

# *Fordham Environmental Law Review*

---

*Volume 11, Number 3*

2017

*Article 5*

---

## Enhancing Environmental Remediation in New York By Strengthening the Superfund Program and Expanding the Brownsfields Program

Richard L. Brodsky\*

John L. Parker†

\*New York State Assembly

†Pace University School of Law

Copyright ©2017 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

## ARTICLES

# ENHANCING ENVIRONMENTAL REMEDiation IN NEW YORK BY STRENGTHENING THE SUPERFUND PROGRAM AND EXPANDING THE BROWNFIELDS PROGRAM

*Richard L. Brodsky\**

*John L. Parker\*\**

### INTRODUCTION

The industrial age produced thousands of acres of land that are still contaminated with chemicals and chemical wastes. These sites exist in all regions of New York State and in all types of neighborhoods, whether urban, suburban, or rural. While some sites are heavily contaminated and present significant risks to public health and the environment, many others have only minor

---

\* Richard L. Brodsky J.D., 1971, Harvard Law School. Chairman of the Assembly Environmental Conservation Committee, representing the 86th Assembly District. Adjunct Professor of Constitutional Law at Pace University School of Law, and Adjunct Professor of Municipal Law and Entertainment Law at St. John's University School of Law.

\*\* John L. Parker J.D., 1996, Pace University School of Law. Counsel to Assemblyman Richard L. Brodsky, Chairman of the Assembly Environmental Conservation Committee. Special thanks to Chris Duryea, Graduate Research Intern, whose assistance was invaluable in completing this article.

contamination. This contamination impacts the buildings, soil, and groundwater on these sites and adjacent properties, resulting in the need for more comprehensive and expensive clean ups to eliminate public health threats and environmental problems. Many of these contaminated sites are abandoned and are a blight on the communities in which they are located.

Contaminated properties that threaten public health and the environment have been addressed by a number of state laws. In 1979, New York enacted the "Superfund Program" to clean up contaminated sites by enabling the state to order responsible parties to clean up those sites that pose the most serious threat.<sup>1</sup> When necessary, the state can clean up the site itself if the party responsible for the contamination cannot be found. The Superfund Program is used to clean up the thousands of contaminated sites identified under the law. The program has been a tremendous success, although the program is limited to cleaning up sites contaminated by hazardous waste. Therefore, sites contaminated with a hazardous substance are not covered.<sup>2</sup> Several hundred hazardous waste sites throughout New York State have been remediated, but several hundred still remain idle. Moreover, there is not enough money left to clean up the remaining sites.

The money that remains in the Superfund is quickly dwindling. Many constituencies, including businesses, community groups, developers, environmental groups, and government institutions, have become involved in supporting legislation that will reauthorize funding for the program. Part of that effort has included proposals calling for radical changes to the State's environmental programs. Some proposals seek to dramatically change existing state law by weakening clean up standards, allowing more contamination to stay in the ground. Some proposals also make taxpayers responsible for a larger share of the clean up costs. Changes made to current environmental remediation programs will impact the State for generations to come. Therefore, the

---

1. In 1979, the "Abandoned Sites Act" was enacted as the first component of the current "Superfund Program." The Program was subsequently amended by N.Y. ENVTL. CONSERV. LAW §§ 27-1301-27-1321 (McKinney 1999). These sections were added by 1979 N.Y. Laws 282 §2, and amended by 1982 N.Y. Laws 857 §3; 1989 N.Y. Laws 440 §4; 1986 N.Y. Laws 671 §8; 1994 N.Y. Laws 295 §1.

2. See discussion *infra* Part II.A.

uncertainties emerging from the Superfund debate show that public health and environmental protection in New York State are at a crossroads.

Redevelopment of sites with relatively less toxic material than Superfund sites, called brownfields, has also received significant attention. Although the term 'brownfields' is freely used, there is no commonly accepted definition of the term. Consequently, little is known about how many brownfields exist, where they are located, the extent of their contamination, or the changes needed to clean them up. Although the 1996 Clean Air/Clean Water Bond Act<sup>3</sup> was created to clean up brownfields, the current program has not been successful, with at least ninety percent of the \$200 million in the program remaining unspent.<sup>4</sup>

In response to the need for changes in New York's environmental remediation programs, the New York State Assembly has presented a package of bills to remedy these issues.<sup>5</sup> This article explains these key pieces of environmental legislation. It argues that the Assembly's Superfund proposal will improve the State's already successful Superfund Program.<sup>6</sup> Under this program, the Assembly would continue the traditional formula of holding industries and taxpayers each responsible for half of the Superfund monies, while polluting industries would remain fully responsible for the Oil Spill Fund.<sup>7</sup> The proposal maintains the

3. N.Y. ENVTL. CONSERV. LAW §§ 56-0101-56-0611 (McKinney 1999).

4. See Michael B. Gerrard, *New York State Brownfields Programs: More and Less Than Meets the Eye*, 4 ALB. L. ENVTL. OUTLOOK 18, 19 (1999) (stating that \$7.6 million has been granted out of the \$200 million allocated to the program). See also DEP'T OF ENVTL. CONSERV., NEW YORK STATE ASSEMBLY, REPORT OF THE WAYS AND MEANS COMMITTEE ON THE NEW YORK STATE ASSEMBLY BUDGET FISCAL YEAR, at 8 (2000) [hereinafter REPORT OF THE WAYS AND MEANS COMMITTEE]. As of January 31, 2000 the DEC has disbursed only \$4.2 million. *Id.*

5. See discussion *infra* Part II.

6. See generally A. 496, 223 Leg., Reg. Sess. (N.Y. 1999) (rejecting the thrust of other proposals that weaken clean up standards, unduly permit owners of sites to set public health goals, and shift the costs of clean up programs to taxpayers).

7. See discussion *infra* Part II.A.1.

clean up standards now in effect, and creates a greater role for local governments and community groups in making land use decisions.<sup>8</sup>

The Assembly's brownfields Bills are a response to the clear need for better and faster government action to recycle brownfields sites into valuable economic and social assets, while simultaneously maintaining New York State's historic and necessary clean up standards. The Assembly proposes that existing clean up levels should be maintained at all brownfields sites. Other proposals, often supported by the business community, take the position that brownfields sites can only be effectively reclaimed if higher levels of pollutants are permitted to remain in the soil and groundwater than is currently permitted under existing law. The Assembly emphatically rejects that position. If the private sector cannot clean brownfields sites to the current standard without destroying the economic viability of the brownfields project, the State should step in and provide the economic assistance to ensure the clean up. The State's role in brownfields clean up is not to justify lower clean up standards, but rather to supplement the private sector's ability to clean up brownfields sites.

The State should not contribute to the endangering of public health in the name of economic redevelopment. This is especially true in the many environmental justice communities that are believed to have relatively high concentrations of brownfields sites. These communities have traditionally borne a disproportionate share of environmentally dangerous activities. Some proposals suggest that these communities must again shoulder a heavier burden than other communities in the name of economic activity. The Assembly Bills, both theoretically and specifically, are the only proposals that provide a productive brownfields program while continuing to protect public health.

This article stresses the importance of enhancing the environmental remediation program in New York. Part I provides an overview of the brownfields problem, both within New York and on a national level. Part II analyzes the current Superfund and brownfields legislation in New York. Part II also describes the Assembly's proposals for legislation that will expand and encourage environmental protection and clean up. Part III

---

8. See discussion *infra* Part II.A.2.d.

concludes that these Superfund and brownfields legislative proposals will encourage brownfields clean up in New York.

#### I. AN OVERVIEW OF THE PROBLEM OF CONTAMINATED SITES

In response to growing public anger about heavily contaminated properties in particular neighborhoods, such as the Love Canal debacle, New York enacted legislation specifically addressing hazardous waste sites.<sup>9</sup> At the time these laws were passed, the number and location of contaminated sites were unknown, as was the extent of the contamination at these sites. As the sites were 'uncovered,' it became clear that after many years of leaving chemicals and wastes behind, toxic contamination was leaching into the surface of the land, the groundwater, and onto adjacent properties.<sup>10</sup> It became equally clear that this toxic contamination posed serious public health consequences to local residents and other people who were exposed to these dangerous chemicals. In response to this serious public health problem, New York initiated policies to eliminate the threat posed by contaminated sites.

One of the most important pieces of environmental legislation to emerge from this period was the Superfund Program, entitled the Inactive Hazardous Waste Site Remedial Program.<sup>11</sup> When it was signed into law, Governor Hugh Carey noted that the program was "an earnest commitment on behalf of government and industry to eliminate one of the most dangerous health and environmental problems facing the people of the state."<sup>12</sup> In the twenty years since the Superfund Program became law, the dangers and problems facing residents from sites contaminated with hazardous and toxic wastes has not changed. Toxic chemicals found in the soil and groundwater at abandoned and underused properties continue to pose a significant public health threat.<sup>13</sup> Abandoned properties

---

9. See N.Y. ENVTL. CONSERV. LAW § 27-1301 (McKinney 1999), reviewed by Philip Weinberg, Practice Commentaries 659.

10. See *id.*

11. N.Y. ENVTL. CONSERV. LAW §§ 27-1301-27-1321 (McKinney 1999).

12. N.Y. ENVTL. CONSERV. LAW § 27-1301 (McKinney 1999), reviewed by Philip Weinberg, Practice Commentaries 660 (citing 1982 N.Y. Laws, at 2630).

13. See THE EFFECTS OF ENVIRONMENTAL HAZARDS AND REGULATION ON URBAN DEVELOPMENT (1997), Executive Summary,

contaminated with hazardous chemicals and toxic wastes have always presented a challenge to lawmakers. Although the Superfund Program, having remediated 401 sites, has been successful in addressing many highly contaminated sites over the past 20 years, the number of sites that are eligible under the program continues to grow.<sup>14</sup> In March 2000, the New York Department of Environmental Conservation (“DEC”) estimated that approximately 790 sites might require remediation.<sup>15</sup>

Many sites found throughout New York contain only hazardous substances or do not have contamination levels that reach the “significant threat” threshold.<sup>16</sup> The Superfund Program does not cover these sites. These sites are sometimes referred to as brownfields and are typically underused, abandoned and pose environmental and public health threats. Although the particulars of these sites are unknown, contamination or perceived contamination is the major impediment to the re-use of these properties. These abandoned properties are a drain on the economic and social resources of their communities because of lost redevelopment opportunities.

Another challenge posed by the brownfields problem is the disproportionate number of brownfields in minority communities. This problem raises environmental justice concerns in those communities. Consequently, measured and targeted policies must

---

Policy Background, *available at* <http://www.huduser.org/publications/econdev/bfield.html> (last visited Oct. 22, 2000) [hereinafter EFFECTS OF ENVIRONMENTAL HAZARDS].

14. N.Y. DEP’T OF ENVTL. CONSERV., REGISTRY OF INACTIVE HAZARDOUS WASTE DISPOSAL SITES IN NEW YORK STATE, ANNUAL REPORT 1 (April 2000) [hereinafter REGISTRY OF INACTIVE HAZARDOUS WASTE].

15. NEW YORK STATE DEP’T OF ENVTL. CONSERV., SITES THAT REQUIRE OR MAY REQUIRE REMEDIATION THAT MAY NOT BE FULLY FUNDED WHEN THE 1986 ENVIRONMENTAL QUALITY BOND ACT IS PROJECTED TO BE FULLY OBLIGATED, Briefing Documents, Table 2, at 1 (Mar. 10, 2000) (on file with author) [hereinafter SITES THAT MAY REQUIRE REMEDIATION].

16. N.Y. COMP. CODES R. & REGS. tit. 6, § 375-1.4 (1992) (“The commissioner may find that hazardous waste disposed at a site constitutes a significant threat to the environment if . . . the commissioner determines that the hazardous waste disposed at the site or coming from the site results in, or is reasonably foreseeable to result in” an adverse environmental impact.).

be developed to address brownfields redevelopment without sacrificing important environmental and public health protections.

Increased interest in brownfields redevelopment has resulted in a growing effort to establish the causes of, and potential solutions to, the brownfields problem. Research efforts look at the challenges posed by brownfields, and make determinations as to whether current programs will result in the clean up and re-use of these sites.

A recent survey of mayors in cities across the United States posed questions to the mayors regarding perceived impediments to the redevelopment of brownfields sites.<sup>17</sup> The survey report summarized the responses of 231 cities and towns.<sup>18</sup> The respondents were diverse in terms of population, size, location, and in providing a representative cross section of cities and towns across the country.<sup>19</sup> Similarly, in New York, the eleven cities and towns that responded to the survey represented a geographical cross-section of the state.<sup>20</sup> The sizes of the reported brownfields sites across the country ranged from a quarter-acre site to one site that was over 1,300 acres.<sup>21</sup> In the aggregate, the study revealed more than 21,000 brownfields sites, which totaled more than 81,000 acres across the country.<sup>22</sup>

The results of the survey show that city officials believe that the largest impediment to brownfields redevelopment is lack of clean up funds.<sup>23</sup> In fact, lack of clean up funds ranked number one every

---

17. See 3 U.S. CONFERENCE OF MAYORS, RECYCLING AMERICA'S LAND: A NATIONAL REPORT ON BROWNFIELDS REDEVELOPMENT 7 (Feb. 2000).

18. *Id.*

19. *Id.* The populations of these cities ranged from 1,468 in Hope, New Jersey to 7,380,906 in New York City.

20. *Id.* at 17-19. The eleven New York cities responded to the survey were Albany, Binghamton, Mount Vernon, Glen Cove, New York City, North Tonawanda, Rome, Schenectady, Utica, Rochester and Buffalo.

21. *Id.* at 9.

22. *Id.* at 9. It is important to note that these numbers are estimates only, and that 210 of the 231 cities provide such estimates. *Id.*

23. *Id.* at 11. 208 cities or 90% of the cities reporting cited "clean up funds needed" as the largest impediment to brownfields redevelopment. The cities were asked to choose as many responses as they thought applied to their situation from the following list of impediments: standards for clean up, neighborhood conditions, liability



year that the study has been conducted.<sup>24</sup> The remaining four largest impediments to brownfields redevelopment were liability issues, the need for environmental assessments, the need for environmental regulations, and the current market conditions.<sup>25</sup> Of the responding mayors, at least half regarded lack of funds, liability issues and the need for environmental assessments as the largest impediments to redevelopment. In New York, the top five impediments to brownfields redevelopment are the lack of clean up funds, liability issues, current market conditions, the need for environmental assessments, and clean up standards.<sup>26</sup>

The brownfields study (the "Environmental Hazards Study"),<sup>27</sup> funded by the Federal Department of Housing and Urban Development and the United States Environmental Protection Agency ("EPA"), researched impediments to brownfields redevelopment and suggested ways to overcome them.<sup>28</sup> The researchers surveyed developers, property sellers, lenders, public agencies, environmental consultants and others, and reviewed forty-eight redevelopment projects in twelve cities in four states.<sup>29</sup> This study concluded that "[a]lthough State attempts to lower the perceived level of liability risk are important . . . policymakers

---

issues, market conditions, land assembly, insufficient time to develop the deal, inadequate infrastructure, environmental regulations, environmental assessments, demolition monies needed, community concerns, clean up funds needed, and "other." *Id.*

24. *Id.* This is the third annual report of this study. *Id.* at 7.

25. The top five list was the same when the cities were asked to place the impediments in order of ranking of the most significant to the least significant. Statistics for the top five are: 163 or 71% of the cities reported liability issues, 138 or 60% reported the need for environmental assessments, 104 or 45% reported environmental regulations, and 103 or 45% reported market conditions. *Id.* at 11.

26. Statistics for the top five are: 11 of 11 or 100% reported clean up funds needed, 9 of 11 or 82% reported liability issues, 7 of 11 or 63% reported market conditions, 7 or 11 or 63% reported the need for environmental assessments, and 7 of 11 or 63% reported environmental regulations (unpublished documents, on file with author).

27. See EFFECTS OF ENVIRONMENTAL HAZARDS, *supra* note 13. Researchers from Urban Institute, Northeast-Midwest Institute, University of Louisville and University of Northern Kentucky submitted this study.

28. *Id.* at Executive Summary (including both successful and failed efforts on sites that are suspected to be contaminated).

29. *Id.*

should not expect that State assurances, alone, will be sufficient to induce substantial new demands for brownfields properties.”<sup>30</sup> The survey concluded that “markets have begun to respond to environmental problems in ways that should spur investment in brownfield properties.”<sup>31</sup> The survey found that

- (a) [e]nvironmental issues, while often important, were never the single critical obstacle on failed development deals --- other non-environmental factors (potential demand, extraordinary costs) mattered also, to a degree depending on local circumstances;
- (b) immediate environmental costs, rather than the fear of liability for future claims, were developers’ predominate concern, and
- (c) State and local actions to promote brownfield redevelopment appear to have the highest payoff where explicitly linked to efforts to create viable markets and build system capacity to respond to environmental issues.<sup>32</sup>

The aforementioned surveys identify the realities facing brownfields redevelopment. The research shows that the brownfields problem is complex. The survey of mayors reported a diverse range of factors that the mayors of these cities and towns believe are inhibiting brownfields redevelopment.<sup>33</sup> Similarly, the Environmental Hazards Study shows that governmental programs, when coordinated with community involvement, can be more effective.<sup>34</sup> Both studies also suggest opportunities that lawmakers can take advantage of when creating policies and programs to address these issues. Successful programs create financial and legal incentives for redevelopment and provide an active role for the community. The two survey’s findings demonstrate that brownfields redevelopment programs that are consistent with current environmental protection standards can and do work. The studies also show that available financial assistance is a prime engine of change for the redevelopment of brownfields.

---

30. *Id.*

31. *Id.* (showing the markets response to entice brownfields redevelopment policies, citing the growth of environmental insurance, lender willingness and venture capital, and more sophisticated developers).

32. *Id.*

33. *See supra* notes 23-25 and accompanying text.

34. *See supra* notes 30-32 and accompanying text.

In New York, the Assembly's Superfund and brownfields legislation package offers targeted changes that take advantage of these opportunities. The proposed Superfund legislation will strengthen New York State's existing program, place important new provisions into state law, and continue highly protective clean ups at these sites. The Superfund Proposal, Assembly Bill 874-C: The Comprehensive Environmental Clean up Act of 2000, expands the current Superfund Program to include all sites contaminated with hazardous substances, streamlines clean up timeframes, and creates a state action for natural resource damages caused by contaminated sites.

The Assembly's proposed brownfields legislation will free up millions of dollars currently available under the Bond Act program, and develop a new environmental opportunity zone program to encourage brownfields redevelopment in a manner that does not compromise public health and environmental protection for New Yorkers. Assembly Bill 8722-C, amends the Environmental Restoration Program provisions of the Clean Air/Clean Water Bond Act of 1996 by defining what properties are eligible for clean up.<sup>35</sup> It also provides municipalities and community based organizations with the ability to investigate sites for contamination before they take title to such properties, and authorizes and funds an inventory to fully identify these sites.<sup>36</sup> Assembly Bill 496: The Environmental Opportunity Zone Act, creates a new section of the Environmental Conservation Law, authorizing municipalities to create environmental opportunity zones that provide incentives for voluntary brownfields clean up. The proposal also provides ten-year property tax breaks for those sites that fully comply with the remedial clean up requirements for sites located in environmental opportunity zones. Together, this legislative package provides a productive brownfields program while protecting public health.

---

35. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999). The bill is entitled "An act to amend the environmental conservation law and the real property tax law, in relation to environmental restoration projects for brownfields redevelopment."

36. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999).

## II. THE NEW YORK ASSEMBLY'S LEGISLATIVE PACKAGE REGARDING CONTAMINATED SITES

### *A. Superfund Proposal*

#### 1. Current Law: The Inactive Hazardous Waste Disposal Site Remedial Program

The Inactive Hazardous Waste Disposal Site Remedial Program holds responsible those parties that owned, contributed to, or caused the hazardous waste contamination of a site.<sup>37</sup> The parties responsible for the contamination are liable for the costs of clean up. However, when the responsible parties cannot be found, or if they fail to act, the Superfund can be used to clean the site.<sup>38</sup> Superfund monies allow the DEC to remediate contamination and hazardous wastes at sites that pose a significant threat to public health and the environment.<sup>39</sup> The DEC can pursue the responsible party after the remediation occurs.<sup>40</sup>

Under the Superfund Program, when the party responsible for the hazardous waste contamination either can not be found, or is recalcitrant and refuses to comply with clean up orders, the state has leverage to force potentially responsible parties ("PRPs") into clean up negotiations. The leverage the Superfund provides is simple: if PRPs fail to reach a negotiated settlement to clean a contaminated site, the DEC can use Superfund monies to conduct the investigation and remediation work themselves. Without the

---

37. See N.Y. ENVTL. CONSERV. LAW §§ 27-1301–27-1321 (McKinney 1999).

38. N.Y. ENVTL. CONSERV. LAW §§ 27-1313 (5)(a)-(b) (McKinney 1999) (suggesting that the fund can be used when the responsible party has not responded within the time required pursuant to N.Y. ENVTL. CONSERV. LAW § 27-1313(3) or has not been found after a reasonable attempt has been made to identify or locate the responsible party).

39. See N.Y. ENVTL. CONSERV. LAW § 27-1313(3)(a) (McKinney 1999).

40. N.Y. ENVTL. CONSERV. LAW § 27-1313(5)(b) (requiring the DEC Commissioner to make every effort to recover appropriate relief from responsible parties).

money needed to fund clean ups, the State loses an important tool in its toolbox.

The goal of inactive hazardous waste clean up is to “restore that site to pre-disposal conditions, to the extent feasible and authorized by law.”<sup>41</sup> To do so, the DEC must determine when and which inactive hazardous waste sites will be cleaned up based on the extent of the on-site contamination and the threat the site poses to public health.<sup>42</sup> When the DEC Commissioner determines that a site poses a significant threat, the responsible party is encouraged to clean up the site by entering into a Consent Order. Alternatively, the Commissioner may order the responsible party to remediate the site. In cases where sites are abandoned or the responsible party fails to clean the site, the DEC can perform the remediation itself or contract with another party to perform the clean up.<sup>43</sup>

The Superfund Program has successfully identified thousands of sites with potentially dangerous contamination, and remediated hundreds of sites that present a significant threat. Since 1980, the program has identified 1,714 potential sites.<sup>44</sup> According to the DEC, 401 sites have been successfully remediated.<sup>45</sup> The most recent statistics indicate that 864 sites remain on the DEC’s

41. N.Y. COMP. CODES R. & REGS. tit. 6, § 375-1.10(b) (1995) (“At a minimum, the remedy selected shall eliminate or mitigate all significant threats to the public health and to the environment . . .”).

42. *Id.* § 375-1.8(a)(2) (1995). DEC regulations set forth regulatory site rankings as follows: Class 1 – Causing or presenting an imminent danger of damage to the public health or environment; Class 2 – Presenting a significant threat to the public health or environment; Class 3 – Not presenting a significant threat to the public health or environment; Class 4 –requiring continued management; Class 5 –no evidence of present or potential adverse impact. *See id.* Currently, there are no Class 1 designated sites.

43. N.Y. ENVTL. CONSERV. LAW § 27-1313(5) (McKinney 1999).

44. REGISTRY OF INACTIVE HAZARDOUS WASTE, *supra* note 14, at 1. This report is required annually pursuant to N.Y. ENVTL. CONSERV. LAW § 27-1305 (McKinney 1999).

45. REGISTRY OF INACTIVE HAZARDOUS WASTE, *supra* note 14, at 1. Of these identified sites, 170 have been remediated and removed from the Inactive Hazardous Waste Disposal Site Registry. In addition to these sites, 680 other sites have been removed from the registry “after either an investigation found that no consequential quantity of hazardous waste was disposed at the site, or after the site was merged with another site.” *Id.*

Inactive Hazardous Waste Site Disposal Site Registry.<sup>46</sup> Of these remaining sites, the DEC has identified 505 sites that present a significant threat to the public health and the environment, and are likely to require remediation under the Superfund Program.<sup>47</sup>

The number of hazardous waste sites eligible for remediation under the Superfund Program continues to grow. The Superfund Management Board, whose primary responsibility was to monitor and evaluate the Superfund Program, estimated that approximately thirty-five new sites are added to the State's Registry each year.<sup>48</sup> The DEC estimates that approximately twenty sites that meet the "significant threat" threshold are added to the Registry each year.<sup>49</sup> In addition to these numbers, the DEC suspects that hundreds of unidentified sites have yet to be discovered.<sup>50</sup>

The Environmental Quality Bond Act of 1986 ("EQBA") provided \$1.2 billion for the remediation of inactive hazardous waste sites.<sup>51</sup> EQBA authorized the Superfund monies that are allocated in the Inactive Hazardous Waste Disposal Site Remedial Program. In March 2000, the DEC released an analysis of EQBA funds that are already obligated to specific sites and the remedial

46. *Id.*

47. *Id.* at 13 (identifying these sites as Class 2 sites). *See supra* note 42 for a description of Class 2 sites.

48. STATE SUPERFUND MANAGEMENT BOARD, 13TH ANNUAL EVALUATION REPORT TO THE GOVERNOR AND THE LEGISLATURE: THE NEW YORK STATE HAZARDOUS WASTE SITE REMEDIATION PROGRAM 3 (1999) [hereinafter 13TH ANNUAL EVALUATION]. The Superfund Management Board was empowered, by statute to, among other things, "[m]onitor and review the implementation of the [I]nactive [H]azardous [W]aste [S]ite [R]emediation [P]rogram," and to annually make "comments, suggestions, and recommendations regarding the program . . ." N.Y. ENVTL. CONSERV. LAW § 27-1319(4)(d)(g) (McKinney 1999). The Management Board's statutory authority expired on March 31, 1999 and therefore, this is their final report. *Id.* § 27-1319(8) (McKinney 1999).

49. *See* SITES THAT MAY REQUIRE REMEDIATION, *supra* note 15, at 1.

50. *Id.* at 2 (suspecting that hundreds of dry cleaners and manufactured gas plant sites have yet to be discovered).

51. 13TH ANNUAL EVALUATION, *supra* note 48, at 3 (stating that the \$1.2 billion in funding from EQBA is not sufficient to fund the state's share of site remediation costs).

status of those sites.<sup>52</sup> Three hundred ninety of the 785 fully funded sites have already been cleaned up.<sup>53</sup> However, 790 known additional sites remain that may not be fully funded when EQBA runs out of money.<sup>54</sup> The DEC estimates that EQBA will be fully obligated by fiscal year 2001, leaving several questions about the continued viability and fiscal future of New York's environmental remediation programs.<sup>55</sup>

There is widespread support for the refinancing of the Superfund Program.<sup>56</sup> The major point of contention with the Governor's proposed Superfund financing package is the inclusion of proposals that dramatically change the current environmental remediation programs in New York by lowering clean up standards and changing the Oil Spill Fund.<sup>57</sup> The New York Assembly's staff

52. SITES THAT MAY REQUIRE REMEDIATION, *supra* note 15, at 1.

53. NEW YORK DEP'T OF ENVTL. CONSERV., SITES REQUIRING REMEDIATION THAT ARE OR ARE PROJECTED TO BE CLEANED UP OR FULLY FUNDED WHEN THE 1986 ENVIRONMENTAL QUALITY BOND ACT IS PROJECTED TO BE FULLY OBLIGATED, Briefing Documents, Table 1, at 1 [hereinafter SITES REQUIRING REMEDIATION]. There exists an obvious deviation between the number of sites deemed "cleaned up" in the DEC's Annual Registry Report of April 2000 and the DEC documents, which were released March 10, 2000. Compare SITES REQUIRING REMEDIATION, at 1, with REGISTRY OF INACTIVE HAZARDOUS WASTE, *supra* note 14, at 1, and SITES THAT MAY REQUIRE REMEDIATION, *supra* note 15, at 1. Although the Reports were released approximately one month apart, it is possible the site numbers were not compiled in such an adjoining timeframe.

54. SITES THAT MAY REQUIRE REMEDIATION, *supra* note 15, at 1.

55. 13TH ANNUAL EVALUATION, *supra* note 48, at 5 (setting forth the DEC's projections after EQBA funds become fully obligated).

56. See generally SUPERFUND WORKING GROUP, RECOMMENDATIONS TO REFORM AND FINANCE NEW YORK'S REMEDIAL PROGRAMS (1999) [hereinafter SUPERFUND WORKING GROUP].

57. See RICHARD L. BRODSKY, ASSEMBLY COMMITTEE ON ENVIRONMENTAL CONSERVATION, FINANCING THE STATE'S SUPERFUND-AN ANALYSIS OF THE "WORKING GROUP" FUNDING PROPOSAL, at 1 (1999) (on file with author). In negotiations on the Clean Water/Clean Air Bond Act in 1996, Administration officials chose not to include Superfund refinancing in the funding package that ultimately won approval in a statewide referendum. In August 1998, before the general election, discussions between the Governor and environmental groups resulted in the Governor convening a Superfund Working Group. The

analysis of the Governor's proposed remediation program indicates that over the course of this proposal, it will actually make taxpayers responsible for hundreds of millions of additional dollars than they are responsible for under the current Superfund's funding formula.<sup>58</sup> In terms of financing mechanisms, however, the Assembly's position remains consistent. Polluters are liable under the Oil Spill Program and should continue to be responsible for one hundred percent of the expenses incurred for clean up.

## 2. Assembly Bill 874-C - The Comprehensive Environmental Clean Up Act of 2000

The Assembly's "Comprehensive Environmental Clean up Act of 2000" will result in a more efficient program that continues to protect public health and the environment.<sup>59</sup> The legislation expands the current Superfund Program by addressing the issue of additional sites, and by making a series of changes that make the program more responsive to the needs and concerns of the communities where these sites are located.<sup>60</sup>

---

Superfund Working Group was composed of members selected by the Governor, and discussions were not open to the public. *See generally* SUPERFUND WORKING GROUP, *supra* note 56 (providing a description of the Governor's Superfund package). The final report of the Superfund Working Group was issued in April 1999. *Id.*

58. *See id.* The Governor's Program Bill #91 incorporates the fiscal recommendations of the Governor's Superfund Working Group's report. The Assembly's analysis of the Governor's bill indicates that it would reduce the polluter share of the Oil Spill Program from 100% industry pays to 50%, costing taxpayers an estimated \$529 million. The resulting \$153 million surplus in the Oil Spill Program would be used to subsidize the overall Superfund Program, traditionally set at 50/50 taxpayer/industry share for overall Superfund allocation. The net result is a respective 68.7%-31.3% taxpayer-industry share for Superfund financing. NEW YORK STATE ASSEMBLY, ANALYSIS OF MAJOR ISSUES IN THE WORKING GROUP'S REPORT 2-3 (circulated to public in Spring 2000).

59. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999).

60. *See generally* A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999). The Bill was introduced by Assembly Members Brodsky, Englebright, Clark, and multi-sponsored by Assembly Members Cohen, Colten and Hochberg.



*a. Includes Hazardous Substance Sites in the Superfund Program*

The current Superfund Program addresses sites contaminated with hazardous wastes listed under the Federal Resource Conservation and Recovery Act ("RCRA"),<sup>61</sup> but does not address those sites containing hazardous substances.<sup>62</sup> Assembly Bill 874-C removes the legal distinction between hazardous substances and hazardous waste that currently excludes more than one hundred sites from the Superfund Program.<sup>63</sup>

Under the current Superfund Program, Superfund sites are defined as an "area or structure used for the long-term storage or final placement of *hazardous waste*, including, but not limited to, dumps, landfills, lagoons, and artificial treatment ponds . . . ."<sup>64</sup> Hazardous wastes that are products of industrial processes must be identified as wastes by criteria that are "at least as stringent" as RCRA.<sup>65</sup>

Assembly Bill 874-C repeals the existing law that defines hazardous waste in favor of a more expansive definition that includes hazardous substances.<sup>66</sup> The legislation, which changes the name of the program to the "Inactive Hazardous Substance Sites" program, defines hazardous substances as those specified under various federal laws.<sup>67</sup> The legislation also makes the required

61. 42 U.S.C. §§ 6921 *et seq.* (1994).

62. N.Y. ENVTL. CONSERV. LAW §§ 37-0101–37-0103 (McKinney 1999) (describing the characteristics of substances that are covered by this Act). For lists of substances hazardous or acutely hazardous to public health, safety or the environment, see also N.Y. COMP. CODES R. & REGS. tit. 6, § 597 (McKinney 1999).

63. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999).

64. N.Y. ENVTL. CONSERV. LAW § 27-1301(2) (McKinney 1999) (emphasis added).

65. N.Y. ENVTL. CONSERV. LAW § 27-0903 (McKinney 1999).

66. *See* A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 2 (amending N.Y. ENVTL. CONSERV. LAW § 27-1301(1), which defines hazardous substances).

67. *See* A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1-a (amending the title heading of Title 13 of N.Y. ENVTL. CONSERV. LAW Art. 27). The legislation defines hazardous substance as those substances specified: under Article 37 of the N.Y. ENVTL. CONSERV. LAW, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")—designating hazardous substance provisions of the federal Superfund law, hazardous air pollutants provisions of the Clean

amendments to the existing Superfund Program, incorporating the more comprehensive hazardous substances definition rather than the limited hazardous waste definition.

Including hazardous substances in the definition of hazardous waste will potentially allow the DEC to address hundreds of additional sites through the Superfund Program. In 1995, the DEC studied and inventoried 1,142 existing hazardous substance sites in New York.<sup>68</sup> The DEC concluded that approximately 118 to 161 of the identified hazardous substance sites, including landfills, industrial sites and manufactured gas plant sites, "may be determined to pose a significant threat."<sup>69</sup> That evaluation concluded that remediation of these sites could cost between \$508 and \$702 million dollars, with the state's share of the cost at approximately \$252 to \$326 million.<sup>70</sup> Current DEC estimates indicate that this amount may be higher, placing the number of these sites at 279.<sup>71</sup>

There is widespread agreement that the Superfund Program must address these hazardous substance sites. The Superfund Management Board, in its Final Report, recommended that the Superfund Program be "expanded to include the financing of the remediation of those hazardous substance sites posing significant threat to public health or the environment."<sup>72</sup>

---

Air Act, identification and listing of hazardous waste provisions of the Solid Waste Disposal Act as amended by RCRA, and the toxic and pretreatment effluent standards and the oil and hazardous substance liability provisions of the Federal Water Pollution Control Act ("FWPCA" or the "Clean Water Act"). *See id.* § 2.

68. HAZARDOUS SUBSTANCES WASTE DISPOSAL TASK FORCE, NEW YORK DEP'T OF ENVTL. CONSERV., ADDENDUM TO HAZARDOUS SUBSTANCE WASTE DISPOSAL STUDY 3 (1998) [hereinafter ADDENDUM]. *See generally* HAZARDOUS SUBSTANCES WASTE DISPOSAL TASK FORCE, NEW YORK DEP'T OF ENVTL. CONSERV., REPORT ON HAZARDOUS SUBSTANCE WASTE DISPOSAL STUDY (1995).

69. ADDENDUM, *supra* note 68, at 12.

70. *Id.*

71. SITES THAT MAY REQUIRE REMEDIATION, *supra* note 15, at 1.

72. 13TH ANNUAL EVALUATION, *supra* note 48, at 7.

*b. Creates a Natural Resource Damages Action*

The current Superfund Program does not authorize the state to recover from responsible parties for environmental damage to state resources caused by pollution at contaminated sites. Comparatively, the right to collect such damages from responsible parties exists in tort law, which allows a private owner to recover damages caused by a neighboring property. The federal Superfund Program explicitly provides the right to bring an action for damage to natural resources.<sup>73</sup>

The Comprehensive Environmental Clean Up Act holds those parties that cause "an injury to, destruction of, or loss of natural resources" liable to the State for natural resources "within the State" or controlled by the State for damages.<sup>74</sup> In the case of tribal lands, the party responsible for the contamination is liable to the Native American tribe for damage to those resources "belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe . . . ."<sup>75</sup>

Under the Comprehensive Environmental Clean up Act, the DEC Commissioner, the Attorney General, or both are authorized to act on behalf of the public as trustee to recover for natural resource damages.<sup>76</sup> The legislation limits the use of the proceeds from such

73. See Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(4)(C) (1994) (stating that the person otherwise liable under the act shall be liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such release."). The liability is to "the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State . . . ." *Id.* § 9607(f)(1).

74. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 14 (creating a new N.Y. ENVTL. CONSERV. LAW § 27-1329, entitled Natural Resource Damages, which sets forth the damages the state is entitled to collect for harm to its natural resources).

75. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 14 (creating N.Y. ENVTL. CONSERV. LAW § 27-1329(1) that provides liability to any Indian tribe and also accrues for those resources "belonging to a member of such tribe if such resources are subject to a trust restriction on alienation."). *Id.*

76. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 14 (creating N.Y. ENVTL. CONSERV. LAW § 27-1329(1)).

actions, whereby the sums recovered can only be used to restore, replace, or acquire the equivalent of such natural resources by the state.<sup>77</sup> Assessment of the damages to natural resources must be performed in accord with DEC regulations, and there is a rebuttable presumption on behalf of the trustee when the damage assessment is performed according to these regulations.<sup>78</sup>

*c. Initiates Timeframes for Contaminated Site Remediation*

Under the current Superfund Program, there is no statutorily mandated time period during which investigation and remediation of contaminated sites must be completed.<sup>79</sup> Many critics of the program, including citizens and business interests, argue that clean up of these sites takes too long, and that these delays further threaten public health and increase the cost of clean up. Assembly Bill 874-C sets statutory timeframes for the clean up of contaminated sites.<sup>80</sup> The legislation sets forth a six-year timetable to complete the remediation of sites that pose a "significant threat to the public health or environment."<sup>81</sup> Those sites that do "not present a significant threat" have an eight-year timetable.<sup>82</sup> The legislation also requires that "[s]uspected hazardous substance sites

77. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 14 (creating N.Y. ENVTL. CONSERV. LAW § 27-1329(1)). The recovery is not limited to the sums that can be used to restore or replace such resources. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 14.

78. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 14 (creating N.Y. ENVTL. CONSERV. LAW § 27-1329(2) which describes the enforcement of damage penalties).

79. See generally N.Y. ENVTL. CONSERV. LAW §§ 27-1301-27-1315 (McKinney 1999).

80. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 7 (amending N.Y. ENVTL. CONSERV. LAW § 27-1313(1)(D) to provide timetables for the remedial programs based on the actions to be taken and the classifications of the sites).

81. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 7 (creating N.Y. ENVTL. CONSERV. LAW § 27-1313(d)). Specifically, the timetable applies to "sites classified in paragraph (b) of subdivision 4 of § 27-1305 of this title in order of priority as determined by the Department's priority ranking system." A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 7.

82. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 7 (amending N.Y. ENVTL. CONSERV. LAW § 27-1313(1)(d), redefining the time tables for the remediation of sites).

shall be investigated and tested within two years . . . .”<sup>83</sup> The proposed legislation gives priority to those sites “where groundwater contamination or possible human exposure may exist.”<sup>84</sup>

*d. Expands Citizen Participation and Technical Assistance Grants*

Citizen groups and local residents complain that the Superfund Program is not responsive to their concerns and that it does not provide adequate mechanisms to safeguard their interests in site remediation decisions. Assembly Bill 874-C addresses these concerns by requiring the department to develop an extensive program for citizen participation in the Superfund Program.<sup>85</sup> The goals of the citizen participation plan are to “facilitate two-way communication between the DEC and individuals, groups, and organizations” and “to foster the active involvement of the public in the decision making process associated with the investigation and remediation of sites.”<sup>86</sup>

Assembly Bill 874-C requires the DEC, the Department of Health and the Department of Law to “jointly adopt, publish, and issue an inactive hazardous substance site citizen participation statewide plan . . . .”<sup>87</sup> Regarding a site’s preliminary assessment, which is the process before actual site investigation and remediation begins, Assembly Bill 874-C mandates that the DEC develop site-specific citizen participation activities.<sup>88</sup> In addition,

83. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 7 (amending N.Y. ENVTL. CONSERV. LAW § 27-1313(1)(d)).

84. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 7 (amending N.Y. ENVTL. CONSERV. LAW § 27-1313(1)(d)).

85. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. ENVTL. CONSERV. LAW § 27-1314 which facilitates the remedial process by enabling community participation and citizen involvement in decision making).

86. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. ENVTL. CONSERV. LAW § 27-1314(1)).

87. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. ENVTL. CONSERV. LAW § 27-1314(2)(a)).

88. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. ENVTL. CONSERV. LAW § 27-1314(3) that requires details regarding the activities that involve citizen’s participation).

this provision gives the right to "impacted citizens" to petition to "be included in remedial plan negotiations."<sup>89</sup>

The proposed legislation authorizes the DEC to order any party that is responsible for Class 1 or Class 2 sites to "make grants available to any organization or group of individuals who may be affected by a site."<sup>90</sup> The purpose of the grant is to obtain assistance in "interpreting information with regard to the nature of the hazard at the site, and the development and implementation of a remedial program . . . ."<sup>91</sup> These Technical Assistance Grants can be up to \$50,000 for a single grant recipient at any one time, and the grants are renewable as necessary to facilitate public participation throughout the remediation process.<sup>92</sup> The assistance grants are issued to interpret "the remedial investigation and feasibility study; interim remedial measures; health and exposure assessments and studies; selection, design, and construction of the remedial action; and [to support] long-term site monitoring, operation and maintenance" of the site.<sup>93</sup>

---

89. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. ENVTL. CONSERV. LAW § 27-1314(1)). The citizens shall also be provided opportunities to participate in the site investigation, development and implementation of an inactive hazardous substance site remediation program. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8.

90. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. ENVTL. CONSERV. LAW § 27-1314(6)(a)(i)). Class 1 and Class 2 sites are defined in N.Y. ENVTL. CONSERV. LAW § 27-1305.

91. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. ENVTL. CONSERV. LAW § 27-1314(6)(b)). The grants are called Technical Assistance Grants. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8.

92. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. ENVTL. CONSERV. LAW § 27-1314(6)(c)). ("The total amount of such grant, however, shall not exceed two percent of the expense of developing and implementing a remedial program pursuant to § 27-1313 of this title."). In cases where the grant applicant can show that the expense of technical assistance exceeds the grant limit, "the commissioner may waive the limit to cover administrative expenses in an amount not to exceed twenty percent of the total grant." A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8.

93. A. 874-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. ENVTL. CONSERV. LAW § 27-1314(6)(b)).

*B. The Brownfields Proposals*1. Current Law: Clean Air/Clean Water Bond Act of 1996  
Environmental Restoration Program

New York State does not currently have a statutorily based comprehensive brownfields program. The 1996 Clean Air/Clean Water Bond Act ("Bond Act"), which established a \$ 200 million Environmental Restoration Project Fund, is widely regarded as New York's brownfields program.<sup>94</sup> The Bond Act provides funding for the investigation and remediation of brownfields in New York. Under the Bond Act, brownfields are called 'environmental restoration projects,' which are defined as projects "to investigate or to remediate hazardous substances located on real property" owned by a municipality.<sup>95</sup> By definition, an environmental restoration project cannot be a Superfund site on the inactive hazardous waste disposal site registry and is limited to sites that contain either hazardous substances or petroleum contamination.<sup>96</sup>

The Bond Act's Environmental Restoration Program provides state monies to municipalities for the investigation and remediation of contaminated sites. These sites, once remediated, can be resold and returned to economically productive use, providing additional local tax revenues, employment and development opportunities.<sup>97</sup> The Environmental Restoration Program reimburses municipalities, up to seventy-five percent of the eligible costs, for their investigation and/or remediation of municipally owned contaminated properties.<sup>98</sup> A party that purchases the property from the municipality is required to pay an amount at least equal to the

---

94. N.Y. ENVTL. CONSERV. LAW §§ 56-0101-56-0611 (McKinney 1999). The law authorized a \$1.75 billion fund to provide money for the preservation and enhancement of the state's environment, which came into effect on November 5, 1996, when voters approved it. *Id.*

95. *Id.* § 56-0101(7).

96. *Id.* § 56-0505(2).

97. *Id.* § 56-0505(4) (suggesting that a municipality may use the land for public use or dispose of it by sale to the private sector).

98. *Id.* § 56-0505 (providing criteria for the identification of environmental restoration projects).

state assistance received under the Bond Act.<sup>99</sup> The state is also obligated to “make all reasonable efforts to recover the full amount” of state assistance from parties responsible for contamination at the site, but not against the municipality, or its successors in title, the lender or lessee.<sup>100</sup>

The Environmental Restoration Program cannot be used to fund remediation and clean up of the most contaminated sites. Current law prohibits Bond Act funds from being used to fund investigations and remediation of Class 1 or Class 2 “significant threat” sites or for any site on the inactive hazardous waste site registry.<sup>101</sup> Under this program, remediation funded by state monies must meet the clean up standards of the current Superfund Program.<sup>102</sup>

## 2. Assembly Bill 8722-C - An Act to Amend the Current Laws in Relation to Environmental Restoration Projects for Brownfields Redevelopment

Assembly Bill 8722-C amends the existing Bond Act Environmental Restoration Program in ways that will enhance and accelerate brownfields clean ups throughout the state. The legislation defines what properties are eligible for clean up, provides municipalities and community based organizations with the ability to investigate sites for contamination before they take title to such properties, and creates a registry to fully identify these sites.<sup>103</sup>

This proposal amends existing law to encourage Bond Act funds to be used to recycle the brownfields sites. These changes are necessary. In terms of monies spent for site investigation and

99. *Id.* § 56-0505(4). The municipality shall “deposit that money into the environmental restoration project account of the hazardous waste remedial fund.” *Id.*

100. *Id.* § 56-0507(2). This provision applies only if these parties were “not otherwise a responsible party prior to the municipality taking title.” *Id.*

101. *Id.* § 56-0505(2).

102. *Id.* § 56-0505(3) (requiring that the “project shall meet the same standard for protection of public health and the environment that applies to remedial actions undertaken pursuant to § 27-1313 of this chapter.”).

103. *See generally* A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999).



remediation, the current Environmental Restoration Program has not lived up to its expectations. Moreover, few sites are being transferred from municipal to private ownership under this program.<sup>104</sup> As of January 31, 2000 the DEC has disbursed only \$4,188,356 of the \$90,000,000 appropriated for the Environmental Restoration Program for New York State's fiscal year 1999-2000.<sup>105</sup>

*a. Amends the Existing Environmental Restoration Project Provisions to Define Brownfields*

Assembly Bill 8722-C offers the first comprehensive and rational definition of the term brownfields. The proposal includes brownfields in its definition of environmental restoration projects.<sup>106</sup> The proposal defines brownfields as an "abandoned [or underutilized] real property in a brownfields redevelopment area where real or suspected environmental contamination [from industrial or commercial use] has inhibited redevelopment."<sup>107</sup> A brownfields redevelopment area is "an area characterized by a poverty rate of at least twenty percent or an unemployment rate of at least one hundred twenty-five percent of the statewide unemployment rate."<sup>108</sup> Defining the term brownfields puts an end to unproductive discussions where interest groups assign different meanings to the term based on their specific interests.

---

104. Gerrard, *supra* note 4, at 18-19.

105. See REPORT OF THE WAYS AND MEANS COMMITTEE, *supra* note 4, at 8.

106. See A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (amending N.Y. ENVTL. CONSERV. LAW § 56-0501(7) to include these sites in its definition).

107. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 3(2) (creating N.Y. ENVTL. CONSERV. LAW § 56-0502(2) to define this term). Abandoned real property is property that has not been occupied in the two years prior to environmental investigation or remediation. N.Y. ENVTL. CONSERV. LAW § 56-0101(12) (McKinney 1999).

108. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 3(3) (creating a N.Y. ENVTL. CONSERV. LAW § 56-0502(3)).

*b. Amends the Existing Environmental Restoration Project Provisions to Prioritize and Create Additional Incentives for Brownfields Clean ups*

Assembly Bill 8722-C changes the repayment obligations for certain properties that accept state brownfields assistance and expands the definition of environmental restoration project under the Bond Act, by including brownfields inventory projects, brownfields assessment projects, and priority brownfields clean up projects.<sup>109</sup> The proposal also increases the state's share of assistance for priority clean ups, and does not require repayment for brownfields inventory projects, brownfields assessment projects, and priority brownfields clean up projects.<sup>110</sup>

Under current law, the DEC can enter into contracts with a municipality to provide *up to* seventy-five percent state assistance for an environmental restoration project.<sup>111</sup> After a project is complete, the municipality is liable to the state to 'offset' any monies it receives from the federal government, the responsible parties or the purchasers of the property. In addition, up to half of the profits derived from a sale of the property must be returned to the state.<sup>112</sup> Under proposed Assembly Bill 8722-C, when a municipality or community based organization receives Bond Act state assistance payments for a priority brownfields clean up project, the existing requirement for repayment does not apply, regardless of whether it is eventually sold to the private sector.<sup>113</sup>

109. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 3 (creating N.Y. ENVTL. CONSERV. LAW §§ 56-0501(7)). These terms are defined in N.Y. ENVTL. CONSERV. LAW §§ 56-0101(4), (6).

110. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 4 (amending N.Y. ENVTL. CONSERV. LAW § 56-0503).

111. N.Y. ENVTL. CONSERV. LAW § 56-0503(1) (McKinney 1999).

112. *Id.* § 56-0503(2)(d). The "[r]ecalculation of the state share shall be done each time a federal payment, payment from a responsible party, or payment received from the disposition of such property is received by the municipality." *Id.* § 56-0503(2)(c). In either case, such monies shall be deposited in the "environmental restoration project account of the hazardous waste remedial fund." *Id.* § 56-0503(2)(c).

113. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 4 (creating N.Y. ENVTL. CONSERV. LAW §§ 56-0503(3), (4) stating that priority brownfields clean up projects shall receive one hundred percent of eligible groundwater remediation costs).

For sites where it can be shown that the "main encumbrance to such redevelopment is the cost of clean-up," the state will pay the bill for priority brownfields clean up projects.<sup>114</sup> In addition, the proposal provides state funding assistance of a *mandatory 90 percent* of eligible project costs to municipalities and community based organizations when the project is in a priority brownfields area.<sup>115</sup>

The Assembly's legislation provides for an additional and significant reimbursement for clean up of groundwater contamination. The priority brownfields clean up project will receive "one hundred percent of eligible costs of remediating off-site groundwater contamination related to the project."<sup>116</sup> The legislation further prioritizes use of Bond Act monies by expanding the list of the sites, such as Federal Superfund sites, that cannot receive funding under the program.<sup>117</sup> Therefore, the money will be channeled to those sites most in need of state funding.<sup>118</sup>

---

114. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 3(4) (creating N.Y. ENVTL. CONSERV. LAW § 56-0502(4)).

115. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 5(1) (creating N.Y. ENVTL. CONSERV. LAW § 56-0503(3)). The 90 percent provision also applies to "a brownfields inventory" and "brownfields assessment." A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 5.

116. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 4(1) (creating N.Y. ENVTL. CONSERV. LAW § 56-0503(4)).

117. The proposed bill also explicitly adds to the types of sites that are currently excluded from the Environmental Restoration Projects Program. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 7 (amending N.Y. ENVTL. CONSERV. LAW § 56-0505(2) by adding: sites listed on the national priorities list established under 42 U.S.C. § 9605; sites subject to an enforcement action or permit pursuant to N.Y. ENVTL. CONSERV. LAW, Art. 27, tits. 7, 9; sites subject to an order for clean up pursuant to Art. 12 of the Navigation Law or pursuant to N.Y. ENVTL. CONSERV. LAW, Art. 17, tit. 10; or sites subject to any other on-going state or federal enforcement action).

118. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 7 (amending N.Y. ENVTL. CONSERV. LAW § 56-0505(2)).

*c. Amends the Existing Environmental Restoration Project Provisions to Authorize Community Groups to Undertake On-Site Investigation and Remediation*

Assembly Bill 8722-C allows community groups to receive Bond Act monies and to directly participate in on-site investigation and remediation.<sup>119</sup> Eligible community-based organizations must be not-for-profit corporations located within the brownfields redevelopment area, with residents of the local community on the board.<sup>120</sup> The community-based organizations must have a “demonstrated record of community involvement and/or revitalization; and . . . financial need for state assistance,” and must not have generated, transported or disposed of the hazardous substances located on the site.<sup>121</sup>

The Assembly legislation will push more monies “out the door” to fund projects by expanding the list of projects that are eligible to receive Bond Act funding by including community organizations, and by allowing municipalities to investigate site conditions prior to undertaking remediation obligations.<sup>122</sup> The amended Bond Act program will encourage municipalities and community-based organizations to address brownfields sites that may have been passed over under the original Bond Act.

*d. Amends the Existing Environmental Restoration Project Provisions to Create a Brownfields Site Registry*

There has been no comprehensive brownfields study in New York State. As a result, there is much speculation about how many brownfields exist, where they are located, who owns these sites, the current use of these sites, and the level of contamination at these sites. The actual data available on the number of brownfields is

---

119. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 3 (amending N.Y. ENVTL. CONSERV. LAW § 56-0502(i) to include community-based organizations in the definition of a municipality).

120. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 3 (amending N.Y. ENVTL. CONSERV. LAW § 56-0502 to define community based organization as a not-for profit corporation located within the brownfields redevelopment with a demonstrated record of community involvement and/or revitalization and financial need for state assistance).

121. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 3(8)(b)-(c).

122. See *supra* note 116 and accompanying text.

incomplete because not enough money has been spent to identify and study brownfields in a comprehensive way. The information available about brownfields is hampered by the fact that there is no common definition of the term brownfields.

Assembly Bill 8722-C provides funds for municipalities to investigate and inventory brownfields. The bill sets aside \$7,500,000 of the \$200,000,000 available under the Bond Act for 'brownfields inventory projects.'<sup>123</sup> A brownfields inventory project is defined as "a project undertaken by a municipality to inventory potential brownfields within its jurisdiction" that may be contaminated by hazardous substances.<sup>124</sup> The inventory list will be an important tool for community planning and resource allocation.

One such study to identify brownfields was conducted in New York City. The New York City Office of Environmental Coordinator received a \$10,000 grant from the EPA to conduct a limited research project to identify brownfields in New York City.<sup>125</sup> The study looked for "vacant and underutilized industrial properties" in the fifty-nine community districts of the city and concluded that there were 6,500 vacant and underutilized industrial lots, as identified in the city registries of tax blocks.<sup>126</sup> The generalized definition of these lots did not include a review of the environmental status of each site, and thus, many of the lots identified were not actually contaminated.<sup>127</sup>

The review by New York City did not look at particular properties or even identifiable parcels of property in the common everyday sense of the word. Many of these lots are parts of larger properties, and therefore, the number of lots does not represent

---

123. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 2 (amending N.Y. ENVTL. CONSERV. LAW § 56-0501 by requiring that "seventy-five million dollars (\$75,000,000) shall be available for priority brownfield clean-up projects and no less than seven million five hundred thousand dollars (\$7,500,000) shall be made available for brownfield inventory projects and brownfield assessment projects.").

124. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 3(5) (creating N.Y. ENVTL. CONSERV. LAW § 56-0502(5)).

125. Telephone Interview with Annette Barbaccia, Director, Office of Environmental Coordinator, New York City Mayor's Office (Apr. 17, 2000).

126. *Id.*

127. *Id.* This is an example of how an inadequate definition of brownfields contributes to confusion as to their number and location.

actual individual parcels of real estate. Limited resources coupled with incompatible databases within New York City's government agencies resulted in a very generalized brownfields study.<sup>128</sup> However, under the proposed legislation, studies like this one can be more precise, using funds from the amended Bond Act.

*e. Amends the Real Property Tax Law Regarding the Assessment of Environmental Conditions at Brownfields Properties*

Assembly Bill 8722-C provides another important tool for municipalities to use when addressing brownfields site clean up and reuse. Under current law, a municipality must take title to a site that it wants to redevelop before it can undertake an investigation of the site. Assembly Bill 8722-C changes the New York Real Property Tax Law ("RPTL") by enabling a municipality to take "temporary incidents of ownership" to complete an environmental investigation of the property.<sup>129</sup> The proposal allows the taxing district, during a foreclosure proceeding, to move 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 investigation upon such parcel."<sup>130</sup> During the temporary stay of foreclosure, the taxing district is protected from hazardous waste remediation liability for the sites unless the district contributed to the on-site release of the contamination.<sup>131</sup>

This provision of Assembly Bill 8722-C protects municipalities from potential environmental liability by allowing the district to determine the extent of the on-site contamination prior to making

128. *Id.*

129. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. REAL PROP. TAX LAW § 1120(3), which will be effective unless local law provides otherwise).

130. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. REAL PROP. TAX LAW § 1120(3)(A)).

131. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. REAL PROP TAX LAW § 1120(3)(c)). Such

incidents of ownership shall not be sufficient to qualify it as the owner of such property for the purposes of holding it wholly or partially liable for any damages, past, present, or future from any release of any hazardous material, substance, or contaminant into the air, ground, or water, unless such release was caused by such taxing district.

A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8.

the decision of whether or not to take title to the property. It allows the municipality to qualify "as being the owner of such property for the purposes of obtaining funding" from the Bond Act, and uses these monies to pay for the investigation.<sup>132</sup> A municipality that relies on this provision of law is not limited to using Bond Act monies, but rather can receive funding, from any source pursuant to any other laws, to conduct investigations.<sup>133</sup> The municipality, based on the environmental investigation, may determine that the parcel is too contaminated to undertake a restoration project. This provision will enable municipalities to more easily decide whether or not to ultimately take title to property because it allows municipalities to know the extent of on-site contamination before taking title and entering into remediation commitments.

### 3. Assembly Bill 496 - The Creation of Environmental Opportunity Zone Act.

The third piece of the Assembly's legislative package is the "Environmental Opportunity Zone Act."<sup>134</sup> This proposal provides private parties who wish to clean up brownfields properties with various economic incentives to encourage redevelopment, and provides a role for local communities in the brownfields redevelopment process.<sup>135</sup> Thus, the proposal creates an expansive and forward-looking brownfields redevelopment program and provides statutory authorization that goes beyond the current DEC non-statutory voluntary cleanup program ("VCP").<sup>136</sup>

The DEC's VCP was designed to encourage volunteers to redevelop brownfields properties. The purpose of the VCP is to "to enhance private sector cleanup of brownfields by enabling businesses and financial institutions to remediate sites using private

132. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. REAL PROP TAX LAW § 1120(3)(c)).

133. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8 (creating N.Y. REAL PROP TAX LAW § 1120(3)(c)). The incidents of ownership qualify as being ownership for purposes of obtaining federal, state or local funding. A. 8722-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 8.

134. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) (creating the Environmental Opportunity Zone Act, N.Y. ENVTL. CONSERV. LAW §§ 58-0101-58-0125, a new Article 58).

135. See generally A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999).

136. See discussion *infra* this Part.

rather than public funds . . . .”<sup>137</sup> The VCP is not explicitly authorized by State statute, but is derived from the DEC’s general powers and statutory authority to address environmental remediation issues. Under the VCP, a volunteer enters into an agreement to investigate and/or remediate a site under the oversight of the DEC and the New York State Department of Health.<sup>138</sup> Any party is eligible under the VCP program, except a PRP under State or Federal law.<sup>139</sup>

*a. Designating an Environmental Opportunity Zone*

Assembly Bill 496 creates a new program that authorizes municipalities to designate parcels of real property within their jurisdiction as environmental opportunity zones.<sup>140</sup> Before a zone can be designated, the municipality must prepare and implement a community participation plan that provides the public with an opportunity to participate in the selection of parcels within the zones and gives the public a vote in the ultimate use of the property.<sup>141</sup>

One or more qualified parcels may be designated as an opportunity zone.<sup>142</sup> The program excludes the more contaminated

137. DEP’T OF ENVTL. CONSERV., DIV. OF ENVTL. REMEDIATION FACT SHEET, VOLUNTARY CLEAN UP PROGRAM (addressing the environmental, legal and financial barriers that may otherwise inhibit brownfields redevelopment), *available at* <http://www.dec.state.ny.us/website/der/vcp/vcpfs.html> (last visited Oct. 23, 2000).

138. *Id.*

139. *Id.* Property to which a VCP agreement does not apply includes property that is classified as a Class 2 inactive hazardous waste disposal site in the New York State Registry of Inactive Hazardous Waste Disposal Sites; a Treatment Storage Disposal Facility subject to RCRA; a Treatment Storage Disposal Facility operating under interim RCRA status; or subject to any other enforcement action requiring the PRP to remove or remediate a hazardous substance. *Id.*

140. A. 496, 223 Leg., Reg. Sess. (N.Y. 1999) (creating N.Y. ENVTL. CONSERV. LAW § 58-0109 which defines an environmental opportunity zone as parcels of land that are vacant or underutilized and in need of remediation due to contaminants).

141. A. 496, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0109, which describes the criteria for the design of an environmental opportunity zone).

142. A. 496, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0109).



sites, such as inactive hazardous waste disposal sites, because the Assembly recognizes the need to prioritize state and local resources.<sup>143</sup> Applicants will be required to remediate properties within the zones according to Superfund clean up requirements.<sup>144</sup> The proposal requires that parties taking advantage of these incentives provide a permanent remedy for those properties. The goal of the program is “to clean up or restore the site for unrestricted future use.”<sup>145</sup>

The proposal requires that the applicant and the DEC formulate the remedial action plan. Once the parcel is cleaned-up under the plan’s terms, the DEC will provide the applicant with a covenant not to sue “for any liability or claim for any remedial action which was the subject of the approved remedial action workplan.”<sup>146</sup>

*b. Creating Financial Incentives and Tax Exemptions for Properties in the Environmental Opportunity Zone*

Municipalities can create opportunity zones through resolutions, which shall provide, among other things, that the applicant who completes a remedial action plan in accordance with the statute can be eligible for up to a ten-year property tax exemption. Assembly Bill 496 creates new provisions in the Real Property Tax Law that exempt remediated properties from “taxation and special ad

143. A. 496, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0103(9) that includes properties on the list of inactive hazardous waste disposal sites, those subject to corrective action order under Article 9 of Chapter 27, subject to clean up under Article 12 of the Navigation law or Title 10 of Article 17 of the N.Y. ENVTL. CONSERV. LAW or subject to other enforcement actions).

144. A. 496, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0103(10)). The work plan must meet “the same standards for remedial actions undertaken or requested pursuant to § 27-1313 of this chapter or any other appropriate law or regulation.” A. 496, 223 Leg., Reg. Sess. (N.Y. 1999) § 1.

145. A. 496, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0103(10)).

146. A. 496, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0111(2) and § 58-0103(8-A) defining person as “an individual, trust, firm, joint stock company, corporation, partnership, association, state, municipality, commission, political subdivision of a state, public benefit corporation or any interstate body.”).

valorem levies by any municipal corporation . . . ."<sup>147</sup> An applicant could be eligible for fifty-percent property tax abatement over ten years. This tax abatement decreases by five percent each year.<sup>148</sup> The amount of the tax exemption is based upon the increase in value of the assessed property based on the redevelopment.<sup>149</sup>

Assembly Bill 496 provides economic incentives for brownfields redevelopment by introducing a series of loans and other financial assistance under the State's economic development law. The legislation authorizes "loans, loan guarantees or interest subsidy grants for the remediation of qualified real property" in opportunity zones.<sup>150</sup> These incentives can provide up to "fifty percent of total project cost . . . for sites remediated to a level of industrial use and seventy-five percent . . . for sites remediated to a level of commercial, mixed-use or residential use."<sup>151</sup> Repayment terms can be up to ten years.<sup>152</sup>

*c. Requiring Community Participation When Designating the Opportunity Zone and Prior to Finalizing Specific Brownfields Remedial Work Plans*

Assembly Bill 496 creates several opportunities for citizen participation during the processes of designating opportunity zones

147. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 2 (amending N.Y. REAL PROP. TAX LAW § 485-H(1)). However, these exemptions are only applicable if the local government authorizes the exemption through local law. *Id.*

148. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 2 (amending N.Y. REAL PROP. TAX LAW § 485-H(2)(b) to reflect this exemption).

149. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 2 (amending N.Y. REAL PROP. TAX LAW § 485-H(3)(A)). The actual amount of the tax break for the first year is "fifty per centum" of the "exemption base," which is defined as the "extent of the increase in assessed value attributable to such alteration, construction, installation, or improvement as determined in the initial year for which application for exemption is made." A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 2.

150. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 4 (amending § 8 of Chapter 839 of the Laws of 1987, the Omnibus Economic Development Act of 1987, to provide assistance from this act to applicants of the Environmental Opportunity Zone Act).

151. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 4 (amending § 8 of Chapter 839 of the Laws of 1987 at (3-A)(B)).

152. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 4 (stating that repayment terms shall not exceed ten years).

and developing remedial plans for specific brownfields sites. Prior to the designation of an opportunity zone, a municipality must develop a "community participation plan" that permits residents of the community where the proposed zone is located to meaningfully participate in the decision making process.<sup>153</sup> Municipalities and applicants prior to the completion of remedial action workplans for each particular site must also develop a "supplementary community participation plan".<sup>154</sup> The intent of this provision is to have the community involved "as early as possible in the decision making process, especially during the exploratory and design stages of zone designation and site remediation," and before "selection of a preferred course of action by the department and the applicant."<sup>155</sup> The DEC is also required to develop a handbook to make sure the community participation plan is effective.<sup>156</sup>

Assembly Bill 496 specifies the elements that must be included in the community participation plan. Among other things, the proposal requires that in the design stage of zone designation, the community participation plan must be "reflective of the diversity of interests and perspectives found within the community as possible . . ."<sup>157</sup> The participation process should include small working groups and should be open to anyone wishing to participate.<sup>158</sup> All materials that comprise the participation plan, including those from

---

153. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0105(1)). If the zone encompasses more than one jurisdiction, the municipalities are required to coordinate to develop a single plan. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1.

154. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0105(2) recognizing the importance of meaningful community participation in the entire decision making process).

155. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0105(4)(A)).

156. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1. The Commissioner's Handbook is required to outline "opportunities and recommended methods for effective community participation." A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1.

157. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0105(4)(B)).

158. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0105(4)(B) including advisory committees and forums that reflect the diverse concerns and perspectives of the community).

small work groups, must also be made available to the public.<sup>159</sup> The proposal also requires that “full, timely and accessible disclosure and sharing of information shall be provided, including the provision of technical data and the assumptions upon which analyses are based.”<sup>160</sup> The minimum requirements for the participation plan include: a sixty day public comment period for draft zone resolutions, public access to the draft resolution, and a public hearing upon request of a community member.<sup>161</sup> The legislation also requires the DEC to review the adequacy of the municipality’s community participation plan prior to its implementation.<sup>162</sup>

### CONCLUSION

The clean up and redevelopment of contaminated properties presents a significant challenge to lawmakers. A series of changes need to be made to the 1996 Bond Act and other laws to assure speedy, health protective and efficient clean ups of both heavily polluted sites and less polluted sites around the state. The three-bill Assembly legislative package strikes the appropriate balance between environmental protection and economic incentives. Moreover, it will encourage clean up of contaminated sites in New York State.

The legislative package acknowledges that the goals of environmental protection and economic development are not mutually exclusive, but that both environmental protection and economic development should be the goals of New York State

---

159. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0105(4)(B) which states that formal minutes, correspondence and work product of small work groups should be made available to the public).

160. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0105(4)(E)).

161. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0105(5)(A)). The same requirements apply to the draft remedial action workplan. *See* N.Y. ENVTL. CONSERV. LAW § 58-0105(5)(B).

162. A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1 (creating N.Y. ENVTL. CONSERV. LAW § 58-0105(6)). The legislation requires such review, “prior to approval of the municipality’s resolution.” A. 496-C, 223 Leg., Reg. Sess. (N.Y. 1999) § 1.

policy. The package is based on a set of values and achievable policies. The proposed legislation builds upon existing New York environmental programs that have been successful in cleaning up the most contaminated sites in the State. The proposals create new programs to encourage economic development of contaminated sites. The State's role is to fund clean ups where the private sector cannot produce economically viable redevelopment.

The proposed legislation strengthens the existing Superfund Program, and will result in the clean up of hundreds of additional sites contaminated with hazardous substances that were not previously covered under the Superfund Program. The proposal will also provide remedies to the State when polluted sites damage its natural resources. Lastly, the proposal provides ample opportunity for community involvement in the entire Superfund process.

The ultimate goal of brownfields redevelopment is to recycle brownfields properties and reinvigorate the communities where they are located. The legislative proposals create mechanisms and incentives for redevelopment in ways that are feasible. The proposed changes to the Bond Act will open up millions of dollars that are currently unused. The proposals fund an organized inventorying of existing properties, and prioritize and target the monies to go to communities that need it the most, locations where "perceived contamination" is, in fact, an impediment to redevelopment. The proposed legislation expands the role of local communities in the brownfields clean up process and empowers them to take the lead and perform the investigation and remediation themselves, if government or the private sector refuses.

The Environmental Opportunity Zone Act provides the statutory framework necessary for successful private sector brownfields clean ups. It supplements the brownfields provisions of the Bond Act and provides necessary liability releases, financial assistance and tax breaks as incentives to spur redevelopment of these brownfields properties throughout the State. Most importantly, the program makes the community an integral part of the redevelopment planning and implementation process. The growing body of research suggests that incentives like those provided in this program will be successful in the re-use of brownfields sites. Most importantly, the program maintains the current level of public health and environmental protections.

The Assembly's legislative package was created to entice contaminated site clean up through financial incentives. Since financial burden is the largest inhibitor to the clean up of these sites, the legislature must resolve this issue to increase site clean ups. The legislative package places a burden on the government and responsible parties and alleviates the monetary pressures faced by the private sector. When this package is approved, the number of contaminated sites in New York will begin to decrease and will eventually cease to exist.

