

REAUTHORIZATION AND EXPANSION OF THE BROWNFIELDS TAX INCENTIVE: TAX RELIEF AND HEALTH CARE ACT OF 2006

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On Dec. 20, 2006, the Tax Relief and Health Care Act of 2006 extended the Brownfields Tax Incentive (Incentive) a fifth time. The Incentive allows deduction of "qualified environmental cleanup costs" in the year incurred or when taxes are paid. P.L. 109-432. "Qualified environmental cleanup costs" are costs "paid or incurred in connection with the abatement or control of hazardous substances at a qualified contaminated site." P.L. 105-304 § 198(b)(1)(B). Qualified cleanup costs can include "site monitoring; cleanup costs; operation and maintenance costs; state voluntary cleanup program oversight fees; and removal of demolition debris." See "Brownfields Tax Incentive Guidelines" at www.epa.gov/brownfields. Sites qualifying for the Incentive must meet two criteria. First, the site must be "held by the taxpayer for use in a trade or business or for the production of income." P.L. 105-304 § 198(c)(1)(A)(i). These sites may include "trade or business property, investment property, or property held as inventory." See *id.* However, qualified sites do not include "personal use property." *Id.* Second, the site must be one "at or on which there has been a release (or threat of release) or disposal of any hazardous substance." P.L. 105-304 § 198(c)(1)(A)(iii). Extension of the Incentive applies retroactively to include "expenditures paid or incurred after December 21, 2005." P.L. 109-432.

The Incentive was originally enacted through passage of the Taxpayer Relief Act, which was signed by President Clinton on Aug. 5, 1997. Public Law 105-304. The Incentive originally applied to cleanup expenditures through 2000. As enacted in 1997, the Incentive applied only to: (i) qualified contaminated sites within (ii) targeted areas. Public Law 105-304. Qualified contaminated sites were defined as sites

within a targeted area, at or on which there has been a release (or threat of release) or disposal of any hazardous substance. *Id.* Targeted areas were originally defined as high poverty areas and nearby industrial/commercial redevelopment sites, empowerment zones and communities, and sites not listed on or proposed for the National Priorities List. *Id.*

President Clinton extended the Incentive on Dec. 17, 1999 to apply to expenditures through 2001. Public Law 106-70. The Taxpayer Relief Act was amended on Dec. 21, 2000, as part of the Consolidated Appropriations Act of 2001. P.L. 106-554. The amendments extended the Incentive through 2003, and expanded its application. The 2000 amendments expanded application of the Incentive to include expenses for remediation of sites not within a targeted area. P.L. 106-554. The Working Families Tax Relief Act of 2004 extended the Incentive a fourth time through Dec. 31, 2005.

In addition to extending the Incentive through Dec. 31, 2007, the Tax Relief and Health Care Act of 2006 also expands application of the Incentive. The Incentive now includes sites contaminated with "any petroleum product," as defined in Section 4612(a)(3) of the Internal Revenue Code. That definition, in Title 26 of the Internal Revenue Code, "includes crude oil." The definition of crude oil, in turn, "includes crude oil, crude oil condensates and natural gasoline." 26 U.S.C. §4612(a)(1). By allowing deduction of expenses for the cleanup of these petroleum products, the legislation allows deduction of expenses for sites previously ineligible for the Incentive. For instance, leaking underground storage tank (LUST) sites contaminated with petroleum products, as defined above, may now qualify for the Brownfields Tax Incentive. LUST sites, while eligible for some brownfields grant funding, were not previously eligible for the Incentive. A report prepared by the Government Accountability Office (GAO) cites EPA data, which confirms 450,000 releases from underground storage tanks, of which "100,000 releases had not yet been fully cleaned up."

See United States Government Accountability Office, Report to Congressional Requesters, “Leaking Underground Storage Tanks, EPA Should Take Steps to Better Ensure the Effective Use of Public Funding for Cleanups” (Feb. 2007). The GAO Report also found that “[i]n the past 20 years, EPA and states have spent over 10 billion in public funds to clean up these releases.” *Id.*

Little current data exists demonstrating the frequency with which the Incentive is utilized. In fact, the author located only one report, prepared by the Congressional Research Service (CRS), which provides data evidencing potential use of the Incentive as a brownfields redevelopment tool on a state-by-state basis. See CRS Report for Congress, “Brownfields Tax Incentive Extension,” by Mark Reisch, Analyst in Environmental Policy, Resources, Science and Industry Division, CRS-1 – CRS-5, (Oct. 17, 2006). This report cites to a CRS survey conducted between June and April 2003, which counted 161 applications for certification for receipt of the Incentive in twenty-seven states. *Id.* at CRS-2. Of these 161 applications, 147 were approved. *Id.* However, twenty-three states reported receiving no applications for certification for the Incentive. *Id.* These states were: Alabama, Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Iowa, Kansas, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming. CRS Report for Congress, “Brownfields Tax Incentive Extension,” by Mark Reisch, Analyst in Environmental Policy, Resources, Science and Industry Division at CRS-2 and CRS-3. It is unclear why these states received no applications for certification for the Brownfields Tax Incentive. In the twenty-seven states receiving applications for certification of the Incentive, the average estimated time for a decision on applications for certification ranged from same day approval to sixty days. CRS Report for Congress, “Brownfields Tax Incentive Extension,” by Mark Reisch, Analyst in Environmental Policy, Resources, Science and Industry Division at CRS-4 and CRS-5.

Cleanup of brownfields restores sites to productive use, facilitates job growth, and substantially increases

tax revenues for local governments. Additionally, cleanup revitalizes otherwise dormant, and frequently blighted urban core areas, thus promoting smart growth by taking development pressures off undeveloped, open land. EPA updated its guidelines and other information resources to reflect this latest extension and expansion of the Incentive, which are available online at www.epa.gov/brownfields.