

The New York Environmental Lawyer

A publication of the Environmental Law Section of the New York State Bar Association

Message from the Outgoing Chair

The Section’s meetings this year covered a wide range of subject areas that have been thrusting themselves on the public as well as on the legal world in just the past couple of years, and which are likely to continue to do so, in various manners, as the future unfolds. All were the subject of in-depth discussion by panel participants, including our Section members who have become valued for their specializations.



Kevin Reilly

The fall meeting was co-sponsored with the Municipal Law Section, which we have done before to the benefit of both memberships. The co-chairs for the En-

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Message from the Incoming Chair

As the newest Chair of the Environmental Law Section and a longtime Section member, I am looking forward to working this year with our team, Mike Lesser, Vice Chair; Laurie Silberfeld, Treasurer; and Larry Schnapf, Secretary. This Section has wonderful members, who are hardworking attorneys and are always available to pitch in and address complicated environmental issues. The members of this Section have welcomed law students and newly admitted attorneys to our ranks and we have long sought and continue to seek concrete ways to support diversity in membership, as well as in-



Teresa Bakner

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Message from the Outgoing Chair

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Environmental Law Section were Teresa Bakner and Mike Lesser, both of whom are active cabinet members with a long history of taking leading roles in Section activities, and Dominic Cordisco. Michael Kenneally and Steven Levantahl co-chaired for the Municipal Law Section. Given the practical focus of many of our programs, important attention—and CLE accreditation—was devoted to updates relevant to environmental practices, which I'll mention momentarily. However, a substantial part of the program was addressed to superstorms and other natural disasters, events that are very much on all kinds of radar screens but which are posing significant challenges to municipalities and states, not to mention federal programs such as FEMA.

The unusual ferocity of meteorological disturbances in recent years likely results from several variables giving rise to different kinds of storms, but the evidence, of course, is clear that a major contributing factor is the excessive energy in the global system resulting in large part from the escalating layering of greenhouse gases in the atmosphere. While the credible scientific community is endeavoring to understand the relationship between those variables and the outcomes, too many of the various political systems around the globe are responding either reluctantly, or inadequately, or not at all. Just as not all storms, from tornadoes to cyclones, can be lumped together if meaningful conclusions are to be drawn, not all political systems can be realistically expected to respond coherently. However, the conclusion is inescapable that governments must take the lead in encouraging, or even imposing, discipline on the economic sectors that are significant causative factors in climate change. The American economy and its supportive political system have a long history of technological innovations that seem to spring up in the nick of time to stave off crises. While that may be a simplification, nevertheless the 20th century, through a crushing world war, with economic and financial systems unimaginable by prior generations, and the marriage of mechanics and physics that thrust the human handprint to worlds beyond, must be understood as a sequence of technological gestalts that would not have arisen as abruptly except for the pressing needs of the time. One can hope that technology—either cleaner or cleaning—will drive some of the responses to what is becoming understood by reasonable and intelligent people to be a quickening climate crisis.

If one hopes for a technological strategy, however, both the motivation—in part regulatory—and the complicated economics of technological innovations that will make a difference must be better understood by all sides in the climate debate. That there even is an unresolved climate debate as the evidence grows more dour suggests that a lot of work must be done quickly to understand the

economics of cleaner energy, cleaner industries, and even adjustments in lifestyles, and to hammer out effective agreements. We also have to accept the practical reality that while international conventions can be discussed and even negotiated, we have limited leverage with many governments, our own national track record is spotty, and the contributions to climate change by the several nations of the world are asymmetrical, dampening any argument by Western governments, and especially our national government, that a general reduction in greenhouse emissions will be necessary.

The role of knowledgeable lawyers, not just as regulators or in compliance roles or even in defense of industry, but, more importantly, as communicators will be pivotal. The Environmental Law Section, which includes attorneys from several fields and backgrounds, in cooperation with other NYSBA Sections (presently comprising the Climate Change Initiative), and diverse organizations, such as Columbia Law School's growing set of programs on Climate Change that is steered by our Section's former chair Mike Gerrard, is doing its part to play such a role. These, of course, are easy statements to make, and the devil, of course, is in the details. Some of those details were addressed in the Section's fall meeting during a panel addressing the environmental and municipal responses to natural disasters, with specific reference in this part of the nation to Sandy and Irene; how land use planning should change in anticipation of future storms; and the need for, and shape of, disaster preparedness planning. Section member Michael Bogin, of Sive Paget & Riesel, Schoharie County Treasurer William Cherry, and Neal Connolly and Kevin Crawford from the Insurance industry, provided perspectives from their particular backgrounds and experiences. All of these issues remain important, and strategies are evolving, as was evident in various other programs this year involving Section members, such as the Climate Change Initiative, for which Columbia Law School hosted a program in April. Although these kinds of discussions do not resolve the larger climate problem, they are integral to the process of directing the public's focus toward that problem and they, indeed, do start to address the more local problems with which coastal and riverside communities are grappling.

Also at the fall meeting, changes to the SEQRA regulations and forms, and recent case law, were brought to the attention of participants on Friday, and on Sunday DEC's new audit incentive policy was discussed by DEC's Monica Kreshnick, and EPA's self-audit policy was discussed by EPA's (and former Section chair) Carl Howard, which together were easily worth the price of admission. Eugene Kelly, DEC's Director for Region 4, gave a regional update on DEC's activities and goals on Friday evening, and Jack McEneny, a former Assembly member

and an Albany historian, took the Saturday dinner audience on an entertaining, and colorful, journey through the history of a town that is often defamed as being bland.

The annual meeting included a moot court addressing the land use controversy pitting municipalities against industry with respect to hydrofracking within municipal boundaries. The legal dispute presented the question whether traditional land use controls, including zoning, exercised by municipalities in New York are preempted by state statutory controls addressing mining and other extractive activities. Thus far, the Appellate Division has ruled for the municipalities—basically finding that while the *how* of these activities is governed by state statutory law, the *where* falls under local land use authority. The Court of Appeals ruling, which will likely be issued before the summer, likely will constitute landmark law regardless of the specific outcome. Tom West argued for industry in the Section's moot court, as he had before the Appellate Division and will before the Court of Appeals, and Debbie Goldberg represented the *Town of Dryden*, as she, too, did in the Appellate Division. The "court" was comprised of people known for their particular expertise and balance: Mike Gerrard, Joel Sachs, Gail Port, Adam Schultz and Bridget Lee. Ed McTiernan, General Counsel for DEC, was the luncheon speaker. Ed, who is well known to many Section members, provided an engaging, but also informative, discussion of DEC initiatives that was, as described by attendees, straightforward and frank, while also being helpful in articulating the Department's goals and limitations.

At the Executive Committee meeting following the luncheon, the issue of committee responsibilities arose again. While we have numerous committees that address the many subfields of environmental law, many of which have been very active and effective over the years, a malaise, as Jimmy Carter would say, has overtaken some committees. Committee work provides a valuable means of not only advancing programs, but involving newer members in those programs, so that they have a role and a presence, and a platform to get more involved

in the Section. Committees, too, provide some of the best marketing for the Section, in terms of committee output as well as attracting and retaining membership. As has been amply discussed at several meetings, in the increasingly competitive environment—so to speak—of bar association memberships, our Section needs to focus like a laser beam—as a young Bill Clinton might say—on more effective marketing. As has been discussed several times over the years, committees should be productive on an annual basis. That productivity might be achieved by a CLE program, legislative activity, other projects, or even a substantive *Journal* article. Not all subfields of environmental law are equally active all the time, so that committees should be free to find their own means of establishing their relevance. However, each committee should do something each year.

Committee chairs have that responsibility, in tandem with the committee members. Some have suggested that we institute an automatic rotation of committee chairs. I am not entirely comfortable with term limits. We are fortunate in having many very active chairs whom we do not want to lose. Others have been active in the past but are faced with other responsibilities and have recently asked for others to step up and assume the responsibility. One possible strategy for motivating committees, chairs and members, especially newer or younger members, might be to have a two- or three-year term for a chair, subject to renewal, with the default position more or less understood to be that the chair would be reappointed for another term if the committee had demonstrated activity during the prior term. That might be a means of ensuring that we retain active chairs, and allow others to consider whether they have the time to continue, or whether they want to groom other committee members to step up and assume responsibility. These are only ideas, but I hope that they generate some discussion about reviving our committee structure or even leading to some re-structuring as our Section continues to assert its relevance, but also seeks an enlarged and vital membership.

Kevin Reilly



CHECK US OUT ON THE WEB
<http://www.nysba.org/Environmental>

Message from the Incoming Chair

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creased participation in our Fall, Annual and Legislative meetings.

One of the benefits of being an environmental lawyer is the constantly changing legal landscape resulting from the many novel issues that arise in our practice. From climate change and carbon regulation to new energy technologies such as hydraulic hydrofracking, wind and solar; each day brings new laws, regulations, and court decisions that prevent us from becoming intellectually complacent (or bored) as attorneys.

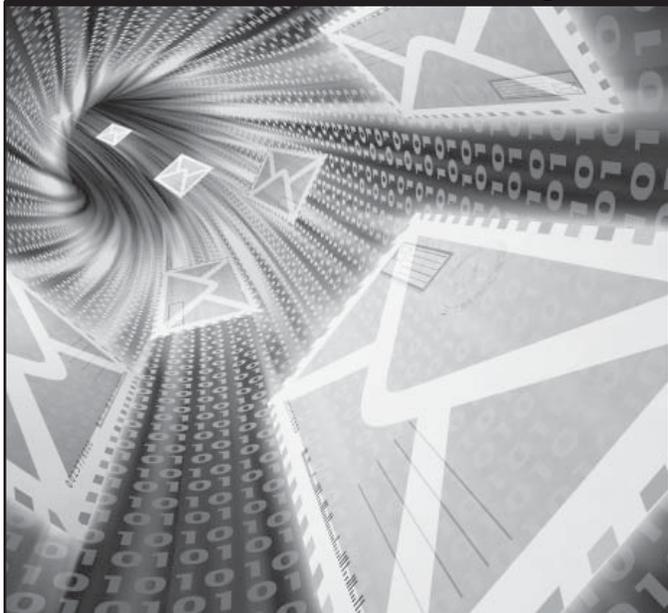
For those of us who appear before municipal boards, it is clear that any project of scale will have its advocates and detractors. With the recent and forthcoming changes to the forms and procedures necessary to comply with the New York State Environmental Quality Review Act, you can expect even greater public discourse on the merits of projects. As the Legislative Forum this past May demonstrated, critical environmental issues regarding the transport of oil in substandard railcars can arise in the 21st Century. How to better regulate this transport mode and meaningfully address the safety concerns of those

who reside near the railroad tracks is likely to consume a substantial portion of federal, State, and local agency time and effort over the coming months.

As this issue was going to press, we were finalizing plans for our Fall Meeting at the lovely Otesaga Hotel in Cooperstown, New York for the weekend of September 19, 20, and 21. The program will have many CLE credits available for newly admitted attorneys. The focus of the weekend will be on effectuating Brownfields reform, following a road map to the Clean Air Act and recent judicial rulings, surveying CERCLA and hot topics involving hazardous waste remediation, and many more issues of importance to environmental lawyers. The cabinet is also embarking on an effort to reorganize and reenergize the Section committees. Those efforts will be addressed at the Executive Committee meeting on Sunday, September 21. All of this and baseball and brewery tours too—many additional activities will be organized for the weekend so that your families can enjoy Cooperstown to the fullest.

Terresa Bakner

Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact one of *The New York Environmental Lawyer* Editors:

Miriam E. Villani
Sahn Ward Coschignano
& Baker, PLLC
333 Earle Ovington Blvd.,
Suite 601
Uniondale, NY 11553
mvillani@swcblaw.com
Editor-in-Chief

Justin M. Birzon
259 State St.
Albany, NY 12210
birzon.law@gmail.com
Issue Editor

Prof. Keith Hirokawa
Albany Law School
80 New Scotland Ave.
Albany, NY 12208
khiro@albanylaw.edu
Issue Editor

Aaron Gershonowitz
Forchelli Curto
333 Earle Ovington Blvd.
Uniondale, NY 11553
agershonowitz@fcmcc.com
Issue Editor

Articles should be submitted in electronic document format (pdfs are not acceptable), along with biographical information.

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