

## Memorandum Regarding Proposed Brownfield Cleanup Program Tax Credit

### ENVIRONMENTAL AND ENERGY LAW SECTION

Environmental #6

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S. 7509-A, Part S  
A. 9509-A, Part S

By: BUDGET  
By: BUDGET  
Senate Committee: Finance  
Assembly Committee: Ways and Means

The Environmental and Energy Law Section of the New York State Bar Association (EELS) is providing the following comments to the proposed Brownfield Cleanup Program (BCP) tax credit deferral contained in Part S of the Revenue Article VII legislation of the proposed 2018-19 Executive Budget.

EELS believes that the proposed deferral of the tax credits available under the BCP should not be incorporated in New York State's 2018-19 budget for the following reasons:

- The proposed deferral would cause severe hardships to projects that are currently in remediation and/or under construction because the predictability of the availability of BCP credits plays a critical role in underwriting such projects. Investor funding and construction financing depend on the amount and timing of the BCP credits. The proposed deferral would disrupt funding sources or result in the breach of financing-related obligations, which would result in severe delays to ongoing projects and, in some cases, cause them to fail.
- The proposed deferral would have a particularly adverse impact on affordable housing. The value of affordable housing tax credits has significantly dropped due to changes in federal tax law. Affordable housing developers have been attracted to lower cost brownfield sites and thus have been using the BCP tax credits to help fill the funding gap. Deferral of BCP tax credit payments would exacerbate these existing financing challenges.

- To the extent that the proposed deferral is based on the belief that real estate developers are C-Corporations and will be receiving a windfall under the new federal corporate tax rates, this belief is erroneous. Real estate development projects are always structured as "flow-through" partnerships or LLCs and are rarely, if ever, C-Corporations.
- The proposed deferral represents a breach of faith with both the Legislature and the regulated community. The 2015 amendments to the BCP were the product of a careful and arduously-negotiated compromise among the Executive Branch, both houses of the Legislature, developers and the environmental community. This proposal reneges on a major element of that compromise.
- Another significant concern is the damage the proposed deferral would do to the State's reputation as being "open for business." The introduction of the deferral in the budget has already raised questions about the credibility of the State's economic development programs. At a time when New York State is seeking to encourage businesses to locate in or relocate to the State in a highly competitive interstate environment, the deferral would call into question the State's ability and willingness to meet its commitment to stakeholders willing to invest capital in our State. This is particularly troubling for brownfield projects, where the tax credits are the principal incentive (and compensation) for the risks associated with the investigation, remediation, and redevelopment of polluted sites that would otherwise remain vacant and underutilized.

Accordingly, EELS strongly recommends that deferral of BCP tax credit payments, as proposed in the Executive Budget, not be incorporated into the State's 2018-19 budget.