

**New York State Bar Association  
Environmental Law Section  
Executive Committee Meeting  
Marriott Marquis, New York City  
January 27, 2006**

Attendees:

Louis Alexander	Ragna Henrichs	Gail S. Port
Stan Alpert	Carl Howard	David Quist
Michael Altieri	Ernie Iearldi	Andrew Ratzkin
Vincent Altieri	Kristen A. Kelley	Kevin Reilly
Jeff Baker	Alan Knauf	Daniel Riesel
Lisa Bataille	Barry R. Kogut	James Rigano
Kevin Bernstein	Alice Kryzan	Virginia Robbins
Lisa Bromberg	Shannon LaFrance	Nicholas Robinson
David Cook	Maureen F. Leary	Daniel Ruzow
Philip Dixon	Joan Leary Matthews	Joel Sachs
Lou Evans	Peter Lehner	Larry Schnapf
William Fahey	Michael Lesser	James Sevinsky
Bruce S. Fein	Jean McCarroll	Laurie Silberfeld
David Freeman	Terrance McDonald	Dean Sommer
John French	Robert McLaughlin	Gail Suchman
Andrew Gershon	Luis G. Martinez	Howard Tollin
Drayton Grant	Flaire Hope Mills	Tom Ulasewicz
Jennifer Hairie	Dorothy Mines	Miriam Villani
John Hanna, Jr.	Walter Mugdan	Cheryl Vollweiler
Kevin Healy	Rosemary Nichols	Philip Weinberg
William Helmer	James Periconi	Michael Zarin

1. **Call to Order/Opening Remarks.** Section Chair Miriam Villani called the meeting to order at 3:12 p.m. She thanked the program chairs for doing a great job with the main morning program and the pre-morning program, and Walter Mugdan for his efforts in setting up the audio visual equipment.
2. **Approval of Minutes from September 25, 2005 Executive Committee Meeting.** Nick Robinson asked that he be added to the list of attendees for the September 25, 2005 Executive Committee Meeting. Rosemary Nichols moved to approve the Minutes of the September 25, 2005 Executive Committee meeting with that correction. Phil Dixon seconded the motion and the Minutes were unanimously approved.
3. **Treasurer's Report.** Joan Leary Matthews distributed the Section's current income and expense reports. The Section is showing a surplus of about \$40,000, and is nearly \$17,000 under the projected expenses in the budget. Matthews also reported on efforts to diversify speakers for CLE programs, and a survey that was being conducted.

4. **Membership.** Chair Villani announced recent Executive Committee appointments: Wendy Marsh and Doug Zamelis has been appointed as Co-Chairs of the Petroleum Spills Task Force to join Gary Bowitch, Flaire Hope Mills has been appointed as a Chair of Air Quality, Ed Malley and Bob Hallman will be joining George Rusk as Co-Chair of Corporate Counsel.
5. **Minority Law Student Fellowship Program/Environmental Justice.** Jean McCarroll reported on the program, and the minority fellowship recipients that had been announced at the luncheon earlier in the day. John Greenthal has suggested that we allow internships in private firms. McCarroll said the Committee was working on efforts to increase applicants, and to track recipients.
6. **Government Agency Reports.**
  - A. **New York State Department of Environmental Conservation.** Lou Alexander gave a report, a copy of which is attached as Appendix A to these Minutes..
  - B. **Office of the New York State General.** Peter Lehner reported that Andrew Gershon had negotiated a consent agreement relating to Long Island Sound requiring the upgrade of four sewage treatment plants that contribute nitrogen to the Sound, and upgrade of a Jamaica Bay Plant. He also reported on NSR Program Litigation, and the Attorney General's challenges to changes in the Program, and enforcement efforts with respect to American Electric Power and Synergy. He also noted that the Supreme Court had granted *certiorari* for two environmental cases concerning water pollution issues, including Clean Water Act §401 water quality certification, and jurisdiction over tributaries of tributaries for issuance of dredge and fill permits under Clean Water Act §404.
  - C. **Environmental Protection Agency.** Carl Howard noted that the EPA had entered into an UST agreement with New York City under RCRA, requiring upgrades.
7. **Section Journal.** Kevin Reilly is looking for articles for the Spring issue with a March 1 deadline. He is also looking for reports from Committees. We plan to include Kevin on a Cabinet Conference Call to discuss this issue.
8. **Policy and Procedures for Environmental Law Section Comments on Legislation, Regulations and Agency Guidance Documents.** Miriam Villani introduced the issue, discussing the "white paper" prepared by Maureen Leary, and efforts of the working group on this issue to develop a policy.

Walter Mugdan explained the issues debated by the working group, and a proposed Policy and Procedures for Environmental Law Section Comments on Legislation, Regulations and

Agency Guidance Documents had been developed (a copy which is attached as Appendix B to these Minutes). There had been a discussion of whether a super majority would be required to take a position, and if so, whether it should be two-thirds or three-quarters. Mugdan noted that it was good to have consensus on an issue.

Mugdan explained that under the draft policy, there were two types of comments, Educational Comments and Advocacy Comments. Positions could be proposed by a Committee or Task Force, a Section member, or a bar group outside the Section. The proposal would be referred to the appropriate Committee, and then to the Executive Committee. Any deadline would be indicated on the proposal. Even if a super majority is required, minority comments could be allowed. Votes could be by e-mail.

Dave Freeman spoke in support of the draft policy. Maureen Leary thanked Walter Mugdan, and indicated her support. Joan Matthews indicated her support.

Dan Riesel stated he was opposed to a super majority requirement. Dan Ruzow questioned the distinction between advocacy and educational comments. Gail Port agreed with Dan Ruzow, and noted that a proposal might not precisely meet the given criteria.

John Hanna supported the proposal, but was in favor of a simple majority. Jim Sevinsky supported a super majority.

Larry Schnapf supported taking positions and participating in the process. Dave Quist said there would be comments without us, and we need a consensus. Nick Robinson supported the policy.

Chair Villani then closed the debate. The Cabinet will consider the policy.

9. **Upcoming Programs.** There will be a NEPA Program focusing on Storm King at St. John's on March 10. The ABA EPA Region II Conference will be held at Fordham on April 28. A program on Global Climate Change will be held on April 18 at Albany Law School.

10. **Committee Reports.**

**A. Adirondacks.** Lou Alexander recused himself from the discussion and left the room for this Committee's report. Carl Howard reported that the Adirondacks Committee held a program the previous day with respect to tree cutting by the DOT, and that the Committee will look into the issue.

**B. Continuing Legal Education.** The CLE Committee is planning a May program, and then a program on Basic Environmental Law in October and November that Jim Rigano will Chair.

**C. Hazardous Waste/Site Remediation.** Dave Freeman reported that 70 people attended the “pre-morning” program on the Proposed Part 375 Regulations. A 12-person task force is working on comments. He noted that the Senate may be looking at the statute starting in March, including issues such as eligibility, and affordable housing (including availability of tax credits for condominiums and single family houses). They may look at the proposed disqualification of properties between Canal Street and 96 Street in Manhattan.

**D. International Law.** John French announced that the Committee is planning a program in China in October.

**E. Land Use.** Rosemary Nichols said the Committee will be working on conservation easements.

**F. Transportation.** Bill Fahey is planning a program on a proposed intermodal facility for New York City and Long Island.

11. **House of Delegates.** Phil Dixon reported that membership in the Association was flat although dues had been raised. CLE revenue was down. Judge Kay is pushing a study of *pro bono* for civil cases. There was a discussion of regulation of advertising.
12. **Legislative Forum.** The Legislative Forum will be held on April 5, 2006 in Albany and will focus on brownfields.
13. **Fall Meeting.** The Fall Meeting will be held October 13 - 15 in Cooperstown. Co-Chairs of the Program will be Kevin Bernstein, Bill Helmer, and Jennifer Hairie. The Program will focus on alternative energy and historic preservation.
14. **Adjournment.** On motion of Lou Alexander, seconded by Walter Mugdan and unanimously carried the meeting was adjourned at 5:11 p.m.

Respectfully submitted,

*Alan J. Knauf*

Alan J. Knauf  
Secretary

## Appendix A

### DEC REPORT January 27, 2006

1. Brownfield and Superfund Programs - Draft regulations issued. Seven informational meetings conducted. Three public hearings scheduled (March 6, 2006 – NYC; March 9, 2006 – Rochester; and March 15, 2006 - Albany).
2. Executive Budget Fiscal Year 2006-07
  - \$180 million for Environmental Protection Fund (up \$30 million from last year)
  - 43 additional DEC staff
    - 15 for DEC's stewardship efforts and land management project
    - 7 wetlands staff
    - 21 for critical inspections and complianceauthorized DEC staff would increase to 3,378
  - \$6.5 million for construction of Adirondack Natural History Museum, Tupper Lake, Franklin County
  - \$5.0 million for upgrades to DEC fish hatchery systems
  - \$5.3 million to enforce and monitor NYC watershed
  - \$135 million for State Superfund and Brownfield program
  - \$10 million for Onondaga Lake Cleanup
  - Renewable fuels initiatives
3. Environmental Benefit Project Policy - Revised policy issued November 14, 2005 (CP-37). Establishes criteria for EBPs undertaken in partial settlement of an enforcement action.
4. Great Lakes - December 13, 2005 announcement that New York State has reached agreements with 7 Great Lakes States and 2 Canadian provinces (Ontario and Quebec) to improve management, protection and conservation of Great Lakes-St. Lawrence River Basin and associated water-dependent natural resources (see 12/13/05 Governor press release).
5. Office of General Counsel Personnel Changes - 12/05

Reassignment/Promotions

  - Richard Sherman becomes Acting Bureau Chief of the Superfund and Brownfields Restoration Bureau
  - Jennifer Hairie becomes program counsel to Division of Mineral Resources
  - Patricia Mastrianni will be working on air issues (ozone standard and greenhouse gas emissions)
  - Nathaniel Barber will be handling RCRA enforcement matters
  - Mary Reynolds will be working on PBS, CBS and spills enforcement

- Michael Lesser will be assuming supervisory responsibilities as Section Chief for the Eastern and Central Field Units

Departures

- Anthony Quartararo (moved to South Carolina to join family business)
- Michael Altieri (moved to Massachusetts where he will be working for the Massachusetts Department of Environmental Protection)

6. Office of Hearings: Selected Decisions and Rulings

- Erie Boulevard Hydropower, L.P., Ruling of ALJ, 12/23/05 (concludes that, for Clean Water Act section 401 Water Quality Certificate, SEQRA review is preempted by Federal Power Act)
- Suffolk County Water Authority, Interim Decision of the Commissioner, January 19, 2006 (addresses late-filed petitions)
- Farmersville Landfill, Decision of the Assistant Commissioner, October 25, 2005 (addresses whether to reopen conceptual review decision)

7. Invasive Species Eradication Grant Program - Applications for grants will be accepted through 2/28/06 from municipalities and not-for-profit corporations.

8. Long Island Sound – January 2006 DEC/Department of Law agreement with NYC by which NYC will sharply reduce nitrogen discharges from wastewater treatment plants on East River.

9. Oil and Gas Well Spacing – Public Hearing Guidance  
Draft policy issued in fall 2005. Comment period ended on November 25, 2005.

10. Open Space Plan - 2005 draft plan released in November 2005.

11. Rescission of DEC Guidances - See ENB 10/26/05; ENB 1/18/06.

The DEC report is compiled by Lou Alexander solely in his individual capacity and is not a publication prepared or approved by the Department of Environmental Conservation.

## Appendix B

### **Draft Policy and Procedures for Environmental Law Section Comments on Legislation, Regulations and Agency Guidance Documents.**

January 26, 2006

From: Walter Mugdan  
First Vice Chair  
Environmental Law Section

To: Executive Committee Members

At the Executive Committee's Fall 2005 meeting, a workgroup was assembled to draft a policy and set of procedures for the Section when considering the submission of comments on legislation, regulations and Agency guidance. The issue was raised by Executive Committee member Maureen Leary at the Section's Spring, 2005, and was the subject of a white paper that she distributed in hard copy at the Fall meeting. The white paper was later distributed electronically to all Executive Committee members.

The members of the workgroup are: David Freeman, Maureen Leary, Joan Leary Matthews, Walter Mugdan, Rosemary Nichols and Dan Riesel. The workgroup members represented a wide spectrum of views on this subject. At the January, 2006 Executive Committee meeting, the workgroup presented the attached draft policy document.

The draft represents, as may be imagined, a compromise with which none of the workgroup members was entirely satisfied. Nevertheless, the six workgroup members are jointly able to recommend this draft for your consideration – with one important but discrete exception. As you will see, the draft provides in Paragraph 3.A. that a “supermajority” of the Executive Committee is required to approve “Advocacy Comments” (comments that advocate a particular position). The workgroup did not reach closure on this issue. Five of the six members were prepared to accept the idea of a supermajority; one was not. Of those five, one felt that the size of such a supermajority should not be higher than two thirds; two felt that the size of the supermajority should not be lower than three quarters; one felt that the figure should not be higher than three quarters; and one was willing to accept either two thirds or three quarters.

A wide variety of views about the supermajority issue was presented at the January, 2006 Executive Committee meeting. The issue will be on the agenda again for our April 5, 2006 meeting. In the meantime we have, on a trial basis, used the procedures laid out in Paragraph 2. for a proposal that our Section take a position on a particular piece of legislation. The purpose was to “pilot” the procedural elements of this draft to find out how well they work.

Attachment

## **Policy and Procedures for Environmental Law Section Comments on Legislation, Regulations and Agency Guidance Documents**

Draft #6A, January 26, 2006

The Environmental Law Section (the Section) represents a large and diverse group of New York lawyers with an interest and expertise in environmental law. Included among the Section's purposes, as set forth in its Mission Statement and consistent with its Bylaws, are activities "to support, promote or initiate desirable environmental law reform" and "to make recommendations for the improved integration of [environmental] laws to better effectuate protection of human health, the natural environment and the public welfare." Such activities may include submitting comments on proposed legislation, regulations or agency guidance pertaining to the setting of environmental policy and the administration of environmental law ("Comments"). The Executive Committee has adopted this policy and these procedures to facilitate a process which will achieve a high quality and timely work product. The Executive Committee also hopes that the policy and procedures will promote the consideration of diverse views within the Section, and that the Section will seek consensus when possible.

1. Definitions. Section Comments may intend to advocate a particular position ("Advocacy Comments) or they may intend to educate and inform without advocating a particular position ("Educational Comments"). Advocacy Comments may set forth a single recommended position on a given issue or they include majority and minority recommendations ("Multiple Position Advocacy Comments").
2. Proposal to Submit Comments. A proposal to submit Comments ("Proposal") may be made by any member or group of members of the Section, by any of the Section's Committees or Task Forces (referred to in this document as "Committees"), by the Bar Association or any subsidiary unit thereof, or by another Bar Association. A Proposal should be submitted to the Section Cabinet (directly, or through the Section's Association Staff Liaison). The Proposal will receive Section consideration pursuant to the procedures set out below. In unusual circumstances, the Cabinet may modify those procedures, taking into account, *inter alia*, any time constraints on the submission of the proposed Comments and the importance of the matter to the interests and mission of the Section.
  - A. A Proposal should be in writing, submitted electronically. If possible, a Proposal should be submitted no later than 30 days before the proposed Comments are to be submitted; a shorter time should be explained. The Proposal should contain:
    - i. A concise summary of the issues/matters to be addressed; a statement of the Section's interest in submitting the proposed Comments; and a statement whether the Proposal is for Advocacy or Educational Comments.
    - ii. Identification of the entity to which the Comments will be submitted.
    - iii. An electronic copy of, or a link to, the legislation, regulations, policy, guidance or other written matter to be commented on.
    - iv. A draft of the proposed Comments (preferred), or a detailed outline.
    - v. A brief statement indicating the likelihood of consensus among Section

- members; if possible, identify anticipated opposition to the Proposal.
  - vi. The deadline by which the Comments must be submitted.
  - vii. The name, address, phone, fax and e-mail address of the person(s) submitting the Proposal.
- B.
- i. If a Proposal is made by a Committee, the Cabinet will refer the Proposal directly to the Executive Committee for consideration.
  - ii. If a proposal is made by the Association, or an individual member or group of members, the Cabinet will refer the Proposal to the appropriate Committee for further consideration. If, after reasonable opportunity for consideration, the Committee does not endorse the Proposal or does not express any position on the Proposal, and if the proponent(s) nevertheless request further consideration of the matter, the Cabinet will refer the Proposal to the Executive Committee for consideration. If there is no appropriate Committee, or the appropriate Committee is not prepared to consider a Proposal, the Cabinet may convene an *ad hoc* committee to consider the matter, or the Cabinet may refer the Proposal directly to the Executive Committee. In any event, the Cabinet will notify the Executive Committee of the receipt of the proposal, and how it is being handled.
3. Approval of Comments. No Comments will be submitted on behalf of the Section (or any of its Committees) without prior approval in accordance with this paragraph.
- A. The decision to approve Advocacy Comments will be made by a vote of the Executive Committee, and requires a [*three quarters majority*] of those voting.
  - B. The decision to approve Educational Comments or Multiple Position Advocacy Comments will be made by a vote of the Executive Committee, and requires a simple majority of those voting.
  - C. In the case of a Proposal for Advocacy Comments concerning which substantial disagreement exists among the Section membership the Cabinet may, without further prior notice to the Executive Committee, authorize the submission of Multiple Position Advocacy Comments notwithstanding a vote of the Executive Committee to approve Advocacy Comments, provided the proposed alternative or competing recommendations were made available to the Executive Committee in advance of that Committee's vote.
  - D. An Executive Committee vote will occur only after its members have had at least 15 days notice, so as to provide an adequate opportunity to become familiar with the matter and to share their views.
  - E. Provision of notice and dissemination of further related information will ordinarily be by email. The vote itself will be conducted either by email or at a regularly scheduled Executive Committee meeting (if consistent with the timing of the comment process).
  - F. If and when the Section submits Advocacy Comments concerning which there was not consensus among the Executive Committee, the transmission document accompanying such Comments should note that they do not reflect the views of all

Section members.

4. General Policy Considerations.

- A. Consensus among Section members on a Proposal is desirable, but may not be achievable. As to some issues, members may hold strong and divergent views. Before voting on any Proposal, Executive Committee members are encouraged to consider whether –
- i. the Proposal is consistent with the Section’s Mission Statement, and with any prior Section Comments;
  - ii. the Proposal is supported with sufficient information to allow a reasoned decision;
  - iii. there has been an adequate opportunity for discussion, including the opportunity for members with opposing views to be heard;
  - iv. the Proposal is likely to be controversial or divisive within the Section;
  - v. any Section members are recusing themselves from discussions about or votes on the issue;
  - vi. approval of the Proposal could create a perception that the Section is inappropriately promoting the interests of a particular subset of its members or their clients;
  - vii. an alternative approach to the Proposal (*e.g.*, submission of Educational Comments instead of Advocacy Comments, or submission of Multiple Position Advocacy Comments) would be preferable.
- B. The integrity and quality of the Section’s Comment process is, to a great degree, dependent on the work of the relevant Committees that are drafting Proposals and Comments for Cabinet and Executive Committee review. It is the policy of the Section that, during the drafting process, the Committees should strive for a transparent process, with appropriate notice and opportunity to participate for all Committee members as well as any Executive Committee members who have expressed specific interest in the matter. The Committees should also strive for consensus where possible in their internal deliberations.