Episode Title: New and Old -- A Conversation with the Legendary Robert M. Sussman

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Lynn L. Bergeson (LLB): Hello, and welcome to All Things Chemical, a podcast produced by Bergeson & Campbell, P.C. (B&C®) a Washington, D.C., law firm focusing on chemical law, business, and litigation matters. I'm Lynn Bergeson.

This week, I sat down with the truly legendary Robert M. Sussman of Sussman and Associates to discuss Bob's extraordinary career engaging in all things TSCA [the Toxic Substances Control Act], new and old. Bob was a prominent private practice attorney and frequent senior EPA [U.S. Environmental Protection Agency] official before TSCA was amended in 2016. Since Lautenberg [the Frank R. Lautenberg Chemical Safety for the 21st Century Act], Bob has been extraordinarily successful, putting his TSCA know-how and finely honed litigation skills to effective use for a wide range of public interest clients. During our conversation, we discuss Bob's amazing career, his litigation successes, his views on new TSCA, and his hopes for the future of domestic chemical management. Now, here is my conversation with Bob Sussman.

Bob, I have been so looking forward to having you into the studio today. I am one of your biggest fans, and I'm just really, really glad you're here.

Robert M. Sussman (RMS): It's a pleasure to be here, Lynn, and we've had a great time working together on ELI [Environmental Law Institute] and other projects over the years, so I value this relationship.

LLB: Well, wonderful to hear. Bob, I'm going to give a very brief summary of your absolutely extraordinary career. I'm doing that not because *you* don't know what you've been up to the last couple of years, but rather I want our listeners to really understand the depth and breadth of your extraordinary career, so I'm going to recap it.

You graduated from Yale, where you served as Editor of the *Yale Law Journal*. You clerked for the Third Circuit Court of Appeals for Judge Stapleton. You began Latham & Watkins' storied environmental department after leaving a partnership at Covington & Burling. President Clinton appointed you as Deputy Administrator of EPA in 1993, and as Deputy

Administrator and functionally serving as its Chief Operating Officer, you led EPA's Superfund reauthorization effort, you co-chaired a White House Interagency Committee on Risk Policy, and you led the Administration's climate change and global warming initiatives in addition to, I'm sure, a zillion other tasks.

You then returned to private practice and chaired Latham & Watkins' environmental practice from 1996 to 2006 and retired from the firm in that year. In 2007, you were a Senior Fellow at the Center for American Progress. In 2008, you co-chaired the EPA transition team following the election of Barack Obama as President. You then served as Senior Counsel to EPA Administrator Lisa Jackson, where you functioned as Principal Policy Adviser. You left EPA in 2013. President Obama then appointed you to represent the federal government in the Interstate Commission on the Potomac River Basin in 2014. And you currently serve as that Commission's Chair. You have served on the Board of Environmental Studies and Toxicology and the Board of Chemical Sciences and Technology of the National Academies of Sciences, Engineering, and Medicine (NASEM) and on the Board of Directors of the Chesapeake Legal Alliance. You have served on the Board of the Environmental Law Institute, and I suspect lots of other boards that I'm not going to note here. You have been an Adjunct Professor at the Georgetown Law Center and visiting instructor at Yale Law School and the Yale School of Forestry in the Yale School of the Environment. And somewhere in there, in that extraordinary litany of just amazing responsibilities, you formed Sussman and Associates, a private interest consulting firm where you work with a wide range of advocates, including the Asbestos Disease Awareness Organization, among many other groups. Given that truly, truly spectacular career, what are you most proud of in terms of your environmental accomplishments?

RMS: Lynn, everything that I've done has presented unique challenges and offered unique rewards. I think this is a case where looking at my career, the whole is more than the sum of the parts, because everything I've done is connected to everything else. All my different activities have, I think, given me a wealth of insight and a variety of perspectives, which have made me better as a lawyer, better as a government official, better as a law school professor. So all of it is important, but what I would say is probably the most fulfilling was serving at EPA in two different administrations, which for me really broadened my horizons and challenged me to use my expertise as a manager and as a policymaker and not narrowly as a lawyer.

When you are at EPA and you have some influence over what the Agency does, you appreciate the responsibility that EPA as an agency has to the public and the significance of EPA and the history of environmental protection in this country. You also come to appreciate that making many decisions is difficult and demands more than is demanded of you when you were an advocate and developing positions for a client that are intended to influence the process but don't carry any decision-making weight. When you are a decision maker, there's a whole new set of pressures and considerations that are brought to bear. And of course, you appreciate that the decisions that you're involved in have very significant consequences, consequences for the economy, consequences for companies, consequences for public health. I think weighing those considerations requires a great deal. I feel that EPA as an agency hasn't always gotten it right. EPA has had its ups and downs, but I think environmental protection in this country and environmental quality would not be where they are today without EPA. EPA has had an important and positive impact on the country, even though many of EPA's decisions have not been unanimously supported. They have disappointed stakeholders. They have at times aroused the ire of people in Congress. But I think when you take the long view of EPA over many years, you can't but acknowledge that EPA has been an important and positive force in American life.

LLB: That's so true, Bob. While you have a different perspective, having worked, as you noted, in two separate presidential administrations, I've had the pleasure of working with EPA for many years also. Although I don't always agree with some of the positions taken, I have nothing but the utmost respect for the camaraderie, the commitment, just the passion that the EPA people that I've had the pleasure of knowing over the years have for their job, their respect for the environment, and their many contributions to making the world a better place. I really share your views there.

Let me pivot for a minute to TSCA. TSCA has just been a very large part of your law practice. But I know when you were at Latham, and Covington, and in other capacities, you have an amazing expansive environmental legal practice behind you. But the extent you've worked under old TSCA and litigated many cases, both under the old one and the new one, you are without question, one of the country's -- if not the world's -- leading authorities on TSCA.

Now that we're seven years, almost, into the Frank R. Lautenberg Chemical Safety for the 21st Century Act, what would you have done differently, if anything, in amending TSCA, given your perch? You've seen it from the perspective of a law professor, a practitioner and someone who knew intimately old TSCA. What about new TSCA? Anything you would have switched around had you been given the opportunity?

RMS: New TSCA is a work in progress. I think at the time it was passed, the stakeholders and many of the authors of the new law and Congress didn't know exactly what to expect. I think that, yes, TSCA was bipartisan, and that's critically important because it would not have been passed without bipartisan support. But I think there were fundamentally different visions that industry and environmental groups had, and Republicans and Democrats had, on what the new law would accomplish. What we're seeing seven years into the implementation of the law is that the seeming consensus that we had back in 2016 has dissolved, and there is a lot of rancor, a lot of conflict over how the law should be implemented and interpreted. I think that all of the parties from their different perspectives would say that they are not happy with the current state of the TSCA program.

What might have been done differently? That's hard to say, except I would note that they built into the new law a set of deadlines and benchmarks that EPA was required to meet. Those are very important to assure that EPA makes the progress on chemical assessment and chemical regulation that, I would say, that the public and certainly the environmental groups wanted. But getting the job done has proven more difficult than people understood at the time, more resource intensive, more demanding of the Agency heads and more controversial. Maybe if that had been better appreciated at the time the law was enacted, Congress and stakeholders might have gone in a different direction in an effort to make sure that the law really worked and did what it was intended to do.

LLB: Are there specific measures, Bob, that you would have recommended in the moment? Because I know the law did not allow for a transition period. To the extent that the administration changed in 2017 from the Obama Administration, some would argue, I think with pretty good reason, that the law took on a very different kind of focus, given that the entities who were tasked with implementing it in 2017. Aside from the change in administration, were there opportunities shortly after on June 22, 2016, when President Obama signed Lautenberg, that we just didn't avail ourselves of? Or was it just baked into the law that, well, we're off to the races? We're starting to implement this, and good luck to everybody doing so.

RMS: I think to a large extent, we were off to the races because, as you will remember, EPA almost immediately had to designate ten chemicals for risk evaluations. And once that was done, EPA was on a three, three-and-a-half-year conveyer belt to get those evaluations done. I think that the Trump people may not have done the job the way some stakeholders would like, but I think they produced risk evaluations that in many respects were significant accomplishments. I know that the environmental community understandably thinks that the scope of those risk evaluations, and some of the ways in which they were conducted, were not adequately protective of public health, and I agree with that. But the amazing thing about those risk evaluations is that they did determine that every one of nine chemicals made determinations of unreasonable risk and triggered risk management.

I'm not sure people understood in the abstract that that's where the law might go, but I think they were not prepared for the concrete outcomes and the across-the-board determinations of unreasonable risk that EPA made, and then they -- the ensuing risk management rulemakings. I would say, Lynn, industry certainly understood in the abstract that not every chemical was going to be found not to present an unreasonable risk, and not every chemical would escape risk management and regulation.

But it's one thing to understand that in the abstract; it's another thing to come to terms with the reality of the risks that these chemicals pose and the need to manage and reduce those risks under TSCA. Again, I'm not sure that we might have done anything different, other than be more honest and straightforward, all of us, about the way the law as written might play out and the consequences that might have for everybody affected.

LLB: As you note, there has been a fair amount of, to use your word, rancor among TSCA stakeholders, the chemical community, [non-governmental organizations] (NGO), labor unions. That tone some might regard as a measure of success because no one's happy. I don't share that view, and I wish there were more of a collegial tone to our discussions about TSCA and more focus on getting the job done and just getting to the next best place. In your view, Bob, are there certain aspects of the Lautenberg amendments, phrases and new terms that are replete throughout the law, that could have been or should have been clarified better or more explicitly to avoid some of the opportunities for ambiguity and hence disagreement on how the law should be implemented based on what Congress intended? Is that a fair view? Or is that -- look at every legislative initiative -- can be interpreted differently, and yet that's our job as advocates?

RMS: I think it's a bit of an idealistic view in the sense that the legislation was a compromise. Industry pored over every word and phrase, environmental groups pored over every word and phrase. I think everybody was aware of some of the latent ambiguities, but they also understood that if an effort had been made to nail down all of those loose ends and ambiguities, it would have shattered the bipartisan consensus. I think everybody was making their calculations, as stakeholders and lawyers do, that where there was ambiguity, they would be able to steer the process toward the outcomes that *they* wanted by making clever arguments about how the words on the page should have been interpreted.

That's been the case with other environmental statutes, but the consequence, as I said before, is that the seeming agreement that existed when the law was enacted in 2016 disappeared and devolved into controversy and conflict. That's not unusual among environmental laws, where the first five or six years are a battleground between different stakeholder groups about what the Agency should do to implement the law. The difficult issues often have to be settled through litigation, but I think the depressing part of that is that people who thought that EPA would hit the ground running and that, at this point in TSCA,

we would have a lot of accomplishments under our belt. They become disillusioned and angry and see the lack of progress not as sort of the nature of the process, but as a function of the lack of political will, the undue influence of one stakeholder group or another, as opposed to being part of the process of sorting out a difficult and complicated law.

LLB: The run-up to TSCA reform, back in 2016, had a fairly long lead time before that, right? TSCA -- the amendments didn't evolve in 2016. There was a long gestation period that preceded that. I recall as a member of the chemical industry just being particularly concerned with a growing number of state and local initiatives that might give rise to a lot of incoherence in the field of domestic chemical regulation. Since we're seven years out now, it does not appear, to my eye anyway, that the states have really deferred to EPA as the arbiter of environmental and chemical management. Just focusing on [per- and polyfluoroalkyl substances] PFAS, for example, states seem to be really anxious to develop their own, most protective PFAS standards. I'm not sure -- some might argue that Lautenberg hasn't really worked as intended with regard to harmonizing domestic chemical management in a way that aligns with an EPA kind of overview of it all. Are things working as intended in that regard, or is it as incoherent as it seems to me to be?

RMS: I think that the preemption provisions in Lautenberg, which industry may look to to promote the primacy of the federal program over the states, are really pretty limited, in that they are triggered by risk evaluations and risk management rules. We -- at this point in time -- we have completed risk evaluations on ten chemicals and no completed risk evaluations. The scope of preemption is actually quite limited. I don't think anybody reading the law back in 2016 had any reason to expect that the states would stop forging ahead in areas that EPA was not fully addressing, and PFAS is certainly one of those areas. There's a lot that could be done on PFAS under TSCA. But just to cite an example, there are no PFAS that have been through the risk evaluation process, none that have been through risk management. There is a void at the federal level, and the progressive states are filling that void. For example, there are bans on the use of PFAS in particular products that we're seeing in different states, but there are no product bans under TSCA. I think states that are concerned about PFAS are filling the vacuum, and that's going to continue to occur, whether they -- until the product issues, the risk management issues for PFAS are effectively addressed at the federal level.

LLB: Knowing that you are intimately aware of old TSCA that the law signed into effect in 1976, as well as the 2016 amendments, is it your view, Bob, that old TSCA was the spectacular failure that it's now thought to be? I mean, why did it fail? I have my own views, and I've read some of your writings on the topic, as well as your former partner, Bill Rawson, who is also a noted TSCA expert. I think the expectation is that new TSCA would address the systemic failures of old TSCA, but that presumes they *did* exist. Will the new law -- or not so new anymore -- the seven-year-old TSCA amendments fully address those deficits? What are your thoughts?

RMS: The biggest deficit in a long and unhappy history of old TSCA is that EPA did very, very few risk assessments, risk evaluations of commercially significant chemicals and minimal regulation of those chemicals. The biggest effort that EPA undertook, which was the asbestos rulemaking, ultimately ended up back at square one because it was overturned by the Fifth Circuit on the basis of certain requirements of old TSCA that the court said EPA had not met. I think it's very fair to look at old TSCA and say, "Gee, this is the nation's marquee chemical risk management law, but it did virtually nothing on important chemicals in commerce that were known to have adverse effects." I think that criticism is very justified. You can make the same criticism of the Section 4 testing program, which was

expected back in 1976 to be an engine for addressing data gaps on chemicals, but which in reality produced very little test data.

The key elements of the new law were tailored to address those perceived deficiencies. When I said before that people were now confronting the enormity of risk evaluations and risk management on ten commercially significant chemicals, we wouldn't be in that situation if we were still operating under old TSCA. The deadlines and minimum requirements in the new law were intended to address that. I think that's also true of the Section 4 testing program, where EPA's new authority to issue testing orders was intended to greatly accelerate the development of data.

LLB: Two follow-up thoughts on that. I would agree that new TSCA definitely addresses some of the core deficits in old TSCA. Many liken the old law to kind of a wonderful theoretical outline of how things *should* be done but provided no mandate or roadmap to actually *get* things done. With regard to Section 6, the paucity of any type of review of existing chemicals was one of the key drivers of new TSCA. And the absence of robust existing testing on either existing chemicals (or even new for that matter) was addressed through the provision to provide the Agency unilateral testing authority under Section 4. What do you say to critics of new TSCA that we're seven years in, and we don't have a single risk management rule out yet. Do you think that situation will improve? And are you surprised that we are where we are in 2023 with regard to the Section 6 program?

RMS: Yes.

LLB: And the follow-up question is what are your thoughts on EPA's implementation of the Section 4 authority? How would you assess the existing test rules that have been issued there, the cadence of those rules and their implementation?

RMS: The unfortunate reality is that we are way behind the statutory deadlines for risk evaluation and risk management. We got through the first ten chemicals with one exception, which is now being redone. But we are still working on risk management for those chemicals. We're beyond -- we will soon be beyond -- the statutory deadlines for risk management on those ten. And we have at this point in time one proposed risk management rule. We have others that are coming, hopefully in the next few months. But it is an effort that's gotten bogged down, and that's also true of the risk evaluations EPA designated, I think at the end of 2019, if I remember correctly, 20 high-priority chemicals for risk evaluations. We are near, if not beyond, the three-year deadline in the law for *completing* risk evaluations, but we don't have even *draft* risk evaluations.

That is disappointing. You just have to say that measured against the deadlines and directives in the law, we are not where we should be. That gets into the debate about why that is, Lynn. There's certainly a school of thought that EPA subscribes to, and my clients subscribe to, that EPA doesn't have the resources to get the job done. There may be other people who say, "Gee, they aren't trying hard enough, or maybe they have the resources, but they just don't work efficiently as they should." I know the chemical industry has said that EPA is inefficient and spending much more money on risk evaluations than it should. The jury is out on whether EPA can do more with what they have, but I think it's incumbent on everybody who supported the law in 2016 to find a way to meet the statutory deadlines and get the program back on track, but I'm not sure that all the stakeholders agree that that should be the objective at this point in time.

LLB: Since we're on the subject of resources, and as you know well, Dr. Freedhoff has remarked publicly on innumerable occasions that the Agency needs many more resources than it has. When you were Deputy Administrator, one of the big responsibilities in your portfolio was the EPA budget process. If you were Deputy Administrator today, would you give the Office of Pollution Prevention and Toxics more resources, even with the competing priorities that EPA must address? There are so many of them. TSCA implementation and chemical risk management is just one priority, but what would your advice be if you were Deputy Administrator today to Dr. Freedhoff?

RMS: The Administrator and the Deputy Administrator have to balance all of EPA's programs, and certainly TSCA isn't the only EPA program that has resource issues right now. Other programs are recognized by everybody to be critically important: the Superfund program, the air program, and so forth. The other thing is that because of the structure of the EPA budget and the appropriation process, the senior EPA management has limited -- not no, but limited -- ability to reallocate resources across programs. That's because the Congressional appropriation mirrors the stovepipe structure of EPA and allocates money and fees to specific programs.

I think that the Biden Administration maybe could shift more resources to TSCA, but I don't think they have broad discretion in that regard. What they do have is the ability to request additional resources and funding from Congress, and they've done that. They asked for a very significant increases in funding for [fiscal year] FY 23, but they got in the end much less than they asked for. It's curious to me that industry stakeholders, including the American Chemistry Council, have on the one hand said that they support providing EPA with additional resources, but on the other hand, they're sending a very mixed message about EPA and the effectiveness of EPA programs from their standpoint, some of the policy decisions, and even the efficiency of the TSCA program. I think what happened here then is that Republicans in Congress, they heard the mixed messages, and they opted for not providing meaningful additional resources to the program. I think for some folks in industry, that's just fine. It's a difficult situation.

LLB: It is, indeed. Let's touch briefly upon the Section 5 program. We, as you know, Bob, do a lot of work here on new chemicals. I will be the first to admit that when I first laid eyes on fully signed into law Lautenberg, I was surprised at the number of changes with the Section 5 program because, to my recollection, the Section 5 program was never the subject of significant criticism, certainly, back in the 2013 to 2016 timeframe, when things really started to heat up. But that might just have been my perception. Under the old program, many, if not most, new chemical submissions kind of went through the 90-day review process without regulation. Now, of course, those numbers have flipped, and upwards of 90 percent of new chemicals are regulated in one form or another, with a consent order and in most cases subsequent significant new use rule. Was there a, in your view, failure of the prior implementation program? And were there many, some, or even few failures, where new chemicals went on to be significant problems? In other words, has the program of the past given rise to notable failures that we are now contending with? And did Lautenberg address those issues?

RMS: I think that the new chemical program did not have egregious failures the way the existing chemical program did. But there was one criticism of the program that I think in the end resonated with Congress when they passed the new law, which was that EPA was regulating new chemicals electively. That's not the best way of saying it, but EPA, for the great bulk of new chemicals, was not making safety determinations. They were focusing on the chemicals that they chose to regulate, but the system was not structured in a way to provide the public

with reassurance that those that were not being regulated had been fully and carefully evaluated and determined to be safe.

The innovation in the new law was to say to EPA, "You've got to make a safety determination for every new chemical. And if you're not able to say that the new chemical is unlikely to present an unreasonable risk of injury, then you need to take some action. You need to restrict the chemical, you need to require additional data, and so forth." I would agree with those who say that these changes were significant and redefined EPA's mission in reviewing new chemicals. I would also say that these are good improvements and can improve and enhance the quality of health and environmental protection in the program.

But I think there's an important reality here that needs to be recognized, which is that if EPA is going to, in fact, make a safety determination on the record for every new chemical, it's going to need more data, it's going to need more information from industry, and it's going to have to be in a position to defend the determinations that it makes. To me, that is true to where we are with the new chemical program. I know that people view the 90-day review period as sacrosanct, but the design of the new law, in fact, says that if EPA can't make a safety determination in 90 days, then the clock stops running. That I think was a judgment by Congress that is embedded in the new law, but people did not understand the time the new law was enacted. I'm not one of those who insist on measuring the new chemical program by adherence to the 90-day review period, when I think my touchstone is whether EPA is making the safety determinations that the law requires. EPA can certainly be more disciplined, maybe more efficient in the new chemical program, but I just think that the nature of the game has changed.

LLB: I agree with you, Bob, and I certainly am not one to measure the success of the Section 5 program by EPA's adherence to the 90-day clock, because that is not a good or accurate reflection of success. One question for you is, given the inherent lack of clarity regarding some of the terms now that are very important with regard to the new chemical program, like "not likely to pose an unreasonable risk," or what is a "foreseeable condition of use"? Do you think it would benefit both EPA and the stakeholder community by having some greater definitions around what those terms mean in the real world? Because right now there aren't definitions that seem to be consistently applied across the new chemical review process, and it has caused a good deal of frustration in the regulated community.

RMS: Yes. Sometimes it's hard to develop general definitions of terms that acquire their meaning through case-by-case application. I suspect that if we tried to define these terms more than they have been defined, we would quickly find ourselves in a morass. Personally, I don't think EPA is far from the mark in the way it approaches these terms, although people may not like the outcomes. I would myself not spend a lot of time working on definitions at this point.

LLB: That's probably one of the few areas, Bob, where we are not totally aligned, but I absolutely understand what you're saying and respect your views.

Maybe as a last topic, you and I could just pivot to our forthcoming TSCA at 7 program. We have work collaboratively in the past with the Environmental Law Institute and the G.W. Milken Institute School of Public Health to present a full day talking about TSCA implementation, TSCA policy, what's working, what's not, TSCA litigation -- something that you know a whole lot about. We're now looking at having a program for June 29 this year, a virtual program. I, for one, look forward to working with you in identifying issues where the stakeholder community can at least sit down and talk about where we are with a

view toward maybe improving certainly the level of discourse and getting some good thoughts out there, and maybe even providing some assistance to EPA in charting a pathway forward on some of these issues. Any parting thoughts that you would like to offer on TSCA at 7, or just TSCA generally, or your extraordinary career in the environmental area?

RMS: Yes. I think these conferences, particularly last year's conference, have been very, very productive and very informative, both for the speakers and for the audience. I'm looking forward to doing it again. And what we were -- the two of us with our steering committee last year -- trying to accomplish was to bring some new perspectives to the table and to hear from people who are part of the TSCA world, but maybe not known to each other the way they should be. I think that's very important. I can't say that I'm at this stage very optimistic that there will be a laying on of hands, but I think that there are great opportunities for people to hear each other and to talk to each other, and that's always a good thing.

LLB: I agree. Totally agree, Bob. I'm especially grateful to the extraordinary cast of presenters and folks that you brought to the table to add to the depth and quality of the discussion. Last year was terrific, and I'm expecting this year to be even more so. I look forward to working with you on that and wish to thank you, Bob, not just for being here today and sharing your thoughts on TSCA and a bit about your background with our listening audience, but also for your many, many, many, many contributions to just environmental health and safety. We really appreciate it.

RMS: Yes, Lynn. It's a pleasure to be here, and as always, a pleasure to work with you.

LLB: Thank you, Bob. Thanks again to Bob Sussman for speaking with me today about his legendary career and his views on TSCA and domestic chemical management.

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