



**The
Business
Council**

**New York State Senate Finance Committee and
Assembly Ways and Means Committee Hearing On
The New York State Fiscal Year 2014-2015**

The Executive Budget Proposals to Amend
the Brownfield Clean-Up Program

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Good morning Chairmen Farrell, DeFrancisco, Grisanti, and Sweeney, and the other members of the legislature. I am Darren Suarez, Director of Government Affairs for The Business Council of New York State. Thank you for the opportunity to testify about the Governor's Executive Budget and his proposed changes to the Brownfield Clean-up Program ("BCP").

The Business Council is the leading business organization in New York, representing the interests of large and small firms throughout the state. Its membership is made up of over 2,500 companies, as well as local chambers of commerce and professional and trade associations.

As an organization dedicated to advancing an economic climate that encourages opportunity, entrepreneurship, and innovation, I offer testimony today to articulate our support for the current program. Brownfield projects have successfully redeveloped properties, neighborhoods, and communities, all while returning a direct capital investment of over \$6.80 for every \$1 of tax incentives. In a soon to be released study by the Public Policy Institute we have determined that the current program has provided significant return to the State of New York in the form of State taxes and payroll.

In my testimony today we will articulate our support for the framework and much of the intent contained in the Executive's proposed amendments to the BCP, provided however, we do have concerns about the results of some of the specific provisions.

Many of our members are currently reviewing the proposed amendments to determine the real world. Today I will share with you some of our early observations, but in the coming weeks, our membership will provide to the members of the committee a thorough and detailed response.

Background

In 2003, the Legislature and Governor George Paktaki developed landmark legislation that refinanced and reformed New York State's Superfund Program¹, expanded the Superfund program to cover hazardous substance sites, increased the effectiveness of the municipal brownfield program, increased public participation in cleanups, adopted use-based approach to cleanups, provided liability relief to municipalities, lenders, and created a new brownfields program.

The passage of the legislation was not simple; the Legislature, the Executive and determined advocates worked to draft and shape the complex legislation intensely for over four years. Much of debate regarding the legislation focused on the cleanup standards, and liability provisions.

¹ The legislation contained a significant fee increase on manufacturing see <http://www.bcnys.org/inside/env/superfund061303.pdf>

The BCP was enacted because " ... there are thousands of abandoned and likely contaminated properties that threaten the health and vitality of the communities they burden it is appropriate to adopt this act to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment..²

To meet the goals of the program, the legislation authorized the state, upon issuance of a certificate of completion for a brownfield site, to provide the applicant with a covenant not to sue for any liability, including any future liability or claim for further remediation of hazardous waste and/or petroleum at or emanating from the brownfield site that was the subject of such certificate. Additionally, the program provides an opportunity for developers to earn tax credits.

Tax Incentives for Brownfields

The most significant of the credits is the "Brownfield Redevelopment Tax Credit", which consists of the sum of three credit components: 1) a site preparation credit component, 2) a tangible property credit component and 3) an on-site groundwater remediation credit component. The credits are computed by applying a percentage to costs relating to each component.

- 10%-22% of site and groundwater remediation costs.
- 10%-22% of redevelopment costs.

The BCP credits are refundable, which means if the credit amount exceeds the total tax owed to the state for the year, the excess is refunded by the state to the taxpayer.

Additionally, the legislation created an "Environmental Remediation Insurance Credit". The amount of this credit is 50% of the premiums paid on or after the date a brownfield site agreement is executed by the taxpayer and the Department of Environmental Conservation. There is a cap that limits the credit to \$30,000.

A year later, after the creation of the BCP, Chapter 577 of the Laws of 2004 was adopted to provide a series of technical amendments. Contained in those amendments was a provision to extend the tax credits to residential projects other than rental housing. The initial draft of the legislation did not include residential units constructed by a developer for resale (such as condominiums, townhomes, or single family residences) as qualified tangible property. The chapter amendment extended the tangible property credit to residential units.

Chapter 577 contained a significant number of amendments that were "technical in nature", including a provision clarifying that certificate of completion can be transferred to a new owner without triggering a change of use; lenders were provided the same liability exemptions for oil-spill sites as they were for Superfund properties, and the definition of municipality was clarified.

² (ECL 27-1403)

Amended Tax Credits in 2008

In 2008, after considerable media attention on outlier projects, amendments to the tax credits were adopted. The legislation imposed a cap on the tangible property tax credits, limiting credits for non-manufacturing projects to the lesser of \$35 million or 3 times the site preparation costs (which include cleanup costs) and to the lesser of \$45 million or 6 times the site preparation costs for manufacturing projects.

The site preparation and on-site groundwater remediation credits were restructured to increase incentives for achievement of the highest soil cleanup objectives. The site preparation and on-site groundwater remediation tax credits were not limited by a dollar cap.

The legislation added several reporting requirements to include the amount of tax credits claimed the redevelopment and taxes generated, and data on the progress of the BCP. The new reporting requirements were an attempt by the Legislature to provide the public with a fuller picture of the BCP.

The effects of the 2008 changes have not appeared yet because Tax & Finance does not track them differently than the pre-2008 projects, but it is logical to determine that some of the significant outlier projects that have been identified would not have occurred under the 2008 changes. In fact, the 2008 changes were agreed to in-part because they did address those outlier projects.

Program Success

The program success is very apparent for anyone who is interested in looking beyond the headlines. Brownfield projects have successfully redeveloped properties, neighborhoods, and communities better than another single program in the state, all the while returning a direct capital investment of over \$1.2 B.

The data is undeniable – New York taxpayers have seen \$6.80 in capital investment for every \$1 of tax incentives. This is only direct investment and does not include the other benefits to the economy including jobs, wage taxes, sales taxes, corporate taxes, property taxes, infrastructure savings (roads, powerlines, sewer, etc), or the environmental benefits.

There are numerous examples of brownfield redevelopment projects that have literally transformed a property, and the area around the property.

- A good example of a commercial redevelopment is College Park (site #C447037) a 8.36 acre site formerly owned by the American Locomotive Company. The property was abandoned in 2004. Investigation activities at the site identified soil contamination from metals, petroleum and dry cleaner solvents, as well as petroleum, vinyl chloride, tetrachloroethene and trichloroethene in the groundwater.

- The former building on the site was razed and replaced with a gold level Leadership in Energy and Environmental Design (LEEDs) certified six story building. The new building serves as the Golub Corporation's headquarters, and will employ approximately 700 people on site.
- In Western New York adjacent to the Buffalo River, sits a 42 acre site that was abandoned by the bankrupt former operator, the Buffalo Color Corporation (site # C915230, C915231, and C915232). For over a hundred years the facility was involved in the continuous production of dyestuffs and organic chemicals. Due to the complexity of the project cleanup will occur in phases and is expected to take a number of years. This site will return to productive use as an industry site.
- Another good example lays in the development of a parcel of land at West 61st street in New York City. Dermot Clinton Green, LLC, created a total of 2,035 construction jobs, 92 ongoing operations jobs and over \$117 million in investment (projected to 2034). The projection includes over \$10.4 million in construction activity; \$57 million in property-related impacts; \$7.1 million in sales and excise taxes from operations, a \$6.7 million impact in operations jobs; and \$35.9 million for the impact of new residents.

Critical Juncture

In December, the Business Council joined with members of the development community, the environmental justice community, and the environmental community, to request that the Executive Budget amend and extend the brownfield tax credits.

The letter stated "that the state has reached a critical juncture: sites currently entering the Brownfield Cleanup Program (BCP) are increasingly less likely to complete the program before the Brownfield Redevelopment Tax Credit sunsets at the end of 2015. It is paramount that the Brownfield Redevelopment Tax Credits be extended - along with the BCP and the Brownfield Opportunity Areas (BOA), they are driving brownfield cleanups and redevelopment in New York State."

Many of the requests of the letter are contained in the Executive Budget including:

- Extending the tax credits for a period of not less than ten years;
- Maintaining the current site preparation tax credit structure for all eligible participants;
- Amending the tangible property tax credit to provide targeting of the tangible property credits based upon statutory quantifiable criteria; and
- Increasing the incentives for developers to redevelop brownfields consistent with BOA plans
- The inclusion of Class 2 significant threat sites into the BCP and;
- The development of a fast track program for lightly contaminated sites that do not seek tax credits

The Executive budget proposal has provided a critical framework to focus a discussion on the BCP program. After initial review of the proposal our membership have developed an early list of critical items that should be addressed by all parties

to ensure the BCP continues to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment.

It is very clear with the right reforms; the BCP will empower communities and private capital to redevelop New York's tens of thousands of contaminated brownfield sites. Unfortunately, some of the proposed amendments to the program will increase uncertainty, and reduce the programs ability to empower communities and private capital.

Specific Concerns

The Executive budget proposes to create three tiers of brownfield projects.

In a new tier brownfields will be eligible for the BCP EZ, which is intended to be a fast-track voluntary cleanup program without tax credits. The Business Council strongly supports the intent of this new track. Many businesses are interested in quickly and safely addressing lightly contaminated sites in a manner which will result in reduced potential state liability.

In the second tier are sites that are not eligible for the tangible property credits. While the Business Council strongly agrees that not every site admitted to the program should be eligible for the tangible property credits, we do not support the currently proposed criteria limiting eligibility for the tangible property credits.

In the third tier sites that qualify are eligible for the tangible property credits. To be eligible for the tangible property credit a site must demonstrate that the site meets one of three tests. The Business Council believes that the tests, as currently drafted are too restrictive, and will lead to excluding some sites, which should be eligible for tangible property credits.

The three proposed test are as follows:

- **The Vacancy Test.** The applicant must demonstrate that the site has been vacant for at least 15 years, or has been both vacant and tax delinquent for at least 10 years;
- **The Under Water Test.** The applicant must demonstrate that the site is economically "under water" (i.e., it is worth less in the absence of contamination than the projected cost of remediation); or
- **The PED Project Test.** The applicant must obtain certifications from state and local officials relating to the project planned for the site. The applicant must demonstrate that the site will meet the criteria to qualify as a Priority Economic Development Project ("PED Project") sometime between the time of application and three years after CoC issuance.

Eligible PED Projects would be:

- software development or new media businesses creating 50+ net new jobs in NYS;
- manufacturers, agribusiness, scientific R&D, or corporate HQs creating 100+ net new jobs in NYS;
- financial service, distribution, or back office operations creating 300+ net new jobs in NYS; and
- other businesses creating 300+ net new jobs in NYS and determined by DED to be a PED Project.

Our membership is in the process now of reviewing past project to determine the practical effects of the three criteria, today I would like to share some of our initial concerns

The Vacancy Test – is too restrictive and does not acknowledge that many sites are not completely vacant but are underutilized. We suggest amending the test in a number of manners including building in safe harbors for underutilized sites. Local governments could certify that the site is underutilized in the market or the site meets a statutory definition of significantly underutilized (ie as site is being used as long term storage for vehicles or materials). Additionally, we would recommend that the vacancy requirement be replaced by the tried-and-true concept of less than highest and best use to allow for currently active sites to receive the tangible property credit component. Vacancy and tax delinquency are symptoms of blight but the degree varies by locality.

The PED Project Test – contains threshold job requirements that don't appear to be too high, given current experiences, most importantly the PED Project Test does not value capital investment or job retention. The current brownfield program at numerous times has resulted in the expansion of current manufactures and the retention of those jobs. Unfortunately, many of the sites would now not be eligible for tangible property credits for those sites.

The Business Council has concerns with some of the proposed modification to the current program. It is undeniable that increased uncertainty has a cost. There is little doubt that when programs are amended midstream, the result is an increased hurdle to future participation. The Business Council strongly urges the administration to rethink the proposed "grandfathering". The proposed grandfather of current sites in the program, places significant modifications to the current terms and conditions for sites participation in the BCP, significantly increasing uncertainty, and raising a future barrier to entry to the BCP.

Breaking from past reforms, the proposal would remove sites for which a brownfield cleanup agreement (BCA) was entered into before June 23, 2008 if it does not obtain a Certificate of Completion (CoC) by December 31, 2015. A site with a BCA dated after June 23, 2008 and before July 1, 2014 would be removed unless the CoC is

issued by December 31, 2017. Sites accepted into the BCP after July 1, 2014 would have to receive a CoC by December 31, 2025 to qualify for any BCP credits. These provisions do not take into consideration market conditions, or newly discovered environmental conditions.

A new provision would require the implementation of an approved work plan must begin within ninety days of approval and must proceed on the department-approved schedule. This is not necessarily practical even in the best of real estate markets. This provision could force poor long-term choices to satisfy an unjustified urgency. The DEC is right to be concerned about the timeframe for completion of this program, but the development of uncompromising statutory solutions does not reflect the long term best interest of the community.

Finally, the effective date of this proposal should be amended to January 1, 2016 thus providing a greater transition period between programs.

Conclusion

Thank you again for the opportunity to comment. We look forward to continuing our conversation with the Administration and the State Legislature to advance a multifaceted effort to strengthen BCP. With the right reforms, the program will empower communities and private capital to redevelop New York's tens of thousands of contaminated brownfield sites. The current proposal provides a framework for a productive conversation, but also contains numerous positive provisions.

In closing please remember, brownfield redevelopment can benefit both private investors and the communities in which they are located. For the private sector, Brownfields redevelopment can mean new business opportunities, the potential for profit on unused or under-utilized properties, improved community and environmental stewardship, and access to untapped urban markets. The public sector has benefit from an increased number of employment opportunities, increased local and state tax revenues, improvements in the community's quality of life, and a reduction in urban sprawl.