New York State Bar Association

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Memorandum in Support

ENVIRONMENTAL LAW SECTION

ELS #3 March ___, 2012

A. 8192 By: M. of A. Schimminger
Assembly Committee: Environmental Conservation
Effective Date: Immediately

AN ACT to amend the Navigation Law, in relation to responsible parties for petroleum contaminated sites and incentives to parties who are willing to remediate petroleum contaminated sites.

LAW AND SECTIONS REFERRED TO: Navigation Law Sections 176, 180, 181, 183.

DISCUSSION:

The Environmental Law Section of the New York State Bar Association represents a large and diverse group of New York lawyers with an interest and expertise in environmental law. Included among the Section's purposes, as set forth in its Mission Statement and consistent with its Bylaws, are activities "to support, promote or initiate desirable environmental law reform: and "to make recommendations for the improved integration of [environmental] laws to better effectuate protection of human health, the natural environment and the public welfare."

Consistent with its Mission Statement, the Section supports the proposed amendments to Article 12 of the Navigation Law, commonly known as the Oil Spill Act, embodied in Assembly Bill No. A. 8192, which was introduced for the 2011-2012 legislative session by Assemblyman Robin Schimminger. At the same time, the Section recommends additions to that proposed legislation to remedy long-standing shortcomings in the current version of the Act. In accordance with the Section's advocacy policy, this memorandum, which was prepared by a special task force of the Section's Petroleum Spills Committee, has been approved by the Section's Executive Committee.*

Summary of Proposed Amendments

The Oil Spill Act has been largely unchanged since 1992. In the years that have followed, practitioners have identified several consistent shortcomings with the Act, chiefly related to the process for allocating responsibility among multiple dischargers, the lack of a pre-litigation mechanism to give alleged dischargers an opportunity to demonstrate to the State that another

* No State employees have participated in the development of this memorandum.

party is the actual discharger, the inability of cooperating parties to obtain a meaningful liability limitation after cleanup and the risk of liability to municipalities that acquire petroleum contaminated property through tax foreclosure. The proposed amendments are intended as legislative correction for these and other problems.

The proposed legislation amends four sections of the Oil Spill Act: Sections 176 (Removal of prohibited discharges), 180 (Administrator of the fund), 181 (Liability) and 183 (Settlements). The language of each proposed amendment is presented below along with its rationale.

- **Navigation Law § 176**

The first proposed amendment, which is contained in the Schimminger bill (with an additional sentence, set forth in brackets below, suggested by the Section), is to Navigation Law § 176 subdivision (a) of subparagraph 2 to allow a party that the Department of Environmental Conservation (the "Department") has deemed a discharger of a petroleum spill to be able to present evidence that another party caused the discharge:

> (a) Upon the occurrence of a discharge of petroleum, the department shall respond promptly and proceed to cleanup and remove the discharge in accordance with environmental priorities or may, at its discretion, direct the discharger to promptly cleanup and remove the discharge. **If a person the department deems a discharger, and thus directs to cleanup and remove the discharge pursuant to this section presents the department with evidence that a third party is solely responsible for the discharge and requests the department to determine whether the evidence establishes the third party is in fact solely responsible, the department shall, within thirty days of receipt of such request, determine in writing either that the third party: (i) shall be deemed a discharger by the department, and shall be directed to undertake the cleanup and removal of the discharge; or (ii) will not be deemed a discharger by the department because the information presented does not establish the responsibility of the third party by a preponderance of the evidence. [If the department determines that the person the department initially deems a discharger and the third party are both dischargers, the department shall, within thirty days of such request, advise each of the parties that they are deemed dischargers subject to apportionment of liability for the discharge pursuant to subdivisions 1 and 2 of section 180.]** The department shall be responsible for cleanup and removal or as the case may be, for retaining agents and contractors who shall operate under the direction of that department for such purposes. Implementation of cleanup and removal procedures after each discharge shall be conducted in accordance with environmental priorities and procedures established by the department.

Under the current framework of the Oil Spill Act, the Department has no real authority or incentive to consider such evidence. Instead, the Department's practice often is to deem one party associated with a contaminated site—typically the property owner—as the discharger.

In instances where the Department correctly identifies the actual discharger, this practice does not pose a problem. However, in other instances, where the party identified by the Department is not the actual discharger, this innocent party (generally the owner) is forced to litigate against the actual dischargers to shift liability to where it properly belongs. The legislative amendment is intended to lessen the risk of this situation and avoid unnecessary litigation, which, unfortunately, has been a common occurrence. It provides a party tentatively identified by the Department as the discharger with an opportunity to present information proving that it should not be the party declared the discharger. Once presented with that information, the Department can either reject it because the evidence does not establish the third party is a discharger, accept it and deem the third party the rightful discharger, or deem both parties dischargers. This will encourage cleanup of petroleum sites by bringing the rightful discharger(s) to the table.

The next proposed amendment, which the Section recommends adding to A. 8192, would be to Navigation Law § 176 subparagraph 8:

> **8. Notwithstanding any other provision of law to the contrary, including but not limited to section 15-108(c) of the general obligations law, every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party.**

This amendment is intended to correct what likely was an oversight in the original legislation enacting this provision. It clarifies that a party who has otherwise settled a claim for costs or damages related to the discharge of petroleum is entitled to seek contribution from other potentially responsible parties.

Currently, there is confusion regarding the interplay of the impact of the provisions of the General Obligations Law and this section of the Navigation Law, as it is unclear whether a settling party retains the right to contribution and/or whether a party seeking contribution may pursue such a claim against a settling party. Simply adding a reference to section 15-108(c) of the General Obligations Law to this section of the Navigation Law clarifies that, while a settling party will still receive contribution protection, and the damaged party's claim will still be reduced accordingly, to the extent that the settling party feels they are entitled to contribution from other potentially responsible parties they will be permitted to continue pursuing such claims. As such, the benefits of settling remain in place, fostering settlement, without preventing a settling party from continuing to pursue claims against others for overpayment.

The Section also proposes adding language to A. 8192 to create a new subparagraph 9 to Navigation Law § 176:

> **9. The following shall not be deemed a final agency action subject to review pursuant to civil practice law and rules article 78, and shall not have a binding effect on any party in pending or future proceedings regarding the discharge: (a) a determination or action of the department pursuant to subdivisions 1, 2, or 3 of section 176, including but not limited to, a determination of the reasonableness of any costs incurred; (b) a**

determination or action of the administrator pursuant to sections 180, 181-a, or 183, including the filing of an environmental lien.

The purpose of this new subparagraph is to clarify that certain determinations by either the Department or the Administrator of the Spill Fund are not subject to challenge in an Article 78 proceeding. These determinations include a determination of the reasonableness of costs incurred by the Department to respond to a spill, the decision of the Administrator to file an environmental lien against a piece of property, the Department's determination of who it ordered to respond to a spill, the Administrator's determination of who to identify as a responsible party for purposes of resolving a Spill Fund claim or the determination of the Administrator on whether to have a hearing regarding a Spill Fund claim.

Currently there is uncertainty surrounding which, if any, of these determinations or actions of the Department or Administrator are subject to Article 78 review. The addition of this language would avoid the need for the filing of litigation at each stage of the process in responding to the discharge of petroleum. Rather, it would leave all such matters to either be resolved through a negotiated settlement, or comprehensive litigation seeking costs and/or damages under Navigation Law §181 addressing all issues, avoiding the expense of such repeated litigation to both the State and other involved properties.

- **Navigation Law § 180**

The Section also supports the following provision proposed in A. 8192, which would amend subparagraphs 1 and 2 of subdivision (a) of Navigation Law § 180 as follows:

> 1. To represent the state in meetings with the alleged discharger **or dischargers** and claimants concerning liability for the discharge and amount of the claims, **and, if there is more than one discharger in a meeting, to apportion liability for the discharge;**
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> 2. To determine if hearings are needed to settle particular claims filed by injured persons **and to apportion liability between and among dischargers;**

Petroleum contaminated sites—such as current or former gasoline service stations or industrial sites that store or use petroleum—are common in New York. When contamination is found at these sites, often multiple parties in the petroleum distribution, storage and use chain are responsible. The Oil Spill Act currently encourages the Department to seek liability only from one potential discharger, even if others are equally likely to be responsible. The existing provision, for instance, only allows the Administrator to meet with one discharger, which once again discourages settlement of liability for remediation of petroleum sites. This amendment would allow the Administrator to represent the State at meetings with more than one discharger and to apportion liability among the dischargers at a meeting or hearing.

- **Navigation Law § 181**

A proposed change to Navigation Law § 181 subparagraph 1, which originates from the Schimminger bill, would add a liability limitation incentive to parties who agree to perform a spill cleanup identical to parties in the brownfield cleanup program:

> 1. **(a)** Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section**, unless the liability limitation as described under paragraph (b) of this subdivision applies.** In addition to cleanup and removal costs and damages, any such person who is notified of such release and who did not undertake relocation of persons residing in the area of the discharge in accordance with paragraph (c) of subdivision seven of section one hundred seventy-six of this article, shall be liable to the fund for an amount equal to two times the actual and necessary expense incurred by the fund for such relocation pursuant to section one hundred seventy-seven-a of this article.
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> **(b)(i) Any person who agrees to remediate the discharge to the satisfaction of the department, and in conformance with this article, shall be entitled to receive liability limitation. Such agreement shall be called the liability limitation agreement and shall be written and executed by both the department and such person. After execution of the liability limitation agreement, such person shall not be liable to the state upon any statutory or common law cause of action, arising out of the presence of any contamination in, on, or emanating from the site that was the subject of the liability limitation, except that such person shall not receive a release for natural resource damages that may be available under law. The liability limitation shall apply to all successors in ownership of the property and to all persons who lease the property or who engage in operations on the property, provided that such persons act with due care and in good faith to adhere to the requirements of the liability limitation agreement.**
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> **(ii) A liability limitation agreement and the protections it affords shall not apply to any discharge that occurs subsequent to the execution of the liability limitation agreement, nor shall a liability limitation agreement and the protections it affords relieve any person of the obligations to comply in the future with laws and regulations. The state nonetheless shall reserve all of its rights concerning, and such liability limitation shall not extend to, any further investigation and/or remediation the department deems necessary due to fraud, noncompliance with the terms that formed the liability limitation agreement, or a written finding by the department that a change in an environmental standard, factor, or criterion upon which the liability limitation agreement was based would render remediation activities no longer protective of public health or the environment. Nothing in this section shall affect the liability of the person responsible for such person's**

own acts or omissions causing wrongful death or personal injury. Nothing in this section shall affect the liability of any person with respect to any civil action brought by a party other than the state. The provisions of this section shall not affect an action or a claim, including a statutory or common law claim for contribution or indemnification, that such person has or may have against a third party.

A problem commonly encountered by parties who clean up sites is their inability to secure a meaningful liability limitation following the cleanup. The inability to obtain this limitation can make it difficult for these parties, who often are property owners, to sell, obtain financing for or otherwise make productive use of a cleaned-up site because of lenders' or buyers' reluctance to become involved with formerly contaminated sites—even if those sites are deemed cleaned up by the Department. Currently, the Department may or may not provide what has become known as a "no further action" letter. However, the letter has little legal effect, as it is merely a letter. Providing a liability limitation incentive would encourage more petroleum site remediation projects to proceed. The proposed amendments provide a new incentive in the form of a liability limitation to parties who cooperate with the agencies and proceed with the remediation.

The Section also proposes a new subparagraph 7 to Navigation Law § 181, which provides for an exemption to liability for prohibited discharges of petroleum to municipalities that involuntarily acquire title to petroleum contaminated property without participating in the development of the site. It would read:

7. Notwithstanding any other provision of this section, a public corporation shall not be liable for the discharge of petroleum at a site if such public corporation acquired such site involuntarily, and such public corporation retained such site without participating in the development of such site. This exemption shall not apply to any public corporation that has (i) caused or contributed to the discharge of petroleum from or at the site, (ii) purchased, sold, refined, transported, or discharged petroleum from or at such site, or (iii) caused the purchase, sale, refinement, transportation, or discharge of petroleum from or at such site. The terms "participation in development," "public corporation" and "involuntary acquisition of ownership or control" shall have the same meaning as those terms are defined in paragraphs (c), (d) and (e) of subdivision two of section 27-1323 of the environmental conservation law. However, "participation in development" shall not include improvements which are part of a cleanup and removal of a discharge of petroleum pursuant to this article.

The Oil Spill Act does not expressly assign liability to a municipality—or any other entity—based on fee ownership of a petroleum-contaminated property. Nonetheless, as a practical matter, municipal taxing authorities have long been reluctant to foreclose on tax-delinquent properties which are or are suspected to be contaminated by petroleum without an express exemption to Oil Spill Act liability. As a result, municipalities have been steadily losing valuable tax revenue because they will not foreclose on these sites for fear of acquiring liability

for the cleanup of the petroleum contamination. Many of these tax-delinquent sites have therefore become blighted and abandoned eyesores.

This provision provides municipalities with the same protection from liability at petroleum contaminated sites as municipalities currently have under Environmental Conservation Law § 27-1323(2), which exempts municipalities from liability when they involuntarily acquire title to property which is contaminated with hazardous wastes or hazardous substances. Since petroleum-contaminated sites are generally not as serious a threat to the environment as sites contaminated with hazardous wastes or substances, it is illogical that municipalities have a defense for hazardous waste or substance sites, but not petroleum sites. This provision will also provide municipalities with the same level of liability protection afforded to lenders, which are already exempt from liability for the involuntary acquisition of properties contaminated with petroleum, as well as hazardous wastes or hazardous substances. This new provision will ultimately spur cleanup and redevelopment of tax-delinquent petroleum contaminated sites by enabling municipal taxing authorities to foreclose on such sites without fear of possible Oil Spill Act liability.

- **Navigation Law 183**

The final proposed amendment is to Navigation Law § 183, regarding settlements, which is contained in A. 8192:

> Settlements. The administrator shall attempt to promote and arrange a settlement between the claimant and the person **or persons** responsible for the discharge. If the source of the discharge can be determined and liability is conceded, the claimant and the alleged discharger **or dischargers** may agree to a settlement which shall be final and binding upon the parties and which will waive all recourse against the fund. **To the extent an alleged discharger presents evidence to the administrator that another party is wholly or partially responsible for the claim, and requests the administrator to consider whether such information presented establishes by a preponderance of the evidence that the third party is in fact wholly or partially responsible, the administrator within thirty days of receipt of such request shall either determine: (1) in writing, if the third party shall be deemed an additional discharger or any pending or anticipated claim or (2) if an administrative hearing as to liability is necessary.**

The changes to this provision, which has not been amended since 1977, are intended to be consistent with the other proposed changes to the Oil Spill Act. The amended language will allow the Administrator to promote and arrange a settlement between the claimant and multiple dischargers who may be responsible for the discharge and allow an alleged discharger to present evidence to the Administrator that another party may be wholly or partially responsible for the claim.

Conclusion

Petroleum contaminated sites are common in New York. Experience has shown that litigation involving these sites is often expensive and protracted. While the Section generally supports the Schimminger bill, it believes that the bill should be used as an opportunity to make additional adjustments to the law. The Section believes that, while not a cure-all, the proposed amendments will reduce the risk of unnecessary litigation, produce fairer settlements—especially where multiple dischargers are involved—and provide a meaningful incentive for cooperation for potential litigants. For these reasons, the Section endorses these proposed amendments.

Section Chair: Philip H. Dixon
Petroleum Spills Committee Co-Chairs: Wendy A. Marsh, Gary S. Bowitch and Douglas H. Zamelis