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December 21, 2006

The Honorable Eliot L. Spitzer, Governor-Elect
Transition Office of New York State Governor-Elect Eliot L. Spitzer
2 Park Avenue, Suite 1400
New York, NY 10016

Re: Recommendations of the Environmental Law Committee

Dear Governor-Elect Spitzer:

The Committee on Environmental Law of the New York City Bar Association (hereinafter "Committee") appreciates the opportunity to suggest important environmental issues that Governor-Elect Eliot Spitzer and his Transition Team should address next year. Members of the Committee are drawn from the private, government and non-profit sectors and represent diverse viewpoints with respect to national and local environmental matters.[1] While representing diverse viewpoints, the members of the Committee agree that the Transition Team should consider the following action items, all of which are described in more detail below: (1) advocate for federal legislation that creates an effective and efficient national greenhouse gas cap-and-trade program; (2) modify Article 8 of the Environmental Conservation Law so that citizens are not denied standing if they cannot demonstrate a harm different from the public at large; (3) modify 6 NYCRR Part 617 so that park alienation is treated as a Type I action under the State Environmental Quality Review Act ("SEQRA"); (4) ensure more effective delivery of the Brownfield Opportunity Grants to local communities and establish a brownfield cleanup standard for schools; and (5) require an "environmental life-cycle analysis" as a component of the development of solid waste management plans in order to help support more sustainable management of solid waste throughout the state.

National Greenhouse Gas Cap-and-Trade Program

The Committee remains encouraged that New York and other mid-Atlantic and Northeast states have used the courts to try to require that the U.S. Environmental Protection Agency ("EPA") regulate air pollutants that contribute to global warming in the absence of federal legislation that addresses climate change. Nonetheless, the Clean Air Act does not provide for a cap-and-trade program to address greenhouse gas emissions, which is recognized as the most effective and efficient remedy to address climate change. Even if the EPA were to find that greenhouse gas emissions are contributing to adverse impacts to public health or public welfare, establishing a National Ambient Air Quality Standard for

[1] Committee members represent their individual views and do not represent the views of any particular affiliation.

greenhouse gas emissions will likely take years, and then each state would likely become non-attainment and would need to adopt regulations into their respective State Implementation Plans, a process that will take many more years. In essence, the Clean Air Act does not provide EPA with authority to mandate a national cap-and-trade program similar to the cap-and-trade program that addresses acid rain precursors under Title IV of the Act.

Accordingly, the Committee urges New York to continue to advocate for either an amendment to the Clean Air Act or alternative legislation that creates a cap-and-trade program for greenhouse gas emissions within a very tight regulatory timeframe, as occurred with the Title IV acid rain program.[2] The Committee would support a national program similar to the Regional Greenhouse Gas Initiative ("RGGI") and continues to believe that a program like RGGI can be more effective in reducing greenhouse gas emissions with the least cost if such program became national in scope.

The Standard for Article 78 Standing

The Committee also continues to support legislation that would amend Article 8 of the Environmental Conservation Law by adding a new section entitled "Standing," which would ensure that petitioners are not denied standing to bring Article 78 petitions solely on the grounds that the petitioners do not suffer an alleged injury that differs in kind or degree from the injury that would be suffered by the public at large. From 1975, when SEQRA was passed, through 1991, plaintiffs who challenged state and city actions under SEQRA were only required to meet the traditional "injury in fact/zone of interests" test for standing. Under this test, a plaintiff was required to demonstrate: (1) that he or she had suffered, or would suffer, an injury, and (2) that such an injury is "arguably within the zone of interests" protected by the relevant statute. Dairylea Coop., Inc. v. Walkley, 38 N.Y.2d 6, 9, 339 N.E.2d 865, 867, 377 N.Y.S.2d 451, 454 (1975).

In 1991, the Court of Appeals decided a case named Society of the Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991). In the years since this decision, many New York courts have interpreted Society of Plastics as adding a third prong to the test for standing under SEQRA, namely, a showing that the plaintiff suffered, or will suffer a "special harm" that is in some way different from the harm suffered by the public at large. As a result, the purpose of SEQRA, to require thoughtful consideration of environmental impacts, has often been frustrated by closing the courthouse doors to many plaintiffs for failure to meet this restrictive third prong.

For example, in Save Our Main St. Bldgs. v. Green County Legislature, 293 A.D.2d 907, 740 N.Y.S.2d 715 (3d Dep't 2002), lv. to appeal denied, 98 N.Y.2d 608, 775 N.E.2d 1288, 747 N.Y.S.2d 409 (2002), the court held that petitioners had no standing to challenge a SEQRA determination allowing the destruction of ten buildings in a historic district to make way for a modern-looking office building. For the owner of an antiques business located within the historic district, the court held that the petitioner lacked standing under Society of Plastics, despite the fact that his business was a mere two blocks from the project, because the antiques shop was on the same side of the street and not within the line-of-sight of the proposed new building. There are many similar egregious decisions where petitioners have, in our view, been inappropriately denied standing to litigate an important matter that clearly can affect their environment. Indeed, as commentators have pointed out, "New York's doctrine of standing in environmental cases has no parallel in either federal standing law or the laws of most other states, and thus makes New York one of the most restrictive jurisdictions for environmental plaintiffs." Michael B. Gerrard, Judicial Review Under SEQRA: A Statistical Study, 65 ALB. L. REV. 365, 372 (2001); see also, Joan Leary Matthews, Unlocking the Courthouse Doors: Removal of the "Special Harm" Standing

[2] Numerous Senate and House bills have been introduced, including McCain's Climate Stewardship and Innovation Act, Jeffords' Global Warming Pollution Reduction Act and Waxman's Safe Climate Act of 2006. The Committee does not opine which bill is the most effective and recognizes compromise at the national level is expected.

Requirement under SEQRA, 65 ALB. L. REV. 421, 450 (2001) (discussing the more flexible standing requirements under the environmental review statutes of California, Michigan, Washington and Wisconsin). Accordingly, we encourage the Transition Team to continue to push forward legislation to amend Article 8 of the Environmental Conservation Law to address standing.

Parkland Alienation as a Type I Action Under SEQRA

All too often, local governments, working with Albany, alienate parkland with no public review. In fact, environmental review under SEQRA often does not occur until after the alienation is a fait complete and the developer is subject to review for the proposed non-park use on what was a former park. The Committee believes the simple fix to this problem is to amend 6 NYCRR Part 617 to add to the list of Type I actions a change in the use of parkland to a non-park use. By making parkland alienation a Type I action, there is the presumption that an environmental impact statement should be prepared with an analysis of alternatives, mitigation and the mandatory public review. The Committee also recognizes that if the New York State Department of Environmental Conservation ("DEC") proposes such an amendment to the Type I list, DEC should also consider establishing some reasonable thresholds that can remain on the Type II list, such as *de minimis* takings necessary for road widenings as an example.

The recent Yankee Stadium redevelopment project is an example where parkland alienation occurred prior to SEQRA. In that case, the City of New York sought and obtained the necessary approvals for the alienation of Macomb's Dam Park and Mulally Park in the Bronx (in a matter of days) and the alienation occurred with no opportunity for public comment. In essence, the decision to take parkland for a non-park use should first be subject to full environmental review under SEQRA such that the public that might lose a park has an opportunity to participate in the process.

New Yorkers for Parks has already proposed this change to DEC, and staff at DEC have been very receptive to this proposal. The Committee hopes the new Transition Team will also be receptive to the need to address the alienation of parkland.

Ensuring Effective Distribution of the Brownfield Opportunity Area Grant and Creating a Cleanup Standard for Schools

With the passage of the New York Brownfields Law in 2003, the Legislature also created the Brownfields Opportunity Areas Program ("BOA") (Art. 18-C Gen. Mun. Law § 970-4) to provide financial assistance to municipalities and community-based organizations in research, planning, and environmental site assessment associated with brownfield sites. DEC announced awards under the grant program for its initial round in 2004. Since then, there have been additional application cycles in 2005 and 2006, but no awards have been announced. Further, 2004 grantees have yet to receive any funding. BOA grants can only be distributed pursuant to a legislative Memorandum of Understanding ("MOU"), the signing of which delayed the first round of 53 grants ($9.1 million) over a year; and the announcement of the next two rounds of grants await an amended MOU with no date for signing in sight. In the meantime, no money has been distributed to any community! Therefore, the Transition Team must work to ensure that currently awarded BOA funds are dispersed as soon as possible and that 2005 and 2006 BOA funding decisions are likewise made as soon as possible. One way to ensure a more effective distribution of the BOA funds is through the creation of an advisory committee that can develop and recommend priorities for funding, build momentum among stakeholders (including private developers), and make recommendations for streamlining and monitoring the progress and successes of the program. This advisory committee should also prepare an annual report on the progress of the overall program. Further, the need for a legislative MOU should be eliminated.

In addition, DEC's recently approved brownfields regulations at 6 NYCRR Part 375-6 require that residential properties be cleaned to the highest levels to protect public health. However, brownfields cleanup standards currently allow cleanups to lower levels for schools because there is no specific standard for schools. Since children spend a majority of their daytime hours in schools, and because children are especially vulnerable to the harmful effects of toxic chemicals, Governor Spitzer should issue an amendment to the Brownfields Cleanup Program regulations (and an interim executive order) that requires the cleanup of school properties to meet the highest cleanup standards – similar to residential properties.

Conducting a Life-Cycle Analysis to Support Sustainable Solid Waste Management

In February 2007, eighteen years will have elapsed since New York State instituted the requirement of preparing comprehensive long-term solid waste management plans (SWMP's) by the state's "planning units" (generally counties, cities, towns, or combinations of the same). Therefore, most such planning units in New York State will be required to prepare new SWMPs over the coming few years as their existing 20-year plans expire. (New York City, which apparently alone among the state's municipal waste planning districts had a 10-year solid waste plan, has already prepared a new 20-year SWMP.) The state regulations require that the plan consider and select an "integrated system" to manage the planning unit's solid waste, including "minimization at [its] point of generation and its collection, treatment, transfer, storage, processing, energy recovery, and disposal of materials." 6 NYCRR §360-15.2(b). The plan is also required to "take into account the objectives of the State's solid waste management policy" set forth in section 27-0106 of the Environmental Conservation Law. This section provides a waste management hierarchy: first, "to reduce the amount of solid waste generated;" second, "to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;" third, "to recover, in an environmentally acceptable manner, energy from solid waste that cannot be economically and technically reused or recycled;" and fourth, "to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or by other methods approved by the [DEC]." ECL § 27-0106(1). Each SWMP must include an "evaluation of the various technologies for storage, treatment, and disposal of solid waste" from the planning unit, including costs of the various alternatives, and an "assessment of the potential environmental, economic and social impacts associated with each technology." §360-15.9(g).

EPA, in partnership with the not-for-profit RTI International (of Research Triangle Park, N.C.), has now made available a software "decision support tool", developed over the past decade, which utilizes "environmental life cycle analysis" to assist planning units in selecting among competing components for their integrated waste management systems. The tool helps decision makers quantify and compare the cost and environmental aspects of integrated MSW management strategies. It compares such parameters as cost, emissions of sulfur dioxide and oxides of nitrogen, net energy usage, and carbon emissions from alternative components for each step of the management system, including collection, recycling, composting, transfer, transport, energy recovery (such as via thermal technologies such as combustion, or non-combustion gasification or pyrolysis), waste transformation (such as anaerobic digestion to produce biogas, acid hydrolysis to produce ethanol from organic garbage, or depolymerization to produce biodiesel from organic matter) and landfilling (with or without landfill gas recovery for energy production). This decision support tool has now been used by dozens of jurisdictions nationwide, including the State of California and Los Angeles in 2005 (see www.lacity.org/council/cd12 for the resulting RENEW LA plan).

This tool helps make explicit the tradeoffs that are inherent in the selection of an integrated solid waste management system, and provides crucial information about carbon emissions, which up to now has not been a standard parameter for analysis under the State Environmental Quality Review Act. The cost for conducting an environmental life cycle analysis using the EPA/RTI decision support tool is

approximately $5,000; the tool is available in both Internet and desktop versions. See https://webdstmsw.rti.org.

In order to provide better information to the public and to decision makers and a more transparent process, New York State should modify the Part 360 regulations to require an environmental life cycle analysis of a planning unit's proposed integrated solid waste management system, including the emissions from components of the system (such as transport and landfilling) that are located outside of New York State. The State should provide grant support for planning units to undertake such environmental life cycle analysis as well as renewed grant support for the required long term planning efforts in general. The DEC should undertake an environmental life cycle analysis of several waste management scenarios for the State, taking into consideration new and emerging waste conversion technologies as well as established technologies such as landfilling and waste-to-energy combustion, as was done by the California's Integrated Waste Management Board in December 2005 pursuant to a California law (Assembly Bill 2770, Chapter 740, Cal. Statutes of 2002).

In addition, the State should adopt a policy that local solid waste management plans include a consideration of "greenhouse gas" emissions directly resulting from the plan, including emissions generated both in-state and out-of-state.

The Committee is available to discuss any of the proposed suggestions.

Respectfully,

Christine A. Fazio, Chair

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cc: The Honorable David Patterson, Lieutenant Governor-Elect
The Honorable Sheldon Silver, Speaker, New York State Assembly
The Honorable Joseph L. Bruno, President Pro Tempore and Majority Leader, New York State Senate
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The Honorable James W. Wright, Chair, Senate Committee on Energy and Telecommunications
The Honorable William Colton, Chair of the Assembly's Committee on Solid Waste
The Honorable Carl Marcellino, Chair of the Senate's Environmental Conservation Chair
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