

# New Jersey Establishes Tax Credit Program for Brownfields Cleanup and Redevelopment

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On January 7, Governor Murphy signed into law the Brownfields Redevelopment Incentive Program Act (the Brownfields Act) as part of the broader New Jersey Economic Recovery Act of 2020 (the Recovery Act) ([A4/S3925](#)). The Recovery Act, effective immediately, appropriates over \$55 million in spending and allows over \$14 billion in potential tax credits aimed at various sectors and community projects.

The Brownfields Act authorizes \$50 million in annual tax credits over six years to eligible developers of underused, contaminated commercial properties, known as “brownfields.” The tax credits are meant to compensate developers for the costs of cleaning up brownfields before development.

### Program Summary

Features of the program include:

- The New Jersey Economic Development Authority (EDA) will house the program, but EDA will work closely with the New Jersey Department of Environmental Protection (DEP) in considering tax-credit applications.
- To receive a tax credit, a developer must apply to EDA and meet several requirements, including that it has not begun cleanup except for investigative work (unless it certifies that it could not have reasonably known the extent of the contamination when cleanup began); that it cannot foot the entire cleanup bill after good-faith efforts to secure funding; that the development is economically infeasible without the tax credit; and that it will meet certain labor standards in hiring workers for site cleanup.
- In considering applications, EDA can consult with DEP to weigh various other

eligibility factors such as the development’s community benefits, whether the development will reduce environmental stressors on overburdened communities, and the diversity of the developer’s board (if it has one).

- Before cleanup begins, EDA and the developer must enter into a redevelopment agreement that sets the tax credit amount, a cleanup completion date, the expected cleanup cost, and reporting requirements. However, the developer must first (1) prove to DEP that the developer is not responsible for the site’s contamination under the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11g (the Spill Act) and (2) subrogate to DEP the developer’s Spill Act rights to recover site remediation costs from other persons.
- EDA will award the tax credit once cleanup is complete. The tax credit cannot exceed the lesser of 40 percent of cleanup costs (projected or actual) or \$4 million, and will count against the corporate “franchise tax” under the Corporations Business Tax Act, N.J.S.A. 54:10A-5.
- EDA, in consultation with DEP, can promulgate implementing regulations.

### Analysis

The Brownfields Act will provide a welcome boost to a development sector that, like many others, has struggled through the COVID-19 pandemic. It will also further spur development of New Jersey’s many underused, contaminated properties in an equitable and community-oriented way.

Given the program’s size, however, it will likely be highly competitive. As EDA can award up to \$4 million in tax credits per development but not

over \$50 million per year to all developments statewide, as few as 13 projects could deplete the program each year.

The Brownfields Act also leaves several gaps to be filled by regulations, despite the Recovery Act's being effective immediately. For instance, it does not specify how a developer can prove that a development is economically infeasible without a tax credit. Nor does it explain how EDA and DEP will evaluate other criteria such as a development's community benefits and easing of environmental-justice concerns. Yet these factors may be crucial given the program's expected competitiveness and the Murphy administration's focus on environmental justice (including [recently enacted legislation](#)).

The legislation is largely silent on how to meet its environmental requirements as well. It is unclear how a developer can show that it is not responsible for site contamination under the Spill Act and, thus, eligible for the tax credit. And as for EDA remediation agreements, the Brownfields Act does not indicate how the

cleanup completion date will be set (i.e., whether it will be tied to DEP-mandated deadlines) or whether DEP will be involved in negotiating the agreements.

The Brownfields Act, like the larger Recovery Act, will be critical as New Jersey and the nation continue to suffer from the COVID-19 pandemic. But given the Brownfields Act's gaps, developers, community groups, and other stakeholders should look out for EDA regulations and guidance in the near future. In the meantime, developers should begin considering how to meet the Brownfields Act's requirements, including how their developments will benefit nearby communities and reduce environmental inequities. They should also evaluate any liability and defenses they may have under the Spill Act and plan for fulfilling the Brownfields Act's labor requirements.

If you have any questions about the Brownfields Act or New Jersey's brownfield redevelopment initiatives, please contact the authors of this article.

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