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CHANGES TO THE STATE'S BROWNFIELDS PROGRAMS IN THE GOVERNOR'S 2015/2016 BUDGET

Governor Cuomo and the NYS Legislature have come to agreement on substantial revisions to New York's Brownfields Cleanup Program ("BCP") as part of the State budget for the 2015-2016 fiscal year. The new amendments will alter many aspects of the program, including site eligibility criteria for and calculation of tax credits. Changes were also made to the Brownfield Opportunity Area Program (BOA) and the Environmental Restoration Program (ERP).

Here is a summary of the changes to the BCP:

Effective Dates and Sunsets

After July 1, 2015, BCP and continuing for the next eight years, sites entering the BCP will be eligible for the revised the tax credit program, so long as they earn a Certificate of Completion (CoC) by March 31, 2026. Sites that are currently in the program have new deadlines by which to earn a CoC if they wish to receive credits as calculated under the current rules: sites that entered the program before June of 2008 have until December of 2017, and sites that entered the program after June 2008 but before the effective date of the new law will have until December of 2019.

However, there is an interesting caveat. DEC is now charged with promulgating new regulations on a number of issues, including a definition of "underutilized," as discussed below. The July start date for the new tax credits will be delayed if, by July 1st, DEC fails to formally propose that definition; the effective date will then be the date that such regulations are proposed.

Key provisions for sites accepted into the BCP on or after April 1, 2015

- **Definition of a "Brownfield Site."** A site eligible for participation in the BCP is now defined as one which has contamination at levels exceeding DEC soil cleanup objectives, or other regulatory/health standards, for the anticipated use.
- **Eligibility:**
 - now extends to Class 2 and RCRA sites. The applicant must be a volunteer who owns the site or a volunteer who is under contract to purchase the site, and it must be a site for

which DEC has been unable to identify a responsible party with the ability to pay for the cleanup, and

- can be denied if the party applying has been terminated from any DEC remedial program.
- DEC's time to determine completeness of an application is expanded from 10 to 30 days.
- **Separate Eligibility for the Tangible Property Credit Component ("TPCC").** All participants in the BCP will be eligible for site preparation (with an amended definition) and groundwater remediation credits, but, in order for sites in New York City to be eligible for the TPCC after July 1, 2015, the applicant must demonstrate to the satisfaction of DEC that one of four tests is met:
 - At least half of the site is in an En-Zone; or
 - The site is "upside down," defined to mean that the cost of cleanup is at least 75% of the value of the remediated site, or
 - The site is to be used for affordable housing, to be defined by DEC in consultation with DHCR, or
 - The site is "underutilized," to be defined by DEC in consultation with the City of New York and the business community.

In addition, DEC must determine that:

- the site is not solely impacted by off-site contamination; and
- the site has not been previously remediated to the point that it can be developed for its then intended use.
- **Site Preparation Component changes.** The amendments provide a new, detailed definition of site preparation costs, which definition is used to calculate maximum allowable TPCC. The site preparation definition is now tailored to include costs directly associated with required investigation and remediation. Costs for a building's foundation are limited to the cost of a remedial cover of the foundation area.
- **Tangible Property Credit Component changes.** For sites approved after July 1, 2015, the amount of the TPCC will have an across-the-board base of 10% of eligible costs and new bonuses for which the applicant has to submit a demonstration of eligibility, with the total TPCC not to exceed 24%, in the aggregate. (the TPCC will continue to be capped at current levels.)
 - The TPCC will be calculated as ten percent plus:

- 5%, for sites located in an Environmental Zone,
- 5% for sites located in and certified as conforming with a Brownfield Opportunity Area (BOA) plan,
- 5% for sites cleaned up to Track 1 standards,
- 5% for qualified affordable housing projects, and
- 5% for manufacturing projects.
- The BCP tax credits for property taxes and environmental insurance premiums are eliminated.
- For sites that are eligible under the affordable housing test, the eligible costs to be included in the calculation of the TPPC are a fraction of the overall eligible costs; which portion is determined by the percentage of the site (determined by square footage) used for housing.
- The TPCC is allowed for the tax year in which qualified tangible property is first placed in service or the year the CoC is issued, if later.
- **New BCP-EZ Program:** The DEC is to create a streamlined remedial program (called the “BCP EZ Program”) for non-significant threat sites. This program will provide a new fast-track voluntary cleanup program with fewer procedural hurdles, the same substantive cleanup requirements and liability relief, but no tax credits. Sites in the BCP EZ Program could employ site background values in the remedy.
- **Other BCP Changes:**
 - The legislation clarifies that CoCs may be transferred to subsequent holders of legal, equitable, or leaseholds interests in all or a portion of the Brownfield Site.
 - Environmental easements must be in place within 180 days of commencement of the remedial design or at least 90 days before the anticipated issuance of the CoC, whichever is earlier.
 - DEC is given explicit authority to inspect for compliance with site management plans.
 - Responsibility for designation of En-zones is shifted from the Commissioner of Economic Development to the Commissioner of Labor and tied to data from the 2009 – 2013 American Community Survey, which may be updated to the most recent Survey. Whether a site is in an En-zone is determined by the date the application to the BCP is deemed complete.
 - Volunteers in the BCP will no longer be required to pay oversight costs. However, parties that are accepted into the BCP as “participants” will continue to be

required to pay DEC for oversight and for past costs incurred prior to the effective date of the brownfield cleanup agreement. However, DEC may negotiate a “reasonable” flat rate fee for future oversight costs.

- There is now a new ground for revocation of CoC: misrepresentation in the application for tangible property component eligibility.
- Hazardous waste fees and assessments exemptions are broadened to include waste generated as part of an USEPA order, or the NYC BCP.
- The requirement for Developer's Brownfield Report (Form DTF-70) is eliminated.
- The Tax Department is to issue a report for pre-2007 BCP tax credit data.
- The permit exemption is clarified to automatically exempt DEC from the requirement to obtain any state or local permit, which exemption extends to off-site contamination remediation.

- **Brownfield Opportunity Area (“BOA”) changes:**

The amendments:

- clarify that the Secretary may designate a BOA at any time once a nomination study is complete,
- provide for the awarding of grants for site assessments prior to designation, and
- require the Secretary to develop criteria for certifying projects as being in conformance with a BOA.

- **Environmental Restoration Program (“ERP”) changes:** The budget provides up to \$10 million ERP projects from the State Superfund. It allows DEC, upon request by and agreement with the municipality, to directly undertake ERP projects on behalf of the municipality.