

NYSBA

MINUTES OF THE JANUARY 25, 2018 EXECUTIVE COMMITTEE MEETING OF THE NYSBA ENVIRONMENTAL AND ENERGY LAW SECTION

The meeting of the NYSBA Environmental and Energy Law Section Executive Committee was convened on January 25, 2018 at the Section's Annual Meeting in New York City, New York. A list of the meeting attendees is attached at the end of the Minutes.

1. Welcome

Chair Kevin Bernstein ("KB") provided a general welcome to the attendees, an overview of the agenda for the Executive Committee meeting and the Section program on Friday. Kevin noted the attendance for the off-site lunch was at 120 members and that he thought the Executive Committee meeting with lunch being provided and being set up in a round table format would be conducive to a productive meeting.

2. Approval of Minutes

The Minutes from the Section's Executive Committee meeting of October 22, 2017 had been previously distributed to the members and were reviewed, with edits to the attendance list. A motion to approve the Minutes, as amended, was made by Rosemary Nichols, and seconded by Howard Tollin and were unanimously approved.

3. Financial Report

Treasurer Howard Tollin ("HT") provided an overview of the Section's 2017 budget and noted that the Section was on budget with respect to its expenditures and he anticipated a surplus in excess of \$15,000.00 over expenses for the 2017 fiscal year. HT noted the Section currently has an \$80,000.00 surplus and the Section received over \$20,000.00 in sponsorship for the Annual Meeting. There was then a general discussion regarding the use of the Section's surplus with Lisa Bataille ("LB") explaining the Association's restrictions on the use of the surplus and stressing that the surplus must be used for programs of relevance to all members and can't be used to subsidize special interest meetings such as the Fall or Annual meeting. Terresa Bakner suggested the Section consider using the surplus for awards and scholarships which resulted in a general discussion. HT then provided an overview of the 2018 budget, attached to the Executive Committee Agenda packet, and answered questions as raised.

4. Membership Report

Rob Stout provided an overview of the Section's membership and noted that the Section surpassed 1,000 members before the end of the 2017 calendar year. He noted that the challenge now is to retain and increase those membership numbers. The NYSBA President's challenge is for the Section to have 1,058 members by December 31, 2018. Various individuals noted there were opportunities for growth and there was a general discussion regarding strategies for membership initiatives. It was noted the Section overlaps with the municipal, real estate and young lawyers section and there should be an effort in 2018 to continue outreach to those members as well as reaching out to law schools. There was a general discussion that other professional organizations are recognizing membership demographics are trending older and there is a need to attract younger professionals and outreach should start with students, which may include law firms hosting receptions. There exist opportunities to expand student membership.

5. House of Delegates Report

Linda Shaw provided an overview of attendance at the House of Delegates meeting noting the last meeting was held prior to the November election and the focus was on the Constitutional Convention. It was noted there is one House of Delegates member per 1,000 members of a Section and that as Linda had been elected to be the Section's Secretary position starting June 1, 2018, the Section would need to have a new representative to the House of Delegates. Any interested individuals should contact Marla. Linda provided an overview of issues discussed at the House of Delegates Section Caucus where leadership from the Association's Sections discussed issues of common concerns.

6. New York Environmental Lawyer Publication

Miriam Villani indicated work is nearing completion on the February issue with its submission deadline of February 15th. Submission deadlines for the balance of the year are June 1st, October 1st and December 31st and anyone with an interest in submitting an article should do so with those deadlines in mind. There was then a general discussion regarding the Section essay contest with submission due by June 1, 2018 and a list of the law school liaisons discussed at the October 22nd meeting is attached to these Minutes as well as a copy of the essay flyer, as Exhibit A.

7. 2018 Programs

John Parker provided an overview of the legislative forum indicating he was looking at dates in May with a focus on May 23rd. There was a general discussion of whether this would be suitable for a CLE course, but it was noted that as there was a requirement that the speakers submit materials and therefore this is not the type of presentation which is appropriate for CLE credit. The Committee then discussed the oil spill symposium and the committee is

still considering dates and pondering if this can be a CLE course. Jim Rigano provided an update with respect to the Environmental Overview CLE which is being offered at four locations (Buffalo, NYC, Long Island, Albany and webcast) on various dates in April 2018. A copy of the program flyer was included in the agenda packet. Anyone interested in speaking at the program should contact Jim. Larry Schnapf indicated there is a potential for Brownfields CLE in the Fall and there was a general discussion regarding the Environmental Insurance Section holding a seminar and discussion of a Corporate Governance and Environmental Compliance program.

Marla then provided an overview of the Fall 2018 program to be held at Mount Tremper, located near Woodstock, on October 19 through October 21, including a discussion of potential topics.

8. Future of Federal Environmental Law Task Force

Dave Freeman provided an overview of the Task Force activities over the past year and indicated that the Co-Chairs of the Task Force, himself, Gail Port and Kevin Healy, convene a conference call once a month and there are approximately 20 attendees. Dave provided an overview of the Task Force activities over the past year as follows:

- 1) Letter to the Congressional Delegation urging the Administration to maintain funding for important environmental programs.
- 2) The NYSBA Bar President's letter to President Trump drafted by the Task Force and approved by the Executive Committee.
- 3) Task Force comments on the rescission of the CPP Act.
- 4) Members of the Task Force testified at the CPP Hearing.
- 5) The Task Force received a call from Congressman Tonko requesting questions for the Congressman to ask of Secretary Pruitt.

It was noted that Lisa Bataille and Ron Kennedy of Bar Association staff are very helpful in assisting the Task Force in navigating the Association's policies on submitting comments on pending and proposed legislation. Gail Port noted the Task Force has received feedback that its input is helpful and the Task Force will continue its efforts in 2018.

9. Social Media

Meaghan Colligan provided an overview of the presentation to be provided at the end of Friday's program to encourage Section members to actively participate in the Section's social media accounts. The Twitter account was activated in August and there are four volunteers who monitor the account and ensure there are active postings. Meaghan encouraged members of the Committee to follow the Section's Twitter handle (@nysbaeels) and tweet. Meaghan noted that in addition to members posting on the Section's Twitter account the Social Media Committee is retweeting articles so as to promote members, working on proposals to tweak the website and working with staff to move old blogs to the NYSBA's community page. It was also suggested to upload committee reports to the blog. Meaghan also requested volunteers for members of the Social Media Task Force.

10. Minority Fellowship

It was noted the first fellowship was awarded in 1992 and the question was raised "where are they now?" A list was prepared and attached to the agenda packet. It was suggested the list be posted on the Section's website. It was also noted that Michael Gerard forwarded the list to the Westchester Foundation on December 6, 2017 seeking funding of no less than \$10,000.00 a year to assist with financing minority fellowships and is awaiting a response.

11. Committee Manual Revisions

Ginny Robbins provided an overview of the edits to the Committee Manual and there was a suggested edit by Nicholas Ward-Willis that a new Section 10 be added to page 5 to read as follows:

In accordance with the request of the Chair of the Social Media Committee, provide an entry on the Section's blog no less than once a year and actively participate on the Section's Twitter account and other social media.

Walter Mugdan seconded the edit and all approved. There was then a motion by Walter Mugdan and seconded by Larry Schnapf to approve the Committee Manual, as edited, which was unanimously approved.

12. Attorney General's Report

Kevin explained the Section has been having discussions as to how to get more involved with the various regulatory agencies and it was agreed it was a benefit to the membership to receive reports from the agencies. To that end, AAG Andrew Gershon of the Environmental Protection Bureau, agreed to provide an update. Andrew provided a detailed and informative overview of the AG's Environmental Protection Bureau, including staffing, the types of matters being handled with specific citation to particular investigations, administrative proceedings and cases of interest. After his presentation and receiving

questions, it was agreed that Mariam would work with Andy to publish the AG's report in the *New York Environmental Lawyer* publication.

13. New Business

There was then a general discussion of miscellaneous matters including Larry Schnapf's suggestion the Section consider providing a new book on environmental law similar to what other Sections have done. Larry volunteered to be the Editor and solicited interest for chapter authors.

There being no further business, a motion to adjourn was made by Rosemary Nichols and seconded by Ginny Nicholas with all in favor.

ATTENDEES

Neil J. Alexander
Susan E. Amron
Teresa M. Bakner
Lisa J. Bataille
Kevin Bernstein
Michael S. Bogin
Meaghan A. Colligan
David J. Freeman
John L. Greenthal
Andrew J. Gershon
Ragna Henrichs
Carl R. Howard
Robert J. Kafin
Amy K. Kendall
John P. Kirkpatrick
Alan J. Knauf
Daniel Mark Krainin
Jan S. Kublick
Eileen D. Millett
Laura L. Mona
Donna Mussio
Rosemary Nichols
Telisport W. Putsavage
Virginia C. Robbins
Steven C. Russo
Daniel A. Ruzow
Joel Sachs
David S. Sampson
Lawrence P. Schnapf
MacKenzie Spring Schoonmaker
Michele Schroeder
Adam J. Schultz
Linda R. Shaw
Keith G. Silliman
Adam Michael Stolorow
Robert Alan Stout, Jr.
Howard M. Tollin
Melissa M. Valle
Miriam E. Villani
Cheryl P. Vollweiler
Nicholas M. Ward-Willis
Marla E. Wieder

EXHIBIT A

EXCERPT FROM OCTOBER 22, 2017 EXECUTIVE COMMITTEE MINUTES:

4. Section Scholarship

There was an extended discussion regarding how to increase outreach to law school students to encourage them to participate in the Section's Annual Essay Contest. Miriam Villani provided an overview of past outreach efforts and noted recruiting students would be more successful if there were individual liaisons to the law schools to promote the essay. After further discussion, it was agreed that the following individuals would be liaisons to the law schools to promote the students to participate in the essay contest: 1) NYU – Michael Bogin; 2) Pace – MacKenzie Shoonmaker; 3) St. John's – Miriam Villani; 4) Fordham – Eric; 5) Albany – Rob Stout; 6) Hofstra – Frank Piccinni and Howard Tollin; 7) University of Buffalo – Amy Kendall; 8) Syracuse – Ginnie Robbins; and 9) Brooklyn Law School – Nicholas Ward-Willis. It was agreed that Nick and Miriam will work in early 2018 to work with liaisons in promoting the essay contest.



2018 Professor William R. Ginsberg Memorial Essay Contest

The Professor William R. Ginsberg Memorial Essay Contest is an annual competition designed to challenge law students to analyze the environmental issues confronting us today.

Topic:

Any topic in environmental law.

Eligibility:

Contest open to all JD and LLM candidate students enrolled in a New York State law school. Essays may have been submitted for course credit or for law reviews, but not as part of paid employment.

Length:

Maximum length, 35 double-spaced pages (including footnotes, which may be single-spaced).

Format:

Each entrant **MUST** submit a hard copy **AND** an electronic version in Microsoft Word.

Judging:

Criteria for judging entries will be: organization, practicality, originality, quality of research, clarity of style. Entries will be judged by environmental law professors and other distinguished members of the Environmental and Energy Law Section from throughout the State.

Awards:

The first place winner will receive a \$1,000 prize, the second place winner will receive a \$500 prize, and third place will receive \$250. All winners will receive certificates. In addition, the 1st place essay will be published by the New York State Bar Association, and the 2nd and 3rd place essays will be considered for publication. All three winners will receive an invitation to the Fall 2018 conference of the Environmental and Energy Law Section.

To Enter:

Send hard copy to New York State Bar Association, One Elk Street, Albany, New York 12207, and email your entry to kplog@nysba.org. Include with your entry a cover letter stating your name, mailing addresses (both school and permanent), telephone number, email address, name of school, and year of graduation. This letter should also certify that the essay was not written as part of paid work. Please make sure your name and student information do not appear on the essay. No more than one entry per student per year is allowed.

Deadline:

June 1, 2018 (Winners will be announced in early September 2018.)

For Further Information:

Contact your environmental law professor or Miriam E. Villani, Esq.
Sahn Ward Coschignano, PLLC
333 Earle Ovington Blvd., Suite 601
Uniondale, New York 11553
(516-228-1300)



EXHIBIT B
COMMITTEE REPORTS

Corporate Counsel Committee

Petroleum Spills Committee

Environmental Insurance Committee

Hazardous Waste/Site Remediation Committee

Toxic Tort Committee

Legislation Committee

2017 Environmental Energy Law Section Committee Year-End Report

Committee Name: Corporate Counsel

Committee Co-chairs: George A. Rusk; Michael J. Hecker

Date of Report: December 29, 2017

Committee Activities- Please summarize activities completed by the Committee during 2017.

Planning activities/discussions to revitalize dormant committee, including discussions with L. Schnapf (prior to his leaving office as Chair); and, discussions with representatives from the Corporate Counsel Section on a half day CLE program to be co-sponsored by the two sections, including Jeffrey Lanier (former chair) and Jana Behe (then-current chair). Ms. Behe unexpectedly passed away at the end of the summer of 2017, and no formal discussions have been held since. We expect to reengage after the annual meetings with the in-coming chair for a potential 2018 program.

Judicial or Administrative Decisions- Please summarize significant decisions issued in 2017 that involve the jurisdiction of the Committee.

- (1) Ongoing PFOA (perfluorooctanoic acid) administrative and enforcement matters associated with Hoosick Falls properties that involve certain Potentially Responsible Parties (“PRPs”) (e.g. DuPont, Honeywell, etc), the United States Environmental Protection Agency (“USEPA”) and the New York State Department of Environmental Conservation (“NYSDEC”). Recent actions have been taken by the NYSDEC and NYSDOH associated with the enforcement, and USEPA listed the site located at 14 McCaffrey Street on the National Priorities List;
- (2) The restoration settlement between the United States Department of Justice (“US DOJ”), the Federal government, Onondaga County, and Honeywell International, regarding the Onondaga Lake cleanup;
- (3) The October 2017 Exxon Mobil Corporation/ExxonMobil Oil Corporation Clean Air Act settlement with the US DOJ and the Louisiana Department of Environmental Quality that resolved allegations of failing to properly operate and monitor industrial flares at several petrochemical facilities; and,
- (4) In a pending lawsuit filed by 16 states against the USEPA, the agency agreed in August 2017 to drop its decision to delay Obama administration-era regulations on ozone.

Legislation- Please summarize significant state or federal legislation enacted in 2017 that involve the jurisdiction of the Committee:

(1) The Trump Administration's use of the Congressional Review Act to repeal certain pieces of legislation enacted at the end of the Obama administration's tenure, including revoking the Stream Protection Rule that eliminated stream protections from mining waste coal, and requiring overseas oil producers to disclose payments to foreign governments, amongst others.

Regulations- Please summarize significant state or federal regulations proposed or adopted in 2017 that involve the jurisdiction of the Committee:

(1) New York State's adoption of the amendments to 6 NYCRR Part 597 to include certain PFOA and perfluorooctane sulfonic acid ("PFOS")-based materials as being categorized as hazardous substances, which came into effect as of March 3, 2017;

(2) The adoption of the revisions to the 6 NYCRR Part 360 regulations, which came into effect as of November 4, 2017;

(3) The U.S. EPA's October 10, 2017 Notice of Proposed Rulemaking ("NPRM") proposing to repeal the Clean Power Plan;

(4) The Trump Administration's overturning of 29 rules, including, but not limited to, rules pertaining to flood building standards, freezes on new coal leases on public lands, the banning of a pesticide, offshore drilling bans in the Atlantic and Arctic Oceans, and, royalty regulations for oil, gas, and coal; and,

(5) The U.S. EPA's publication of the final rules for prioritization and risk evaluation under the Toxic Substances Control Act ("TSCA").

Guidance Documents- Please summarize significant state or federal guidance documents or policies issued in 2017 that involve the jurisdiction of the Committee.

(1) The Trump Administration's decision to remove the United States of America from the Paris Climate Agreement. Formal action cannot be taken to withdraw until November 2019;

(2) The NYSDEC revised guidance document DER-32 (Brownfield Cleanup Program Applications and Grants) as of July 28, 2017;

(3) The issuance of the Superfund Task Force recommendation by the USEPA on July 25, 2017;

(3) The USEPA's publication of updated guidance on its nanoscale materials information gathering rule in August 2017; and,

(4) The USEPA's publication of guidance in June 2017 to assist interested persons in developing and submitting draft risk evaluations under TSCA.

Please return completed report to: BernstK@bsk.com

Hi Lisa and Kevin,

Jon Brooks and I (co-chairs of the Environmental Transactions Committee) weren't sure if we needed to provide you with a Committee report (see highlighted language below). The only item we have to report is that the Environmental Law Section (spearheaded by the Environmental Transactions Committee) and the Real Property Law Section co-hosted a half-day program on Halloween titled "The Art of the (Brownfields) Deal."

Regards,

Donna

Donna Mussio

Donna.Mussio@friedfrank.com | Tel: +1 212 859 8147

Fried, Frank, Harris, Shriver & Jacobson LLP

One New York Plaza, New York, NY 10004

friedfrank.com

2017 Environmental Law Section Committee Year-End Report

Committee Name: *Petroleum Spills Committee*

Committee Co-chairs: *Douglas H. Zamelis, Gary S. Bowitch, Melissa M. Valle*

Date of Report: *1/3/2018*

Committee Activities- Please summarize activities completed by the Committee during 2017.

8th Annual Oil Symposium, Wednesday June 7, 2017

Judicial or Administrative Decisions- Please summarize significant decisions issued in 2017 that involve the jurisdiction of the Committee.

State v. Ronnen, Index No. L-00055-14 (Sup. Ct. Albany Co., Jan. 23, 2017 and Mar. 30, 2017, Hon. Michael H. Melkonian, J.). In a cost recovery action for two spills at a former major oil storage facility, the court held that the theory of unjust enrichment by double recovery was inapplicable even though the State received \$223,312 from federal ARRA LUST Stimulus Funding for the cleanup. The court did not address the Defendant's claim that Navigation Law §193 (providing that "no person," defined by Navigation Law §172(14) to include the State, "who receives compensation for damages or cleanup and removal costs pursuant to any other state or federal law shall be permitted to receive compensation for the same damages or cleanup and removal costs under this article") bars recovery by the State.

In a second decision, Judge Melkonian held that the State failed to meet its burden in seeking a protective order for two Investigative Summary Reports ("IRSs") regarding the spills, and a Transmittal Memorandum which transmitted one of the IRSs between employees of NYSDEC. The court rejected the State's argument that the attorney-client privilege applied to any of the documents because the contents were not confidential communications in the context of legal advice, and specifically did not apply to the IRSs because they were not communications with the Attorney General. The court found these documents were simply factual.

Zincke v. P. Energy Corp., 146 A.D.3d 923, 45 N.Y.S.3d 510 (2d Dep't 2017). The Second Department affirmed an order that found that a home heating oil provider failed to raise a triable issue of fact on summary judgment, and thus, was liable under the Oil Spill Act when its employee overfilled a homeowner's basement heating oil tank, causing oil to discharge out of a valve at the bottom of one of the tanks onto the cellar floor, which contained several floor drains that emptied directly into the soil. The court held that it was insufficient for the Defendant to "merely demonstrate that the oil spill . . . did not actually reach the surface or groundwater," rather "[i]t was required to also demonstrate that the oil spill could not have done so."

Zahav Enterprises, Inc. v. Martens, 2017 N.Y. Slip Op. 03522, 1, 2017 WL 1657221 (2d Dep't May 3, 2017). The Second Department affirmed an order denying a hybrid Article 78 challenge seeking to set aside a stipulation by which the Petitioner agreed to remediate, rejecting allegation of bad faith. Further, the Petitioner illegally discharged petroleum, failed to contain

petroleum, and failed to comply with the stipulation, in violation of the Oil Spill Act, so the \$60,000 penalty imposed by the Commissioner (reduced from \$112,500 sought by NYSDEC) was not excessive, and was properly assessed even if the Petitioner was an “innocent owner.”

Legislation- Please summarize significant state or federal legislation enacted in 2017 that involve the jurisdiction of the Committee:

N/A

Regulations- Please summarize significant state or federal regulations proposed or adopted in 2017 that involve the jurisdiction of the Committee.

N/A

Guidance Documents- Please summarize significant state or federal guidance documents or policies issued in 2017 that involve the jurisdiction of the Committee.

N/A

2017 Environmental Law Section Committee Report

Committee Name: Environmental Insurance

Committee Co-chairs: Gerard P. Cavaluzzi and Michele Schroeder

Date of Report: December 30, 2017

The Committee is now preparing to offer a half day CLE program in the Fall of 2018.

The Committee will again sponsor the highly regarded CLE program entitled “Emerging Issues in Environmental Insurance”. The program, which will be held in New York City and by webinar. The topics will include an overview of the market for environmental insurance products and trends from the perspectives of insurers, policy holders and brokers, and practical tips for utilizing environmental insurance products in transactions. The program has been well-attended in the past, both online and in person. The program continues the series of programs hosted by our Committee every two years.

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

Legislation aimed at addressing recent legionella outbreaks contemplates mandatory inspections and monitoring of cooling towers. Additionally, coverage may be limited to new conditions with sub-limits of insurance, and subject to maintenance and monitoring plans associated with water delivery and filtration systems and pathways i.e.: piping infrastructure, HVAC systems, fountains, pool and spa facilities, sprinkler systems, etc.

Contingent business interruption coverage demand associated with pollution releases at locations in proximity to the insured location that result in loss at the insured location. Events such as severe weather conditions/hurricanes, floods, and wildfires resulting in pollution releases having consequential interruption in normal and customary business operations at separate locations due to stigma or denial of access have led to this broker request for coverage. Markets have responded with varied terms and conditions.

Owned property exclusion prohibits all property damage on, at or under an insured location except for damage incurred as a result of remediating a pollution condition, which is commonly referred to as restoration costs or replacement costs. Demand grew for broader restoration costs coverage in an effort to achieve expansion of property damage coverage in the form of replacement costs vs. actual cash value of the property and/or broader coverage not directly caused by a remediation but casually connected to the pollution release. Markets have responded with varied terms and conditions.

Insurance coverage demand conditioned on the failure of an indemnity or failure of an assumption of the responsibility for a cleanup at a location that is the subject of a real estate transaction. The demand for this coverage is from the party receiving the indemnity benefit as a

backstop to non-performance by the party giving the benefit. Select markets have responded with manuscript policy language and varied terms and conditions.

Demand for Remediation Stop Loss coverage continues and in combination with discovery of new pollution conditions. Select markets have refined products with varied terms and conditions and underwriting restrictions.

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

Recently, the New York State Department of Health (NYSDOH) lowered the indoor air guideline for trichloroethene (TCE) from 5 micrometers per cubic meter ($\mu\text{m}/\text{m}^3$) to 2 $\mu\text{m}/\text{m}^3$. TCE is a man-made chemical which is used as a solvent to remove grease in adhesives, in paint stripper, and in manufacturing. The main source of exposure to TCE is through indoor air.

The NYSDOH set this guideline at a concentration that is significantly below levels that are known to have direct negative impacts on human health. When TCE levels exceed this guideline, actions should be taken to reduce exposure. The guideline is used to determine how urgently actions are needed to reduce exposure. As with any chemical found in indoor air, the NYSDOH, along with CA RICH, recommend taking steps to reduce exposure whenever levels are detected above background concentrations (typically 1 $\mu\text{m}/\text{m}^3$ for TCE).

Significant court decisions affecting our committee specialty in the current year includes:

1. The Third Circuit U.S. Court of Appeals on December 14, 2017 affirmed a New Jersey federal judge's ruling in favor of Indian Harbor Insurance Company in an environmental contamination dispute after determining that Indian Harbor's failure to exclude coverage to certain insured's involved in the contamination dispute clearly was a mistake or "scrivener's error". (Indian Harbor Insurance Co. v. NL Environmental Management Services Inc. et al., Nos. 16-3262, 16-3293, 3rd Cir., 2017 U.S. App. LEXIS 25277).
2. The United States District Court for the District of Minnesota on September 12, 2017 decided a motion for summary judgment brought by Illinois Union Insurance Company interpreting the extent of recovery of losses resulting from an outbreak of highly pathogenic avian influenza (HPAI or "bird flu"). The court interpreted the term "replacement costs" in the pollution legal liability policies definition of remediation costs to include certain costs but not others. (Rembrandt Enters. V. Ill. Union Ins. Co. Civ. No. 15-2913 (RHK/HB), 2017 U.S. Dist. LEXIS 147030).
3. The United States District Court for the Northern District of California on March 29, 2017 granted summary judgment to American Guarantee and Liability Insurance Company, Steadfast Insurance Company and Zurich American Insurance Company deciding that the deductible in an environmental impairment liability insurance policy was applicable to the costs of defense. (American Guarantee and Liability Insurance Company, et al., v. Technichem, Inc. Case No. 15-cv-03611-VC, 2017 U.S. Dist. LEXIS 47103).

4. The Commonwealth of Massachusetts, Suffolk, Superior Court on September 7, 2017 denied summary judgment to Steadfast Insurance Company on the basis that material facts existed as to whether a Department of Environmental Protection claim arose from a pollution event existing prior to the policy period. Steadfast argued that coverage applied only for a “new pollution event” and there were no material facts to indicate that pollution event was a “new pollution event”. (Casella Waste Systems, Inc., et al. v. Steadfast Insurance Company, Commonwealth of Massachusetts, Suffolk, ss. Superior Court Civil Action No. 2016-2521 BLS 1, Lawyers Weekly No. 09-008-17).
5. The U.S. District Court for the Western District of Missouri denied Illinois Union Insurance Company’s motion for summary judgment interpreting language associated with a Remediation Cost Cap policy associated with a remediation plan and coverage for new pollution conditions provided by endorsement. The Court rejected Ill. Unions position that costs associated with pollution conditions covered by one policy are necessarily excluded by the other coverage. (Sunflower Redevelopment LLC v. Illinois Union Insurance Co., No. 15-577, W. D. Mo., 2017 U.S. Dist. LEXIS 66466.

2017 Environmental Law Section Committee Year-End Report

Committee Name: Hazardous Waste/Site Remediation

Committee Co-chairs: David J. Freeman, Amy L. Reichhart

Date of Report: January 12, 2017

Committee Activities- Please summarize activities completed by the Committee during 2016.

- We reviewed DEC's proposed revisions to Part 375 regulations, regarding the State's hazardous waste programs, and DEC's proposed new DER-32, reflecting 2015 legislative changes to the State's Brownfield Cleanup Program (BCP).
- Re DER-32, we elected not to recommend that the Section comment because the language of the guidance tracks the statutory changes very closely and is therefore relatively non-controversial.
- Re the Part 375 regulations, members of the Committee held a conference call with representatives of DEC last spring to comment informally on a preliminary draft of the revisions that DEC had provided to us. DEC has apparently taken our comments under advisement, since the agency has not yet formally published its proposed revisions for public comment. When the agency does so, we expect that the Committee will likely (a) hold a meeting or conference call to discuss them; (b) present a CLE program on them, and/or (c) provide the Section with recommendations with respect to formal comments to DEC.

Judicial or Administrative Decisions- Please summarize significant decisions issued in 2016 that involve the jurisdiction of the Committee.

- None this year.

Legislation- Please summarize significant state or federal legislation enacted in 2017 that involve the jurisdiction of the Committee:

- On April 26, 2017, Governor Cuomo signed the Clean Water Infrastructure Act which included making significant changes to provisions of the state Superfund program. The relevant provisions are included in revisions to Title 13 and a new Title 12 of Article 27 of the Environmental Conservation Law.

Regulations- Please summarize significant state or federal regulations proposed or adopted in 2016 that involve the jurisdiction of the Committee.

- While not yet adopted, DEC is in the process of revising the Part 375 regulations.
- Effective March 3, 2017, DEC amended Part 597 - Hazardous Substances Identification, Release Prohibition, and Release Reporting. The amendments under this rule making finalized the (1) addition of perfluorooctanoic acid (PFOA-acid), ammonium perfluorooctanoate (PFOA-salt), perfluorooctane sulfonic acid (PFOS-acid), and perfluorooctane sulfonate (PFOS-salt) to the list of hazardous substances at 6 NYCRR Section 597.3; (2) allowance for continued use of firefighting foam that may contain PFOA-acid, PFOA-salt, PFOS-acid or PFOS-salt to fight fires (but not for training or any other purposes) on or before April 25, 2017 even if such use may result in the release of a reportable quantity (RQ), which is otherwise prohibited; and (3) correction to the list of hazardous substances by providing units for RQs.

Guidance Documents- Please summarize significant state or federal guidance documents or policies issued in 2016 that involve the jurisdiction of the Committee.

- Effective September 8, 2017, DER-32: Brownfield Cleanup Program Applications and Agreements was amended. This document provides guidance on the application process and general terms and conditions for Brownfield Cleanup Agreements (BCAs) under the BCP. It also includes guidance on the process for amending and terminating a BCA.

Bataille, Lisa

From: Cheryl Vollweiler <cvollweiler@traublieberman.com>
Sent: Thursday, January 11, 2018 5:09 PM
To: 'kbernstein@bsk.com'
Cc: Bataille, Lisa; dkrainin@bdlaw.com
Subject: NYSBA Energy & Environmental Law Section - Toxic Tort Committee Report - January 2018

Hi Kevin,

The Toxic Tort Committee ("TTC") had a good rebound in 2017, co-chairing the 2017 Toxic Tort Litigation half-day CLE program with the TICL committee when they had difficulty executing on the program. Although TICL ultimately hogged most of the credit, our committee provided all but two of the speakers for all three locations, which were well received.

Our plan for 2018 is to keep the momentum going. Co-chair Dan Krainin and I have scheduled a committee meeting at the 2018 Annual Meeting later this month and are both planning to attend all of the Section events. We also volunteer to produce another CLE program focusing on hot topics in the environmental toxic tort arena. We are still discussing our options/topics and welcome your input, but we are considering a half day program (e.g., the first 4 bullets below have a strong environmental theme focusing on what we eat, drink and breathe every day). We are, of course, open to discussion about a longer program, shorter programs (e.g., one or more 1-hour webinars), a joint program with another section/committee, presenting at a Section meeting in the Fall, or even chairing the 2019 Annual Meeting. On that note, the TTC has not chaired the annual meeting in quite awhile, but we have done so in the past and I think we are well positioned with an interesting (possibly less politically polarizing) agenda than other environmental issues right now. We are, above all, very flexible and happy to do whatever you think will best serve the section's interests.

The following are some of the topics we are considering:

- "What's In Our Water These Days?" – update on what contaminants are posing current/emerging threats to the air, water and more (it's not just MTBE and lead); federal and state action; claims and litigation
- "Toxic Tortes?" There is ongoing debate about whether our food supply is becoming toxic, with issues ranging from GMOs, irradiation, organic v. non-organic and pesticides to sugary drinks/foods, artificial sweeteners and trans fats. This presentation will explore the science, regulation, claims, litigation and forecast for the future of "toxic" food issues.
- Update on Low Level Contamination Claims – what's the risk, science and potential liability when contaminants are present but below government thresholds
- "Nano-Particles – The Next Toxic Tort?" Nanotechnology is everywhere. While we can't see, smell or taste it, and few really even think about it, the potential risks are palpable. This presentation explores both the positive and negative implications of nanotechnology on health, safety and the environment, and a forecast for future regulation, claims and litigation.
- TSCA Reform – In light of the Lautenberg Chemical Safety for the 21st Century Act, how are the changes working; what are the roadblocks; next steps; EPA and NIOSH views; NYS experience/challenges; impact on regulations, workplace, workers and legal enforcement?
- Talc – Scientific and legal debate in light of the recent Johnson & Johnson verdicts (the hits just keep coming)

Dan and I look forward to working with you and the Board this year and to putting a TTC event on the calendar in the near future.

Best,
Cheryl

Cheryl P. Vollweiler | Partner

Traub Lieberman Straus & Shrewsberry LLP

7 Skyline Drive | Hawthorne, NY 10532

(914) 586-7039 Direct

(917) 455-1180 Mobile

(914) 347-2600 Main

(914) 347-8898 Fax

cvollweiler@traublieberman.com | vCard | www.traublieberman.com

New York | New Jersey | Illinois | Florida | California | Connecticut | London (Liaison Office)



**TRAUB LIEBERMAN
STRAUS & SHREWSBERRY LLP**

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2017 Environmental Law Section Committee Year-End Report

Committee Name: Legislation

Committee Co-chairs: John Parker and Jill Kasow

Date of Report: 1/22/18

Committee Activities- Please summarize activities completed by the Committee during 2017.

In May, we held our annual legislative forum in Albany, with a panel discussion titled "Rising to the Top: Clean Water Infrastructure Act of 2017." The speakers of the panel were:

1. Elizabeth Moran, Water and Natural Resources Associate, Env'tl Advocates of NY
2. Dan Shapley, Water Quality Program Director at Riverkeeper
3. Julie Tighe, Assistant Commissioner, Intergovernmental and Legislative Affairs, NYS Department of Environmental Conservation
4. Darren Suarez, Director of Government Affairs at NYS Business Council
5. Mary Beth Bianconi, Senior Project Manager at Delaware Engineering

The event also featured a legislative update by Senator Thomas O'Mara, Chair of the Environmental Conservation Committee in the NYS Senate, and Keynote Speaker Judith Enck, Visiting Scholar at Elisabeth Haub School of Law at Pace University and former EPA Region 2 Administrator.

There were 96 attendees at the annual legislative forum.

Judicial or Administrative Decisions- Please summarize significant decisions issued in 2017 that involve the jurisdiction of the Committee.

Legislation- Please summarize significant state or federal legislation enacted in 2017 that involve the jurisdiction of the Committee:

The Clean Water Infrastructure Act was passed in the New York State budget in 2017. At \$2.5B, it represents the most significant funding in water infrastructure in the state since the 1950s. In the previous two years, the Legislation Committee has held annual panels that focused on the challenges and needs for clean water. These annual Legislative Forums have been a part of the public dialogue on critical water issues as they brought together members of the section and key decision makers. The Section's role in contributing to this important public dialogue represents a significant success in helping shape the state law.

Regulations- Please summarize significant state or federal regulations proposed or adopted in 2017 that involve the jurisdiction of the Committee.

Guidance Documents- Please summarize significant state or federal guidance documents or policies issued in 2017 that involve the jurisdiction of the Committee.