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MEMORANDUM AND RECOMMENDATIONS REGARDING PROPOSED EXTENSION AND REFORM OF THE BROWNFIELD CLEANUP PROGRAM

ENVIRONMENTAL LAW SECTION

Environmental #2-A January 8, 2015

Following a panel discussion at the Fall Meeting of the Environmental Law Section of the New York State Bar Association (NYSBA), the Section's Brownfield Task Force invited key stakeholders[1] to continue a dialogue in hopes that a consensus could emerge on the key issues to be addressed in any extension of the New York State Brownfield Cleanup Program (BCP).

The Section is pleased to report that, after several months of conference calls and meetings, the Brownfield Task Force has been able to develop, with the input of these stakeholders, a series of new recommendations that we believe inform the debate[2].

This memorandum, which has been approved by the Environmental Law Section's Executive Committee in accordance with the Section's Advocacy Policy, summarizes the recommendations of the Section's Brownfield Task Force based on input from these stakeholder meetings and conference calls.[3]

1. Amending ECL § 27-1405(2)(b)'s Definition of Brownfield Site

The current definition, based on federal law, is a site which "may be complicated by the presence or potential presence" of a contaminant. The Governor's proposal in last session's budget bill was to amend the definition of "brownfield site" to "any real property where a contaminant is present at levels exceeding the soil cleanup objectives or *other health-based or environmental standards* promulgated by the department that are applicable based on the reasonably anticipated use of the property, *as determined by the department.*" (Emphasis added)." The Assembly's bill was essentially the same but omitted the provision that the site's "reasonably anticipated use" be determined the Department of Environmental Conservation (DEC). The Senate's proposal also required

[1] The participants in this process included representatives of the New York State Bar Association Environmental Law Section ("Section"), the New York League of Conservation Voters, the Environmental Defense Fund, the New York State Business Counsel, New Partners for Community Revitalization, the New York City Office of Environmental Remediation, the Real Estate Board of New York and the New York City Brownfield Partnership.

[2] The views expressed in this memorandum are those of the Section. No inference is intended, and none should be inferred, that each organization has endorsed the specifics of each of the recommendations herein.

[3] No state employees have participated in the development of this memorandum.

contaminants to be present at levels exceeding soil cleanup standards but allowed the applicant to choose the appropriate standard based on use. The Senate's definition added a list of criteria that would need to be met to qualify for entry into the BCP and for tax credits.

In addition, the Governor's and Senate's bills added the phrase "or other health-based or environmental standards". This phrase did not clarify as to whether DEC could create additional standards for admission into the BCP, by guidance documents or otherwise, than are provided in 6 NYCRR Part 375-6 and the DEC groundwater criteria.

Recommendation: We recommend the definition proposed by the Governor and the Assembly, except that the cleanup standard to be applied should be based on the proposed end use as reasonably determined by the applicant. We believe that the applicable threshold of contamination should be the standards and criteria set by statute or regulation.

2. **Amending Tax Law § 21(a)(3-a)(A) To Reduce Tangible Property Tax Credit Component**

Currently, the tangible property tax credit component available for a qualified, non-industrial site "shall not exceed thirty-five million dollars or three times the costs included in the calculation of the site preparation credit component."

The Governor's proposal would have created an additional "gate" for accessing tangible property tax credits: sites would have to (i) have been vacant for 15 or more years, (ii) include a building or buildings that have been vacant or tax delinquent for 10 or more years, (iii) be "upside down", or (iv) meet certain future use requirements related to economic development. The Assembly proposal would also have established a second gate, but would have modified the criteria to require sites to (i) have been vacant for four years, or with buildings vacant for two years (ii) be underutilized, (iii) have functionally obsolescent buildings, or (iv) be "upside down" (using a different definition than in the Governor's proposal). As noted above, the Senate proposal would have added criteria to qualify as a "brownfield" but, once a site was in the BCP, there would have been no additional restriction on the availability of tangible property tax credits.

Recommendation: The two-gate approach to qualify for this credit will likely result in (a) complication, delay and uncertainty in site acceptance, (b) increased program complexity and transaction costs for both DEC and the regulated community, and (c) litigation based upon the subjectivity of the proposed criteria (e.g., what qualifies as "underutilized" or "functionally obsolescent"?). The goals that the two-gate approach seeks can be achieved by retaining as-of-right eligibility for the tax credits while prioritizing the tangible credit based on the benefits such projects provide to the State and to the community in which the site is located.

Accordingly, we recommend that all sites in the BCP remain eligible for the tangible property tax credit component, but that the $35 million cap on such credits be reduced for non-targeted sites and projects, and that targeted sites and projects receive increased

percentages and limitations. See Attachment A for a spreadsheet illustrating how such an approach might work.

3. Amending Tax Law § 21(b)(2) Regarding Site Preparation Costs Eligible for Tax Credits

Under existing law, recoverable site preparation costs are broadly defined. They include the costs paid or incurred in connection with the site's qualification for a certificate of completion (COC) and other costs to prepare a site for building construction. They specifically include costs of excavation, temporary electric wiring, scaffolding, demolition, fencing and site security.

The Governor's proposal would have restricted eligible site preparation costs to those specified in a DEC decision document and directly related to remediation-related construction. The Assembly and Senate proposals would have left existing law on this issue unchanged

Recommendation: We propose (in Attachment B) a definition of "remediation costs" that ties the credit to costs that are more closely associated with remediation activities. The proposed definition would clarify that certain costs associated with constructing the foundation of a building—e.g., those in excess of the cost of an engineering cap required by an approved remedy—would not be eligible for the remediation credit component.

4. Adding new ECL § 27-1437 to create a streamlined, non-tax credit voluntary cleanup program:

The Governor's, Assembly's and Senate's proposals all included the addition of a liability-release-only cleanup program that would allow parties to waive tax credits in exchange for a more expedited cleanup process. The Assembly's bill allowed both volunteers and participants to waive tax credits but still required compliance with the full panoply of the BCP requirements. The Governor's "BCP-EZ" provision provided that a volunteer would be relieved of any or all procedural requirements, including public participation and community acceptance of a proposed plan. The Senate "NY-RAPID" program limited eligibility to volunteers for sites that are either "minimally contaminated" or "where contamination is overwhelmingly the result of the use or placement of historic fill" and also provided for an exemption from procedural requirements.

Recommendation: We agree that there is value to creating a new, streamlined program. However, there should be more clarity than was provided in any of the existing proposals as to which procedural requirements would be waived in any such program. Cleanup and review timeframes should be reduced, greater reliance placed on simplified templates and presumptive remedies, and the alternative analyses, ASP data and EQUIIS database requirements should be deleted. Although participation in a streamlined program should generally be at the election of the applicant, certain types of sites—e.g., significant threat sites—should not be eligible.

5. **Amending ECL 27-1407 (1-a) Brownfield Site Eligibility for Off-Site Contamination**

The Governor's and Assembly's proposals contained a provision that sites where contamination is solely from offsite sources are not eligible for tangible property tax credits. Such sites would remain eligible to enter the BCP and obtain site preparation tax credits.

Recommendation: If a site is contaminated, it needs to be cleaned up irrespective of the source of that contamination. Therefore, sites that meet the definition of "brownfield" should be eligible to enroll in the BCP and obtain applicable site preparation and tangible property credits, even if some or all of the contamination originates offsite.

6. **Amending the Brownfield Definition To Allow Class 2 Site Eligibility-**

The Governor's proposal would have allowed Class 2 sites to be eligible for the BCP if the sites were "under contract to be transferred to a *volunteer and the department has not identified any responsible parties for that property having the ability to pay for the investigation or cleanup of the property*." (emphasis added).

Recommendation: We agree that Class 2 sites should be eligible for the BCP where a volunteer owns or is under contract to purchase the site, but we recommend that the italicized language be deleted. Instead, we recommend including language, similar to that in the Senate bill, that site cleanup does not extinguish the right of the volunteer or the State to pursue responsible parties for cleanup costs, or for cleanup if the site is not remediated appropriately.

7. **Amend Tax Law § 21(a)(3), (b)(2) and (b)(4) Regarding the "Related Party" Issue.**

Currently, the brownfield redevelopment tax credit (Section 21 of the Tax Law) does not distinguish creditable expenditures based on whether they are paid to related parties. Rather, qualified expenditures that are properly chargeable to capital under federal tax law are creditable unless specifically excluded (such as pre-Brownfield Cleanup Agreement costs). The Governor's proposal would have added language to specify that the calculation of each of the tangible property, site preparation and on-site groundwater remediation credit components would not include costs paid to a "related party or parties", as that term is defined under the Internal Revenue Code. The Senate and Assembly bills contained no changes to existing law. If enacted, the Governor's proposal would have swept too broadly, eliminating from credit eligibility a panoply of typical and necessary project costs paid to related parties which would then have to be paid instead to third parties, possibly at greater cost to both the project and the State (in tax credits).

Recommendation: We suggest an approach that is directly targeted to related party expenditures which we understand to have created concerns at the NYS Department of Taxation and Finance: accrued but deferred amounts owed to "related parties" for services (typically development fees calculated as a percentage of project costs). These amounts may be properly capitalized under federal tax law but may be deferred after

project completion, often because lenders and investors demand priority over such payments. Rather than eliminating all related party payments, and to preserve the well-understood usage of federal income tax basis in the credit calculations, we suggest instead that the tangible property credit component with respect to such deferred service obligations to related parties be allowed only if and when such payments are actually made. Suggested language incorporating this approach can be found in Attachment C.

8. Grandfathering of Existing Sites

Under current law, the BCP continues indefinitely, but eligibility for tax credits expires for all sites which have not received their COCs by December 31, 2015.

The Governor's proposal would have retained that deadline for sites that entered the program prior to June 23, 2008. Sites entering between June 23, 2008 and June 30, 2014 would have had until December 31, 2017 to obtain their COCs. Sites entering between July 1, 2014 and December 31, 2014 would have had until December 31, 2025 to obtain COCs. However, a site not meeting its applicable deadline would not only have been ineligible for tax credits but would be terminated from the BCP and thus not receive the liability protection that accompanies the COC.

Both the Senate and Assembly proposals would have extended eligibility for tax credits to all sites obtaining COCs by December 31, 2025 (although the Assembly proposed a December 31,2022 cutoff date for site entry).

Recommendation: We recommend that all sites accepted into the BCP as of the date of any amendment to the BCP be grandfathered with respect to eligibility for currently available tax credits, and that the deadline for obtaining their COCs be the earlier of ten years after admission to the BCP (as long as that date is no earlier than December 31, 2015) or December 31, 2025. In order to address this issue on a going-forward basis, we recommend that newly-admitted sites qualify for tax credits based on their date of admission to the Program, not based on the issuance of a COC. In no event should sites in the program automatically lose their eligibility for COCs for failing to meet a cutoff date. The issue of sites remaining in the program indefinitely can be addressed using existing DEC authority to terminate sites that are not making reasonable progress in implementing a remedial program.

9. Amending ECL § 27-1409(2) re Payment of DEC and DOH Oversight Costs

State oversight costs sometimes represent a significant proportion of brownfield cleanup project expenses. For smaller projects, these costs can exceed the tax credit benefits. Whereas other project costs are usually somewhat predictable, State oversight costs are often difficult to predict, especially when DOH costs are added to DEC costs.

The Governor's proposal would have eliminated to oversight fees for volunteers for costs incurred after the effective date of the legislation. It also provided authority to DEC to negotiate "a reasonable flat-fee" for oversight costs for participants. The Senate proposal would have also eliminated State oversight fees; the Assembly proposal did not address this issue.

Recommendation: We agree that the State should not charge oversight fees for volunteers, and that DEC be authorized to negotiate reasonable flat fees with participants.

10. Amending ECL §72-0402(1)(d) Hazardous Waste Program Fee and ECL §27-0923(3)(c) Special Assessment on Hazardous Waste

ECL §72-0402 imposes a program fee, and ECL §27-0923 imposes a special assessment, on generators of hazardous waste. Statutory exemptions are provided for hazardous wastes generated as part of remedial actions performed under an order or agreement with DEC pursuant to title 13 or title 14 of the ECL. However, these exemptions do not extend to cleanups performed under local or other regulatory authority.

The Governor's proposal would have extended the statutory exemptions to projects that remediate sites under local government programs that either have been delegated authority to implement their remedial program by DEC or that have entered into a MOA with DEC. Neither the Senate nor Assembly proposals addressed this issue.

Recommendation: We agree that the hazardous waste program fee and special assessment should be exempted for sites remediated under programs run by municipalities with delegated authority or that have a MOA with DEC.

11. Provide Municipalities with Authority to Enter Sites in Tax Foreclosure to Perform Environmental Investigations:

Existing law authorizes municipalities that foreclose on tax liens to enter foreclosed sites to perform environmental investigations. However, there is no such authority for municipalities that, rather than foreclosing directly, sell liens to third parties which then foreclose.

Recommendation: We recommend amending the ECL §56-0508(1) to allow municipalities to enter sites subject to foreclosure or tax lien sales, in order to perform environmental investigations on those sites. See suggested statutory language in Attachment D.

12. Allowing Expenses Deducted Under Internal Revenue Code §198 To Be Considered in Calculation of Tangible Property Credits

Current law does not allow remedial expenses deducted under now-expired IRC §198 towards the calculation of the tangible property credit component limitations established by the 2008 BCP Amendments. The result is that if an applicant deducted rather than capitalized all of its cleanup expenses, it would not qualify for any tangible property tax credits. This anomalous result was, apparently, not intended by the drafters of the 2008 Amendments.

Both the Governor's and the Senate's proposals included language which would have allowed all costs of remediating a site—regardless of whether they were capitalized or deducted—to be considered in calculating tangible property tax credits.

Recommendation: We support the approach taken in the Governor's and Senate's proposals.

13. BOA Reform:

The BOA Program does not expire under existing law.

The Governor's proposal did not amend the BOA Program, and the budget did not fund it. The Senate proposal would have required the Department of State (DOS) to establish criteria for brownfield opportunity area conformance determinations for purposes of the BCP. The Assembly proposal would have required the DOS to develop criteria to determine if the proposed use and development of a site advances the goals and priorities established for that applicable BOA.

Recommendation: We recommend that the BCP program be amended so that a site in a designated BOA would be eligible for enhanced BCP tax credits. As far as the BOA program itself is concerned, designation should be far more transparent and simple than the current process. The information developed in relation to the existing BOAs should be publicly accessible, with the assistance of ESD, so that developers know the locations of BOAs and the pre-development amenities offered. Enough funding should be provided so that all of the existing BOAs can be designated as eligible for BCP tax credits and the opportunity remains for the creation of new BOAs. Moreover, the three-step process should be reduced to a single process, and DOS should be accountable for facilitating BOA designation within a defined time period. Upon designation there should be grant funding for implementation, specifically pre-development activities that will assist in the marketing and redevelopment of brownfield sites.

CONCLUSION

The Brownfield Task Force is fully prepared to work with the Governor's office, the Assembly and the Senate on legislation that would resolve the issues highlighted in this Report and Recommendations. Since the tax credits are expiring on December 31, 2015, it is imperative the two branches of Government work together to revise and extend the BCP along the lines suggested herein, so that the Program can continue to assist in the environmental cleanup and economic revitalization of the many remaining brownfield sites in New York State.

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ATTACHMENT A

			Tangible Property Credit Component Is Limited to the Lower of	
Use	**Type of Enhancement**	**Applicable %**	**Remediation Cost Multiplier**	**Sitewide Cap On Taxable Property Tax Credits**
Non-Affordable Residential	None	10%	3.0	$15,000,000
	LEED (Green Building) or TOD (Transit Oriented Development)	12%	3.0	$20,000,000
	En-Zone/BOA*	14%	3.0	$25,000,000
Affordable Residential	None	13%	4.0	$25,000,000
	LEED or TOD	15%	4.0	$30,000,000
	En-Zone/BOA	17%	4.0	$35,000,000
Commercial	None	10%	4.0	$35,000,000
	LEED or TOD	12%	4.0	$40,000,000
	En-Zone/BOA	14%	4.0	$45,000,000
Industrial	None	15%	8.0	$50,000,000
	LEED or Near Rail/Roads/Barge	20%	8.0	$55,000,000
	En-Zone/BOA	25%	8.0	$60,000,000

*** NOTE: The En-Zone definition in Tax Law 21(6) should be amended to reference the most recent census data and to eliminate the sunset of the county En-Zones.**

ATTACHMENT B

Section 21(b)(2) of the Tax Law would be amended to read as follows:

(*2) Remediation costs. The term "remediation costs" shall mean all amounts properly chargeable to a capital account, which are paid or incurred in connection with a site's investigation, remediation, or qualification for a certificate of completion, and all costs paid or incurred within sixty months after the last day of the tax year in which the certificate of completion is issued for compliance with the certificate of completion or the remedial program defined in the certificate of completion including but not limited to institutional controls, engineering controls, an approved site management plan, and an environmental easement with respect to the qualified site. Remediation costs shall include, but not be limited to, costs of excavation; demolition; lead paint removal; asbestos removal; environmental consulting; engineering; legal costs associated with participation in the brownfield cleanup program; transportation, disposa, treatment or containment of contaminated soil; remediation measures taken to address contaminated soil vapor; cover systems consistent with applicable regulations; physical support of excavation; dewatering and other work to facilitate or enable remediation activities; sheeting, shoring, and other engineering controls required to prevent off-site migration of contamination from the qualified site or migrating onto the qualified site; and the costs of fencing, temporary electric wiring, scaffolding, and security facilities. Remediation costs shall not include the costs of foundation systems that exceed the cover system requirements in the regulations applicable to the qualified site.*

ATTACHMENT C

Section 21(a)(3) would be amended to add the following at the end thereof:

Notwithstanding any other provision of law to the contrary, the portion, if any, of the tangible property credit component calculated pursuant to this section which is attributable to related party service fees includable in the cost or other basis of qualified tangible property shall be allowed as follows: (A)the tangible property credit component attributable to related party service fees actually paid by the taxpayer to the related party in the taxable year in which such property is placed in service shall be allowed for such taxable year; and (B) with respect to any other taxable year for which the tangible property credit component may be claimed under this section, the tangible property credit component attributable to related party service fees shall be allowed only with respect to payments actually made by the taxpayer to the related party in such taxable year.

A.Section 21(b) would be amended by adding a new paragraph (3-A) as follows:

(3-A) The term "related party service fee" shall mean any fee or other monetary compensation earned by a related party and calculated as a percentage of project and/or acquisition costs, in consideration of services rendered to or for the benefit of the taxpayer placing qualified tangible property in service in connection with the acquisition and development of such property. For purposes of the immediately preceding sentence, "related party" shall have the meaning ascribed to it under Sections 267(b) and 318 of the Internal Revenue Code.

ATTACHMENT D

ECL § 56-0508 would be amended as follows:

Notwithstanding any general, special or local law or ordinance to the contrary:

*1. upon the commencement of a proceeding to foreclose a tax lien, the taxing district bringing the proceeding**, the taxing district that sold the tax lien** or any **other** taxing district other than the one foreclosing the tax lien, having any right, title, or interest in, or lien upon, any parcel described in the petition of foreclosure may upon twenty days notice to all parties having any right, title, or interest in, or lien upon such parcel, move, at a special term in the court in which the foreclosure proceeding was brought, for an order granting such taxing district the temporary incidents of ownership of such parcel for the sole purpose of entering the parcel and conducting an environmental restoration investigation project upon such parcel.*