

**BUDGET BILL INTRODUCED ON JANUARY 22, 2008 LIMITS ACCESS TO THE
NEW YORK BROWNFIELD CLEANUP PROGRAM AND PROPOSES FISCAL
AND PROGRAMMATIC CHANGES¹**

Bill A09810, a budget bill introduced on January 22, 2008 to the New York Senate and the Assembly, contains a short bill focused solely on fiscal reforms of the Brownfield Cleanup Program and a long bill focused on both programmatic and fiscal reforms. The short bill, Part D of the budget bill, significantly limits access to the Brownfield Cleanup Program and caps the tangible property tax credits available under the Program at ten million dollars. The long bill, Part E of the budget bill, (i) requires an applicant to the Program to state whether it is seeking tax credits and, if so, to disclose detailed financial information; (ii) gives the NYDEC authority to determine whether or not an applicant is eligible to receive tax credits; (iii) offers increased incentives for properties in distressed areas, but caps tangible property tax credits at fifteen million dollars; and (iv) increases the tax credits for site cleanup and preparation for construction and on-site groundwater remediation, and scales the credits further upward conditioned on a more stringent cleanup than the NYDEC would normally require. The choice of which approach to take is left to the legislature.

Background

The Brownfield Cleanup Program was established in 2003 as part of a bipartisan agreement. Tough environmental cleanup standards were set and multiple tax credits were established as an incentive to redevelop brownfield sites under those stringent standards. Part H of the Brownfield statute contains provisions that authorize the grant of three distinct tax credits with respect to “qualified sites”, meaning those where the taxpayer has been issued a certificate of cleanup completion by the Commissioner of Environmental Conservation. The three credits are called (i) the “Brownfield Redevelopment Tax Credit”, based upon the site preparation costs, the cost or other basis of tangible property on the site, and on-site groundwater remediation costs with respect to the site, (ii) the “Remediated Brownfield Credit for Real Property Taxes”, based on the real property taxes for the site and (iii) the “Environmental Remediation Insurance Credit”, for a portion of the premiums paid for environmental remediation insurance at the site. The second and third types of credits are not affected by the proposed changes.

Proposed Changes

A. The Short Bill

The short bill amends Subdivision 8 of ECL §27-1407, which deals with eligibility, stating that the Department of Environmental Conservation shall reject a request of an applicant

¹ This Memorandum is for general information purposes only and is not intended to provide legal advice. It may be considered Attorney Advertising under the New York ethical rules. Prior results do not guarantee a similar outcome. © 2008 by N.W. Bernstein & Associates, LLC. All rights reserved.

to participate in the Brownfield Redevelopment Program if “the Department determines that reuse or redevelopment of the site for which the applicant is requesting participation would likely occur in the absence of the tax credits...” (Section 4). To make this determination, the Department will “consider such factors as the extent and difficulty of remediating on-site contamination, the anticipated cost of on-site remediation, the anticipated impact of remediation on the value of the real property, and the economic circumstances of the community and municipality in which the real property is located” (Section 4). Thus, the NYDEC under the new bill would have the ability to significantly restrict the number of applicants accepted into the program.

The short bill also places a cap on the tangible property tax credit at ten million dollars for any site accepted into the Brownfield Cleanup Program after July 1, 2007. The credit is applicable in essence to the cost of constructing the building excluding real estate acquisition costs and site cleanup costs. Currently taxpayers can receive a credit in the amount of twelve percent of those costs without a cap. This means that the proposed ten million dollar cap on tangible property tax credits would affect taxpayers spending more than approximately eighty-four million dollars on the cost of the building, but would not affect smaller projects.

B. The Long Bill

The long bill requires an applicant to the Brownfield Cleanup Program to submit a form stating whether it is seeking tax credits. If the applicant is seeking tax credits, it then would have to submit detailed financial information to the NYDEC as prescribed by the Department. This information may include:

- A description of the reuse or redevelopment project associated with the site
- Whether or not the site is associated with other sites
- Total costs incurred on or after the Brownfield Site Cleanup Agreement, which may qualify for the site preparation tax credit, tangible property tax credit, groundwater tax credit, environmental remediation insurance credit
- Estimated future costs which may qualify for the site preparation tax credit, tangible property tax credit, groundwater tax credit, environmental remediation insurance credit
- Number of full-time employees
- Eligible real property taxes projected to be imposed upon the site in the first calendar year following issuance of the certificate of completion
- Estimated remediated Brownfield credit for real property taxes which can be claimed in the first taxable year following certificate of completion
- Estimated credit for the site preparation component of the site preparation tax credit, tangible property tax credit, groundwater tax credit, environmental remediation insurance credit that may be claimed in each year following issuance of the certificate of completion
- Any other information the Department deems necessary

The NYDEC then would determine whether or not the applicant is eligible to receive tax credits “because (I) the applicant is a volunteer and (II) redevelopment of the site for which the applicant is requesting participation is unlikely without such tax credits” (Section 3). Potentially responsible parties would be excluded from receiving any tax credits under the proposed long bill.

The long bill sets a baseline for tangible property tax credits at fifteen percent (as opposed to the current twelve percent) and allows more credits if the tangible property is in a distressed area, thereby encouraging development in these areas. However, the total amount of tangible property credits allowed is capped at fifteen million dollars for any site accepted into the Program after July 1, 2007.

The long bill also links the available site preparation tax credits to the level of cleanup achieved. The applicable percentage under the current tax law is twelve percent of the site cleanup and preparation costs incurred by the taxpayer. The bill increases this percentage to a minimum of twenty-five percent and provides for greater credits depending on the type of cleanup and the end use of the property. For example, soil cleanup for industrial use has an applicable percentage of forty percent. The bill gives an even higher level of credit, sixty percent, for soil cleanup for residential use. (It is unclear why converting old industrial property to residential use is socially more desirable than converting it to new commercial or industrial use.)

On-site groundwater tax credits are also linked to the level of cleanup. The applicable tax credit for groundwater cleanup under current law is twelve percent, and under the proposal would be increased to fifty percent of those costs. It would be increased further to seventy-five percent where groundwater is remediated to drinking water standards (although in many cases involving old industrial property that may be technically and financially impractical).

Conclusion

The practical effect of the short bill will be to give the NYDEC the authority to reject any site that it believes will be cleaned up without tax incentives, and the tangible property tax credits will be capped at ten million dollars.

The long bill will have more complicated effects. It will allow the NYDEC to demand extensive financial disclosure and give it the discretion to allow a development to go into the Brownfield Program but exclude it from receiving tax credits unless redevelopment is unlikely without the credits. The long bill also excludes potentially responsible parties from eligibility to receive tax credits. It provides additional incentives to locate property in distressed areas (with a cap at fifteen million dollars) and to achieve more costly and stringent cleanup levels by increasing the site preparation tax credits and on-site groundwater tax credits.