

Contaminated Land Redevelopment Credit



OFFICE OF THE STATE AUDITOR

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The Contaminated Land Redevelopment Credit (Brownfields Credit) allows property owners to claim an income tax credit for voluntary cleanup of contaminated land—known as brownfields—located in Colorado. The credit’s purpose is “to encourage voluntary environmental remediation of contaminated sites by providing a financial incentive to move forward with costly remediation projects.” Our office issued an evaluation of the Brownfields Credit in 2022. Statute requires our office to “review a tax expenditure with a statutory repeal date so that the evaluation report for such tax expenditure is available during the legislative session held in the calendar year before the tax expenditure is scheduled to repeal” [Section 39-21-305(1)(d), C.R.S.]. The credit is scheduled to expire at the end of 2024. Since we evaluated the Brownfields Credit recently, this follow-up evaluation focuses on evaluating the substantive changes made to the credit by House Bill 22-1392, which include a higher cap on credits that may be certified and reserving a certain amount of the cap for projects in rural communities, a larger credit for remediation projects that occur in rural communities, and an expanded definition of “qualified entities.”

We found:

- As noted in our 2022 evaluation of the Brownfields Credit, the credit likely provides a relatively modest additional incentive to remediate contaminated land, but other factors are often more important to property owners when deciding whether to go forward with projects.
- In this evaluation, we found that other factors besides the credit, particularly unfavorable market conditions, have been impacting the number of brownfield sites that are being remediated, including in rural communities.
- Additional qualified entities, such as urban renewal authorities and school districts, appear to be benefitting from the Brownfields Credit with the expanded definition from House Bill 22-1392.

Policy Considerations

We did not identify any policy considerations for this evaluation.

Tax Type:	Income tax	Year Enacted:	2014
Expenditure Type:	Credit	Repeal/Expiration date:	Dec. 31, 2024
Statutory Citation:	Section 39-22-526, C.R.S.	Credits Certified (2022):	\$2,554,836

Purpose given in statute or enacting legislation? **Yes**



Contaminated Land Redevelopment Credit

Background

The Contaminated Land Redevelopment Credit (Brownfields Credit) allows property owners to claim an income tax credit for voluntary cleanup of contaminated land—known as brownfields—located in Colorado. The credit is set to expire at the end of Calendar Year 2024.

The Brownfields Credit is calculated as 40 percent of the first \$750,000 spent on approved remediation plus 30 percent of the next \$750,000. No credit is allowed for expenditures that exceed \$1.5 million. Therefore, the maximum credit allowed is \$525,000. For tax years beginning on or after January 1, 2022, if the approved remediation site is located in a rural community, the credit amount is increased to 50 percent of the first \$750,000 spent plus 40 percent of the next \$750,000, for a total maximum credit of \$675,000. For the purposes of the credit, a rural community is a municipality or an unincorporated part of any county with a population of less than 50,000 people that is not located in the Denver metropolitan area. Statute allows the Colorado Department of Public Health and Environment (CDPHE) to certify up to \$5 million in credits each year; \$2 million of the \$5 million is reserved for projects in rural communities [Section 39-22-526(3), C.R.S.].

Technical Note:

There is no formal process for sites to be designated as brownfields. CDPHE considers brownfields to be abandoned, idled, or under-utilized properties where redevelopment is complicated by the presence of a hazardous substance, pollutant, or contaminant. Some examples of brownfield sites are former gas stations, dry cleaning shops, mining operations, power plants, and agricultural processing facilities.

The credit is not refundable, but may be carried forward for 5 years if the taxpayer does not have sufficient tax liability to use all of the credit in the year in which it was generated. Alternatively, the taxpayer or a qualified entity (defined below) can transfer the credit to a taxpayer who can use it; transferring the credit typically involves the taxpayer or qualified entity that completed the remediation project selling the credit at a discount to another taxpayer who can use the credit to offset their income tax liability. According to a Colorado-based tax credit broker, credits are typically sold at 85 percent of their value (e.g., a \$100,000 credit sells for \$85,000). According to CDPHE staff, in 2021 and 2022, all Brownfields Credits were transferred from the taxpayer or qualified entity that earned the credit to another taxpayer.

For purposes of the credit, qualified entities are nontaxable entities such as nonprofit organizations and local governments. They are defined in statute to include counties, municipalities, school districts and charter schools, state institutions of higher education, public improvement districts (including urban renewal authorities and downtown development authorities), conservation and irrigation districts, public corporations organized pursuant to law, and private nonprofit entities that are exempt from Colorado income tax [Section 39-22-526(2)(d), C.R.S.]. Since qualified entities are not typically income tax paying entities, these entities will often transfer (sell) their credits, which allows them to receive a financial benefit from the credit. For qualified entities, the credit is referred to as a “transferable expense amount.” Throughout this report, we refer to credits and transferable expense amounts collectively as “credits.”

Nine other states offer tax expenditures that are similar to Colorado’s Brownfields Credit, although there is variation in how the tax expenditures operate. Three states offer transferable credits and in two states, the credits are refundable (in one of these the credit is only refundable if the entity is a 501(c)(3) nonprofit organization). Two states allow the credits to be earned by nontaxable entities; in Florida, municipalities and counties are eligible for the credit and in Iowa, 501(c)(3) nonprofit entities may earn a credit. Several states also allow for a larger credit if certain requirements are met. For example, Maryland and New Jersey allow a larger credit if the brownfield site is located in a designated area, such as an enterprise zone or distressed area. Other states allow for an enhanced credit based on property use, such as manufacturing in New York and affordable housing or health care facilities in Florida.

In order to be eligible for the credit, which the General Assembly created in 2014, a qualified entity or taxpayer must submit an application to the Voluntary Clean-up Program within CDPHE. In 1994, the General Assembly created the Voluntary Clean-Up Program to provide guidance and financial assistance for remediating contaminated lands [Section 25-16-301 et seq., C.R.S.]. Sites eligible for the Voluntary Clean-Up Program are brownfields that are not under federal or state environmental regulations, often because the contamination occurred prior to such regulations. Statute excludes the following types of sites from the Voluntary Clean-Up Program—sites designated as “superfund” sites and placed on the National Priorities List by the U.S. Environmental Protection Agency (EPA); sites subject to the federal Resource Conservation and Recovery Act or the State Hazardous Waste Disposal Site program run by CDPHE; and sites subject to CDPHE’s Water Quality Division enforcement actions or the Underground Storage Tank program administered by the Colorado Department of Labor and Employment [Section 25-16-303(3)(b), C.R.S.]. Entities participating in the Voluntary Clean-Up Program may also apply for a loan through the Colorado Brownfields Revolving Loan Fund. This program offers low-cost financing at reduced interest rates and flexible terms. The loan is administered by CDPHE, the Colorado Housing and Finance Authority, and the loan fund’s Board of Directors, which approves loans. Entities may receive both a loan and a Brownfields Credit. According to CDPHE staff, one project in the last 3 years has applied for both the loan program and the tax credit.

CDPHE is responsible for determining whether a property is eligible for the Voluntary Clean-Up Program. In order to qualify, Section 25-16-304, C.R.S. requires the property owner to submit a plan that provides:

- An environmental assessment that describes the property’s contamination and its risk to public health and the environment.
- A plan for remediation of the contaminated land that either has or could release contamination that poses an “unacceptable” risk to public health and the environment. The plan needs to consider the site’s present and future use, and a timetable to implement the plan and monitor the site after completion of the remediation.
- A description of state standards that apply to the soil, surface water, or groundwater—or if no standards exist, a description of the plan’s proposed clean-up levels and existing risks to public health and the environment.

In order to be certified for the credit by CDPHE, property owners must complete the following steps:

- Submit a Voluntary Clean-Up Program plan to CDPHE for approval and pay a fee of \$2,000 to compensate CDPHE for the time it spends reviewing the plan. Voluntary Clean-Up Program plans include the applicant’s estimated costs of remediation and the projected tax credit based on those costs.
- Complete the remediation described in the plan.
- Receive a No Action Determination letter from CDPHE, which confirms that the remediation is complete and, generally, that neither CDPHE nor the federal government will require additional remediation.
- Submit documentation to CDPHE on the actual remediation costs, such as invoices detailing payments for remediation.
- Receive a certification letter for the credit from CDPHE that shows the credit amount based on actual remediation costs.
- Claim the credit on their income tax return or transfer the credit. If the credit is transferred, the transferor and transferee must jointly file a copy of the written transfer agreement with CDPHE within 30 days after the transfer.

Statute provides that the specific legislative purpose of the Brownfields Credit is “to encourage voluntary environmental remediation of contaminated sites by providing a

financial incentive to move forward with costly remediation projects” [Section 39-22-526(3.5)(b), C.R.S.]. Additionally, statute provides that the general purposes of the credit are to “induce certain designated behavior by taxpayers” and “provide tax relief for certain businesses or individuals” [Section 39-22-526(3.5)(a)(I) and (II), C.R.S.]

Our office issued a Brownfields Credit evaluation in January 2022. In that evaluation, we found that the credit provides a relatively modest additional incentive to clean up contaminated land and appears to have encouraged some property owners to go forward with remediation projects. However, it is likely more effective for properties that are located in marginal redevelopment markets and for property owners with less funding available for remediation and redevelopment, whereas well-funded redevelopment projects in strong redevelopment markets may already have strong incentives to complete remediation. In our 2022 evaluation, we also had several policy considerations for the General Assembly, including (1) amending statute to allow entities such as school districts, urban renewal authorities, and business improvement districts to qualify, (2) reviewing the annual aggregate cap on credits, and (3) reviewing the effectiveness of the credit and whether it is meeting its purpose to the extent intended.

The Brownfields Credit was originally set to expire December 31, 2022. In 2022, with House Bill 22-1392, the General Assembly extended the expiration date to December 31, 2024. In addition to extending the credit through the end of 2024, House Bill 22-1392 made other substantive changes to the credit, including providing a larger credit amount for remediation projects located in rural communities; increasing the overall cap for credits that can be issued annually from \$3 million to \$5 million, while providing that \$2 million must be reserved for projects in rural communities; and expanding the list of qualified entities eligible to receive a transferable expense amount for completing remediation projects. These changes went into effect in 2022. Statute requires our office to “review a tax expenditure with a statutory repeal date so that the evaluation report for such tax expenditure is available during the legislative session held in the calendar year before the tax expenditure is scheduled to repeal” [Section 39-21-305(1)(d), C.R.S.]. Since we evaluated the Brownfields Credit recently, this follow-up evaluation focuses on evaluating the substantive changes made to the credit by House Bill 22-1392, some of which addressed the policy considerations we included in our 2022 evaluation. We used the following performance measures to assess the changes:

- To what extent has the Brownfields Credit, as amended in House Bill 22-1392, encouraged remediation of additional brownfield sites, particularly those in rural communities?
- To what extent are public entities that were previously excluded from the credit now able to benefit from it due to the changes from House Bill 22-1392?

Evaluation Results

In our 2022 evaluation of the Brownfields Credit, we found that the credit likely provides a relatively modest additional incentive to remediate contaminated land and may encourage some remediation projects, though other factors are often more important to property owners when deciding whether to go forward with projects.

In this evaluation, we found that other factors besides the credit, particularly unfavorable market conditions, have been impacting the number of brownfields sites that are being remediated, including in rural communities. In Calendar Year 2022, CDPHE certified Brownfields Credits for eight projects, for a total amount of \$2.55 million in credits. Two of those projects, with total credits of \$1 million for both combined, were in rural communities. We previously found that from 2015 to 2020, CDPHE certified about \$2.63 million in credits for about 10 projects each year and about 23 percent (14 of the 62 projects) were outside of Denver, but we cannot say whether all of these projects would have been classified as rural projects by CDPHE since that was before the statutory change by House Bill 22-1392. Based on the number of applications CDPHE has received in 2022 and 2023, it does not seem like the number of projects and percent that are in rural areas will increase significantly in coming years. In Calendar Year 2023, 12 projects completed applications for the Voluntary Clean-Up Program and Brownfields Credit (one of which is in a rural community), but as of November 2023, no credits have been issued for 2023. For 2024, seven projects have applied for the credit, one of which is in a rural community. However, figures for 2023 and 2024 are preliminary since additional entities may file their paperwork to receive the credit or apply for the credit for 2024.

CDPHE staff reported that many remediation projects that submitted applications in recent years have put those projects on hold because construction loan interest rates have increased substantially. For example, three additional projects completed an application for the credit in 2022, but those projects were later put on hold. Other stakeholders, including an environmental lawyer and an environmental consultant who works with brownfields developers, also reported that construction financing has been an issue for brownfields, including high interest rates, lenders' willingness to lend, and high property values. Rising costs might have also impacted the number of developers that have started brownfields projects and, therefore, applied for the credit.

If market conditions improve in the future, developers might apply for and receive more in credits. In 2021, the amount of credits reserved was close to the credit cap of \$3 million. Credits reserved for 2022 and 2023 were around \$4 million, so were above the old cap but have not approached the new cap of \$5 million. However, the amount reserved so far for 2024 is much less, which may also be due to recent and current market conditions. CDPHE staff reported they have spoken with additional developers who are interested in applying for the tax credit for 2024, but they have not yet applied. We spoke with a tax credit broker who works with Brownfields Credit recipients to sell their credits and an environmental consultant that works with developers, and they reported that the

increased credit for projects in rural communities has been helpful for the entities that they work with because remediation work is more expensive in those areas since they do not have access to local contractors, which adds travel and hotel expenses for contractors to work in rural communities. Therefore, when market conditions improve, more developers in rural areas might apply for the credit and receive the credit since \$2 million of the credits must be allocated to rural areas by statute.

Additional qualified entities appear to be benefitting from the Brownfields Credit with the expanded definition from House Bill 22-1392. Prior to the passage of House Bill 22-1392, the only qualified entities listed in statute eligible for a transferable expense amount were counties, home rule counties, cities, towns, home rule cities, home rule cities and counties, and private nonprofit entities exempt from Colorado income tax. In our 2022 evaluation of the Brownfields Credit, we included a policy consideration for the General Assembly to consider expanding the definition of qualified entities that are eligible for the credit because we found that CDPHE, after consulting with the Attorney General’s Office, interpreted “qualified entities” to exclude entities not explicitly mentioned in statute such as school districts, urban renewal authorities, and business improvement districts. It was not clear whether the General Assembly had intended to exclude those entities from accessing the credit. House Bill 22-1392 expanded the list to include school districts, charter schools, special districts, districts authorized by Article 20 of Title 30 (county public improvement districts, such as local improvement districts and county public improvement districts), Article 25 of Title 31 (municipal public improvement districts, such as urban renewal authorities and downtown development authorities), and Articles 41 to 50 of Title 37 (conservation and irrigation districts), state institutions of higher education, quasi-governmental entities, and municipal, quasi-municipal, or public corporations organized pursuant to law.

CDPHE staff reported that they believe the legislative changes from House Bill 22-1392 addressed the issue regarding qualified entities and have not had any issues with ineligible public entities attempting to access the credit but not being included in the expanded definition. We also asked an environmental lawyer, who we also spoke with during the last evaluation, and a tax credit broker whether this has remedied the issue and they said they believe the definition now sufficiently includes all local government entities. According to CDPHE staff, it had two projects from newly eligible qualified entities that were certified credits in 2022—an urban renewal authority and a school district.

Policy Consideration

We did not identify any policy considerations for this evaluation. As discussed above, the General Assembly addressed the policy considerations from our previous evaluation of this credit in House Bill 22-1392.

OFFICE OF THE STATE AUDITOR

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