New York State Bar Association

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ENVIRONMENTAL LAW SECTION MEMORANDUM-- COMMENTS REGARDING BROWNFIELD CLEANUP ACT REFORMS

1. The Brownfield Cleanup Act has been very successful, spurring the cleanup and redevelopment of hundreds of sites throughout New York State. Independent studies have shown that the Act is responsible for tens of millions of dollars of cleanup at contaminated sites in the State.

2. However, experience over the last four years has indicated the need for some revisions in the Act, which can be improved to be even more effective, and cost-effective, in encouraging site cleanup.

3. Among the areas where improvement is needed is the issue of site eligibility for the Brownfield Cleanup Program (BCP). In the Act, the Legislature wisely provided that the criteria for eligibility should be broad—eligible sites are those where redevelopment *may* be complicated by the presence *or potential presence* of contaminants. This broad definition is virtually identical to the definition of brownfields under federal law.

4. Concerns have arisen among various participants in and observers of the BCP, including members of the environmental community and of the private sector, that eligibility criteria for the BCP adopted by DEC through a guidance document establish a narrower definition of what constitutes a brownfield than the Brownfield Cleanup Act contemplated. The DEC interpretation of "brownfield," which, many have speculated, has been designed to minimize the financial impact of the tax credits available under the BCP, restricts eligibility to those sites with significant contamination and differentiates among types of contamination that will qualify a site for admission into the BCP. For example:

   A. Sites with contaminated historic fill have been ruled not eligible for the BCP, even where the fill material might qualify as hazardous waste and be subject to the costly and onerous RCRA hazardous waste management requirements. No basis for this distinction appears in the statute, and its impact is to prevent certain sites in urban areas like New York City, where historic fill is common, from entering the BCP.

   B. DEC has excluded sites where the contamination originates from offsite sources (including midnight dumpers) and solid waste landfills, even though this contamination is complicating reuse.

Opinions expressed are those of the Section/Committee preparing this memorandum/report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

C. Even though the Act was amended in 2006 to clarify that sites subject to a petroleum stipulation are eligible for the BCP, DEC has been advising applicants of petroleum-contaminated sites that it is not in the public interest to allow such sites into the BCP when there is a responsible party subject to a stipulation, even where the cleanup by that responsible party will not be sufficiently comprehensive or completed in a timeframe to allow the proposed development to proceed.

If any site cleanup is or may be required and the site is not disqualified by virtue of other restrictions in the statute, the Section has concluded that the site should be eligible for admission into the BCP.

5. In addition, DEC decided to terminate the administrative Voluntary Cleanup Program (VCP) and has imposed an administrative freeze on VCP sites. Accordingly, prospective purchasers of these sites, who would otherwise be eligible as Volunteers under the BCP, are prevented from enrolling these contaminated sites into the BCP.

6. Restricting eligibility in ways and through limitations not contemplated in the Brownfield Cleanup Act creates additional costs, delays and uncertainty in the BCP. The Section is aware of sites where applications were denied, withdrawn or never attempted because of the restrictions that have been placed on site eligibility. It is not only site owners and developers who suffer, since sites not allowed into the BCP either will not be remediated or, if they are, will be cleaned up without the DEC oversight or public input that the Legislature intended.

7. If the goal of eligibility restrictions is to control and target the application of state tax benefits, in the Section's view, a far better approach would be to modify the tax credit scheme itself. Consideration should be given to a variety of ways to accomplish this goal, including but not limited to the following:

A. Differentiating, for tax credit purposes, between dollars spent for cleanup (which should earn a greater percentage credit) and dollars spent for development.

B. Providing a more generous tax credit to Volunteers (those who are not responsible for the contamination) than to Participants (who are), and to Volunteers who propose to build affordable housing projects.

C. Retaining tax credits for Track 4 cleanups, since they result in substantial environmental improvement and may be the only practical way that certain types of sites can be remediated, particularly Upstate.

D. Capping the tax credit for development expenses in some equitable way.

E. In order to ensure appropriate consideration of economic opportunity and to better encourage private investment, having Empire State Development Corporation play a role in defining tax credit eligibility (based on impeded

redevelopment potential) and in strategically ranking brownfield sites (based on the economic benefits of redeveloping them).

Further, rather than guess at the appropriate amounts of tax credits necessary to spur cleanup and redevelopment, the Legislature should conduct (or require DEC, the Department of State or the Empire State Development Corporation to conduct) a cost-benefit analysis using data from the BCP. After the results of that study are reported and analyzed, the Legislature should act to revise the tax credit structure appropriately.

8. Maintaining a consistent program is essential to its success. Accordingly, the Section believes that if the Legislature does amend the tax credits, it should provide that applicants already accepted into the BCP would be grandfathered and remain eligible for the tax credits that were in effect at the time the applicant was accepted into the BCP.

9. The current law provided an amnesty period that expired in July 2006, allowing Class 2 sites to be eligible for the BCP if purchased by a Volunteer. The Section believes that Class 2 sites, as well as RCRA corrective action sites, should be eligible for the BCP if there is a Volunteer who is willing to perform a cleanup and put the property back into productive use. This approach would be consistent with the federal brownfield program, which allows sites on the National Priorities List (which are equivalent to Class 2 sites) and RCRA corrective action sites to be eligible for the national brownfield program.

10. The Section also believes that the BCP can be improved by increasing staffing levels at DEC and the Department of Health so that applications and projects are reviewed on a timely basis, and by requiring that statutorily prescribed time periods for action on applications and submissions be met. Since each BCP application must undergo both a technical and a legal review, the lack of sufficient resources in either area can create logjams that delay timely review of BCP applications and other submissions.

11. Because of the narrow definition of brownfields adopted by DEC, there are many categories of contaminated sites that are not eligible for the BCP, yet not sufficiently contaminated to qualify as a Class 2 site. Since these sites have no DEC program under which they can be remediated, the only recourse for property owners and operators of these sites is to implement "self-directed" cleanups without any DEC oversight. Accordingly, the Section would support the establishment of a much more streamlined program for sites whose owners would like state oversight and signoff but do not need or desire tax credits. The program should be available for any property. Cleanups would take place under DEC's supervision, resulting in a no further action letter at the end of the process.

Note: Several members of the Executive Committee of the Environmental Law Section who are attorneys in government agencies recused themselves from discussion and consideration of the foregoing comments and the issues underlying them.