The Business Council

Testimony to

New York State Senate Finance Committee and Assembly Ways and Means Committee Hearing SFY 2017-2018 Executive Budget Proposal

Environmental Conservation and Energy Budget

Presented by

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Good afternoon, my name is Darren Suarez. I am an energy and environmental policy analyst for The Business Council of New York State. I would like to share with you some of our thoughts regarding the 2017-18 Environment and Energy Executive Budget.

The Business Council is the leading business organization in New York State, representing the interests of more than 2,400 member businesses employing more than 1 million New Yorkers. The primary function of The Business Council is to serve as an advocate for its members in policy matters affecting economic development, jobs and the general business climate in the state.

The Business Council recently issued our "Back to Business" advocacy agenda for 2017, with an emphasis on legislation with broad, positive impacts on the state's economic climate, the elimination of barriers to investment and growth, and the promotion of private sector job growth, particularly in regions of upstate New York where post-recession growth has been limited. Our comments today are strongly influenced by that advocacy agenda as it relates to energy and environmental policy.

Water Quality

New York State, like many other states, faces real challenges to our water infrastructure. Although water infrastructure is less visible than other infrastructure, it's no less important. Our water treatment and delivery systems provide public health protection, and are a valuable component to both the manufacturing process and food preparation and has resulted in a higher quality of life for residents of the state.

Over the past century, many improvements in lifespan and public health are due to improvements in water quality. It wasn't that long ago that the life span of the average American was shortened due in part to sickness and death from diseases spread through drinking water. Thankfully, treatment, disinfection, and the environmental regulation of water contaminants have made our nation's drinking water one of the safest drinking water supplies in the world.

The New York Legislature and the Governor deserve credit for first acknowledging that we have significant water infrastructures deficiencies and for committing resources to address those deficiencies. To address some of this need, the last two New York State budgets have committed $400 million to municipal water quality infrastructure grants. In addition, last year's budget included a record increase in the Environmental Protection Fund (EPF), allowing $20M to be dedicated towards water quality improvement programs and a $1.5M Department of Health water testing program. The increase also included funding for several other programs like open space acquisition, pollution prevention assistance, and farm land protection, all of which will protect the quality of our water.

This year, as part of the Clean Water Infrastructure Act of 2017, the Executive Budget proposes a $2 billion, multi-year commitment to support capital investments in water and sewer infrastructure. Legislation was also introduced in the Senate and Assembly that would authorize the creation of a $5 billion clean water bond act. The Business Council applauds the Executive and the Legislature for their continued commitment to drinking water and waste

water infrastructure improvements. We strongly support efforts to provide additional funding for critical investment in drinking water infrastructure, wastewater infrastructure and drinking water protection.

S2008 /A3008 TED Article VII Budget Bill - Part II

The Business Council recommends that this part be amended to specifically address matters related to drinking water and wastewater infrastructure. The Council also recommends that other sections either be stricken or significantly amended because the proposed sections contain a number of provisions that will create uncertainty in the real estate market, deprive parties of due process, and limit public input in the development of remedial design.

Part II labeled "the Clean Water Infrastructure Act of 2017" contains a number of new statutory programs and amendments to current remedial programs not directly related to clean water infrastructure.

Title 12

Section 4 includes a new Title 12 to Article 27 of Environmental Conservation Law (ECL) that would grant the Department of Environmental Conservation (DEC) the power to compel the cleanup and abatement of solid waste sites and drinking water contamination. New York already has a number of remedial programs; including the state Superfund Program, Oil Spill Program, and the Waste Tire Program, to mandate the remediation of different types of pollutants. Those programs have not only resulted in thousands of cleanups, but also the abandonment of thousands of properties throughout the state because of the fear of liability associated with sites and/or outstanding property leans. Decades after New York developed and implemented its remedial programs, the state developed the Brownfield Program, and the Environmental Restoration Program, to allow volunteers and municipalities to address properties where "a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by DEC that are applicable based on the reasonably anticipated use of the property, in accordance with applicable regulations."

The newly proposed Title 12 will create significant uncertainty as it would allow the DEC to enter any property to investigate and remediate any discarded material. The owner or operator of the site then is required to implement all remedial measures deemed necessary by the DEC. If the owner fails to implement the measures the DEC may implement the remediation and place a lien on the owner or operator's real property. The DEC could do all this without commencing a hearing or issuing an order. There is no limit to the size or the level of the remediation that the DEC could conduct. The owner or operator would be afforded no statutory defenses to liability like the secured creditor or third-party polluter exemptions. Furthermore, the public is provided no opportunity to provide input on the remedial design. The remedial program contained in Title 12 appoints DEC prosecutor, judge, jury, and executioner.

In addition, Title 12 would allow the Commissioner of Health to require that all reasonable measures are taken to reduce exposure to a contaminant. The provision does not require the contaminant exceed a health-based standard, merely the presence of contaminant is enough to require action. Furthermore, a contaminant can include

any physical, chemical, microbiological or radiological substance that the Commissioner of Heath declares **may** have the potential to be a health hazard.

The required remedial measures may include the installation of a drinking water treatment system and source removal. Municipal drinking water treatment systems can cost $1M or be in excess of $100M. The DEC is required by Title 12 to recover the full amount of the cost of the water treatment system and any associated remediation from any owner, operator or party that contributed to the contamination

Past experience has demonstrated that in many cases, particularly where the contamination may involve multiple sources or substances and multiple Potential Responsible Parties (PRPs), liability for the disposal may not be traceable to a particular source. Consequently, remedial enforcement targets for liability the party who may be most readily identifiable—typically the current owner or operator—or who may have the deepest pockets. The net effect is that a party with only a slight relationship to the site, or to the hazardous substance disposed there, may be held responsible for a disproportionate share or even all of the response costs of the cleanup.
An essential tenet of the American justice system is that a person should not be held responsible and compelled to pay for injuries which that person did not cause. Because the proposed liability framework in Title 12 is grounded not on causation, but on the status of the party as an owner or operator, many innocent landowners could face strict liability even though they may have done nothing to contribute to the contaminate of concern.

Moreover, the innocent landowner cannot conduct meaningful due diligence prior to purchasing the property given the broad latitude that Title 12 provides for the DEC and Department of Health (DOH) to determine what is a containment and to establish remedial action levels based on a declaration that a contaminate may be harmful to human health.

The failings of Title 12 are too many to amend as it would require at minimum the establishment of standards, due process and statutory protections of the innocent. The Business Council instead recommends current laws and programs be amended to increase protections for drinking water in New York State.

- Title 4 of article 56 of the ECL, the landfill closure program, be expanded and fully funded.
    - In 2010 the state of New Hampshire found 67 sites contained 1, 4 Dioxane. Thirty of these sites were solid waste landfills, most of which have been closed for years. Amending and funding the landfill closure program would immediately address New York's 1, 4 Dioxane sites.
- Title 13 (Superfund) should be amended to provide DEC with a similar authorization that EPA has pursuant to CERCLA § 104(a)(1)(B) that allows EPA to respond to the release or substantial threat of release of "any pollutant or contaminant" that may present an "imminent and substantial danger to the public health or welfare." The phrase "pollutant or contaminant" is defined as any material "which after release into the environment . . . may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions . . . or physiological deformations".

- Develop a new program that contains a rapidly awardable allocation of money specific for planning and implementation grants for emergency drinking water issues whether they are caused by a chemical or biological condition.

Amendments to the State Superfund

Sections 12, 13 and 15 collectively would alter the state Superfund program by providing the DEC with the authority to design and implement site cleanups without providing an opportunity for a hearing regarding the design. The proposal was drafted in a manner to overturn FMC Corporation v. NYS Department of Environmental Conservation (143 A.D. 3d 11128). The Appellate Division's decision did not affect the emergency exemption to the hearing requirement currently in the state Superfund program.

Land Acquisition

Section 2 of the proposals would establish a new land acquisition program dedicated to the protection of state water resources. The newly proposed land acquisition program does not contain the detail, review and planning required under current law for Open Space Land Conservation Projects (ECL Article 54, Title 3) and does not require that projects are related directly to drinking water protection or land acquisition projects that are consistent with plan developed by a public water supplier. This program should be amended to ensure the interests of local governments, and local public water suppliers are being considered and the land acquisitions would protect drinking water.

The Business Council strongly supports efforts to provide additional funding for critical investment in drinking water infrastructure, wastewater infrastructure and drinking water protection. We support the development of a lead service line replacement program, but we have concerns with many of the other provisions contained in Part II.

The Business Council believes that decisions regarding drinking water, waste water treatment, remediation, and enforcement should be guided by scientific understanding. Currently, significant data gaps exist regarding the human health effects of detectable levels of contaminates in drinking water, and scientists have difficulty predicting the effects of drinking small amounts of contaminates for many years. Furthermore, standards do not take into account the presence of multiple chemicals, which may increase or decrease the toxicity of a particular contaminant. More research should be conducted on contaminates and their health effects. This research should be conducted at a national level and should be done quickly, as our current rate of review of these contaminates needs to occur in a timelier manner.

S.2008/A.3008 TED Article VII Budget Bill - Part MM

The Business Council opposes Part MM which would authorize the Public Service Commission (PSC) to continue an assessment of up to $19.7Mon gas and electric customers. The funds collected would be transferred to the New York State Energy Research Development Authority (NYSERDA) for research, development and demonstration, policy, and Department of Environmental Conservation (DEC) climate change program.

This special assessment is in addition to the special assessment under Section 18-a of the Public Service Law which authorizes the Department of Public Service (DPS) to assess gas and electric corporations for expenses related to administering Public Service Law programs.

The State Energy Plan has committed the state to the goal of achieving energy consumer cost savings, but continuation of state energy assessments will remain a barrier to achieving this goal. Part MM is one of many of New York State's hidden energy taxes which increase the real cost of energy in New York State.

Part MM is an example of a growing trend of hidden energy taxes and assessments that provide funding for programs that should be considered with other General Fund expenses. Furthermore, these hidden taxes have become more popular because regardless of an entities tax status, these taxes are unavoidable. Additionally, it has been well documented that lower-income families are more vulnerable to energy costs than higher-income families because energy represents a larger portion of their household budgets. Energy consumes one-fifth or more of the household incomes of lower- and middle-income families, an amount otherwise spent on food, housing, or health care.

S.2008/A.3008 TED Article VII Budget Bill - Part V

The Business Council opposes Part V which would authorize the DPS to assess public utilities (telephone, electric, water, and natural gas companies) and ultimately their customers, for expenses of the Departments of Agriculture and Markets, Environmental Conservation, State, and the Office of Parks, Recreation and Historic Preservation.

Section 18-a (2) of the PSL authorizes the DPS to assess public utilities for costs associated with administering PSL programs. In 2009, PSL Section 18-a was restructured to end a practice of off-loading various agency costs on to utilities.

Specifically, the 2009-2010 Budget increased the permanent assessment from one-third of one percent to a full percent (Section 18-a (2)(G)) of a utility's annual gross intrastate operating revenue. The 2009-2010 Budget also included a new two percent "temporary state energy and utility service conservation assessment". The more famous temporary assessment was scheduled to expire in March of 2014. In 2013, after extensive negotiations, the final 2013-14 state Budget included an extension of the assessment, but committed the state to a full phase-out of the temporary assessment scheduled by the aforementioned March 2017 date. This budget does not extend the temporary assessment.

The Business Council does not oppose the historic 18-a assessment which enables state regulators to recover their costs for regulating the various utilities (telephone, electric, water, and natural gas companies) they oversee. But the assessment should be reduced to its past level which was one-third of one percent. The state should reject this expanding taxing mechanism and instead pay for general spending with general fund dollars.

S.2008/A.3008 TED Article VII Budget Bill – Part JJ

The Business Council supports the Executive Budget proposal to increase to $300 million the state's allocation to the EPF. The EPF has proven to be a sound investment in environmental stewardship projects, and members of The Business Council are committed to environmental stewardship, and a sustainable economic future.
The EPF supports many practical programs that provide matching assistance directly to businesses and farms in a manner which benefits the environment. Specifically, the EPF provides: funding for farmers to implement practices to protect agricultural soils; support for the Pollution Prevention Institute which is dedicated to increasing the efficient use of raw materials, energy and water and reducing emissions to the environment and waste generation; and supports the Water Quality Improvement Program, which offers grants to municipalities for undertaking projects that reduce the flow of pollution to lakes, rivers and streams, and projects to protect aquatic habitats.

Thank you for your consideration in regards to this manner.
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