



New York City Brownfield Partnership

Comment on Proposed Bill S5868

June 2023

The New York City Brownfield Partnership (“NYCBP”) is a New York State nonprofit organization whose mission is to serve as a primary resource for information on brownfields and brownfields redevelopment in New York City, advance public awareness and understanding of benefits, opportunities, and best practices of brownfield redevelopment, promote excellence in brownfield redevelopment by honoring successful brownfield projects, support the education and training of brownfield professionals, workers, and students, and foster collaborative relationships among brownfield developers, property owners, government agencies, and community groups. Its membership includes the leading environmental, scientific and engineering practitioners, governmental agencies and community groups who regularly work on remedial investigation, remediation, and redevelopment projects throughout New York.

Since 2003 the New York Brownfield Cleanup Program (“BCP”) has provided both regulators and the development market with a robust cleanup program for environmentally contaminated sites. The law, developed and amended by the Legislature over the past 20 years, carefully balances the risk associated with contaminated properties with incentives in the form of refundable New York State tax credits based on cleanup and redevelopment costs.

Last year, the Legislature and the Governor agreed to extend the tax incentives available under the BCP for another ten years. In doing so, they signaled strong support for a program that has cleaned up over 500 sites, many in economically disadvantaged areas, and generated over \$20 billion in private sector capital investment.

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Just a year later, the BCP faces a new challenge in the form of a bill seeking to impose prevailing wage requirements on private sector BCP projects. On May 9, the New York State Senate's Standing Committee on Environmental Conservation ("Senate En-Con") reported and committed to the Senate Finance Committee bill number S5868. If enacted, this bill would impose prevailing wage ("PW") requirements on private sector taxpayers—not just as a condition to tax credits, but as a condition to acceptance into and ongoing participation in the BCP. Doing so would have a severe detrimental effect on the BCP. Furthermore, although the bill creates an exemption for "affordable housing projects", the exemption would be unworkable in practice.

The Legislature has had ample opportunity to consider whether the BCP tax credits justify imposition of prevailing wage rules, but has never done so. In each of the last two years the Legislature has declined to impose PW requirements on BCP redevelopment. In 2021, the Legislature amended the Labor Law to apply PW requirements on certain private projects receiving public funds. However, at that time, the Legislature determined that BCP tax credits are not "public funds."¹ Just last year, the Legislature and the Governor agreed to a ten-year extension of the BCP in the enacted NYS 2022-23 Fiscal Year Budget, with no mention of prevailing wage requirements.²

Imposing the PW regime on BCP redevelopment as proposed in S5868 would circumvent these clear legislative determinations by conditioning BCP site acceptance and BCP tax credits on PW requirements. The bill fails to consider the burdens its enactment would impose on the New York State Department of Environmental Conservation ("NYSDEC") and BCP applicants and how this requirement would chill private investment in the remediation and redevelopment of contaminated sites across the state, particularly in upstate New York.

In particular, the bill would:

1. Bar applicants from being accepted into the program if the applicant does not require site remediation workers to be paid prevailing wages (unless the site is an affordable housing project)³ (the "Application Requirement");
2. Authorize NYSDEC to terminate a brownfield site cleanup agreement ("BCA") at any time if the applicant fails to pay prevailing wage to workers performing remediation activities (unless the site is an affordable housing project) and subjects the obligation to enforcement under the prevailing wage rules set forth in the Labor Law⁴ (the "BCA Termination Power"); and

¹ See N.Y. Labor Law § 224-a subd. 3(e).

² See 2022 N.Y. Session Laws Chapter 58, Part LL.

³ S5868 §2

⁴ S5868 §3



3. Provide that sites would not be eligible for the tangible property credit component (for buildings and other site improvements) if remedial activities are performed by workers paid less than the prevailing wage (unless the site is an affordable housing project)⁵ (the "TPC Eligibility Condition").

Each of these requirements would impose untenable burdens on private sector developers. Taken together, would harm economically disadvantaged areas and environmental justice communities that the BCP is expressly designed to benefit.

These burdens are discussed in greater detail below.

- The increase in costs due to PW requirements would jeopardize NYS' environmental justice goals that are achieved through the BCP. The BCP is unique in that it promotes the economic revitalization of and environmental justice for disadvantaged communities after long spells of disinvestment. This is particularly significant because brownfield sites are disproportionately concentrated in disadvantaged communities. By advancing remediation and redevelopment of these economically challenged areas, the BCP advances the state's flagship policies on environmental remediation, environmental justice, and the goals of the Climate Leadership and Community Protection Act.⁶ Redevelopment in these communities is often done on very thin margins because of low property values and the limitations of the markets in these areas. The bill would impose an additional financial burden on participants in the BCP, which would disincentivize and discourage prospective applicants and their financial backers from utilizing the BCP to remediate and redevelop sites. While the increased costs would impact all brownfield sites, this would have an outsized impact on disadvantaged communities in New York State, because less participation would mean less cleanup. Less cleanup of contaminated sites would, inevitably, mean contamination would continue to adversely affect these communities. This would also undermine environmental rights under the recently enacted Green Amendment.
- The bill would also adversely affect remediation projects Upstate. The bill would have a particularly pronounced impact on upstate brownfield sites. Contaminated sites are complicated, expensive, and fraught with risk, particularly upstate projects where margins for redevelopment tend to be perilously thin. The vast majority of BCP projects across upstate New York need every penny of margin, including BTCs, to be economically viable for remediation and redevelopment. Adding a PW requirement to upstate BCP sites would drive up remediation costs and result in increased up-front costs for site remediation, which

⁵ S5868 §1

⁶ Climate Leadership and Community Protection Act (S.6599) §3, 4, 6, and 7 and the State's finalized scoping plan: <https://climate.ny.gov/resources/scoping-plan/> (Chapter 19 Land Use, at pages 61, 366, 391, and 392).



would in turn increase financial risk and the volume of costs that must be carried by the project until it generates revenue. The risk associated with the increased costs would be magnified when site owners encounter unexpected contaminant issues that require more remedial work than anticipated. These risks may cause lenders and investors to avoid brownfield projects in the upstate area in particular.

- The Application Requirement is impractical. The Application Requirement would require applicants to select prevailing wage-qualified site remediation contractors prior to application into the BCP. In most projects, the environmental conditions and the work necessary to remediate them have not been fully identified at that point. However, the Application Requirement would compel applicants to seek verification from NYSDEC that the applicant's selected contractor(s) would meet PW requirements. This is akin to forcing a homeowner to choose and commit to a foundation contractor before knowing whether to put in a basement or even what kind of foundation might be required based on site conditions. Failure to meet the Application Requirement brings a drastic consequence: NYSDEC must reject the application in its entirety.
- The Application Requirement would impose a significant burden on NYSDEC. NYSDEC is not administratively equipped to independently assess whether on-site labor is receiving prevailing wage and would have to adopt procedures and regulations to make those determinations across a spectrum of parties who engage in on-site activities on a contaminated site.

Additionally, the new exemptions would require NYSDEC to make a determination as to whether planned development on a site would qualify as an affordable housing project for every such project in New York State. While NYSDEC has been making such determinations with respect to affordable housing project for sites in New York City for several years, this shift to state-wide review would create significant administrative burdens for NYSDEC staff. By requiring NYSDEC to assume responsibility for oversight well beyond their expertise and for eligibility determinations on a significantly larger scale, the bill would limit NYSDEC staff's ability to timely manage the other functions of the BCP and other important environmental programs in NYS.

- The exemption for Affordable Housing Projects from the Application Requirement is unworkable. The bill would exempt "affordable housing projects" as defined in NYSDEC regulations from the obligations in the bill. However, in order to clear the Application Requirement and get any site into the BCP, a site with some amount of affordable housing would need to seek a determination from NYSDEC that it is exempt from the PW requirement. Any applicant seeking the affordable housing exemption from PW would have to submit proof with the application that the project meets NYSDEC's regulations defining an affordable housing project. Those regulations generally require a regulatory agreement or other legally



binding restriction linked to Area Median Income. However, the documentation necessary to support that determination is generally not available at the time of the application, or at least until the project has closed on its financing, which often comes after the Remedial Action Work Plan is approved by NYSDEC.⁷ By interposing the requirement to qualify as an affordable housing project at such an early stage, the bill may limit the applicability of the exemption for affordable housing projects. Some affordable housing projects simply will not happen because of delays caused by the requirement of this bill. For the projects that do survive, the added cost associated with these delays will impose materially greater pre-development costs on affordable housing projects.

- The bill would create severe cash flow issues for BCP applicants. Developers of BCP sites must pay cleanup and development expenses on a current basis and then wait, typically 3-5 years, for partial reimbursement of those expenses in the form of tax credits. This creates a significant cash flow issue for BCP applicants. That problem will be exacerbated if BCP applicants have to bear even higher up-front costs imposed by prevailing wage requirements. Combined with the new \$50,000 application fee, the prevailing wage requirement will be a severe disincentive to sites enrolling in and being remediated under the BCP.
- Limiting the contractors eligible to perform remedial work would reduce the available vendors in a market, which could increase costs. Handling contaminated materials is risky and requires specialized training. Not all regions are rich with experienced site remediation contractors able to handle the rigors and complexity of work required by the BCP. The PW requirement would likely narrow the universe of qualified contractors and subcontractors, which could drive up the cost of such vendors. If an applicant were to commit to a contractor that met PW requirements but later needed to select a different contractor that did not meet PW requirements for some or all of the remedial work because of limited alternative contractors available, NYSDEC could force the site out of the BCP under the BCA Termination Power, regardless of how far along the remediation and the overall development may be. This would be a catastrophic outcome for most projects.
- The bill creates confusion related to contracting work on brownfield sites. In many (perhaps most) cases, site remediation and vertical development are undertaken by the same contractor, particularly where the foundation system is part of the remedial cover system. If the bill were enacted, site owners would have to wrestle with a prevailing wage requirement for the remedial scope but not the vertical development scope. Furthermore, the bill does not provide clarity on work that might serve both as a remedial measure

⁷ Under current law and regulations, NYSDEC must make the determination as to whether a site will include an affordable housing project by the time the Certificate of Completion is issued at the close of remedial work and even in that case the documentation may not be available until after that point.



and as a part of the vertical development, such as the construction of the foundation systems that serve as cover systems.

- The bill would drive up the cost to New York State taxpayers with no additional environmental benefit. The effect of this bill would be to increase the cost of remediation work being performed on sites in the BCP in several ways (i.e., the direct costs of PW requirements, the administrative costs of delays associated with NYSDEC oversight of PW requirements, the potential increased fees of contractors complying with PW requirements in markets with limited competition). The net result of the bill would be to make brownfield remediation more complicated and costly for project developers and New York State alike, while likely not increasing the quantity of sites in the BCP nor improving the remediation measures implemented on such sites.

Given the critical issues raised above, the Partnership respectfully urges the proponents of Senate Bill S5868 to reconsider. In its current form, the bill would not be beneficial to the BCP, would cost both developers and the State more money, would represent a huge administrative burden on NYSDEC, and would significantly undermine the state's critical and strategic policy goals of remediating brownfields and revitalizing disadvantaged communities.