

New York State Bar Association  
Environmental Law Section, Executive Committee Meeting  
Gideon Putnam, Saratoga, N.Y.  
October 4, 2015 - 10:05 – 12:00 a.m.

AGENDA

1. Welcome to the Meeting and Chair's report, committee initiative – Michael Lesser
2. Approval of the previous minutes for the May 6, 2015 Executive Meeting – Marla Wieder
3. Welcome to guest, Patricia Stockli, Esq., Director, NYSBA Department of Section Services
4. Membership Committee Report, Welcome Letters – Jason Kaplan, Rob Stout
5. Diversity Committee Report – John Greenthal, Joan Leary-Mathews
6. Financial Report – Kevin Bernstein, Michael Lesser
7. House of Delegates Report, Linda Shaw, David Quist
8. Environmental Justice/Internship Program Report – Peter Casper, Yelan Momot
9. Brownfields Task Force regulatory comments status – L. Schnapf, D. Freeman
10. Report on May 20, 2015, Environmental Enforcement program – Steve Russo
11. November BCP CLE Programs, 11/12/15, 11/17/15, Alan Knauf, Maureen Leary, Larry Schnapf
12. Annual Meeting Program Status, 1/28-29/15
13. Awards and Nominating Committees 2015, status
14. CLE Committee – 2016 Events – Jim Rigano, Maureen Leary
15. Section Media Status, Envir. Lawyer, EnviroSphere (blog), LinkedIn, Website  
Miriam Villani, Larry Schnapf, Sam Capasso, Michael Lesser
16. New Business: NYSBA online Communities, committee reform,  
2017 Constitutional Convention
17. Old Business/Miscellaneous

**New York State Bar Association - Environmental Law Section**  
**Executive Committee Meeting – May 6, 2015**  
**Elk Street, Albany, NY - NYSBA Headquarters**  
**Minutes – September 22, 2015**



<b>In attendance (15):</b>	<b>Via telephone (8):</b>
Philip Dixon	David Freeman
Alan Knauf	Larry Schnapf
Jillian Kasow	Joan Leary Mathews
John Parker	Linda Shaw
Dominic Cordisco	Jim Rigano
Amy Kendall	Barry Kogut
Telisport Putsavage	Marla Wieder
Keith Silliman	Alita Giuda
Kevin Anthony Reilly	
Maureen Leary	
Michael Lesser	
Terresa Bakner	
Lisa Bataille	
David Quist	
Claudia Braymer	

1. Welcome to the meeting and Chair's report  
Welcome remarks by Section Chair Terresa Bakner
2. Approval of the Minutes of the Executive Committee Meeting on January 2015—Larry Schnapf  
Motion to accept the minutes from the January 30, 2015, Executive Committee Meeting  
Motion by Alan Knauf / 2d by Maureen Leary / Motion carries by unanimous voice vote
3. Membership Committee's Report: Rob Stout & Jason Kaplan (report attached to email)  
Reports on possible fall reception at Buffalo Law School
4. Diversity Committee Report - John Greenthal & Joan Matthews  
Discussed plan for the University of Buffalo Law School fall event in an effort to add members and, in the process, increase Section diversity.

5. Brownfields Task Force Report Update - status of the Task Force's efforts with the Legislative Session: David Freeman  
Open discussion on Task Force proposal for definition of "underutilized" for proposed regulatory language to be submitted to NYSDEC. The proposal is time sensitive and must be submitted to NYSBA legislative counsel and NYSDEC the week of May 11.  
  
Motion placed on floor to have section membership review Task Force proposal and vote to approve/disapprove the proposal and if approved to submit to NYSBA counsel and upon approval to NYSDEC legislative affairs staff.  
  
Motion by Alan Knauf / 2d by Phil Dixon  
Motion approved by voice vote with 3 abstentions: Jillian Kasow, Maureen Leary & David Quist
6. House of Delegates Report: Howard Tollin & Linda Shaw  
David Quist becomes Section Alternate Delegate on 6/1/2015  
Reports on major issue of unlicensed online legal services in competition with the state's law firms
7. Financial Report- Michael Lesser & Laurie Silberfeld  
Reports results of March 2015 (most recent) Financial Report  
Operating year surplus, 3/31/15 – \$47,729.52
8. CLE and other Programs Proposed for 2015-2016: Jim Rigano, Genevieve Trigg, Randy Young & Maureen Leary  
Jim Rigano summarizes past and planned events.
9. Planning for Cabinet Retreat in June 2015 & for the Fall Meeting in Oct. 2015: Michael Lesser  
Discussed plans, scheduling and the agenda for the 6/24/15, Section Retreat in Poughkeepsie.  
Discussed plans for dual registration Fall Meeting, with Friday as a standalone registration program for transitional credits for new attorneys and administrative practice for government attorneys. Discussed selection of program Co-Chairs Alita Giuda, Genevieve Trigg and Gene Kelly.
10. Social Media Initiatives/Linkedin-Larry Schnapf  
Membership to our LinkedIn group continues to grow
11. Adjourn  
Motion to Adjourn by Michael Lesser / 2d by Phil Dixon / Motion approved by unanimous voice vote

Meeting adjourned

New York State Bar Association  
Environmental Law Section  
For the Seven Months Ending Friday, July 31, 2015

	2015 Budget	July	2015 Year To Date	Percent	2014 Budget	2014 Year To Date	Percent	2013 Year To Date	2012 Year To Date
<b>Income</b>									
Dues	\$32,000.00	\$175.00	\$31,125.42	97.27%	\$35,405.00	\$32,175.75	90.89%	\$33,657.92	\$33,757.51
Meetings	34,000.00		19,835.00	58.34%	39,770.00	17,976.00	45.20%	20,867.00	18,709.00
Sponsorship	9,000.00		6,300.00	70.00%	3,680.00	5,700.00	146.91%	6,700.00	3,500.00
Newsletters	1,000.00		555.00	55.50%	485.00	720.00	148.45%	720.00	185.00
Publications	4,900.00		25.00	0.00%	10,185.00		0.00%		50.00
Prior Years Surplus Used	80,900.00	175.00	57,840.42	71.50%	89,725.00	56,574.75	63.05%	61,944.92	56,201.51
<b>Expenses</b>									
Postage & Shipping	1,750.00	3.45	685.60	39.18%	2,910.00	666.99	22.99%	795.81	675.53
Awards & Grants	5,000.00		1,550.13	31.00%	4,850.00	1,529.90	31.54%	1,553.17	6,757.20
Diversity	6,000.00		5,500.00	91.67%	5,820.00		0.00%	3,000.00	
Catering & Banquets	45,000.00		22,122.36	49.16%	40,740.00	13,309.68	32.67%	41,007.37	38,319.33
Beverage Service & Receptions	7,500.00		3,604.63	48.06%	10,670.00	3,351.63	31.41%	5,675.25	5,502.03
Speaker & Guest Expense	1,000.00			0.00%	1,940.00	289.23	14.91%	277.75	
Audio/Visual Expense	2,500.00		1,857.93	74.32%	4,850.00	2,083.32	42.96%	2,076.95	
Promotional Costs	500.00			0.00%	970.00		0.00%		
Activities & Entertainment	1,000.00			0.00%	970.00		0.00%		
Gratuities	300.00			0.00%	291.00		0.00%		
Section Executive Committee Meetings	350.00		1,210.72	345.92%	485.00	35.11	7.24%	275.48	15.44
Officers Expense	1,500.00	31.09	37.40	2.49%	1,164.00	105.16	9.03%	666.65	380.40
Miscellaneous Meeting and Program Costs	1,000.00		699.77	69.98%	2,425.00	400.00	16.49%	1,064.90	3,105.62
Section Subcommittee Meetings	500.00		213.80	42.76%	1,455.00	217.54	14.95%	79.99	3,565.90
Newsletters	5,000.00	1,798.42	2,548.42	50.97%	7,760.00	3,440.71	44.34%	61.92	3,282.62
Graphic Department Allocations	1,500.00		415.83	27.72%	2,425.00	683.04	28.17%	474.83	1,094.94
Total Expenses	80,400.00	1,832.96	40,386.59	50.23%	89,725.00	26,114.31	29.10%	57,010.07	65,251.43
<b>Net Income over Expense</b>	<b>500.00</b>	<b>(1,657.96)</b>	<b>17,453.83</b>	<b>3490.77%</b>		<b>30,460.44</b>	<b>0.00%</b>	<b>4,934.85</b>	<b>(9,048.92)</b>
<b>Accumulated Surplus (Deficit)</b>									<b>43,298</b>

# NYSBA Section Profile Report for Environmental Law Section

Total Number of (REG, NRES, STU) Members: 1,008

	Count	Percent	Valid Percent
<b>A) Gender</b>			
F	300	29.76%	30.33%
M	689	68.35%	69.67%
X (no data)	19	1.88%	
	<b>1,008</b>	<b>100.00%</b>	<b>100.00%</b>
<b>B) Practice Setting</b>			
Government	14	1.39%	1.72%
Government - Federal	13	1.29%	1.60%
Government - Local	19	1.88%	2.34%
Government - State	32	3.17%	3.94%
In-House Counsel	52	5.16%	6.40%
Judiciary	3	0.30%	0.37%
Law School - Faculty	11	1.09%	1.35%
Law School - Student	6	0.60%	0.74%
Legal Aid	2	0.20%	0.25%
Non-Law Related	17	1.69%	2.09%
Non-Profit	22	2.18%	2.71%
Other	21	2.08%	2.58%
Part-Time Attorney	5	0.50%	0.62%
Private Practice	573	56.85%	70.48%
Public Interest	2	0.20%	0.25%
Retired	12	1.19%	1.48%
Trade/Professional Association	5	0.50%	0.62%
Unemployed	4	0.40%	0.49%
X (no data)	195	19.35%	
	<b>1,008</b>	<b>100.00%</b>	<b>100.00%</b>
<b>C) Office Size</b>			
Fifty to 99	89	8.83%	11.48%
One Hundred and greater	211	20.93%	27.23%
Six to Nine	51	5.06%	6.58%
Solo Practitioner	119	11.81%	15.35%
Ten to Nineteen	81	8.04%	10.45%
Twenty to 49	104	10.32%	13.42%
Two to Five	120	11.90%	15.48%
X (no data)	233	23.12%	
	<b>1,008</b>	<b>100.00%</b>	<b>100.00%</b>
<b>D) Position</b>			
Academic	16	1.59%	2.24%
Administrative Law Judge/Hearing Offic	3	0.30%	0.42%
Associate	112	11.11%	15.71%
Court Personnel	2	0.20%	0.28%
<b>E) Age</b>			
24 and Under	16	1.59%	1.67%
25 to 35	145	14.38%	15.17%
36 to 45	139	13.79%	14.54%
46 to 55	203	20.14%	21.23%
56 to 65	278	27.58%	29.08%
66 and Over	175	17.36%	18.31%
X (no data)	.52	5.16%	
	<b>1,008</b>	<b>100.00%</b>	<b>100.00%</b>
<b>F) Race/Ethnic Group</b>			
Asian/Pacific Islander	10	0.99%	1.62%
Black/African American	7	0.69%	1.14%
Decline to Answer	35	3.47%	5.68%
Hispanic	11	1.09%	1.79%
Multiple Race/Ethnic Group	2	0.20%	0.32%
Native American	1	0.10%	0.16%
Other	6	0.60%	0.97%
White/Caucasian	544	53.97%	88.31%
X (no data)	392	38.89%	
	<b>1,008</b>	<b>100.00%</b>	<b>100.00%</b>
<b>G) Who Paid For Membership Dues</b>			
Collectively by Firm and Member	25	2.48%	4.08%
Fully by Firm, School or Organization	324	32.14%	52.85%
Member	252	25.00%	41.11%
No Dues Paid	12	1.19%	1.96%
X (no data)	395	39.19%	
	<b>1,008</b>	<b>100.00%</b>	<b>100.00%</b>
<b>H) Number of Years Admitted to Bar</b>			
0 (Less than 1)	22	2.18%	2.28%
1 to 3	91	9.03%	9.42%
4 to 5	42	4.17%	4.35%

9/15/2015

	Count	Percent	Valid Percent
6 to 7	36	3.57%	3.73%
8 to 14	114	11.31%	11.80%
15 to 19	73	7.24%	7.56%
20+	588	58.33%	60.87%
X (no data)	42	4.17%	
	<b>1,008</b>	<b>100.00%</b>	<b>100.00%</b>
<b>D) Disability</b>			
Decline to Answer	102	10.12%	16.75%
No	500	49.60%	82.10%
X (no data)	399	39.58%	
Yes	7	0.69%	1.15%
	<b>1,008</b>	<b>100.00%</b>	<b>100.00%</b>
<b>J) Sexual Orientation</b>			
Decline to Answer	60	5.95%	13.99%
Heterosexual	363	36.01%	84.62%
Lesbian/Gay/Bisexual/Transgender	6	0.60%	1.40%
X (no data)	579	57.44%	
	<b>1,008</b>	<b>100.00%</b>	<b>100.00%</b>
<b>K) Areas of Concentration</b>			
Administrative Law	228	22.62%	
Agriculture	38	3.77%	
Antitrust and Trade	12	1.19%	
Appellate Law	98	9.72%	
Arbitration/Mediation	62	6.15%	
Banking	32	3.17%	
Bankruptcy/Insolvency	24	2.38%	
Business Law	111	11.01%	
Civil Rights	49	4.86%	
Commercial Litigation	131	13.00%	
Communication	9	0.89%	
Computer Law	9	0.89%	
Construction	95	9.42%	
Contracts	86	8.53%	
Corporate Law	120	11.90%	
Creditors' Rights and Collections	6	0.60%	
Criminal Law	35	3.47%	
Derivatives and Structured Products	5	0.50%	
Elder Law	28	2.78%	
Employee Benefits	13	1.29%	
Entertainment, Arts and Sports	10	0.99%	
Environmental Law	640	63.49%	
Ethics	7	0.69%	
Family Law	30	2.98%	
Finance and Securities	26	2.58%	
Food, Drug & Cosmetics	18	1.79%	
Franchise Law	4	0.40%	
General Practice	95	9.42%	
Government	132	13.10%	
Health Law	27	2.68%	
Immigration Law	22	2.18%	
Insurance	83	8.23%	
Intellectual Property and Copyrights	40	3.97%	
International Law	39	3.87%	
Labor and Employment Law	65	6.45%	
Law Office Economics and Management	15	1.49%	
Leases And Leasing	57	5.65%	
Libel	4	0.40%	
Litigation - General Civil	219	21.73%	
Medical Malpractice	16	1.59%	
Municipal Law	221	21.92%	
Personal or Property Injury	69	6.85%	
Product Liability	72	7.14%	
Professional Liability	11	1.09%	
Public Contract	38	3.77%	
Public Utility	82	8.13%	
Real Property Law	253	25.10%	
Social Security Law	4	0.40%	
Tax - Corporate Business	18	1.79%	
Tax - Personal	9	0.89%	
Transportation	31	3.08%	
Trust and Estates Law	69	6.85%	
Workers Compensation	10	0.99%	
Zoning, Planning And Land Use	277	27.48%	
	<b>3,904</b>	<b>387.30%</b>	<b>100.00%</b>



## Environmental Law Section Committee Report

Committee Name: Adirondacks, Catskills, Forest Preserve & Natural Resource Management  
Committee Co-chairs: Thomas Ulasewicz and Claudia Braymer  
Date of Report: September 25, 2015

Significant legislation affecting our committee specialty in the current year includes:

- Possible amendments to the Adirondack Park State Land Master Plan
- Draft NYS Open Space Conservation Plan and Draft Generic EIS
- Federal Clean Power Plan

Significant case law/administrative decisions affecting our committee specialty in the current year includes:

- Protect the Adirondacks! Inc., Sierra Club et al. v. Adirondack Park Agency, NYS Department of Environmental Conservation, Preserve Associates, LLC., et al. 121 AD3d 63 (July 3, 2014); Motion for Leave to Appeal denied 24 N.Y. 3d 1065 (December 17, 2014) – Adirondack Club & Resort, Big Tupper Ski Area, Tupper Lake, N.Y.
- July 10, 2015 DEC Commissioner Martens Decision and Ruling on the proposed Belleayre Resort in the Catskill Park (aka: Crossroads Ventures, LLC)  
<http://www.dec.ny.gov/hearings/102608.html>

Significant regulations affecting our committee specialty in the current year includes:

- Ongoing Unit Management Planning in the Adirondack/Catskill Parks
  - Essex Chain Lakes
  - Vanderwhacker Mountain Wild Forest (Community Connector Trail Plan)
  - Remsen- Lake Placid Travel Corridor
  - Jessup River
- Emergency project regulations

Significant government policies affecting our committee specialty in the current year includes:

- potential storage of discarded oil tank cars on the Forest Preserve

Are there any other issues that would be interest to the general members of the section?

- Friends of Thayer Lake v. Brown, 126 A.D.3d 22 (3d Dept. 2015), appeal pending before the Court of Appeals, case re navigable rivers and streams and public right of navigation, including right to portage over posted private land

Please return completed report to:

mlessor@nycap.rr.com; mvillani@swc-law.com and lbataille@nysba.org.



## **Environmental Law Section Committee Report**

Committee Name: Enforcement and Compliance

Committee Co-chairs: Gene Kelly and Craig Kravit

Date of Report: September 25, 2015

The Committee has undertaken and/or completed the following projects in the current year.

Committee co-chair served as co-chair for Environmental Law Section Fall Meeting, scheduled Oct. 2-4, 2015 at Gideon Putnam Hotel, Saratoga Springs, NY

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Significant legislation affecting our committee specialty in the current year includes:

Local: Moratorium on development of facilities to expand crude oil handling capabilities at Albany Port (McCoy);

State: Brownfield Cleanup Program/Brownfield Opportunity Area component to enacted State Budget reauthorizing and extending the life of these programs, with significant reforms aimed at addressing upstate/downstate disparities in brownfield redevelopment; Various bills aimed at tighter regulation of crude oil transport by rail (McDonald/Fahy/Steck/Avella); increase NY Spill Fund to \$40 million (Cuomo); bill to require study on initiatives related to PSC's Reforming the Energy Vision proceeding (DeFrancisco/Russell); bill to expand ability of citizens to bring civil actions against individuals alleged to have violated certain ECL provisions (Kavanagh/Parker); bill to direct use of state funds toward purchase of more energy efficient appliances and equipment by organizations receiving state assistance (Hevesi/Hoylman); bill to amend Navigation Law by requiring DEC to investigate the degree to which additional parties may be responsible for petroleum spills (O'Mara); bill to establish a \$1.5 billion solar incentive program by extending NY-Sun program (Englebright/Latimer);

Federal: Energy Policy Modernization Act of 2015 bill to update energy law across a broad spectrum of functional areas (Murkowski/Cantwell); Regulations from the Executive in Need of Scrutiny (REINS) bill to require major regulatory actions w/ an annual economic impact of \$100 million or more to obtain congressional approval before it could take effect (Rand); bill to require crude oil to be transported in sturdier tanker rail cars (Schumer); Offshore Production and Energizing National Security Act bill to lift 40 year-old ban on crude oil exports and expand offshore drilling (Shaheen/Portman); Federal Highway bill (Shuster); Keystone XL Pipeline (Hoeven); broad array of bills (nearly 100) dealing with climate change.

Significant case law affecting our committee specialty in the current year includes:

Local:

State: *Dawley v. Whitetail 414, LLC*, 130 A.D.3d 1570 (4<sup>th</sup> Dept. 2015), annulling a SEQR neg. dec. that was not accompanied by a concurrently adopted “reasoned elaboration”; *Committee to Stop Airport Expansion v. Wilkinson*, 126 A.D.3d 788 (2<sup>nd</sup> Dept. 2015), holding that a reviewing court’s role in SEQR matters is limited to determining whether the challenged determination was “affected by an error of law, or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure,” and that “it is not the role of the courts to weigh the desirability of any action or chooser among alternatives”; *Fairview Plaza, Inc. v. Estate of Rigos*, 129 A.D.3d 1259 (3<sup>rd</sup> Dept. 2015), holding that perchloroethylene (PERC) is not “petroleum,” as that term is defined by Navigation Law Article 12; *Friends of Thayer Lake LLC v. Brown*, 126 A.D.3d 22( 3<sup>rd</sup> Dept. 2015), with an extensive evaluation of navigability of waters, relevant to the determination of whether such waters permit public use and access;

Federal:

Significant regulations affecting our committee specialty in the current year includes:

Local: Albany County has begun the process of joining a group of other upstate counties (Erie, Chautauqua, Cattaraugus and Tompkins) in developing a ban on microbeads (tiny plastic particles), often used in cosmetics and other personal care products; Ban adopted by Albany, Suffolk and Westchester Counties on certain chemicals in children’s toys.

State: revision of statewide solid waste enforcement policy (7/14/15); enhanced response capabilities for crude oil transportation incidents (5/27/15); restrict movement of ash material to restrict movement of emerald ash borer; updates to list of federal New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants; incorporation of California’s latest greenhouse gas and zero emission vehicle standards in to NY’s existing low emission vehicle program; updated Clean Air Act Title V operating fees; brownfield cleanup program reform regulations; bulk storage of petroleum and chemicals and management of used oil; Sewage Pollution Right to Know Act; establishment of a permitting program for the siting, construction and operation of liquefied natural gas; numerous changes to hunting and fishing regulations (ongoing);

Federal: Clean Power Plan to force reductions in power plant CO2 emissions; Waters of the U.S. to clarify the reach of the Clean Water Act over rivers, streams, ponds and wetlands;

Significant government policies affecting our committee specialty in the current year includes:

Local:

State: Statewide ban enacted on high volume horizontal hydrofracturing of natural gas deposits (6/19/15);

Federal:

Are there any other issues that would be interest to the general members of the section?

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Please return completed form to:  
[mlessner@nycap.rr.com](mailto:mlessner@nycap.rr.com); [mvillani@swc-law.com](mailto:mvillani@swc-law.com) and [lbataille@nysba.org](mailto:lbataille@nysba.org).

**Environmental Law Section Committee Report Template (add space as required)**

Committee Name: Coastal and Wetland Resources

Committee Co-chairs: Dominic Cordisco, Reed Super, Amy Kendall

Date of Report: 9/25/15

The Committee has undertaken and/or completed the following projects in the current year.

**Significant legislation affecting our committee specialty in the current year includes:**

**State:** On September 22, 2014, Gov. Cuomo signed the Community Risk and Resiliency Act. From NYSDEC's website, the two key provisions are:

- Applicants to certain State programs must demonstrate that they have taken into account future physical climate risks caused by storm surges, sea-level rise or flooding.
- By January 1, 2016, DEC must establish in regulation State-adopted sea level rise projections, which will be used as the basis for State adaptation decisions and will be available for use by all decision makers.

Proposed legislation: A5128, SS25-0402 & 24-0703

Relates to requiring notice to neighboring landowners within one thousand feet of intention to develop in wetland areas; requires a public hearing on a wetland application.

**Federal:** None

**Significant case law affecting our committee specialty in the current year includes:**

**State:**

In *Green Earth Farms Rockland LLC v. Town of Haverstraw Planning Bd.*, the court held that a Town's planning board's grant of final site plan approval of shopping center was arbitrary and capricious when, after final environmental impact statement had been adopted, the site plan was changed to include gasoline station. 45 Misc. 3d 1209(A), 3 N.Y.S.3d 285 (N.Y. Sup. Ct. 2014).

In *In re New Creek Bluebelt, Phase 4*, the court held that a city's imposition of wetlands regulations on a landowner's property was a regulatory taking, that a 75% increment applied to value of the property was based on sufficient evidence, and that the trial court was within its discretion in crediting city expert's estimate that extraordinary costs to develop the property would total \$723,000. 122 A.D.3d 859, 997 N.Y.S.2d 447 (2014).

In *Acquest Wehrle, LLC v. Town of Amherst*, the court held that an owner whose property located partially in a designated wetland, had a cognizable property interest in a town board's request to EPA to allow the owner to tap into a federally-subsidized sewer which the town subsequently rescinded, but fact issues barred summary judgment on its substantive due process claim, and the defendants did not violate the owner's equal protection rights. 129 A.D.3d 1644, 11 N.Y.S.3d

772 (N.Y. App. Div. 2015).

**Federal:**

In *Peterson v. U.S. Dep't of Agric.*, the court granted a plaintiff's summary judgment motion that sought judicial review of a final determination of the USDA that he violated the Swampbuster provisions by deepening natural drains on farmland that he operated, because the agency's interpretation of a converted wetland conflicted with the plain statutory definition. No. 3:13-CV-34, 2014 WL 4809398, at \*4 (D.N.D. Sept. 26, 2014).

In *Bass v. Vilsack*, the court held that owners of farmland who brought an action seeking judicial review of a final administrative decision of the USDA, finding that they converted wetlands to agricultural use without authorization in violation of Food Security Act, failed to exhaust their administrative remedies with respect to the claim that USDA did not correctly perform minimal effects determinations, and that the owner's request for new wetland determination did not render owner's prior request for wetland determination invalid. 595 F. App'x 216 (4th Cir. 2014).

In *Davis Wetlands Bank, LLC v. United States*, the court held that the breach of contract claim by the wetlands mitigation bank against the United States was time barred. The bank sued seeking \$1,395,000 in damages based on Army Corps of Engineers' refusal to issue additional wetlands credits to bank for sale to third parties as compensation mitigation for unavoidable impacts to wetlands permitted under Clean Water Act (CWA), after agricultural fields restored by bank matured into forested wetlands. 119 Fed. Cl. 96 (2014).

In *Pioneer Reserve, LLC v. United States*, the court held that wetlands mitigation banking instrument signed by mitigation bank sponsor and district engineer for Corps of Engineers, creating wetlands mitigation bank on two parcels of sponsor's property and authorizing sponsor to sell mitigation credits, pursuant to Clean Water Act (CWA), constituted contract with government, rather than mere regulatory action by Corps. 119 Fed. Cl. 201 (2014).

In *United States v. Smith*, the court held that an owner discharged dredged or fill material into waters of the United States without a permit, in violation of Clean Waters Act, and that the United States was entitled to award of costs as sanction for property owner's partial denial in response to United States request for admission, and the award of \$10,000 was reasonable. 303 F.R.D. 630 (S.D. Ala. 2014).

In *United States v. Nicastro*, the court held that the defendant violated the CWA, and that the government did not need to prove that the defendant knew that filling his wetlands violated a specific provision of the Clean Water Act, only such filling was illegal and that he intended to fill the wetlands. 586 Fed. Appx. 60 (2d Cir. N.Y. 2014).

In *Precon Dev. Corp. v. Army Corps of Engineers*, the court held that 4.8 acres of wetland, located about seven miles away from other wetlands, which are linked to the Northwest River through a series of drainage ditches, was subject to the Army Corps' jurisdiction under the CWA because the Corp produced evidence that the wetlands' functions of storing water and slowing flow were significant and that the wetlands performed beneficial functions for food-chain

support and wildlife, and thus, the “significant nexus” test was satisfied. 603 F. App'x 149 (4th Cir. 2015).

In *Jones Creek Investors, LLC v. Columbia Cnty., Ga.*, the court ruled against a golf course owner and environmental organizations claiming that a railroad’s upstream activities caused significant damage to their businesses and property because a creek, its tributary, and pond formed by damming the creek were not “navigable waters” under the CWA, and it held that a county’s lax enforcement of its MS4 permit did not violate the terms of that permit. No. CV 111-174, 2015 WL 1541409 (S.D. Ga. Mar. 31, 2015).

In *St. Bernard Parish Gov't v. United States*, the court held that property owners, claiming a 5<sup>th</sup> Amendment taking by the Army Corps of Engineers in constructing, expanding, operating, and failing to maintain a navigational channel that significantly increased storm surge and caused flooding on owners' property during Hurricanes, had a protectable property interest, investment-backed expectations, and that their injury was substantial and severe. 121 Fed. Cl. 687 (2015).

In *Tri-Realty Co. v. Ursinus Coll.*, the court held that pollutants from an Impoundment that discharge into a wetland by either traveling over the edge of the Impoundment or by penetrating the Impoundment wall are not actionable discharges under the CWA because these pathways are contained entirely within the alleged wetland, and thus, cannot be a discharge into a navigable water. No. CV 11-5885, 2015 WL 5013729, at \*37 (E.D. Pa. Aug. 24, 2015).

**Significant regulations affecting our committee specialty in the current year include:**

State: NYSDEC has proposed a new 6 NYCRR Part 490, Projected Sea-level Rise, to comply with requirements of Community Risk and Resiliency Act. Summary is available at: [http://www.dec.ny.gov/docs/administration\\_pdf/part490websummary.pdf](http://www.dec.ny.gov/docs/administration_pdf/part490websummary.pdf)

Federal: On May 27, 2015 the Environmental Protection Agency (EPA) and the Army Corps of Engineers jointly announced a final rule defining the scope of waters protected under the Clean Water Act (CWA). The Clean Water Rule: Definition of "Waters of the United States" on June 29, 2015.<sup>1</sup> The rule became effective on August 28, 2015. [Click here for EPA and the Department of Army's statement on the relevance of recent court rulings.](#)

**Significant government policies affecting our committee specialty in the current year include:**

State: On August 28, 2015, the New York State Department of Environmental Conservation (NYS DEC) announced it was revising the policy memorandum which establishes the length of time freshwater wetland determinations and surveyed delineation of freshwater wetlands will be considered fixed. The new policy establishes a five (5) year time period, which is a change from the three (3) year time period established in paragraph 10 of Policy Memorandum FW 87-1. This change provides for consistent treatment of jurisdictional determinations and delineation by NYS DEC and the United States Army Corps of Engineers (US ACE). Implementation of this policy will provide greater certainty to the regulated

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<sup>1</sup> <http://www2.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf>

public during the permitting process.

Federal: On September 14, 2015, USACE proposed updates to National Wetland Plants list. 80 FR 55103.

**Are there any other issues that would be interest to the general members of the section?**

USEPA's Office of Research and Development has finalized the report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*.

<http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414>

On January 30, 2015, the President issued **Executive Order (EO) 13690**, Establishing of a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input. The EO amends existing EO 11988: Floodplain Management originally issued in 1977, to include the Federal Flood Risk Management Standard (FFRMS).

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