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**REVIEW NOTES ON PROGRAM BILL #35 - THE SPITZER
ADMINISTRATION'S BROWNFIELD CLEANUP PROGRAM
TAX CREDIT REFORM PROPOSAL**

By Philip S. Bousquet (August, 2007)

On May 2, 2007, Governor Spitzer submitted a proposal to the New York State Senate to reform the Brownfield Redevelopment Tax Credit created under 2003's Brownfield Cleanup Program (BCP) legislation. The Governor's proposal will apply to all new BCP applicants and future BCP site transferees, and to developers currently in the BCP that have not received approval from the New York State Department of Environmental Conservation (NYSDEC) of a remedial work plan for their sites.

The Governor's proposal completely restructures the Brownfield Redevelopment Credit by amending section 21 of the New York Tax Law.

1. Change to the "applicable percentage." The redevelopment credit currently provides a refundable tax credit equal to a percentage (known as the "applicable percentage") of capitalized costs for cleanup and redevelopment of a brownfield site. The applicable percentage varies from ten percent to as much as 22%, depending on the location of the site, the level of remediation, and the kind of taxpayer (*e.g.*, corporations or individuals). The largest variable is site location – if the site is located in a high poverty, high unemployment census tract (known as an "Environmental Zone" or "En-Zone"), the percentage is increased by eight percent from the base of ten percent (for individuals) or twelve percent (for most corporations). Also, if the site is cleaned up to NYSDEC's unrestricted use ("Track 1") standards, an additional two percent increase applies.

Under the Governor's proposal, the old schedule of applicable percentages would no longer apply. In its place, the applicable percentage is 100% for a "volunteer" and 25% for a "participant" (PRP). This would apply to all three components, except that the tangible property component is limited to (capped at) the **lesser of:**

- (1) \$5,000,000; or
- (2) The sum of the site preparation and on-site groundwater remediation credit components, multiplied by the following percentage (the "Track Factor"):
 - (A) 100% if the cleanup is Track 1
 - (B) 50% if the cleanup is Track 2
 - (C) 25% if the cleanup is Track 3
 - (D) -0- if the cleanup is Track 4 (no tangible property component, so Track 4 sites will not be redeveloped).

The following two examples demonstrate how these changes would affect a developer's redevelopment credit:



Example 1. Assume a volunteer (an LLC owned by individuals) cleans up and redevelops a site to "Track 2" standards, receives a certificate of completion from NYSDEC, and incurs the following costs:

Site preparation costs (cleanup only):	\$2,000,000
On-site groundwater remed. costs:	\$ 500,000
Federal basis of qualified tangible property:	<u>\$45,000,000</u>
Total:	\$ 47,500,000

Under the proposed bill, the taxpayer would calculate the credit components as follows:

<u>Site preparation component:</u>	\$ 2,000,000 x 100% = \$ 2,000,000
<u>On-site GW remed. component:</u>	\$ 500,000 x 100% = \$ 500,000
Total:	\$ 2,500,000

Tangible property component

- A. Component = applicable percentage (100%) multiplied by federal tax basis of qualified tangible property (\$45,000,000) = \$45,000,000; **but** subject to the
- B. **Cap** = lesser of (i) \$5,000,000 or (ii) sum of other two components (\$2,500,000) multiplied by the "Track factor" of 50% = **\$1,250,000**

Therefore the total tax credits are **\$3,750,000** (\$2,500,000 + \$1,250,000), or 7.89% of the total project.

This example illustrates the following points about the proposed changes:

1. Under the proposed bill, there is no enhanced credit if a site is in an En-Zone.
2. If the taxpayer had been a "participant" (a party potentially liable for cleanup under environmental laws), the \$2,500,000 credit for the cleanup costs would have been reduced to \$625,000, and the tangible property component would have been capped at \$312,500 (\$625,000 x the 50% Track factor), for a total remediation credit of \$937,500, or 2.08% of the project.
3. If the cleanup had been to Track 1, the "reward" would have been an additional tangible property credit of \$1,250,000
4. Because the applicable percentage would not relate to the type of taxpayer, the credit would be calculated at the entity level and directly allocated to the entity's owners.
5. Note that under current law, the total credit would be \$4,750,000 (total costs of \$47,500,000 multiplied by an applicable percentage of 10%. If the site is in an En-Zone the credit would be \$8,550,000.

Example 2. Assume a volunteer (an LLC owned by individuals) that cleans up a site to Track 2 and incurs the following costs:

Site preparation costs (cleanup only):	\$12,000,000
On-site groundwater remed. costs:	\$1,500,000



Federal basis of qualified tangible property: \$186,500,000
Total: \$ 200,000,000

The taxpayer would calculate the credit components as follows:

Site preparation component: \$ 12,000,000 x 100% = \$ **12,000,000**
On-site GW remed. component: \$ 1,500,000 x 100% = \$ **1,500,000**
Total: \$ **13,500,000**

Tangible property component

- A. Component = applicable percentage (100%) multiplied by federal tax basis of qualified tangible property (\$186,500,000) = \$186,500,000; **but** subject to the
- B. **Cap** = lesser of (i) **\$5,000,000** or (ii) the sum of the other two components (\$13,500,000) multiplied by the "Track factor" of 50% = \$6,750,000

Therefore the total tax credits are **\$18,500,000** (\$13,500,000 + \$5,000,000), or 9.25% of the total project.

A few additional thoughts about Example 2:

1. Even if the cleanup had been to Track 1, the \$5,000,000 cap would have eliminated any "reward" for the extra cleanup.
 2. If the taxpayer had been a "participant," the \$13,500,000 credit for the cleanup costs would have been reduced to \$3,375,000, and the tangible property component would have been capped at \$1,687,500 (\$3,375,000 x the 50% Track factor), for a total remediation credit of \$5,062,500, or 2.53% of the total project cost of \$200M.
 3. Under current law, the credit would be \$20,000,000 (10% of the total eligible costs). If the site is in an En-Zone the credit would be \$36,000,000 (a \$16,000,000 reward for redeveloping in an En-Zone).
2. Change to Definition of Site Preparation Costs. The bill would allow the site preparation component only for costs incurred in connection with activities specified in a work plan approved by NYSDEC under the BCP. This would eliminate from the credit structure all other site preparation costs capitalized by the taxpayer.
3. Site Transfers. In addition to changing the applicable percentage, the bill would also modify the rules allowing site transferees to claim the tangible property credit component. Under the bill, the CoC could be transferred (for purposes of the redevelopment credit) only by a taxpayer: (a) who is eligible to claim the site preparation or on-site groundwater remediation component, and (b) who does not incur



costs with respect to qualified tangible property *in order to be eligible to claim* the tangible property credit component.¹

The bill then provides that a taxpayer that is eligible to transfer the CoC (*i.e.*, a taxpayer who is not eligible to claim the tangible property credit component), may transfer the CoC, but **only** if: (i) no other taxpayer has a CoC for the same site, or (ii) all other taxpayers on the CoC have also **not** incurred costs eligible in order to claim the tangible property component.

Transferees from taxpayers that pass the above tests can claim the tangible property credit component, but if they do, they cannot then subsequently transfer the CoC for purposes of the redevelopment credit.

These provisions would eliminate the increased market value for any brownfield site that has been improved. Under existing law, remediated sites can be transferred with the CoC, and the transferee can claim the tangible property credit component for improvements placed in service on the site within ten years from the date of the CoC. No longer. Transferees may now claim the tangible property component only by acquiring an unimproved site, and must ensure that their transferors have not claimed, or been eligible to claim, the tangible property credit component.

4. Reporting Requirements. The bill would create a new section 23-a to the Tax Law, which would impose onerous reporting requirements on DTF and taxpayers. Starting in 2009, the DTF would be required to publish a "brownfield credit report" annually, on or before January 31, containing the following information:

- (1) The name of each taxpayer claiming a BCP credit;
- (2) The amount of each credit earned by the taxpayer;
- (3) The taxpayer's tax liability before and after application of "any credits" [which would appear to mean the BCP credits only, but that is not clear]; and
- (4) information identifying the project for which the credit was claimed [it is not clear what identifying information would be required].

For pass-through entities, the report would include information only at the entity level; the names, credit amounts, and tax liability of the taxpayers actually claiming the credits (*i.e.*, LLC members, partners, and S corporation shareholders) would not be included. Information about "grandfathered" taxpayers would be excluded from the report. A taxpayer would be grandfathered if the taxpayer has received approval of a remedial work plan under the BCP, or was a site transferee, prior to July 1, 2007 (see below).

The bill would also amend the BCP provisions of the Environmental Conservation Law to require applicants to provide NYSDEC with information that forms the basis for calculating the BCP tax credits for the site, including project cost information, employment projections, property tax projections, and the taxpayer's estimate of the BCP tax credits. This information must be provided with the BCP application,

¹ It is not clear what the phrase "in order to be eligible to claim" [the component] means. What if the taxpayer places depreciable assets in service on the site, but does not claim the tangible property credit component for them?



with the submission of a remedial work plan, and with the final engineering report. There is no indication of what consequences, if any, would arise if the BCP credits actually claimed differ materially from those projected by the taxpayer.

5. Fixing the "Placed in Service" Dilemma. The bill would ensure that a taxpayer who places property in service prior to getting the CoC, will still obtain the tangible credit component, but not until the year the CoC is issued. This is a welcome clarification for developers, NYSDEC, and DTF, and should greatly reduce the pressure placed on NYSDEC to issue CoCs before each year-end.

6. Effective Dates and "Grandfather" Provisions.

Perhaps the most onerous provision of the Governor's proposal is the effective date language. Most provisions of the bill (including the changes to the redevelopment credit described in item 1. above) would apply to all taxpayers except those who, *before* July 1, 2007, have (a) received approval of a "remedial work plan;" or (b) have received a CoC from another taxpayer. Since we are now past July 1, 2007, that date would certainly be changed. However, regardless of the effective date, it would be grossly unfair to impose these changes on taxpayers already in the BCP (that is, whose applications have been approved by NYSDEC or who have already executed a brownfield cleanup agreement). Strong objections to the bill's "grandfather" provisions have been voiced, and it is possible, if not likely, that any future bill would take a more reasonable approach to developers who have proved themselves willing to take on the risk, delay, and added cost of a brownfield project in New York.

Further Information

If you would like to learn more regarding the Governor's proposed bill, the Brownfield Cleanup Program tax incentives, or other financial incentives for brownfield developers, please contact Phil Bousquet at 315.701.6309 or phil@gsllaw.com.