

**MEMORANDUM**

Date: December 7, 2006

From: Walter Mugdan, Chair, Environmental Law Section, New York State Bar Association

To: Energy & Environment Policy Advisory Committee

Over the past two years the Environmental Law Section has provided detailed comments on the State's evolving Brownfields program. We have participated actively in the public comment process of the New York State Department of Environmental Conservation concerning its proposed (now promulgated) regulations under the Brownfields legislation.

The following four items are drawn from our Section's earlier comments, which were authorized by the Section's Executive Committee.

1. Revision of NYSDEC's Eligibility Guidelines. NYSDEC has promulgated guidelines that restrict eligibility for the state Brownfield Cleanup Program beyond those criteria authorized by the Legislature. Consequently, some sites where cleanup is required are prevented from entering the Program and obtaining the benefits (including tax credits, cleanup under NYSDEC supervision, and a transferable release and covenant not to sue) that the Legislature intended. To the extent the guidelines are more restrictive than the provisions of the Brownfield Cleanup Act, we recommend they be revised to conform to the legislative intent. Tied closely to this recommendation is the following recommendation.
2. Adjustment of BCP Tax Credit Structure. One purpose for the above-referenced eligibility restrictions may have been to limit the number of developers and others that can take advantage of a tax credit structure that is overly generous in certain respects. The tax credit formula should be revised by the Legislature to increase the percentage tax credit available for remediation while reducing, selectively, the tax credit for site improvements so that developers do not receive unjustified windfalls for massive developments on lightly contaminated properties.
3. Provision of an Alternative Means for Site Cleanup Under NYSDEC's Supervision. Sites not qualified for the Brownfields Cleanup Program (BCP) should nonetheless be cleaned up under NYSDEC's supervision and receive a NYSDEC signoff at the end of cleanup. Currently, sites

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not being cleaned up under the BCP, Superfund or Environmental Remediation programs are remediated at risk without any governmental supervision. There should be a program, like the now-discontinued Voluntary Cleanup Program, where sites not qualifying for the BCP or other programs are nonetheless cleaned up under NYSDEC oversight with an agency signoff at the end of the process.

4. Enactment of a Private Right of Action for Contribution Under the State's Superfund Law.  
There is currently no ability for innocent landowners to clean up their properties and sue the original polluters under the state's Superfund law. This problem was largely academic until the Supreme Court decision in the *Aviall* case, which created obstacles to such lawsuits under the federal Superfund statute. This lack of effective means of redress continues to undercut the state's public policy of encouraging voluntary cleanups. This gap in the statutory framework should be addressed by legislative action.