

Assessment of Public Comment
Comments Received on Revised Proposed Part 375 Definitions Rulemaking

Comment Period: March 9, 2016 – April 8, 2016

Committer	Specific Comments	Response
1	1- The proposed and revised definition of “underutilized” is unduly restrictive and is inconsistent with the spirit and plain language of the Brownfield Cleanup Program (BCP).	Response 1-1: New York State Department of Environmental Conservation (DEC) does not agree that the revised definition is unduly restrictive. It was clearly the intent of the Legislature to limit eligibility for Tangible Property Tax Credits (TPCs) in cities with a population of a million or more, as evidenced by the statutory restrictions adopted. Nonetheless, in response to concerns raised by the definition proposed on June 10, 2015, DEC significantly broadened the definition and increased the number of sites eligible for TPCs by revising the definition to allow for commercial use in addition to industrial use, with up to 25% restricted residential uses for “underutilized” properties. The revised definition responds to the Legislative mandate to limit the number of sites that are eligible for TPCs.
1	2- The definition of “underutilized” relies too heavily on the future use of the property as commercial or industrial development. This contravenes the statutory directive to “take into consideration the existing use of a property relative to the allowable development under zoning.”	Response 1-2: The definition of “underutilized” incorporates New York City’s (NYC) express desire that the Brownfield Cleanup Program (BCP) encourage industrial and commercial development, and DEC was statutorily required to consult with NYC on the definition. Properties that are not zoned for commercial or industrial use would be zoned for residential use and while they would not qualify as underutilized, they could qualify as affordable housing, or be located in an environmental zone (EnZone), or possibly be upside down. The other eligibility pathways provide separate avenues for TPCs for residentially-zoned properties.
1	3- The definition of “underutilized” failed to consider other statutory definitions and virtually no sites will qualify under the Tax-in-Arrears test and the need for substantial governmental assistance test is highly subjective and difficult to administer.	Response 1-3: During the development of the statute, the Executive and Legislature evaluated the use of existing definitions of “underutilized” and did not come to the conclusion that any of those definitions were appropriate for eligibility for the TPCs associated with the BCP. In developing the regulatory definition, DEC reviewed other state and city laws, as well as other states’ definitions and determined that these other definitions did not provide a workable definition in the context of the BCP. In many circumstances, the definitions in other laws are subjective and it is clear that in this area having the most objective criteria possible minimizes risk both for applicants and the State. DEC chose these criteria because they are more objective and easier to determine than other potential criteria.

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2	1- The revised definition of “underutilized” improves upon the original proposal, yet it is still restrictive and relies too heavily on the anticipated future uses.	Response 2-1: DEC agrees that the definition is an improvement and appreciates the input and comments that were received. The revised definitions reliance on anticipated future uses met the express desire of NYC to promote industrial and commercial future uses at underutilized sites. See also Response 1-2.
3	1 - The revised definition of “underutilized” is overly restrictive.	Response 3-1: See Response 1-1.
3	2 - The definition of “underutilized” overemphasizes the value of commercial and industrial development and many sites that should be considered underutilized are not suitable for commercial and/or industrial use or commercial and industrial uses are not desired by the surrounding community.	Response 3-2: See Responses 1-2 and 2-1. It is also important to note that underutilized only pertains to TPCs. For example, a market rate housing project that qualifies as a brownfield, but is ineligible for TPCs, would still be eligible to participate in the BCP, seek site preparation tax credits and receive the release of liability offered by the BCP. The liability release is also available through the new BCP-EZ program, once regulations for this program are written and adopted. Only sites seeking the TPCs would be subject to the “underutilized” definition, if not otherwise eligible under one of the other gateways.
3	3 - As a practical matter, in NYC very few sites will qualify as “underutilized” through the Tax-in-Arrears Test because of NYC’s policy and procedures regarding tax delinquencies. Additionally, in NYC very few buildings will qualify as condemned or as having acute structural deficiencies because of NYC’s procedures regarding building code violations.	Response 3-3: DEC has considered this argument and believes that these criteria are valid indicators of underutilization. The regulation is intended to provide objective tests with clear parameters of which these are two. DEC included these criteria to broaden the definition and allow for more sites to meet the definition of underutilized.
3	4 - There is no governmental agency capable to certify that “substantial government assistance” is required for underutilized properties.	Response 3-4: In developing the definition, the DEC consulted with NYC and NYC has indicated it would be able to provide the needed certification. Economic development agencies often conduct such evaluations.
4	1 - The time limit for the Tax-in-Arrears test should be three years rather than five years.	Response 4-1: DEC has considered this argument and believes that the five year limit is appropriate to demonstrate underutilization without creating an adverse incentive to not pay taxes.
4	2 - Several developers have reported that they have identified sites that could be eligible under the revised definition of the “underutilized”.	Response 4-2: DEC concurs with this observation and believes that the final definition will provide opportunities for truly underutilized and deserving brownfield sites to reap the benefits of the TPCs.

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4	3 - The definition of “underutilized” should be expanded to include “government support” and the definition of “substantial government assistance” should include “‘or land environmental investigation or cleanup grant’ from a governmental entity.”	Response 4-3: The definition includes “grant” within the definition of “substantial government assistance” as well as specifically including tax credits. Additionally, the final definition now includes a clarification which allows for a combination of different types of assistance in order to meet the requirement for substantial government assistance.
5	1 - 6 NYCRR 375-2.2(i)(7) must be modified to remove the reference to CERCLA.	Response 5-1: While DEC agrees with this comment, this matter is not the subject of this rulemaking and will be addressed in the planned future update to the Part 375 regulations.
6	1 - The definition of “underutilized” is overly restrictive and the requirement that 75% of the eligible site be developed for commercial or industrial purposes overemphasizes the commercial and industrial development and does not encourage common space, urban agriculture and community space. The definition of underutilized should be amended to include uses that benefit the community, as well as commercial and industrial uses.	Response 6-1: See Responses 1-2 and 2-1.
6	2 - Underutilized should not be predicated on the future use of the site, but should include a review of the current use and an evaluation of the surrounding neighborhoods current uses.	Response 6-2: See Responses 1-2 and 2-1.
6	3 - The “underutilized tests” will be difficult to administer and few sites will qualify. The Tax-in-Arrears test will not have much practical value.	Response 6-3: See Response 3-3.
6	4 - The need for substantial government assistance should be a factor for consideration, but not a requirement, additionally it is unclear which governmental entity would make this determination.	Response 6-4: The express language of the statute directs DEC to consider substantial government assistance in developing its regulatory definition of underutilized. The City of New York or an entity of the State would certify (see Response 3-4) that the proposed development requires substantial government assistance, and DEC would consider that certification in its determination on eligibility for TPCs for underutilized properties.
7	1 - The revised definition of underutilized would exclude many properties outside of Manhattan because they are not in EnZones, are not to be developed for affordable housing and will not have future uses that are primarily or commercial or industrial uses.	Response 7-1: DEC considers these properties to be potentially eligible under the upside down gateway.

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7	2 - The proposed definition of “underutilized” would limit the potential for TPCs for primarily family-owned properties, which have tremendous potential to improve neighborhoods and create jobs and growth.	Response 7-2: See Response 7-1. In addition, it should be noted that any site meeting the definition of a "brownfield" remains eligible to participate in the site preparation tax credits and receive the release of liability offered by the BCP. The liability release is also available through the new BCP-EZ program, once regulations for this program are written and adopted. Only sites seeking the TPCs would be subject to the “underutilized” definition, if not otherwise eligible under one of the other gateways.
7	3 - The proposed definition of underutilized would be unnecessarily restrictive on mixed-use re-developments and would fail to encourage market-rate housing in NYC.	Response 7-3: See Response 1-2 and 2-1. In addition, sites have the potential to eligible for TPCs as affordable housing, under the upside down gateway, or possibly in an EnZone.
7	4 - The use restrictions under the definition of “underutilized” interfere with holistic, community-specific redevelopments.	Response 7-4: The definition of “underutilized” will not impose use restrictions. If community-specific redevelopments are preferred and more beneficial for a community the market will drive those developments without need for TPCs, in the alternative these sites may qualify under the upside down gateway or as affordable housing.
7	5 - It is alleged that NYC does not want to certify any condition on private property to facilitate entry into the BCP.	Response 7-5: DEC has consulted with NYC on the proposed definition, and NYC is willing to certify that a proposed development requires substantial government assistance. In revising the proposed definition, other certifications were shifted from NYC to the applicant, in response to previous comments regarding these issues.
7	6 - The definition of “substantial government assistance” should allow the municipality to count the BCP tangible property credits, as government assistance towards making the certification that the Project would not go forward without “substantial government assistance.”	Response 7-6: See Response 4-3.
7	7 - The state of being in arrears does not equate with underutilization.	Response 7-7: DEC has considered this argument and disagrees. The state of being in arrears is an indicator that the property is being underutilized.
7	7 - The definition of underutilization should be revised. There are other statutory definitions of underutilized that could be applied in the context of BCP, which would be more consistent with the legislative intent.	Response 7-8: See Response, 1-3.

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8	1 - The definition of “underutilized” should mean that the site’s prior commercial or industrial uses has caused environmental contamination such that its current use is impacted.	Response 8-1: DEC has considered this definition and believes that the proposed definition more accurately reflects the Legislature’s intent regarding underutilized.
8	2 - DEC did not consult with the business community and the definition of underutilized does not adequately take into consideration the existing use of the property.	Response 8-2: DEC disagrees. DEC consulted with the real estate and business community prior to proposing the initial definition, held a public hearing (July 29, 2015), collected public comments, and is proposing this revised regulation specifically to put forth changes that were made based on comments received from the public and business community.
8	3 - The proposed definition of underutilized exceeds the statutory mandates.	Response 8-3: DEC disagrees. The definition, which was originally proposed on June 10, 2015, was revised (based comments from the business community and public) to accurately reflect the clear Legislative mandate to limit eligibility for properties that are not underutilized. DEC further believes that the final regulation, which reflects the comments of the business community and interested parties, not only meets the statutory mandates but also incorporates the concerns identified by the regulated community.
8	4 - Under the proposed definition of underutilized, only commercial and industrial uses can receive tangible property tax credits and market rate housing projects cannot earn tangible property tax credits.	Response 8-4: A mixed use project with up to 25% residential use can still meet the definition of underutilized. Also see Responses 1-2 and 2-1.
8	5 - The proposed definition of “underutilized” relies only on commercial and industrial uses and it illogical, arbitrary and capricious. DEC should not be making land use decisions.	Response 8-5: DEC is in no way mandating land use. See Responses 1-2 and 2-1.
8	6 - There are many definitions of the underutilized, including the definitions of numerous NYS State agencies and many different definitions from other states. For example, the commenter provided an example definition that defines underutilized as any area of the state that receives less than 15 percent of the total film and television production in the state during a fiscal year.	Response 8-6: As demonstrated by the commenter’s own examples, definitions of underutilized from other sources would not work for the NYS BCP. See Response 1-3.
8	7 - DEC should revise the definition of underutilized to mimic the New York City code.	Response 8-7: The New York City Code definition has no applicability to the BCP. See also Response 1-3.

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8	8 - The definition of underutilized, which includes “as certified by the municipality in which the site is located”; municipalities do not certify that proposed developments could not take place without substantial government assistance.	Response 8-8: See Responses 3-4 and 6-4.
8	9 - The definition of underutilized, which includes “as certified by the municipality in which the site is located”; does not specify the form of certification or the proper parties from whom to request this certification.	Response 8-9: DEC understands the concern and will work with applicants and NYC to develop an appropriate form.
8	10 - The time frame for the “Tax-in-Arrears” test should be revised from five years to one year.	Response 8-10: DEC has evaluated this suggestion and believes that one year is too short of a timeframe to be a legitimate indicator of underutilization and because one year is such a short time frame it could have the perverse effect of encouraging entities to stop paying property tax specifically for the purpose of qualifying for TPCs.
8	11 - The commenter finds the portions of the definition that refer to finding that the building is presently condemned or presently exhibits structural deficiencies or there are no structures to be reasonable and transparent.	Response 8-11: Comment noted.
8	12 -The proposed definition is inconsistent with the statutory mandate of ECL §27-1405(30) and DEC should re-write the definition of underutilized.	Response 8-12: See Response 1-1.

Commenters

- 1 – NYS Bar Association, Environmental Law Section: Dave Freeman and Larry Schnapf
- 2 – Brownfield Coalition of the Northeast (BCONE): Steve Jaffe
- 3 – NYC Brownfield Partnership: Mimi Raygorodetsky
- 4 – NYC Office of Environmental Remediation (NYCOER): Mark McIntyre
- 5 – NYS Superfund Coalition: Tom Walsh
- 6 – The Business Council of New York State, Inc.: Darren Suarez
- 7 – Real Estate Board of New York (REBNY): Ryan Baxter
- 8 – Knauf Shaw LLP: Linda Shaw