



## Cannon Heyman & Weiss, LLP

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Law Practice Concentrating in Affordable Housing and Community Development Law

### OVERVIEW: NEW YORK STATE BROWNFIELD CLEANUP PROGRAM (“BCP”)

#### (1) What is the BCP?

- The Brownfield Act, established in Title 14 of Article 27 of the Environmental Conservation Laws of New York, is designed to encourage the development and remediation of contaminated Brownfield sites across New York state.
- A Brownfield is defined as any real property, re-development, or re-use which may be complicated by the presence or potential presence of hazardous waste, petroleum, pollutant, or contaminant. Some of the most severely contaminated sites are not eligible.

#### (2) Who is eligible to participate in the BCP?

- Both individuals who volunteer to clean up a Brownfield site and individuals that actually participated in the contamination of the site place are eligible to participate in the BCP.

#### (3) What are the financial incentives under the BCP?

- The most significant incentive under the BCP is the Brownfield Redevelopment Tax Credit (“BRTC”).
- If the applicant completes the remediation and development of the Brownfield site in accordance with a Brownfield Cleanup Agreement (“BCA”) (entered into between the applicant and the NYS Department of Environmental Conservation (“DEC”)) and receives a certificate of completion from the DEC, tax credits will be available.
- The basis for calculation of BRTC consists of three components; (i) site preparation costs (ii) on-site ground water remediation costs and (iii) capital investment in tangible property on-site.
- Basis is multiplied by an applicable percentage that determines the amount of tax credit.
- The amount of the site preparation tax credit is based upon the level of remediation performed:
  - soil cleanup for unrestricted use, the protection of groundwater, or the protection of ecological sources has a maximum applicable percentage of 50%
  - soil cleanup for residential use has an applicable percentage of 40%
  - soil cleanup for commercial use has an applicable percentage of 33%
  - soil cleanup for industrial use has an applicable percentage of 27%
- Properties designated for restricted use, track 4 properties, have separate credit percentages. The applicable percentages for track 4 sites are 28% for residential use, 25% for commercial use, and 22% for industrial use.
- Tangible personal property expenses are eligible for credit of between 10 and 22%, but are capped at the lesser of \$35 million or three times the cost of cleanup and other site preparation costs.

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- Credit for manufacturing projects is capped at the lesser of \$45 million or six times the cost of cleanup and other site preparation costs. Also, a definition of manufacturing activities has been added in order to limit what projects are entitled to the tax credits.
- By enacting this "lesser of" test based on the preparation and groundwater costs, the potential tax credits for any site has been significantly limited.
- The BCP is a refundable NYS credit.
- There are also two other financial incentives available which include (i) a tax credit based on real property taxes and job creation at the project site, the Brownfield's real property tax credit, and (ii) a tax credit based on the premiums paid for environmental insurance, the insurance credit.

**(4) How does one apply to the BCP?**

- An eligible party willing to undertake a cleanup must submit an application for a BCA to the DEC.
- It is recommended that prior to the submission of an application an applicant have a meeting with the DEC to discuss the overall program and ways to streamline the process.

**(5) What cleanup standards will applicants have to satisfy?**

- Four possible "tracks" of cleanup are available under the BCP; "1" unrestricted use, "2" used for commercial property, "3" used for industrial sites and "4" DEC approved standards.
- Residential property will always require cleanup to track "1" standards.

**(6) Will an applicant be open to environmental liability?**

- Once the DEC has issued a Certificate of Completion, the party is entitled to environmental liability limitation that binds the state as to liability, present and future. The liability protection extends to successors and assigns.

**The content contained within this summary should not be construed as legal advice, and readers should not act upon information contained herein in the absence of professional counsel.**

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