

Breaking ground: Incentivizing development with brownfield tax credits

■ MOLLY BRENNAN AND LINDSEY HAUBENREICH

The New York State Brownfield Cleanup Program (BCP), which provides substantial tax credits for redeveloping contaminated real property, is often overlooked by Rochester-area developers.



Lindsey Haubenreich

Created to incentivize private-sector cleanup and redevelopment of contaminated sites, more than 1,300 sites have been accepted into the BCP since its inception in 2003, and more than 700 have been successfully remediated and redeveloped. In 2024 alone, 61 sites successfully completed the program by obtaining a Certificate of Completion (COC), the sign-off by New York State Department of Environmental Conservation (NYSDEC) that indicates a site's remediation reached an acceptable level for the site's new intended use.

While areas like Buffalo and New York City annually top BCP project numbers, NYSDEC's Region 8, covering the Rochester area, has historically been one of the lowest to participate. While the program is time-consuming and requires upfront investment, the milestones are also predictable, the tax credits are substantial and the developer

can tell a compelling story of turning a degraded site into an environmentally responsible development.



Molly Brennan

Phillips Lytle's experience with brownfield sites pre-dates the advent of the BCP. In the 1990s, Phillips Lytle assisted with the conversion of a former manufacturing facility that was on New York State's list of inactive hazardous waste sites into a modern manufacturing facility. According to NYSDEC, this facility was the first of its kind and helped to set the standard for brownfield redevelopment in the State. Since then, Phillips Lytle has assisted numerous clients through the BCP on projects across the state — from Buffalo's Canalside, its West Side waterfront and the Marine Drive Apartments to dynamic redevelopments in Niagara Falls, Troy and Haverstraw.

In this series of articles, we provide our insights on key aspects of the BCP and offer tips to deftly navigate the program and maximize tax credits. Redeveloping sites that require remediation, particularly in Rochester's historic urban and industrial cores, opens the door to new and creative projects. And uti-

lizing the BCP, especially in this financial climate, can be a lucrative pathway to leveraging overlooked incentives, unlocking value and driving projects forward.

BCP'S DUAL BENEFITS

Over the BCP program's two-plus decades, the New York State Legislature twice amended the amount of tax credits that an applicant could receive and extended the program. Notably, in 2022, the State Legislature extended tax credit eligibility to all sites accepted into the program prior to January 1, 2033. We're now on our third generation of the BCP, indicating New York State's continued commitment to the success of this program.

This success is due to the two significant benefits of the program — liability release and refundable tax credits. Together, these benefits provide assurances for buying and cleaning up contaminated sites while generating substantial tax credits to contribute equity to redevelopment costs. Diving into the type of development costs eligible for tax credits and when that period commences is key to understanding the BCP's benefits.

THE BROAD LIABILITY RELEASE

The COC issuance marks that the site has been remediated to NYS-

DEC's satisfaction, has met NYS-DEC's standards and can safely be occupied for its intended use (e.g., residential, commercial). With it comes a broad liability waiver to the applicant for *any* common law cause of action arising out of the presence of any contamination on the site or for contamination that may have emanated from the brownfield at any time before the brownfield cleanup agreement's (BCA) effective date. This liability release is key to making developments easier to insure, resell, and are attractive for financing, particularly financing mechanisms that involve an ownership interest like assistance grants from industrial development agencies. This release is contingent on the applicant complying with any required post-COC institutional and engineering controls (e.g., monitoring, inspections, use restrictions, etc.). Importantly, the liability release granted by the COC runs with the land, meaning that it can be transferred to all successive owners.

TAX CREDITS

Jointly administered by NYSDEC and NYS's Department of Taxation and Finance (DTF), the BCP offers three types of tax credits, all of which are refundable, meaning the state will cut a check if the tax credits exceed the applicant's tax liability. This is crucial since many applicants are single-purpose entities with little to no income prior to redevelopment.

Eligible credits depend on when the site is accepted into the BCP, which is measured from the date that the BCA is signed by *both* the applicant and NYSDEC. Once fully executed, tracking of all eligible costs should begin as credits can only be claimed for eligible costs incurred *after* the BCA is signed.

The first type of tax credit, the Site Preparation Credit, is for the costs incurred preparing and remediating the site for development. Site Preparation Credits cover all costs properly charged to a capital account that are paid to obtain remediation sign-off from NYSDEC, prepare the site to erect a building or addition, and establish a site as usable for housing, industry, commercial or recreation purposes. This could include money spent on building demolition, asbestos abatement, excavation, scaffolding, fencing, temporary electric wiring and security, but does not include costs to acquire the site. The amount of credits depends on level of cleanup, and ranges from 22-50% of eligible costs. Working with a qualified attorney will help ensure that as many of these costs as possible are eligible for tax credits. Site Preparation Credits may be claimed in the tax year following the issuance of the COC, and then up to five taxable years thereafter.

The second type of tax credit is for costs incurred to remediate on-site groundwater and for post-COC site preparation and/or groundwater monitoring required to comply with the COC. The credits are issued at the same percentage as the Site Preparation Credits, and DTF prohibits double dipping, meaning groundwater remediation should not be in both the site prep credit and the groundwater credits. Credits may be claimed annually and for five years following issuance of the COC.

The third, and most lucrative, type of tax credit is known as the Tangible Property Credit. These credits are based on the costs of depreciable property used for construction or redevelopment and can include buildings, machinery and equipment used

onsite, fixtures and appurtenances. The amount of credits ranges from 10-24% of the value of the improvements, subject to a cap of the lesser of \$35M or three times the Site Preparation Credits for residential/commercial use; and the lesser of \$45M or six times the Site Preparation Credits for manufacturing use. Tangible Property Credits can be claimed in the tax year following the occupancy of the new buildings. Applicants have 10 years from the issuance of the COC to put buildings into service and claim these credits.

TIME CAN BE ON YOUR SIDE

Earlier this year, NYSDEC reported that 50% of the sites granted a COC in 2024 took less than 1.5 years from the signing of the BCA to the issuance of the COC. So, in less than two years, if the process is managed well, site preparation and remediation costs can start to be recouped through tax credits. While NYSDEC generally estimates about four years from application to the COC, these sites prove that the time can be significantly reduced with effective management of the process.

To learn more about the program, stay tuned for our next article, where we dig into the logistics and provide practical considerations for navigating the application process from pre-application to acceptance.

Lindsey E. Haubenreich, Partner and Co-Leader of the Firm's Energy and Renewables Team focuses her practice on environmental law, land use and zoning, energy and real estate. She can be reached at lhaubenreich@phillipslytle.com or 716-504-5789.

Molly K. Brennan, Special Counsel and member of Phillips Lytle's Environmental Law Practice Team has significant experience handling complex environmental and land use matters. She can be reached at mbrennan@phillipslytle.com or 212-508-0465.