

Brownfield Restoration in New York State: Program Review and Options

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Thomas P. DiNapoli
New York State Comptroller

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Office of the State Comptroller
Public Information Office
110 State Street
Albany, New York 12236
(518) 474-4015

Or through the Comptroller's website at: www.osc.state.ny.us

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Executive Summary

Since 1990, New York State government and interested private parties have explored policy options to promote the redevelopment of “brownfields,” abandoned properties where prior industrial or other use has left the sites contaminated with toxic substances. Potential liability for remediation of such contamination, under the State and federal Superfund laws, is widely identified as a factor that makes these sites unattractive to developers.

Two decades of efforts to clean up brownfields have delivered some successes. In New York, 408 sites have been remediated under three State programs. The State has spent more than \$1.0 billion on brownfield programs, most of it in the form of tax credits, and may incur an additional \$3.3 billion in costs for such credits within the next few years. Yet thousands of other contaminated sites continue to pose environmental and health threats, while discouraging economic activity and job creation for New Yorkers.

Key provisions of the State’s largest remediation initiative, the Brownfield Cleanup Program (BCP), will expire in 2015 unless extended. Cleanup projects typically take several years to complete, and developers cannot qualify for State incentives until remediation efforts are complete. Thus, uncertainty about the long-term future of New York State’s cleanup programs may start to deter new projects within the coming year.

This report provides an overview and assessment of the three major initiatives New York State has undertaken to turn vacant brownfield sites into productive, environmentally safe properties.

- **Voluntary Cleanup Program.** Established administratively by the New York State Department of Environmental Conservation (DEC) in 1994, the Voluntary Cleanup Program (VCP) was New York State’s first initiative to address the brownfields problem. The VCP accepted applicants until 2003, and 212 sites have been remediated through the Program. It offered participants limited liability protection, cleanup standards based on proposed site use, and a process to define cleanups that was more streamlined than the State Superfund process. The VCP offered no direct financial incentives.
- **Environmental Restoration Program.** The Environmental Restoration Program (ERP) was created in the Clean Water/Clean Air Bond Act of 1996. The ERP authorized \$200 million in bonding authority to support municipal projects to assess, remediate and reuse brownfields. According to DEC, program funds are currently fully obligated and the ERP is no longer accepting applicants. The Program offered participating municipalities limited liability protection, indemnification by the State for third party liability, and, initially, 75 percent of

cleanup costs, which was later increased to 90 percent. To date, the ERP has remediated 68 sites at an average State cost per site of \$779,176.¹

- **Brownfield Cleanup Program.** The BCP was created in statute in 2003. Chapter 1 of the Laws of 2003 included a legislative declaration of policy and findings of fact which stated that, in order to promote environmental and public health as well as the economic vitality of the State, it was appropriate to adopt in statute a program to promote the cleanup and redevelopment of the “thousands” of brownfields in the State. The BCP offers parties limited liability protection, an abbreviated process to identify a cleanup remedy, soil cleanup objectives based on the proposed use of the site, and refundable tax credits of 10 to 22 percent of site cleanup and redevelopment costs.

In 2008, amendments to the BCP capped tax credits at the lesser of \$35 million or three times cleanup costs for most sites and \$45 million or 6 times cleanup costs at sites where the proposed use is manufacturing. Since 2003, 128 sites have been cleaned up through the Program, at an average tax credit cost to the State of \$9.4 million per site. Based on tax credit reports produced by the Department of Taxation and Finance (Tax Department), the Office of the State Comptroller projects a potential outstanding tax credit liability to the State of \$3.3 billion for the 389 sites currently enrolled in the BCP.

Based on an evaluation of experience with brownfield programs in New York and neighboring states, this report outlines options for targeting cleanup resources more cost-effectively, so a larger number of sites can be restored to productive use. Such options include:

- Allowing use of regulatory and liability incentives with more limited or no tax incentives.
- Maintaining credits for cleanup costs, providing additional benefits where projects are consistent with local and State economic development priorities, and restricting credits for development costs.
- Providing State support from existing revenue sources for the environmental and other assessments that municipalities or project developers currently must undertake before deciding to proceed with a cleanup.
- Identifying potential new sources of financing for the Environmental Restoration Program.

¹ The number of sites remediated was extracted from the DEC's Environmental Site Remediation Database on February 25, 2013. The average cost per site was determined from a review of DEC contracts with municipalities for ERP activities at specific sites conducted in July 2012.

- Authorizing a new Voluntary Cleanup Program providing liability protections and a streamlined cleanup process.
- Reducing administrative burdens to simplify participation in the cleanup programs.
- Partnering with municipalities to increase overall capacity for brownfield remediation.
- Requiring more public reporting on redevelopment projects, and enhancing the State's database of environmental remediation sites.

Brownfield Remediation Programs in New York

Background

The New York State Superfund Program, established by law in 1979, was one of the first programs in the United States to provide a legal framework through which sites contaminated by releases of hazardous wastes could be remediated.² The State Superfund called for the development of a list of contaminated sites and empowered the Commissioners of the Department of Environmental Conservation (DEC) and the Department of Health (DOH) to order owners of the sites to clean them up. Where no responsible party was identifiable, or the site owner was unable or unwilling to do the cleanup, DEC and DOH were given the authority to remediate sites and then recover costs from responsible parties.

Stringent liability standards and rigorous cleanup requirements associated with the State Superfund and the later federal Superfund programs were held by some parties to be responsible for the abandonment of old factory sites and other unused sites in urban settings. Under the federal Superfund's strict, joint and several liability standard, developers who took title to contaminated properties could be held responsible for the cost of remediating hazardous contamination on and emanating from these properties. Developers avoided sites that could have subjected them to these risks. To encourage developers to consider remediating and using the abandoned urban sites that became known as "brownfields," policies to limit cleanup requirements and provide liability relief were proposed. In addition to the potential threat to public health and environmental quality posed by these sites, associated cleanup costs and potential liability were widely perceived as impediments to the economic revitalization of New York's cities. Many, if not most, of New York's urban areas contain concentrations of contaminated sites.

For over a decade, through the 1990s and into the early 2000s, representatives of New York State and local government, economic development proponents, developers, representatives of community-based organizations, owners of contaminated sites, environmental groups and others discussed policies to promote the remediation and redevelopment of brownfields. Such initiatives were promoted as a matter of environmental and economic justice for the residents of these communities, as well as useful steps toward revitalizing the State's economy more generally.

This policy debate arose in the context of New York State's lack of general laws covering remediation of all contaminated properties in the State. Specific statutes govern remediation of sites contaminated by specific activities. For example, current spill sites where contamination is due to releases of petroleum products or regulated hazardous wastes are governed by Article 12 of the State Navigation Law and Title 9 of Article 27 of the State Environmental Conservation Law, respectively. Contaminated sites that have been listed on the State Registry of Inactive Hazardous Waste Disposal

² Established in Chapter 282 of the Laws of 1979.

Sites are governed by Title 13 of Article 27 of the State Environmental Conservation Law, also known as the State Superfund law. Cleanup of sites under the authority of these statutes is subject to the oversight and approval of DEC.

Contaminated sites that are not subject to these statutes may be remediated without DEC oversight or approval. For this reason, it is not possible to say with certainty whether brownfield sites have been redeveloped outside of the DEC programs discussed here, or even how many there are in New York State. DEC has estimated the number as being in the “thousands.”³

Over the past two decades, New York State has created three major programs to provide incentives to encourage parties to voluntarily clean up contaminated sites.

Voluntary Cleanup Program

The New York State Voluntary Cleanup Program (VCP) was created administratively by DEC in 1994. It was not explicitly authorized by law or regulation. DEC ran the VCP under administrative guidance. Participants in the Program entered into a voluntary cleanup agreement (VCA) with DEC. Under the terms of the VCA, volunteers remediated sites to a level consistent with their intended use under the oversight of DEC.

On satisfying the terms of the VCA, participants received from DEC a liability release and covenant not to sue. These commitments were not binding on other State agencies or the New York State Attorney General. The waiver addressed potential future liability for additional remediation of contamination addressed by the VCA, but would not apply to: offsite migration of petroleum; unacceptable threats to public health or the environment caused by environmental conditions that were not identified in or addressed by the VCA; problems caused by failure to comply with the VCA; or a hazardous release, or threat of release, after the effective date of the VCA. In addition, changes in site use, or fraud committed by a VCP participant could void the liability protections.⁴

As of February 25, 2013, the DEC Environmental Sites Data Base listed 414 sites as admitted to the VCP, with 212 site completions. Many parties viewed the lack of statutory authority for the Program, and the inability of the liability protections to bind all State government entities, as weaknesses of the VCP. However, the fact that many private businesses, nonprofit organizations and other parties participated in this Program and engaged in cleanups under the oversight of DEC without any financial incentive is testament to the desirability of even limited liability protections.

³ See www.dec.ny.gov/docs/remediation_hudson_pdf/DraftBCPguide.pdf.

⁴ See www.dec.ny.gov/chemical/8442.htm.

Environmental Restoration Program

The New York State Environmental Restoration Program (ERP) was created by Chapter 413 of the Laws of 1996 as a component of the Clean Water/Clean Air Bond Act (Bond Act) of 1996. The Bond Act provided \$200 million for the ERP, \$20 million of which was controlled by a Memorandum of Understanding (MOU) among the legislative leaders and the Governor. Sixteen years later, the MOU has yet to be finalized, and the \$20 million has yet to be obligated for investigations or cleanups under the Program. According to DEC, all other funds have been obligated, and the ERP is currently not accepting new applications.⁵⁵ However, as of July 2012, a review by the Office of the State Comptroller of disbursements linked to the Program showed that \$40 million remains to be disbursed, in addition to \$20 million that is subject to the MOU. As of February 25, 2013, the DEC Environmental Site Database listed 180 sites in the Program, 68 of which have received certificates of completion.

When established, the ERP reimbursed municipalities for 75 percent (representing the State share) of the cost of investigating and remediating contaminated, municipally owned sites. In addition, the Program provided a release of liability from the State to participating municipalities for contamination addressed by the site's remedial program. The release does not protect the municipality in the following situations: if the municipality fails to successfully complete the terms of contracts with DEC; if the municipality commits fraud in completing the contract; if the municipality causes a hazardous release at the site; and if the municipality implements a use of the site that renders the cleanup insufficiently protective.

In addition, the municipality must monitor environmental conditions at the site and if conditions that render the cleanup insufficiently protective and that were unknown to DEC at the time of cleanup are found, the municipality must remedy these new conditions to protect public health and the environment. The ERP indemnified municipalities in the Program from damage claims by third parties.

The ERP was amended by Chapter 1 of the Laws of 2003 to make the Program more attractive to municipalities. Key changes included increasing to 90 percent the portion of investigation and remediation costs borne by the State. Amendments also allowed municipalities to count any other State or federal assistance against the municipal share of project costs.

Average ERP Cost Per-Site

To establish State costs for remediating sites under the ERP, the Office of the State Comptroller extracted records of payments under the Program and reviewed contract records between DEC and municipalities in the Program to link expenditures to specific sites.

⁵⁵ See the Department of Environmental Conservation's Division of Environmental Remediation 2011/2012 Annual Report.

Expenditure and site information was linked in this way for 172 sites. Records from the State's Central Accounting System indicate that a total of \$140.7 million has been expended on the Program. Of this amount, the Office of the State Comptroller attributed \$118.1 million in costs to specific sites. Contract information was available for 45 of the 63 sites DEC lists as completed in its Remediation database. A total of \$35.7 million has been expended on these sites. An additional \$85.5 million was spent on sites listed by DEC as incomplete. In addition, the review identified contracts for 19 sites accounting for total expenditures of \$6.0 million that do not appear in DEC's database, and expenditures of \$3.8 million for travel or other expenses not directly linked to site cleanup, or to specific contracts. Expenditures of \$12.8 million could not be attributed to specific sites because contracts for these sites were not available. Contracts for 17 sites in the DEC database had been purged and were no longer available for review. This analysis relied on expenditure and site status data available as of July 13, 2012.

The average State cost of remediating sites under the ERP was \$779,176, with a median cost of \$256,637. Two completed sites had State costs that were significantly higher than those for other sites.⁶ If these outliers are excluded, the average State cost per site was \$460,807.

The ERP allowed municipalities to address sites ranging from small, lightly contaminated lots to large areas contaminated with multiple toxic substances.

Brownfield Cleanup Program

Chapter 1 of the Laws of 2003 (the Statute) created a broader response to the brownfields problem – the Brownfields Cleanup Program (BCP), under the oversight of DEC. According to the declaration of policy and findings of fact in the Statute, the BCP was created to promote the cleanup and redevelopment of the “thousands” of contaminated properties in New York State. With the creation of the BCP, DEC stopped accepting applications for the VCP.

As stated in the legislative intent section of the Statute, the purposes of the BCP are to:

- Mitigate the threat to public health and the environment from contaminated sites.
- Promote the redevelopment of abandoned contaminated properties as a means to revitalize economically blighted communities.
- Create an alternative to greenfield development by removing barriers to the redevelopment of urban brownfields.

⁶ The “outlier” sites are the Niagara Frontier Transportation Authority Outer Harbor Greenbelt (B00149) at \$11,363,743.51 and Irvington Waterfront Park (B00004) at \$3,884,484.10.

Program Incentives

To encourage parties to cleanup and redevelop contaminated sites, the Program provided procedural, legal and financial incentives.

Procedural incentives included a process for characterizing site contamination and selecting remedies that was more expedited and streamlined than the requirements under the State Superfund Program. To provide certainty about BCP cleanup requirements, specific soil cleanup standards associated with the planned use of a site were developed.

Legal incentives included the ability for parties who have entered the program to take ownership of and remediate sites without incurring superfund liability and limited liability protection for any contamination remaining on the site. The liability protection binds all State agencies, but does not address liability resulting from the following:

- Contamination at, on, under, or migrating from the site that creates conditions that are no longer protective of public health or the environment;
- Noncompliance with the terms of the brownfield cleanup agreement, the remedial work plan, and/or the certificate of completion;
- Fraud committed by the applicant in connection with its application or its participation in the BCP;
- A finding by DEC that the remedial program implemented at the site is no longer protective of public health or the environment due to a change in an environmental standard, factor, or criteria upon which the remedial work plan or determination that no further action was needed had been based;
- A change in the site's use that would create conditions not protective of public health or the environment (a volunteer who remediates a site to unrestricted conditions is not subject to this reopener provision); or
- Failure of the applicant to make substantial progress toward redevelopment of the site within three years, or unreasonable delays in redevelopment, considering the size, scope and nature of the proposed development.

Financial incentives included tax credits for a percentage of costs incurred in site cleanup, remediation of groundwater contamination and redevelopment of the site. The base percentage for credits against liability under the State's Corporation and Utilities Tax, the Corporation Franchise Tax, the Bank Tax and the Insurance Tax was 12 percent. For credits claimed against the State's Personal Income Tax, the base percentage was 10 percent.

All sites admitted to the BCP and successfully completing remediation were to receive at least the base tax credits. If the site was located in an economically distressed census tract defined as an "environmental zone," an additional 8.0 percent was added, and if the cleanup was conducted to the most stringent cleanup standard an additional 2.0 percent was added. In addition, tax credits were made available for a percentage of

property tax liability and the cost of environmental remediation insurance. Tax credits that exceeded a party's State tax liability were refundable under the terms of the Program, meaning credit amounts that exceeded tax liability became grants to eligible entities.

When the law was enacted, based on projections by the Division of Budget, DEC estimated the value of the tax credits associated with the BCP would be \$135 million annually when the Program was fully operational.⁷ The actual annual cost of the Program for tax years from 2008 through 2012 averaged \$188 million.

While the Internal Revenue Service has not offered specific guidance on tax credits under the BCP, other refundable State income tax credits have been determined to be taxable income for beneficiaries. In order to be eligible for tax credits under the terms of the original statute, the project must have completed remediation and received a certificate of completion from DEC by March 31, 2015. This deadline was recently extended to December 31, 2015.⁸

Program Eligibility

The Statute defines brownfield sites as “any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous waste, petroleum, pollutant, or contaminant.” This is essentially the same as the definition of “brownfield” used in the federal Superfund Law, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Generally, sites that were subject to cleanup under another regulatory program were excluded from the BCP, although sites on the State Superfund Registry could be admitted to the Program until July 1, 2005. Implementing regulations established criteria by which DEC would determine if sites could be entered into the Program. Measures adopted for this purpose included: a requirement that the presence of contaminants must be confirmed on site; a requirement that contamination must be from on-site sources; and a provision that gives DEC the authority to deny an application if it is in the public interest to do so.

In a guidance document addressing site eligibility, DEC further spelled out how it would assess the eligibility criteria in the BCP statute and regulations.⁹ This document included criteria by which DEC would attempt to determine if the site would be remediated and redeveloped in the absence of the Program incentives. These criteria included whether surrounding properties showed signs of blight and if the cost of remediation would be “significant” when compared with the value of the property after cleanup and redevelopment.

⁷ Desnoyers, Dale and Larry Schnapf. “Environmental Remediation Process is Undergoing Sweeping Changes Mandated by New Brownfields Law.” New York State Bar Association Journal, October 2004.

⁸ Chapter 474 of the Laws of 2012.

⁹ See www.dec.ny.gov/docs/remediation_hudson_pdf/bcp_eligibility.pdf.

Brownfield Opportunity Areas

To promote planning for cleanup and redevelopment of contaminated properties, grants are available to municipalities and community based non-profit organizations under the Brownfield Opportunity Area (BOA) Program. BOA grants support activities to identify contaminated sites, assess potential contamination and identify potential reuses for the sites. The U.S. Environmental Protection Agency modeled its Area-Wide Pilot Planning Program on the BOA Program.

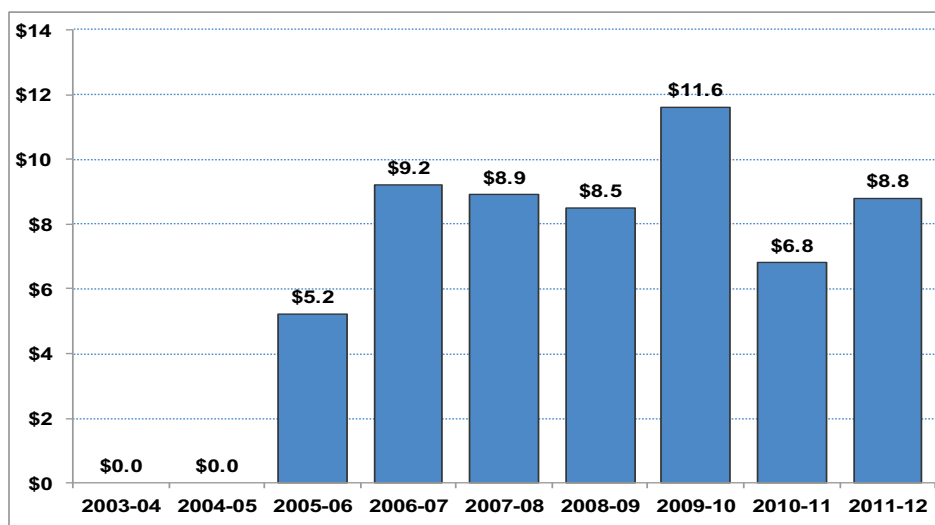
Application

The cleanup and DEC oversight provisions of the BCP statute apply only to sites that have been admitted to the Program. Sites that are contaminated due to historic spills of hazardous substances not on the State Superfund Registry and that have not been admitted to one of New York's voluntary cleanup programs can still be remediated without regulatory oversight.

Program Financing

The Statute included provisions addressing the financing of oversight of the BCP and State Superfund Program. A new Hazardous Waste Remediation Oversight and Assistance Account was established to pay for costs associated with DEC oversight of the BCP, grants authorized by the BOA Program and technical assistant grants associated with the BCP and State Superfund Program. Annual costs for these purposes have ranged from \$5.2 million to \$11.6 million.

State Expenditures on Brownfield Cleanup Program Implementation
(in millions of dollars)

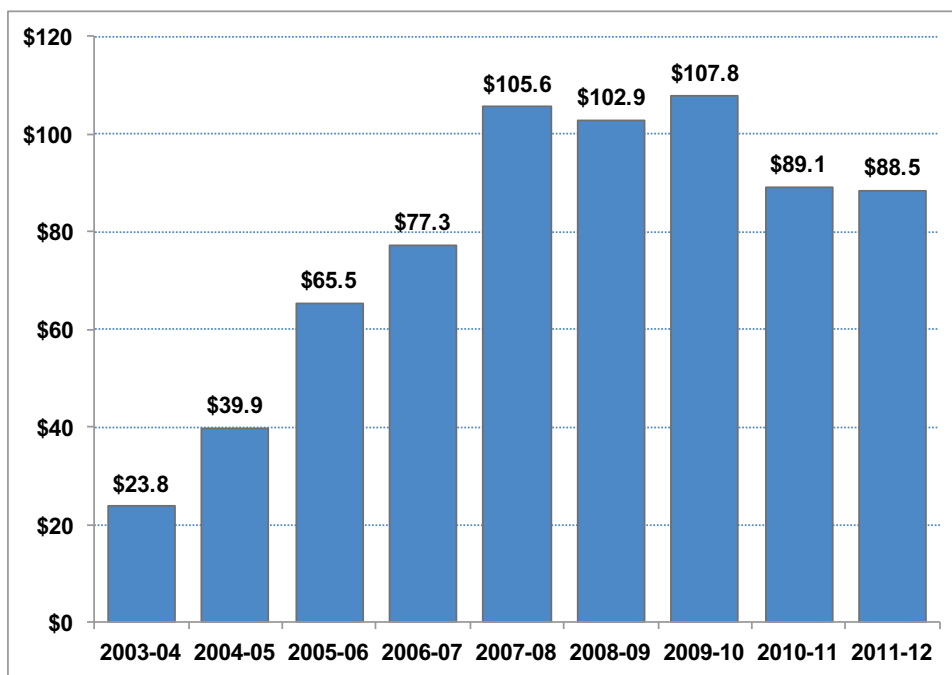


Sources: Division of the Budget and Office of the State Comptroller

The Statute also established surcharges on existing Hazardous Waste Program fees to be paid by generators of hazardous waste and increased registration fees paid by owners of petroleum bulk storage facilities. These fees are used to pay 50 percent of debt service on bonds issued to cover the costs of the State's Superfund Program.¹⁰ The other 50 percent of debt service costs are paid from the State General Fund. In SFY 2011-12, fees associated with the Hazardous Waste Remedial Fund generated \$34.3 million.

In addition, the Statute provided a source of financing for the State Superfund Program by authorizing the Environmental Facilities Corporation (EFC) to issue up to \$120 million in bonds annually up to a cap of \$1.2 billion. This was critical because a lack of funding had led to a significant reduction in the activities of the Superfund. The Statute prohibits EFC from issuing bonds for new appropriations enacted after March 31, 2013. Bonds may be issued to finance expenditures based on appropriations made for hazardous waste remediation in prior years until the cap is reached. Since the beginning of the Program, \$1.2 billion has been appropriated.

Annual State Superfund Disbursements, SFY 2003-04 to SFY 2011-12
(in millions of dollars)



Source: Office of the State Comptroller

¹⁰ Chapter 99 of the Laws of 2010 repealed the surcharge on hazardous waste generators established by Chapter 1 of the Laws of 2003 and increased the Hazardous Waste Generator Fees established by Chapter 15 of the Laws of 1983.

As of the end of SFY 2011-12, \$507 million in bonds had been issued to finance the State Superfund Program, according to the SFY 2012-13 Enacted Budget Five-Year Financial Plan. A review of disbursements from capital appropriations to the Hazardous Waste Remedial Fund since 2003 shows that \$700.5 million has been disbursed to clean up State Superfund sites. Since SFY 2007-08, the State has spent an average of \$98.8 million annually in support of cleanups under the State Superfund Program. At a similar rate of spending, available bonding authorized by the Statute would support an additional 5.1 years of cleanup activities at these sites.

Program Performance

As of February 25, 2013, DEC's Environmental Site Remediation Database listed 389 sites enrolled in the BCP and 128 sites having completed a DEC-approved remediation of the site. Through the 2011 tax year, sites that have received a certificate of completion under the program have claimed a total of \$923.1 million in tax credits.¹¹ As outlined below, the average tax credit award for sites that have completed the program is \$9.4 million.¹²

Based on tax credit reports published by the Tax Department, the Office of the State Comptroller has projected the overall tax credit liability for sites currently admitted to the program.¹³ Reports created by the Tax Department show that a total of \$852.0 million was claimed for work at 91 different sites for the years in question. Information linking specific sites with tax credits claimed before 2007 is not available.

To account for potential regional variability in the cost of remediating and redeveloping sites, an average credit for upstate and downstate projects was calculated and applied to the 389 sites currently in the BCP as follows. The estimated average credit upstate has been \$4.2 million. For the 214 upstate sites currently in the program, the potential total for credits used upstate (including those already claimed) is more than \$892 million. The average credit downstate has been \$13.8 million. Given the 175 sites still in the Program from downstate, total credits used in that region may surpass \$2.4 billion. The potential total for upstate and downstate combined is more than \$3.3 billion.¹⁴

¹¹ This number is based on total tax credits reported in the New York State Department of Taxation and Finance (Tax Department) *Brownfield Credit Reports*, added to \$28.2 million in credits claimed against the Personal Income Tax and \$42.9 million claimed against the Corporate Tax in 2006. Figures for 2006 were provided to the Office of the State Comptroller by the Tax Department.

¹² This average is based on tax credits claimed for eligible expenditures at 91 sites as presented in the Tax Department's *Brownfield Credit Reports* for 2008 through 2012.

¹³ This projection represents total State costs for all projects that were listed on the DEC's Environmental Remediation Database on February 25, 2013, including those that have received a certificate of completion under the program.

¹⁴ To control for the impact of the cap on tangible property tax credits imposed by Chapter 390 of the Laws of 2008, tax credits claimed in this category and reported by the Tax Department were reduced to the level of the cap.

Average Tax Credit Claimed By Region

Region	Within Environmental Zone	Average Tax Credit	Outside Environmental Zone	Average Tax Credit
Upstate	25	\$2,015,479	25	\$6,323,051
Downstate	19	\$21,456,064	22	\$10,719,710

Sources: Department of Taxation and Finance and Office of the State Comptroller

On average, it takes two to three years from the date of project application to completion of remediation and receipt of a certificate of completion.¹⁵ If these time frames continue to hold, a significant number of Program participants who applied after December 31, 2012 may not be able to complete their projects in time to receive the BCP's financial incentives.

New York City Local Brownfield Cleanup Program

The New York City Office of Environmental Remediation (OER) operates the New York City Local Brownfield Cleanup Program (LBCP) under a city ordinance and agreement with DEC, both adopted in 2009. The city is the only jurisdiction in the State where DEC has authorized local officials to administer such a program, although the LBCP is more limited than the statewide program. According to testimony delivered by the OER on December 19, 2012, 85 sites have been enrolled in LBCP. As of July 12, 2012, eight of those sites had a completed remedy in place. Under the terms of the City's agreement with DEC, OER commits to operate the LBCP in accordance with State regulations governing the BCP. The agreement does not authorize the BCP liability protection for parties in the LBCP, but contains the following statement:

Generally, NYSDEC agrees that a site is of no further interest and it does not plan or anticipate taking administrative or judicial enforcement action seeking to require a removal or remedial action under CERLCA, 42 U.S.C. §9601 et seq. or the ECL [Environmental Conservation Law] at a site addressed by this Agreement while (1) the site remains in compliance with the LBCP and the terms of any local brownfield cleanup agreement with OER, or (2) when a site investigation or remediation has been completed in accordance with the LBCP and if the site is the subject of a notice of completion.

¹⁵ See New York State Department of Environmental Conservation, Division of Environmental Remediation, SFY 2010/11 Annual Report at www.dec.ny.gov/docs/remediation_hudson_pdf/derannualreport.pdf.

In addition, parties that successfully complete site remediation under the LBCP are eligible for a limited release of liability to New York City. The OER holds that the inability of parties completing a remediation under the LBCP to receive a release of liability to the State makes their program less attractive to volunteers. New York City has advocated for a change in State law to make these parties eligible for a State release.

Completion of cleanup under the LBCP does not entitle parties to tax credits available to parties admitted to the State's BCP. Through the city's Brownfield Incentive Grant Program, OER provides grants of up to \$100,000 to eligible parties, defined as owners of qualified brownfield properties, or recipients of Brownfield Opportunity Area grants. The grants support a wide variety of activities associated with the remediation of brownfield sites.¹⁶ Grants are sourced from a one-time \$10 million New York City appropriation.

¹⁶ See www.nyc.gov/html/oer/html/big/granttypes.shtml#caps.

Comparative Cost Analysis

In the declaration of policy and findings of fact in the legislation establishing the BCP, the New York State Legislature acknowledged that there were thousands of contaminated or likely contaminated sites in the State that were a threat and a burden to the communities in which they were situated. The extent of the problem was one factor in the Legislature's decision to create a program to encourage volunteers to clean up and redevelop those sites. As the program enters its tenth year, it is worthwhile to evaluate whether the BCP is meeting the goals laid out for it by the Legislature. To date, 389 sites have been enrolled in the program and 128 of those have completed site cleanup.

When compared to other New York State voluntary remediation programs, the BCP financial incentives are the most costly to the State. For the years in which the Tax Department has reported tax credit information, the total value of BCP tax credits either rivals or significantly outstrips spending on the State Superfund. The BCP tax credits rank among the most generous in the nation. The majority of costs associated with the program come from the as-of-right availability of tangible property tax credits – those tax credits based on expenditures to develop the site. In other words, the State is spending significantly more money to support the redevelopment of sites after cleanup (which may involve upscale commercial projects) than for remediation itself. In the application process, DEC does not require submission of detailed information on the proposed use of the site after remediation that could be used as a basis by which to determine the site's potential tax credit liability. While measures are in place to limit the upper bounds of the amount of a tax credit on any particular site, there is currently no way for the State to limit overall liability other than by limiting admission to the program.

Based on New York State's experience with the VCP and the New York City Local Brownfield Cleanup Program, it is possible to remediate and redevelop many sites without significant financial incentives.

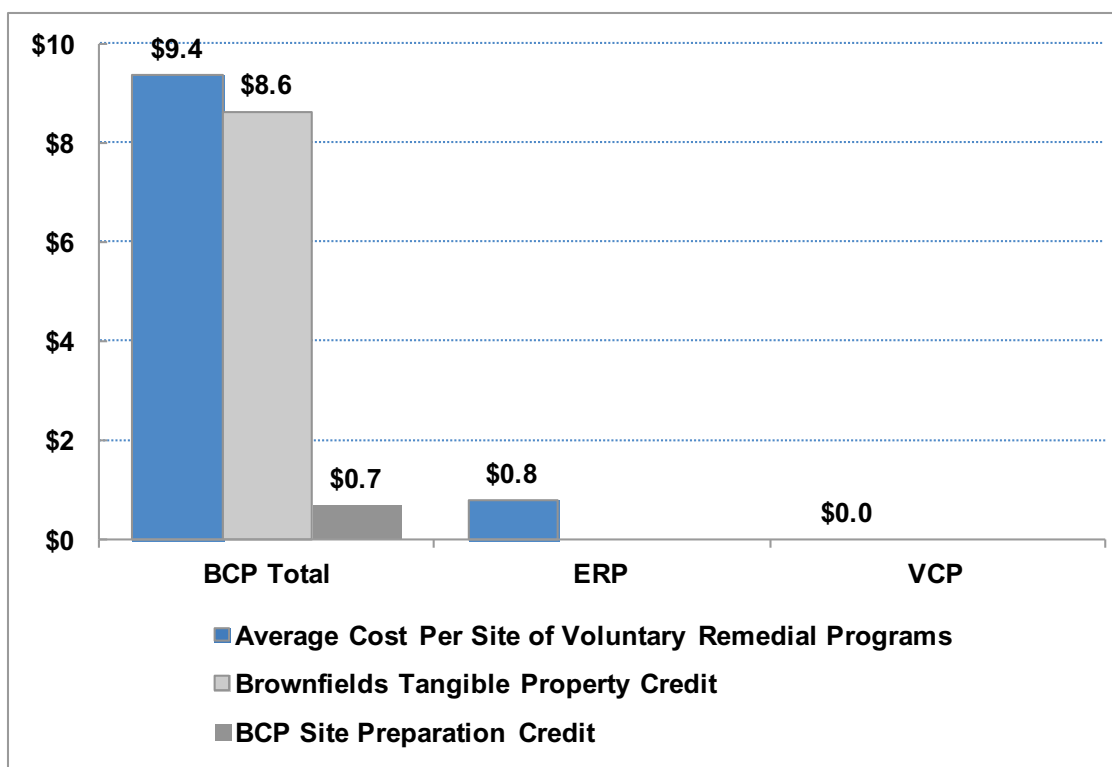
Over its life span, the VCP averaged 11 site completions a year, comparable to the BCP, with little or no incentive cost to the State.

The ERP, with an average cost of \$779,176 and a median cost of \$256,636 per site, has also been a lower cost alternative to the BCP. In addition, the ERP allows municipalities to undertake strategic projects that may address sites that are valuable for recreational purposes or for needed infrastructure. These projects may make surrounding areas more attractive for development.

In considering the cost of the BCP, with an average claimed tax credit of \$9.4 million per site, it must be noted that there is evidence that the cost of the program has led the State to take actions that may actually limit the program's success. According to the New York State Court of Appeals, DEC adopted a higher bar for entry to the program

than that found in the authorizing legislation.¹⁷ This controlled the overall cost to the State, but also denied project applicants the legal relief of liability protection and the DEC seal of approval on their cleanup. Plaintiffs challenging denial of admission to the program argued that banks will not finance projects and municipalities will not approve projects on brownfields without a DEC-approved cleanup. By denying these parties access to the program based on a financial needs test, DEC was limiting the potential of the program to reach the goals set for it by the Legislature.

Average Cost Per Site of Voluntary Remedial Program Financial Incentives (in millions of dollars)



Sources: Department of Taxation and Finance and Office of the State Comptroller

¹⁷*Matter of Lighthouse Pointe Prop. Assoc. LLC v. New York State Department of Environmental Conservation*, 14 NY3d 161 (2010); and *Matter of East River Realty Co. LLC v. New York State Department of Environmental Conservation*, 22 Misc 3d 404 (2008).

BCP Issues and Reforms

As DEC undertook steps to implement the BCP, several concerns came to light. Certain stakeholders argued that DEC and DOH had adopted soil cleanup objectives that did not comply with standards established in statute. An environmental group unsuccessfully challenged the cleanup objectives in State court.¹⁸ In addition, several unsuccessful applicants to the Program argued that DEC had adopted eligibility requirements for the program that were more stringent than those authorized by the BCP statute. Several of these parties sued successfully in State courts.¹⁹

Some concern has also been expressed that the BCP's financial incentives may have been more generous than necessary in certain cases, and that the initial estimates for the annual costs of tax credits for the Program had been underestimated. Advocates have argued that BCP incentives should be targeted to sites in economically distressed communities.²⁰ One observation, expressed by many parties, was that the BCP was not attracting significantly more applicants than the VCP. The following sections discuss recommendations for reform, the impact of litigation and changes to the Program that were enacted into law.

Comptroller's 2008 Report

In 2008, Comptroller DiNapoli released a report, *Overview of the New York State Brownfields Cleanup Program*. The report estimated the outstanding tax credit liability for sites admitted to the BCP in 2008 to be \$3.1 billion. The report presented policy options for mitigating the fiscal impacts of the Program, more closely targeting tax credits to State policy goals and promoting more cleanups under the Program.²¹ See Appendix B for a summary of the recommendations in the Comptroller's 2008 report.

Litigation

As DEC exercised its discretion to deny Program access to some applicants, these decisions were challenged in court. Unsuccessful applicants argued that the more explicit eligibility criteria adopted in DEC guidance and regulation were not authorized by the broad eligibility criteria adopted in the statute. This argument found support in New York State court rulings.

In the matter of *Lighthouse Pointe Property Associates LLC v New York State Department of Environmental Conservation (Lighthouse Pointe)*, DEC argued that a

¹⁸ *Matter of Citizens' Environmental Coalition, Inc., et al., Appellants, v. New York State Department of Environmental Conservation et al., Respondents*, 57 A.D. 3d 1279; 871 N.Y.S. 2d 435 (2008).

¹⁹ *Matter of Lighthouse Pointe Prop. Assoc. LLC v. New York State Department of Environmental Conservation*, 14 NY3d 161 (2010) and *East River Realty Co. LLC v. New York State Department of Environmental Conservation*, 22 Misc 3d 404 (2008).

²⁰ Environmental Advocates of New York. "Missing the Mark: New York's Off-Target Brownfield Cleanup Incentives." www.eany.org/images/bcptaxcreditpolicybrief_revised_final.pdf. Accessed December 8, 2012.

²¹ A more detailed discussion of the report is found in Appendix B.

property housing an old landfill and a marsh that had been filled with coal ash and other fill was not contaminated to an extent that would complicate development of the site.²² The plaintiff in the case presented evidence that the county health department had objected to the project and held that the only acceptable way for the project to move forward was after a remediation of the site had been conducted under the supervision of DEC. The plaintiff also presented evidence that lenders would be reluctant to finance the project without the liability protections which accrue to parties that receive a certificate of completion for a BCP project.

This case was decided in favor of the plaintiff on December 20, 2007 in State Supreme Court. On February 6, 2009 the Appellate Division reversed the lower court decision, but granted the plaintiff's request to appeal the case. In a unanimous decision on February 18, 2010, New York State's highest court, the Court of Appeals, reversed the Appellate Division decision and ruled in favor of the plaintiff. Based on documents in the bill jacket and the legislative intent section of Chapter 1 of the Laws of 2003, the ruling held that a "brownfield" was intentionally defined broadly to allow the BCP to apply to many sites across the State, and that DEC had acted arbitrarily in adopting and applying more stringent criteria in its regulation and guidance.²³

Another case, the matter of *East River Realty Co. LLC v New York State Department of Environmental Conservation (East River Realty)*, hinged on the legality of DEC's application of economic eligibility criteria found in its guidance document. The criteria are referred to in the case as "but for" criteria, or an attempt to determine if remediation and redevelopment would be economically feasible without the financial incentives of the BCP.²⁴

In his ruling for the plaintiff, Supreme Court Justice Lewis Stone relied in part on the similarity between the definitions of brownfield in CERCLA and the BCP. The definition of "complicated" in the CERCLA statute is: "where contamination can add cost, time or uncertainty to a redevelopment project," a lower threshold than the "but for" test proposed by DEC. Judge Stone held that the "but for" test in DEC guidance was not supported by the definition of "brownfield" in the BCP and its interpretation by State courts, and could not serve as a basis to deny projects admission to the Program.

The application of strict criteria for admission to the BCP was viewed as an attempt by DEC to limit the State's financial exposure under the BCP tax credits.²⁵ There is a widely held belief among BCP stakeholders that the unanticipated liability posed by tax credits led the agency to focus on financial complicating factors in the "but for" test, as opposed to other factors such as litigation risk or regulatory risk that may complicate the redevelopment of a brownfield. As argued by the plaintiffs in the cases discussed

²² *Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Department of Environmental Conservation*. 14 NY3d 161 (2010).

²³ *Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Department of Environmental Conservation*. 14 NY3d 161 (2010).

²⁴ *East River Realty Co. LLC v New York State Department of Environmental Conservation*. 22 Misc 3d 404 (2008).

²⁵ Freeman & Schnapf, *Brownfield Cleanup Program's Final Site Eligibility Criteria*, 25 N.Y. Environmental Lawyer 2 at 13 (Spring/Summer 2005).

above, these other risks can be barriers to development that are equal to or even greater than the cost of remediation.

BCP Reforms

Chapter 390 of the Laws of 2008

Chapter 390 of the Laws of 2008 amended the BCP to provide adjustments in the calculation of benefits, impose an overall cap on the amount of tax credits a project can receive, and establish reporting requirements to assist in evaluating Program costs and benefits. The statute amended the formulas by which tax credits were awarded to BCP projects and adopted caps on the total amount of redevelopment tax credits that can be awarded through the Program.

The statute capped redevelopment tax credits at the lesser of \$45 million or six times the cleanup costs for projects where the remediated site will be used for businesses involved in manufacturing, and the lesser of \$35 million or three times the cleanup costs for all other sites. The statute increased the applicable percentage of tax credits for site cleanup costs. Cleanups that achieved industrial restricted standards would qualify for a tax credit equal to 22 percent of cleanup costs. As less restrictive cleanup standards were met, project sponsors would be eligible for more generous tax credits, up to a maximum of 50 percent of expenditures for cleanups achieving an unrestricted standard. For redevelopment tax credits, the statute increased the applicable percentage of project redevelopment costs that could be applied as tax credits by 2 percent for projects that were in conformance with a BOA plan.

To assess the potential effectiveness of the cap on redevelopment credits, the Comptroller's Office projected State liability for tax credits with the cap in place in comparison to its liability if the cap had not been enacted. This analysis found that the cap enacted in Chapter 390 reduced the State's overall liability for the BCP tax credit by about \$300 million, from \$3.6 billion to \$3.3 billion.

The statute also required the Tax Department to prepare annual reports on tax credits claimed under the BCP. It required project developers to file an annual "brownfield redevelopment report" with the Tax Department, including tax revenues generated by activities on the remediated and redeveloped brownfield site. However, the statute neglected to provide the Tax Department with authority to take enforcement action against developers who fail to provide the brownfield redevelopment report, and developers largely do not file these reports.

The Tax Department's tax credit reports provide more accurate assessments of the cost of these credits to the State than was previously available. However, the failure of most developers to file the required brownfield redevelopment reports makes an assessment of the financial benefits of the BCP very difficult. The legislation also required an annual report on Program performance by DEC, and transferred administration of the BOA Program from DEC to the Department of State.

SFY 2010-11 Enacted Budget

The State Fiscal Year 2010-11 Enacted Budget capped tax credits related to redevelopment, property tax liability, and environmental remediation insurance at \$2.0 million per year, per tax payer, for tax years 2010 through 2012. Tax credits earned in excess of \$2.0 million were deferred and could be claimed beginning in tax year 2013. Even with this measure in effect, the highest amount of total tax credits to date – \$279 million – were claimed under the Program in 2011.²⁶

Chapter 474 of the Laws of 2012

Chapter 474 of the Laws of 2012 extended the date for receiving a certificate of completion of a BCP cleanup to December 31, 2015.

²⁶ Barring new action to mitigate the financial impact of tax credit liability, the State could face a significant number of tax credit claims beginning in 2013 from parties who have been unable to claim the full value of tax credits for which they are qualified under the Program.

Remediation Programs in Neighboring States

Other Northeastern states with large numbers of brownfields offer a range of incentives to volunteers who remediate and redevelop contaminated sites. Most states tie brownfield incentives to revenue generation or job creation from the remediated site.

Tax Credit Eligibility and Limits on Tax Credit Liability

Connecticut, New Jersey and Pennsylvania offer tax credits as incentives. Connecticut's are significant, but eligibility for the tax credit is not as-of-right on admission to the program. Tax credits are based on an approved level of investment in an eligible project. In this way, Connecticut is able to determine the exact tax liability due to tax credits offered to each project and by the program as a whole. In determining eligibility, the Commissioner of Connecticut's economic development agency must conduct a revenue impact analysis and determine that the tax credits that accrue to the project will not exceed projected project revenues. Connecticut also delays eligibility for the credit for four years and then requires project sponsors to take the credit in increments over a six-year time period. Connecticut limits annual liability for the tax credits issued under the program to \$500 million. New Jersey's program allows the project sponsor to recoup up to 75 percent of remediation costs, but recovery is based on tax revenues generated at the site. Pennsylvania's credit is based solely on the number of jobs created by the project.

Grants and Loans

Massachusetts and New Jersey offer a mix of grants and loans. For projects in regions designated as economically distressed, Massachusetts offers grants of \$100,000 for investigation and characterization, and up to \$500,000 for remediation activities. Projects designated as priorities can receive up to \$2.0 million. New Jersey has a program similar to New York's ERP, in which municipalities are eligible for up to \$3.0 million annually for site investigation activities and up to \$5.0 million annually for remediation costs at certain types of sites.

Incentive Targeting

Massachusetts, New Jersey and Vermont limit financial incentives related to their brownfields programs to the costs of remediation. Connecticut allows a tax credit based on investment in a redevelopment project beyond the cost of cleanup. Pennsylvania's incentive is unrelated to cleanup or project investment costs, and is instead based on the number of jobs created through the project. Massachusetts and Connecticut target incentives to economically distressed communities.

New York's neighboring states offer financial incentives that are more closely targeted to revitalization of economically distressed communities, and are often less generous.

Incentives are frequently in the form of grants or loans. When tax credits are offered, these states employ measures to limit their budget impact.

Options for Reform

New York State has adopted three programs to promote the reuse of properties that are contaminated with toxic wastes. While all three programs have achieved some success, many more brownfield sites may continue to pose threats to the environment, health and the State's economy. Accelerating the pace of cleanups would require a change in current State policies.

Together, the State's three programs have completed remediation of 408 brownfield sites as of February 25, 2013. Only one of these programs, the BCP, is currently accepting new applications. The VCP (212 remediated sites) was phased out with the creation of the BCP (128 remediated sites) and, according to DEC, Clean Water / Clean Air Bond Act funding to support the ERP (68 remediated sites) is fully obligated and the Program is no longer accepting applications.

The BCP is the most expensive of the three programs. Program costs are driven by refundable tax credits that accrue to parties who remediate and redevelop sites. While these tax credits do provide an important incentive for developers to site projects on brownfields, there are barriers other than cost to the success of projects for the reuse of brownfields. As was noted in Comptroller DiNapoli's 2008 report on the BCP, even generous tax credits may not overcome local economic factors that may make a project unviable. In addition, as was noted in the rulings in *Lighthouse Pointe* and *East River Realty*, participation in the BCP assists project developers in addressing complications other than the cost of cleanup, such as perceptions of project safety and liability risk. These complications could make financing a project difficult, or lead local public officials to withhold project approvals.

New York State's experiences with the VCP and those of neighboring states with similar programs demonstrate that it is possible to run successful brownfield remediation and redevelopment programs for at least some sites without generous financial incentives. The State faces significant fiscal challenges that may linger for some years to come. For economic as well as environmental reasons, achieving maximum results for any given level of resources dedicated to this purpose is essential. In this context, New York State policy makers should examine options to make brownfield remediation and redevelopment efforts more effective. Such options are outlined below.

Restructure the Program to Control Costs and Expand Access

In order to receive BCP tax credits under existing law, projects must receive certificates of completion from DEC by December 31, 2015. Since the average time for completion

of BCP projects is three years, various stakeholders have called for the extension or elimination of this deadline along with a wide range of additional reforms.²⁷

As noted previously, when the BCP was created, the Division of the Budget projected that the associated tax credits would cost approximately \$135 million annually. In 2011 alone, eligible parties claimed \$279 million in BCP tax credits. These tax credits are significantly more generous than those in neighboring states and make the BCP the most expensive cleanup program in the State.

The Legislature could consider further limiting this liability, not by creating a more restrictive definition of “brownfield” under law, but by creating options with lower cost incentives to allow projects to benefit from the regulatory and liability incentives of the Program. Reducing the number of projects that obtain tax credits and imposing a cap on the total value of such credits – while allowing other projects to qualify for other incentives – could make the cost of the BCP more predictable and sustainable within the overall State budget.

A restructured BCP could offer tax credits for cleanup costs at all sites, but with modifications to the tax credits based on redevelopment costs to mitigate the financial risk to the State. For example, the State’s open-ended financial liability associated with the current as-of-right award of the tangible property tax credits could be addressed by a move towards a needs-based structure.

Since the most significant BCP costs are associated with the redevelopment tax credit, the Legislature could also consider basing access to this incentive on an assessment that includes other criteria. Such factors could include the potential of a remediated site to contribute significantly to the State economy, and the likelihood of reuse or redevelopment absent the credits. Criteria that could be considered, among others, include the economic status of the community in which the site is located and whether the project is consistent with established development plans such as those created through the BOA plan, or by Regional Economic Development Councils. Review of economic need and impact by the State’s economic development agencies, such as the Empire State Development Corporation, may be helpful.

Massachusetts, which has cleaned up a large number of sites, offers modest grants for projects in economically distressed communities and low-cost loans for most other projects. Connecticut requires evaluation and approval of each application for a tax credit by the state’s economic development commissioner. These programs could serve as models for consideration.

²⁷ The following discussion of options draws on recommendations by Allen and Desnoyers LLP, New Partners for Community Revitalization, the New York City Environmental Justice Alliance, the New York City Office of Environmental Remediation, the New York Public Interest Research Group, the New York State Bar Association and the Business Council of New York State.

Maintain Tax Credits Associated with Cleanup Costs

While many advocates recommend revisions to the financial incentive structure, there is broad agreement on maintaining site preparation tax credits as part of the BCP. The current formula for determining the value of the tax credit provides a benefit for parties that achieve unrestricted cleanups (50 percent of cleanup costs) and that are consistent with BOA plans (2.0 percent of cleanup costs). The incentive structure could be amended to provide additional benefits to projects that are consistent with BOA plans. Site preparation credits represent a small proportion, approximately 7.0 percent, of the total cost of BCP tax credits. Even changes to the Program that increase the value of site preparation credits awarded to BOA-compliant projects would not significantly increase the overall cost of the Program.

Consider State Support for Site Assessments

Current DEC guidance addressing application procedures for the BCP recommends that potential applicants conduct a Phase 1 and Phase 2 site assessment of the brownfield property before applying to the Program.²⁸ The costs of these studies, which can include the costs of analyzing environmental samples, could pose barriers for some sites.²⁹ Compared to the costs of the existing property tax credits, the costs of grants to support assessments would likely be modest for most sites. It may be feasible to fund site assessment grants with reappropriated funds from the New York State Hazardous Waste Remedial Fund.

Incorporate the Benefits of the VCP and the ERP

While the BCP has offered predictable cleanups and essential liability relief, as noted above, the costs associated with the Program as currently structured are enormous. The VCP and the ERP also served to address factors that complicate redevelopment of contaminated sites, most notably liability for past contamination, but at significantly less cost. The Legislature could explore amendments to the BCP that would provide liability protection, but few other incentives, to certain classes of sites. In addition, the Legislature could examine options to finance the ERP. These changes could help the State address the brownfield issue in a more comprehensive manner and clean up more sites at lower cost.

As noted previously, the ERP provided municipalities with the resources to address blighted properties that make communities less attractive, reduce local tax bases, and can pose public health and safety threats. The ERP also allowed municipalities to reuse these properties and to develop public amenities such as parks, or provide vital infrastructure that can make neighborhoods more attractive for private investment. The VCP provided developers and their investors with limited liability protection and provided communities with the added protection of DEC-supervised remediation. New

²⁸ DEC Division of Environmental Remediation 32/ Brownfield Cleanup Program Applications and Agreements.

²⁹ Brownfields Dilemma, New Partners for Community Revitalization, June 2012.

York City has requested an amendment to the BCP that would grant liability protections to municipalities that sell tax liens on tax-delinquent properties; such protections are currently available to jurisdictions that foreclose on tax-delinquent properties rather than selling the liens. Many advocates also suggest a program like the VCP that offers only liability protection, which could be useful in cases where tax credits are not required to make a project economically feasible.

An ERP with a recurring source of funding could help promote the economic development programs associated with the New York Works Program. A VCP that provided the BCP liability protections and broad eligibility criteria – even with no financial incentives – would remove concerns associated with outstanding State liability for tax credits, and could facilitate movement of redevelopment projects that are economically viable without incentives.

Finally, as the financing for the State Superfund Program provided for in Chapter 1 of the Laws of 2003 winds down, the Legislature could examine options to provide funding for the State Superfund. The State Superfund addresses contaminated sites that pose significant threats to public health and the environment, and remediating these sites must be considered a high priority.

Reduce Administrative Burdens of the Program

Corollary to proposals to recreate the VCP, several proposals for reducing the administrative burden on BCP participants have been suggested. One approach would be to limit public participation in the process for sites that are lightly contaminated. Another approach would be to limit the fee charged to participants to pay for DEC oversight costs associated with their project. Some advocates suggest that the array of soil cleanup objectives created in DEC's BCP regulations could be simplified to make it easier for participants to determine what their remedial requirements will be.

Limiting public participation may be justified if contamination of the site is minor and remediation requirements are relatively simple. The drawback of this approach is that public participation can assist project sponsors and regulators in identifying potential sources of contamination, geologic or anthropogenic site features that bear on the presence or spread of contamination and other factors that may contribute to the development of an appropriate remedy. In addition, public participation can build confidence in the remedy. Reducing or eliminating DEC oversight fees could reduce overall resources available to the agency to administer the Program, which could reduce the agency's ability to review elements of the process in a timely manner.

Partner with Municipalities

Based on the success of the New York City Local Brownfield Cleanup Program, a number of parties have suggested that the reach of the BCP could be extended without incurring additional cost, if DEC were to enter into BCP implementation agreements with

other municipalities. Sites that enter municipal programs would not be eligible to receive tax credits, but like sites that enter the State Program, they could be granted an exemption from State hazardous waste disposal fees.

Allowing municipalities to implement a BCP could clearly increase the number of sites that can be remediated. Some parties have argued that by doing so, sites that may currently be redeveloped without regulatory oversight and to which no soil cleanup standards apply, could be brought into the Program. However, allowing more municipalities to implement a BCP could also complicate DEC's ability to ensure that sites meet the environmental quality standards of the Program. Ensuring that municipal programs meet the BCP standards is crucial if, as proposed, municipalities are authorized to issue liability protection that binds the State.

In approaching this recommendation, care must be taken to ensure that authorized municipalities have the experience and capacity to implement the program in a manner consistent with statute and regulations. Further, DEC must have the capacity and authority to oversee municipal programs to ensure that standards are met.

Address Tax Credit Eligibility at Sites Currently in the Program

As noted above, eligibility for financial incentives accruing to program participants who clean up and redevelop a brownfield site are predicated on receiving a certificate of completion for the project by December 31, 2015. To date, BCP participants have required an average of three years to reach this objective. Parties that have been recently admitted to the Program may not be able to complete remedial activities by the deadline. It has been recommended that the Legislature consider authorizing those applicants currently admitted to the Program to receive the tax credits provided by the current Program. Some groups have argued that the BCP breaks with State precedent by establishing a deadline based on the date of Program completion, rather than the date of admission to the Program. If the Legislature enacts measures to control the costs associated with BCP tax credits, then removing the expiration date and making the tax credits permanent may be justified.

Given the costs associated with these remediation programs, as well as the direct community impact related projects have in neighborhoods across the State, public discussion of changes to these programs is essential. These options are provided to demonstrate the scope of alternatives available for consideration, and each has associated positive and negative factors that must be weighed as the Legislature and the Executive determine the best course of action.

Require Brownfield Redevelopment Reports

Given the significant potential liability resulting from the BCP, the State should be sure that the Program is achieving its goals. Contaminated sites have been redeveloped under the Program, but it is difficult to determine after the fact whether or not these

projects could have been accomplished in the absence of BCP tax credits. The Brownfield Redevelopment Reports established by Chapter 390 of the Laws of 2008 have the potential to provide information that would allow the State to better assess the benefits of the Program, but lack of enforcement authority has resulted in spotty, inconsistent reporting. Authorization of enforcement action against parties who fail to provide this information could be considered.

Enhance DEC's Environmental Remediation Sites Database

DEC's online searchable database provides valuable information about the sites that have been admitted to and/or remediated under the State's various cleanup programs. However, its usefulness is limited by its failure to report some data that is readily available to DEC. For example, to evaluate whether or not the amendments to the ERP included in the 2003 brownfields bill made the Program more attractive to municipalities, it would be useful to know when an ERP site was admitted to the Program. In order to determine if a particular brownfields site is subject to the tax credit cap imposed in the 2008 amendments to the BCP, it would be useful to know when the site was admitted to the Program. Currently that information is not available in the DEC database. Other additions that could make the database more useful as a policy evaluation tool include:

- Funding awarded, encumbered, or disbursed in support of municipal activities at ERP sites.
- Tax credits claimed at BCP sites.
- The Environmental Zone status of BCP sites.
- The date that a certificate of completion was issued.
- Tax map coordinates for the site.

Conclusion

As the threats to public health and environmental quality from contaminated sites have become clear, New York State policy makers have worked to create programs to address these threats. New York State was an early actor in this effort, creating some of the nation's first programs to remediate oil spills and large, highly contaminated hazardous waste sites. In the 1990s and into the first decade of the 21st century, State policy makers crafted programs to promote redevelopment of contaminated sites, both to promote economic revitalization and to encourage private entities to take on the remediation of these sites. Each of these programs attracted applicants, produced cleanups, resulted in redevelopment projects that have contributed to the local and State economies, and have improved the quality of life in the communities where they occurred.

The VCP and the ERP, respectively, offered low-cost options for the State to encourage private cleanup and redevelopment of contaminated sites and provided significant resources for municipalities to remedy blighted, potentially hazardous properties that were economic drags on the community. As currently structured, the BCP has not fully achieved the important goals set forth in the legislative intent of the authorizing statute.

Expiring tax credit eligibility under the BCP is likely to be considered by the State Legislature – and such discussions would be most beneficial if undertaken this year. The Legislature should take this opportunity to consider the effectiveness of policies intended to turn contaminated properties into shining examples of environmental and economic renewal. The brownfields policy agenda may include steps to make brownfield tax credits as cost-effective as possible, to examine the optimal level of State assistance for municipal remediation efforts, to create a low-cost option for projects that are viable without financial incentives, and to ensure long-term financing for the State Superfund. By incorporating the successful elements of all of these programs, the State has the potential to encourage more remediation and redevelopment of contaminated abandoned properties in a more cost-effective manner.

Appendix A

Overview of Volunteer Cleanup Programs in Neighboring States

Massachusetts ³⁰ Number of sites in the program: 40,780 ³¹ Number of sites completed: 35,360
<ul style="list-style-type: none">• Liability: Any site assessment or remediation of property in Massachusetts is subject to the state's cleanup law and regulations.³²• Brownfields Redevelopment Fund: Projects that are located in designated Economically Distressed Areas (EDAs) are eligible to receive up to \$100,000 for site assessment and characterization and remediation funding of up to \$500,000. Projects designated as priority projects are eligible for up to \$2 million in assistance.• Remediation Loan Program: This program provides loans in amounts between \$500,000 and \$2 million to finance all aspects of the program from cleanup to redevelopment.• Clean Water State Revolving Fund: Municipalities may apply and compete for 2 percent loans to remediate brownfields if there is a demonstrated water benefit from the project.• Massachusetts Division of Housing and Community Development: This agency offers grants for brownfield remediation projects that will benefit low and moderate income communities and/or economically blighted communities.• Tax Credits: Tax credits of up to 50 percent of cleanup costs are available to projects located in EDAs. The tax credit is capped at 25 percent of cleanup costs for projects that employ activity and use limitations. In addition projects located in economic target areas are eligible for a 5 percent investment tax credit and 10 percent abandoned building deduction.• Subsidy for Environmental Insurance Premiums: This Program provides 50 percent of the premiums for insurance to cover cleanup cost overruns, pollution liability and secured creditors. Private entities can receive up to \$50,000 while public entities can receive up to \$150,000.

Vermont ³³ Number of sites in the Program: 19 ³⁴ Number of sites cleaned up: 12
<ul style="list-style-type: none">• Technical Assistance Program: This program provides assistance with site assessment, cleanup planning and cleanup.³⁵ All work is paid for by the VT DEC and performed by pre-qualified contractors. Assistance of up to \$200,000 per project is available. Benefits are subject to an application in which the following criteria are assessed: consistency with smart growth principles and statewide community and economic development goals; benefit to environmental and public health; incorporation of green building standards in redevelopment; and feasibility of and community support for redevelopment plan.• Brownfields Revitalization Fund: This program provides site assessment and characterization grants of up to \$50,000 per project and cleanup grants of up to \$200,000 per project, and also makes cleanup loans. The program provides loans of up to \$250,000 for site assessment and characterization. There is no cap on cleanup loans. Loans are based on need and ability to repay. Loan terms are 2 percent fixed interest for a term of 15 years. Repayment may be deferred until the project starts producing revenue.³⁶• Regional Assessment Program: Vermont's Regional Planning Commissions (RPCs) provide assistance with site assessment, cleanup planning and cleanup. Work is paid for by the RPCs and performed by prequalified contractors.

³⁰ For incentives, see www.mass.gov/dep/cleanup/bffund.htm.

³¹ See www.epa.gov/brownfields/state_tribal/update2011/bf_states_report_r1.pdf.

³² See www.mass.gov/dep/cleanup/brint.htm.

³³ For incentives, see www.anr.state.vt.us/dec/wastediv/sms/RCPP/Loans_Grants.htm.

³⁴ See www.epa.gov/brownfields/state_tribal/update2011/bf_states_report_r1.pdf.

³⁵ See www.anr.state.vt.us/dec/wastediv/sms/RCPP/DA-Criteria.htm.

³⁶ See www.leg.state.vt.us/statutes/fullsection.cfm?Title=10&Chapter=159&Section=06654

Connecticut

Number of sites in the program: 460³⁷

Number of sites completed: 34

- **Urban and Industrial Sites Reinvestment Program:** Tax credits up to \$100 million are available to sites with the potential to create jobs and promote reinvestment in urban and economically distressed communities. The tax credit program is required to be revenue neutral. Projects are not eligible for tax credits until they have been in the program for 4 years and may only claim increments of the tax credit over the succeeding 6 years. The overall cost of the program is capped at \$500 million and the Commissioner of the Connecticut Department of Economic Development must submit claims for tax credits over \$20 million to the legislature for consideration.
- **Special Contaminated Property Remediation and Insurance Fund:** This program offers below-market loans to individuals, municipalities, corporations and businesses to conduct site assessments, building demolition and remediation. The loans have a term of 5 years.
- **Urban Sites Remedial Action Program:** This is the principal Connecticut brownfields program. In addition to offering expedited approval of steps in the cleanup process, in cases where a site is determined to be important for the state economy and the site owner is not able or willing to carry out the remediation of the site, the state can commit public funds to clean up the site. Connecticut then attempts to recover its investment from responsible parties.
- **Municipal Grant Program:** Municipalities may apply for grants to fund cleanup activities at sites owned by the municipality or another party, with the permission of the owner.
- **Dry Cleaning Establishment Remediation Fund:** This program provides grants of up to \$300,000 to owners of contaminated dry cleaning sites. The source of funds is a fee on dry cleaners in the state.

New Jersey

Number of sites in the Program: 339³⁸

Number of sites completed: 15

- **Hazardous Discharge Site Remediation Fund:** Municipal grants are available to fund 100 percent of site investigation activities up to \$3 million per municipality per calendar year. Grants for remedial actions matching between 75 percent and 25 percent are available for sites where the sites are used for selected uses such as public housing or recreation, and where unrestricted cleanups or innovative remediation techniques are employed. Loans at 2 percent below the federal discount rate are available for municipalities to fund remedial activities at sites where preliminary investigation activities have been performed. Private parties who did not cause the contamination at the site (innocent parties) are eligible to receive grants equal to 50 percent of the investigation costs at a site, up to \$1 million. Matching grants for 25 percent of the costs of remedial activities are available to innocent parties undertaking unrestricted cleanups, or employing innovative remediation techniques. To be eligible, parties must have a net worth of not more than \$2 million. Loans are available to private entities to fund remedial activities up to a cap of \$1 million. Interest rates are set at the federal discount rate and the term of the loan is 10 years.³⁹
- **Brownfields and Contaminated Sites Remediation Reimbursement Program:** Innocent developers can recoup up to 75 percent of remediation costs through entering into a redevelopment agreement with the New Jersey Economic Development Authority. Reimbursement is based on collections of sales, business use and corporate taxes from the businesses located on the remediated site. There is no cap on the amount of reimbursement.⁴⁰

Pennsylvania

Number of sites in the Program: 1,227⁴¹

Number of sites completed: 3,636

- **Job Creation Tax Credit Program:** A tax credit equal to \$1,000 per job is available to firms that increase employment by 25 jobs or 20 percent within three years from entering the program.⁴²

³⁷ See www.epa.gov/brownfields/state_tribal/update2011/bf_states_report_r1.pdf.

³⁸ See www.epa.gov/brownfields/state_tribal/update2011/bf_states_report_r2.pdf.

³⁹ See www.nj.gov/dep/srp/finance/hdsrf/.

⁴⁰ See www.njeda.com/web/Aspx_pg/Templates/Npic_Text.aspx?Doc_Id=876&menuid=1258&topid=718&levelid=6&midi=1175

⁴¹ See www.epa.gov/brownfields/state_tribal/update2011/bf_states_report_r3.pdf.

⁴² See www.epa.gov/brownfields/state_tribal/update2011/bf_states_report_r3.pdf.

Appendix B

Comptroller's 2008 Report Recommendations

In 2008, Comptroller DiNapoli released a report, *Overview of the New York State Brownfields Cleanup Program (BCP)*. The report estimated the outstanding tax credit liability for sites admitted to the BCP in 2008 to be \$3.1 billion. The report presented policy options for mitigating the fiscal impacts of the Program, more closely targeting tax credits to State policy goals and promoting more cleanups under the Program.

The report also assessed incentives offered by neighboring states, and found that New York's financial incentives were among the most generous. Such incentives were significantly more generous than those in Massachusetts, New Jersey and Pennsylvania, which had completed cleanup of many more sites than New York. The report made the following recommendations for BCP reforms to limit the outstanding tax credit liability to the State and make other improvements to the BCP.

Limiting Tax Credit Eligibility. Under New York State's Brownfields Cleanup Law, sites that are not cleaned up to "unrestricted use" standards require ongoing State agency oversight to ensure that use restrictions and engineering controls are maintained. This oversight imposes a cost on the State. From this perspective, cleanups that achieve unrestricted use status produce a savings to the State. The State could recognize this value and target tax credits to sites where unrestricted use cleanups are accomplished. While there would be a higher cost associated with a more generous tax credit for unrestricted use cleanups, it could help realize an important State policy objective of promoting unrestricted use cleanups and reducing long-term Program costs.

New York State could control its tax credit liability by limiting eligibility for financial incentives to sites that are located in economically distressed communities, sites that are consistent with BOA plans, and projects that meet smart growth and green building criteria. This could further serve to advance complementary New York State policy objectives.

Mitigating the Fiscal Impact of Credits. In order to mitigate the fiscal impact to the State, several amendments to the tax credit pay-out structure could be considered. In particular, the refundability of tax credits could be reconsidered. Instead, tax credits that could not be claimed in one year because they exceeded a taxpayer's liability could be allowed to carry forward to address liability in succeeding years. Another measure that could be considered is to defer tax credits until after the redevelopment project has been completed and is successfully producing tax revenue. Strong consideration should be given to New Jersey's practice where financial incentives are based on tax revenues generated by a redevelopment project. This approach limits the tax credit liability to the state. Tax credit awards could be limited to the tax revenue generated by the project in any tax year, up to the overall amount for which the project was eligible.

In order to be able to better project the potential fiscal liability from the BCP, more information about the redevelopment project could be required from applicants. With information about projected redevelopment costs, the State could more accurately project potential costs and benefits from the Program.

Expanding Eligibility. Program eligibility should be based on objective criteria regarding the presence of contamination on the site in concentrations exceeding State standards. Current exclusions for contamination resulting from historic fill could be reconsidered. In addition, the State could consider the admission of parties that are true volunteers – entities that did not control the sites when contaminants were released or play any other role in the release of such contamination. In admitting sites from the Superfund Registry, DEC discretion should be maintained.

Some sites may not be appropriate for remediation through the BCP. To maintain the “polluter pays” principle, financial incentives or liability protection should not be provided to parties responsible for contamination. Sites on the State Registry of Inactive Hazardous Waste Sites, or sites resulting from recent spills of toxic materials or oil, must be cleaned up under the supervision of DEC or an entity to which the State has delegated authority to undertake remediation.