

MEMORANDUM

BROWNFIELD DEVELOPMENT INCENTIVES:

TAX CREDITS UNDER NEW YORK'S BROWNFIELD CLEANUP PROGRAM

(Updated: November, 2006)

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New York State's Brownfield Cleanup Program (BCP), which was signed into law on October 9, 2003, subsequently amended on October 5, 2004 and again on July 26, 2006, was established to encourage voluntary remediation and redevelopment of brownfield sites. From a business perspective, the most significant component of the BCP is the creation of three new refundable New York State tax credits made available to New York State taxpayers² who voluntarily cleanup and develop brownfield sites³ under the BCP. From an economic development perspective, BCP tax credits can be utilized to facilitate lending and deal structure to encourage the remediation and development of contaminated properties. This memorandum contains an in-depth description of the BCP tax credits and summarizes relevant sections of the October 2004 technical amendments, the July 2006 changes, and the New York State Draft Brownfield Cleanup Program Guide.

I. BCP Tax Credit Introduction

The first new BCP tax credit is the refundable Brownfield Redevelopment Tax Credit (BRTC). The BRTC equals 10-22% of all capital costs related to remediating and developing a brownfield site. The BRTC begins at 10% for individual taxpayers, with 12% for corporate taxpayers; it increases by an additional 8% for brownfield sites located in an Environmental Zone, and it further increases by another additional 2% if the site is cleaned up to an unrestricted use standard. The second new BCP tax credit is the refundable Tax Credit for Remediated Brownfields (TCRB) producing a tax credit equal to up to 100% of a brownfield site's real property tax expense. The third new BCP tax credit is the refundable

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² Eligible taxpayers include business/franchise and income tax taxpayers taxed under Articles 9, 9-A, 22, 32, or 33 of the New York Tax Law. Eligible taxpayers include participants and volunteers. Participants are: (i) taxpayers who owned the brownfield site at the time of the disposal of the contamination; or (ii) are otherwise responsible according to statutory or common law principles. Volunteers are applicants other than participants, including, without limitation, a person whose liability arises solely as a result of the ownership or operation or involvement with the brownfield site subsequent to the disposal of the contamination. Eligible taxpayers do not include those subject to a State/federal enforcement action regarding the site or those subject to an outstanding claim by the New York Spill Fund at the project site.

³ Brownfield sites eligible for inclusion in the BCP include any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant, except: (i) sites listed as Class 1 or 2 in the Registry of Inactive Hazardous Waste Disposal Sites (Class 2 sites owned by a Volunteer are eligible until 7/1/05); (ii) sites on the USEPA National Priorities List (NPL); (iii) hazardous waste treatment, storage, or disposal facilities (TSDF's) permitted under New York Environmental Conservation Law (ECL) Section 27-0901; (iv) sites subject to a cleanup order under Article 12 of the New York Navigation Law (oil spill prevention, control, and compensation) or under Title 10 of ECL Article 17 (control of the bulk storage of petroleum) except such property shall not be deemed ineligible if it is subject to a stipulation agreement; or (iv) sites subject to any on-going state or federal enforcement actions regarding contamination.

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Environmental Remediation Insurance Credit (ERIC) equal to a certain percentage of environmental remediation insurance costs for projects where such insurance may be required.

The new BCP tax credits are discussed in detail below. Note that BCP tax credits rival, and in most cases exceed, similarly designed tax benefits offered under New York's Empire Zone Program because: 1) all BCP tax credits are refundable in cash; 2) BCP tax credits are not limited in geographic application to designated "zones"; 3) property leased to third parties does not result in BCP tax credit recapture; and 4) BCP tax credits broadly apply to all capitalized soft and hard costs related to developing a remediation plan and cleaning up the site and to all tangible personal property costs, including buildings, placed on the site for any commercial, industrial, recreational, conservation or residential housing purpose.

II. October 2004 Technical Amendments

Several technical amendments were made to the BCP and signed into law in October 2004. The four most significant changes for taxpayers are briefly described below. These changes will facilitate the development of brownfield sites.

1. **Brownfield Redevelopment Tax Credit:** When a Certificate of Completion (COC) is issued in a tax year that began prior to one beginning on or after April 1, 2005, or when a building is placed in service prior to a tax year beginning on or after April 1, 2005, then the effective date of the COC and the date the property is placed in service shall be treated as if such date occurred in the first taxable year occurring on or after April 1, 2005. Thus, BRTC tax credits will not be lost for projects where the COC is issued, and a building is placed in service, in a tax year beginning prior to one beginning on or after April 1, 2005.

2. **BRTC Benefit Period:** Tangible property placed into service within ten years after the issuance of a COC is now eligible for the BRTC. This change allows for phased development to qualify for the BRTC.

3. **Transfer of the COC:** Successors and assigns of an applicant's COC who obtain the COC upon the transfer or sale of the site or upon a sale of an ownership interests in a partnership, an LLC, or a corporate entity that has been issued a COC are eligible to claim the BRTC.

4. **BRTC Recapture:** BRTC amounts related to tangible property are no longer subject to BRTC recapture upon the sale of that property provided the property remains in qualified use. Similarly, a sale of a partnership or LLC membership interest or the sale of stock in a corporate entity no longer results in BRTC recapture.

III. Draft Brownfield Cleanup Program Guide

In May 2004, the New York State Department of Environmental Conservation (DEC) published its draft Brownfield Cleanup Program Guide. The DEC is currently utilizing this draft guidance in implementing the BCP. Of importance to taxpayers, the draft guidance, as exemplified below, attempts to limit the number and size of brownfield sites that the DEC will accept into the BCP.

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Of particular relevance, the draft guidance provides that the DEC can limit the boundary of a brownfield site to the actual area where contamination and redevelopment are issues, which may be smaller than the overall project site boundary. The draft guidance attempts to more precisely define the term “brownfield site” by parceling out the two elements that define a brownfield site: (i) that such a site have confirmed contamination or a reasonable basis to believe that contamination is likely to be present on the property; and (ii) that the contamination or potential presence of contamination may be complicating the development or re-use of the property. In doing so, the DEC may determine that only a portion of any overall project meets the definition of a brownfield, such that the entire area subject to the overall project may or may not be an eligible brownfield site for BCP purposes.

In addition, the draft guidance also proposes a methodology by which the DEC will evaluate applications to determine if the public interest will be served by accepting a project into the BCP. It is noteworthy that the DEC has not limited itself to the statutory criteria⁴ here, as it has expanded the factors that it will consider, on a case by case basis, in determining whether to accept or reject an application. As such, the DEC will now consider the following factors, in addition to the statutory factors: (i) whether the project will reduce contaminant exposure or threat of exposure; (ii) whether contaminants are present at levels that exceed guidance values, standards, or criterion; (iii) whether contamination on the proposed site exceeds historic/background levels; (iv) whether the proposed site is idled, abandoned, or underutilized; (v) whether the proposed site is unattractive for redevelopment due to the presence or perception of the presence of contamination; (vi) whether participation in the BCP is likely to spur redevelopment in surrounding areas; (vii) whether the area of the site shows indicators of economic distress including low resident incomes, high unemployment, high commercial vacancy rates, or depressed property values; (viii) whether a health advisory has been issued for the site; (ix) whether the estimated cost of any necessary cleanup is likely to be disproportionate to the value of the property/project; (x) whether there were industrial or commercial operations at the site which may have resulted in environmental contamination; and (xi) whether the proposed project is likely to re-contaminate the site. These additional factors are not listed in order of importance and it is not known if certain factors have greater weight or influence than other factors or combination of factors.

IV. Detailed Discussion of BCP Tax Credits

The BCP tax credits available to New York State taxpayers are described below. With careful tax planning, BCP tax credits may significantly reduce a company’s New York State income (franchise) tax and real property tax and produce significant cash refunds equal to credit amounts that cannot be otherwise claimed. The BCP tax credits may also be used, to a certain extent, in conjunction with New York State Empire Zone Program tax credits and exemptions thereby producing even greater tax savings or refunds.

⁴ Under ECL Section 27-1407(9), the DEC may reject an application if: (i) the applicant requesting participation has been determined in any administrative, civil, or criminal proceeding to have violated any provision of ECL Article 27, any order or determination issued thereunder, any regulations promulgated thereunder, or any similar statute or regulation; (ii) the applicant has previously been denied entry into the BCP or a similar program in another state; (iii) the applicant has been found in a civil proceeding to have committed a negligent or intentionally tortuous act or been convicted of a criminal act involving contaminants; (iv) the applicant has been convicted of a criminal offense which involves a violent felony offense, fraud, bribery, perjury, theft, or an offense against public administration; (v) the applicant knowingly falsified or concealed a material fact or knowingly submitted or made use of a false statement in connection with the application, and (vi) the applicant committed an act or failed to act in a manner that could be the basis for a permit denial.

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Brownfield Redevelopment Tax Credit (BRTC)

The BRTC is a fully refundable investment incentive tax credit available to taxpayers who have satisfactorily cleaned up a brownfield site and who have been issued a Certificate of Completion (COC) with respect to that brownfield site (the "qualified site"). The BRTC can be applied against a taxpayer's income/franchise tax and is based on the sum of the following three components: (i) the applicable percentage of the site preparation credit component (costs paid or incurred for preparing a qualified brownfield site for remediation); (2) the applicable percentage of the tangible property credit component (costs paid or incurred for new tangible property placed upon such a qualified brownfield); and (3) the applicable percentage of the on-site groundwater remediation credit component (costs paid or incurred for on-site groundwater remediation at a qualified brownfield site).

(a) Definitions.

1. Qualified Site. A "qualified site" is a brownfield site with respect to which a COC has been issued to the taxpayer by the Commissioner of Environmental Conservation pursuant to Section 27-1419 of the Environmental Conservation Law.⁵

2. Site Preparation Cost. The term "site preparation cost" means all amounts properly chargeable to a capital account (presumably, architectural, engineering, legal and professional fees) which are:

(i) paid or incurred in connection with a site's qualification for a COC; and

(ii) all other site preparation costs paid or incurred in connection with preparing/improving a site for the erection of a building or a component of a building, or otherwise to establish a site for useable industrial, commercial (including the commercial development of residential housing), recreational or conservation purposes. Site preparation costs include, for example, the costs of excavation, temporary electric wiring, scaffolding, demolition costs, and the costs of fencing and securing facilities.

Site preparation costs do not include the cost of acquiring the site and amounts included in the costs or other basis for federal income tax purposes of qualified tangible property.

3. Qualified Tangible Property. "Qualified Tangible Property" is property, including buildings and structural components thereof (described in (i) or (ii), below), which is:

(i) (a) depreciable pursuant to Section 167 of the Internal Revenue Code;

(b) has a useful life of four more years;

(c) has been acquired by purchase under Section 179(d) of the Internal Revenue Code;

⁵ New York Environmental Conservation Law Section 27-1419 provides for certification by the applicant that the remedial requirements have been achieved for a brownfield site. Upon the satisfaction of the Commissioner of the New York State Department of Environmental Conservation that the remediation requirements have been or will be achieved in accordance with, the time frames, if any, established in the remediation plan, the Commissioner shall issue a written Certificate of Completion.

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(d) has a situs on a qualified site in the State; and

(e) is principally used by the taxpayer for industrial, commercial, recreational or environmental conservation purposes including the commercial development of residential housing; or

(ii)⁶ (a) is, or when occupied becomes, part of a dwelling whose primary ownership structure is covered under either article nine-B of the real property law or meets the requirements of Section 216 (b)(1) of the Internal Revenue Code;

(b) has been acquired by purchase (as defined in Section 179(d) of the Internal Revenue Code);

(c) has a situs on a qualified site in this state; and

(d) for purposes of Section 21(b)(3)(B) of the New York Tax Law, and notwithstanding any other section of New York Tax Law to the contrary, property qualifying under Section 21(b)(3)(B) of the New York Tax Law shall be deemed to be qualified tangible property for the purposes of the depreciation provisions of Section 21(d)(1) of the New York Tax Law and in addition, for the purposes of this subdivision only (meaning Section 21(b)(3)(B)(iv) of the New York Tax Law), property qualifying under Section 21(b)(3)(B) of the New York Tax Law shall be deemed to have been placed in service for the purposes of paragraph Section 21(a)(3) of the New York Tax Law when a certificate of occupancy is issued for such property.

4. On-Site Groundwater Remediation Costs. "On-site groundwater remediation costs" include all amounts properly chargeable to a capital account which are paid or incurred in connection with qualifying for a COC and include costs paid or incurred in connection with the remediation of on-site ground water contamination to implement a requirement of the remediation work plan or an interim remedial measure work plan for a qualified site imposed pursuant to Section 27-1411 of the New York Environmental Conservation Law.

5. Certificate of Completion. A "Certificate of Completion" is issued to the applicant by the Commissioner of Environmental Conservation pursuant to Section 27-1419 of the New York Environmental Conservation Law.

6. Environmental Zones ("EN Zones"). An EN Zone is an area designated as such by the New York State Commissioner of Economic Development.

7. Applicable Percentage. For purposes of determining the site preparation credit component, the tangible property credit component, and the on-site ground water remediation credit

⁶ This Section IV(a)(3)(ii) of this memorandum encapsulates Section 21(b)(3)(B) of the New York Tax Law which was signed into law on July 26, 2006. Prior to this amendment to the tax law, the BRTC for qualified tangible property only applied to property depreciable under Section 167 of the Internal Revenue Code, thereby excluding applicability of the BRTC in relation to properties such as co-operatives and condominiums, which are generally not depreciable under the Internal Revenue Code. New York Tax Law Section 21(b)(3)(B) expands the BRTC to cover costs of a dwelling whose primary ownership structure is either a co-operative or condominium structure.

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component of the BRTC, the "applicable percentage" shall be 12% in the case of credits claimed under Articles 9, 9-A, 32 or 33, and 10% in the case of credits claimed under Article 22.

Where at least 50% of the area of the qualified site relating to the credit is located in an EN Zone, the applicable percentage shall be increased by an additional 8%, or to 20% and 18%, respectively.

If the COC indicates that the qualified site has been remediated to Track 1 as that term is described in Section 27-1415(4) of the New York Environmental Conservation Law, the applicable percentage as originally set forth shall be increased an additional 2%.

The BRTC Applicable Percentage amounts are summarized in the following table.

BRTC Applicable Percentage			
Taxpayer	Base Percentage	Unrestricted Use Percentage (+2%)	Environmental Zone Percentage (+8%)
Individual	10%	12%	18% or 20%
All Others	12%	14%	20% or 22%

8. Site Preparation Credit Component. The "site preparation credit component" of the BRTC shall be equal to the applicable percentage of the site preparation costs paid or incurred by the taxpayer with respect to a qualified site.

The credit component amount so determined *with respect to a site's qualification for a COC* shall be allowed for the taxable year in which the effective date of the COC occurs. Thus, costs paid or incurred for purposes of obtaining a COC are eligible site preparation costs. These costs presumably include architectural and engineering fees, legal and professional fees. Note that typically, such costs would be amortized over the life of the building placed on the site (39 years for nonresidential property and 27 1/2 years for residential rental property).

The credit component amount *so determined other than with respect to such costs for qualification for a COC* shall be allowed for the taxable year in which the improvement to which the applicable costs apply is placed in service, provided the improvement is placed into service within at least up to five taxable years after the date of issuance of such COC.

In all cases, *site preparation costs paid or incurred by the taxpayer shall only include costs paid or incurred by the taxpayer on or after the date of execution of the Brownfield Site Cleanup Agreement* between the taxpayer and the New York Department of Environmental Conservation.

9. Tangible Property Credit Component. The "tangible property credit component" shall be equal to the applicable percentage of the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, *including buildings and structural components of buildings*, which constitute qualified tangible property.

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The credit component amount so determined *shall be allowed for the taxable year in which such qualified tangible property is placed in service on a qualified site with respect to which a COC has been issued to the taxpayer for up to ten taxable years after the date of the issuance of the COC.*

The tangible property credit component shall be allowed with respect to property leased to a second party but only if such second party is a non-responsible party (a party not responsible for the disposal of hazardous waste or the discharge of petroleum at the site) or an innocent land owner (a responsible party wherein such party's liability arises solely from operation of the site subsequent to the disposal of the hazardous waste or petroleum discharge as certified by the commissioner of the New York State Department of Environmental Conservation).

In all cases, the cost or other basis for federal income tax purposes of tangible personal property and other tangible property including buildings and structural components thereof, which constitute qualified tangible property, shall only include costs paid or incurred by the taxpayer on or after the date of execution of the Brownfield Site Cleanup Agreement between the taxpayer and the Department of Environmental Conservation.

10. On-Site Ground Water Remediation Credit Component. The "on-site ground water remediation credit component" shall be equal to the applicable percentage of the on-site groundwater remediation costs paid or incurred by the taxpayer with respect to a qualified site (to the extent that such groundwater remediation costs are not included in the determination of the site preparation credit or the tangible property credit component).

The credit component so determined for costs incurred and paid with respect to and prior to the issuance of a COC shall be allowed for the taxable year in which the effective date of the issuance of a COC occurs.

The credit component amount determined in taxable years after the effective date of the issuance of a COC shall be allowed in the taxable year such qualified costs are incurred and paid for up to five taxable years after the issuance of such COC.

In all cases, on-site groundwater remediation costs paid or incurred by the taxpayer shall only include costs paid or incurred by the taxpayer on or after the date of execution of the Brownfield Site Cleanup Agreement between the taxpayer and the Department of Environmental Conservation.

11. Brownfield Site Cleanup Agreement. A "Brownfield Site Cleanup Agreement" is an agreement executed in accordance with Section 27-1409 of the New York Environmental Conservation Law by an applicant and the New York State Department of Environmental Conservation for the purpose of completing a brownfield site remedial program. A brownfield site remedial program means all remedial activities or actions undertaken to eliminate, remove, treat, abate, control, manage or monitor hazardous waste or petroleum at or emanating from a brownfield site.⁷

⁷ Section 27-1409 of the New York Environmental Conservation Law describes the provisions to be included in a brownfield site cleanup agreement. The agreement must describe the boundaries of the realty that is subject to the agreement. The agreement must require the applicant to pay for State costs incurred for overseeing and reviewing the agreement. An agreement may contain a provision that allows the applicant to offset against the State's costs any technical assistance grant, as provided under New York Environmental Conservation Law Section 27-1316, for a site that the DEC has determined poses a significant threat to the public health and the environment. The agreement must also include, but is not limited to, provisions concerning dispute resolution, State indemnification, brownfield site cleanup agreement termination, State permit exemptions, and cost recovery as well as a provision requiring any work at the affected site to be conducted pursuant to one or more work plans which are approved by the DEC. The agreement must also provide for the preparation and implementation of a community participation plan, require a waiver of any rights the applicant may have under Article 12 of the New York Navigation Law with respect to the brownfield site, and other conditions considered necessary by the DEC concerning the effective and efficient implementation of the site cleanup.

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(b) Computation of the BRTC.

1. The BRTC shall only be allowed with respect to a qualified site. The amount of the credit in a taxable year shall be the sum of: (i) the site preparation credit component; (ii) the tangible property credit component; and (iii) the on-site ground water remediation credit component.

Note that the amount of any federal, state or local government grant money or any grant received from an instrumentality thereof used by the taxpayer to pay for any costs associated with the site preparation credit component, the tangible property credit component, or the on-site ground water remediation credit component, which was not included in the federal gross income of the taxpayer, shall be subtracted in computing each of the credit components. In addition, with respect to property that qualifies for the BRTC and also for either the investment tax credit or the Empire Zone investment tax credit, only one of the credits may be claimed.

2. For Article 9 taxpayers, the BRTC will not be allowed in an amount that will reduce the tax payable to less than the applicable minimum tax. If the BRTC reduces the tax to such amount, any amount of BRTC not deductible in such taxable year shall be treated as an overpayment of tax and shall be refunded.

3. For Article 9-A taxpayers, the BRTC shall not reduce the tax due for such tax year to less than the higher of the minimum taxable income base or the fixed dollar minimum. However, if the BRTC for any taxable year reduces the tax to such amount, any amount of credit that is not deductible in such taxable year shall be treated as an overpayment of tax and shall be credited or refunded.

4. For Article 22 taxpayers, if the amount of the BRTC for any taxable year exceeds the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded to the taxpayer.

5. For Article 32 taxpayers, the BRTC for any taxable year shall not reduce the tax due for such year to less than the minimum tax. However, if the amount of the BRTC reduces the tax to such amount, any amount of BRTC that is not deductible shall be treated as an overpayment of tax to be credited or refunded to the taxpayer.

6. For Article 33 taxpayers, the BRTC shall not reduce the tax due for such tax year to less than the minimum tax. However, amounts of BRTC in excess of the minimum tax shall be credited or refunded to the taxpayer.

(c) Transfer of the Certificate of Completion.

A COC issued under the BCP can be transferred to the applicant's successors or assigns upon transfer or sale of the brownfield site. Consequently, subsequent owners can continue to claim the BRTC.

(d) BRTC Recapture

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Under the October 2004, technical amendments, BRTC recapture provisions no longer automatically apply to a disposition of the underlying asset upon which the BRTC was claimed, provided it remains in qualified use, or to a disposition of an equity interest in a partnership, LLC, or corporation.

Tax Credit for Remediated Brownfields (TCRB)

The TCRB is a refundable credit based on the amount of real property taxes imposed on a qualified site and the number of employees (employment number factor) at the site and can be claimed by a taxpayer (developer) who is an owner of a qualified site and applied against the tax imposed under Articles 9, 9-A, 22, 32 or 33 of the New York Tax Law.

(a) Definitions.

1. **Qualified Site.** Note that for purposes of the TCRB, a "Qualified Site" is a site with respect to which a COC has been issued by the Commissioner of Environmental Conservation pursuant to Section 27-1419 of the Environmental Conservation Law.

2. **Developer.** A "Developer" is a taxpayer under Articles 9, 9-A, 22, 32 or 33 of the New York Tax Law who: (i) has been issued a COC with respect to a qualified site; or (ii) has purchased or has been conveyed all or any portion of a qualified site from a taxpayer or any other party who or which has been issued a COC with respect to such site provided such purchase or conveyance occurs within seven years of the effective date of the COC issued with respect to such qualified site.

Note that a taxpayer who is purchasing all or any portion of a qualified site and a taxpayer who has been issued a COC with respect to such site may not be related persons as such term is defined under IRC Section 465(b)3(C). Partners in partnerships, or shareholders in an S corporation, where the partnership or the S corporation has been issued a COC or has purchased or been conveyed all of or a portion of a qualified site from a taxpayer who was issued a COC with respect to the site are also developers for purposes of the TCRB.

3. **Benefit Period Factor.** The "benefit period factor" is a numerical value corresponding with a TCRB benefit period of ten consecutive taxable years beginning in the tax year during which the COC is issued or the taxpayer's first tax year commencing after March 31, 2005, which ever is later. The benefit period factor is 1.0 for each year of the ten year benefit period.

4. **Employment Number Factor.** The "employment number factor" is based on the average number of full time employees, excluding executive officers, employed by the developer of a qualified site, *plus* the average number of full time employees employed by a lessee or lessees of a portion of such a qualified site, where such employees are employed at such site during a taxable year.

When the average number of full time employees as expressed above is at least 25 but less than 50, the employment number factor is .25. When the average number of full time employees as expressed above is at least 50 but less than 75 the employment number factor is .50. When the average number of full time employees as expressed above is at least 75 but less than 100 the employment number factor is .75. Finally, when the average number of full time employees is at least 100, or more, then the employment number factor is 1.

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5. Average Number of Full Time Employees. The "average number of full time employees" employed by a developer and the lessee at a qualified site during a taxable year shall be computed by ascertaining the number of such employees employed, excluding general executive officers, by the developer and such lessee or lessees on the 31st day of March, the 30th day of June, the 30th day of September, and the 31st day of December during each taxable year and dividing the sum so obtained by the number of such dates occurring within such taxable year.

6. Eligible Real Property Taxes. "Eligible real property taxes" means taxes imposed on real property which consists of a qualified site owned by the developer, provided such taxes become a lien on the real property in a period during which the real property is a qualified site. Payments in lieu of taxes by the developer with respect to a qualified site to the state, a municipal corporation or a public benefit corporation shall also be included in the term eligible real property taxes, subject to certain limitations.

7. Credit Limitation. The TCRB is subject to a credit limitation which is the product of: (i) \$10,000; and (ii) the average number of full time employees employed by the developer of a qualified site and a lessee or lessees of a portion of such qualified site during the tax year.

(b) Computation of the TCRB.

1. The TCRB shall be allowed for ten consecutive years to a developer of a qualified site wherein the amount of the credit shall be 25% of the product of: (i) the benefit period factor; (ii) the employment number factor; and (iii) the eligible real property taxes paid or incurred by the developer of the qualified site during a taxable year.

If the real property which is subject to the TCRB is a qualified site located in an EN Zone then the amount of the credit shall be 100% of the aforementioned product. However, in any case, the amount of the TCRB may not exceed the credit limitation.

Note that if the qualified site is located in an area designated as a New York State Empire Zone, and a taxpayer qualifies for both the TCRB and the Qualified Empire Zone Enterprise ("QEZE") Real Property Tax Credit, the taxpayer shall be required, in the first taxable year such taxpayer is allowed to claim the TCRB, to elect to claim either the TCRB or the QEZE Real Property Tax Credit. A taxpayer who or which has been allowed the QEZE Real Property Tax Credit in a taxable year preceding the first taxable year the taxpayer is allowed to claim the TCRB shall not be precluded from making an election to claim the TCRB.

2. For Article 9 taxpayers the TCRB will not be allowed in an amount which will reduce the tax payable to less than the applicable minimum tax. If the TCRB reduces the tax to such amount, any credit not deductible in the tax year shall be treated as an overpayment of tax and refunded.

3. For Article 9-A taxpayers, the TCRB shall not reduce the tax due for such year to less than the higher of the minimum taxable income base or the fixed dollar minimum. However, if the amount of the TCRB reduces the tax to such amount, any amount of credit that is not deductible in such taxable year shall be treated as an overpayment of tax and shall be credited or refunded.

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4. For Article 22 taxpayers, if the amount of the TCRB for any taxable year exceeds the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded.

5. For Article 32 taxpayers the TCRB for any taxable year shall not reduce the tax due for such year to less than the minimum tax. However, if the amount of the TCRB reduces the tax to such amount, any amount of TCRB that is not deductible shall be treated as an overpayment of tax to be credited or refunded to the taxpayer.

6. For Article 33 taxpayers the TCRB shall not reduce the tax due for such tax year to less than the minimum tax. However, amounts of TCRB in excess of the minimum tax shall be credited or refunded to the taxpayer.

Environmental Remediation Insurance Credit (ERIC)

The ERIC is a credit equal to the lesser of \$30,000 or 50% of the premiums paid by a taxpayer for environmental remediation insurance issued with respect to a qualified site, provided such premium or premiums are paid on or after the date of execution of the Brownfield Site Cleanup Agreement. The ERIC can be applied by the taxpayer against the amount of tax imposed under Articles 9, 9-A, 22, 32 or 33 of the New York Tax Law.

(a) Definitions.

1. **Qualified Site.** A "qualified site" is a brownfield site with respect to which a COC has been issued to the taxpayer (the applicant) by the Commissioner of Environmental Conservation.

2. **Environmental Remediation Insurance.** The term "environmental remediation insurance" shall mean that type of insurance described in Section 3447 of the New York Insurance Law, and includes insurance containing any of the following coverage or substantially similar coverages for: (i) the costs of on-site clean-up of pre-existing pollution conditions from the insured property which are outside the scope of the remedial work plan pursuant to issuance of a COC for such insured property; (ii) third-party claims for on-site bodily injury and property damage resulting from pre-existing pollution conditions outside the scope of the remedial work plan pursuant to issuance of a COC for the insured property; (iii) coverage which caps clean-up costs relating to the remedial work plan; and (iv) coverage for the costs of state re-openers pursuant to fill any gap in any liability limitation provided by the State.

(b) Computation of the ERIC.

1. The ERIC shall equal the lesser of \$30,000 or 50% of the premiums paid by a taxpayer for environmental remediation insurance issued with respect to a qualified site.

2. The ERIC shall be allowed in the tax year in which the COC is issued to the taxpayer, and shall be allowed only once with respect to a particular COC.

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3. For Article 9 taxpayers, the amount of the ERIC will not be allowed in an amount that will reduce the tax payable to less than the applicable minimum tax. Any excess amounts shall be allowed as a refund to the taxpayer.

4. For Article 9-A taxpayers, the ERIC allowable for any taxable year shall not reduce the tax due for such year to less than the higher of the minimum taxable income base or the fixed dollar minimum. Excess amounts shall be treated as an overpayment of tax and shall be credited or refunded.

5. For Article 22 taxpayers, if the amount of the ERIC for any taxable year exceeds the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded to the taxpayer.

6. For Article 32 taxpayers the ERIC for any taxable year shall not reduce the tax due for such year to less than the minimum tax. However, if the amount of the ERIC tax credit reduces the tax to such amount, any amount of ERIC tax credit that is not deductible shall be treated as an overpayment of tax to be credited or refunded to the taxpayer.

7. For Article 33 taxpayers the ERIC shall not reduce the tax due for such tax year to less than the minimum tax. However, amounts of ERIC tax credit in excess of the minimum tax shall be credited or refunded to the taxpayer.

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