NYSBA FALL/WINTER 2013 | VOL. 33 | NO. 2

The New York Environmental Lawyer

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

Message from the Outgoing Chair

Carl Howard

As I write my Outgoing Message my term as Chair has expired. I thoroughly enjoyed working for this wonderful Section and urge others to accept the honor should it be offered. It is a lot of time and effort, but the experience and rewards make it worthwhile. You will work with similarly motivated and dedicated fellow officers willing to devote four short years to the effort. I am the last of the five-year officers (an important trivia answer that, no doubt, will surface in future NYSBA crossword puzzles). In my case I want to thank my fellow officers, First Vice-Chair Kevin Reilly, Treasurer Terresa Bakner, and Secretary Michael Lesser. As I step aside (and

(continued on page 2)

Message from the Incoming Chair

Kevin Reilly

First, I wanted to commend the Outgoing Chair, Carl Howard, for his successful year. I especially enjoyed the Fall Meeting in beautiful Lake Placid. As I write this column, I am happy to report that the state of the Section is good, although subject to some challenges which we are taking in hand. I am joined in the Cabinet by officers who not only have deep Section experience but who also bring considerable legal experience from a variety of backgrounds to the task. Our Vice-Chair Terresa Bakner, of Whiteman Osterman & Hanna, brings to the table a ready knowledge of current environmental issues from the perspective of a practicing lawyer who repre-

(continued on page 3)

Inside

From the Editor-in-Chief 4
(Miriam E. Villani)
From the Issue Editor 5
(Aaron Gershonowitz)
From the Student Editorial Board:
With EPA Uncertainty, New York Must Lead 6
(Edward Hyde Clarke on behalf of the SEB)
EPA Update 7
(Marla E. Wieder, Chris Saporita and Joseph A. Siegel)
DEC Update 16
(Randall C. Young)
Member Profile
Long-Time Member: Marla Wieder 17
Committee Reports
Global Climate Change Committee Report 18
Committee on Legislation Report 18
District Court Decisions Provide Further Guidance on Scope of "Arranger" Liability Under Superfund 21
(David J. Freeman and Harry H. Clayton IV)
Green Alert: The Need to Rescue New York's Renewable Energy Portfolio Standard 24
(Edward Hyde Clarke)
Pre-Emptive Measures to Reduce Environmental Exposure 34
(Urs Broderick Furrer)
Insuring Island States: The Role of Insurance for Small Island States in Responding to the Adverse Effects of Sea Level Rise 36
(Maria Antonia Tigre)
Administrative Decisions Update 46
(Prepared by Robert A. Stout Jr.)
Recent Decisions and Legislation in Environmental Law 48

NYSBA

Message from the Incoming Chair

(Continued from page 1)

sents a wide variety of clients. Mike Lesser, formerly of the Department of Environmental Protection where he supervised its Superfund and Brownfield programs, and presently of counsel to Sive, Paget & Riesel, has a prodigious memory of our policy decisions and events over the past couple of decades, joined with an expert's keen insight into contamination and cleanup problems. Mike also has kept our focus on some emerging trends in our Section's finances which I will address momentarily. The newest member of the Cabinet is our secretary, Laurie Silberfeld, who is Vice President and General Counsel of the Hudson River Park Trust. In that capacity, Laurie not only advises on conservation and recreational matters, but also has to bring administrative skills to the task. Howard Tollin, an expert in environmental insurance, is our representative on the House of Delegates and in that capacity keeps us informed of matters that are engaging the Bar Association at large. I am also especially happy to have Phil Dixon as a member of the Cabinet. Phil was Chair when I joined the Cabinet and is serving as liaison to the Section Council. Phil, who wears his emeritus status lightly, declines to retire from Section activities. Among other of his own contributions, Phil successfully solicits financial contributions from the several organizations that have generously sponsored our Fall and Annual meetings. The combined experiences and perspectives of these officers have ensured robust and productive discussions during our monthly Cabinet meetings. As I write this column, we are preparing for our Fall meeting at Jiminy Peak, which is being co-sponsored by the Municipal Law Section. Our Section's meeting co-chairs are Terresa Bakner, Mike Lesser, and Dominic Cordisco, aptly described by someone as a dream team. They have made significant efforts and judging by the speakers and topics, I anticipate an impressive success.

This column is addressed mostly to Section administration. We started with a Cabinet Retreat in July, for which Chazen Engineering in Poughkeepsie generously provided the space, with the goal of closely examining Section operations, flagging problems and proposing solutions. I recalled that we had a weekend Executive Committee Retreat a few years ago when Ginny Robbins was Chair, which was very productive. The time seemed right for another roundtable discussion. Section finances occupied a significant part of the discussion. Mike Lesser, as Treasurer, has consistently been drawing our attention to a growing imbalance between revenues and expenses, as had Terresa Bakner as Treasurer before him. Although I am loath to cite a Tea Party sound byte, we cannot spend money we don't have, and we have less than we did only a few years ago. Although various budget items are causative factors, some of which we have cut while others are under review, budgeting for the Annual Meeting in January has presented the greatest recent challenge. As such, the manner in which we conduct what has actually become a two-day conference, with the reception and business meeting on Thursday evening, followed by an increasingly expensive lunch on Friday, is being reconsidered. Because Lori Nicoll of the Bar Association's Meetings Department negotiated a favorable deal for January 2014, final decisions can be deferred, but only temporarily since the present arrangement is a one-off. We will have to tackle the economics of 2015's Annual Meeting before the close of this year. Members may be aware that a major hurdle has been the status of the Bar Association as a lobbyist, which imposes on it, and on us, onerous rules that effectively ended our prior arrangement whereby Proskauer Rose hosted our Thursday evening events for several years. The result has been that the cocktail reception and the accompanying business meeting recently have been venued in the hotel, under the umbrella of the Bar meeting, as contrasted with a private event which government lawyers attend. The costs have proven to be exorbitant, not easy to control, and in just the past couple of years, increasingly hard to justify. Alternatives are being explored. Similarly, we are considering alternatives to the Friday lunch and the accompanying program, and how and where we conduct the Executive Committee meeting. This is only in the discussion phase, but the economics of the meeting have to be faced. On the revenue side, membership, and the correlating dues, is a significant variable. The better we are at retaining members, and in finding new members, the more likely it will be given a high priority.

Also under continuing review will be our committee structure and operations. Committees are the backbone of our Section. Given the very eclectic nature of environmental law, we have numerous committees which feature a wide array of subject areas and which invite contributions from lawyers in many walks of life. That our Section has long been comprised of members enjoying a variety of professional backgrounds and intellectual interests also reflects the nature of the field. The combination of talented members and legal diversity has allowed a vibrant committee structure to flourish, which, in turn, has effectively served as a gateway to new members. Hence, it is critical to our Section's dynamism, relevance, and our efforts to retain and attract membership, that our committees stand out in what seems to be an increasingly competitive world where bar groups are vying for a shrinking base of lawyers who are professionally active outside of the office. Many legislative initiatives over the years started with our committees, which enhanced the relevance of the Section, that relevance being an attraction for newly minted lawyers; new members can be enticed into deeper Section involvement by offering them responsibilities in committee activities. New members, of course, deepen our talent pool and they often have the enthusiasm of youth, while their dues are also welcomed. Some committees are perennially productive, while others, likely reflecting the transient topicality of their subject areas, occasionally seem to be in search of a mission. We hope to find ways to facilitate the

(continued on page 71)

Message from the Incoming Chair

(Continued from page 3)

reinvigoration of our committee structure, adding new subject areas if relevant and pruning if necessary. So, we invite each committee to reassess its purpose and operations with the goal of marketing itself and the Environmental Law Section to present members and prospective members alike. One means of doing so, although certainly not the exclusive route, is for each committee to commit to at least one activity, or one article in our Section's journal *The New York Environmental Lawyer*, each year. During the Annual Meeting in January 2014, we will invite committees to bring the Executive Committee up to date on their activities or proposed activities for the following year.

During the Cabinet Retreat, and regularly during our monthly conference calls, Section communications were also discussed. This includes information passed among members by means of the *Journal*, the Section Blog, and other evolving media. I cheerfully admit to being an antediluvian in a digital world, which may have something to do with having passed the half century mark in life. However, I recognize, along with most others, the imperative to quickly adopt, and adapt to, increasingly fast and effective modes of communication, where personal and professional information as well as legal analysis and updates no longer await traditional print media. Our *Journal*, I continue to believe, is a Section cornerstone, but there is no reason why it cannot be supplemented by electronic publications which provide different kinds of communications. We have had success with webinars, and the blog also comes immediately to mind, although Mike Lesser has suggested others. We welcome proposals and, with proposals, volunteers to devise practical and effective means of spreading ideas, analysis and legal updates to members and—a consistent theme—to help attract new membership.

Meanwhile, the 2014 Awards Committee, chaired by past Section chair Barry Kogut and consisting of Janice Dean, Steve Russo and Kevin Ryan has been appointed, as has the Nominating Committee, chaired by Laurie Silberfeld—an official function of the Secretary—consisting of Gail Port, Lou Alexander, Walter Mugdan, and Phil Dixon—performing yet another task for us. These are all people who have been active in Section activities in varying capacities, and can be expected to bring thoughtful and discerning judgment to moving the Section forward. Kevin Healy has agreed to serve as the Section representative on the planning committee for the EPA Region 2 Conference held annually at Columbia Law School, presided over by our former Chair, Mike Gerrard. The Section is co-sponsoring that event, notice of which will be provided in more detail at a later date. Wendy Marsh and Kevin Bernstein will be co-chairing the Annual Meeting in January, for which themes are under discussion.

On a final note, I will turn from administrative matters to an idea involving our Section's history, which corresponds in so large a part with the general development of environmental law in New York, the region and the Nation. Several years ago, we recognized the Section's Founders at the Fall meeting with a brief ceremony and some tokens of our appreciation. That acknowledgment was due and timely, and I now think that some further recognition is becoming overdue. There were many more Founders present then than we have now. The march of mortality has become increasingly apparent over just the past couple of years as we've written commemorations and attended memorials for individuals who not only were significant actors in the Section's creation and early development, but also for whom personal affection had grown over the years. Those of us who have been active in the Section over the past couple of decades can easily recall at least a half dozen such recent passings, but it is easy to lose sight of what those individuals' specific contributions were in the formation of the Section and, indeed, how they shaped those aspects of environmental law that became public policy. While it is well to memorialize those we lose, it seems to me to be more important to honor those we still have. I invite proposals as to how we can do this. Perhaps the acknowledgment can be attached to next year's Fall meeting, or, alternatively, maybe a stand-alone event would be more appropriate. On the latter, the tribute paid to Phil Weinberg by Section members along with Phil's colleagues from his days in the Attorney General's Office comes to mind—and Phil, by the way, was a Founder and early Section Chair, and he also effectively created the AG's Environmental Protection Bureau.

Several benefits of an appropriate recognition, coupled with a written and updated compilation of the Section's history, are immediately apparent. First, it is simply right, on a personal level, for obvious reasons: one likes to feel that youthful dedication and contributions are still appreciated in the fullness of age. However, it is also a means of connecting newer members to the Section's history in almost an organic sense. We are not simply a law group that is involved with recent changes in tax codes, or property trends, or insurance coverage or novel tort theories. Rather, from the beginning this Section was committed to the development of thoughtful and sound public policy that would accrue to the benefit of our communities, our State and the Nation, ourselves and our children, and, that being the case, the Section's early members helped devise new legal theories and remedies towards that end. Our members represent all kinds of clients, some of whom may chafe against environmental regulations, yet understanding those regulations and how they further public policy is crucial to that representation. In that sense, paying homage to our early leaders, their efforts and aspirations, also gives proper recognition to our Section as a vehicle for achieving important and lasting benefits to not only the natural world, but also to the health and well-being of the individuals, families and communities that in the aggregate make up our social world. As we look for the next generation of members and leaders, we would do well to reflect on those who came first. Ideas anyone?

Kevin Reilly