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April 26, 2011

OVERNIGHT DELIVERY

Robert Ewing
New York State Department of Environmental Conservation
Department of Environmental Permits
625 Broadway
Albany, NY 12233-1750

Re: *NYSBA Environmental Law Section*
- *Comments on Proposed EAF Changes*

Dear Mr. Ewing:

I am the current Chair of the NYSBA Environmental Law Section. Kevin Ryan and Mark Chertok, who serve as co-chairs of the Section's Environmental Impact Assessment Committee, have drafted the enclosed memorandum, commenting on the proposed changes by the Department to the SEQRA Environmental Assessment Forms. Their memorandum has been approved for submission to you in accordance with the Section's Advocacy Policy.

On behalf of the Section, I thank the Department for granting the Section an extension of time until April 30 to submit this memorandum. Please note that no State employees have participated in the drafting of the proposed comment.

Very truly yours,

Barry R. Kogut
Chair, Environmental Law Section

cc: Lawrence Weintraub
Jack Nasca
Kevin Ryan
Mark Chertok
Section Cabinet

MEMORANDUM

TO: Mr. Robert Ewing
New York State Department of
Environmental Conservation
Division of Environmental Permits
625 Broadway
Albany, New York 12233-1750

FROM: Environmental Law Section of the New York State Bar Association
(Mark A. Chertok, Esq, and Kevin G. Ryan, Esq. - Co-chairs of the Section's
Environmental Impact Assessment Committee)

DATE: April 6, 2011

RE: Comments on Proposed Revisions to SEQRA Environmental Assessment Forms

We submit this Memorandum on the proposal to revise the SEQRA Environmental Assessment Forms ("EAF") on behalf of the Environmental Law Section of the New York State Bar Association (the "Section").

Initially, the Section wants to compliment the Department for its exhaustive efforts in preparing and proposing much-needed changes to both the short and full EAFs. We believe that the amplification of the short EAF would allow agencies to utilize this form for most proposed actions, and thereby both provide for a more thorough environmental review than provided by the current form and avoid unnecessary addenda, time commitments and costs. We also believe that the modifications to the full EAF, which provide for more explanation and assessment of potential impacts would, subject to the concerns explained below, assist in assuring that lead agencies take the requisite "hard look" and provide the reasoned elaboration for actions that have more than nominal adverse environmental impacts. In short, the Section applauds the Department for its efforts to update and modernize the short and full EAFs.

The Section will focus its comments on the generic approach provided in Part II of the full EAF, as there is concern that it would place an inadvertent burden on lead agencies and project sponsors to conduct analyses and prepare explanations for virtually every potential impact of a proposed action, regardless of the reasonably anticipated magnitude or importance thereof. We believe that modest revisions of the instructions and format would achieve the same goal as the proposed form, avoid confusion and avoid these burdens.

Part 2 of the proposed EAF instructs the lead agency to answer either "yes" or "no" with regard to whether a proposed action would impact different environmental media. This binary choice is different from the present full EAF; in that form, the lead agency is given discretion to find that while impacts may occur, they would be potentially insignificant (i.e., small to moderate) and do not require further evaluation. The instructions in the proposed full EAF are to answer, "yes" (i.e., in the affirmative) "if there may be **any** impact" (emphasis in original). The

column under "Yes" has the parenthetical "(Impact is likely or possible)", thus reinforcing the directive that the lead agency must answer "yes" if the proposed action could possibly affect the relevant environmental media. This is confirmed by the parenthetical under the "No" column, which states that this answer is permissible only if "(Impacts will not occur)".

These instructions suggest that virtually every proposed action would require a "yes" answer with respect to any environmental media that it may possibly impact, regardless of whether the potential impact would be large or small, important or unimportant. Thus, if an action might affect air quality, the proposed EAF would require a "yes" answer – even if it were undisputed that the effect of a particular proposal on air quality would be nominal. The "yes" answer would be required because there would be some effect, and the presence of any effect dictates the affirmative response.

Further, the formulations of the introductory questions that precede the more specific questions in many of the sections effectively dictate a "yes" answer. For example, Section I requires a "yes" if the proposed action "may involve construction on, or physical alternations of, the land surface of this action site" – a rather commonplace occurrence if an action involves construction. Many of the questions in the subcategories dictate affirmative responses regardless of the magnitude or importance of the impact (e.g., whether the proposed action is located in a Coastal Erosion Hazard Area). Similarly, if a proposed action would affect a water body or wetland, a "yes" answer automatically follows. This is true for all the principal questions, because the form does not allow for anything but an all or nothing answer; either there will be no impact, or a yes answer is required.

In addition, many of the questions in subparts reinforce the notion that any impact suggests significance, regardless of magnitude or importance. For example, under Section 1 (Impacts on Land), the subsidiary questions suggest (and could be read as a presumption) that an affirmative answer would mean a potentially significant impact and necessitate the explanation in Part III.

The consequences of this new proposed format are twofold. First, a "yes" answer to any question in Part 2 requires, pursuant to the instructions to Part 3, that the lead agency must prepare an explanation of "why a particular element of the proposed action will not, or may, result in a significant environmental impact." Thus, the lead agency would be required to prepare an evaluation of numerous categories of environmental media, despite the fact that, in many instances, the impact would be nominal or inconsequential. This would place an unnecessary burden on lead agencies and third party project sponsors (because, in this era of shrinking government budgets, lead agencies will necessarily look to project sponsors for the relevant assessments – which could itself be problematic given the instruction in Part 3 that it must be completed by the lead agency).

Second, while the Section recognizes that the lead agency has the burden of identifying relevant area of concern, taking a "hard look" at these areas and providing a reasoned elaboration, the proposed revised EAF could be read to create a presumption that any affirmative answer – regardless of the actual effect – means the presence of a possible significant impact. Put another way, the proposed new structure of the full EAF could be construed to mean that if there is an impact, it is presumptively significant. This would effectively place the burden on the

lead agency to rebut each such affirmative answer, and could be used in litigation to effectively shift the burden of proof from a petitioner to the lead agency. To avoid the unwarranted conclusion that the mandated “hard look” was not undertaken with respect to any of the affirmative answers noted in the new Part 2, a lead agency might thus feel compelled to compensate for this burden shift by requiring or conducting unnecessary analyses and writing detailed explanations of the non-significance of a multitude of potential environmental effects, no matter how obviously insignificant.

In short, the proposed EAF could be construed to require lead agencies (and in many instances project sponsors) to prepare extensive documentation to explain plainly minor and insignificant impacts. The Section is confident that the Department does not intend the revised EAF to have that consequence, and thus suggests that the EAF Part 2 should allow the lead agency to find that certain impacts are nominal, and do not need further discussion in Part 3. The following changes are suggested.

- If the purpose of the Part 2 questions (both numbered and lettered) is to create a presumption that impacts are more than nominal but not necessarily significant, that should be explained. This would mitigate the concern that the questions could be read as effectively establishing a presumption of significance and thus functioning as the equivalent of Type I thresholds.
- An additional column should be added that would allow for an affirmative answer (where a threshold in Part 2 of the EAF is exceeded), but would indicate that a potential significant impact would not occur because of project design, scale or context. The foundation for this response should be developed in the answers to the questions in Part 1 of the EAF. The proposed additional column is attached as Figure 1.¹ Concordantly, the instructions should provide that if a Part 2 threshold is exceeded, but the effect would nonetheless be insignificant (for example, because of the project context or the mitigating effecting of a project component), the new “Yes-but-No” column should be checked. Where the non-significance of identified effects is already clear based on the project scale, context or design, this instruction and the additional column would eliminate the need for lead agencies to prepare “mini-EISs” to explain the non-significance of a potential multitude of affirmative answers to individual Part 2 questions. This would also avoid the potential that lead agencies will issue unnecessary positive declarations or (where permitted) Conditioned Negative Declarations. Ultimately, this approach would have the dual benefits of allowing lead agencies to consider a myriad of potential effects without having to prepare unduly lengthy explanations of plainly non-significant ones, and of encouraging project sponsors to include up-front as part of proposed actions what would otherwise be characterized as mitigation measures.
- The caption of the “Yes” column should be clarified to reflect that a “yes” answer means that there is a potential significant adverse impact, rather than a “likely” impact, as that is the statutory criterion.

¹ We also suggest switching the columns, so that the “No” response column precedes the “Yes” response column; this recommended change is indicated on Figure 1.

The Section believes that these modest changes would strengthen the full EAF and avoid unnecessary burdens on lead agencies and project sponsors while assuring that lead agencies take the requisite "hard look" at relevant areas of concern and provide the necessary reasoned elaboration of the reason for its determination of significance.

We would be pleased to meet with the Department staff to discuss these suggestions.

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FIGURE 1

1. Impact on Land	Relevant Part I Question(s)	No (Significant impact will not occur)	Yes (No significant impact due to project design, scale and/or context)	Yes (Significant impact is possible)
Proposed action may involve construction on, or physical alteration of, the land surface of this action site. If "Yes" (<i>either</i> column), answer questions a-j. If "No", go to Section 2.				
a. The proposed action may result in the creation of over 1000 square feet of impervious surface.				
b. The proposed action may involve construction on land where depth to water table is less than 3 feet.				