

TESTIMONY OF DAVID J. FREEMAN AND LAWRENCE P. SCHNAPF
BEFORE THE NEW YORK STATE ASSEMBLY
ENVIRONMENTAL CONSERVATION COMMITTEE

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My name is David Freeman. I am an environmental lawyer and director at Gibbons P.C. in New York City. I am also President of the New York City Brownfield Partnership, a non-profit public-private partnership promoting the cleanup and redevelopment of brownfield sites in New York City.

Larry Schnapf is an environmental lawyer and principal of Schnapf LLC, an adjunct professor of environmental law at New York Law School as well as the Center for Real Estate Studies, where he teaches a course on Brownfield Law and Policy.

We come before you today in our roles as Co-Chairs of the Brownfield Task Force of the New York State Bar Association's Environmental Law Section. We would like to review with you the Section's recommendations to revitalize the New York State Brownfield Cleanup Program. Copies of those Recommendations have already been provided to the Committee Chair and his staff.

First, a word about the New York State Bar's Environmental Law Section. We are a membership organization of more than 1,100 lawyers, representing all segments of the environmental bar and a wide spectrum of clients -- from public agencies, to non-profits, to community organizations, to site owners and developers. We have been active on these issues since 1998, when the Section first established its Brownfield Task Force.

The Task Force made its first set of recommendations in October 1999. Many of those recommendations were incorporated into the Brownfield Cleanup Act passed by the New York State Legislature four years later.

Since then, the Section has been active in commenting on various aspects of the program, including DEC's eligibility guidance, its implementing regulations, and proposed amendments to the Brownfield Cleanup Act.

The Task Force met numerous times over the spring, summer and fall of 2011 to develop a Report and a series of Recommendations for revitalizing the Act. The Report and Recommendations were passed unanimously by the Section's Executive Committee and circulated late last year to this Committee, its Senate counterpart, the DEC, the Governor's Office and others.

The Section's recommendations are as follows:

1. **Retain broad eligibility of sites** to enter the Brownfield Cleanup Program. Any site which has or may have contamination levels that exceed cleanup standards should be allowed to enroll.
2. Expand eligibility for the BCP by **allowing enrollment of Class 2 and enforcement sites**, if undertaken by Volunteers. It is in the public interest for those sites to be cleaned up by parties not liable for the contamination, and the Act should encourage such cleanup.
3. Make clear that **historic fill counts as contamination** in determining site eligibility. If a site is contaminated, the source of the contamination should not make any difference in deciding on site eligibility.

4. **Retain the current level of tax credits for cleanup expenses** for all sites.

Focusing tax credits on cleanup is the best way to encourage the remediation of the most highly contaminated sites, as well as higher levels of cleanup at all sites.

5. **Target development credits more carefully** to sites that really need them to make development viable. In other words, there should be a two-tier program: cleanup credits for all sites, but development credits only for a more limited universe of sites. These sites would need to meet objective criteria regarding under utilization, blight and market conditions, as determined by the Empire State Development or another state agency with economic development expertise.

6. **Re-establish a program like the old Voluntary Cleanup Program** for less contaminated sites that do not need or want cleanup or redevelopment tax credits. These sites would be given more expedited treatment than is possible under the BCP but would still receive a Release and Covenant Not To Sue from the State upon satisfactory completion of remediation.

7. **Provide that the tax credit and liability release provisions be contractually enforceable**, so that Program participants need not fear that tax credits already earned would be retroactively removed or delayed.

8. **Make the tax credit provisions of the Program permanent** by eliminating the December 31, 2015 sunset date. Doing so will remove the Sword of Damocles, currently hanging over the heads of Program participants, of losing their tax credits entirely if they do not receive their Certificates of Completion by the sunset date.

Other recommendations of the Section, all of which are contained in the Report, include restoring En Zones to assist redevelopment upstate, on Long Island and in rural communities;

capping State oversight costs at a percentage of site cleanup costs;
providing additional incentives for renewable energy projects on brownfield sites; and
streamlining the administrative process by implementing some of the innovations pioneered by New York City's Voluntary Cleanup Program.

The New York State Brownfield Cleanup Program has been a very positive force in facilitating the cleanup and redevelopment of contaminated sites in New York State. We believe that there is a strong consensus among the environmental community, site owners and developers, community groups and practitioners in the field (like us) that the Program should be extended and strengthened by making reforms based on lessons learned during the first nine years of its operations.

We wish to emphasize that time is of the essence. Already, developers and community groups are deferring decisions on entering the Program because they do not know whether its tax credit provisions will extend past December 2015. Eliminating the sunset date is a matter that must be addressed in this session of the Legislature.

We appreciate the opportunity to provide these comments. We would be pleased to provide more details as to the Section's Recommendations and to answer any questions.