

November 17, 2004

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New Partners for Community Revitalization, Inc.

Robert W. Schick
NYS Department of Environmental Conservation
Environmental Remediation
Remedial Bureau C
625 Broadway
Albany, NY 12233-7014

Re: Draft Brownfield Cleanup Program Eligibility Determination Guidance

Dear Mr. Schick:

We share the Department's concern over the potential abuse of the brownfields tax credit program, and recognize that the Draft Eligibility Determination Guidance provides a vehicle through which the Department can address this problem. While we understand and support the Department's plan to develop eligibility requirements so that the tax credits are more focused on financial need, we believe that changing the eligibility criteria for the entire BCP is not the best way to accomplish this. As a matter of good public policy, the basis of New York's voluntary Brownfields Cleanup Program should be to encourage as much and as many voluntary cleanups as possible under the State's watchful eye. The notion of the State turning away people who want to voluntarily clean up brownfield sites with regulatory guidance from the Department is antithetical to good public policy. Rather than imposing limits on the tax credits through Guidance on Eligibility for the BCP, we would like to see the Department issue Guidance on the eligibility and/or calculation of the brownfields tax credits.

The underlying question here is whether or not the Department has the authority to issue Guidance that would limit the eligibility of the tax credits and/or the amount of the tax credits to a subset of projects that receive a Certificate of Completion from the Department. While we see nothing in the Brownfields statute that prohibits the Department's ability to do so, there is also nothing in the statute that directs the Department to establish such limits. Given the absence of any prohibition or restriction on the Department with regard to the tax credit program, the Department should use its broad regulatory powers to promulgate criteria to implement the tax credit program. Clearly, State agencies have a long history of using their regulatory authority to establish the necessary requirements to fulfill statutory obligations, particularly to ensure fiscal responsibility in the implementation of funding programs. In fact, the Department is applying such discretion in its

proposed BCP eligibility guidance. New York State courts have consistently granted wide discretion for agencies to act within their expertise to fulfill their statutory mandates. To this end, we would encourage the Department to consider whether the statute has the flexibility, and to also consider other doctrines of law, such as unjust enrichment, on which to develop tax credit program eligibility/calculation Guidance.

By applying its discretion through common sense criteria in the implementation of the tax credit program without altering the BCP eligibility, it opens the door for the Department to develop more quantitative criteria and hence, a, more predictable and more fiscally responsible program. While limiting eligibility of the BCP to only those projects where there is a financial need would be nonsensical, it makes a whole lot of sense to more carefully target the tax credits to only those projects that are in need, however that need might be defined. The challenge would then become, what are the best quantitative criteria that should be imposed on the tax credit program, which can also bring certainty to the process? As a matter of fiscal responsibility, government assistance, whether in the form of grants, loans or tax credits, should be structured to i) Provide gap financing on projects in need; ii) Leverage private investment in cleanups; iii) Advance the plans that emerge from the BOA program, and iv) Ensure cost efficiency and accountability.

We urge the State to consider developing criteria for the tax credit program to directly address our shared concern that tax credits should be targeted based on need. We, along with our many partners, would be willing to work with the Department to develop and implement a workable tax credit program.

Sincerely,

Jody Kass and Mathy Stanislaus
Co-Directors

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