

# The New York Environmental Lawyer

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

## Message from the Chair

Since my last message to the Section, three more serious environmental problems have grabbed both national and local attention. The events impacting the water supply of Flint, Michigan may have unnecessarily exposed the entire population of a major U.S. city to a contaminated water supply. Closer to home, a series of developing disclosures in Hoosick Falls, New York, indicates that both private and public drinking water wells are contaminated with the industrial chemical perfluorooctanoic acid (PFOA), a suspected carcinogen. In both cases, government stands accused of being slow to react. Finally, German car company Volkswagen has admitted that since 2006 it sold approximately eleven million diesel vehicles which were rigged to give false air emission test results. Half a million of these vehicles were sold in the United States.

If there is a common thread between these three disparate environmental transgressions, it is that on some level government agencies knew or should have known about

the threats and taken action before they became environmental or public health threats—and huge public embarrassments!

### New Issues: REV and the NYS Constitutional Convention

The waning months of 2015 also saw two new significant statewide issues surface on the environmental horizon that will impact the Section members and their clients.



Michael Lesser

Reforming the Energy Vision (“REV”) is Governor Cuomo’s comprehensive strategy to build a statewide clean, resilient, and affordable energy system. Among the staggering challenges set forth by the Governor is to have 50% of the state’s energy generated by renewable fuels by 2030, and to have a 40% reduction in greenhouse gas emis-

## Inside

Message from the Editor-in-Chief .....3  
(Miriam E. Villani)

Message from the Issue Editor .....4  
(Justin Birzon)

Message from the Student Editorial Board .....5  
(Sarah A. Valis on behalf of the SEB)

EPA Update .....6  
(Mary McHale, Chris Saporita, Joseph A. Siegel and Marla E. Wieder)

DEC Update .....13  
(Randall C. Young)

SECTION NEWS

Member Profiles:

Long-Time Member: Walter Mugdan .....15

New Member: Claudia Braymer .....15

Member News .....16

In Memoriam: Henry L. Diamond .....16

Scenes from the Annual Meeting .....18

Letter from Honorable Thomas P. DiNapoli .....19

Committee Report .....20

Property Contamination and Leasing: The Federal Law .....21  
(Larry Schnapf)

Resolving Conflicts Between Endangered Species Conservation and Renewable Energy Siting: Wiggle Room for Renewables? .....26  
(Gregg Badichek)

Siting Renewable and Other Electric Generation Under Article 10 of the New York Public Service Law .....38  
(Sam Laniado)

SMPIL Comments on the Long Island Nitrogen Action Plan .....41  
(Frank Piccinini, J.D., M.S. and Kristin A. Perret, Ph.D)

The Third Department Gives Some Teeth to the Statutory Protections Afforded to Conservation Easements under the Environmental Conservation Law .....44  
(Phillip Oswald)

Glow-in-the-Dark Watch Dials, the First Toxic Tort Litigation, and the Birth of the Occupational Safety Movement .....48  
(Walter Mugdan)

Administrative Decisions Update .....50  
(Robert A. Stout Jr.)

Recent Decisions and Legislation in Environmental Law .....51

sions from 1990 levels. At the request of incoming NYSBA President Claire Gutekunst, the Section's Global Climate Change Committee has undertaken the difficult task of updating the Section's GCC reports of 2009 and 2011. In this endeavor, we are being assisted by the Pace Law School Environmental Center.

In related news, the Section's Agriculture and Rural Issues Committee took advantage of the Association's new webinar technology to present a program on the impact of GCC on that important segment of the environment and commerce. The Section also will Co-sponsor the upcoming June GCC program at Columbia University. In addition, we will have GCC segments at most of our upcoming programs. So, the Section's coverage of this important issue continues to be relevant and timely.

In unrelated but equally important news, the state, as mandated every 20 years, is rapidly approaching the 2017 vote on whether to hold a Constitutional Convention in 2019. Governor Cuomo also has set aside funds in the latest draft state budget to address the matter. If approved by the voters, process would potentially raise many issues that impact almost every aspect of government and policy. But, if there is a Constitutional Convention, at least two significant environmental issues could be at issue for the Environmental Law Section: potential changes to the Article 14, forever wild provision of the state constitution as it applies to the Adirondacks, and the insertion of an "Environmental Bill of Rights" into the state constitution as in other states' constitutions.

Both of these developments are not without controversy. But, as is our mandate, the Section is already working to educate our members and guide NYSBA through these complicated issues. Look for future news and Section programs on these developing matters.

### The 2016 NYSBA Annual Meeting

By any measure, the January 2016 Annual Meeting was a rousing success. Approximately 170 members and others registered for the two-day CLE program. More than 120 also joined us for lunch, and at least 30 attended our Executive Committee meeting on Friday afternoon.

The high point of the meeting, however, was the presentation and spirited Q & A session by our distinguished lunch speaker, the Honorable Thomas P. DiNapoli, New York State Comptroller. Comptroller DiNapoli gave us a lesson in how the fiduciary of the state's pension funds can use that authority to influence state and national environmental policies. He also discussed when and if divestiture is an appropriate tool to effect environmental change.

On behalf of the Section, I also want to thank the four event co-chairs, the program panelists, our devoted NYSBA staff, Hilton employees, and our important sponsors and supporting law firms. In total, it took more than three dozen people and sponsors to put this program together. They all have my profound gratitude for lending the Section their time and talents. Well done!

### Section Media, Membership, and Finances

Due to the strong efforts of our various committees and co-chairs, the Section's back office activities continue to prosper. Perhaps the best indicator of our progress is that the Section's finances have stabilized and improved. At this writing, the deficit spending of a few years ago has been reversed and we enter 2016 with an accumulated surplus of more than \$70,000.00. To put that number in context, be aware that the surplus has not dwelled in such lofty financial heights since the early 2000s.

The Section's membership decline has also been reversed (for now). More than 100 new members have joined the Section over the past year with more than 20 in December 2015 and January 2016 alone. Total Section membership is now approximately 1,080. Much of this turnaround can be credited to the pro-active and coordinated efforts of both our Diversity and Membership Committees. I also believe that our efforts to improve our member services and benefits have been a strong factor in this resurgence.

Finally, due to the hard work of Editor-in-Chief Miriam Villani, the issue editors, student volunteers, and article contributors, *The New York Environmental Lawyer* is back on track for a faster publishing schedule. While the content quality has never suffered, the TNYEL had fallen into an infrequent publishing schedule due to the size of recent issues. By adjusting the content quantity of each issue, we can look forward to a more frequent publishing schedule.

In related news, the Section's online media (LinkedIn, blog, website) also continue to prosper and inform. We also await the advent of the new NYSBA Online Communities and Webinar programs. By using these varied resources we will improve our member services and benefits for the future.

### Tentative 2016 Event Schedule

Below, please find the tentative schedule of Section programs including co-sponsored programs. As always, this listing is merely for convenience and to save the date **BUT IS SUBJECT TO CHANGE!** So, please check the Section's announcements and other media for more current information and additional events.

- 6/2 USEPA R2 Roundup program (NYC)
- 6/17 Columbia GCC program (NYC)
- 10/14-16 Environmental Law Section Fall Meeting (Cooperstown)
- 11/15 Hazardous Waste Remediation-BCP Update (Albany)

In closing, I cannot begin to express the appreciation I have for the NYSBA staff including Lisa Bataille, Kathy Plog, and Lori Nicoll. They make all of this possible. Finally, to again borrow a turn from the late and great radio personality Bob Grant, "Your influence counts! Use it!" Feel free to contact me or any of the Section officers if you have suggestions, questions, or if you require assistance.

**Michael J. Lesser**  
2015-16 Chair, Environmental Law Section