New York State Bar Association

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Environmental & Energy Law Section Brownfield Working Group

Brownfield Cleanup Program Extender and Omnibus Bill Report

August 13, 2021

The New York State Brownfield Cleanup Program ("BCP") is one of the most successful programs of its type in the country. As of July 2021, it has facilitated the remediation of over 500 sites adversely affected by contaminated waste through receipt of a Certificate of Completion, with 900 additional sites still in progress. The program has generated over $17.6 billion in economic development, leveraging approximately $2.7 billion in tax credit incentives and generating a return of more than $6.60 for every dollar of tax credit earned. Increasingly, the cleanup and development has been targeted to those geographic areas that need it most – economically disadvantaged environmental zones – based on amendments to the law in 2015. The program has also increasingly been targeted to the types of projects that New York needs most: affordable housing and revitalizing New York State's industrial base.

However, the tax credit incentives which support this program are about to expire. Projects which have not been accepted by the New York State Department of Environmental Conservation ("NYSDEC") into the BCP by December 31, 2022, will not qualify for the tax credits, which have been driving the success of the program.

Members of the Section of Environmental & Energy Law ("Section") have seen first-hand the importance of the BCP to environmental cleanups and the revitalization of our communities. Therefore, we are proposing our own bill to extend this program.

At the same time, our members—many of whom are "in the trenches" on a day-to-day basis on BCP projects—have identified a number of issues that have interfered with the fair and efficient implementation of the BCP. We believe that these issues should be addressed in connection with the extension of the BCP tax credits.

Once such issue is the lack of staffing at NYSDEC, and, to a lesser extent, the New York State Department of Health ("NYSDOH"), to properly implement this program. Both agencies have been adversely affected by retirements of senior personnel and have not been able to hire adequate replacement staff. Our bill proposes a solution to this problem.

Similarly, there has been confusion and inconsistent application of certain aspects of the BCP – particularly with respect to certain contaminated media, such as soil vapor, which was not considered an environmental issue at the time the original BCP was enacted in 2003.

While the BCP is appropriately targeted to economically disadvantaged areas called "en-zones", the Section believes its targeting could be strengthened further by increasing the incentives for projects in environmental justice areas, projects that are certified to be in compliance with Brownfield Opportunity Area plans, and renewable energy projects.

The Section is proposing the attached bill, which we believe would, if enacted, accomplish these goals. The proposal builds on legislation (S. 7120) introduced during the 2021 legislative session by Senator Tim Kennedy. It also contains provisions from a bill introduced in the 2019 legislative session, authored by Senator Carl Marcellino. Members of the Section have discussed the provisions of this bill extensively with staff members of NYSDEC, as well as staff in the NYS Assembly and executive branch. Thus, the majority of the provisions of this bill do not come out of the blue. They have been introduced by the Senate or have recently been developed based on discussions with the NYSDEC, the executive branch and Assembly.

The provisions of the proposed bill can be categorized generally as follows:

A. Extending Time for Entry of Sites into BCP and Claiming the Tax Credits

Section 21 of the bill extends from December 31, 2022 to December 31, 2032 the deadline for sites to be accepted to the BCP to qualify for tax credits. Similarly, the deadline for sites in the BCP to receive their Certificate of Completion (COC) is extended from March 31, 2026 to December 31, 2036 (a December date being substituted for March to more closely align with the end of the tax year for most BCP applicants and NYSDEC's process for issuing COCs by the end of the year).

Other time periods extended by this proposed bill are found in Sections 11 and 16, which would extend the five-year period to claim the site preparation costs after issuance of a COC to seven years, and addresses a drafting oversight in the 2015 Brownfield Cleanup amendments to clarify the year in which certain tax credits can be claimed. Section 12 would amend the tax law to provide that tangible property credits can be claimed for site improvements completed up to 180 months after the date of the COC rather than the current 120 months, because experience since the enactment of the BCP has shown that development on these sites is difficult and often takes a significant amount of time. There are still 44 projects that have received a COC but have not been able to construct their buildings during the current 120 month timeframe. These are often difficult projects in areas that may require extensive rezoning, or involve other complicating factors. The 2008 real estate crash and the 3- to 5-year deferral of the tax credits between 2010-2012 also slowed or stopped financing of many projects, and the COVID-19 pandemic has also slowed projects. The proposed changes would therefore allow developers who took on the risk of site remediation to have additional time to place their remediated sites back into productive reuse.

B. Provision of Dedicated Funding for NYSDEC and NYSDOH to Administer the BCP

Discussions with representatives of NYSDEC indicate that a major problem with administering the BCP is the lack of adequate staffing. Because NYSDEC is short-handed, staff time spent on the BCP must be pulled from enforcement matters. At the same time, brownfield projects—many of which need to meet deadlines set by lenders, joint venture partners or other third parties—are delayed because staff has no time to review submissions or otherwise implement the program. Sections 4 and 10 address this issue by establishing a fee to be paid by both Volunteers and Participants, as defined in the BCP (with Participants

paying a higher amount) and those funds being deposited in a dedicated account which would fund adequate NYSDEC and NYSDOH staffing to implement the BCP.

Prior to the 2015 amendments to the BCP, all applicants to the BCP were required to pay oversight costs to offset the expense of administering the program. The 2015 amendments to the BCP eliminated oversight costs for Volunteers (those who have no prior relationship to the site or the contamination thereon), but retained those payments for other applicants (Participants) to the BCP. However, both before or after the 2015 Amendments, those payments did not fund NYSDEC or NYSDOH. Rather, they were deposited in the State's General Fund. Under our proposed bill, these payments will be directed to a special revenue account already set up for receipt of fees.

C. Extending the BCP to Economically Disadvantaged and Environmental Justice Areas and Increasing Incentives for Renewable Energy Projects

The BCP already provides extra incentives for sites in Environmental Zones, as defined by the New York State Department of State. The Omnibus Bill would add Potential Environmental Justice Areas (PEJAs), which have already been defined by the NYSDEC's Office of Environmental Justice on state-wide maps, to qualify for all of the tax credits, to incentivize remediation and redevelopment of contaminated sites within these underserved areas.

Additionally, the BCP provides a very limited percentage increase to sites in Brownfield Opportunity Areas (BOAs) as defined by the New York State Department of State, but only four sites have been able to take advantage of this "bump up". The Omnibus Bill extends all the tax credit benefits to those sites certified by the Department of State as conforming to designated BOA plans.

The need for renewable energy has become increasingly apparent since the last amendments to the BCP. However, based on the current tax credit formulas, the tax credits cannot offset the costs sufficiently to attract these projects to landfills or brownfield sites, where they should be located. The Omnibus Bill changes the formula to provide the sufficient incentives needed to attract renewable energy projects to these sites and address remediation issues.

D. Addressing Soil Vapor Issues

Soil vapor intrusion was not considered a matter of concern at the time of initial enactment of the BCP in 2003. It has become an increasingly significant issue in the ensuing years. However, the provisions of the BCP have not kept up with that development. The Omnibus Bill contains a number of provisions which would ensure that appropriate tax credits be given for those portions of site remedies that address soil vapor intrusion issues.

E. Preserving Tax Credits for Certain Affordable Housing Projects Whose Eligibility for Credits May Be Adversely Affected by Recent Legislative Changes

For sites in New York City to qualify for tangible property credits as affordable housing projects, a regulatory agreement must be submitted to NYSDEC in advance of the site's obtaining a COC. However, because of changes in the affordable housing program, such agreements are no longer finalized until after the project is constructed, which is well after the NYSDEC issues the COC As a result, such projects may no longer qualify for such credits based on a technicality of when a qualifying regulatory agreement is signed.

This result is inconsistent with legislative intent and would arbitrarily deny tangible property credits for sorely needed affordable housing projects in New York City. The Omnibus Bill would address this anomaly by providing that a project will qualify for such tax credits if a regulatory agreement is signed at any time prior to the site's applying for tangible property tax credits.

F. Other Technical Corrections/ Clarifications of Qualifying Costs

There are also a number of other technical corrections or clarifications being made to the BCP provisions in the Environmental Conservation Law and Tax Law in relation to the costs that should or should not count toward the site preparation costs, since often there is an overlap between some construction costs and costs that also serve a remedial purpose.

In sum, this bill largely preserves the existing BCP program and tax credits but further targets certain sites and projects still in need of these incentives. The Section looks forward to working with the Bar Association Executive Committee to facilitate the Bar Association's endorsement of this important piece of legislation.

Brownfield Cleanup Program Extender and Omnibus Proposal

MEMO IN SUPPORT

TITLE OF BILL: An act to amend the environmental conservation law (ECL) and the tax law to extend the Brownfield Cleanup Program tax credits set to expire in 2022, and amend certain applicable provisions.

PURPOSE OF THE BILL: To continue to encourage brownfield redevelopment across the state of New York. The bill extends the very successful Brownfield Cleanup Program (BCP) tax credits set to expire at the end of 2022. The BCP has resulted in over $16 billion in investment on New York contaminated real estate in return for an expenditure, in tax credits, of approximately $2.5 billion, which is a return on investment of more than 6-to-1 without even factoring in new tax revenue from the projects. There is concern that the program may be not extended due to staff shortages at the departments of environmental conservation (NYSDEC) and health (NYSDOH), which administer the BCP due to many recent retirements of seasoned staff and the inability to hire new staff due to the Covid pandemic hiring freeze. This bill will provide a new revenue stream in the form of new fees to be directed into a special pre-existing revenue account, as opposed to the state's general fund, so that the departments of environmental conservation and health each have sufficient staff to administer the program. Second, the bill extends the BCP tax credit program for an additional ten years. Third, the bill expands the BCP to support projects in environmental justice communities and those involving renewable energy. Finally, the bill clarifies certain BCP provisions that have hampered the efficient administration of the program. These changes will promote predictability for program applicants and would further advance the program's environmental cleanup and urban revitalization goals by incentivizing the remediation, strategic reuse and redevelopment of contaminated land throughout the State, including environmental justice areas and brownfield opportunity areas and by encouraging renewable energy projects on brownfield sites.

SUMMARY OF PROVISIONS:

Section 1 clarifies that the 2015 amended definition of "Brownfield Site" in ECL § 27-1405(2) was not intended to exclude application of the Track 1 soil cleanup objectives in the event the site's intended use is any form of residential housing and the planned remediation is to achieve the Track 1 soil cleanup objectives. There was confusion that only the Track 2 residential soil cleanup objectives could be used to deem a multi-family housing residential project eligible for the program, however, this could result in fewer Track 1 brownfield remediation projects, which was not the intent of the legislature. In addition, these provisions clarify that if a brownfield site consists of multiple tax lots or is one large tax lot, provided at least 50 percent of the site is contaminated, not every lot or area on the site has to be contaminated for the entire brownfield site to qualify for the program because this is not only a cleanup program but an economic development program.

Section 2 amends several definitions in ECL § 27-1405 and adds two new definitions. Subparagraph 29 of subdivision 2, which is the "affordable housing project" definition, has been amended to clarify eligibility for the tangible property tax credits for affordable housing projects that are subject to binding restrictions, which may not arise until the building is placed into service, and which typically occurs well after the Certificate of Completion for the remediation is provided by NYSDEC. Current language in the statute requires written documentation in order to make a request to NYSDEC for an eligibility determination

before the Certificate of Completion is issued. However, as a result of post 2017 amendments to the 421-a affordable housing program, these projects no longer receive a regulatory agreement until after the affording housing building is constructed. The bill amends the statute to clarify that these projects can claim the tangible property tax credits as long as affordable housing restrictions are imposed on the site before the tax return is filed for these credits and that the documentation can be provided to the Department of Tax & Finance rather than NYSDEC. Subparagraph 30 of subdivision 2 is also amended to codify into law the definition of "underutilized" that the department has promulgated by regulation but liberalize it to provide that a site may qualify as "underutilized" if it meets any of the criteria, rather than having to meet all of them. The current definition has, as we had predicted at the time, proven almost impossible for sites to meet and, as such, is contrary to legislative intent because it effectively forecloses the ability of underutilized sites in New York City to claim tangible property credits. The bill also eliminates the requirement that "underutilized" determinations need to be sought at the time of the BCP application because it is sometimes impossible to provide the analysis required to meet this test at the time of the application. A new conforming brownfield opportunity area (BOA) Site definition is added in a new subparagraph 32 for projects on sites certified by the Secretary of State as conforming to an approved BOA plan, so that these sites will be eligible for tangible property tax credits similar to eligibility afforded to sites in Environmental-Zones. Finally, a new renewable energy facility site definition has been added in a new subparagraph 33 to encourage renewable energy projects on brownfield sites.

Section 3 amends ECL § 27-1407 (1-a) to enable an affordable housing project to either present proof for a determination (in the form of a BCA amendment application) that the project satisfies the regulation either by submitting a regulatory agreement to NYSDEC before the Certificate of Completion is issued, or to the Department of Tax and Finance after the Certificate of Completion is issued.

Section 4 amends Section 27-1409 in Article 27 of the environmental conservation law by adding a new subdivision 13 to create an application fee to be paid by applicants into a pre-existing NYSDEC special revenue fund in order to create a revenue stream dedicated to the NYSDEC to fund staff for the program.

Section 5 amends ECL § 27-1411(2) by clarifying that the Remedial Action Work Plan and the Final Engineering Report were intended to be the documents that describe the approved remedial action for the site, not a summary document being prepared by the NYSDEC called a Decision Document, which has been used to exclude otherwise eligible site preparation costs. This provision clarifies that NYSDOH's review should be focused on public health impacts of the remedy, if any.

Section 6 updates the Track 1 cleanup definition in ECL § 27-1415(4) to address sites where contaminated soil vapor may still be present from an on-site residual or off-site groundwater or soil vapor source after implementation of a Track 1 soil remediation. At the time the BCP Law was created, soil vapor intrusion was not a known environmental risk. The vast majority of brownfield sites still have residual soil vapor and groundwater contamination even after the most stringent Track 1 soil cleanup has been implemented. The added language clarifies that a site which completes a Track 1 soil remediation does not lose its Track 1 status after five years pursuant to existing regulations at 6 NYCRR §375-3.8(e)(1)(iv)(*a*) if it must implement groundwater and/or soil vapor institutional or engineering controls as a result of the site being present in an area where there may be area-wide ubiquitously contaminated groundwater and/or soil vapor plumes from other brownfield sites in the area. The amendment clarifies that a site that achieves Track 1 soil cleanup objectives can maintain the site's Track 1 status even if soil vapor persists after five years, provided the site owner records an environmental easement to ensure that the soil vapor

and groundwater mitigation measures are maintained by the site's owner pursuant to a Site Management Plan.

Section 7 updates the Track 4 cleanup definition in ECL § 27-1415(4) to clarify the original legislative intent that source removal is required for all Track 4 remedies. Recently, NYSDEC has been issuing decision documents that a Track 4 remedy solely consists of a two-foot cut for residential projects or a one-foot cut on commercial or industrial projects of surface soils and then a soil only cover system on top. This approach disregards the current source removal requirements in ECL § 27-1415(5), which are applicable to all remedial sites. In addition, this amendment includes a cross-reference to the new remedial action cover system description in ECL § 27-1415 (5-b) being added pursuant to the amendment in Section 9 of this bill.

Section 8 amends ECL § 27-1415 subpart 5 to include a new section 5-b defining when "remedial action cover systems" are required and the required thickness for such a cover system to be effective. The 2015 amendments to the Tax Law defining "site preparation costs" permit a portion of the cost of foundations and sidewalls that are part of a remedial action cover system to be counted as "site preparation costs." When read together, Tax Law Sections 21(b)(2) and 21(a)(3)(iv), as amended in 2015, clearly intended to require taxpayers to divide the cost of remedial action cover systems consisting of building foundations into two parts: (1) a site preparation amount equal to the equivalent cost of a remedial action cover system for the area on the site that is covered by the foundation slab; and (2) a qualified tangible property amount equal to the balance – that is, the foundation cost that exceeds the equivalent remedial action cover system cost (e.g., the excess cost for very thick foundation slabs). NYSDEC has been drafting decision documents, and revising work plans and engineering reports to exclude the cover system requirement at all sites except Track 4 sites (and on Track 4 sites limiting cover systems to the cost equivalent of soil only cover systems), even though the presence of a remedial action cover system is part of the remedy. DTF has also decided to disallow all foundation costs as site preparation costs even when the Remedial Action Work Plan (RAWP) and Final Engineering Report (FER) include a constructed foundation as a required as part of the remedy. Accordingly, DTF has been allocating all of the foundation costs as tangible property costs, even when a portion of the foundation is clearly remedial under NYSDEC approved plans and documents. The effect is to eliminate valid site preparation costs from the site preparation tax credit calculations.

The bill clarifies the legislature's intent of the 2015 amendments by 1) defining when remedial cover system consisting of a foundation or hardscape surface such as asphalt or concrete is required as part of a remedial action; 2) specifying the minimal thickness needed for such cover systems in accordance with the minimal construction requirements in the existing Building Code of New York State, New York State Department of Transportation Standard Specifications, and based on practical remedial experience by brownfield practitioners; and 3) requiring the foundation to be certified by a licensed Professional Engineer. A formula to calculate the portion of the foundation that should count toward the site preparation costs is present in Section 17 of this bill.

Section 9 amends ECL § 1419 (3) to incorporate a second project "close out" fee to address NYSDEC and NYSDOH's staffing needs for the program. Both agencies already are required to keep track of the time they spend on BCP projects, and the prior versions of the law made all applicants, and later only participants, to pay the agencies actual oversight costs incurred. However, the money went into the General Fund for the state and provided no direct benefits to NYSDEC and NYSDOH to address their

staffing needs. This provision reinstates the oversight fees for all parties, but the money is directed into an existing "Environmental Conservation Special Revenue Fund" established pursuant to State Finance Law section 71 Fund Number 21050 to be used as revenue for staff to administer the program.

Sections 10 and 15 amend Tax Law § 21(a)(2) to extend the five-year period to claim site preparation credits to seven years for all sites. The section also cures an oversight in the 2015 Brownfield Cleanup Program law to clarify that taxpayers may claim site preparation credits for costs to comply with the certificate of completion and the approved remedial program (COC compliance costs) in the year those costs are paid or incurred. While the law was changed in 2015 to let taxpayers claim credits for COC compliance costs, there was not a corresponding change to the timing rule that would allow those credits in the year those costs are paid or incurred. This leaves taxpayers with eligible costs, but no tax year in which to claim the credits. The provision corrects this error by allowing taxpayers to claim credits in 2021 for pre-2021 COC compliance costs not otherwise claimed, and thereafter in the year the costs are paid or incurred.

Section 11 amends Tax Law § 21 (a)(3)(i) to extend the time to place the tangible property credit component into service from one hundred twenty months to one hundred eighty months after the date of the issuance of a certificate of completion for all sites in the program to give parties more time to construct their projects on fully remediated brownfield sites given the past and current economic conditions in the real estate market. Due to the real estate crash in 2008, which delayed projects for up to 3-4 years and the more recent COVID-19 Pandemic, land use approvals ceased for periods of time and then only resumed slowly, construction ceased or significantly slowed down with new COVID-19 restrictions, and the urban residential market is suffering from excess inventory, as well as difficulty in finding debt financing and equity contributors for projects. As the economy slowly begins to revitalize, it is important to extend the entire Brownfield Cleanup Program and the timeframe to construct a building after earning a Certificate of Completion to ensure that projects on brownfield sites continue throughout this state. A site that entered the program before June 23, 2008 (referred to as a Generation 1.0 site) that goes beyond the ten years (or 12 years if the site is entitled to the Governor's 2021 budget bill 2 year extender provision) will have a tangible property tax credit cap of $35 million (similar to the maximum presently imposed on sites that entered the program after June 23, 2008, and before July 1, 2015 or Generation 2.0 sites).

Section 12 adds a new Tax Law § 21 (a)(3-a)(A) to address practical issues as to why renewable energy facilities are not being developed on brownfield sites. The current tangible property tax credit formulas require the *lower of* the calculations from the following two formulas to apply: 3 times the site preparation costs or 10-24% of the tangible capital costs. Since the cost to cleanup most brownfield sites that would be applicable for a renewable energy facility are high in comparison to the capital costs, renewable energy developers are not securing enough tax credits under the current law to cover the cost of the remediation. As a result, these sites are not being redeveloped into renewable energy projects in urban areas where this type of power is most needed. This amendment allows the renewable energy developer to select which of the two formulas apply.

Section 13 adds a new subparagraph to Tax Law §21(a(3-a)(E) to address practical issues not covered by the current tax law provisions. In many cases – and commonly with affordable housing projects – a project developed on a single BCP site may be developed in more than one component or project phase, and each component may be separately financed or owned. The current Tax Law contains no mechanism to

apportion the tangible property credit component among distinct project entities if the overall redevelopment on the site reaches the statutory limit on that component. A two-part solution is therefore proposed: first, taxpayers with an interest in the brownfield site may allocate the limitation in any manner that they may agree upon in a written agreement with a recorded memorandum and a copy must be filed with each tax return claiming tangible credits for the site. Alternatively, if there is no such agreement in place, default rules are created to allocate the tangible property credit component. The default rule applies in a year the credit limit is reached, and allocates the allowable amount of credits among all claiming taxpayers in proportion to the amounts they would have been allowed if there had been no limit – in other words, a proportionate reduction in credits is applied to each taxpayer in order to ensure that the statutory limit is equitable applied.

Section 14 amends Subparagraph B of paragraph 5 of subdivision (a) of Section 21 of the Tax Law to add a five percent bump up on the tangible property tax credits for renewable energy facilities on brownfield sites.

Section 15 amends Tax Law § 21(b) by adding a new subparagraph 2-a to harmonize federal tax law with the definitions of "site preparation costs" and "qualified tangible property" used in calculating the brownfield redevelopment tax credit (BRTC). This section clarifies that the cost of remediation and site preparation as defined in the law can include costs that are also included in the depreciable basis of project assets (such as a building) used for federal income tax purposes, while preserving and clarifying the no double dipping rule to ensure that federal depreciable basis is reduced – for BCP credit purposes – by allowed site preparation costs when calculating the tangible property credit component. Since this amendment clarifies the State's intention to permit taxpayers to comply with federal tax law while recognizing that the no double dipping rule prevents abuse of the BRTC credits, this amendment must be made applicable retroactively to ensure equitable treatment of all taxpayers with sites and projects in the BCP. Therefore, this change is applicable to all brownfield sites, regardless of the date of acceptance into the brownfield cleanup program.

Section 16 harmonizes the definitions of "site preparation costs" with Sections 11 and 16 and also clarifies the treatment of several site preparation costs. For example, a specific reference to industry standard data provided by RSMeans when calculating the costs of foundation work has been added. See https://www.rsmeans.com/, which provides construction industry data that can be reliably used to calculate the cost of the foundation that should count as a remedial cover system.

Section 17 amends Paragraph 3 of subdivision (b) of section 21 of the Tax Law is amended by the addition of a new subparagraph (C) which includes renewable energy facilities to be placed in service.

Section 18 amends Paragraph 6 of subdivision (b) of Section 21 of the Tax Law by adding new paragraphs 6-a and 6-b for sites that have entered the program after July 1, 2015, with respect to the definition of environmental zones. The definition of Environmental zones (EN-Zones) has been expanded to include NYSDEC-designated potential environmental justice areas throughout the state. This furthers the overarching goal of the BCP by incentivizing cleanup of contaminated sites in areas where environmental issues and concerns have disproportionately impacted low income and diverse communities.

Section 19 adds the new definition of a renewal energy facility into Paragraph 7 of subdivision (b) of section 21 of the Tax Law.

Section 20 amends Section 31 of part H of chapter 1 of the laws of 2003, as amended by chapter 56 of the laws of 2015, extending from December 31, 2022 to December 31, 2032 the brownfield redevelopment tax credits for qualified sites, the BCP acceptance date for sites to be eligible for brownfield redevelopment tax credits , and the last date to receive a certificate of completion to qualify for such credits from March 31, 2026 to December 31, 2036. Certificates of Completion are typically earned at the end of the calendar year; therefore, therefore, a December deadline is consistent with current NYSDEC practice.

Section 21 contains the effective date of this bill, which is immediately upon adoption, with the exception of specific provisions in Sections 2, 3 and 19 related to affordable projects and environmental justice sites.

EXISTING LAW: Title 14 of Article 27 of the ECL governs the eligibility and programmatic responsibilities for the Brownfield Cleanup Program. Tax Law § 21 establishes a tax credit program to encourage parties to remediate contaminated sites.

PRIOR LEGISLATIVE HISTORY: This is a new bill.

STATEMENT IN SUPPORT: The BCP is one of the most successful programs of its type in the country. As of July 2021, it has facilitated the remediation of over 500 sites adversely affected by contaminated waste through receipt of a Certificate of Completion, with 900 additional sites still in progress. The program has generated over $17.6 billion in economic development, leveraging approximately $2.7 billion in tax credit incentives and generating a return of more than $6.60 for every dollar of tax credit earned. Increasingly, the cleanup and development has been targeted to those geographic areas that need it most – economically disadvantaged environmental zones – based on amendments to the law in 2015. The program has also increasingly been targeted to the types of projects that New York needs most: affordable housing and revitalizing New York State's industrial base.

However, the tax credit incentives which support this program are about to expire. Projects which have not been accepted by NYSDEC into the BCP by December 31, 2022, will not qualify for the tax credits, which have been driving the success of the program.

Due to the tax incentives in this program, superior cleanups have been achieved, enabling not only individual brownfield sites, but multiple brownfields in economically disadvantaged and environmental justice neighborhoods, to be redeveloped. In addition, the project sites that have been remediated and redeveloped have not only created tax revenue-generating buildings and permanent jobs on sites that formerly lay fallow but have also enhanced investment opportunities on neighboring sites, improving livelihoods and property values in numerous communities throughout the state.

By contrast to the BCP, which remediates contaminated sites in an average of 3-4 years, the average timeframe for remediation under the State’s other cleanup program, the Superfund Program, is 10 to 20 years and generally only achieves an industrial cleanup level. Furthermore, and sites cleaned up under the Superfund program are rarely, if ever, redeveloped because the final cleanups are not safe enough for site reuse except for industrial purposes.

These amendments to the BCP proposed by this bill are necessary to extend, stabilize and improve this highly successful remediation and economic development program. The bill extends deadlines for claiming tax credits; extends the benefits to economically disadvantaged and environmental justice areas and renewable energy projects; provides NYSDEC and the Department of Health dedicated funding, paid for by the projects themselves, to administer the BCP; addresses soil vapor issues (an environmental risk not fully appreciated when the BCP was enacted in 2003); preserves tax credits for certain affordable housing projects that would otherwise lose them; and makes a number of technical corrections which we believe will improve the administration of the BCP by clarifying which types of expenses can—and which cannot—qualify for tax credit treatment.

While the law has significant fiscal implications, studies have shown that revenues exceed the tax credit expenditures over the long term. As of May 2021, the state has paid out $2.7 billion in tax credits, but developers have invested over $17.7 billion remediating and redeveloping brownfield sites in some of the state's most difficult-to-develop areas.

BUDGET IMPLICATIONS: The benefits associated with the proper remediation and redevelopment of the state's contaminated sites has been shown by studies to more than offset the tax credit expenditures over the long term. The state has spent an average of $190 million per year on the BPC tax credits, but this money has caused approximately $2 billion in development to be constructed each year on NYS brownfields. By contrast, an average of $115 million is spent on the Superfund program each year, and few if any of these inactive sites are ever put back on the tax rolls to produce new tax revenue. These sites are fenced and padlocked, and are continuing to severely impact redevelopment efforts in the communities in which they exist.

EFFECTIVE DATE: Section 22 of this bill would provide an immediate effective date for all sections , with the exception of specific provisions in Sections 2, 3 and 19 related to affordable projects and environmental justice sites.

Brownfield Cleanup Program Extender
and Omnibus Proposal

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§ 1. Subdivision 2 of section 1405 in article 27 of the environmental conservation law as amended by section 2 of part A of chapter 577 of the laws of 2004 and by section 2 of part BB of chapter 56 of the laws of 2015, is amended by adding clarification that exceedances of the Track 1 Soil Cleanup Objectives can be used to determine eligibility if the planned remediation is to achieve the Track 1 soil cleanup objectives for a planned residential project as follows:

"Brownfield Site" or "Site" shall mean any real property where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by the department that are applicable based on the reasonably anticipated use of the property, in accordance with applicable regulations. **If a project as defined in the application by the Requestor is proposed on a Site as defined herein which consists of a single tax lot or multiple tax lots, the entire Site shall constitute the eligible Site to the extent the proposed project will encompass the entire Site or the applicable portion thereof.**

§ 2. Subdivisions 29 and 30 of Section 1405 in Article 27 of the environmental conservation law, as amended by section 2 of part A of chapter 577 of the laws of 2004 and by section 2 of part BB of chapter 56 of the laws of 2015, is amended and new subdivisions 32 and 33 are added as follows:

29. "Affordable housing project" **shall mean either (a) a project as** shall be defined in regulation by the department, after consultation with the division of housing and community renewal, which shall at a minimum, establish the percentage of units in the project that must be below a defined percentage of the area median income**; or (b) a project situated on a brownfield site that is the subject of a determination by a state or local government housing agency that all or a portion of the project or site will qualify for benefits, including but not limited to real property taxation exemptions, under an affordable housing program which defines a percentage of residential rental or home ownership dwelling units to be dedicated to tenants or home owners at a defined maximum percentage or percentages of area median income based on the occupants' households annual gross income. For purposes of this subdivision, "area median income" shall mean the area median income for the primary metropolitan statistical area or for the county if located outside a metropolitan statistical area, as determined by the United States department of housing and urban development or its successor for a family of four, as adjusted for family size.**

30. "Underutilized" shall ~~be defined in regulation by the department, after consultation with the business community and the city of New York. Such regulations shall be adopted no later than October first, two thousand fifteen and take into consideration the existing use of a property relative to allowable development under zoning, the need for substantial government assistance to redevelop and other relevant factors.~~ **mean, as of the date of application,**

(a) a Site on which no more than fifty percent of the permissible floor area of the building or buildings is certified by the applicant to have been used under the applicable base zoning or as a non-conforming use for at least three years prior to the application, which zoning has been in effect for at least three years; or

(b) the proposed future use is at least seventy-five percent for industrial or commercial uses; or

(c) the proposed development project on the Site could not take place without substantial government assistance, as certified by the municipality in which the Site is located, and for purposes of this provision, substantial government assistance shall mean a substantial loan, grant, land purchase subsidy, land purchase cost exemption or waiver, or tax credit, from a governmental entity; or

(d) a Site on which one or more primary structures have been condemned, or presently exhibits documented structural deficiencies, as certified by a professional engineer; or

(e) a Site on which there are no structures or the buildings have not been occupied or used for at least twelve months; or

(f) an industrial or commercial Site that is no longer functional for its initially intended use due to factors such as functional obsolescence that affects the Site itself or the Site's relationship with other surrounding property, and for purposes of this provision functional obsolesence means that the Site is unable to be used to adequately perform the function for which it was intended due to a substantial loss in value resulting from factors such as overcapacity, changes in technology, deficiencies or superadequacies in design, lack of demand for this type of use such as office space due to a pandemic, or other similar factors that affect the Site itself or the Site's relationship with other surrounding real property.

32. "Conforming BOA site" shall mean a site located within an area designated by the Secretary of State as a brownfield opportunity area pursuant to section nine hundred seventy-r of the general municipal law and for which the Secretary of State has issued an affirmative conformance determination pursuant to subdivision ten of section nine hundred seventy-r of the general municipal law.

33. "Renewable energy facility site" shall mean a site that is primarily used for a renewable energy facility as described in subparagraph (C) of paragraph (7) of subdivision (b) of the tax law.

§ 3. Subdivision 1-a of Section 1407 in Article 27 of the environmental conservation law, as amended by section 2 of part A of chapter 577 of the laws of 2004 and by section 2 of part BB of chapter 56 of the laws of 2015, is amended as follows:

1-a. If the person is also seeking a determination that the site is eligible for the tangible property credit component of the brownfield redevelopment tax credit pursuant to paragraph three of subdivision (a) of section twenty-one of the tax law for a site located in a city having a population of one million or more, such person shall submit information sufficient to demonstrate that: (a) at least half of the site area is located in an environmental zone as defined in section twenty-one of the tax law; (b) the property is upside down or underutilized; or (c) the project is an affordable housing project **as defined under paragraph (a) of the definition of affordable housing project**. An applicant may request an eligibility determination for tangible property credits at any time from application until the site receives a certificate of completion pursuant to section 27-1419 of this title ~~except for sites seeking eligibility under the underutilized category~~**. Notwithstanding the foregoing, a site located in a city having a population of one million or more and which is a conforming BOA site or which is described in paragraph (b) of subdivision twenty-nine or section 27-1405 of this title, shall also be eligible for the tangible property credit component of the brownfield redevelopment tax credit pursuant to paragraph three of subdivision (a) of section twenty-one of the tax law.** Sites are not eligible for tangible property tax credits if: (a) the contamination from ground water or soil vapor is solely emanating from property other than the site subject to the present application; or (b) the department has determined that the property has previously been remediated pursuant to titles nine, thirteen and fourteen of this article, title five of article fifty-six of this chapter and article twelve of the navigation law such that it may be developed for its then intended use.

§ 4. Section 27-1409 in Article 27 of the environmental conservation law is amended by adding a new subdivision 13 to read as follows:

13. An executed Brownfield Cleanup Agreement shall be submitted and returned to the department of environmental conservation with payment of an application fee in the amount of five thousand dollars for a volunteer and ten thousand dollars for a participant. The fee shall be paid to the "Environmental Conservation Special Revenue Fund, Fund Number 21050" created pursuant to State Finance Law section 71 and shall be exclusively dedicated for the department of environmental conservation to enhance funding for department staff to administer the Brownfield Cleanup Program pursuant to this article.

§ 5. Subdivision 2 of Section 27-1411 in Article 27 of the environmental conservation law is amended by adding clarification that the remedial work plan and final engineering report are the operative documents to describe the remedy planned and then implemented at the Site as follows:

A remedial work plan shall provide for the development and implementation of a remedial program for such contamination within the boundaries of such brownfield site; provided, however, that a participant shall also be required to provide in such work plan for the development and

implementation of a remedial program for contamination that has emanated from such site. **The remedial action work plan, as amended and finalized, and for some sites an interim remedial measures work plan, is the document that describes all then known components of a remedial action selected by the volunteer or participant and approved by the Department in consultation with the Department of Health's review on the public health impacts of the remedy. The Commissioner may prepare a decision document to summarize the major components of the selected and approved remedy described in the remedial action work plan to assist the public's understanding of the remedy; however, a decision document shall not be relied upon as a complete or final description of the remedy; nor does it supersede the requirements for the remedy under the remedial action work plan. The final engineering report shall describe the final and completed remedy implemented during the remedial action work necessary for the site's qualification for the certificate of completion, including any revision or variance of the remedial action work plan, which is approved by the Department.**

§ 6. Subdivision 4 entitled "Track 1" of Section 1415 of Article 27 of the environmental conservation law is amended to clarify the treatment of soil vapor intrusion on a Track 1 site as follows:

Track 1: The remedial program shall achieve a **soil** cleanup level that will allow the site to be used for any purpose without restriction and without reliance on the long-term employment of institutional or engineering controls **to**~~, and shall~~ achieve **the** contaminant-specific remedial action objectives for soil which conform with those contained in the generic table of contaminant-specific remedial action objectives for unrestricted use developed pursuant to subdivision six of this section. Provided, however, that volunteers whose proposed remedial program for the remediation of groundwater **or soil vapor** may require the long-term employment of institutional or engineering controls after the bulk reduction of groundwater contamination to asymptotic levels has been achieved **or if residual soil vapor remains present from residual on-site, area-wide soil vapor or an off-site soil vapor source,** but whose **soil cleanup** program would otherwise conform with the **soil remediation** requirements necessary to qualify for Track 1, shall qualify for Track 1 **provided the site's owner: a) shall be responsible for maintenance of the soil vapor mitigation remedy, whether in the form of a vapor barrier system or a passive or active sub slab depressurization treatment system, either ex-situ or in-situ, and 2) shall remain in compliance with the terms of an applicable environmental easement created and recorded pursuant to title thirty-six of article seventy-one of this chapter.**

§ 7. Subdivision 4 entitled "Track 4" of Section 1415 of Article 27 of the environmental conservation law is amended by adding clarification that source removal is still required in a Track 4 remedy and how to address soil vapor intrusion on a Track 4 site as follows:

Track 4: The remedial program shall achieve a cleanup level that will be protective for the site's current, intended or reasonably

anticipated residential, commercial, or industrial use with restrictions and with reliance on the long-term employment of institutional or engineering controls to achieve such level. **At a minimum, all Track 4 remedies shall include source removal as defined in subdivision five-a of this section and excavation and removal of all contaminated soils sufficient to facilitate the installation of remedial action cover systems and any remaining contaminated soils above applicable soil clean up objectives will be covered with a remedial action cover system selected by the applicant and consistent with subdivision five-b of this section.** The regulations shall include a provision requiring that a cleanup level which poses a risk in exceedance of an excess cancer risk of one in one million for carcinogenic end points and a hazard index of one for non-cancer end points for a specific contaminant at a specific site may be approved by the department without requiring the use of institutional or engineering controls to eliminate exposure only upon a site specific finding by the commissioner, in consultation with the commissioner of health, that such level shall be protective of public health and environment. Such finding shall be included in the draft remedial work plan for the site and fully described in the notice and fact sheet provided for such work plan.

§ 8. Subdivision 5 of Section 1415 of Article 27 of the environmental conservation law, is amended to include a new section 5-b as follows:

5-b. Remedial action cover systems are engineering controls comprised of physical barriers employed to actively or passively contain, or stabilize contamination, restrict the movement of contamination to ensure the long-term effectiveness of the remedial program, or eliminate exposure pathways to contamination, and may include:

(1) soil cover systems in landscaped or exposed soil areas, which must:

(i) be comprised of soil or other unregulated material as set forth in Part 360 of this title and otherwise complies with applicable regulations; and

(ii) not exceed the applicable soil cleanup objectives for use of the site pursuant to applicable regulations; or

(2) hardscape cover systems which shall be defined as a physical layer of solid impervious material such as concrete, asphalt, or other hard surfaces, and which are designed to serve a remedial purpose by creating a physical barrier between remaining contaminated media and an exposure pathway notwithstanding that the hardscape cover system may also serve another purpose for building construction or end use of the Site such as foundation slabs, parking lots or sidewalls, and shall be included in the remedial action and not the tangible property for:

(i) a Track 3 or 4 site if residual soil exceeds any applicable soil cleanup objectives; or

(ii) a Track 1, 2, 3 or 4 remedial action site if the remedial action cover system is required for monitoring, or to prevent exposure to area-wide or remaining contaminated groundwater; or

(iii) a Track 1, 2, 3 or 4 remedial action site if soil vapor mitigation or monitoring is required due to an exceedance of an

applicable soil vapor concentrations established by the commissioner of health pursuant to guidance or regulation or as otherwise required by the commissioner of health, and therefore, soil vapor mitigation methodologies such as a vapor barrier or a passive or active sub slab depressurization treatment system including a vapor barrier as a sealing layer, either ex-situ or in-situ, is required to be covered by or integrated into the hardscape cover system.
The thickness of a hardscape cover system that meets the remedial action cover system requirements must be at least one foot thick at Sites where the hardscape cover system is being constructed in structurally sound native soil, or two feet thick for Sites in structurally unsound soil, such as historic fill or sand; and must otherwise meet the requirements of the Building Code of New York State, and New York State Department of Transportation Standard Specifications, if applicable, and be certified by a licensed Professional Engineer.

§ 9. Subdivision 3 of section 1419 of article 27 of the environmental conservation law is amended to read as follows:

3. Upon receipt of the final engineering report, the department shall review such report and the data submitted pursuant to the brownfield site cleanup agreement as well as any other relevant information regarding the brownfield site. Upon satisfaction of the commissioner that the remediation requirements set forth in this title have been or will be achieved in accordance with the time frames, if any, established in the remedial work plan, the commissioner shall issue a written certificate of completion. **Following such issuance, the commissioner shall transmit an invoice for oversight costs incurred by the department of environmental conservation and the department of health staff who oversaw the project. Within thirty days of receipt of the invoice, the applicant shall transmit its payment of the department of environmental conservation's oversight costs to the "Environmental Conservation Special Revenue Fund, 71 Fund Number 21050" established pursuant to State Finance Law section and the department of health's oversight costs to the "Drinking Water program Management and Administration Fund, Fund Number 23100" established by Title IV of Article 11 of the Public Health Law and the Drinking Water Revolving Fund established by §1285-m of the Public Authorities Law. Provided, however, that such collective invoices for oversight costs cannot: (a) include any time spent on dispute resolution pursuant to subparagraph 3 in section 1409 and (b) exceed fifty thousand dollars in a municipality with a population of less than one million or seventy-five thousand dollars in a municipality with a population of one million or more. All such payments to the above-identified funds shall be dedicated as revenue for, respectively, the department of environmental conservation and the department of health to fund the staff of each respective department necessary to administer the Brownfield Cleanup Program pursuant to this article.** The certificate shall include such information as determined by the department of taxation and finance, including but not limited to the brownfield site boundaries included in the final engineering report, and the date of the brownfield site cleanup agreement, and the applicable percentages as

of the date of the certificate of completion available for that site for purposes of section twenty-one of the tax law. For those sites for which the department has issued a notice to the applicant on or after July first, two thousand fifteen or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision thirty of section 27-1405 of this title, whichever shall be later, that its request for participation has been accepted under subdivision six of section 27-1407 of this title, the tangible property credit component of the brownfield redevelopment tax credit pursuant to paragraph three of subdivision (a) of section twenty-one of the tax law shall only be available to the taxpayer if the criteria for receiving such tax component have been met. For those sites for which the department has issued a notice to the taxpayer after June twenty-third, two thousand eight that its request for participation has been accepted under subdivision six of section 27-1407 of this title the applicable percentage for the site preparation credit component pursuant to paragraph two of subdivision (a) of section twenty-one of the tax law, the applicable percentage shall be based on the level of cleanup achieved pursuant to subdivision four of section 27-1415 of this title and the level of cleanup of soils to contaminant-specific soil cleanup objectives promulgated pursuant to subdivision six of section 27-1415 of this title, up to a maximum of fifty percent, as follows:

(a) soil cleanup for unrestricted use, the protection of groundwater or the protection of ecological resources, the applicable percentage shall be fifty percent;

(b) soil cleanup for residential use, the applicable percentage shall be forty percent, except for Track 4 which shall be twenty-eight percent;

(c) soil cleanup for commercial use, the applicable percentage shall be thirty-three percent, except for Track 4 which shall be twenty-five percent;

(d) soil cleanup for industrial use, the applicable percentage shall be twenty-seven percent, except for track 4 which shall be twenty-two percent.

§ 10. Paragraph 2 of subdivision (a) of section 21 of the Tax Law, as amended by section 1 of part H of chapter 577 of the laws of 2004, is amended to read as follows:

(2) Site preparation credit component. The site preparation credit component shall be equal to the applicable percentage of the site preparation costs paid or incurred by the taxpayer with respect to a qualified site. The credit component amount so determined with respect to a site's qualification for a certificate of completion shall be allowed for the taxable year in which the effective date of the certificate of completion occurs. The credit component amount determined other than with respect to such qualification shall be allowed for the taxable year in which the improvement to which the applicable costs apply is placed in service for up to five taxable years after the issuance of such certificate of completion**, provided, however, that for any qualified site to which a certificate of completion is issued on or after January**

first, two thousand sixteen, the site credit component for such costs shall be allowed for up to seven taxable years after the certificate of completion; and provided further that the credit component amount for any costs necessary for compliance with the certificate of completion or subsequent modifications thereof or the remedial program defined in such certificate which were paid or incurred but not included in the calculation of a credit allowed under this section in any taxable year beginning prior to January first, two thousand twenty-one, shall be allowed for the taxpayer's first taxable year beginning on or after January first, two thousand twenty-one, and the credit component amount for any such costs paid or incurred in any taxable year beginning on or after January first, two thousand twenty-one shall be allowed in the taxable year such costs are paid or incurred for up to seven taxable years after issuance of the certificate of completion.

§ 11. Subparagraph (i) of paragraph 3 of subdivision (a) of section 21 of the Tax Law, as amended by section 1 of part AA of chapter 58 of the laws of 2021, is amended to read as follows:

(i) The tangible property credit component shall be equal to the applicable percentage of the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property and may include any related party service fee paid; provided that in determining the cost or other basis of such property, the taxpayer shall exclude the acquisition cost of any item of property with respect to which a credit under this section was allowable to another taxpayer. A related party service fee shall be allowed only in the calculation of the tangible property credit component and shall not be allowed in the calculation of the site preparation credit component or the on-site groundwater remediation credit component. The portion of the tangible property credit component which is attributable to related party service fees shall be allowed only as follows: (A) in the taxable year in which the qualified tangible property described in subparagraph (iii) of this paragraph is placed in service, for that portion of the related party service fees which have been earned and actually paid to the related party on or before the last day of such taxable year; and (B) with respect to any other taxable year for which the tangible property credit component may be claimed under this subparagraph and in which the amount of any additional related party service fees are actually paid by the taxpayer to the related party, the tangible property credit component for such amount shall be allowed in such taxable year. The credit component amount so determined shall be allowed for the taxable year in which such qualified tangible property is first placed in service on a qualified site with respect to which a certificate of completion has been issued to the taxpayer, or for the taxable year in which the certificate of completion is issued if the qualified tangible property is placed in service prior to the issuance of the certificate of completion. This credit component shall only be allowed for up to one hundred twenty months after the date of the issuance of such certificate of completion~~, provided, however, that for qualified~~

~~sites to which a certificate of completion is issued on or after March twentieth, two thousand ten, but prior to January first, two thousand twelve, the commissioner may extend the credit component for up to one hundred forty-four months after the date of such issuance, if the commissioner, in consultation with the commissioner of environmental conservation, determines that the requirements for the credit would have been met if not for the restrictions related to the state disaster emergency declared pursuant to executive order 202 of 2020 or any extension thereof or subsequent executive order issued in response to the novel coronavirus (COVID-19) pandemic.~~; **provided, however, with respect to any qualified site for which the department of environmental conservation has issued a notice to the taxpayer before July first, two thousand fifteen or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision thirty of section 27-1405 of the environmental conservation law, whichever shall be later, that its request for participation has been accepted under subdivision six of section 27-1407 of the environmental conservation law, this credit component shall be allowed for up to one hundred eighty months after the date of such issuance of such certificate of completion; provided, however, with respect to any qualified site for which the department of environmental conservation has issued a notice to the taxpayer on or after July first, two thousand fifteen or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision thirty of section 27-1405 of the environmental conservation law, whichever shall be later, that its request for participation has been accepted under subdivision six of section 27-1407 of the environmental conservation law, or which received such notice of acceptance prior to that date but is eligible for the brownfield redevelopment tax credits as if the site was accepted into the brownfield cleanup program after that date as provided in section thirty-three of chapter fifty-six of the laws of two thousand fifteen, this credit component shall be allowed for up to one hundred eighty months after the date of such issuance of such certificate of completion.**

§ 12. Subparagraph (A) of Paragraph 3-a of subdivision (a) of section 21 of the Tax Law is amended as follows:

Notwithstanding any other provision of law to the contrary, the tangible property credit component available for any qualified site pursuant to paragraph three of this subdivision shall not exceed thirty-five million dollars or three times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component under paragraphs two and four, respectively, of this subdivision, and the costs that would have been included in the calculation of such components if not treated as an expense and deducted pursuant to section one hundred ninety-eight of the internal revenue code, whichever is less; provided, however, that: (1) in the case of a qualified site to be used primarily for manufacturing activities, the tangible property credit component available for any qualified site pursuant to paragraph three of this subdivision shall not exceed forty-five million dollars or six times the sum of the costs

included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component under paragraphs two and four, respectively, of this subdivision, and the costs that would have been included in the calculation of such components if not treated as an expense and deducted pursuant to section one hundred ninety-eight of the internal revenue code, whichever is less; **(2) for a site which is primarily used for a renewable energy facility pursuant to subparagraph (C) of paragraph (7) of subdivision (b) of section 21 of the tax law and as defined in Subdivision 33 of Section 1405 in Article 27 of the environmental conservation law, the tangible property credit component pursuant to paragraph three of this subdivision shall not exceed the greater of thirty-five million dollars or three times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component under paragraphs two and four, respectively, of this subdivision;** and ~~(2)~~ **(3)** the provisions of this paragraph shall not apply to any qualified site for which the department of environmental conservation has issued a notice to the taxpayer before June twenty-third, two thousand eight that its request for participation has been accepted under subdivision six of section 27-1407 of the environmental conservation law.

§ 13. Paragraph 3-a of subdivision (a) of section 21 of the Tax Law is amended by the addition of a new subparagraph (E) to read as follows:

(E) If more than one taxpayer is claiming credits under this section with respect to the same qualifying site, then with respect to the limitations set forth in subparagraph A of this paragraph:

(i) the taxpayers who are subject to such limitations may allocate the amount of any applicable limitations in any manner that such taxpayers may agree upon. Any such agreement shall be in writing, and may be first entered into at any time prior to the due date with all available extensions for filing the tax return for the year in which the limitations set forth in subparagraph A will limit the allowable amount of any taxpayer's credits under this section, and a memorandum of such agreement shall be recorded in all counties where the qualified site is located. Each taxpayer that is party to such agreement or is otherwise bound by it, including as a successor or assign of a party, shall file a copy of the agreement with each tax return in which a tangible property credit component is claimed with respect to the qualified site. The agreement permitted by this subparagraph may be amended, provided that the aggregate of the available tangible property credit component for the qualified site shall not exceed the limitation prescribed by subparagraph A of this paragraph.

(ii) If a claim for a tangible property credit component for a qualified site is disallowed to a taxpayer in whole or in part, then, in the case of a written agreement subject to this subparagraph E, the effect of disallowance shall be subject to the agreement if provided for therein.

(iii) In the absence of a duly recorded written agreement under this subparagraph, the available tangible property credit component subject to this paragraph shall be allowable to taxpayers

claiming the tangible property credit component for the same qualified site in accordance with the following:

(a) for purposes of this clause (iii) only, qualified tangible property placed in service on the qualified site by a taxpayer at any point during a taxable year shall be deemed to have been placed in service by such taxpayer on the first day of January falling within such taxpayer's taxable year;

(b) the tangible property credit component shall be allowable to such taxpayers in the order and priority upon the date that qualified tangible property is deemed under sub-clause (a) of this clause (iii) to have been placed in service, with highest priority to the earliest date, until the limitation set forth in subparagraph A of this paragraph [§21(a)(3-a)(A)] shall have been reached for such qualified site;

(c) provided, that if more than one taxpayer shall have been deemed under sub-clause (a) of this clause (iii) to have placed qualified tangible property in service on the qualified site on the same date and year, such that the limitation set forth in subparagraph A of this paragraph would be exceeded by reason of such property being deemed placed in service on such date, then the limitation shall be allocated among such taxpayers so that the amount of the tangible property credit component allowable to each such taxpayer shall be in proportion to the ratio of the amount of the tangible property credit component that would otherwise be allowable to each such taxpayer in the absence of such limitation to the total amount of tangible property credit component that would be allowed to the taxpayers that are deemed to have placed qualified tangible property in service on the qualified site on the same date and year under sub-clause (a) of this clause (iii).

§ 14. Subparagraph B of paragraph 5 of subdivision (a) of Section 21 of the Tax Law, as amended by chapter 56 of the laws of 2015, is amended to modify clauses (iv) and (v) and to add a new clause (vi) as follows:

(iv) five percent for a site to be used primarily for manufacturing activities as such term is defined in subparagraph (B) of paragraph three-a of this subdivision; ~~and~~

(v) five percent for sites remediated to Track 1 as that term is defined in subdivision four of section 27-1415 of the environmental conservation law; **and**

(vi) five percent for a site to be primarily used as a renewable energy facility in accordance with paragraph seven of subdivision (b) of this section.

§ 15. Subdivision (b) of Section 21 of the Tax Law is amended by the addition of a new subparagraph 2-a applicable to all brownfield sites regardless of the date of acceptance into the brownfield cleanup program to read as follows:

2-a. Site preparation costs as defined in paragraph two of this subdivision, and which under the Internal Revenue Code, as amended, are

also properly includible in the cost or other basis for federal income tax purposes of qualified tangible property, as described in paragraph three of this subdivision, shall be allowable for purposes of the calculation of the site preparation credit component under paragraph two of subdivision (a) of this section, but any such costs shall be excluded from such qualified tangible property basis for purposes of calculating the tangible property credit component under paragraph three of subdivision (a) of this section.

§ 16. Paragraph 2 of subdivision (b) of section 21 of the tax law, as amended by section 23 of part BB of chapter 56 of the laws of 2015, is amended as follows:

Site preparation costs. The term "site preparation costs" shall mean all amounts properly chargeable to a capital account, which are paid or incurred **and** which are necessary to implement a site's investigation, remediation, or qualification for a certificate of completion **or to abate hazardous building materials or conditions**, and shall include costs of**, but may not be limited to:** excavation; demolition; activities undertaken under the oversight of the department of labor or in accordance with standards established by the department of health to remediate and dispose of regulated materials including asbestos, lead or polychlorinated biphenyls; environmental consulting; engineering; legal costs; transportation, disposal, treatment or containment of contaminated soil; remediation **and mitigation** measures taken to address contaminated soil vapor **such as sub slab depressurization systems and soil vapor barriers**; **remedial action** cover systems ~~consistent with applicable regulations~~ **as defined in subdivision five of section 27-1415 of the environmental conservation law**; physical support of excavation; **underpinning of structures and infrastructure adjacent to the site;** dewatering and other work to facilitate or enable remediation activities; sheeting, shoring, and other engineering controls required to prevent off-site migration of contamination from the qualified site or migrating onto the qualified site; **waterfront bulkheads facilitating excavation or which are part of a remedial cover system for the brownfield site** and the costs of fencing, temporary electric wiring, scaffolding, and security facilities until such time as the certificate of completion has been issued. Site preparation shall include all costs paid or incurred within sixty months after the last day of the tax year in which the certificate of completion is issued that are necessary for compliance with the certificate of completion or subsequent modifications thereof, or the remedial program defined in such certificate of completion including but not limited to institutional controls, engineering controls, an approved site management plan, and an environmental easement with respect to the qualified site. Site preparation cost shall not include the costs of foundation systems that exceed the cover system requirements in the regulations applicable to the qualified site; **provided, however, with respect to any qualified site for which the department of environmental conservation has issued a notice to the taxpayer before July first, two thousand fifteen or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision thirty of section 27-1405 of**

the environmental conservation law, whichever shall be later, that its request for participation has been accepted under subdivision six of section 27-1407 of the environmental conservation law, site preparation shall include all costs paid or incurred within eighty-four months after the last day of the tax year in which the certificate of completion is issued that are necessary for compliance with the certificate of completion or subsequent modifications thereof, or the remedial program defined in such certificate of completion, including but not limited to institutional controls, engineering controls, an approved site management plan, and an environmental easement with respect to the qualified site. Site preparation costs shall ~~not~~ include the cost of **remedial action cover systems as defined in as defined in subdivision five of section 27-1415 of the environmental conservation law, but shall not include the costs of** foundation systems that exceed the **remedial action** cover system requirements ~~in~~ **as defined in subdivision five of section 27-1415 of the environmental conservation law** ~~the regulations~~ applicable to the qualified site. **Where an element of such remedial action cover system is enclosed within a building constructed or to be constructed on a qualified site or consists of a concrete slab, the allowable amount of the site preparation cost with respect to each square foot by surface area of such element shall be the actual cost per square foot to install and support such element, which should be compared to the established industry standard reference data unit costs as published by RSMeans (www.RSMeans.com) unless inapplicable due to unique field conditions where standard unit costs do not apply multiplied by one foot depth for a commercial or industrial project or a two foot depth for a residential project. In the event unique field conditions require a remedial action cover system to be more than one feet deep for a commercial or industrial project or two feet deep for a residential project, the engineer of record shall justify a request for a deeper remedial action cover system with geotechnical and other field specific data, which shall be considered by the department, and the final depth of the approved remedial action cover system shall be presented in the final engineering report pursuant to subdivision two of section 27-1419 of the environmental conservation law.**

§ 17. Paragraph 3 of subdivision (b) of section 21 of the Tax Law is amended by the addition of a new subparagraph (C) to read as follows:

(C) is placed into service on a site that is primarily used as a renewable energy facility pursuant to subparagraph (C) of paragraph (7) of subdivision (b) of the section 21 of the tax law and: (i) which is a renewable energy facility or a component of a renewable energy facility, or (ii) which otherwise constitutes qualified tangible property under subparagraph (A) of this paragraph.

§ 18. Subdivision (b) of Section 21 of the Tax Law is amended by adding a new paragraph 7 to read as follows:

(7) Environmental zones (EN-Zones). An "environmental zone" shall mean, with respect to any qualified site for which the department of

environmental conservation has issued a notice to the taxpayer before July first, two thousand fifteen or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision thirty of section 27-1405 of the environmental conservation law, whichever shall be later, that its request for participation has been accepted under subdivision six of section 27-1407 of the environmental conservation law:

(A) an area designated as such by the commissioner of labor. Such areas shall be census tracts that satisfy either of the following criteria:

(i) areas that have both:

(I) a poverty rate of at least twenty percent based on the most recent five year American Community Survey; and

(II) an unemployment rate of at least one and one-quarter times the statewide unemployment rate based on the most recent five year American Community Survey, or;

(ii) areas that have a poverty rate of at least two times the poverty rate for the county in which the areas are located based on the most recent five year American Community Survey.

(iii) Such designation shall be made and a list of all such environmental zones shall be established by the commissioner of labor based on the most recent American Community Survey, or its successor.

(B) an area designated by the commissioner of the department of environmental conservation to be a potential environmental justice area.

(i) "Potential environmental justice area" means a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies and which are shown on maps created by the department of environmental conservation.

(ii) "Minority community" means a census block group, or contiguous area with multiple census block groups, having a minority population equal to or greater than 51.1%* in an urban area and 33.8%* in a rural area of the total population.

(iii) "Minority population" means a population that is identified or recognized by the U.S. Census Bureau as Hispanic, African-American or Black, Asian and Pacific Islander or American Indian.

(iv) "Low-income community" means a census block group, or contiguous area with multiple census block groups, having a low-income population equal to or greater than 23.59 percent of the total population.

(v) "Low-income population" means a population having an annual income that is less than the poverty threshold, as such thresholds are established by the United States Census Bureau.

(vi) "Census block group" means a unit for the U.S. Census used for reporting. Census block groups generally contain between two hundred fifty and five hundred housing units.

(vii) "Urban area" means all territory, population, and housing units located in urbanized areas and in places of 2,500 or

more inhabitants outside of an urbanized area. An urbanized area is a continuously built-up area with a population of 50,000 or more.

(viii) "Rural area" means territory, population, and housing units that are not classified as an urban area.

(C) The determination whether a site is located in an environmental zone shall be based on the date the department of environmental conservation issued a notice to the taxpayer that its request for participation in the brownfield cleanup program has been deemed complete pursuant to subdivision three of section 27-1407 of the environmental conservation law; provided, however, if the area in which a site is located is designated an environmental zone subsequent to the issuance of such notice and before qualified tangible property as defined in paragraph 3 of subdivision (b) of Section 21 of the Tax Law is placed in service, then the site shall be deemed located in an environmental zone.

(D) A site which is in a potential environmental justice area, as of the effective date of this act, shall be deemed to be in an environmental zone from and after January 1, 2021 for all purposes including but not limited to the site's eligibility for the tangible property credit component under subdivision 1-a of section 27-1407 of the environmental conservation law and the calculation of the brownfield redevelopment tax credit pursuant to section 21 of the tax law as amended by this action for all taxable years beginning on or after January 1, 2021.

§ 19. Subdivision (b) of section 21 of the Tax Law is amended by adding a new paragraph 8 to read as follows:

For purposes of this section:

(A) "renewable energy facility" means the following systems and any constituent components thereof (whether constituting real or personal property and regardless of useful life): any renewable energy system, as such term is defined in section sixty-six-p of the public service law as added by chapter one hundred six of the laws of two thousand nineteen, any co-located system storing energy generated from such a renewable energy system prior to delivering it to the bulk transmission, sub-transmission, or distribution system, and any standalone system storing energy interconnected into New York's bulk transmission system or an Investor Owned Utility's (IOU) transmission or distribution system providing distribution services, wholesale market energy, ancillary services, and/or capacity services, including all associated appurtenances to electric plants as defined under section two of the public service law;

(B) "renewable energy facility property" shall mean buildings, facilities, and equipment placed in service on the qualified site which are an integral part of a system included in the foregoing definition of renewable energy facility, or in the case of a building, more than fifty percent of the square footage of the building is dedicated to such system equipment or to occupancy by businesses

constructing, operating, or maintaining such systems; and

**(C) a qualified site shall be deemed to be primarily used as a renewable energy facility if more than fifty percent - as measured by cost or other basis for federal income tax purposes - of the buildings,
facilities, and equipment placed in service on the qualified site constitute renewable energy facility property.**

An applicant claiming the tangible property credit component because the site is a renewable energy facility site shall attach to each tax return claiming the tangible property credit component under paragraph 3 of subdivision (a) of section 21 of the tax law with respect to the brownfield site: (i) a copy of interconnection agreement with a utility or equivalent documentation with respect to the renewable energy system or systems placed into service at the site; and (ii) the taxpayer's primary use determination under subparagraph (C) of this paragraph which shall set forth the cost or other basis for federal income tax purposes of all items of qualified tangible property placed into service on the site through the end of the taxable year.

§ 20. Section 31 of part H of chapter 1 of the laws of 2003, amending the tax law relating to brownfield redevelopment tax credits, remediated brownfield credit for real property taxes for qualified sites and environmental remediation insurance credits, as amended by chapter 56 of the laws of 2015, is amended to read as follows:

§ 31. The tax credits allowed under section 22 or 23 of the tax law and the corresponding provisions in articles 9, 9-A, 22 and 33 of the tax law, as added by the provisions of sections one through twenty-nine of this act, shall not be applicable to any site accepted into the brownfield cleanup program on and after July 1, 2015 ~~**[or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision 30 of section 27-1405 of the environmental conservation law, whichever shall be later]**~~. The tax credits allowed under section 21 of the tax law and the corresponding provisions in articles 9, 9-A, 22 and 33 of the tax law, as added by the provisions of sections one through twenty-nine of this act, shall not be applicable to any site accepted into the brownfield cleanup program after December 31, ~~**2022**~~ **2031**, provided, however that any sites accepted on or before December 31, ~~**2022**~~ **2031** must have received the certificate of completion required to qualify for any of such credits on or before **December** ~~**March**~~ 31, ~~**2026**~~ **2036.**

§ 21. Effective Date:

This Act shall take effect immediately; provided, however:

(a) The amendments made by sections two and three of this act, and shall apply to sites for which the department of environmental conservation has issued a notice to the applicant that its request for participation has been accepted under subdivision six of section 27-1407 of the environmental conservation law, regardless of the date of such

notice; provided, however, that the amendments made by section three of this act regarding eligibility for the tangible property credit component of the brownfield redevelopment tax credit under paragraph three of subdivision (a) of section twenty-one of the tax law shall apply to all taxable years beginning on and after January 1, 2021; and

(b) a site which is in an environmental justice area as of such effective date shall be deemed to be in an environmental zone from and after January 1, 2021 for all purposes, including but not limited to the site's eligibility of the tangible property credit component under subdivision 1-a of section 27-1407 of the environmental conservation law and the calculation of the brownfield redevelopment tax credit pursuant to section 21 of the tax law as amended by this act for all taxable years beginning on and after January 1, 2021.