



NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

ENVIRONMENTAL LAW SECTION

2009-2010 Officers

December 14, 2009

ALAN J. KNAUF

Chair
Knauf Shaw LLP
1125 Crossroads Building
2 State Street
Rochester, NY 14614
585/546-8430
FAX 585/546-4324
aknauf@nyenvlaw.com

BARRY R. KOGUT

First Vice-Chair
Bond Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202
315/218-8181
FAX 315/218-8481
bkogut@bsk.com

PHILIP H. DIXON

Second Vice-Chair
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260
518/487-7726
FAX 518/487-7777
pdixon@woh.com

CARL R. HOWARD

Treasurer
US Environmental Protection Agency
290 Broadway
Office of Regional Counsel
New York, NY 10007-1866
212/637-3216
FAX 212/637-3199
howard.carl@epa.gov

KEVIN A. REILLY

Secretary
New York State Supreme Court
Appellate Division, 1st Dept.
27 Madison Avenue
New York, NY 10010
212/340-0403
FAX 212/340-0571
knreilly@courts.state.ny.us

MIRIAM VILLANI

Journal Editor-in-Chief
Sahn Ward & Baker, PLLC
333 Earle Ovington Boulevard
Suite 601
Uniondale, NY 11553
516/228-1300
FAX 516/228-0038
mvillani@sahnwardbaker.com

COMMITTEES

Adirondacks, Catskills, Forest Preserve
& Natural Resource Management
Agriculture & Rural Issues
Air Quality
Biotechnology, Nanotechnology and
the Environment
Coastal and Wetland Resources
Continuing Legal Education
Corporate Counsel
Energy
Enforcement and Compliance
Environmental Business Transactions
Environmental Impact Assessment
Environmental Insurance
Environmental Justice
Global Climate Change
Hazardous Waste/Site Remediation
Historic Preservation, Parks & Recreation
International Environmental Law
Internet Coordinating
Land Use
Legislation
Membership
Mining and Oil & Gas Exploration
Pesticides
Petroleum Spills
Pollution Prevention
Public Participation, Intervention & ADR
Solid Waste
Task Force on Legal Ethics
Toxic Torts
Transportation
Water Quality

Ms. Karen Diligent
Bureau of Program Management
Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-7012

**Re: Draft DER Program Policy DER-30, Real Property Eligibility
Opinions for the Brownfield Cleanup Program**

Dear Ms. Diligent:

The Environmental Law Section of the New York State Bar Association submits the enclosed comments on Draft DER Program Policy DER-30, Real Property Eligibility Opinions for the Brownfield Cleanup Program.

These Comments have been approved by our Executive Committee. Please note that some members abstained from the vote.

Thank you.

Very truly yours,

ALAN J. KNAUF
Section Chair

pc: Alison Crocker, Esq.
Benjamin A. Conlon, Esq.
Mr. Ronald Kennedy, NYSBA Department of Governmental Relations

**NEW YORK STATE BAR ASSOCIATION
ENVIRONMENTAL LAW SECTION**

**COMMENTS ON DER-30
REAL PROPERTY ELIGIBILITY OPINIONS
FOR THE BROWNFIELD CLEANUP PROGRAM**

The Environmental Law Section of the New York State Bar Association respectfully submits the following comments on the November 4, 2009 draft of DER Program Policy DER-30, Real Property Eligibility Opinions for the Brownfield Cleanup Program (Draft Policy).

The Section commends the New York Department of Environmental Conservation (DEC or the Department) for its willingness to issue early opinions on site eligibility to participate in the Brownfield Cleanup Program (BCP) for sites in Brownfield Opportunity Areas (BOAs) or BOA study areas. As the Draft Policy correctly notes [¶ III], DEC's goal of promoting the revitalization of brownfield sites is facilitated "by providing the certainty and predictability that developers need in making investment decisions."

That goal can be most effectively advanced by a process that is informal, quick, and non-bureaucratic; that does not entail significant transaction costs; and that provides real certainty for the parties involved in the request and the BOA community. However, a number of aspects of the Draft Policy appear to undercut this goal, including the following:

1. The opinion that DEC renders under the Draft Policy is "non-binding" [¶ V.E.(1)] and does not represent a final agency determination. [¶ V.E.(4)]. On the other hand, ¶ V.E.(1) provides that "[t]he opinion *can be relied upon* only to the extent..."[emphasis added], suggesting that there are indeed circumstances under which the parties can rely on opinions rendered under the Draft Policy. DEC should clarify the extent, if any, that site owners, developers and the BOA community can actually rely on such opinions.
2. If a DEC opinion under the Draft Policy is neither binding nor a final agency decision, it appears likely that the statutorily-prescribed process for application and DEC decision-making as set forth in ECL §27-1407 must be followed for sites subject to the Draft Policy, even though the very same issues may have been previously considered by the DEC in rendering its informal opinion. DEC should clarify the relationship between the decision-making process under the Draft Policy and under ECL §27-1407. For example, does a positive decision on eligibility create at least a presumption that may be rebutted in the course of the formal application process? If both processes must be followed for sites considered under the Policy, DEC should make every effort to prevent the second, formal decision-making process under ECL §27-1407 from being a time-consuming and redundant "do-over." For example, a public notice and comment period with respect to site eligibility should not have to take place twice for the same project.
3. The time periods required for DEC to render its "informal opinion" under the Draft Policy are, anomalously, longer than the ones prescribed by the Brownfield Cleanup Act for DEC's formal, legally-binding opinions. Under the Draft Policy, DEC is to provide notice to the

requestor that its application is complete with 30 days of receipt [¶ V.A.(5)], as compared to ten days under the Act. ECL §27-1407(3). DEC will use “best efforts” to issue an eligibility opinion under the Draft Policy within 60 days of receipt of a complete request [¶ V.B.(1)], compared to 45 days under the statute. ECL §27-1407(6). These time periods should be adjusted to be consistent with, if not shorter than, those prescribed under the Act.

4. The Draft Policy requires more information to be submitted as to certain issues than is required for formal eligibility determinations under the Act, including, significantly, a completed Phase II Environmental Site Assessment [¶ V.A.(4)(e)]. The Act includes as eligible sites those having either known *or suspected* contamination. Moreover, one major purpose of an early determination should be to allow requestors to obtain assurances of eligibility before committing the substantial resources necessary to perform a Phase II. DEC should be willing to accept the results of a Phase I or other evidence short of a complete Phase II in making the informal determinations contemplated by the Draft Policy.

5. The expiration of opinion letters after one year [¶ V.B.(4)] is likely too short a development window for many projects, given the lengthy lead time required for brownfield projects under current market conditions, and given the fact that the opinion is non-binding, subject to the formal application process and subject to revision due to “subsequent changes in material facts or site conditions” (see ¶ V.E(1)), it is unclear why an expiration date is needed.

6. DEC’s reservation of rights to decline to issue an opinion where “all parties involved are not sufficiently identified and described” [¶ V.C(4)] appears unnecessary, since the opinion covers only eligibility of the site and not of the parties themselves. See ¶ V.E.(2).

7. DEC’s reservation of rights to use information outside the request in rendering an opinion [¶ V.B.2] is problematical unless the requestor has an opportunity to review and respond to such other information. Similarly, DEC should commit to advising a requestor of any alleged deficiencies and allowing it to supplement its application accordingly before denying a request for an opinion pursuant to ¶V.C.

8. DEC’s reservation of rights to deny a request as being “not in the public interest” [¶ V.C.(6)] is troublesome unless the phrase can be defined and guidance given to the regulated community as to how this standard will be applied.

* * * *

The Environmental Law Section appreciates the opportunity to comment on DEC’s draft DER Program Policy DER-30, Real Property Eligibility Opinions for the Brownfield Cleanup Program. Such a Policy can be a useful tool to assist owners, site developers and the BOA community in cleaning up brownfield sites, bringing them back to productive use, and revitalizing the neighborhoods in which they are located. We believe that DEC’s incorporation of the clarifications and modifications recommended above can make the Draft Policy even more effective in achieving these important goals.