

Memorandum in Opposition

NEW YORK STATE BAR ASSOCIATION ENVIRONMENTAL AND ENERGY LAW SECTION

June 7, 2023

S. 5868-A
A. 7491

By: Senator Harckham
By: M. of A. Bronson
Senate Committee: Finance
Assembly Committee: Environmental Conservation
Effective Date: Immediately

AN ACT to amend the environmental conservation law, in relation to imposing certain brownfield remediation site work requirements to be eligible for the tangible property tax credit associated with brownfield redevelopment.

LAW AND SECTIONS REFERRED TO: ECL Section 27-1407.

THE NYSBA ENVIRONMENTAL AND ENERGY LAW SECTION OPPOSES THIS LEGISLATION

Since 2003, the New York State Brownfield Cleanup Program (“BCP”) has served as a robust vehicle for remediating and revitalizing environmentally contaminated sites. It has enabled the private sector to clean up more than 500 contaminated sites, more than half of which are in economically disadvantaged areas. The BCP has returned those sites to productive uses, in the process generating over \$20 billion in private sector capital investment throughout the State.

In its last session, the Legislature and the Governor extended the BCP for another ten years, signaling broad bipartisan support for this important program.

The 2022 extension of the BCP added a new requirement: a program fee of \$50,000 for sites accepted into the BCP. This new fee represents a significant barrier to entry into the Program— especially for smaller projects and affordable housing projects, which are often those in greatest need of BCP tax credits to be financially feasible.

S5868 would introduce another barrier to entry into the BCP program. It would require private developers to pay prevailing wage for all labor at all BCP sites, except for affordable housing projects.

The Section strongly supports the concept that workers at BCP sites be fairly paid for their efforts. However, we believe more study is needed to ensure that any prevailing wage requirement not result in significant decline in participation in the BCP itself. Issues that bear further study and review include the following:

- The bill establishes payment of prevailing wages as an *eligibility* requirement for entry into the BCP. It would require submission of documentation at the very outset of a project, before environmental conditions and the work necessary to remediate them (or the cost of that work) have been established.
- The exemption for affordable housing projects is likely to be unworkable, because it would require sponsors to submit proof with the BCP application that the project meets the regulatory definition of affordable housing. That documentation is generally not available at the time of the BCP application.
- The bill's prevailing wage requirements may create difficulties for many projects outside of large metropolitan areas, especially upstate, where the number of qualified contractors may be constrained, thus reducing participation in the program. Accordingly, further analysis is needed to determine whether the bill's prevailing wage requirement would increase remedial costs or decrease participation in the BCP in all or part of the State due to the limited number of available contractors who could comply with any such requirement.
- The bill would impose additional enforcement obligations on the New York State Department of Environmental Conservation ("NYSDEC"), which is already short-staffed, and has no expertise with respect to prevailing wage issues.

The BCP powerfully advances significant State interests, including the cleanup and redevelopment of sites in economically disadvantaged areas. It also encourages such cleanup and redevelopment to be conducted under the auspices of NYSDEC and the New York State Department of Health ("NYSDOH"), insuring that they are fully protective of public health of the environment. Any legislation that erects new obstacles and disincentives to sites enrolling in the BCP puts these important goals at risk.

We recommend that, prior to the adoption of any legislation imposing a prevailing wage requirement on projects in the BCP, a thorough analysis be made of the potential adverse impact of such a requirement on the viability of future BCP projects. Without

such an analysis, we are concerned this new requirement (including the requirements unique to affordable housing projects) could effectively undermine the program by creating a disincentive to remediating contaminated properties and returning them to productive use. We respectfully urge the Legislature to defer action on this bill until such an analysis is completed.

Based on the forgoing the Environmental and Energy Law Section **OPPOSES** this legislation in its current form.