3** amends ECL § 27-1407 (1-a) to enable an affordable housing project to either present proof for a determination (in the form of a BCA amendment application) that the project satisfies the regulation either by submitting a regulatory agreement to NYSDEC before the Certificate of Completion is issued, or to the Department of Tax and Finance after the Certificate of Completion is issued.

**Section 4** amends Section 27-1409 in Article 27 of the environmental conservation law by adding a new subdivision 13 to create an application fee to be paid by applicants into a pre-existing NYSDEC special revenue fund in order to create a revenue stream dedicated to the NYSDEC to fund staff for the program.

**Section 5** amends ECL § 27-1411(2) by clarifying that the Remedial Action Work Plan and the Final Engineering Report were intended to be the documents that describe the approved remedial action for the site, not a summary document being prepared by the NYSDEC called a Decision Document, which has been used to exclude otherwise eligible site preparation costs. This provision clarifies that NYSDOH’s review should be focused on public health impacts of the remedy, if any.

**Section 6** updates the Track 1 cleanup definition in ECL § 27-1415(4) to address sites where contaminated soil vapor may still be present from an on-site residual or off-site groundwater or soil vapor source after implementation of a Track 1 soil remediation. At the time the BCP Law was created, soil vapor intrusion was not a known environmental risk. The vast majority of brownfield sites still have residual soil vapor and groundwater contamination even after the most stringent Track 1 soil cleanup has been implemented. The added language clarifies that a site which completes a Track 1 soil remediation does not lose its Track 1 status after five years pursuant to existing regulations at 6 NYCRR §375-3.8(e)(1)(iv)(a) if it must implement groundwater and/or soil vapor institutional or engineering controls as a result of the site being present in an area where there may be area-wide ubiquitously contaminated groundwater and/or soil vapor plumes from other brownfield sites in the area. The amendment clarifies that a site that achieves Track 1 soil cleanup objectives can maintain the site’s Track 1 status even if soil vapor persists after five years, provided the site owner records an environmental easement to ensure that the soil vapor

and groundwater mitigation measures are maintained by the site's owner pursuant to a Site Management Plan.

**Section 7** updates the Track 4 cleanup definition in ECL § 27-1415(4) to clarify the original legislative intent that source removal is required for all Track 4 remedies. Recently, NYSDEC has been issuing decision documents that a Track 4 remedy solely consists of a two-foot cut for residential projects or a one-foot cut on commercial or industrial projects of surface soils and then a soil only cover system on top. This approach disregards the current source removal requirements in ECL § 27-1415(5), which are applicable to all remedial sites. In addition, this amendment includes a cross-reference to the new remedial action cover system description in ECL § 27-1415 (5-b) being added pursuant to the amendment in Section 9 of this bill.

**Section 8** amends ECL § 27-1415 subpart 5 to include a new section 5-b defining when "remedial action cover systems" are required and the required thickness for such a cover system to be effective. The 2015 amendments to the Tax Law defining "site preparation costs" permit a portion of the cost of foundations and sidewalls that are part of a remedial action cover system to be counted as "site preparation costs." When read together, Tax Law Sections 21(b)(2) and 21(a)(3)(iv), as amended in 2015, clearly intended to require taxpayers to divide the cost of remedial action cover systems consisting of building foundations into two parts: (1) a site preparation amount equal to the equivalent cost of a remedial action cover system for the area on the site that is covered by the foundation slab; and (2) a qualified tangible property amount equal to the balance – that is, the foundation cost that exceeds the equivalent remedial action cover system cost (e.g., the excess cost for very thick foundation slabs). NYSDEC has been drafting decision documents, and revising work plans and engineering reports to exclude the cover system requirement at all sites except Track 4 sites (and on Track 4 sites limiting cover systems to the cost equivalent of soil only cover systems), even though the presence of a remedial action cover system is part of the remedy. DTF has also decided to disallow all foundation costs as site preparation costs even when the Remedial Action Work Plan (RAWP) and Final Engineering Report (FER) include a constructed foundation as a required as part of the remedy. Accordingly, DTF has been allocating all of the foundation costs as tangible property costs, even when a portion of the foundation is clearly remedial under NYSDEC approved plans and documents. The effect is to eliminate valid site preparation costs from the site preparation tax credit calculations.

The bill clarifies the legislature's intent of the 2015 amendments by 1) defining when remedial cover system consisting of a foundation or hardscape surface such as asphalt or concrete is required as part of a remedial action; 2) specifying the minimal thickness needed for such cover systems in accordance with the minimal construction requirements in the existing Building Code of New York State, New York State Department of Transportation Standard Specifications, and based on practical remedial experience by brownfield practitioners; and 3) requiring the foundation to be certified by a licensed Professional Engineer. A formula to calculate the portion of the foundation that should count toward the site preparation costs is present in Section 17 of this bill.

**Section 9** amends ECL § 1419 (3) to incorporate a second project "close out" fee to address NYSDEC and NYSDOH's staffing needs for the program. Both agencies already are required to keep track of the time they spend on BCP projects, and the prior versions of the law made all applicants, and later only participants, to pay the agencies actual oversight costs incurred. However, the money went into the General Fund for the state and provided no direct benefits to NYSDEC and NYSDOH to address their

staffing needs. This provision reinstates the oversight fees for all parties, but the money is directed into an existing “Environmental Conservation Special Revenue Fund” established pursuant to State Finance Law section 71 Fund Number 21050 to be used as revenue for staff to administer the program.

**Sections 10 and 15** amend Tax Law § 21(a)(2) to extend the five-year period to claim site preparation credits to seven years for all sites. The section also cures an oversight in the 2015 Brownfield Cleanup Program law to clarify that taxpayers may claim site preparation credits for costs to comply with the certificate of completion and the approved remedial program (COC compliance costs) in the year those costs are paid or incurred. While the law was changed in 2015 to let taxpayers claim credits for COC compliance costs, there was not a corresponding change to the timing rule that would allow those credits in the year those costs are paid or incurred. This leaves taxpayers with eligible costs, but no tax year in which to claim the credits. The provision corrects this error by allowing taxpayers to claim credits in 2021 for pre-2021 COC compliance costs not otherwise claimed, and thereafter in the year the costs are paid or incurred.

**Section 11** amends Tax Law § 21 (a)(3)(i) to extend the time to place the tangible property credit component into service from one hundred twenty months to one hundred eighty months after the date of the issuance of a certificate of completion for all sites in the program to give parties more time to construct their projects on fully remediated brownfield sites given the past and current economic conditions in the real estate market. Due to the real estate crash in 2008, which delayed projects for up to 3-4 years and the more recent COVID-19 Pandemic, land use approvals ceased for periods of time and then only resumed slowly, construction ceased or significantly slowed down with new COVID-19 restrictions, and the urban residential market is suffering from excess inventory, as well as difficulty in finding debt financing and equity contributors for projects. As the economy slowly begins to revitalize, it is important to extend the entire Brownfield Cleanup Program and the timeframe to construct a building after earning a Certificate of Completion to ensure that projects on brownfield sites continue throughout this state. A site that entered the program before June 23, 2008 (referred to as a Generation 1.0 site) that goes beyond the ten years (or 12 years if the site is entitled to the Governor’s 2021 budget bill 2 year extender provision) will have a tangible property tax credit cap of \$35 million (similar to the maximum presently imposed on sites that entered the program after June 23, 2008, and before July 1, 2015 or Generation 2.0 sites).

**Section 12** adds a new Tax Law § 21 (a)(3-a)(A) to address practical issues as to why renewable energy facilities are not being developed on brownfield sites. The current tangible property tax credit formulas require the *lower of* the calculations from the following two formulas to apply: 3 times the site preparation costs or 10-24% of the tangible capital costs. Since the cost to cleanup most brownfield sites that would be applicable for a renewable energy facility are high in comparison to the capital costs, renewable energy developers are not securing enough tax credits under the current law to cover the cost of the remediation. As a result, these sites are not being redeveloped into renewable energy projects in urban areas where this type of power is most needed. This amendment allows the renewable energy developer to select which of the two formulas apply.

**Section 13** adds a new subparagraph to Tax Law §21(a(3-a)(E) to address practical issues not covered by the current tax law provisions. In many cases – and commonly with affordable housing projects – a project developed on a single BCP site may be developed in more than one component or project phase, and each component may be separately financed or owned. The current Tax Law contains no mechanism to

apportion the tangible property credit component among distinct project entities if the overall redevelopment on the site reaches the statutory limit on that component. A two-part solution is therefore proposed: first, taxpayers with an interest in the brownfield site may allocate the limitation in any manner that they may agree upon in a written agreement with a recorded memorandum and a copy must be filed with each tax return claiming tangible credits for the site. Alternatively, if there is no such agreement in place, default rules are created to allocate the tangible property credit component. The default rule applies in a year the credit limit is reached, and allocates the allowable amount of credits among all claiming taxpayers in proportion to the amounts they would have been allowed if there had been no limit – in other words, a proportionate reduction in credits is applied to each taxpayer in order to ensure that the statutory limit is equitably applied.

**Section 14** amends Subparagraph B of paragraph 5 of subdivision (a) of Section 21 of the Tax Law to add a five percent bump up on the tangible property tax credits for renewable energy facilities on brownfield sites.

**Section 15** amends Tax Law § 21(b) by adding a new subparagraph 2-a to harmonize federal tax law with the definitions of "site preparation costs" and "qualified tangible property" used in calculating the brownfield redevelopment tax credit (BRTC). This section clarifies that the cost of remediation and site preparation as defined in the law can include costs that are also included in the depreciable basis of project assets (such as a building) used for federal income tax purposes, while preserving and clarifying the no double dipping rule to ensure that federal depreciable basis is reduced – for BCP credit purposes – by allowed site preparation costs when calculating the tangible property credit component. Since this amendment clarifies the State's intention to permit taxpayers to comply with federal tax law while recognizing that the no double dipping rule prevents abuse of the BRTC credits, this amendment must be made applicable retroactively to ensure equitable treatment of all taxpayers with sites and projects in the BCP. Therefore, this change is applicable to all brownfield sites, regardless of the date of acceptance into the brownfield cleanup program.

**Section 16** harmonizes the definitions of "site preparation costs" with Sections 11 and 16 and also clarifies the treatment of several site preparation costs. For example, a specific reference to industry standard data provided by RSMeans when calculating the costs of foundation work has been added. See <https://www.rsmeans.com/>, which provides construction industry data that can be reliably used to calculate the cost of the foundation that should count as a remedial cover system.

**Section 17** amends Paragraph 3 of subdivision (b) of section 21 of the Tax Law is amended by the addition of a new subparagraph (C) which includes renewable energy facilities to be placed in service.

**Section 18** amends Paragraph 6 of subdivision (b) of Section 21 of the Tax Law by adding new paragraphs 6-a and 6-b for sites that have entered the program after July 1, 2015, with respect to the definition of environmental zones. The definition of Environmental zones (EN-Zones) has been expanded to include NYSDEC-designated potential environmental justice areas throughout the state. This furthers the overarching goal of the BCP by incentivizing cleanup of contaminated sites in areas where environmental issues and concerns have disproportionately impacted low income and diverse communities.

**Section 19** adds the new definition of a renewal energy facility into Paragraph 7 of subdivision (b) of section 21 of the Tax Law.

**Section 20** amends Section 31 of part H of chapter 1 of the laws of 2003, as amended by chapter 56 of the laws of 2015, extending from December 31, 2022 to December 31, 2032 the brownfield redevelopment tax credits for qualified sites, the BCP acceptance date for sites to be eligible for brownfield redevelopment tax credits, and the last date to receive a certificate of completion to qualify for such credits from March 31, 2026 to December 31, 2036. Certificates of Completion are typically earned at the end of the calendar year; therefore, therefore, a December deadline is consistent with current NYSDEC practice.

**Section 21** contains the effective date of this bill, which is immediately upon adoption, with the exception of specific provisions in Sections 2, 3 and 19 related to affordable projects and environmental justice sites.

**EXISTING LAW:** Title 14 of Article 27 of the ECL governs the eligibility and programmatic responsibilities for the Brownfield Cleanup Program. Tax Law § 21 establishes a tax credit program to encourage parties to remediate contaminated sites.

**PRIOR LEGISLATIVE HISTORY:** This is a new bill.

**STATEMENT IN SUPPORT:** The 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 NYSDEC into the BCP by December 31, 2022, will not qualify for the tax credits, which have been driving the success of the program.

Due to the tax incentives in this program, superior cleanups have been achieved, enabling not only individual brownfield sites, but multiple brownfields in economically disadvantaged and environmental justice neighborhoods, to be redeveloped. In addition, the project sites that have been remediated and redeveloped have not only created tax revenue-generating buildings and permanent jobs on sites that formerly lay fallow but have also enhanced investment opportunities on neighboring sites, improving livelihoods and property values in numerous communities throughout the state.

By contrast to the BCP, which remediates contaminated sites in an average of 3-4 years, the average timeframe for remediation under the State's other cleanup program, the Superfund Program, is 10 to 20 years and generally only achieves an industrial cleanup level. Furthermore, and sites cleaned up under the Superfund program are rarely, if ever, redeveloped because the final cleanups are not safe enough for site reuse except for industrial purposes.

These amendments to the BCP proposed by this bill are necessary to extend, stabilize and improve this highly successful remediation and economic development program. The bill extends deadlines for claiming tax credits; extends the benefits to economically disadvantaged and environmental justice areas and renewable energy projects; provides NYSDEC and the Department of Health dedicated funding, paid for by the projects themselves, to administer the BCP; addresses soil vapor issues (an environmental risk not fully appreciated when the BCP was enacted in 2003); preserves tax credits for certain affordable housing projects that would otherwise lose them; and makes a number of technical corrections which we believe will improve the administration of the BCP by clarifying which types of expenses can—and which cannot—qualify for tax credit treatment.

While the law has significant fiscal implications, studies have shown that revenues exceed the tax credit expenditures over the long term. As of May 2021, the state has paid out \$2.7 billion in tax credits, but developers have invested over \$17.7 billion remediating and redeveloping brownfield sites in some of the state's most difficult-to-develop areas.

**BUDGET IMPLICATIONS:** The benefits associated with the proper remediation and redevelopment of the state's contaminated sites has been shown by studies to more than offset the tax credit expenditures over the long term. The state has spent an average of \$190 million per year on the BPC tax credits, but this money has caused approximately \$2 billion in development to be constructed each year on NYS brownfields. By contrast, an average of \$115 million is spent on the Superfund program each year, and few if any of these inactive sites are ever put back on the tax rolls to produce new tax revenue. These sites are fenced and padlocked, and are continuing to severely impact redevelopment efforts in the communities in which they exist.

**EFFECTIVE DATE:** Section 22 of this bill would provide an immediate effective date for all sections , with the exception of specific provisions in Sections 2, 3 and 19 related to affordable projects and environmental justice sites.