

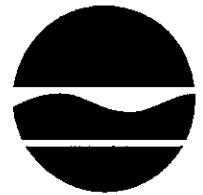
New York State Department of Environmental Conservation

Regional Director, Region 2

47-40 21ST Street, Long Island City, NY 11101-5407

Phone: (718) 482-4949 • FAX: (718) 482-4026

Website: www.dec.ny.gov



Alexander B. Grannis
Commissioner

STATEMENT OF SUZANNE Y. MATTEI, REGIONAL DIRECTOR, REGION 2 OF
THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
TO THE CITY COUNCIL COMMITTEE ON ENVIRONMENTAL PROTECTION
REGARDING BROWNFIELDS INITIATIVES
JANUARY 8, 2007

Good afternoon. My name is Suzanne Mattei, Regional Director for Region 2 of the New York State Department of Environmental Conservation (DEC). With me is Daniel Walsh, Chief of Region 2's Brownfield Remediation Program. I am pleased to be here today to provide information to the City Council Committee on Environmental Protection regarding initiatives to address the important need for remediation and appropriate development of brownfields.

A vigorous brownfields program is essential to address the environmental and economic blight that surrounds abandoned contaminated sites in communities throughout our State. DEC was involved in the multi-year effort to create a brownfield program for New York State, and DEC Commissioner Pete Grannis, who was appointed by Governor Eliot Spitzer, was active in the legislative effort to create that program in his former role as a member of the State Assembly.

Today, with the benefit of four years of experience with the program and precipitated by Governor Spitzer's introduction of legislation to address shortcomings with the current law, the Legislature is re-evaluating New York's Brownfield Law to determine the extent to which the statute is meeting its goals and to consider whether or not it needs amendment. A law of this complexity and cost deserves a careful review after a period of time sufficient to determine how it is working. While I cannot at this point predict what the outcome of that review will be, I can

certainly describe for you how the program operates today and some of the major efforts underway in New York City.

New York elected officials and residents were among the first in the nation to understand the urgent need to clean up contaminated sites when, in the 1970's, Western New York's Love Canal became a worldwide symbol of the hazards of toxic dumping. Eventually, both federal and state laws were enacted to regulate hazardous waste, criminalize its mishandling, and clean up contaminated sites posing the greatest risk to public health and the environment. These laws provided legal tools to require "responsible parties" to clean up these sites or reimburse the government for cleanup, although government has been forced to shoulder cleanup costs where it has been unable to identify or force a responsible party to do so or when such party is unable to pay for cleanups..

We have made progress. Of the 2,000 sites on the State Superfund list, approximately 1,400 have been cleaned up, leaving about 600 that are either being remediated or are still to be addressed. And DEC continues to add sites to the Superfund list as appropriate. DEC also manages a similar petroleum spill response program to address about 16,000 new spills every year. The current annual appropriation level is approximately \$43 million.

Still, despite the importance of these efforts, we know that many contaminated sites remain unaddressed because they do not qualify for the Superfund and Spill Response Programs. There is no complete or accurate inventory of these sites, now known as "brownfields," but it is clear that they number in the thousands. And though they usually do not pose the same level of threat as Superfund sites, they often contain toxic chemicals of concern to surrounding neighborhoods, often pose a threat to groundwater and in some cases may pose a threat to indoor air quality.

The Brownfield Cleanup Program (BCP), created in 2003, established cleanup goals and standards, offered liability relief to participants, and provided “refundable” tax credits, meaning that if a participant’s tax liability does not equal the credits available, the remainder would be given to the taxpayer as cash. Over 350 sites have applied to the Brownfield Cleanup Program statewide, with the number of applications growing each year. To date, 41 of these sites – 16 of which are located in New York City – have received a certificate of completion, meaning that they have completed remediation except for any on-going operation and maintenance requirements or controls.

Many brownfield cleanups have already begun to lead an economic revival in the neighborhoods they used to burden with blight. For examples:

- On Staten Island, a rail yard has been recast as the 6,500 seat home to the Staten Island Yankees’ minor league baseball team. This project created 200 jobs and brings in more than \$16 million in annual revenue for Staten Island.
- In East Harlem, a five-acre former industrial facility has been converted into a commercial complex consisting of 400,000 square feet of retail and 650,000 square feet of parking. This retail complex will provide more than 100 permanent jobs.
- In Melrose in the Bronx, on the site of a former gasoline and automotive service station, remediation under the Brownfield Cleanup Program has enabled construction of 200 units of low income housing.
- In Glendale, Queens, an eight-acre portion of a former industrial complex has been converted into 400,000 square feet of shopping, dining, entertainment and office space.

But important problems with the program must be addressed, including the issues of the frequently over-generous financial incentives and limitations on eligibility.

The current tax credits awarded to brownfield development projects are simply too generous and are not strategically targeted. These refundable credits range from 10% to 22% of the total cost of a project without limitation, even if the development costs are in the billions of dollars and the cleanup costs are relatively small. The law does not provide for the sharing of cost figures until a program participant actually files for a tax credit, and, even then, much of the information given to the Tax Department is considered confidential. Still, using rough estimates and extrapolation based on very conservative assumptions, we have worked with the Division of Budget in estimating the cost of the program. A program that was supposed to cost less than \$150 million a year, according to the original projections at the time of passage, will more than double in cost in the next three years.

Rather than allowing this to continue, we believe that, by crafting a revised program that does not allow for huge, unjustified awards to outsized and well-financed development projects, New York can spend much less money and reap even greater results, including cleaner cleanups, than those obtained under the current law. DEC would also like to see the program become more inclusive, so that sites containing "historic fill" or other contamination that is not at levels high enough to qualify under the current rules but is significant enough to be of some concern can be included.

Governor Spitzer is committed to making the Brownfield Cleanup Program the most aggressive and effective in the country. We have been listening to municipalities, environmental justice groups, builders and other interested parties about further changes in the law that will help meet this goal. We have also begun discussions with the Mayor's Office about the Mayor's brownfield proposals as envisioned in the PlaNYC program. We look forward to working with the City and with members of the Legislature to address these concerns.

We also have suggestions about other brownfield issues. The Brownfield Cleanup Program is only one of the three programs created or enhanced under the 2003 Brownfield Law—the other two, the Brownfield Opportunity Area program and the Environmental Restoration Program, also deserve attention.

The Brownfield Opportunity Area program is designed to address the fact that even with brownfield financial incentives, many sites are challenging to market because of their location, often in low-income communities and near other brownfields. We cannot ignore them if we are truly interested in cleaning up the environmental damage from our industrial past. The Brownfield Opportunity Area program empowers communities to create their own economic dynamic using planning tools, community involvement, and public-private partnerships. Money is made available to municipalities and community-based organizations to study market conditions, survey available resources, create a dialogue with site owners and other interested parties, and devise strategies to redevelop the site and surrounding area to best meet local needs and interests.

Unfortunately, the program has been stymied. Even though the program has a budget (shared with other brownfield program functions) of \$15 million a year, only \$9 million has been committed for program grants in the entire four years of its existence. This has nothing to do with a lack of public interest in the program. DEC and the Department of State have approved over 100 applications for funding from cities and community groups across the State. Nineteen of these are in Region 2. The problem has been the need for a new Memorandum of Understanding (MOU) among the two houses of the Legislature and the Governor's office to finalize projects, and some delays that resulted from a dual review process of applications and contracts by DEC (which has fiscal responsibility for the program) and the Department of State (which has

responsibility for implementation). Nine of the 19 projects in Region 2 have been addressed by the legislature but the remaining 10 await the pending Memorandum of Understanding.

We are working out these problems. The 2007-2008 fiscal year's budget no longer requires an MOU for future applications, and the Governor's office and the Legislature are working out the details of an MOU to cover some 50 plus projects awaiting approval. Also as of the 2007-2008 fiscal year, DEC is now allowed to delegate fiscal oversight to the Department of State to avoid multiple reviews, and we are working with the Department of State to allow a continuous grant process instead of a once-per-year window for submission of applications.

But a larger problem still looms. A community may have done considerable market research and have demonstrated strong public support for small retail, affordable housing or job-creating manufacturing, but a developer can still access large tax credits for building parking lots, condos or big box stores that are inconsistent with or do little to further community needs and goals. We need to consider rewarding development that supports the Brownfield Opportunity Area program by linking brownfield tax incentives to development that advances municipal planning and public participation.

Finally, I would like to highlight the importance of the Environmental Restoration Program, which was created as part of the 1996 Clean Water, Clean Air Bond Act. Under this program, we reimburse municipalities for 90% of on-site costs and 100% of off-site costs for site investigation and remediation of municipally-owned brownfields. This program also provides localities with total indemnification, meaning that the State will represent municipalities and pay any future claims if any unforeseen consequences of the site's contamination arise after cleanup. It is the strongest liability protection in the nation, and a positive incentive for municipalities to join the program. In Sunset Park, Brooklyn, a remedial plan approved under the Environmental

Restoration Program will enable construction of a 17-acre waterfront park. The park will include ball fields, nature trails, fishing piers and an education center for a community that has long been under-serviced by parkland. We note that with \$170 million approved to date, the program is approaching its initial funding limit of \$200 million.

A lot of work needs to be done to maximize the potential of our Environmental Restoration Program, Brownfield Cleanup Program and Brownfield Opportunity Program. Still, we've seen some important successes over the last few years. Our goal is to have the best program in the country, to revitalize our communities, create new jobs, generate increased tax revenues and new investment, while enjoying a cleaner, healthier environment.

Thank you for this opportunity to testify today. I look forward to responding to your questions.



Mayor's Office of Operations
253 Broadway, 10 Floor
New York, New York 10007

Testimony of Rohit Aggarwala
Director, Mayor's Office of Long Term Planning & Sustainability

NEW YORK CITY COUNCIL
Committee on Environmental Protection

State and Local Brownfields Initiatives

8 January 2008

Good afternoon Chairman Gennaro and members of the committee. My name is Rohit Aggarwala, and I am the Director of the Mayor's Office of Long Term Planning & Sustainability, which is responsible for implementing PlaNYC, the City's long-term plan for a sustainable City. I am joined by Angela Sung of the Office of the Deputy Mayor for Economic Development and Mark McIntyre of the Mayor's Office of Environmental Coordination.. Thank you for the opportunity to testify on the status of State and local brownfields initiatives.

As you know, brownfields are sites where redevelopment or reuse may be complicated by the presence or potential presence of hazardous waste or petroleum.

As the City's population is expected to grow to 9.1 million people by 2030, it is essential that we make the most efficient use of our existing stock of land. This is why Mayor Bloomberg has included cleaning up brownfields as a focus in his PlaNYC 2030 sustainability agenda. Brownfields are fundamentally an urban issue. Investigating and cleaning them up allows cities to address infill development challenges, promote transit-oriented development, and encourage density.

Brownfields represent an enormous opportunity to use New York City's land more efficiently. Last year we estimated that approximately 7,600 acres of potential brownfields exist in the City, an area that is roughly 8 times the size of Central Park. However, while there are potentially thousands of sites with contamination, only 1,900 of those acres are currently enrolled in a state program.

State remediation programs available for New York City brownfields currently include the Environmental Restoration Program, a voluntary program for municipally-owned sites; the Superfund program, an involuntary program in which the State lists the most contaminated sites, and mandatory programs for petroleum spills and manufactured gas plants. Additionally, there is the Brownfield Cleanup Program or BCP, which is the only available voluntary program for privately-owned property. The BCP is an oversight and incentive program which encourages both cleanup and redevelopment by providing liability relief, state oversight, and tax credits based on the cost of remediation and site improvements.

Currently the State is re-evaluating various aspects of the BCP, particularly site eligibility, the levels of program utilization, and the tax credit structure. In last year's State of the State address, Governor Spitzer stated his intention to reform the brownfields law to increase its effectiveness. And in the past several months, the Senate and the Assembly have held brownfield hearings and expressed interest in improving the program.

As the primary tool for brownfield redevelopment, the State Brownfield Cleanup Program is critical to increasing cleanups in the City. Even though New York City has 85 of the 256 applications the state has approved for the BCP to date, enrollment is low compared to the pace of our development. From 2004 through 2006, the City's Department of Buildings issued permits for 19,071 new buildings, including 471 new buildings to be erected on industrial land. This represents a potential volume of missed opportunities for overseeing and ensuring appropriate cleanups.

To address these issues, the PlaNYC brownfield proposal centered around 3 primary goals

1. encourage more cleanups in the City by providing education, access, and incentives to developers of idle brownfields that may currently be blights or public health risks within our communities
2. provide more remediation and investigation oversight options, so developers of every site that is not compliant with state standards who want to enroll in a government program can do so, and
3. improve brownfield planning to empower developers, community groups, and organizations to proactively address these environmental issues and community needs

Key to achieving these goals are keeping an open dialogue with the State as it evaluates amendments to the current BCP and BOA programs; getting State legislation enabling the City to create an expedited voluntary program for mild- to moderately-contaminated sites that would use the same standards as DEC uses in the rest of the State and that would provide the same liability relief as the BCP; and fully staffing the Office of Environmental Remediation.

Last year, the City dedicated \$2 million annually to create a new Office of Environmental Remediation, which will spearhead the City's brownfield efforts that are discussed above and further outlined in the PlaNYC document. The office will implement the PlaNYC brownfield initiatives, providing communities, developers, and land owners with the appropriate tools to redevelop these sites. We are currently interviewing candidates to direct the office.

The priorities outlined today represent the City's objectives to be more aggressive in cleaning up its land. For too long, too many sites in areas throughout the five boroughs have remained sadly underutilized or vacant eyesores. By addressing changes to statewide programs and using City resources to target brownfield reclamations, we can prevent our land challenges from undermining our goals to maintain a vibrant and productive city into the future.

I would now be happy to answer any questions.



NPCR
NEW PARTNERS FOR
COMMUNITY
REVITALIZATION, INC.

11 Penn Plaza, 5th floor
New York, NY 10001

Testimony
Presented to the
New York City Council
Committee on Environmental Protection
by
Jody Kass and Mathy Stanislaus
January 8, 2008

Thank you for the opportunity to address the timely question posed by the Committee on Environmental Protection: "State and local brownfields Initiatives: Where are we and where do we go from here?" New Partners for Community Revitalization, Inc. (NPCR) is a not-for-profit organization whose mission is to advance the revitalization of New York's communities, with a particular focus on brownfield sites in and proximate to low and moderate income neighborhoods and communities of color. At both the State and New York City levels, we are at a critical juncture. The "field" of brownfields is still relatively young – the first federal brownfield law was passed in 2002, and NYS passed its brownfield law in 2003. These new laws bring enormous new resources and provide a new regulatory framework in which to advance these sites.

The City of New York is now facing the dual challenge of how to meet the needs of existing communities while managing the growth necessary to accommodate its anticipated new residents. The backdrop to this challenge is a land crunch of historic proportions. The City no longer owns a substantial inventory of usable land and buildings. There is still a lot of vacant and underutilized property, mainly in low and moderate income neighborhoods, but it is privately owned, and much of it is considered to be brownfields – properties contaminated from past industrial uses, historic fill, or illegal dumping. On Earth Day 2007, Mayor Bloomberg announced his sustainability PlaNYC 2030 through which the City intends to accommodate all of these needs. Of the 127 initiatives that comprise the PlaNYC there are 11 initiatives aimed at cleaning up and redeveloping all of the City's 7,600 acres of brownfields. We support the PlaNYC brownfield initiatives and believe this is an opportune moment to ensure that the foundation to implement PlaNYC commitments are in place. With Earth Day 2008 right around the corner, it is an auspicious time to take a moment to evaluate the progress to date and where we are going.

NYS Brownfield Initiatives:

The most innovative part of New York's 2003 Brownfield Law is the Brownfield Opportunity Area (BOA) program, which grew out of the seven-year policy debate. The BOA program is a planning tool that seeks to address entire neighborhoods and clusters of brownfields within those neighborhoods, including the conditions fueling abandonment and decay. It recognizes that a brownfield program that is based on a "one-parcel-at-a-time" strategy will not result in the

revitalization of distressed areas and will frequently invite dirty or stigmatizing uses such as garbage transfer stations. Instead, the BOA approach can reverse the cycle of disinvestment and decay – not by cleaning up one parcel at a time, but by creating a vision for an entire area, including housing, shops, small manufacturing, public amenities, and infrastructure improvements: street lights, trees, parks, sidewalks and roadways. These are the things that together define functional communities and livable neighborhoods that allow current residents to remain and attract new residents. The BOA program encourages residents and community groups to work with municipalities, and it provides State planning grants and seed money to help create the vision that subsequent cleanups and redevelopment projects will help fulfill.

Every year since the Law was passed, the State has appropriated up to \$15 million for the BOA program, for a total of nearly \$75 million. To date, over 100 communities across the State have applied for this money. Yet, despite the incredible promise offered by BOA, the program has been stymied by statutory problems which need immediate fixing:

Infighting over the Legislative MOU is holding up \$7.8 million in awards to over 50 communities.

BOA funding award decisions are being held up by the inability of the Governor, Senate Majority Leader Joseph Bruno and Assembly Speaker Sheldon Silver to jointly execute the legislative Memorandum of Agreement (MOU) required under the Law in order to award BOA planning grants. Our leaders in Albany need to immediately execute the Legislative MOU and release the State funds to these communities.

Dual agency administration results in redundancy and delay in the disbursement of funds:

Despite the fact that nearly \$75 million has been appropriated for this program, less than 1% has been received by communities. Indeed, nearly all of the BOA funds appropriated are still sitting in the State Treasury when it should be out in communities – supporting desperately needed neighborhood revitalization efforts. The problem of getting grant funds out to communities is directly attributable to the dual-agency administration of the BOA program. It is inefficient and costly in terms of delay and duplication, with the Department of State (DOS) reviewing BOA applications and working directly with community applicants, while the Department of Environmental Conservation (DEC) has oversight and ultimate control over the program. The Law needs to be amended to clarify that one State agency, the Department of State, is responsible for administering this planning program.

There are no incentives for private owners of brownfields sites to cooperate with BOA planning.

Many BOA grant recipients report that they have been unsuccessful in securing the cooperation of brownfield site owners in their planning efforts. Indeed, there is little to encourage the cooperation of brownfield property owners whose absence severely hampers meaningful planning and also allows for outsized or otherwise incompatible development. There is simply no incentive for a brownfield site owner or developer to participate in the BOA planning process, cooperate with the community, or develop a site consistent with a BOA plan. The Brownfield Tax Credit and the Brownfield Opportunity Program should be symbiotic with the BOA program offering special help to communities to address entire areas impacted by the economic and health burdens from multiple brownfields, and the tax credits needed to make the individual deals work. Unfortunately, despite being created in the same Law, the programs have insufficient interconnection. Instead, the tax

credit program almost guarantees that communities who attempt to do revitalization planning can expect to get little or no help from developers enjoying the liberal benefits of the tax incentives. To remedy this problem, Brownfield Tax Credits should be re-assigned to encourage developers to work with community-based organization (CBOs) and municipalities through the BOA program. The law should be amended to provide a BTC bonus to projects built consistent with a BOA plan and to deny credits to inconsistent projects.

In 2003, New York was one of the last industrial states in the country to pass a brownfield law that was supposed to encourage voluntary cleanups. Four years later, it has become all too clear that the Law has serious deficiencies and is not functioning as intended. Unfortunately, the political landscape in Albany as we await the Governor's State of the State address tomorrow is less than rosy, making it that much more important for the City of New York to develop and implement a robust brownfield initiative. With the prospects for action in Albany uncertain, it become even more important for leadership at the City level to establish the resources and programs needed to advance New York City's thousands of brownfield sites.

City Brownfield Initiatives:

Mayor Bloomberg's PlaNYC calls for the cleanup of the City's estimated 7,600 acres of brownfields. The Mayor's plan is visionary, courageous and insightful, and includes provisions that empower residents and community based organizations and directs funds where they are most needed.

A dozen groups, including NPCR had lobbied the City to create a centralized office focused on redeveloping city brownfield sites. The mayor included such an office in his plan, but it now needs the authority, staff and funding to develop and implement his agenda. Moving forward, the office will also need to ensure that the projects it assists have emerged from a community planning effort or have support of the local community. And any project that seeks City help to develop a brownfield must demonstrate that their projects are consistent with the City's sustainability goals.

The mayor announced that the City will provide \$15 million for a public-private revolving loan fund to finance remediation and related costs. But it is not clear how the city will get these dollars into specific projects. The City should maximize its funds by leveraging private dollars for remediation through partnerships with community lending institutions such as the NY Metro Brownfields Redevelopment Fund Program, which uses federal and City funds to credit enhance remediation loans.

The mayor also announced a \$10 million investment for an environmental insurance initiative, which will be important for developers of affordable housing. Because of the scope of the overall development, the City is in an excellent position to negotiate reasonably priced environmental insurance policies (even for small sites), with few or no exclusions.

The mayor has also called for new incentives to encourage private property owners to participate in the State brownfield planning process. One way to achieve this is to grant the existing eight percent increase in brownfield tax credits only to projects that are built consistent with plans that emerge from the State's Brownfield Opportunity Area program. If the project is not consistent, it would not receive any tax credits. But beyond asking the State to create incentives, the City should

use its own resources to encourage private property owners to participate in brownfield planning and development and to take a strong municipal role in improving these once blighted areas.

What is going to be critical to the success of PlaNYC is the details of the programs and resources devoted to ensure that the City's brownfield sites will get cleaned up and re-used for sustainable uses that also meet the needs of low income neighborhoods and communities of color. We believe that the Mayor's sustainability vision will only be achieved through a detailed, strategic plan that integrates brownfield redevelopment incentives with larger community planning efforts that consider both the needs of today's communities, and also the expected newcomers. Providing incentives and fast tracks to developers and otherwise expediting deal-making, if not accomplished in the context of meaningful community involvement and a plan for sustainability, is counter to sustainable growth ideals and the underpinnings of the Mayor's sustainability agenda. Of the utmost importance is for the City to target brownfield cleanup and redevelopment incentives to ensure that the incentives and rewards are used only for those projects and developers who build within the sustainability framework.

There already exists a sustainable growth planning tool for brownfield sites that will advance the achievement of the Mayor's sustainability goals – the Brownfield Opportunity Area (BOA) Program. The City should use the BOA program both as an opportunity for productive partnerships with community groups and for the targeted granting of incentives.

CONCLUSION:

In closing, we would like to acknowledge Councilman Gennaro for his leadership on the brownfields issue overall. Councilman Gennaro has been a long time advocate for communities and for the environment in general, and in particular, for responsible, sustainable brownfields cleanup and re-use. His leadership helped advance the first round of grants under the Brownfield Opportunity Area (BOA) Program in Albany. In early 2005, he led the Council in adopting a Resolution that prompted finalization of the Legislative Memorandum of Understanding that had been stalled in Albany for two years, which was delaying the award of nearly \$8 million to 53 communities to begin planning for brownfield sites. Unfortunately, the two subsequent rounds of BOA grants are again stalled by Albany's inability to execute a new three-way Legislative Memorandum of Understanding.

We encourage the Council to undertake the following five measures:

1. *Call on the Governor, Assembly Speaker and Senate Majority Leader to execute the statutorily required Legislative MOU and release the BOA funds for Rounds 2 and 3 – nearly \$8 million for over 50 communities.*
2. *Call on Albany to enact statutory reforms to eliminate the dual agency administration of the BOA Program that results in redundancy and delay in the disbursement of funds*
3. *Call on Albany to restructure the Brownfield Tax Credit to provide incentives for private owners of brownfields sites to cooperate with BOA planning.*
4. *Moderately contaminated sites, including sites contaminated with historic fill, have been rejected from the State's Brownfield Cleanup Program, leaving hundreds of NYC sites in a*

state of limbo and without the benefit of regulatory oversight or State brownfield resources, notably the BTCs. This untenable circumstance must be resolved.

5. *And, we encourage the Council to work closely with the Bloomberg Administration to establish and fully fund the PlaNYC brownfield programs in a way that builds a foundation upon which a strong City brownfield program can grow.*

Thank you.

Schulte Roth & Zabel LLP

919 Third Avenue
New York, NY 10022
212.756.2000
212.593.5955 fax

www.srz.com

Writer's Direct Number
212.756.2205

Writer's E-mail Address
lawrence.schnapf@srz.com

January 8, 2008

Hon. James F. Gennaro
Chairperson-Committee on Environmental Protection
The Council of The City of New York
City Hall Office
250 Broadway, Room 1773
New York NY 10007

Re: State and Local Brownfield Initiative

Dear Chairman Gennaro:

I. Brownfield Cleanup Program (BCP) Does Not Meet Remedial Needs of NYC

- Most Stringent Eligibility Requirements in Country
 - On-site Source (e.g., contamination migrating from adjacent property)
 - Contamination Above Cleanup Levels Only "Moderate"
 - "But For" Test Replaces "Complicating Re-Use"
 - Solid Waste Not "Contaminant" (e.g. landfill)
 - Old VCP Sites May Not Be Eligible
 - Class 2 Sites Not Eligible
 - No "Grace Period" For Change in Economic Conditions
- Significant Eligibility Uncertainty
- Significant Pre-Applications Investment (Time and Costs)
- Partial Site Acceptance May Promote Incomplete Cleanups on Non-BCP portion of Site With One Building
- No Voluntary Cleanup Program for Sites Denied Entry Into BCP or "Non-Program" Sites
 - Historic Fill Sites
 - Unregulated UST Sites (former manufacturing sites, residences, parking garages)
 - Pesticides
- Proliferation of Self-Directed Cleanups

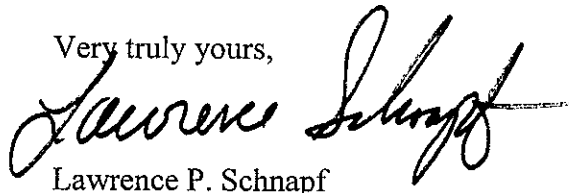
II. Oil Spill Program

- DEC Requires Waiver of Claim Against Spill Fund To Sign Stipulation
- Presence of Closed Tanks May Disqualify Owner From Compensation

III. NYC Brownfield Initiative Can Help Accelerate Remediation and Reuse of Contaminated Sites

- "e" Program Has Been Effective Tool for Remediating Contaminated Sites
- Five Counties have UST delegation (e.g., Nassau, Suffolk, Rockland)
- Unique Characteristics of NYC Sites
 - Fill Material
 - Non-use of Groundwater
 - Vapor Intrusion
- Lenders Will Accept Remediation Certificates
- Streamlined Remediation Process Will Promote More Cleanups and Remove Disincentive For Self-Directed Cleanups
- Database of Phase 2 Reports Will Reduce Transaction Costs
- Altering Reporting Obligations from Reportable Quantities To Contamination Levels Will Require More Cleanups With Regulatory Oversight

Very truly yours,

A handwritten signature in black ink, appearing to read "Lawrence Schnapf", with a stylized flourish at the end.

Lawrence P. Schnapf



**New York Lawyers
For The Public Interest, Inc.**
151 West 30th Street, 11th Floor
New York, NY 10001-4017
Tel 212-244-4664 Fax 212-244-4570
TDD 212-244-3692 www.nylpi.org

**Testimony of Veronica Eady Famira and David Palmer
New York Lawyers for the Public Interest**

**Oversight Hearing – State and Local Brownfields Initiatives: Where Are We and Where Do
We Go from Here?**

**Before the Committee on Environmental Protection
New York City Council
January 8, 2008**

My name is Veronica Eady Famira. I am Associate General Counsel at New York Lawyers for the Public Interest (NYLPI), and I also manage the Environmental Justice and Community Development Program at NYLPI. David Palmer is a staff attorney at NYLPI who serves as our point person for schools on contaminated sites and the School Construction Authority's leasing program.

NYLPI is a non-profit organization formed in 1976 to provide legal, organizing, and technical assistance to underrepresented communities in New York City. Since 1993, our Environmental Justice and Community Development Project has offered legal assistance and community organizing resources to communities of color and low-income residents living in environmentally-distressed neighborhoods. We will soon release an updated edition of our free *Brownfields Basics* manual, and we have been working closely with communities across the five boroughs, including residents in Soundview, Bronx and Bushwick, Brooklyn that are seeking to clean up and redevelop several large vacant lots that serve as environmental, social, and economic nuisances in their neighborhoods.

Last May, we testified before this very Committee in favor of Intro 21 for the bill's strong stand on redeveloping brownfields and prioritizing communities of low and moderate income that are disproportionately burdened by the clustering of brownfield sites. This emphasis on chronic underutilization should be the touchstone of brownfields redevelopment.

Today, we are pleased to provide further testimony on strengthening both state and local brownfields initiatives. We begin with general comments before turning our comments more specifically on schools sited on contaminated brownfield sites.

General

- Public participation in the brownfields process should be early and often. Unfortunately, the brownfields business has been regarded as largely a real estate deal. Development in communities should ideally be driven and, at a minimum,

actively supported by local residents. The City can foster community involvement by making information on developments readily available to residents, by making it available in a language that is accessible and relevant – lay language as well as the dominant language of the community, by facilitating the distribution of information on funding at all levels of government, especially technical assistance grants, and by encouraging developers to engage the public through public meetings and other vehicles. Any reports or strategies mandated by a state or local brownfields program should be readily available to the public without the going through the Freedom of Information Law process.

- To the maximum extent possible, low-income communities should receive priority for incentives over neighborhoods that have fewer obstacles to attracting development.
- The City, in concert with the state brownfields program, should explore methods for encouraging socially and environmentally responsible development such as affordable housing, green manufacturing and sustainable businesses that will not result in new brownfields on top of old brownfield sites.
- State and local brownfields programs should also explore ways to prioritize projects that offer appreciable employment benefits to low-income host communities. For example, in some states developers must demonstrate significant job development in order to avail themselves of certain incentive programs, like liability protections. In the same spirit, the City should actively encourage development projects to hire brownfields workers from the Minority Worker Training Programs funded by the National Institute of Environmental Health Sciences and the Environmental Protection Agency and it should prioritize projects that result in long-term job benefits to the local community.
- As New York City grows and bolsters its inventory of public schools, it should be especially cognizant of the public health threats associated with the construction or leasing of schools on contaminated sites. The City should expressly require that prior to opening a school on a brownfield site, the site be put through a rigorous environmental review that involves notification and input of local residents, parents, and school faculty. Furthermore, because it is well-settled by risk assessors that children are considered “sensitive receptors” – those bearing the most vulnerable to injury and illness resulting from exposure to chemicals and environmental toxins, schools sited on brownfields sites should be required to be cleaned to the highest level of cleanup. Under the State Brownfields Cleanup Program, that would be Track 1.
- The City should develop methods for coordinating tax incentive programs that are broader than brownfields programs, such as empire zone tax credits or empowerment zone credits so that developers and the community can consider the entire menu of incentives that are incorporated into a project. Moreover, there should be a graduated tax incentive scheme under any state or local brownfields

program that would provide for higher levels of tax credits for cleaning properties to cleaner levels.

- Finally, the City should develop a strategy for assisting brownfields projects that fall outside the scope of the state's brownfields program. Thus far, the state has shown a bias against admitting sites that contain historic fill material and sites that are not severely contaminated. The City needs to develop contingency plans for offering incentives to projects proposed on such sites. Additionally, the City should aggressively seek to persuade the state to curtail this sort of bias that can potentially carve most New York City sites out of the state brownfields cleanup program.

Schools on Brownfields

NYLPI's experiences working with communities affected by schools built on brownfields include representation of the Bronx Committee for Toxic Free Schools at the contaminated **Mott Haven Schools Campus** in the South Bronx, as well as the Parent Teacher Association at the **Manhattan Center for Science and Mathematics** in East Harlem – a school that sits atop a former manufactured gas plant site. We've worked with the Hillcrest Citizens for Neighborhood Preservation and the Hillcrest Estates Civic Association along with Chairperson Gennaro, in his district to push for a stronger cleanup at the **Gateway Site** in Queens.

We began working on toxic schools issues in 2004 through representation of the Concerned Residents Organization in the Soundview Section of the Bronx. CRO has worked for years to ensure that the leased **Soundview Educational Campus**, housed within a former military electronics systems plant, is safe for site occupants and the local community. We represent the Parent Teacher Association at the **Information Technology High School** in Long Island City, housed within a leased former metal works factory turned into a school in 2003. They have seen pollution beneath the school increase since the school's opening in 2003 and they have been subject to maintenance and monitoring oversights that could have placed children at risk of exposure. We also work with PS 65 Parents & Neighborhood Against TCE, some of whom have lawsuits pending against the City alleging exposure of their children to toxic vapors from an underground TCE plume beneath **P.S. 65 in Ozone Park Queens**. We have been contacted by parents and teachers at other sites as well, like the **Longwood Campus** in the Bronx, as well as the leased **Art & Leather School** in Queens and **Beacon School** in Manhattan.

We have connected with these communities mainly because each was lucky enough to have especially vigilant watchdogs and/or through news reports that exposed contamination concerns that no one had been aware of. We can only guess as to the number of schools on contaminated properties in New York City, or how many will likely be proposed in the future. In his plaNYC report, Mayor Bloomberg calls for the eventual development of an estimated 7,600 acres of contaminated land in New York City – “an area over eight times the size of Central Park.” The report did not specifically mention schools on brownfields, but one need only connect the dots to see a trend

towards siting more and more schools on contaminated properties – both new school construction projects and the leasing of former factories for use as educational facilities.

Below, we make a series of recommendations, each followed by an explanation based on issues that our clients have encountered in their communities at specific toxic school sites. We call these concerns to the City Council's attention because they seem to be left out of the current debate around brownfields. And, if one governmental body has been a champion of the toxic schools issue, it has been the Council. For sure, this issue falls under many categories, like children's health, education, and environmental justice; but all are relevant to brownfields redevelopment policy. We are hopeful that these issues will be given serious consideration in the formulation of the Council's brownfields policy agenda.

- **The Environmental Protection, Health and Education Committees Should Hold a Joint Oversight Hearing to Assess the Department of Education's Ability to Adequately Maintain And Monitor Schools Sited on Contaminated Properties**

Unfortunately, the trend in brownfields redevelopment, both in New York City and around the country, is to leave contamination in place, as opposed to undertaking full source removal. Doing so means having to employ long term controls to ensure that future site occupants are not exposed to remaining contaminants. These controls -- like soil caps, ventilation systems and groundwater barriers, for example -- can and do fail. They require maintenance and monitoring for as long as a site remains a school to ensure their integrity and thus that a site will remain safe. Parents, students and community members and their elected representatives have a right to know for sure that the Department of Education has the expertise, staff resources and funding to ensure the integrity of controls on contaminated school sites. The Council should investigate the Department of Education's maintenance and monitoring capabilities before approving any more plans to site schools on contaminated properties.

- **The Council Should Urge Mayor Bloomberg to Withdraw His Opposition to Passage of a Bill that Would Give the Council Oversight of Contaminated Leased Facilities**

To build a new school, state law requires the School Construction Authority (SCA) to submit a site plan to the local community board, gives the City Council an opportunity to review the site plan, and requires environmental review -- all of which give communities notice and an opportunity to participate. The SCA argues that its leasing program is not subject to these requirements. Thus, even where there is known contamination, there may be insufficient environmental review of proposed lease sites, and no opportunity for the community and Council to weigh-in. According to the November 2007 amendment to the 2005-2009 Department of Education Five-Year Capital Plan, there are a total of 35 leased sites, 16 for which construction has not yet begun, and 13 that do not yet have identified sites. There will likely be more in the next five-year plan. Almost certainly, some of these sites will be on contaminated brownfields.

The Council knows this issue well; it unanimously passed a resolution in support of legislation to amend the Public Authorities Law (PAL) to clarify expressly that leased facilities are subject to the same community participation and political and environmental review processes applied to new school construction. The legislation is supported by 30 organizations, all of which are listed in a footnote below.¹ This past June, the Assembly passed a strong protective bill (A.8838, Nolan), but the Senate passed a much weaker bill (S. 6393, Padavan) that fails to address the central concerns, largely because of intense Mayoral opposition to involving the City Council in toxic school siting decisions. The Mayor's opposition to a political check by the Council unjustifiably places children at risk.

The City claims that allowing the City Council to review the City's plans to address environmental contamination on leased school sites will introduce "politics" into the process and delay the opening of new schools. However, the City has offered no evidence of major slow downs of new school construction projects due to Council review. The current process for siting newly constructed schools is already expedient and heavily favors the Mayor and the SCA. When a site application is submitted to the City Council it triggers a statutory process whereby the Council has only 20 days to act. If the Council does not vote on a site application within those 20 days, it is deemed automatically approved. And, even where the Council would seek to disapprove of a site, it would require a super-majority vote (two-thirds) to do so – not an easy feat. In fact, two recent new school construction site applications, one for the severely contaminated Mott Haven Site in the South Bronx, and another for the contaminated Gateway Site in Queens, went through Council review, gained significantly stronger cleanups through the process, and in each case approval was slowed by less than one month. Concerns about minor delays are outweighed by the potential danger of long-term exposure of school children to toxic materials. Council review is essential to ensure that stronger cleanups can be sought in order to protect children's health.

This past summer, Dennis Walcott, Deputy Mayor for Education, attended a news conference with Council Speaker Christine Quinn and Chairperson Gennaro to highlight the successful collaboration between the City Council and the Mayor's office that resulted in a stronger cleanup of the contaminated Gateway Site mentioned above. At the same time, the Mayor had lobbyists in Albany opposing legislation that would give the

1 Asian American Legal Defense and Education Fund (AALDEF) • Bronx Committee for Toxic Free Schools • Bronx Health REACH • Center for Health, Environment & Justice (CHEJ) • Chinese Progressive Association • Class Size Matters • Concerned Residents Organization • Environmental Advocates of New York • Environmental Defense • Healthy Schools Network • Hillcrest Citizens for Neighborhood Preservation • Hillcrest Estates Civic Association • Institute for Health and the Environment at SUNY Albany • Institute for Urban Family Health • Make the Road by Walking • Natural Resources Defense Council (NRDC) • New York City Environmental Justice Alliance (NYCEJA) • New York Immigration Coalition • New York Lawyers for the Public Interest (NYLPI) • New York League of Conservation Voters (NYLCV) • New York Public Interest Research Group (NYPIRG) • Northwest Bronx Community & Clergy Coalition • Nos Quedamos/We Stay • Puerto Rican Legal Defense and Education Fund (PRLDEF) • Sierra Club • Sustainable South Bronx • United Federation of Teachers (UFT) • United Puerto Rican Organization of Sunset Park (UPROSE) • WE ACT for Environmental Justice • Wellness in the Schools.

Council, and thus communities, a meaningful role in the siting of contaminated, leased facilities. The Mayor's plaNYC report states that "protecting the health of New Yorkers must be our primary concern" and that "for too long, communities have been left out of the process of reshaping their neighborhoods." But the Mayor's public proclamations and his opposition to this legislation appear to conflict. We urge the Council to express its disappointment with the Mayor's mixed messages and urge that he withdraw his opposition to this important legislation immediately.

- **The Council Should Refuse to Approve Schools on Contaminated Brownfields Unless Funding is Provided to Affected Communities for Technical Assistance to Enable Communities to Meaningfully Participate in School Siting Processes**

Parents, students, teachers and community members (not to mention most lawyers and elected officials) are often ill-equipped to fully analyze highly technical environmental data, and properly assess whether a proposed remedial scheme is sufficient to protect the health of children, the population most vulnerable to toxic chemicals. We believe that the City has an obligation to provide funds to allow communities to *meaningfully* participate in public processes. Funding for communities for independent technical assistance is not a novel idea. Indeed, technical assistance grants are available to provide communities with funds to "obtain independent technical assistance in interpreting environmental and health information generated and/or evaluated under the State Superfund Program or Brownfield Cleanup Program about an eligible site,"² though it is not always so easy to secure such funding.

To supply affected communities with funds for independent expertise is justified even where merely to calm fears in environmentally-overburdened communities that are often justifiably wary. Yet, there is important additional value. NYLPI has witnessed oversights at contaminated school sites that might have placed children at risk had independent experts not drawn attention to them. At the Mott Haven Site, independent consultants who reviewed the City's cleanup plan noted, "Cancer-causing compounds will remain on the property in concentrations well above Recommended Soil Cleanup Objectives."³ The experts went on to recommend removing those "hot spots," which, thankfully, the City agreed to do. At the Information Technology High School in Long Island City, initial air quality testing results used by City officials to assure parents that the air inside the school was safe had in fact employed inappropriate instrumentality incapable of detecting lower levels of contamination that could be harmful to occupants. Only after this error was pointed out by an independent consultant did the City retest the air. In both instances, had independent experts not been available, these flaws would almost certainly have gone unnoticed and unresolved.

The utmost precaution must be taken when dealing with the risk of toxic exposure to children, especially children from already overburdened communities. As explained above, there is precedent in both policy and past practice which justifies funding independent consultants. This funding is critical to our clients – parents of children attending these schools, teachers and

² See DER-14/ Technical Assistance Grants Guidebook, New York State Dept of Environmental Conservation, DEC Program Policy, 27 Mar 2006; *see also* NYS ECL §27-1417 and §27-1316.

³ Lenny Siegel (Center for Public Environmental Oversight) and Peter Strauss (P.M. Strauss & Associates), *Independent Review of the Cleanup of the Mott Haven Schools Complex* January 24, 2007.

local community members. This expertise will benefit you as elected officials, the communities within your districts, and organizations like ours as we work collectively to ensure that the strongest possible cleanup plans are put in place before we place the City's children in schools on brownfields. We urge the Council to demand City funds for independent expertise each time the City proposes to site a school on a contaminated brownfield.

- **The Council Should Refuse to Approve Schools on Contaminated Brownfields Unless the Council Has an Opportunity to Review Maintenance and Monitoring Plans, Including an Assessment of the Plans' Viability and Cost, Before School Site Applications are Submitted by the Mayor/SCA**

As noted above, toxic school sites require long-term maintenance and monitoring. A plan for maintaining and monitoring a site is often called a Site Management Plan, or SMP. (The cleanup plan is generally called a Remedial Action Work Plan, or RAWP.) Across the board, experts will explain that a robust SMP is essential to ensuring a site's safety. Yet, current practice for new school construction projects on contaminated properties in New York City allow for public review of the RAWP, public review of the environmental impact statement, a public hearing and vote in the Council on each school site application and the commencement of construction, all *before* an SMP is produced.

This is the subject of litigation NYLPI has brought on behalf of the Bronx Committee for Toxic Free Schools against the City. The suit is currently pending in the Bronx Supreme Court. An expert affidavit submitted by one of the Committee's consultants was critical of the very bare-bones maintenance and monitoring plan outline that the City submitted well past the date of any of the public review processes described above. (A detailed SMP, as required by law, has still not been released and construction on-site is underway). The expert stated, "It is my professional judgment that the Mott Haven [site management plan] could and should have described the long-term monitoring program in greater detail, particularly because maintenance and monitoring of the selected remedy will necessarily affect public health of schoolchildren."

The Brownfields Cleanup statute requires SMPs to include not only detailed descriptions of how sites will be maintained and monitored, but analyses of the long-term costs of any plan and sufficient analyses to support conclusions within plans that effective implementation, maintenance, monitoring and enforcement of institutional and/or engineering controls can be reasonably expected.⁴ If an assessment were to reveal that DOE is incapable of carrying out what has been proposed in an SMP, or if the SMP were to prove cost-prohibitive, this would force SCA to reconsider its cleanup plan. Perhaps the SCA would decide to remove more contamination, or even site the school at an alternate location. This essential precautionary planning, however, is precluded by current practice. This should be especially troubling to the City Council which is being pressured to approve contaminated school sites without having essential information

⁴ ECL 27-1415(7)

provided upfront. The Council should insist upon the completion and submission of a draft SMP by SCA before it will approve schools on contaminated properties.

- **The Council Should Demand More Disclosure of Toxic School Sites by Passing Strong Public Disclosure Legislation**

The Council should start by demanding a list of locations from the School Construction Authority of all contaminated school properties, what maintenance and monitoring programs are put in place at those facilities and proof that there is currently no risk of exposure at those facilities.

The Council should pass legislation that would require the SCA to post the above-mentioned past information online, as well as to post all current and future plans to site schools on contaminated properties as soon as site applications for new school construction projects are created or proposals to lease contaminated existing facilities are initiated. For each site, where applicable, the proposed cleanup plan and SMP should be made available, as well as any monitoring reports required as they become available to the SCA. This legislation should also provide a mechanism by which parents can request air quality testing, within reason.

Conclusion

Again, we appreciate this opportunity to provide testimony the state and local brownfields programs. We hope to be helpful in any way we can to help the City and State build effective brownfields programs alleviate the environmental burden in the City's low-income neighborhoods and neighborhoods of color.



Center for Health, Environment & Justice

P.O. Box 6806 • Falls Church, VA 22040 • Phone: 703.237.2249 • Fax: 703.237.8389 • www.chej.org

New York State's Brownfield Cleanup Program

New York City City Council Committee on Environmental Protection

Public Hearing

January 8, 2008

Testimony of

Anne Rabe
Center for Health, Environment & Justice

*CHEJ Upstate New York Office
1265 Maple Hill Rd., Castleton, NY 12033
518-732-4538, annerabe@msn.com*

Good Morning. I am Anne Rabe, and I work for a national organization, the Center for Health, Environment & Justice (CHEJ). CHEJ is one of the leading groups in the country on toxic waste issues, especially Superfund and brownfield sites. Our Executive Director, Lois Gibbs, is well-known as the community leader who organized the successful relocation of 833 families away from the infamous Love Canal toxic waste site in Niagara Falls in the late 1970's. For over 25 years, CHEJ has worked with New York communities impacted by toxic sites.

We appreciate the opportunity to testify at this hearing on New York's Brownfield Cleanup Program. The 2003 Brownfield Law, ushered in with great fanfare, has proved to be a disappointment on many levels. Our organization was involved in the effort to pass the legislation. When the law passed, we saw a tremendous opportunity for New York to have top-notch cleanup standards and informed groups around the country about the law.

As you know, the law established a program with directives on protective cleanup standards, as well as rewards for developers that entered the program to clean up a site (Environmental Conservation Law [ECL] 27-1401-1433). In exchange for cleaning up a site to a level that is "fully protective of public health and the environment," a developer would receive substantial tax credits, a streamlined process with timetables and certainty on remediation requirements with established soil standards.

The framework of the law was based on compromises crafted by the Legislature and Governor Pataki over a multi-year negotiation process. For the first time, the state approved a land-use based approach for soil standards, for which industry groups had been advocating for years. However, while the new program would have different cleanup levels for residential, commercial, and industrial properties, these standards would be based on protective environmental and health criteria, such as the protection of drinking water and children, leading Governor Pataki to state that it would *"be one of the most protective cleanup programs in the country."*

It took almost two years for the Departments of Environmental Conservation and Health (DEC and DOH) to draft the Brownfield Cleanup Program regulations and soil cleanup standards. When the draft regulations were finally released in 2005, we were shocked over the unsafe cleanup requirements and standards. We joined with many citizens, community and environmental groups to call on DEC to correct the problems. CHEJ and a coalition of groups filed three sets of extensive comments and enlisted the expertise of scientists and doctors from Cornell University and Mt. Sinai Medical Center, who also submitted comments outlining serious problems with the soil standards. For the most part, DEC rejected the recommendations, and issued deeply flawed regulations in December 2006.

It is urgent that the state fix this program now. As important as the tax credit issues are, it is equally important that the cleanup requirements for brownfield sites receiving such benefits be strengthened to meet the letter and the spirit of the law.

I would like to highlight just a few of the major shortcomings of the state's brownfield cleanup program.

Fix Dirty Cleanup Standards

The DEC's "dirty" cleanup standards pose toxic threats to children, water and fish habitats. The law clearly stated that the soil standards for toxic chemicals (known as Soil Cleanup Objectives or SCOs) shall be *"protective of public health and the environment"* and specifically included protecting *"...groundwater... surface water and air (including indoor air); sensitive populations, including children; and ecological resources, including fish and wildlife."* (ECL Section 27-1415). Yet, DEC did not set standards that are protective of children, surface water, groundwater and fish habitats.

Children are a uniquely vulnerable population. Their growing bodies are more sensitive to toxic exposures than adults, and their behavior, such as playing in soil and placing their hands in their mouth, can cause them to be more exposed. Despite the law's recognition that children are especially vulnerable, the standards are not protective due to pervasive problems identified by health experts.

For instance, the state agencies assumed that children would have far less exposure to contaminated soil than is plausible. They also based the standards on "predictive" models of human exposure, rather than preventive. Based on a "predictive" model, exposures are assumed to be at the average or 50th percentile level, *which fails to protect the 50 percent of the population who are the most highly exposed*. When the Legislature declared that the remedial goal was to "protect public health," they did not mean *only half* of the population. DEC should have used "protective" exposure assumptions, such as the 95th percentile levels, to ensure that a majority of children and other sensitive populations would be protected.

DEC's three standards for "restricted-residential," "restricted-commercial" and "restricted-industrial" use also do not protect groundwater. In fact, they frequently exceed the DEC's separately established "protection of ground water" standards. The groundwater standards will only be applied at sites if the cleanup does not include engineering controls to address groundwater pollution, and DEC staff has stated that these will probably be used at a minority of sites. This means that in most cases cleanups at residential, commercial and industrial sites could leave behind residual contamination that can threaten groundwater.

In reviewing these standards, we found that more than 30 of the industrial standards are 1,000 times *less* protective than the level needed to protect groundwater. Thus, soil remediated to "clean" levels at many sites will still pose a considerable toxic threat to groundwater quality, especially industrial use sites. These unsafe standards fail to meet both the letter and spirit of the law because it threatens the goal of groundwater restoration and makes a mockery of the legal mandate for DEC to develop strategies "to protect groundwater from future degradation" as required by Section 15-3109 of the ECL.

DEC also designed standards that do not protect against surface water contamination, stating that it would address it on a site-specific basis. Not only does this contradict the law, but it contradicts the agency's existing cleanup policies, such as the agency's sediment cleanup criteria to protect against surface water contamination from 64 organic compounds and 12 metals (DEC Technical Guidance for Screening Contaminated Sediments).

Clearly, DEC knows that chemicals can leach from contaminated soil and pollute nearby surface water. For example, toxic leachate from the GE Dewey Loeffel site in Nassau, NY, has polluted the nearby Nassau Lake with polychlorinated biphenyls (PCBs). The lake is so polluted that the Health Department has to issue Advisories every year warning people to not eat the poisoned fish.

DEC also set standards that do not protect fish habitats, stating merely that it *"declines to extend the protection of ecological resources to aquatic environments."* (DEC Response to Comments, October 2006). The legislature made it abundantly clear that "ecological resources" included protection of fish. And this is again, in direct contrast to the agency's existing policies to protect aquatic resources from toxic contaminants (DEC *Fish and Wildlife Impact Analysis for Hazardous Waste Sites.*)

DEC also set standards that will not protect New Yorkers from being exposed to polluted air in their home from toxic vapor intrusion. While they acknowledge that *"vapor intrusion may be an important exposure pathway at some brownfields,* DEC decided to primarily rely on engineering controls to limit the migration of contaminants. (DEC Response to Comments, 2006.) However, even the best engineering measures can fail. And, the Legislature made it abundantly clear that the standards should protect "indoor air." The residents of Hopewell Junction and Endicott can attest to the need to address this problem as they have suffered from years of toxic vapor intrusion in their homes when polluted groundwater spread from nearby sites.

DEC also ignored the legal directive to consider past Superfund and other toxic site cleanup levels when developing the standards. The law required DEC to *"consider... the feasibility of achieving more stringent remedial action objectives, based on experience under the existing state remedial programs, particularly where toxicological, exposure, or other pertinent data are inadequate or non-existent for a specific contaminant."* (ECL Section 27-1415.)

DEC ignored this directive and argued that while *"it may be possible to achieve cleanup values which are more stringent,"* it was unnecessary because *"both public health and the environment will be protected through the use of the SCOs and more stringent levels will not significantly increase this level of protection."* (DEC Technical Support Document, 2006). Unfortunately, this is not the case.

The standards are just not protective of children, water and fish habitats. And, they are based on inadequate data because there are uncertainties about the health impacts of

many chemicals and new studies continue to uncover health risks. In fact, DEC repeatedly raised the issue of inadequate or non-existent data on various chemicals in regulatory comments. Since a lack of data creates uncertainties—particularly with respect to vulnerable populations such as children—how can the agency claim that no benefit would be gained by strengthening any of the standards?

As the Assembly sponsor of the 2003 law, former Assembly member Thomas P. DiNapoli stated, *"the clear intent of the law was for DEC and DOH to consider feasibility [of strengthening the SCOs] in those situations where information on risk may be lacking and soil cleanup standards developed based on current knowledge may not be protective enough."* (Comments on Draft Regulations, 2006).

This fall we released a report on brownfields with a coalition of statewide groups. The report included a review of some State Superfund cleanups from 1992 to 1995 and found that DEC could have established substantially more protective standards. Our review showed that soil cleanup levels at Superfund sites were stricter than 7 of the "unrestricted" brownfield standards, and 17 "commercial" and "industrial" standards. I have included a chart that highlights just a few of the large discrepancies between the current brownfield standards and past Superfund cleanup levels.

Comparison of Brownfield SCOs & Historic Cleanup Levels Achieved at State Superfund Sites

Chemical	BCP SCO Unrestricted	BCP SCO Commercial	BCP SCO Industrial	Historical Superfund Cleanup Level	Site
Copper	270	270	10,000	25	Dublin Rd. (Orleans County)
Endosulfan II	4.8	200	920	4 – 7.3	Sigismondi Landfill (Monroe County)
Lead	400	1,000	3,900	350	Sigismondi Landfill (Monroe County)
Nickel	140	310	10,000	500	Sigismondi Landfill (Monroe County)
Toluene	100	500	1000	1.5	Burroughs-Unisys (Monroe County)
Zinc	2200	10,000	10,000	30	Dublin Rd. (Orleans County)

All Soil Cleanup Objectives and Record of Decision cleanup levels are in parts per million (ppm). BCP SCO = Brownfield Cleanup Program Soil Cleanup Objectives.

Sources: NYS Department of Environmental Conservation *Regulations 6 NYCRR Subpart 375-6 Remedial Program Soil Cleanup Objectives*, December 14, 2006. NYS Department of Health *Site-Specific Soil Action/Cleanup Levels* summarizes NYS State Superfund Site cleanup levels from 1992 to 1995, and was provided in June 1996 to Citizens' Environmental Coalition.

Cleanup standards as high as 10,000 parts per million for cyanide endanger the health of New Yorkers. In years past, when such levels were found at Superfund sites, these levels of contamination would have triggered an action threshold *resulting in the site being cleaned up*. Under the new regulations, however, this is merely the level that developers will have to *clean up to*—leaving extensive amounts of residual contamination that will threaten the environment and future generations.

We also reviewed other state brownfield cleanup standards and found that New York is no longer an environmental leader in setting protective remediation policy. As you may know, throughout the 1980's and 1990's, the state led the way in establishing protective State Superfund cleanup policies and drinking water standards. Now, New York has developed second rate standards for many chemicals, especially in the industrial and commercial use categories.

For the common toxic chemical lead, New York allows unsafe amounts of contamination behind at an industrial site at 3,900 parts per million—compared to California, Connecticut, Delaware, New Hampshire and New Jersey which require stricter cleanups in the range of 400 to 1,000 parts per million (ppm). Arsenic, a known carcinogen, is allowed to remain up to 16 parts per million at New York restricted residential, commercial and industrial sites—in contrast to California, Colorado and Delaware which require protective cleanups to a range of 0.82 to 4 parts per million. Vinyl chloride, an especially toxic chemical, can be left at industrial sites in New York up to 27 ppm. Whereas, the six states surveyed require dramatically more protective cleanups ranging from 0.1 to 9 ppm. The survey confirmed that New York has weak commercial and industrial standards for many chemicals which are not protective of children, workers, water and fish and wildlife.

I have included the chart which provides the comparison of New York's standards with those of six other states.

Comparison of NY Brownfield SCO's & Those of Six Other States

	NY Res	NY Co	NY In	CA C/I	CT C/I	CO Co	CO In	DE C/I	NH In	NJ C/I
Chemical										
Arsenic	16	16	16	2.7	10	1.04	0.82	4	11	20
Lead	400	1,000	3,900	750	1,000	2,920	1460	780	400	600
Nickel	310	310	10,000	150	7,500			4,100	3,900	2,400
Pentachloro phenol	6.7	6.7	55	5	48	1.95	1.87	48	3.3	24
Vinyl Chloride	0.9	13	27	0.04	3	0.1	0.07	3	9	7

All standards are in parts per million (ppm). Key: Res = Restricted Residential; Co = Commercial; In = Industrial; and C/I = Commercial/Industrial.

Sources: NYS Department of Environmental Conservation *Regulations 6 NYCRR Subpart 375-6 Remedial Program Soil Cleanup Objectives*, 2006; *Application of Risk-Based Screening Levels and Decision Making to Sites with Impacted Soil and Groundwater*; California Regional Water Quality Control Board, 2001 *NHDES Contaminated*

Sites Risk Characterization and Management Policy; Regulations Concerning the Remediation of Polluted Soil, Surface Water, and Groundwater; State of Connecticut, Judicial Branch, Commission on Official Legal Publications in the Connecticut Law Journal, 1996; *Proposed Soil Remediation Objectives Policy Document*; State of Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division, 1997; *Remediation Standards Guidance Under the Delaware Hazardous Substance Cleanup Act*, State of Delaware Department of Natural Resources, December 1999; and New Hampshire Department of Environmental Services, 1998.

Remediation Regulatory Flaws

There are other problems with the state Brownfield regulations. In order to avoid duplication with other testimony presented today, I will touch upon just a few additional problems.

Land use determination is inadequate and could harm future site users. The level of cleanups at brownfield sites is determined by the site's future anticipated use. But the new rules do not ensure that future uses such as schools, day care centers, and residences are adequately protected. Whether a site use is determined to be "commercial" or "unrestricted" can have a significant impact on the amount of contamination that can be left on site. There is no requirement to ensure that schools and day care centers, for instance, always receive the more protective unrestricted standard. Where the Legislature anticipated only 3 tables of "use-based" cleanup standards—unrestricted, commercial, and industrial—with most people assuming that residential uses would fall into the "unrestricted" category. But the DEC has added two new Track 2 restricted residential cleanup categories plus separate tables for groundwater and ecological standards – a total of 7 tables.

Use-based cleanup standards should not be applied to all cleanup programs. Only the Brownfield Law allows use-based cleanup standards. The DEC has applied the same use-based cleanup standards to all three environmental remediation programs, despite the fact that both the Superfund law and the Environmental Restoration Program created under the 1996 Bond Act require "complete cleanups."

Législation Needed to Address Tax Credit Problems

Lastly, I would like to briefly comment on the tax credits issue. The Department of Budget has estimated that the first 54 sites in the program will cost more than a billion dollars. We join with NYPIRG and other organizations who are calling on the Legislature to review the way the tax credits are structured and take corrective action. There are major problems with the current brownfield tax credits.

- 1) The tax credits do not provide a strong enough incentive for developers to opt for the Track 1 "Unrestricted" cleanups rather than dirtier cleanups which rely on engineering and institutional controls. Of 29 sites that were under remediation this summer, only 3 were Track 1 cleanups; the lion's share – 24 sites – were Track 4 cleanups, which is the dirtiest track. *The tax credits must be adjusted to support the law's "preference for permanence."*

- 2) The tax credits for site development costs are overly generous. The bulk of the tax credits the state will pay out over the next year is for redevelopment costs, not the cost of site clean-ups. The tax credits encourage developers to “build big.” Perhaps the most vivid example is a 44-story luxury hotel planned for White Plains, which is estimated to get a \$110 million tax break – 73 times the estimated cost of the site cleanup. And in many cases the tax credits are fueling development that clearly would have happened anyway, rather than the Legislature’s intention to create incentives for revitalizing decaying urban centers. For instance, a high-rise apartment building on West 42nd Street in Manhattan is slated to receive an estimated \$144 million in tax credits – based on an estimated \$20 million in cleanup costs, and a whopping \$700 million in development costs. *These two examples represent a glaring misuse of public funds.*

As difficult as it will be, the Legislature and the Governor need to address this problem. Unless these problems are corrected, you can be sure that the public will be scandalized over how their tax dollars are being lavished on mega-development projects that provide little if any environmental or community benefits. We believe the tax credit reforms should achieve the following goals.

1. Tax credits should prioritize and incentivize permanent cleanups over dirty cleanups on a sliding scale – Track 1 getting highest tax credits, then Track 2 residential, etc. and have Track 4 and Track 2 industrial receive very low tax credits.
2. Tax credits should be needs-based, and should prioritize cleanup and redevelopment in economically distressed areas, particularly redevelopment proposals that are consistent with local BOA plans.
3. Tax credits for redevelopment costs need to be scaled down or capped.

In addition, the Legislature should amend the Brownfield Law to allow sites that do not meet the needs-based requirements for tax credits to still enter the program and reap the other benefits of BCP enrollment, such as a state-issued Certificate of Completion and liability releases in return for meeting the BCP’s cleanup and public participation requirements. These changes are needed to ensure that the State’s limited financial resources are used to advance the program’s public policy objectives.

In summary, the state’s Brownfield Cleanup Program is on the wrong track. While the Legislature needs to address the tax credit issue, Governor Spitzer, DEC Commissioner Pete Grannis and DOH Commissioner Richard Daines have the power—and the responsibility—to ensure that the Brownfield Program results in sites where it is safe for people to live, work or play.

It is time for Commissioner Grannis and Commissioner Daines to fix the unsafe cleanup standards and other problems in the regulations to adequately protect public health and fulfill the letter and intent of the 2003 law. Without these reforms, New York will be using public funds to subsidize “dirty” cleanups, and the state will be certifying sites as safe for their future uses, when they are not.



EARTHJUSTICE

Because the earth needs a good lawyer

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA NEW YORK, NEW YORK
OAKLAND, CALIFORNIA SEATTLE, WASHINGTON
TALLAHASSEE, FLORIDA WASHINGTON, D.C.

**Testimony Before the New York City Council Environmental Protection Committee on
New York State's Brownfield Cleanup Regulations, January 8, 2008**

Provided by: Keri N. Powell, Staff Attorney
Earthjustice, Inc.
Tel: (845) 265-2445
kpowell@earthjustice.org

My name is Keri Powell and I'm a staff attorney with Earthjustice, a not-for-profit environmental law firm that provides free legal representation to organizations and individuals in litigation to protect public health and the environment.

The Brownfield Cleanup Program was intended to encourage the cleanup and redevelopment of the thousands of boarded-up gas stations, decaying factories and other abandoned sites across the state. But when the Department of Environmental Conservation issued the regulations spelling out which sites were eligible and how these sites would be cleaned up, there were troubling gaps between the DEC regulations and the law.

On behalf of several New York environmental groups, Earthjustice filed a lawsuit against the DEC to close the gaps in the state's regulations. We and our clients want to make sure that sites in this program are properly cleaned up. We want to protect the people living, working, and learning in the homes and offices and schools that eventually will be built on these brownfields.

Our lawsuit challenges the DEC's regulations on four primary points. I'll briefly describe each of them. If you'd like to know more, I'd be happy to provide you with a copy of our legal papers.

First, when state lawmakers approved the Brownfield Cleanup Program, they were clear that they wanted pollution in the soil to be cleaned up to a level that protects, among other things, the air in our homes and offices, water quality in our lakes and rivers, and the health of our state's fish and other aquatic wildlife.

The DEC outright refused to follow this mandate. They said that soil contamination affecting indoor air, surface water and aquatic wildlife can be addressed by a piecemeal combination of remedial techniques like air filters and concrete barriers. The DEC did not require that this pollution actually be removed from the soil as mandated by the state legislature.

When it comes to toxic chemicals like lead, arsenic and mercury, we don't feel comfortable keeping these toxins at bay with air filters and concrete barriers. We want it eliminated. We're asking the state to do the right thing and set soil cleanup standards that make sure pollution is removed before we start handing out tax credits to developers.

(continued on reverse)

Second, we are challenging the DEC's failure to consider historically achieved cleanup levels when setting its soil cleanup objectives. Requiring the DEC to consider the feasibility of achieving more extensive cleanups in light of historically achieved cleanup levels is meant to be a precaution. As the DEC readily admits, for the vast majority of chemicals, no human studies have been done to determine potential health impacts. Instead, the DEC must rely on animal studies. The lack of human data on chemicals is especially dramatic when it comes to the impact of chemicals on children.

The Legislature was well aware of the limits on available data. Thus, even after the DEC gives its best shot at setting protective standards based on available data, the statute requires the DEC to examine its historical experience with cleanups and consider whether it is feasible to require even more extensive cleanups. This analysis is required for *all* of the DEC's standards. The statute emphasizes that it is "particularly" important where data is inadequate or non-existent, but does not limit the analysis to those circumstances.

The requirement that the DEC look at historical cleanup levels is very important because we don't know for sure how most chemicals will affect people and the environment. We don't want to look back 10 years from now and discover that we allowed day care centers and schools to be placed on toxic sites. So, the DEC must set its cleanup levels as best it can based on available data, and then look to see whether it is feasible to achieve more extensive cleanups. The statute defines "feasible" to include not just what is physically possible, but also what is financially possible. The idea is that if past cleanups show that it is physically and economically feasible to achieve more extensive cleanups, then we should do it.

Third, we are challenging an illegal exemption in the DEC's regulations that allows a site to be cleaned up to a less stringent level than required by the soil cleanup objectives if the "site background" level exceeds those objectives. In other words, if the area surrounding a site is very contaminated, a developer can get tax credits and liability relief even if the cleanup is not protective of public health and the environment.

The exemption appears in two places in the DEC's regulations. The first place it appears applies broadly to all cleanups. In the litigation, the DEC admitted that this provision is illegal and says that it will remove it. The second place the exemption appears applies to soil brought on to a site during remediation for cover or backfill. The DEC admits that this exemption would be illegal in most circumstances. It only defends one narrow application of the exemption, which is to allow backfill placed below two feet on a track 4 site to exceed the soil cleanup objectives. But even if the DEC is correct that that one narrow application is legal, every other application of the exemption is still plainly illegal.

Finally, we are challenging the DEC's arbitrary exclusion from the program of all sites polluted by an off-site source. In other words, if leaking tanks on one site contaminate an adjacent site, the adjacent site can never be eligible for the Brownfield Cleanup Program, regardless of the particular circumstances of the site. This exclusion is unfair and it is illegal. It leaves countless sites ineligible, many of them in low income communities with a legacy of toxic contamination where pollution can be coming from several sources.



University at Buffalo
The State University of New York

Department of Chemistry
Professor Joseph A. Gardella, Jr.

January 6, 2008

Comments for New York City Council Environmental Protection Committee
James F. Gennaro, Chair

January 8th Hearing on Oversight - State and Local Brownfields Initiatives: Where Are We and Where Do We Go From Here?

Professor Joseph A. Gardella, Jr.
www.buffalo.edu/~gardella

I am a professor of chemistry at the State University of New York at Buffalo. I work closely with community groups who live near contaminated sites such as brownfields and Superfund sites, and who are dealing with questions regarding exposures to toxic chemicals and their health. I've spent 14 years helping communities throughout New York State clean up contaminated sites in their neighborhoods. We have learned many important lessons along the way. And I'm here to urge the City Council to use these lessons to make sure that brownfield cleanups are done to the standards that are protective of public health. At the moment, the New York State Brownfield Cleanup Program operates under cleanup guidelines that are seriously flawed.

Many brownfield sites are near residential communities, communities that were built around the factories where people worked. In many cases the factories are gone. What's left behind are homes, the people who live in them. From Buffalo to Brooklyn, you have people living side by side with these contaminated sites. We want to see them cleaned up. But if we don't clean them up to levels that protect human health and the environment, people will suffer the consequences down the road, from their long term exposures to contaminants on the site. Thus, rather than leaving contaminants on site, I urge every effort to push for remediation and cleanup, and replacement of contaminated soil with replacement that is clean.

I want to speak to issues that have to do with the *details* of cleanup or remediation of brownfield sites.

First, as a matter of environmental justice, the City should consider strict requirements that define cleanups proximate to housing. Cleanups in urban neighborhoods should be required to achieve the same level of cleanup as suburban and rural areas. At present, the state's brownfield cleanup regulations define a category that allows developers to cleanup sites in historically contaminated neighborhoods to lesser standards, which in some cases, allow contaminants at known danger levels. The notion that urban residents should be required to live with higher levels of toxic contamination violates every principal of environmental and social justice. So, even when the cleanup is regulated by "objective" cleanup standards, those standards have been

rigged to put residents of urban areas in danger.

Secondly, and related, under the current regulations, developers can choose to clean up a site to a minimal standard known as site background -- meaning the site in question only needs to be as clean as the surrounding area. The choices of how to define that "site background" can be left up to the developer and can be chosen to minimize investment or other arbitrary choices. In communities with a legacy of toxic contamination, this is obviously a problem. At the Hickory Woods housing in Buffalo, which was built next to a highly contaminated Superfund site, the state first chose the nearby Seneca Babcock community to determine site background levels. There was a simple problem with that strategy: Seneca Babcock was company housing site for a former chemical plant and the state itself, through the Department of Health had issued a warning designating this community as historically contaminated. Under these regulations, we have no control over what developers choose as their so-called site background. This policy has not worked in the past, under the Superfund program. And it won't work under the Brownfield Cleanup Program.

Before we give out tax credits to developers, before we allow homes and daycare centers and schools and nursing homes to be built on these sites, we must make sure they are cleaned up to a level that protects human health.

Thank you for the opportunity to address you today.