

**New York State Bar Association
Environmental Law Section
Executive Committee Meeting
State Bar Center, Albany**

**Agenda
MAY 14, 2014**

1. Approval of the minutes, Executive Committee meeting on January 31, 2014.
2. Fall Meeting: Terresa Bakner
3. Section Re-structuring: Committees and Committee Chairs
4. Membership Committee's Report: Rob Stout, Jason Kaplan
5. Hazardous Waste Task Force Report: Larry Schnapf
6. House of Delegates Report: Howard Tollin; Position of Alternate.
7. Treasurer's Report: Mike Lesser
8. Miscellaneous committee reports
9. Old Business
NYSBA Section Leadership Conference, May 7, 2014
10. New Business.
 - (a). Annual Meeting in January: Business meeting, cocktail reception, lunch following the Friday morning program.
 - (b). CLE programs and proposed programs for 2013-2014.
 - (c). EPA Region 2 Update, Co-sponsored by the Environmental Law Section, 5/29/14
 - (d). David Sive, Memorial-Professional Legacy and influence on the development of Environmental Law, 5.27/14. Speakers include Dan Riesel, Nick Robinson, and Phil Weinberg. Jeffrey Gracer is moderator.
11. Adjourn.

New York State Bar Association
Environmental Law Section
Annual Meeting
January 31, 2014

Attendees:

Jason Kaplan	Rob Stout	John Greenthal	Joan Leary Matthews
Ruth Moore	Louis Alexander	Maureen Leary	Marla Wieder
Rosemary Nichols	Nicholas A Ward-Willis	Edward F. Premo II	Kristen Wilson
Megan Brillauh	Joel Sachs	Robert J. Kafin	Jerry Cavaluzzi
John Hanna, Jr.	Miriam Villani	Erma Levine Powers	Howard Tollin
Kevin Bernstein	Larry Schnapf	David Freeman	Andres Gershon
Janice Dean	Carl Howard	Kevin Healy	Ginny Robbins
Telisport Putsavage	Gail S. Port	Jillian Kason	Michael Lesser
Kevin Reilly	Terresa Bakner	Laurie Silberfeld	Lisa Bataille

Chair's report- Kevin recapped the morning CLE program and its great success. He recognized both Lori Nichol and Lisa Bataille for all their hard work.

Nominating Committee- The Nominating Committee presented its report and recommendations at the business meeting at the January 30th Thursday night business meeting (Committee report is attached). The slate of candidates was approved unanimously by those in attendance. Kevin acknowledged their work and on the selection of Larry Schnaf, recognizing that it is always a challenge to pick one as we have an embarrassment of riches when it comes to qualified candidates.

Awards Committee- The Awards Committee presented its report and recommendations at the business meeting at the January 30th Thursday night business meeting. The 2014 Section Award was given to the City of New York in recognition of its vision and accomplishments over the past several years in addressing environmental issues, especially sustainability and climate change. A Section Council Award was given to the New York State Department of Environmental Conservation in recognition of the continuing hard work and efforts of the Department and its dedicated employees. Kevin thanked Barry and the entire awards committee for their hard work.

Minority Fellowship program- The fellowship program is designed to encourage minority law students to enter the field of environmental law. Levan Thomas of Pace University was awarded a grant of \$6,000 for use during the summer while working on environmental cases for government or not-for-profit law offices.

Kevin asked for a motion to pass the minutes. Tel Putsavage asked to be added to the minutes for the Fall meeting. Motion for the acceptance of the minutes was introduced and seconded and passed by all.

Treasurer's report. Mike Lesser reported that we have our first surplus in several years- \$21,642.09. He warned, however, that unless something changes we are still on a watch list with the larger bar. All expenses over \$200 have to be approved by the Bar.

He reported on the work done by Carl, Mike and Teresa in going through the budget line by line to find savings expenses were cut where possible. The problem is really is a revenue issue and not expense. Membership is down -968 currently. We need more members. The unsung heroes in bringing in the revenue we do receive are the folks that run the CLE, oils spills symposium and other programs. Also thanks to Phil Dixon whose work has resulted in a more than doubling of our sponsorship dollars this year (this year's sponsors were as follows: Bond, Schoeneck & King; Arnold & Porter; Nixon Peabody; Bryan Cave; Knauf Shaw; James Periconi; Proskauer; Harter, Secrest & Emery; Ecology & Environment; Young & Sommer; Sahn, Ward, Coschignano & Baker; Keane & Beane; Hancock & Estabrook; and Sive, Paget & Riesel). Mike noted that the next few years are critical. We are basically on austerity and no one wants to ask what happens when a section runs out of money.

Kevin- just an addendum, he mentioned the great deal we secured this year at the annual meeting because of the super bowl (60% of our annual expenses are tied to the annual meeting typically). Discussion ensued and questions were fielded as to the costs, particularly the annual meeting, and how to contain and/or find additional savings. Mike further explained the breakdown of costs of the Hilton for the annual meeting.

House of Delegates Report- Howard Tollin reported on the morning meeting (7:30 am). Dave Maranda, the incoming President, reported on CLE consolidation and streamlining efforts across the Bar. They are also looking at how other states handle their CLEs, including mobile apps and other new technology opportunities. In other news, he reported on the finances of the Bar and what other sections are doing, including identifying a dedicated treasurer/budget officer to control costs- Howard suggested that we should continue to consider a move. The State Bar community app (downloadable from Apple) will replace current services in the near future. There was a write-in candidate to contest Dave Maranda for President, first time in a very long time if not a first altogether- the write in candidate received 11 votes; Maranda 190+.

There was a very long discussion on the new pro bono requirements. There will be a further discussion in Cooperstown and the possibility of submitting an opposition to such requirements.

Discussion ensued regarding how CLE revenue and expenses are allocated between the Bar and the Sections. Lisa Bataille explained how it is handled.

Membership Committee report- (written report circulated before the meeting). Robert and Jason gave the report. There is some optimistic news (not all doom and gloom) but membership numbers are down and it is a real challenge. They are trying to take a holistic approach to the issue and identify new ways to boost membership for young lawyers, members of other sections like the property and muni sections, look at sections that are successful at recruiting younger attorneys and why they have been successful. They think we need to bring more younger attorneys to the meetings and do more outreach to them as to what they are looking for Webinars and Web-ex are two possibilities to offer primers on different topics to grow young lawyer fundamental understandings as well as more seasoned professionals that need a better understanding in an area that they might not be regularly working in. Another plan is to have an initiative to reengage former members and persuade them to get them to get back into the section. To the young lawyers, they are also going to reach out to career services and other Law School offices to get the word out more broadly.

Lou Alexander raised the idea of an Ambassador program where Section members act as a connection to the different Law schools to make the pitch for joining the Section.

Larry asked that they consider what the Section can do to make the most of social media – regular blogs ensure that the website allows for access through other avenues like Chrome instead of just Internet Explorer. For example, he suggested that we provide a link to the DEC enforcement and permitting decisions. Lisa noted that the T+E section has a linked-in site. When someone wants to join, she confirms that they are a section member and limits it to only members. Follow up is then done to get those who are not members and try to access the page and get them to join. T+E have had great success with this approach. Janice Dean suggested that we link to NYCELLI to provide an avenue for younger attorneys to have a network and transition to the section. Also we need to provide more programming that is directed to new attorneys (with less than 2 years of experience). We have got to get folks in early as once networks are set it is harder to get them to join later. Joel noted that there are over 2000 attorneys of the larger bar that identify enviro law as a part of their practice, which means that we are capturing less than 50% of the practice area in our section. More targeted outreach to these folks is needed.

Kevin noted that we have an age diversity issue in the section. Younger attorneys are not joining as many organizations as was the cases many years ago- in part the cost, family issues and the large debt from law school that many younger attorneys face these days.

Diversity Initiatives- Joan reported what the Section has done over the past several years, including the guidelines that were adopted respecting the selection of speakers for CLE and other section programs. The State Bar's report indicates that more work needs to be done across the bar to increase diversity. This afternoon's program is an example of where more could be done to improve diversity, including use of younger attorneys.

John Greenthal reported on the diversity committee's proposal to help the Section achieve the diversity goal. Three concrete steps- 1-One of the diversity liaisons be involved in the planning of all programs; 2- all program chairs get a written reminder when first named of the need to consider diversity in their planning for the program; and 3- one of the diversity liaisons be involved in the included in the nominating and awards committees selections every year. Discussion ensued with other ideas for how to assure diversity in the programs, including Larry's suggestion that the ethics and EPA updates be provided by younger attorneys. Kevin asked for a motion on the diversity proposal. The following motion was put forth and seconded and passed by unanimous vote of those in attendance:

RESOLVED THAT one of the Diversity Liaisons participate in the planning process for all Section programming including being informed when Program Chairs are selected, so that one of the Diversity Liaisons can work with the Program Chair in establishing diversity among speakers and other participants in Section programs;

IT IS FURTHER RESOLVED THAT the appointment of Program Chairs be accompanied by an explicit reminder to them of the Section's diversity initiative; and

IT IS FURTHER RESOLVED THAT one of the Diversity Liaisons becomes a member of, or alternatively, any advisor to or participant in the deliberations of the Nominating and Awards Committees annually, with the goal of promoting diversity in the selection of candidates.

Journal-- Miriam Villani reported that the next edition is at the printer's and expected out soon. She also reported that she has been speaking with the editors of other sections to learn more about how they handle their publications, including electronic versus paper issues. Discussion ensued about the number of issues covered in the budget and importance of the journal as a means of communicating with the members. Possibility of doing more on the blogs, though a lot of members want the hard copy journal (expected as part of what they pay for with their membership dues). Question whether we can post the articles on our website and blog prior to issuance of the paper journal and not after as is done now. Question of whether we are contractually prohibited from doing so beforehand, perhaps we can take the lead article in each journal and post that beforehand. Perhaps call it a "newsletter" - question of resources to make that happen. More discussion is needed.

Brownfields Cleanup program- David reported that a number of the Governor's proposal include a number (6/7) of the suggestions that the Section identified in its comments. There is a Section taskforce that is taking a close look at the Governor's proposal and expects to put together draft comments for the Section's consideration. Ideally, comments should be in before the 21 day legislative deadline (allowing changes of newly introduced legislation). Comments need to be approved by the Executive Committee and then the Bar's governmental relations office.

Terresa noted that there will actually be two sets of comments that will be circulated - the other is a set of comments concerning oil spills legislation.

DEC Hearings regulations revisions proposal- Lou Alexander reported on the several reform initiatives to streamline the hearings process. Three current exec committee members who are former DEC hearings Assistant Commissioners (Peter Bergen, Dan Riesel, and Bob Feller) have been asked to weigh in on the proposed revisions.

Subsidization- Lou Alexander reported on his efforts to reestablish the program for individuals who are not state employees and therefore could take advantage of the subsidy- including federal employees and younger attorneys. He asked for a motion to establish a working group to look further into the issue with the expectation that the work group would report back to the committee at the April 6th meeting. John Greenthal suggested that the motion be Lou's suggestions and doesn't require more study. Instead, we should authorize Lou and others to go to the Bar ethics staff and get clearance for Lou's suggestions. Discussion ensued as to best to approach to proceed. Motion is to authorize Lou to reach out to the Bar ethics staff to get clearance for his subsidization program. Motion was introduced, seconded and passed by all in attendance.

Acknowledgement of Art Savage- Ginny Robbins reported on the efforts to recognize Art through a contribution to a scholarship fund that has been established at SUNY Forestry School at Syracuse. Materials were circulated for anyone interested in contributing.

Committee reports- Ruth Moore reported that she is looking for a co-chair for the agricultural committee.

Kevin Healy reported on what the climate change committee is doing. Putting together a forum on climate change with Columbia on April 2nd.

Jason reported on the upcoming Oil Spills forum.

Legislative forum will be on May 16th.

HW and Brownfields symposium is planned for the fall. More details to come at ay exec committee meeting.

Motion to adjourn introduced, seconded and passed and the meeting was closed at 4:44pm.

New York State Bar Association
Environmental Law Section
For the Three Months Ending Monday, March 31, 2014

	2014 Budget	March	2014 Year		2013 Budget	Percent	2013 Year		Percent	2012 Year		2011 Year
			To Date	To Date			To Date	To Date		To Date	To Date	
Income												
Dues	\$35,405.00	\$2,180.41	\$30,717.50	86.76%	\$36,500.00	86.76%	\$32,187.82	88.19%	\$32,318.59	\$34,372.82		
Meetings	39,770.00	525.00	15,951.00	40.11%	41,000.00	40.11%	16,417.00	40.04%	17,813.00	16,304.00		
Sponsorship	3,880.00		4,500.00	115.98%	4,000.00	115.98%	5,450.00	136.25%	3,500.00	3,250.00		
Newsletters	485.00	370.00	555.00	110.31%	500.00	110.31%	165.00	33.00%	185.00	525.00		
Publications				0.00%		0.00%		0.00%		25.00		
Prior Years Surplus Used	10,185.00			0.00%	10,500.00	0.00%		0.00%				
Total Income	89,725.00	3,075.41	51,703.50	57.62%	92,500.00	57.62%	54,219.92	58.62%	53,817.59	53,476.92		
Expenses												
Postage & Shipping	2,810.00	12.48	186.46	6.41%	3,000.00	6.41%	753.32	25.11%	604.38	1,040.89		
Awards & Grants	4,850.00	60.57	60.57	1.25%	5,000.00	1.25%	1,105.25	22.12%	757.20	1,493.98		
Diversity	5,820.00			0.00%	6,000.00	0.00%		0.00%				
Catering & Banquets	40,740.00			0.00%	42,000.00	0.00%	36,904.27	87.87%	38,318.33	22,213.86		
Beverage Service & Receptions	10,670.00			0.00%	11,000.00	0.00%	4,875.25	42.50%	5,502.03	6,654.37		
Speaker & Guest Expense	1,940.00			0.00%	2,000.00	0.00%	277.75	13.89%				
Audio/Visual Expense	4,850.00			0.00%	5,000.00	0.00%	2,076.95	41.54%				
Promotional Costs	870.00			0.00%	1,000.00	0.00%		0.00%		3,128.36		
Activities & Entertainment	870.00			0.00%	1,000.00	0.00%		0.00%				
Gratuities	291.00			0.00%	300.00	0.00%		0.00%		150.00		
Section Executive Committee Meetings	485.00		8.30	1.92%	500.00	1.92%	251.78	50.36%				
Officers Expense	1,184.00	20.08	38.33	3.38%	1,200.00	3.38%	428.78	35.73%	330.64	951.53		
Miscellaneous Meeting and Program Costs	2,425.00			0.00%	2,500.00	0.00%	564.90	22.60%	137.57	148.50		
Section Subcommittee Meetings	7,780.00	56.34	118.72	8.23%	1,500.00	4.33%	65.01	4.33%	68.71	1,186.08		
Newsletters	7,780.00		3,440.71	44.34%	8,000.00	44.34%	61.82	0.77%		3,942.31		
Graphic Department Allocations	2,425.00		135.20	5.58%	2,500.00	5.58%	317.78	12.71%	1,000.94	525.86		
Total Expenses	89,725.00	149.47	3,981.29	4.45%	92,500.00	4.45%	47,483.94	51.33%	49,272.22	41,417.04		
Net Income over Expense		2,925.94	47,712.21	0.00%		0.00%	6,735.98	0.00%	4,545.37	12,059.88		
Accumulated Surplus (Deficit)										21,632		

[NEW YORK STATE BAR ASSOCIATION LETTERHEAD]

**REPORT AND RECOMMENDATIONS REGARDING
PROPOSED EXTENSION AND REFORM OF THE
BROWNFIELD CLEANUP PROGRAM**

Environmental Law Section

The Environmental Law Section of the New York State Bar Association (“NYSBA”) has asked its Brownfield Task Force to review the current proposals by the Governor’s office, the Senate and the Assembly to extend and reform the New York State Brownfield Cleanup Program (“BCP” or “Program”), and to make recommendations with respect to those proposals.

The Task Force has worked diligently to fulfill this mandate. This memorandum, which has been approved by the Environmental Law Section’s Executive Committee in accordance with the Section’s Advocacy Policy, summarizes the recommendations of the Task Force with respect to some of the more significant aspects of these proposals.¹

Definition of Brownfield Site

The Governor’s proposal would amend Environmental Conservation Law (“ECL”) § 27-1405’s definition of “brownfield site” to be a site “where a contaminant is present at levels exceeding soil cleanup objectives or other health-based or environmental standards promulgated by the department that are applicable based upon the reasonably anticipated use of the property, as determined by the department.” The Assembly’s bill essentially keeps the existing definition but adds a requirement that contaminant(s) must be present at levels exceeding the soil cleanup objectives based on the reasonably anticipated use.

The proposed Governor’s and Assembly’s new definitions would replace the current statutory language that defines a brownfield as a site which “may be complicated by the presence or potential presence” of a contaminant. This current definition, although based on the federal definition, has proven to be controversial in New York because (a) there is no requirement that a property actually be contaminated in order to be an eligible brownfield site to qualify for tax credits; and (b) there is no generally-accepted standard for when development may be “complicated”.

By contrast, the Senate’s proposal attempts to reinvent the definition entirely. It would exclude from the BCP, and therefore from the eligibility for Site Preparation Credits and Certificates of Completion (“COCs”), many sites that would currently qualify for the BCP by adding a list of criteria upfront to qualify for the program and for both sets of tax credits. The criteria are generally less stringent than the Assembly and Governor’s bills for receipt of the credits. However, the Senate’s proposed language may well create greater complexity and uncertainty in the application process. It could also lead to a situation in which sites are not contaminated enough to qualify for the BCP but are too contaminated to be eligible for other programs, with the result that they would have no option of being cleaned up under New York State Department of Environmental Conservation (“DEC”) supervision.

¹ No state employees have participated in the development of this memorandum.

All three bills require “proof” that the site is contaminated above the numeric Soil Cleanup Objectives (“SCOs”). It is not clear what “proof” would be acceptable to DEC. If actual sampling data is required (which the bills imply), that may well cause problems for sites with a high likelihood of contamination but where sellers will not allow buyers access for Phase II subsurface investigations prior to sale.

In addition, the Governor’s and Senate’s bills also add the phrase “or other health-based or environmental standards”. Even though DEC and the New York State Department of Health (“DOH”) have a number of known regulatory standards, this phrase might be read to mean that DEC can create even more restrictive standards for admission into the BCP than are otherwise provided in the Department’s regulatory SCOs or groundwater standards, without going through the public comment and State Administrative Procedure Act review processes.

Finally, we observe that the Governor’s and the Assembly’s proposals maintain the distinction between contamination originating onsite and contamination originating offsite which nonetheless requires cleanup in order for the property to be suitable for its intended use. We see no basis for making such a distinction. If contamination must be remediated for a site to be usable, the site should be eligible for the Program, irrespective of the source of that contamination.

The Section recommends (a) the Governor’s and Assembly’s approach regarding the definition of “brownfield site”, with some accommodation being made with respect to sites where a property buyer cannot obtain pre-closing sampling data but can otherwise demonstrate a high likelihood of site contamination; (b) the Senate’s approach as to which party can select the applicable SCOs; (c) clarifying that the applicable threshold contamination standards are those set by statute or regulation; and (d) eliminating the distinction, for purposes of site eligibility, between contamination originating onsite and offsite.

Extension of Dates To Obtain COCs

A key driver for amending the BCP is the approaching expiration of the Program’s tax credits. The current deadline for receipt of a COC to earn the expiring tax credits is December 31, 2015. A site not receiving its COC by that date loses its eligibility for tax credits. However, it can otherwise remain in the BCP and receive a COC and liability release from the State at the conclusion of cleanup.

Both the Assembly and Senate proposals have blanket extensions, to December 31, 2025, of the time by which sites must obtain COCs to qualify for tax credits (although the Assembly proposes a December 31, 2022 cutoff date for site entry).

The Governor’s proposal is much more restrictive, both in terms of time frames and in terms of consequences for sites not meeting the applicable deadlines:

- Projects accepted into the BCP prior to June 23, 2008 would be terminated from the COC and lose all program benefits unless they receive COCs by the current sunset date of December 31, 2015, even if the site were remediated.

- Projects accepted into the BCP between June 23, 2008 and June 30, 2014 would be terminated unless they obtain COCs by December 31, 2017.
- Projects accepted into the BCP between July 1, 2014 and December 31, 2022 would have until December 31, 2025 to obtain COCs to earn tax credits.

Notably, the sanction for missing the cutoff date is not just losing the tax credits: the site would be terminated from the BCP and therefore not even be able to obtain a COC and the accompanying liability protection for cleanup work completed after the deadline.

There are several problems with the Governor's proposal. First, it retroactively rescinds, for sites already in the BCP, the unqualified right to receive a liability release at the completion of cleanup based on a good faith effort to comply with the work required by the Brownfield Cleanup Agreement. Doing so is unfair, and potentially a breach of contract, for sites where significant transaction costs have already been incurred on the basis of being able to obtain a liability release after a successful cleanup.

Second, while DEC has stated that terminated sites could reapply, it is unclear how applications for readmission of terminated sites will be evaluated. If eligibility is determined as of the date of reapplication, a site which has already been substantially cleaned up may no longer be contaminated enough to qualify. Denying readmission to such a site would be manifestly unfair. If, on the other hand, DEC determines eligibility for readmission based on the original condition of the site, readmission would be virtually automatic. The applicant, DEC and the public will nonetheless have to go through an expensive and time-consuming readmission process.

Third, especially for sites which have recently been admitted into the BCP, the deadline is unrealistically short: barely three years from admission to COC. DEC's own statistics show that it takes over 3.7 years for an average site to progress from admission to receipt of a COC.

The Section believes that either of the following two approaches has merit:

(a) a blanket extension of the deadline for obtaining a COC until December 31, 2025, as provided in both the Senate's and the Assembly's proposals; or

(b) a modified approach which would include some elements of the Governor's proposal but would address the most serious of the problems discussed above. Such an approach could provide that:

- all sites enrolled in the Program prior to July 1, 2014 would have until December 31, 2015 or 10 years from the date of acceptance into the Program, whichever is later, to obtain their COCs in order to be eligible for tax credits;
- sites enrolled starting July 1, 2014 would have until December 31, 2025 to obtain their COCs; and

- sites missing those deadlines, while being ineligible for tax credits, could remain in the BCP and obtain their COCs, release and covenant not to sue upon the successful completion of cleanup.

Restrictions on Sites that Can Qualify for Tangible Property Credits

For some time, the Section and others have agreed that tangible property tax credits should be better targeted. However, there has been no public debate on the criteria to be used to target these credits.

Under the Governor's proposal, in order to be able to earn the redevelopment or "tangible property" tax credit, a party must submit information sufficient to demonstrate one of the following:

- (a) the site or building(s) have been "vacant" for 15 years or more;
- (b) the site or building(s) have been vacant and tax delinquent for 10 years or more;
- (c) the site is "upside down"--i.e., projected costs of investigation and remediation for the anticipated use of the site exceed the certified appraised clean site value absent contamination; or
- (d) the project is a "Priority Economic Development Project" as determined by the Empire State Economic Development Corp. ("ESD") and the municipality in which the Site is located as consistent with local plans. A "Priority Economic Development Project" is defined in the bill as a project that must make a "significant investment in the state" and create a specified number of "net new" jobs.

The definition of "significant capital investment" for each project category is not defined in the bill. Regulations will be developed by ESD and the regulations may also include "additional criteria a business must meet to be eligible." Sites are not eligible for these credits if contamination comes from off-site or site has been "remediated such that it may be developed for its then intended use." Finally, sites that receive these credits can have their COCs revoked if there is a "misrepresentation of material fact" that qualified for volunteer under the criteria for this credit.

These criteria are similar to those suggested by the Section in 2011:

- (a) abandoned, vacant or tax delinquent for at least one year prior to the submission of the application;
- (b) underutilized given development in the surrounding area;
- (c) structures on the site are functionally obsolete;

- (d) is located within an environmental zone as defined in paragraph six of subdivision (b) of section 21 of the tax law;
- (e) is located within a brownfield opportunity area pursuant to section 970(r) of the general municipal law; or
- (f) is located in a community where such a site would not be readily sold and redeveloped in the local real estate market due to the findings of a Phase I environmental site assessment report as demonstrated by:
 - (i) real estate listings showing the site has been marketed for sale one year after the Phase I environmental site assessment report was prepared and disclosed and no purchase offers were received during that year within 10 percent of the certified appraised value of the property absent contamination; or
 - (ii) the projected cost of the investigation and remediation which is protective of public health and the environment for the anticipated use of the site is more than 10% of the certified appraised value of the property absent contamination.

However, the timeframes associated with the criteria in the Governor's bill are quite long, and the criteria are in general far more restrictive. The Section is concerned that very few, if any, sites will be able to qualify for tangible property credits under the Governor's proposal.

As noted above, the Senate proposal includes its criteria in the brownfield site definition, but the criteria's associated timeframes are more in line with the Bar's original recommended criteria. The criteria in the Assembly's are scaled back from those in the Governor's proposal but are still onerous and may be difficult to meet.

The Section continues to believe that the criteria it developed in 2011 strike the correct balance of preventing only the high market value brownfield sites from entry into the program.

Inclusion of a Voluntary Non-Tax Credit Program

There is a general consensus that the BCP should be amended to include a streamlined program which allows a party to obtain a liability release while foregoing the full statutory and regulatory process required in order to be eligible for tax credits. While all the proposals provide for such a program, the proposed programs vary greatly in detail:

- Assembly "BCP Liability Only Waiver Program" – This one sentence new program does nothing more than allow a BCP applicant to "waive any claim for tax credits" on "a form prescribed by the department" but otherwise must be eligible for and fully comply with all the requirements of the BCP. Presumably, this language allows both volunteers and participants the ability to waive the tax credits and provides for the same liability release as in the full program. However, there is no indication what, if any, reduction on the BCP process would

result from such waiver. Therefore, it is unclear why a party who otherwise qualifies for the BCP would voluntarily waive its other benefits.

- Senate “NY RAPID” Program - This program limits eligibility to volunteers for sites that are either “minimally contaminated” or “where contamination is overwhelmingly the result of the use or placement of historic fill”, other than if the fill contaminants significantly exceed the SCOs and the volunteer must “waive in writing any claim for tax credits.” The RAPID program provides for an exemption from “procedural requirements . . . that the Department may specify which are otherwise applicable to the implementation of an investigation and/or remediation of contamination [so long as] all substantive technical requirements [are met].” The language does not clarify what requirements are procedural as opposed to substantive, the timeline in which the Department will be required to make these determinations, and if a volunteer will have the ability to appeal the Department’s determinations. While the RAPID program provides for a Certificate of Completion, the current language is not clear that the full liability release provided by ECL §27-1421 is available to volunteers who complete the process.
- Governor’s BCP EZ Program - This program similarly provides for an exemption from “procedural” aspects of the current program that the Department “may specify,” while continuing to require compliance with all “substantive technical requirements.” The language does not clarify what aspects of the current program are procedural as opposed to substantive, the timeline in which the Department will be required to make these determinations and if a volunteer will have the ability to appeal the Department’s determinations. The Governor’s proposal also requires that the volunteer is required to have “waived in writing any claim for the tax credits,” but does not indicate if such waiver is required at the beginning or end of the process or whether a volunteer could choose to opt back into the full process.

Each of these approaches suffers from the same flaw: lack of clarity. While the Governor’s and Senate’s programs are designated to create an easier process for a volunteer in return for foregoing the available tax credits, an applicant does not know: (1) what process it will actually be required to undertake, or (2) that the process selected by the Department for its particular project will be sufficiently cheaper and faster to justify foregoing the tax credits. Presumably regulations will be adopted but such regulations can take between one to two years. Adding more clarity to the statute, and what procedural steps will be streamlined is important to provide in the statutory language.

Therefore, while the Section agrees that the creation of a streamlined program is laudable, there must be more clarity to the requirements, and assurance that participation will actually be easier, faster and cheaper than going through the full BCP process in exchange for foregoing the tax credits. Such programs do exist, such as the New York City Voluntary Cleanup Program (NYC VCP), which could serve as model for the EZ Program. Whatever model is chosen, the parameters, timing and requirements must be clearly established to parties can make an educated decision regarding what program best suits their project.

Proposed Curtailment of Tax Credit-Eligible Costs

The Governor's proposal includes proposed changes to the determination of eligible costs used to calculate tax credits under the BCP. They would apply to *all* sites in the BCP, without regard to the date of acceptance. The Senate's proposal would establish a cap on site preparation tax credits at \$15 million but otherwise leaves the tax credit structures as is. The Assembly proposal contains no changes in this area.

The Governor's proposal would: (1) narrow the range of costs eligible for tax credits; (2) change the required method of accounting for those costs in a manner inconsistent with federal tax law; and (3) alter the time frame for claiming the tangible property credit component (addressed in another comment). The proposal would have limited the credits only to costs actually paid (but not incurred and payable) to unrelated persons and which are construction-related costs associated with remedies described in a DEC "Decision Document", or costs associated with actual construction of a physical structure or of groundwater remedies, would be allowed.

There are several problems with the Governor's proposal. One is that it would represent a very significant cutback in allowable cleanup expenses. Soft costs (which represent a significant percentage of remediation costs) and "related party" costs are excluded from qualification for tax credits, as are even strictly remedial costs unless such costs are required by specific elements in DEC's Decision Document. When added to the restrictions proposed for tangible property credits, these exclusions will make the Program significantly less attractive to site owners and developers and undercut the stated purpose of the BCP: to incentivize private development of contaminated sites.

Project costs that are paid to related parties would otherwise be paid to unrelated parties providing the same work. Related parties may actually charge less for those costs, resulting in lower claims for tax credits. As a practical matter, elimination of related party payments from the tax credit calculation will tend to drive developers – particularly those with construction capability – away from brownfield sites, rather than encouraging them to take on the additional risk associated with a brownfield.

Another problem with the Governor's proposal is that the current tax credit structure rests firmly on federal tax accounting practices for development projects, and the NYS Department of Taxation and Finance ("DTF") has frequently looked to taxpayers' federal tax treatment of project costs to verify tax credit claims. If enacted, the proposed changes would force both taxpayers and DTF auditors to follow a very different array of rules when calculating and verifying the BCP credits.

These changes would introduce significant uncertainty into tax credit calculations, imposed substantial additional burdens on both government and taxpayers, and embroil taxpayers and DTF in costly and unnecessary litigation for years to come. In addition, the proposal would impose curtailments on the tax credit cost base for all sites in the BCP (now and future applicants), without grandfathering sites now in the program. Changing tax credit programs midstream, without grandfathering existing projects in these programs, has already impaired the reputation of New York's economic development incentives and has resulted in

successful litigation against the State. Enactment of the proposed changes without full grandfathering would do even further damage to the business reputation of a State that is otherwise working diligently to be truly "open for business."

Class 2 Site Eligibility

The Section supports the concept reflected in the Senate proposal that Class 2 sites and sites subject to Navigation Law Article 12 cleanup orders; Article 27, Title 7 or Title 9 orders; or any other ongoing state or federal orders (other than those arising from a listing on the federal National Priorities List)(collectively, "Class 2 and Other Enforcement Order Sites") that are owned or under contract for purchase by a volunteer should be eligible to enroll the site in the BCP, providing there is still contamination on the property to remediate. However, we are concerned that the proposed requirement that there be no financially viable party is too restrictive and may prove too difficult to establish for a variety of reasons.

Instead, we would propose that a site be eligible to apply for the BCP where the volunteer did not purchase the site from a responsible party, or where a responsible party or an affiliated entity has not held title to the site after July 1, 2005. We believe this would address the public policy concern that responsible parties not be able to evade their cleanup obligations or profit by selling a Class 2 and Other Enforcement Order Site to a BCP applicant, while ensuring that the hurdles are not so difficult as to discourage volunteers from seeking to redevelop these sites and to put them back into productive use. The July 1, 2005 date was chosen because that is the date after which Class 2 and Other Enforcement Order Sites were no longer eligible to participate in the BCP.

Treatment of Off-Site Contamination

The Governor's proposal contains a provision that would prevent sites in the BCP from earning the tangible property tax credits if the site is contaminated as the result of migrating contamination onto the site to the extent the migrating contamination is the only source of contamination on the site:

ECL 27-1407 (1-a) "Sites are not eligible for tangible property tax credits if (1) the contamination is solely emanating from property other than the site subject to the present application..."

While this proposed statutory amendment appears to allow sites into the Program to receive site preparation tax credits, it would prohibit such sites from receiving tangible property tax credits.

The Assembly proposal bill includes this provision; the Senate proposal does not.

We see no public policy basis for making a distinction between onsite and offsite contamination in eligibility for tax credits. If contamination must be remediated for a site to be usable, parties who remedy such contamination should receive the same tax credits as they would have had the contamination originated onsite. To do otherwise would be to penalize,

rather than reward, BCP parties who take on the difficult task of remedying contamination originating offsite.

Hazardous Waste Program Fee

We support the Governor's proposal to extend the statutory exemption of ECL §72-0402(1)(d) to projects that remediate sites under local government programs that either have been delegated authority to implement their remedial program by DEC or that have entered into a Memorandum of Agreement ("MOA") with DEC.

ECL §72-0402 imposes a hazardous waste program fee ("Program Fee") on generators of hazardous waste. ECL §72-0402(1)(d) establishes statutory exemptions for hazardous wastes generated as part of remedial actions performed under the state superfund or brownfield cleanup program. The Program Fee was intended to apply to traditional generators of hazardous waste in an effort to reduce the volume of waste generated and disposed in landfills.

To prevent the Program Fee from discouraging parties from remediating sites either under the state superfund or brownfield cleanup program, the legislature enacted ECL §72-0402(1)(d) which exempts hazardous waste generated during remedial projects from the Program Fee. The legislature enacted the BCP to encourage cleanup of urban sites and was so concerned about the potential impact of the Program Fee on the BCP that it added the 72-402(1) (d)(vi) after learning of the chilling effect that the Program Fee was having on potential BCP developments.

The statutory amendment did not specifically refer to the NYC VCP because that program had not yet been established when the statute was amended. The New York City Mayor's Office of Environmental Remediation entered into a Memorandum of Understanding ("MOA") with the NYSDEC on August 5, 2010.

Despite the existence of the MOA, the DEC has continued to assess Program Fees for parties that have satisfactorily completed a cleanup under the supervision of OER. Imposing the Program Fee to redevelopment projects will not achieve the legislature's goal of reducing the volume of hazardous waste since the developers are not generators of hazardous waste in the classic sense. Instead, by making developers pay twice for waste they did not create, the Program Fee discourages developers from redeveloping the numerous historic fill sites located in the state's urban areas. Indeed, the potential for being subject to the Program Fee is actually pushing developers who would normally enroll in the NYC VCP to apply to the BCP which is causing the state to incur additional tax credit liability.

Extending the statutory exemption to sites that are remediated under the Office of Environmental Remediation or other local government program that is either delegated by DEC or enters into an MOA with DEC would be consistent with the legislative concerns and encourage more comprehensive cleanups without the tax expenditures associated with the BCP.

Delegation to Municipalities

The Section has previously recommended that consideration be given to amending the statute so that liability releases granted under the NYC VCP would have the same force and effect as those provided under the BCP. The success of New York City program shows that local programs can be an efficient and responsive method to address lightly or moderately contaminated sites.

The Section believes that other municipalities, including some upstate cities, have the capability to administer a similar program. Accordingly, the Section recommends that the statute be amended to allow DEC to delegate authority to municipalities to operate local voluntary cleanup programs that the Department certifies are properly staffed and at least as stringent as the proposed new expedited remediation program. This delegation would include the authority to issue releases on behalf of the State of New York. This delegation process would be similar to the procedure by which EPA delegates authority to DEC to enforce provisions of certain federal environmental statutes like RCRA and the Clean Water Act.

State Oversight Costs

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

The Section applauds the Governor's proposal to eliminate this surcharge on cleanup volunteers, at least for oversight costs incurred after July 1 of this year. It should be clear, however, that the elimination of oversight fees extends to all state agencies, including DOH, and is not confined just to DEC.

While oversight fees are understandably retained (both prospectively and retroactively) for "participants" who have some involvement in causing the contamination, allowing "a reasonable flat-fee" to be negotiated for oversight is a positive step that may encourage more participants to step forward and undertake proactive cleanups.

Even prior to July 1, volunteers should be able to treat previously incurred state oversight costs as an eligible component of site preparation costs.

Transferability of COCs

The Governor's proposal provides that a BCP Applicant or "subsequent holder" of a COC may freely transfer it to any "successor to a real property interest [in the BCP site], including legal title, equitable title or leasehold," even if that interest is only in a portion of the real property. The Senate proposal uses this same language but omits the caveat that the transfer of a COC to a responsible party would not provide the responsible party any liability relief. The Assembly proposal does not propose any alterations from the existing statutory language.

The Section believes that the proposed clarifications in the Governor's and Senate's proposals on the transferability of COCs are an improvement on the current statute, since ensuring the unrestricted transfer of COCs will reduce the uncertainty as to the continuing validity of COCs at sites which have been successfully remediated.

New Timing Requirements for Filing of Environmental Easements

The Governor's proposal would amend ECL § 27-1318(b) to require an environmental easement to be executed, where required at inactive hazardous waste disposal sites, within 180 days of commencement of the remedial design, rather than within 60 days as in the former version of this section. New ECL § 27-1415(7)(b) requires an environmental easement to be executed, where required at brownfield sites, within 180 days of commencement of the remedial design or at least three months prior to the anticipated issuance of a certificate of completion.

We believe that granting the property owner or party responsible for the inactive hazardous waste or brownfield site additional time to execute an environmental easement is a positive change. However, clarification is needed on what it means to "commence" the remedial design. As drafted, it is unclear whether commencement of the remedial design occurs when the remedial design work plan is prepared, submitted to DEC, approved by DEC, or implemented.

We recommend that the 180 days be counted from the date that DEC approves the remedial design for the site, as that is the most clearly ascertainable date.

CONCLUSION

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

NYSBA Section Profile Report for Environmental Law Section

Total Number of (REG, NRES, STU) Members: 993

	Count	Percent	Valid Percent
A) Gender			
F	293	29.51%	30.05%
M	682	68.68%	69.95%
X (no data)	18	1.81%	
	993	100.00%	100.00%
B) Practice Setting			
Government	19	1.91%	2.35%
Government - Federal	11	1.11%	1.36%
Government - Local	20	2.01%	2.47%
Government - State	28	2.82%	3.46%
In-House Counsel	47	4.73%	5.81%
Judiciary	2	0.20%	0.25%
Law School - Faculty	13	1.31%	1.61%
Law School - Student	11	1.11%	1.36%
Legal Services	12	1.21%	1.48%
Non-Law Related	14	1.41%	1.73%
Non-Profit	24	2.42%	2.97%
Other	28	2.82%	3.46%
Part-Time Attorney	5	0.50%	0.62%
Private Practice	548	55.19%	67.74%
Public Interest	8	0.81%	0.99%
Retired	9	0.91%	1.11%
Trade/Professional Association	4	0.40%	0.49%
Unemployed	6	0.60%	0.74%
X (no data)	184	18.53%	
	993	100.00%	100.00%
C) Office Size			
Fifty to 99	86	8.66%	10.87%
One Hundred and greater	201	20.24%	25.41%
Six to Nine	58	5.84%	7.33%
Solo Practitioner	128	12.89%	16.18%
Ten to Nineteen	91	9.16%	11.50%
Twenty to 49	111	11.18%	14.03%
Two to Five	116	11.68%	14.66%
X (no data)	202	20.34%	
	993	100.00%	100.00%
D) Position			
Academic	16	1.61%	2.33%
Administrative Law Judge/Hearing Office Associate	4	0.40%	0.58%
Court Personnel	104	10.47%	15.14%
	1	0.10%	0.15%
E) Age			
24 and Under	1	0.10%	0.10%
25 to 35	141	14.20%	14.76%
36 to 45	137	13.80%	14.35%
46 to 55	231	23.26%	24.19%
56 to 65	282	28.40%	29.53%
66 and Over	163	16.41%	17.07%
X (no data)	38	3.83%	
	993	100.00%	100.00%
F) Race/Ethnic Group			
Asian/Pacific Islander	10	1.01%	1.66%
Black/African American	8	0.81%	1.33%
Decline to Answer	28	2.82%	4.66%
Hispanic	10	1.01%	1.66%
Multiple Race/Ethnic Group	4	0.40%	0.67%
Native American	1	0.10%	0.17%
Other	6	0.60%	1.00%
White/Caucasian	534	53.78%	88.85%
X (no data)	392	39.48%	
	993	100.00%	100.00%
G) Who Paid For Membership Dues			
Collectively by Firm and Member Fully by Firm, School or Organization Member	22	2.22%	3.61%
No Dues Paid	333	33.53%	54.59%
X (no data)	239	24.07%	39.18%
	16	1.61%	2.62%
	383	38.57%	
	993	100.00%	100.00%
H) Number of Years Admitted to Bar			
0 (Less than 1)	15	1.51%	1.57%
1 to 3	80	8.06%	8.35%
4 to 5	49	4.93%	5.11%

Valid
Percent

Valid
Percent

	Count	Percent	Valid Percent
Franchise Law	3	0.30%	
General Practice	86	8.66%	
Government	124	12.49%	
Health Law	22	2.22%	
Immigration Law	15	1.51%	
Insurance	83	8.36%	
Intellectual Property and Copyrights	36	3.63%	
International Law	30	3.02%	
Labor and Employment Law	56	5.64%	
Law Office Economics and Management	11	1.11%	
Leases And Leasing	51	5.14%	
Libel	4	0.40%	
Litigation - General Civil	222	22.36%	
Medical Malpractice	16	1.61%	
Municipal Law	245	24.67%	
Personal or Property Injury	64	6.45%	
Product Liability	72	7.25%	
Professional Liability	14	1.41%	
Public Contract	38	3.83%	
Public Utility	95	9.57%	
Real Property Law	269	27.09%	
Social Security Law	3	0.30%	
Tax - Corporate Business	17	1.71%	
Tax - Personal	7	0.70%	
Transportation	27	2.72%	
Trust and Estates Law	67	6.75%	
Workers Compensation	13	1.31%	
Zoning, Planning And Land Use	299	30.11%	
	3,901	392.85%	100.00%

	Count	Percent	Valid Percent
6 to 7	32	3.22%	3.34%
8 to 14	107	10.78%	11.17%
15 to 19	83	8.36%	8.66%
20+	592	59.62%	61.80%
X (no data)	35	3.52%	
	993	100.00%	100.00%
I) Disability			
Decline to Answer	111	11.18%	18.59%
No	479	48.24%	80.23%
X (no data)	396	39.88%	
Yes	7	0.70%	1.17%
	993	100.00%	100.00%
J) Sexual Orientation			
Decline to Answer	56	5.64%	13.90%
Heterosexual	342	34.44%	84.86%
Lesbian/Gay/Bisexual/Transgender	5	0.50%	1.24%
X (no data)	590	59.42%	
	993	100.00%	100.00%
K) Areas of Concentration			
Administrative Law	234	23.56%	
Agriculture	35	3.52%	
Antitrust and Trade	11	1.11%	
Appellate Law	91	9.16%	
Arbitration/Mediation	56	5.64%	
Banking	25	2.52%	
Bankruptcy/Insolvency	22	2.22%	
Business Law	101	10.17%	
Civil Rights	39	3.93%	
Commercial Litigation	130	13.09%	
Communication	9	0.91%	
Computer Law	3	0.30%	
Construction	100	10.07%	
Contracts	72	7.25%	
Corporate Law	103	10.37%	
Creditors' Rights and Collections	5	0.50%	
Criminal Law	28	2.82%	
Derivatives and Structured Products	1	0.10%	
Elder Law	23	2.32%	
Employee Benefits	7	0.70%	
Entertainment, Arts and Sports	10	1.01%	
Environmental Law	742	74.72%	
Ethics	1	0.10%	
Family Law	25	2.52%	
Finance and Securities	22	2.22%	
Food, Drug & Cosmetics	17	1.71%	

NYSBA Section Membership by JD

5/13/2014

	<u>JD_1</u>	<u>JD_2</u>	<u>JD_3</u>	<u>JD_4</u>	<u>JD_5</u>	<u>JD_6</u>	<u>JD_7</u>	<u>JD_8</u>	<u>JD_9</u>	<u>JD_10</u>	<u>JD_11</u>	<u>JD_12</u>	<u>JD_13</u>	<u>OOS</u>	<u>No JD</u>	<u>Total</u>
ANTI	253	15	18	5	5	0	6	6	15	9	5	2	2	138	0	479
BUS	1,434	83	190	65	96	43	123	180	267	321	72	23	16	1,126	0	4,039
CORP	424	30	70	26	32	11	30	47	127	116	30	8	7	512	1	1,471
CRIM	268	76	111	60	37	39	56	94	175	124	57	27	19	127	0	1,270
DRS	460	44	79	15	32	14	32	51	129	124	37	12	8	260	0	1,297
EASL	607	88	31	3	7	4	9	12	93	81	41	8	7	336	0	1,327
ELD	341	113	178	114	149	92	149	160	392	583	129	36	54	142	0	2,632
ENVI	198	22	140	34	58	15	39	53	142	88	10	3	1	173	0	976
FAM	484	94	175	111	101	91	135	156	377	409	74	28	34	131	0	2,400
FED	1,014	50	96	8	58	10	62	96	141	191	30	12	3	327	0	2,098
FOOD	59	6	9	3	1	1	4	13	17	22	2	1	2	89	0	229
GEN	275	87	138	94	98	48	100	148	247	292	99	28	20	226	0	1,900
HLS	213	43	161	45	55	31	42	82	111	196	19	11	8	178	0	1,195
ILP	515	33	29	13	8	9	13	33	66	36	36	6	1	712	2	1,512
IPS	652	68	55	19	28	15	35	35	108	108	33	6	7	545	0	1,714
JUD	59	24	50	19	19	11	15	25	39	38	4	11	9	2	0	325
LABR	613	81	195	57	106	36	83	110	191	291	52	16	5	324	0	2,160
MUNI	85	7	132	66	79	63	76	80	200	138	3	2	2	38	0	971
REAL	1,073	147	223	147	134	88	203	173	568	669	171	29	61	359	0	4,045
SLS	587	51	119	57	99	40	88	102	281	281	65	13	28	231	0	2,042
TAX	1,009	47	57	17	32	13	39	63	161	178	40	4	11	633	2	2,306
FICL	427	72	173	58	115	63	83	229	282	408	80	29	22	217	1	2,259
FRIA	437	55	183	57	111	63	88	188	224	297	49	25	9	231	0	2,017
FRUS	1,100	152	215	136	173	109	199	202	548	783	164	31	59	558	1	4,430
YOUN	830	199	175	52	68	37	77	153	155	275	151	34	30	871	1	3,108