Brownfields Dilemma:
Will the impending sunset of NY’s Brownfield Tax Credit program prompt needed reforms or spell the end of State support for brownfield developers?

A Report & Recommendations from
NPCR’s February Roundtable on Brownfield Financial Incentives
June 2012

The Problem:
The Brownfield Tax Credits created by the 2003 Brownfields Law expire on March 31, 2015. In order to qualify for the tax credits, a project must receive a Certificate of Completion from the New York State Department of Conservation by March 31, 2015. Given the significant time it takes to obtain regulatory sign-off, the door is fast closing on these financial incentives, and there is nothing in place to fill the void.

Background:
Community development and municipal leaders across New York are hampered in their economic revitalization efforts by the existence of contaminated sites, known as brownfields. These properties - eyesores that mar the landscape and are a drag on private investment and community revitalization - are often accompanied by disinvestment and decay. Many are in historic downtown areas, the polluted legacy of sprawling development and urban neglect; others are in waterfront communities, where crumbling piers and bulkheads present further challenges to redevelopment. The cost and complexities of cleanup and the specter of liability often present insurmountable risks. In New York, brownfields have been identified as an impediment to every region’s community and economic revitalization goals. It is clear that New York needs a robust incentive program to overcome the barriers and encourage the cleanup and re-use of brownfields in its once vibrant downtown and industrial areas.

In October 2003, New York adopted legislation intended to promote the remediation and redevelopment of brownfield sites. As part of the legislation, State tax law was amended to add a new set of refundable tax credits – generated not just based on remediation costs, but also generated based on total development cost. The ‘refundable’ nature of the Brownfield Tax Credits (BTCs) means that the State treats the credit amount as a tax overpayment, like an estimated payment. If the credit amount is more than the taxpayer’s tax liability for the year, the excess is refunded via payment from the State to the developer after the return is processed.
The BTCs have been controversial from the start. In June 2008, the law was revised to address certain shortcomings, most notably excessive as-of-right tax credits generated by development costs, as some developers were receiving over $100 million on individual projects. Then, in August 2010, the State enacted a recession-era budget for fiscal year 2010-2011 that instituted a deferral of all business tax credits, including BTCs, which exceed $2 million for any individual or corporate taxpayer for the tax years 2010-2012.

For the past nine years, the BTCs have been NY’s primary financial incentive to encourage private investment in brownfields. Since 2003, the State has written checks to developers for a total of more than three-quarters of a billion dollars in BTCs. As most of the sites receiving the bulk of the State subsidies are located in prime or promising locations, there is no agreement as to how many of these sites required the incentive for development to happen. Indeed, the BTCs have been criticized by some as not providing targeted resources in support of communities most in need; while others have argued that the tax credits invested in large development projects have played a critical role in economic development successes. No matter what the viewpoint, it is clear that with the March 2015 sunset of the BTCs, few projects entering the Brownfield Cleanup Program after 2012 will be able to secure the requisite regulatory sign-off in time to generate the tax credits, which leaves the State with a disappearing site-specific brownfield financial incentive program and a significant amount of uncertainty.

The immediate impact of the sunset creates a real imperative to revisit brownfield policies now. In the blueprints for economic development created by Gov. Cuomo’s Regional Economic Development Councils (REDCs), vacant, abandoned and under-utilized properties have been identified as an important local economic development challenge in the pursuit of affordable housing, downtown/main street, commercial, industrial and waterfront redevelopment. Brownfields are specifically referenced in nine of the ten strategic plans; and eight of the ten strategic plans identify abandonment as a challenge. Even the Mid-Hudson plan, which does not explicitly mention brownfields, highlights the need for revitalization and the problems of vacant, distressed and urban real property. At the same time, strategic development sites are emerging from the 120 communities participating in the State’s Brownfield Opportunity Areas (BOA) program. Many of these development sites, which are central to the implementation of the communities’ strategies, are in need of site-specific financial incentives. If Albany leaders do not act now, the only site-specific financial incentives that encourage private investment in brownfield cleanup and redevelopment will be effectively gone by the end of 2012, leaving an empty toolbox to attract private investment to reclaim NY’s thousands of brownfield sites.

The Roundtable:  
With an eye to this shifting landscape, NPCR determined it would be valuable to bring together key stakeholders to identify lessons learned from the BTCs and to discuss where we go from here. On February 16, 2012, NPCR convened a Roundtable of key stakeholders. More than 60 people participated, including environmental and tax attorneys, environmental justice and community development organizations, developers, practitioners and state and federal regulatory agency personnel. The Roundtable included a discussion about the purpose of financial incentives, as well as a report on financial incentives used by states in other parts of the country. To ensure that all opinions were aired and considered, the discussion was facilitated by Allen J. Zerkin, J.D., Adjunct Professor at NYU’s Wagner Graduate School of Public Service.
This Report and NPCR’s Recommendations are informed by that discussion. In this document, we summarize the viewpoints expressed by stakeholders at the Roundtable, provide additional details on what other states are doing, and identify what we believe are the key ingredients for successful financial incentives for brownfield redevelopment in New York. A draft was shared with Roundtable participants who were asked to make corrections for accuracy of the descriptions of the viewpoints expressed, prior to the document being finalized. Nevertheless, while informed by the Roundtable, the opinions and conclusions herein are solely those of NPCR.

NPCR CONCLUSIONS & RECOMMENDATIONS

Much was learned at the Roundtable. Consensus emerged on some key facts, but views on policy going forward were varied. In NPCR’s view, these facts and ideas, together with the track record of other states, suggest a new construct for brownfield incentives in NYS:

1. **Albany leaders must address the chaos created by the sunset.** The 2003 Brownfields Law that created the BTC program provides that the BTCs sunset on March 31, 2015. The statute requires that, in order to generate the tax credits, a project must receive a Certificate of Completion from the NYS Department of Environmental Conservation (NYSDEC) by March 31, 2015. Because it takes an average of 3.2 years to get through the Brownfield Cleanup Program (BCP), the implication is that, unless a project is enrolled by late 2012, it will not be able to finish the cleanup and receive the Certificate of Completion by March 2015. (It should be noted that this 3.2 year average includes some projects that are stalled, so a two-year timeframe is probably more accurate.) This is an unusual approach to financial incentives. For other tax credits (such as low income housing tax credits), it is typically the date upon which the project enters the program, or another factor that is controlled by the applicant – as opposed to a 3rd party such as a regulatory agency – that defines whether or not a project has met the deadline for securing tax credits. For the BTCs it is not the date
by which one enters the program, but the date by which one completes a cleanup in accordance with a process that can be fraught with delay and unexpected complication.

Participants discussed what projects in the pipeline could do to get in under the March 2015 sunset deadline. With an eye to bringing more clarity to this question, NPCR looked into this more deeply following the Roundtable, and found the following:

In some circumstances, performing an Interim Remedial Measure (IRM) can speed up the issuance of a Certificate of Completion (COC). However, performing an IRM alone will not be adequate to qualify for a COC, unless the approved IRM and/or a site investigation conducted concurrently with it identifies the nature and extent of site contamination, and the applicant can demonstrate that the IRM has met or will meet BCP program requirements. Where an applicant can show in a final engineering report that the completed remedial measures eliminate, treat or isolate contaminant sources in full satisfaction of the BCP requirements, DEC can issue a No Further Action Decision Document (“NFA DD”), followed by a COC. (Another advantage of this approach is that the investigation report and the NFA DD can be issued for public comment together, rather than one after the other.) In some cases, an IRM that has not been fully completed can qualify for a COC (e.g., an IRM involving treatment by chemical oxidation, where the contamination has been delineated and the applicant can demonstrate that chemical oxidation will remove a groundwater contamination source within less than 5 years). In most such cases, the IRM would closely follow an investigation that has determined the nature and extent of contamination. In other cases, the IRM and investigation would be conducted concurrently, as part of the same process. Where the interim remedial measures do not by themselves satisfy all program requirements, the IRM can be used as part of a group of other remedial actions to fully address contaminant sources. (An example would be an IRM involving removal of gross contamination associated with a leaking tank, followed by additional investigation and a Track 4 site cover). But IRMs performed in conjunction with other remedies will not always speed the issuance of a COC, since in other situations the additional time required for investigation, remedy design, and documentation of remedy completion may make it difficult to beat the sunset deadline.

Depending on the future use of the site and the level of contamination, another possibility to get in under the deadline might be to complete a less comprehensive and therefore quicker Track 4 cleanup (e.g., a site cover) to get a COC by the March 2015 deadline, and thereby secure the BTCs. It was suggested that with the BTCs in hand, a developer could return to the site and peel off the cover to complete a more comprehensive cleanup to facilitate a subsequent phase of the development plan. A developer in this situation would still be able to qualify for tangible property credits for capital improvements placed into service within 10 years of the original COC. Less clear is whether the developer would be able to qualify for site preparation tax credits for work approved after the sunset date, and whether the later remediation costs would affect the “soft cap” on tangible property credits (three times the site preparation costs). However, the costs of such an effort would need to be reviewed carefully; and it is also important to note that some remedies may not lend themselves to this type of approach (e.g., sites with pockets of gross contamination or contamination posing a threat of off-site migration, for which a cap would be insufficient and significant soil
excavation would likely be required). A more viable alternative might be to reduce the size of the site, since smaller sites generally get through the BCP more quickly.

Clearly, the time crunch caused by the sunset is causing developers to consider lesser cleanups and more achievable goals. And without some action to address the sunset issue or provide alternative incentives, some developers duly admitted to the BCP will face the very real prospect of being unable to complete their projects.

Without action on the BTCs, big problems also loom for the NYSDEC. For example, if there is a perceived delay on the part of the State agency and a project does not receive its COC in time to get BTCs, it could expose the State to litigation. This puts tremendous pressure on the staff of NYSDEC to alert dozens of participants of the need to meet various milestones, and to assiduously maintain their end of the schedule in the face of budgetary and other unanticipated constraints. Nor is rushing NYSDEC review in the public interest, which is something that might occur if the agency is accused of delay or is otherwise fearful of risking delay. More to the point, the closer it gets to the sunset date, the higher the risk to the developer that he/she will not be able to secure the BTCs in time, and by extension, the less value the BTCs have in encouraging the advancement of a project. One result of this uncertainty is that projects that truly need the credits to close a financing gap will be less and less likely to apply to the BCP because the possibility that the credits will not be available could undermine the entire project.

Various legislative and policy initiatives aimed at changing the BTCs, including but not limited to the 2008 cap and the 2010 deferral, have meant that the market for the tax credits has never been able to settle down. As a result, investors and sources of credit have had little confidence in whether and when the credits will be available, and have tended to favor projects with pro formas strong enough to succeed with little or no help from the tax credits. With the BTC sunset date fast approaching, the BTCs are now even more uncertain - further discrediting the program and making developers more wary of participating. Ironically, it is those projects that don’t really need the credits that will continue to enter the BCP because there is no downside for them if the credits do not materialize. This situation is the exact opposite of what should be happening.

The confusion and uncertainty being created by the lack of action in Albany on the BTC sunset is occurring even as Governor Cuomo convenes the Chairman’s Commission on Regulatory Reform, which is supposed to reduce State bureaucracy to encourage private investment and economic development. There are some
who suggest that Albany has not acted on the BTCs because the Legislature does not understand the urgency of the situation due to the March 2015 sunset date which seems far into the future; while others suggest that allowing the BTCs to sunset may be the only way for Albany leaders to address the hemorrhaging from the BTCs in the face of a powerful constituency that has arisen around what has become a sense of entitlement. Whatever the case may be, it is clear that legislation is needed immediately that does two things: i) specifies a date certain by which a developer must be enrolled in the BCP in order to generate BTCs, after which no other projects will be eligible to generate BTCs; and ii) offers a replacement for the BTCs.

2. **The State should evaluate the efficacy of Brownfield Tax Credits.** While there is universal agreement on the need for financial incentives to support brownfield redevelopment, stakeholders have varying opinions on the value of the BTCs to achieve cleanup and redevelopment goals and whether the BTCs should be extended or replaced with more effective incentives. Because the State tax credits and refund are subject to federal income tax, the use of state tax credits automatically results in a payment to the federal government of 25 cents to 35 cents per dollar of available state BTCs, depending on the taxpayer’s tax bracket. (BTCs reduce state income tax, and to the extent they do, the federal deduction for state taxes is reduced or eliminated.) That means that of the $750 million in BTCs that have been paid to developers, a whopping $187 million has gone to the federal government. Indeed, because of these federal tax implications, there are those who question the viability of state-level tax credits altogether.

Beyond the significant federal tax bite which means that the most a developer will ever see is 75 cents for each dollar of tax credits generated by the program, there are other aspects of the BTCs which should be carefully evaluated. Not unlike other development projects, gap subsidies need to be in hand prior to the construction loan closing in order for the brownfield redevelopment deal to work; and the extraordinary costs associated with site investigation and cleanup, which generally occur either before construction or during foundation construction, only add to the need for upfront cash. Because the BTCs come at the end of the project – after the Certificate of Completion (for site preparation BTCs), and after the development is built (for
tangible BTCs) – developers have sought ways to generate upfront cash by selling the BTCs. Sometimes referred to as “syndications,” these transactions involve a purchaser buying a promise of future BTCs from the developer, typically at a discounted rate. Although some early sales of BTCs resulted in developers getting 55 cents for each dollar of BTCs sold, later project BTCs were sold for 45 to 50 cents for each dollar in BTCs. The 2010 tax deferral created more uncertainty, which resulted in a deeper discount - as deep as 75% - or a sale price of 25 cents for each dollar in BTCs, and there is now a very small market for BTCs. For comparison, federal New Market Tax Credits and NJ Biotech credits get about 50 cents on the dollar and federal Low Income Housing Tax Credits have gotten as much as 100 cents on the dollar.

Most striking are the projects where the BTCs were used as a “sweetener,” with the developer receiving no money in exchange for the BTCs, but instead the BTCs were used to attract private capital in the form of high interest investors to the deal. Use of BTCs this way - to attract expensive capital - is particularly problematic for environmental justice communities, affordable housing and other projects in low- and moderate-income neighborhoods which have fewer resources and where the deals have narrow profit margins. To highlight how ineffective the BTCs are as a gap financing tool for the projects that need these resources the most, compare the use of the BTCs as a sweetener to attract capital, with a scenario in which the State provides a direct subsidy to the developer. The cost to the State would be the same, (keeping in mind that the refundable nature of the BTCs has the State writing checks to developers), but instead of increasing the total cost of the deal as a result of the increase in the cost of capital (stemming from the equity partner’s 20% – 40% return requirements), the State subsidies that go in as a direct grant would be valued at 100 cents on the dollar, bridging the financing gap, and allowing for conventional financing and for the deal to “pencil out.”

In fairness, it is important to understand that the dismal track record of the BTCs in the “syndication marketplace” is at least partly because the market for the BTCs has never been given a chance to stabilize. There has always been tremendous uncertainty associated with the BTCs – largely driven by various legislative proposals to cap, defer or otherwise limit the BTCs. Other tax credits have increased in value once the programs have stabilized. But with the federal tax bite of 25 to 35% of every BTC dollar, it is unlikely that the value of the BTCs to a project will ever command a price approaching the State's cost, and when compared to direct grants, leads to the inescapable conclusion that BTCs are an ineffective tool to achieve the State’s economic revitalization goals.

3. **New York’s financial incentives to leverage private investment should be informed by successful programs in other states.** *(Much of this part of NPCR’s report was drawn from materials developed by Charlie Bartsch, Senior Advisor for Economic Development to the Assistant Administrator, EPA/OSWER.)* Of the three dozen states that have authorized some type of incentive to encourage the
cleanup and reuse of brownfield sites, New York is the only state to offer financial incentives based on development costs. And, while other state programs have cleaned up more properties, no other state even approaches the size of New York’s expenditure through the BTC program. In evaluating other state programs it must be recognized that market conditions vary from state-to-state, as do basic transaction support systems and other factors that impact the outcomes. Nevertheless, there are several states that stand out as having particularly innovative or effective programs:

- **Wisconsin** – offers numerous, targeted niche incentives to meet a variety of public benefit goals, including: blight elimination and brownfield redevelopment grants – up to $1.25 million, to public and private entities, for the full range of redevelopment activities (site assessment through redevelopment); state assessment grants to local governments (ranging in size from $2,000 to $100,000); and tax forgiveness on delinquent brownfield properties. The objective is to provide a mix of incentive types to address the wide range of urban and small town brownfield needs with a plethora of (mostly) small, targeted programs that redevelopers can assemble, depending on their brownfield needs. (Note: some of these programs have gone unfunded with recent budget reductions.)

- **Missouri** – offers a flexible blend of loans, loan guarantees, and grants for properties abandoned or underused for at least 3 years. The blend depends on characteristics of the new use (i.e., residential v. commercial, number of jobs created, etc.), and the total project subsidy amount from any eligible source is capped. The objective is to provide maximum redeveloper flexibility while capping the state’s financial exposure (generally, to the extent of cleanup costs).

- **Michigan** – has authorized the creation of special “brownfield redevelopment authorities” – which cities, towns and counties can establish to focus on brownfield situations through the exercise of traditional development authority powers: expedited title clearance, Tax Increment Financing (TIF), and bond financing. The objective is to provide a structure, with a brownfield focus, to financing tools familiar to local redevelopment officials and private sector leaders, with locally determined limits.

Other state programs are particularly noteworthy because they provide resources early in the project, when they are most needed:

- **Delaware** – offers grants to public and nonprofit entities (up to $625,000), and private prospective purchasers (up to $200,000), to cover “reasonable remedial costs” such as assessment, cleanup, and state oversight charges; grants are disbursed as reimbursements for costs incurred. Total annual program authorization is $5 million. The objective is to cover hard-to-finance initial environmental needs.

- **Florida** – offers loan guarantees for up to 50 percent of a primary lender’s loan, for up to 5 years, for redevelopment projects in brownfield areas. The guarantee level rises to 75 percent if the project is for affordable housing. The objective is to attract private capital by reducing lender risk.

- **Oregon** – offers resources through its Brownfields Redevelopment Fund which provides grants (on a limited basis, for publicly owned projects) and direct loans (up to 20 years) to public, nonprofit, private business, and prospective purchasers to conduct environmental actions on brownfields leading to economic development or community revitalization. The objective is to use a revolving loan fund structure capitalized by state revenue bonds to achieve cleanups while limiting state financial participation.
Tax policy is often used to encourage brownfield cleanup and redevelopment. However, those states that offer tax credits do so at a level dwarfed by New York’s program:

- **Illinois** – offers to any taxpayer who has not caused or contributed to contamination a 25 percent income tax credit for remediation costs that exceed $100,000 (and capped at $150,000 per site), for sites enrolled in the state response program; sites in state enterprise zones are exempt from the expenditure threshold.

- **Missouri** – offers a brownfield tax credit for cleanup, up to the full value of the remediation. The credit may be claimed by nonprofits, who in turn can sell them to private companies seeking tax shelters typically. The credit is linked to the number of jobs created. The objective is to attract capital to nonprofit projects and broaden the range of potential sites that can take advantage of it.

- **Colorado** – offers incentives that include a graduated income tax credit for companies that redevelop contaminated property, totaling up to $100,000—broken down as 50% of the first $100,000 spent on cleanup, 30% of the next $100,000, and 20% of the third $100,000. The property must be located in a municipality with a population of 10,000 or more and must be eligible to participate in the Colorado VCP.

- **Delaware** – offers a brownfield tax credit to any taxpayer who invests more than $100,000 in a brownfield facility in an area targeted by the state, and who has hired at least five employees during any taxable year, tax credits for new employees ($900 for each new employee), and for capital investment ($900 per each $100,000 of investment). Those in non-targeted areas are eligible for a $400 credit for every $100,000 of capital investment and for each job created. The objective is to stimulate job-generating redevelopment in focused distressed areas.

- **Florida** - offers incentives to businesses that locate on contaminated sites in state-designated brownfield areas. Some of Florida’s tax incentives focus on social benefits: the brownfield redevelopment bonus refund is available to encourage brownfield redevelopment and job creation; approved applicants receive tax refunds of up to $2,500 for each job created. The state also offers a sales tax credit on building materials used in construction of housing or mixed-use projects.

States also offer tax based policy incentives that are not in form of tax credits, and these include:

- **New Jersey** – offers a brownfield reimbursement program that allows for the reimbursement of up to 75% of the remediation costs incurred at a brownfield site, with reimbursement coming from certain new tax revenues generated by the project (typically sales taxes, but also can include corporate business or realty transfer taxes). This program can be combined with other state grant and loan programs. (Note: Pennsylvania is considering an identical program.) The objective is to encourage cleanups while limiting the state’s “out-of-pocket” incentive costs; initial estimates indicate that the state has reimbursed $21 million on projects that have generated $140 million in new tax revenues.

- **Pennsylvania** – has established a $100 million tax increment financing (“TIF”) guarantee program fund to serve as a credit enhancement to facilitate TIF financing for infrastructure and remediation components of projects consistent with smart growth and economic development goals. Up to $5 million in guarantees is available per project, and brownfield sites have priority. The objective is to
facilitate private participation in bonds or notes linked to tax increment stemming from new development.

✓ **Texas** – has authorized local government to offer property tax abatements for redevelopment of brownfields in designated “reinvestment zones” (defined tax abatement focal areas); owners must enter into agreements with taxing jurisdictions and eligible brownfield properties are those that have received a certificate of completion from the state’s voluntary cleanup program. Abatements are available on a “sliding scale”, over four years: 100% of the value of the property in the first year covered by the agreement; 75% the second year; 50% the third year; 25% the fourth year. The objective is to attract private cleanup and redevelopment capital to brownfield projects by offsetting up-front costs.

✓ **Wisconsin** – provides for environmental remediation tax increment financing (ERTIF) which allows a range of environmental expenses to be supported with TIF proceeds; ERTIF designation can run for a longer period of time, and may start with a base value of $0. The objective is to improve capital market access, and address environmental aspects of the redevelopment process which may be harder to integrate into a traditional TIF structure. Separately, Wisconsin also allows new owners, in cooperation with their local governments, working through the state’s VCP, to have delinquent property taxes waived on contaminated properties. The objective is to expedite the transfer of tax delinquent properties, level the playing field and attract new investors to undertake cleanup and redevelopment.

Other brownfield subsidies of note that states offer include:

✓ **Connecticut** – authorized $40 million in 2012 through the state’s Manufacturing Assistance Act to help towns, businesses, and nonprofit developers cover the cost of insurance policies and pay deductibles for insurance policies to cover remediation costs. The program is targeted to manufacturing and funded by general obligation bonds. The objective is to attract capital to manufacturing opportunities, which may be best suited for brownfield sites.

✓ **Massachusetts** – through its brownfield redevelopment access to capital (BRAC) fund, subsidizes the cost of environmental insurance programs for brownfield sites using financing to cover the cost of assessment, containment, or cleanup of contamination. The subsidy is available to businesses, governments, and quasi-public entities; private owners and developers can get 50% of eligible premiums, up to $50,000; public-and quasi-public entities can get 50%, up to $150,000 in subsidy. The objective is to make environmental insurance, often essential to securing private brownfield capital, more affordable.

Input from Roundtable stakeholders and conversations with federal agency officials and program officials from other states suggest general parameters worth considering for New York’s future:

- **Site assessment funding** – Offering direct support for site assessments can be the simplest and most direct way to advance brownfield site redevelopment and reuse, because the assessments provide basic information needed to drive key investment decisions. (New York’s highly successful Environmental Restoration Program provided site assessment resources to municipalities, but that program has not approved any applications since 2008 – see Recommendation #6 below)
• **Predictability and certainty of incentives** - Developers and the real estate community (along with neighborhood-based and nonprofit organizations that may work with them) need to have a reasonable expectation that, if defined qualifying circumstances or conditions are met, they will receive specified financial assistance. Without this kind of certainty it is difficult or impossible for a developer to integrate the value of the incentives into the site redevelopment project pro forma, which is where the incentive value is realized.

• **Needs testing** – In the current budget climate, more states are emphasizing the “but/for” criteria of their incentives (requirements for a showing that the project would not happen but for the incentive), and moving away from automatic incentives based solely on project performance or results. Alternatively, states are employing caps on the per-project levels of subsidy, for fiscal impact reasons.

• **Funding non-cleanup site preparation/demolition costs** – In addition to cleanup, many brownfield sites also require resources for demolition and other basic site preparation needs. In looking at the site reuse process more holistically, some state programs provide incentives to cover some portion of the funding gaps that are created by these additional factors, or endeavor to streamline the connections with other state programs that could be accessed to meet these needs. (In recognition of the catalyzing effect of removing blighted structures from properties, NYS created the Restore NY program with a $300 million appropriation in the 2006-2007 NY State Budget. It was rolled out in three rounds: $50 million appropriated in 2006; 54 grants awarded; $100 million appropriated in 2008; 64 grants awarded; and $150 million appropriated in 2009; 79 grants awarded; and has been one of the most successful programs in the State’s toolbox for abandoned and dilapidated neighborhood eyesores. Unfortunately, this program exhausted all appropriated funding several years ago.)

• **Broad definition of eligible remediation activities** – A more open, flexible definition can bring new users to the table to consider brownfield sites, with incentives able to ameliorate risk to some extent. In their programs, states are considering a more “inclusive” set of definitions for remediation activities, including any remedial action required by the state, site assessment costs, asbestos and lead paint abatement in buildings or as part of demolition, the cost of environmental insurance needed to secure financing for remediation, and costs related to maintaining institutional controls.

• **Targeted public benefit requirements, award criteria linked to other impacts, and benefit variation** – States are trying to get more bang for their brownfield incentive dollars by targeting dollars via some combination of requirements, criteria, or benefits that dovetail with other policy priorities. Those with traction currently include: job creation, affordable housing, sustainable development, targeted investments in distressed areas, small sites, small towns, use or creation of alternative energy, or location in an area subject to a redevelopment plan. (New York BOA and REDC strategies lend themselves particularly well to this approach).

• **Avoiding double-dipping** – To help control costs and stretch available funding, some states address potential overlap in state (or state and federal or local) incentives, through some type of recapture or deduction provision.
4. **Secure a long-term reliable source/mechanism to pay for brownfield financial incentives.** Many stakeholders believe that the BTCs are too generous and the BTC program too expensive, and there is wide agreement that the current rate of budgetary expenditures on the BTCs is something that the State cannot sustain or afford. Whether or not the State will be able to pay for the BTCs that are being generated on projects already in the pipeline is also a subject of some concern. There is a particular concern about the deferral – by one person estimated to cost $700 million – and whether and how the State will ever be able to pay for the BTCs that have been put on hold. Unless the deferral is extended, in 2013 the State will have to begin making good on the tax credit claims deferred from 2010-2012. It was noted that the 2010 deferral impacted the full range of business tax credits; however, the BTCs may be the biggest. It was also noted that the largest impact on the State treasury will occur in about a year; and that the deferral extends to 2013. Therefore the bill that the state will need to pay is not just for the past but also for ongoing projects in the program.

The redevelopment of a brownfield site typically takes several years. In order for a financial incentive to be effective, it must be reliable, i.e., the developer and lender need to be sure that the resources can be committed up front and will materialize when promised. Because of this need for certainty over time, a financial incentive program that is subject to the vagaries of the State’s annual budget negotiation will not be effective. The BTCs are off budget and therefore not subject to annual budget negotiations. If the State is going to replace the BTCs, the program must be paid for by a reliable, long term source so that projects relying on these funds are not jeopardized by annual budget negotiations.

One option would be to include brownfield financial incentives as part of a new environmental bond act. This would create a pool of money that could be spent down over the course of years, allowing for the careful planning around staffing and implementation. If a single multi-year allotment of cash is not feasible, another option is a tax policy-based program that does not result in the State subsidizing the federal government (such as taxes on real estate, employment, or local tax forgiveness). For example, localities could be authorized to be flexible on repayment of back taxes, a non-cash solution that could bring value to the deal, and connects to the State’s new land bank legislation. Another option is to authorize the Environmental Facilities Corporation to bond for grants, loans, revolving loan funds, or loan guarantees. In addition, there
are some new environmental insurance products that cover long term stewardship liabilities (institutional and engineering controls). Such a product could be more deeply subsidized, making it that much more valuable/usable. Tax Increment Financing (TIFs) could also be a good “off-budget” tool.

5. **If the BTCs are extended, changes should be made to the Program.** Some stakeholders would like to see the BTCs replaced with a program that draws from a defined set of funds that are replenished as they are expended. Others would like to see the BTCs extended indefinitely once the program is adjusted to achieve the State’s economic and revitalization goals. So while there is disagreement on whether the State should replace the BTCs with a different financial incentive tool, everyone is concerned about the tremendous uncertainty associated with the BTCs and there is wide agreement that if the decision is made to extend the BTCs, then that extension also needs to be coupled with revisions that make the BTCs predictable, knowable and certain. Risk devalues the incentive, and there is also wide agreement that the BTCs should be strategic.

Recognizing that the current BTC program supports projects without determining whether or not financial support is needed, or at what level it is needed, it was suggested that a ranking system of objectively determined factors be created to allow for funding decisions based on need and outcomes. A two-tiered approach had strong support among Roundtable participants, wherein a first tier of incentives would be for as-of-right cleanup costs and a second tier could be tied to specific criteria linked to the state’s development goals. Another suggestion was to limit the BTCs to remediation and have the State’s economic development agency manage tangible property credits. Along these lines, it was suggested that the BTCs should be i) tied to the state’s economic development goals; ii) be administered or co-administered by the economic development agency; and iii) be designed to revitalize those parts of our cities that are most in need of thoughtful rebirth. A statutory adjustment that would create an annual cap and/or a limit on the number of projects that could receive BTCs was suggested as a way of addressing concerns about the impact of the overall program costs on the State’s resources.

In the context of “targeting” incentives, it was suggested by some that any award of tax credits in support of projects that are inconsistent with Brownfield Opportunity Areas (BOA) plans is counterproductive and create discordant policy, and that, in any event, development in support of BOAs should be rewarded. Many participants argued for a program that focuses dollars on parts of the State that really need the subsidies, particularly low- and moderate-income communities.
There is also a strong constituency to allow Superfund sites into the program as a way of prioritizing cleanup of the worst sites; and to re-authorize the BTC bump up for some Environmental Zones (those based upon a poverty rate of at least double the county poverty rate), which expired in 2010.

On the mechanics of the program, it was suggested that the structure be changed so that the credit is not refundable. A non-refundable credit, such as the low income housing tax credit ironically, may make the tax credits more flexible at least in terms of generating upfront dollars via traditional syndication. It was noted that more flexible BTCs are also more marketable. Another suggestion was to make the BTCs available as part of the Brownfield Cleanup Agreement (BCA) which would make them contractually enforceable and therefore more certain. Also on the mechanics, it was suggested that the eligibility of nonprofits and municipalities be addressed as the program (not dissimilar to other tax credit programs) is structured in a way that makes it necessary for nonprofits to partner with or form a for-profit entity to take advantage of the BTCs.

6. **There needs to be a program for municipally owned sites, similar to the highly successfully Environmental Restoration Program (ERP).** The 1996 Clean Water/Clean Air Bond Act included $200 million for the cleanup of brownfields by municipal governments, with a requirement that the municipality pay a share of the cleanup costs. Grants to municipalities in the form of state assistance contracts provide municipalities reimbursement of up to 90 percent of eligible on-site costs and 100 percent of off-site costs for the investigation and remediation of eligible sites. One hundred eighty million has been committed (the remaining $20 million is tied up in a legislative/gubernatorial MOU), toward the assessment and cleanup of about 200 sites. New applications have not been approved since 2008 and are currently not being accepted.

<table>
<thead>
<tr>
<th>ERP Remedial Project Starts/Completions as of March 31, 2012</th>
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<td>Remedial Element</td>
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<td>Remedial Action</td>
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<td>Interim Remedial Measure</td>
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Because municipalities tend to end up owning the least marketable sites, i.e., sites that no one wants to pay taxes on, this kind of program is essential to successful urban revitalization. In addition, because
municipalities have a planning function that private owners and developers do not, new funding will generally result in strategic and planned development.

It was also suggested that municipalities should be offered the option of conducting cleanups under the Environmental Restoration Program (ERP) regulations, even without funding, to allow them to secure the same liability release/indemnification offered for ERP cleanups. The liability protection provided to municipalities that assess or remediate sites under the ERP is extraordinarily strong, and therefore particularly valuable. A municipality that cleans up a site under the ERP, and all its successors in title, lessees and lenders, is entitled to a release from remedial liability for hazardous substances present on the property prior to the cleanup. The State also indemnifies these same persons in the amount of any settlements/judgments obtained regarding an action relating to hazardous substances that were on the property prior to the cleanup and persons subject to an action are entitled to representation by the State Attorney General.

7. **Improve and streamline the Brownfield Cleanup Program (BCP).** Without statutory action, the BCP can continue, but the BTCs will end. Even without the BTCs, the BCP has significant value. A regulatory sign-off by the State is important to satisfy lenders. In addition, there is significant value for volunteers who obtain a Title 14 statutory liability release from the State because it eliminates the developer’s liability to the State for off-site contamination (soil vapor, groundwater, etc.) subject to certain exceptions and reopeners. However, a two- to three-year timeline to get through a regulatory program is clearly an obstacle for developers. With very lucrative BTCs, it was more difficult to argue for streamlining, but if the BTCs disappear, it becomes much harder to justify that kind of timeframe.

While all stakeholders would like to see the BCP made more efficient, less time-consuming and less expensive, there is disagreement on how to make that happen. For example, some stakeholders would recommend changing the statutory requirement to reduce the amount of public participation; while others would like to see public participation made more meaningful and linked to the level of contamination and complexity of the project. It was also suggested that the State should clarify and improve the eligibility definitions.

Liability relief can play an important role in reducing costs. There are studies that have found that a good liability relief provision can be equally or more valuable than funding. Ramping up the liability release offered by the State is a non-cash way for the State to bring value. For example, the ERP provides an indemnification which is stronger than the BCP liability release. To date, in the State’s experience, the Attorney General’s office has never been called upon to represent the State under the ERP indemnification provisions. This track record suggests that strengthening the liability release could be a very positive incentive with little or no impact to the State (though the ERP is for municipalities, and it is unclear whether an appetite exists to indemnify private parties).

Because the statute is so prescriptive, it would require statutory action to make significant changes in the BCP process. Indeed, absent a specific legislative enactment, it is unclear whether the NYSDEC has the
authority to administratively create a voluntary cleanup program that is outside of the Title 14 statutory voluntary cleanup program. Moreover, a non-statutory liability release would likely bind the NYSDEC only; and not the Attorney General.

Other suggestions to improve the BCP have to do with oversight costs and coordination. There is a sense that regulatory oversight costs are disproportionate to benefits received. The State could bring value by waiving some or all of the oversight costs, and perhaps set a cap specifically for small projects. The State could also do a better job coordinating available incentives, e.g., New Market Tax Credits (NMTCs), BOA resources, etc., and thereby leverage more value out of public resources, and where needed, allow for layering of various incentives.

CONCLUSION

NPCR’s Roundtable provided an important opportunity to clarify key facts about the BTCs and the implications of their impending sunset, and resulted in a thoughtful dialogue. While robust financial incentives are needed to address the thousands of brownfield sites that lie vacant and under-utilized in communities across the State, the inescapable conclusion is that the BTCs as currently structured are not the optimal tool to achieve the State’s redevelopment goals. Other states have had significant success using far fewer resources. With late 2012 being the “trigger date” by which no new projects will receive BTCs, New York should replace the BTCs right away with a program that draws from a defined set of funds that are replenished as they are expended; and offers predictable incentives that i) are available upfront in the form of grants, loans, loan guarantees and/or tax policies; ii) are tied to remediation costs, iii) are offered only to projects with demonstrated need, and iv) are targeted to revitalize communities and those parts of our cities that are most in need of thoughtful rebirth and projects consistent with the strategic plans that have emerged from the state’s REDCs and BOA strategies.
Appendix #1

About NPCR

New Partners for Community Revitalization, Inc. (NPCR) is a 501c3 nonprofit organization formed to advance the revitalization of New York’s communities with a particular focus on brownfield sites in and proximate to low- and moderate-income neighborhoods and communities of color.

The mission of New Partners for Community Revitalization, Inc. (NPCR) is to advance the renewal of New York’s low- and moderate-income neighborhoods and communities of color through the redevelopment of brownfield sites. In collaboration with community, commercial, government and nonprofit partners, NPCR develops policies, programs and projects aimed at achieving the remediation and sustainable reuse of brownfield sites in New York.

NPCR’s program and policy initiatives were developed through on-the-ground work with community based groups, nonprofit and for profit developers, environmental justice organizations, community lenders, and nationwide research on innovative programs. NPCR’s activities occur in two general areas: the provision of technical and financial assistance to brownfield redevelopment projects and to Brownfield Opportunity Area Program grantees; and efforts to create and improve City, State and federal programs and policies that comprise the infrastructure for the area-wide approach and brownfield redevelopment arena.

NPCR has been tracking and evaluating the Brownfields Tax Credits for many years. In November 2005, NPCR issued a baseline analysis which included a comparison of the brownfield tax credits with low income housing tax credits. In July 2006, Governor Pataki signed legislation that extended the BTCs for condominium projects and clarified a number of provisions in the BTC program. NPCR updated the baseline analysis to reflect those changes and re-issued an analysis as part of a larger report on the Brownfield Tax Credits in May 2007. Following the July 2008 statutory amendments that significantly restructured the BTCs, NPCR updated its report: “Analysis on the Use of Brownfield Tax Credits by Not for Profit Organizations” and distributed it in February 2009. (http://www.npcr.net/tax_credits.html) NPCR continued to track policy related to the BTCs as Governor Paterson deferred the BTCs, along with other business-related taxes in 2010. In 2011, NPCR devoted a chapter in its report “Smart Growth Outlook 2011: Challenges and Opportunities in Brownfields, Area-wide Planning and Implementation” to the current issues associated with the BTCs which also included recommendations for revising the tax credits.

ACKNOWLEDGEMENTS

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Appendix #2

Participants in the February 2012 Roundtable on Brownfield Financial Incentives

NPCR’s Brownfield Financial Incentives Roundtable was held in Manhattan on Feb. 16, 2012. NPCR assembled an expert panel of environmental and tax attorneys, environmental justice organizations and state and federal regulatory personnel to discuss the current status of the NYSDEC BTC program, the impact of the 2015 sunset provision and what it all means.

While this report was informed by the comments of and discussion among the attendees at the Roundtable, the conclusions and recommendations presented herein are solely those of NPCR.

Christian Michel, AKRF
Claudio Gonzalez, ALC Environmental
Dale Desnoyers, Allen & Desnoyers
Val Washington, Allen & Desnoyers
Howard Tollin, Aon
Damon Hemmerdinger, ATCO
Raffaela Petrasek, Blumenfeld Development Group, Ltd.
Jim McIver, C.T. Male Associates
Ian MacDougall, City of Newburgh
Richard Morse, Ecology and Environment, Inc.
Gonzalo Mosquera, Ecology and Environment, Inc.
Nicholas Recchia, EEA, Inc.
Kevin McCarty, ELM Group
Peter Meyer, Energy and Environment Project
Stephen Parnes, EnviroFinance Group LLC

Alison Jenkins, Environmental Advocates of NY
Susan Neuman, Environmental Insurance Agency, Inc.
Adam Cloud, EWVIDCO
Brandon Nathe, GEI Consultants
Daniele Cervino, Golub & Isabel, PC
Philip Bousquet, Bosquet Holden, PLLC
Paul Parkhill, Greenpoint Manufacturing and Design Center (formerly)
Clifford Bell, GZA GeoEnvironmental of NY
Russell Kivler, Hirschen Singer & Epstein LLP
Mark Pennington, John E. Osborn, P.C.
Alan Knauf, Knauf Shaw LLP
Linda Shaw, Knauf Shaw LLP
Joel Landes, Langan Engineering and Environmental Services
Robert Murphy, Law Office of Robert C. Murphy
Vincent Ravaschiere, New Markets Capital Company
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Jessica Snyder Poltarak, NPCR
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   Eddie Bautista, NYC Environmental Justice Alliance
Mark McIntyre, NYC Office of Environmental Remediation
Dan Walsh, NYC Office of Environmental Remediation
Juan Camilo Osorio, NYC-EJA
Ankita Rathi, NYC-EJA
Robert Schick, NYS DEC
Dave Ashton, NYS Department of State

Steven Taylor, NYS Senate Finance Committee
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Sandy Wolff, Staten Island Economic Development Corporation
Donna Boyce, Sustainable Long Island
Samuel Gaccione, TNS Development Group Ltd
Charlie Bartsch, USEPA
Appendix #3

The purposes of financial incentives - Participants in the Roundtable identified three primary objectives for brownfield financial incentives: economic development/neighborhood revitalization; community empowerment; and environment/health protection. Key steps needed to achieve these goals include: supporting projects in weak market areas, leveraging private resources, achieving community visions and redevelopment goals, and increasing the number of sites being cleaned up. Stakeholders identified a range of objectives of brownfield financial incentives and these have been compiled in the list below (in no particular order):

✓ MARKET LEVELER/ ECONOMIC DEVELOPMENT/COMMUNITY DEVELOPMENT
  • To subsidize projects in weak market areas vs. strong markets.
  • To achieve BOA consistency.
  • To make a project financially viable.
  • To encourage development where demographic indicators show weakness.
  • To address historic and existing environmental burdens.
  • To advance projects in Environmental Justice (EJ) communities
  • To influence the capital markets to participate in a project, including lenders, sources of equity, financing, users/businesses and developers.
  • To protect human health and the environment by cleaning up dirty sites and putting them to productive use.
  • To leverage private resources, i.e., get private dollars into the cleanup and redevelopment of brownfields and thereby help strengthen the market.
  • To encourage cleanup and re-use activity that might not otherwise occur.
  • To create a return on investment to the state.
  • To create certainty.
  • To reduce risk.
  • To create jobs – particularly in connection with affordable housing projects.
  • To advance affordable housing projects on brownfields by helping to cover the cleanup cost gap and also the development cost gap.

✓ COMMUNITY EMPOWERMENT
  • To achieve community visions.
  • To prioritize and implement existing community plans, such as Brownfield Opportunity Area (BOA) plans and 197a plans (in NYC).

✓ ENVIRONMENT & HEALTH
  • To clean the environment effectively while also achieving economic development. (It was noted that the 25 cleanups/year that are currently occurring via the BCP do not effectively achieve this objective).
  • To get more sites cleaned up
  • To get sites cleaned up that otherwise would not be cleaned up
  • To encourage the cleanup of superfund sites and significant threat sites.