

NEW YORK
CITY BAR

COMMITTEE ON ENVIRONMENTAL LAW

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Office of Sen. Owen H. Johnson
Attn.: Hugette Ostrander
Room 913, Legislative Office Building
Albany, NY 12247

Dear Ms. Ostrander:

The Environmental Law Committee of the New York City Bar Association (the "Committee") respectfully submits its comments on proposed revisions to the laws concerning the Brownfield Redevelopment Tax Credit (N.Y. Tax Law §21) and the Brownfield Cleanup Program (N.Y. ECL §27-1401, *et al.*), introduced by Governor Eliot Spitzer on January 22, 2008, as part of the 2008-2009 State budget process. The members of the Committee are drawn from the private, public and non-profit sectors, and represent diverse viewpoints with respect to environmental matters in New York State and the City of New York.

A. The Present Brownfield Redevelopment Tax Credit Statute

When New York State adopted the Brownfield Cleanup Program in 2003, the State at the same time created the Brownfield Redevelopment Tax Credit ("BRTC") provision in order to further incentivize persons to voluntarily enter the Brownfield Cleanup Program and clean up brownfield sites. In order to contextualize the Governor's proposal, we include herein a brief description of the present BRTC statute and its issues.

Pursuant to the BRTC statute, tax credits are made available for developers to recoup three types of costs incurred in connection with a brownfield site: (i) site preparation costs, (ii) tangible property costs, and (iii) on-site groundwater remediation costs. "Site preparation costs," as currently defined, include costs resulting from both remediation (accomplishing the targets of remedial investigation work plans and remedial work plans) and preparation for construction ("preparing a site for the erection of a building or a component of a building"). "Tangible property costs" relate to the costs of actually erecting buildings and structural components of buildings on the site. "On-site groundwater remediation costs" are defined as expenditures related to cleaning up groundwater on the site. *See* N.Y. Tax Law §21(b) (Definitions).

After its adoption, the New York State Department of Environmental Conservation ("NYSDEC") quickly discovered that the Brownfield Redevelopment Tax Credit does not provide for a cap on the credits that developers could potentially collect. This becomes particularly problematic with

respect to the tangible property credit component of the tax credit, because developers can and often do expend millions of dollars in erecting large structures (*i.e.*, “tangible property”) on the sites, and, in some cases, those construction costs can be enormous and extremely disproportionate to the relatively minimal remedial effort and expense required to clean up a site for productive use.

Rather than impose a cap on the tax credits, the present statute limits developers to a percentage of the total eligible costs. Specifically, developers claiming the credits under corporate income taxes can get credits for 12% of their eligible costs, while developers claiming the credits under personal income taxes can receive credits for 10% of their eligible costs. Further, the statute provides additional percentages as incentives for developers to utilize Track 1 of the BCP (the most stringent of the 4 cleanup levels) and to build in Environmental Zones.¹ To wit, a developer utilizing Track 1 is entitled to credits equaling an additional 2% of the developer’s costs, while a developer building in an Environmental Zone is entitled to an additional 8% credit.

In order to avoid the fiscal problems that potentially could arise as a result of the generous tax credits provided for in the statute, NYSDEC has seemingly erected internal barriers to persons seeking to redevelop properties under the Brownfield Cleanup Program and has accepted relatively few applications to the program, despite the statute’s broad definition of “brownfield sites” eligible for the program.² The ultimate result could be that State-supervised cleanups of sites that are not contaminated enough to qualify for Superfund enforcement actions become rare, as there are currently no other programs under which such sites can undergo State-approved remediations or under which associated liability protections are afforded. This result would run counter to the interests of both the State, in having brownfield sites properly remediated and reused, and developers and their creditors, in having some certainty with respect to future environmental liability. For this reason, if a well thought out revision to the BRTC statute is proposed, which limits tangible property tax credits to some degree but also helps bring transparency and certainty to the process of applying to the Brownfield Cleanup Program, the Committee believes that such revision would be supported by both developers and environmental advocates alike.

B. The Governor’s Proposal

The Governor’s proposal divides its changes into two parts, a short-term “fiscal proposal” (Part D) and a long-term “programmatic proposal” (Part E). Both parts are intended to address the problems in the current BRTC, as described above. The Governor’s plan contemplates initial enactment of Part D, followed by enactment of the permanent “programmatic” changes in Part E. (The Part D provisions would by their own terms be repealed after enactment of the Part E provisions.)

Part D would implement targeted changes to the BRTC and the Brownfield Cleanup Program, with the narrow goal of relieving the fiscal pressures that are imposed on the State by the present BRTC statute. Part D would first modify the eligibility criteria for the Brownfield Cleanup Program so that brownfield sites are no longer eligible where redevelopment of the site “would likely occur in the absence of the tax credits.” This would limit the overall number of sites eligible for the program. Next, Part D establishes a hard cap of \$10 million on the “tangible property” credit. This would limit the dollar amount of credits given to those sites that are accepted into the Brownfield Cleanup Program. Finally, Part D also includes other smaller

¹ Environmental Zones are economically disadvantaged areas with high unemployment and poverty rates, as specifically defined in N.Y. Tax Law §21(b)(6).

² The statute defines a “brownfield site” as a site where redevelopment “may be complicated by the presence or potential presence of a contaminant.” N.Y. ECL §27-1405.

changes, including language on the transferability of certificates of completion, and restrictions to prevent developers from subdividing sites to avoid the cap.

The programmatic proposal, Part E, is much more sweeping in the changes it would implement; indeed, it effectively creates a new program. Several areas of the BRTC and the Brownfield Cleanup Program would be amended in ways that, working together, should make the brownfield program more equitable and accessible for applicants. One of the biggest changes proposed in Part E is the creation of a two-tier system, where brownfield sites that could be developed “in the absence of the tax credits” are eligible to enter the program and earn a release of liability, but are not eligible for tax credits.³ Part E would also eliminate the present formula for determining the percentage of developers’ costs that are eligible for tax credits, as described above, and replace this with an entirely new calculation based on the level of cleanup, type of end use and other factors. Additionally, a hard cap on the “tangible property” credit would be set at \$15 million. In fact, the changes go so far as to change the very definition of a “brownfield site.”

C. The Committee’s Comments on the Governor’s Proposal

As a general matter, the Committee supports the Governor’s proposal. If both parts of the proposal are taken together, it constitutes a significant improvement over the present statutory regime. To be sure, while Part D may be a necessary way-station, the more meaningful change is found in Part E, which improves the BRTC and the Brownfield Cleanup Program by rationalizing the system while accomplishing several laudatory public policy results. In particular, the Committee believes that the creation of the two-tier structure in Part E, which would allow many more sites to enter the program and be remediated under NYSDEC supervision (without receiving tax credits), is vital to achieving the original goals of the program. Adoption of Part D alone, or a long-delayed implementation of Part E, is insufficient and would be an unsatisfactory result in the environmental law community.⁴

The Committee does recommend one change to the Governor’s proposal, which is to expand the definition of “brownfield site” in Part E to clarify that sites containing “historic fill” qualify for the program, in order to resolve an issue of some confusion and contention. Similar to language proposed in Senate and Assembly bills in 2007, we propose that this be accomplished by adding the following clause to the end of the definition: “including, but not limited to, any real property where contaminants at such levels are contained in historic fill material.”⁵ Without this provision, sites in New York City risk being disproportionately excluded from the program: according to the Mayor’s Office of Long Term Planning and Sustainability, an area within the City equivalent in size to Manhattan and the Bronx consists of historic fill.

The Committee has also considered the fairness of the grandfathering clause, which imposes the new tax credit caps on sites already accepted into the Brownfield Cleanup Program that are issued a certificate of completion after July 1, 2007. We note that owners of such sites may have been in the program for some time, and may have structured their financial projections and financing agreements based on the present statute, which contains no cap. We also note that no harm whatsoever to the environment would result from applying the new cap only to sites that enter the BCP following enactment of the bill. While the Committee ultimately has chosen to

³ This proposal is a more rational effort to achieve the goals of the Remedial Stipulation Program, which was proposed by NYSDEC to be included in the brownfield regulations (6 NYCRR Part 375-5) in July 2006, but was subsequently dropped.

⁴ The Legislature might, nonetheless, wish to consider whether the cap on tax credits should be consistent between Part D (which proposes a cap of \$10 million) and Part E (which proposes a cap of \$15 million).

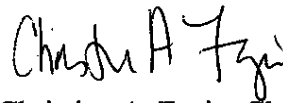
⁵ The definition of “historic fill material” already in the brownfield regulations at 6 NYCRR Part 375-1.2(x) should also be adopted into the bill.

take no formal position on the grandfathering provisions, fairness dictates that the clause be reconsidered.

Finally, the Committee also notes that the Governor's proposal fails to provide necessary structural changes in the Brownfield Opportunity Area ("BOA") program, which, like the Brownfield Cleanup Program, has become stalled, and which remains an issue of great concern in New York's environmental justice community. Control over the BOA should be consolidated in one agency (it is presently divided between NYSDEC and the Department of State), and BOA funds promised for local planning for brownfield sites should be released. It is unfortunate that the Governor's proposal does not address these problems.

Thank you in advance for considering these comments on the proposed brownfield revisions.

Respectfully,



Christine A. Fazio, Chair
Environmental Law Committee

cc: Honorable Eliot Spitzer, Governor

Honorable Joseph L. Bruno
Majority Leader and President Pro Tem
New York State Senate

Honorable Carl L. Marcellino
Chair, Committee on Environmental Conservation
New York State Senate

Honorable Sheldon Silver, Speaker
New York State Assembly

Honorable Herman D. Farrell, Jr.,
Chair, Ways and Means Committee
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Honorable Robert K. Sweeney
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