

TULANE ENVIRONMENTAL LAW NEWS

A Publication of the Tulane Environmental Law Society & the Tulane Institute for Environmental Law & Policy

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HEMISPHERIC INTEGRATION AND THE ENVIRONMENT

A First Look at the Official Text of the Free Trade Agreement of the Americas (FTAA)

The streets of Quebec City last April looked familiar to those with an eye on international news – marches, shouting, placards, sporadic arrests and a threat of violence. From the 1999 World Trade Organization (WTO) meeting in Seattle to more recent pro-

tests that greeted the G-8 meeting in Milan, major international economic meetings increasingly draw large, and sometimes virulent, demonstrations. Quebec City was no different. Yet while some threw stones and set fires, and others sought to scale the 10-foot barricade surrounding 34 presidents and prime ministers, most protesters came peacefully to voice reservations over the terms under which their governments pursue economic integration.

Environmental concerns are at the center of the gathering storm. For the past decade, it has become apparent that international trade accords sometimes conflict sharply with national and international environmental

programs. From the Tuna-Dolphin dispute challenging US marine mammal protection policy to discord over the environmental effects of the North American Free Trade Agreement (NAFTA), there is mounting evidence that multilateral trade agreements can

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A range of concerns were voiced outside "the wall" in Quebec City and the press was listening.

DANNENMAIER

TO DIRECT INSTITUTE

After 17 years as a trial lawyer, environmental compliance attorney, and international development policy advisor, Eric Dannenmaier has accepted an appointment as Director of the Tulane Institute for Environmental Law and Policy. Dannenmaier comes to Tulane from Washington, D.C., where he served most recently as director of an environmental law and policy program established by the US Agency for International Development and as an

ENVIRONMENTAL RIGHTS, HUMAN RIGHTS, & THE ALIEN TORT CLAIMS ACT

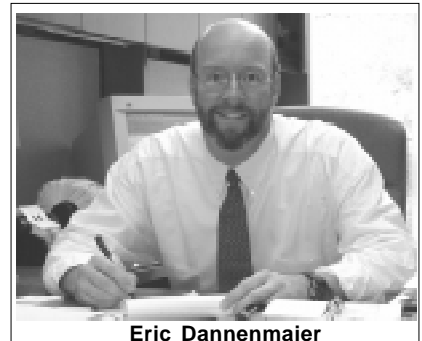
The Panguna Mine of Papua New Guinea

Towards the end of the 20th century, the Panguna mine on Bougainville, an island east of Papua New Guinea known to indigenous population as *Me'ekamui* or "Sacred Island," became one of the world's largest producers of copper ore and mining profits. Tragically, along with monetary rewards came billions of tons of toxic mining wastes that choked the environment of Bougainville, creating an environment where the indigenous populations could no longer live. The displaced people took charge; they organized a resistance and closed down the mine. In an effort to reopen the mine, Papua New Guinea ("PNG") and the mining company, the Rio Tinto Group ("Rio"), responded with

armed force and implemented a decade long blockade of the island, killing thousands of Bougainvilleans.

Today, it appears that the mine may never reopen. In 2001, Rio's directors announced they would leave Bougainville, salvaging what they could. However, even before the announcement, several groups of Bougainville land owners and victims had taken the matter to court in the United States bringing suit under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, in Los Angeles, California. *Sarei, et al. v. Rio Tinto plc, et al.*, 00 11695 MMM AIX (C.D. Cal.). Lead plaintiff Alexis Sarei, a resident of California and former resident of Bougainville, alleges that Rio violated customary interna-

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Eric Dannenmaier

advisor to the Organization of American States (OAS) Sustainable Development and Environment Unit.

Dannenmaier's work has been geographically varied – with projects in Africa, Asia, Eastern Europe, Latin American and the Caribbean – and he has developed a strong regional specialization in Latin America. His principal overseas work has been with

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REQUIEM

For all those who suffered losses on September 11, 2001, our condolences and our prayers.

Environmental Enforcement:

“A Document Suitable for Framing”

As a second year student in Secured Transactions at Tulane, I remember Professor Wessman telling our class that a signed judgment from a court was simply a “document suitable for framing.” As I enter my third year as an enforcement attorney for the environmental division of the Tennessee Attorney General’s office, these words keep on blinking for me like a neon sign.

My job is to represent the Tennessee Department of Environment and Conservation (TDEC) enforcing compliance with the state law. Most cases come to my office after a defendant fails to comply with a final agency order, which usually includes a fine. I begin by filing an action in state court requesting the court to enforce the order. Obtaining a favorable judgment is relatively simple since the substantive issues were decided at the administrative level and are at this point *res judicata*. However, unlike traffic court, our defendants don’t step to the next window to pay their fine as soon as the judge rules.

The next step is to file a lien against any real property that the defendant may own and to begin execution on any available personal assets, such as wages, cash receipts and vehicles. If we are still unable to collect, we then move to

foreclosure on real property. At this point the seizure of assets gains the attention of the defendant, who becomes willing to comply in exchange for being allowed to pay the penalty in installments. If not, we may return to chancery court to seek civil contempt. While some combination of these methods usually results in collection of the civil penalty, we must still achieve environmental compliance.

One dilemma with environmental enforcement is that both the size and the likelihood of sanctions are so minimal that a defendant will decide it is cheaper to violate the law and pay the penalty rather than to spend the money necessary to comply with the law. A common scenario occurs when housing developers either fail to apply erosion control measures in their construction stormwater permits, or simply do not obtain a permit at all. These developers operate under the theory that by the time TDEC writes a notice of violation, holds a show - cause hearing, issues a commissioner’s order, and transfers the case over to our office for enforcement, their project will be completed, *a fait accompli*. They would rather pay a civil penalty than spend the time and money to retain the services of an environmental engineer and implement an appropriate erosion control plan.

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Tulane Environmental Law News

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The Tulane Environmental Law Society and the Tulane Institute for Environmental Law & Policy would like to thank everyone who contributed to this issue.

VISITING PROFESSOR BRINGS NEW IDEAS TO CURRICULUM

Tulane welcomes visiting professor Sandra Zellmer to the environmental faculty for the 2001 fall semester. Prior to joining the University of Toledo Law School faculty in 1998, Zellmer litigated public land and wildlife issues in the Environment and Natural Resources Division of the US Department of Justice. She also clerked for the Honorable William W. Justice, US District Court, Eastern District of Texas, and practiced law with Faegre & Benson in Minneapolis, Minnesota.

Zellmer is teaching Tulane’s “Regulation of Toxic Substances and Biotechnology” and “Pollution Control” courses. Her approach is based on assigning roles in an extended hypothetical an innovative spin on the traditional socratic method.

Student reactions to Zellmer’s

methods are positive and enthusiastic. “The most practical assignment I’ve encountered yet at law school,” says Tim Parr, 2L. After a summer of environmental non-profit work, Doug McLand, 2L, adds “I’m anxious to get the opportunity to learn another side of the issues.”



Sandra Zellmer leads a graduate environmental law seminar in a discussion of indigenous rights and constitutional constraints.

Whistleblowing vs. Retaliation: Are Current Protections Enough?

Eight years ago, the Army Corps of Engineers sought the expertise of one of its top economists to study the feasibility of a navigation project on the Mississippi River. Donald Sweeney, Corps veteran of 23 years, developed a model that showed the Corps could do the job on a much smaller scale (and with a much smaller budget) than proposed. Unwelcome news to an agency that depends on big projects.

Sweeney was demoted and removed as chief of the study group. The Corps began to adjust his model so the full project would be approved. Sweeney decided to blow the whistle. He took information to the Office of

Special Counsel, an independent federal prosecutor, and on February 28, 2000, the Office found “substantial likelihood” that the Corps had “exerted improper influence and manipulated the study to obtain approval for the project.” By late 2000, the Corps conceded that it would redo its analysis. Sweeney and the Corps reached a settlement agreement, under which he will do transportation research at the University of Missouri in St. Louis.

Donald Sweeney was lucky; he had legal recourse. He took advantage of the Whistleblower Protection Act (WPA), enacted in 1989. The WPA prohibits a supervisor from taking action

against an employee because he or she has disclosed information reasonably believed to be evidence of a “violation” of any law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health and safety. The WPA requires that (1) the employee report information of a law violation or gross mismanagement to someone based on reasonable belief; and (2) the retaliation is actually “because of” the disclosure.

Unfortunately, WPA has suffered setbacks in the courts. In *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), the

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TULANE ENVIRONMENTAL LAW SOCIETY – OFF TO A GOOD START

After the first meeting of the year, TELS had 70 new members, and more signing up daily. With its ranks growing, the Society is planning at least four community service activities this year including the Green Project, a construction recycling initiative, and assistance to the Louisiana Nature Center. Brown bag lunches and panels with practicing attorneys will again be featured, with at least six sessions scheduled. Keeping an eye on policy, e-mail action alerts are generating phone calls



ELS paddlers encounter, and conquer, a rope swing.

National Wildlife Refuge and plans to enlarge a golf course and construct a 100-car parking lot in historic Audubon Park.

Outdoor activities continue to draw. We took our first canoe trip on a blue-skied Saturday in September. Forty TELS members enjoyed a lazy day of paddling, swimming, and connecting with nature...and an opportunity to recover from the shock of September 11. TELS has two more outings planned for this semester, and three for the Spring...a bike trip in Abita Springs, overnight canoeing, and a swamp dance in “Cajun-land.”

For more information, contact TELS officers:

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NEW ENVIRONMENTAL LAW CLINIC INSTRUCTORS JOIN FACULTY

After 12 years in New England, **Sallie Davis** has returned to her hometown of New Orleans and joined the Tulane Environmental Law Clinic as a clinical in-

structor. She earned her J.D. at the University of Maine School of Law, and her M.A. at the Muskie School of Public Af-

airs. “It may sound trite,” said Sallie, “but I decided to study law after a speech by Ralph Nader. I was driving home, thinking, how does he speak with such conviction? But I decided it was because he asks the right question: can they DO that?” Sallie has been involved in environmental issues since her college days at Tulane. Sallie is looking forward to the challenges of her new position, and to being back in New Or-

leans where, she says, “my iguana doesn’t need a heat rock.”

Karla A. Raettig will also be joining the Clinic as a Clinical Instructor this fall. Ms. Raettig hails from Seattle, where she has been litigating for Earth Justice (formerly Sierra Legal Defense Fund). A 1997 graduate of Lewis and Clark Law School, Ms. Raettig clerked for U.S. Magistrate Judge Janice M. Stewart after graduation. She has authored a law review article on CERCLA, but characterizes herself as an “outdoor person.” The Clinic’s reputation and “wonderful people I met at Tulane [yes, she actually said this – the editors] make this a once-in-a-lifetime opportunity.”



Sallie Davis



Karla Raettig

JUDGE FINDS EPA MUST MAKE OZONE DETERMINATION

Tulane’s Environmental Law Clinic won a victory in August when a federal magistrate judge recommended that a district court order the EPA to determine whether the Baton Rouge area attained the federal health protection standard for ozone. If Baton Rouge is classified as a “severe” non-attainment area, permit standards must be tightened to limit emissions that react with oxygen in the atmosphere to form ozone. Beth Lasky, a visiting student from Loyola working with the Tulane Clinic over the summer, says a favorable decision in this case will put a stop to a “policy of non-action” nationwide, which she characterizes as “an excuse to avoid local responsibility” for air quality problems.

Magistrate Judge Docia Dalby reviewed the text of the Clean Air Act and found, as a matter of law, that the EPA cannot delay in making its determination. “Continued delay frustrates clear Congressional directives that a determination as to attainment be made *now*,” she wrote, adding that “[s]ound principles of judicial restraint counsel that the Court not use its equitable discretion to essentially negate what Congress has directed must happen and when.”

Plaintiff, the Louisiana Environmental Action Network (LEAN), had also asked the court to declare that Baton Rouge failed to attain the required ozone standards, but Dalby found that the district court without jurisdiction to issue such a ruling under the Clean Air Act; rather, the determination must be made initially by EPA and reviewed by an appellate court. The Judge declined to recommend that the district court set the effective date for the classification, a ruling LEAN has appealed. A determination without an effective date, the Clinic argues, is no determination at

all. Student attorney Jason Grauch explains: “The district court’s jurisdiction fully encompasses the power to order EPA to make a determination that has the full effect mandated by Congress.”

In Other Clinic Action . . .

LOUISIANA’S ANTI-SMOG PROGRAM CRITICIZED

Some Say Rewarding Industry for Clean Air Allows Errors, Cheating

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Monday, September 3, 2001

By Randy Lee Loftis

“BATON ROUGE, La.—Louisiana’s chemical industry pumps \$20 billion a year into the state’s economy. But it also pumps more than 41 million pounds of toxic pollution a year into the state’s air.

“Governments and industries have come up with some innovative ways to reduce that pollution. One of them—letting companies earn, buy and sell credits that they get for voluntarily cutting their emissions—has gotten Louisiana into a jam.

“Environmentalists say the state and its powerful chemical industry, rather than using the credits to encourage deeper pollution cuts, have sometimes done just the opposite—using invalid or nonexistent credits to create the illusion of cleaner air.”

ENVIRONMENTAL JUDICIAL REVIEW IN CUBA

"The recognition of a right to a healthy environment opens the door to legal actions for environmental harm, even without the plaintiff having received direct injury to his person or property, including the undertaking of collective actions." Orlando Rey, Director, Environmental Policy, Ministry of Science, Technology and the Environment, Cuba, 1999

Re-read the sentence. You have just heard a distant explosion. What is this person saying, if not that the door is open to environmental law damage actions and to citizen suits to enforce environmental law? Now add this: this is the chief lawyer for the environmental ministry of Cuba speaking, the architect of its emerging environmental law, and he is talking about what he sees coming in his country. What is being contemplated here? Damage actions against a state-owned enterprise. Injunctive actions against state development decisions. One does not have to be a major in political science or foreign affairs to understand the implications of these actions on governance, any governance, in any country. Now add, in Cuba.

For the last three years of the 1990's, Tulane coordinated an environmental law and policy project with the Cuban Ministry of Science, Technology and the Environment which led to the creation of three seminal laws in Environmental Impact Analysis, Coastal Zone Management and

BioDiversity and Protected Areas Management. In May 2000 Tulane and the Cuban Ministry hosted the first of a new round of law-making workshops in Havana, focused this time on the implementation of law and, more particularly, on administrative and judicial review.

Present at the workshop were the leaders of the Cuban environmental and legal profession, the Union of Jurists, the Supreme Court and other federal, provincial and admin-

istrative courts, legal advisors to environmental and development agencies, academics from the University of Havana, practicing lawyers (from collectives licensed by the state but managed as private firms with fee-paying clients), and public interest environmental organizations (ProNaturaleza, the Foundation for Nature and Man, licensed as NGO's by the state, as are about two dozen similar public interest organizations) ... about seventy persons in all. Assisting their deliberations were Dr. Raul Brañes, former Director of the UN Environment Programme for Latin America, Dr. Paulo de Bessa Antuñes, Chief Prosecutor for the state of San Paulo in Brazil, and Professor Oliver Houck, from Tulane.

According to Houck, the presiding mood was not only "can do", but "must do". Nearly everyone in the room (but not all) came to recognize over a period of three days that Cuba needed to modernize its legal process for civil actions and for administrative and judicial review of public decision-making. The participants worked their way through

the current Cuban Civil and Administrative codes to identify obstacles and opportunities for change. "It was one of the most positive and intense law-making sessions that I have ever had the pleasure to experience," Houck said.

On the last day, the workshop debated more than twenty recommendations for the new



January, 200, Tulane Professor Houck with students from a 2 week course in comparative environmental law at the Faculty of Law in Havana.

law in an open session that at times resembled parliamentary debate and at others more the frenzy of Wall Street at closing time," Houck said. It was the construction of a judicial review framework which everyone knew, although few said, held the potential for altering governance in Cuba. Much as environmental law, through judicial review, has altered governance in the United States and other countries of the world.

Tulane's work on Cuba's environmental legal framework is part of the Institute for Environmental Law and Policy's legislative support program and will continue over the next two years with financial support from the John D. and Catherine T. MacArthur Foundation. During the coming year, lawyers from the Institute and their counterparts will hold additional meetings and workshops to strengthen Cuba's basic environmental regime. Tulane will also host in early 2002 a conference in New Orleans on the advancement of environmental jurisprudence in Cuba. The event will be open to environmental law experts and scholars from across the US. For more information on this and other legislative support initiatives, contact the Institute's program manager at enlaw@law.tulane.edu; (504) 862-8827.

disrupt environmental policies and threaten environmental protection.

This evidence is nowhere more apparent than in the Western Hemisphere, to which much of the global debate on trade and environment has now shifted. While negotiations over expanding the WTO broke down after Seattle, negotiations to create an FTAA – and thus create the world’s largest free trade zone with 800 million potential consumers – are moving forward. The Quebec Summit Declaration affirmed the intent of 34 leaders to complete negotiations and sign the FTAA by 2005.

Proponents of the FTAA promise that it will improve conditions for growth, prosperity and democracy for all the countries of the Americas – indeed the Quebec Summit Declaration claimed as much. But others fear that trade negotiators have largely forgotten the environment. Unless environmental priorities are taken into account, they predict the ill effects of WTO and NAFTA will only be multiplied by the FTAA.

Trade negotiators have been working largely in secret on the FTAA accord for several years, and a draft text was first released to the public in July. A review of this text confirms many of the fears of environmental advocates – and frames the trade and environment debate in the Western Hemisphere that will continue in the coming months.

The text that was “derestricted” and published on July 3 is still subject to negotiation. Indeed the draft has more bracketed (i.e. disputed) than unbracketed text. Yet, as the text now stands, three provisions of the so-called “investment” chapter stand out as cause for concern.

The first of these provisions, “National Treatment,” seems innocuous enough, requiring that each party accord to foreign investors, and their investments, treatment “no less favorable than it accords *in like circumstances* to its own investors” But this apparently simple call for equity can produce troubling results. Interpreting virtually identical language, a NAFTA Tribunal in the *S.D. Myers* case challenged Canada’s ban on hazardous waste exports because the ban prevented the Canadian subsidiary of a US-based hazardous waste disposal firm from sending wastes across the border to its parent’s facility. The Tribunal reasoned that Canada-based subsidiaries of Canadian firms could send wastes without restriction to their Canada-based parents *in*

like circumstances. Canada’s waste export ban – an important environmental policy aimed at preventing exports to countries without the capacity to manage wastes safely – was deemed inconsistent with the terms of the trade accord.

The “Performance Requirements” provisions of the FTAA draft also track similar language in other trade accords – language that has also been used to challenge national environmental policy. These provisions prohibit any measure that would require foreign investors to use or show a preference for domestic goods or services, or to use or transfer certain technologies or production processes. Again, on the surface this seems a benign and equitable prohibition on domestic bias. But similar provisions can and have been used to argue that import bans or technology requirements are impermissible even when they have a legitimate and demonstrable environmental or health objective. A bracketed provision in the draft text would exempt technology mandates designed to meet health, environmental or safety requirements.

But this high-tech friendly exemption would do nothing to preserve legitimate bans on, for example, environmentally hazardous products, or environmentally unsound processes.

The “Expropriation” provisions in the investment chapter also raise concerns for national environmental policy. Anyone familiar with the recent evolution of US takings law will recognize the danger of broad FTAA provisions that require compensation where parties “directly or indirectly” nationalize or expropriate an investment or take a measure

“tantamount to nationalization or expropriation.” As if this sweeping language were not enough, alternate language in the draft would extend the compensation requirement to “*any measure having the same effect*.” These provisions are exceedingly broad and would leave little room for the defense of even basic environmental standards absent a clear exclusionary provision (which, at this writing, has been proposed but remains limited and bracketed). Expropriation provisions of NAFTA have been successfully used to challenge domestic environmental provisions, and much of the proposed language in the FTAA draft is even broader than that found in NAFTA.

In addition to these concerns over the investment chapter, there is an important process issue that should likewise give pause. While investors are given special rights



Fearing the wrath of street demonstrators, businesses in Quebec City’s historic district boarded windows and shut down for the 2 day Presidential Summit. This *McDonald’s* removed its trademark golden lettering (although the shadow remained obvious) prior to a demonstration featuring French farmer Jose Bove best known for his sometimes violent attacks on the “McDonaldization of food.”

[Continued next page](#)

The Journal, now into its fifteenth year of publication, is enjoying increased recognition, with each issue now available to thousands of law students and professionals through the Westlaw and Lexis services. Thirty-five students have been accepted for Journal membership this year.

The first issue, this Winter, will feature articles on EPA's research and regulatory response to the D.C. Circuit's *American Trucking* decision, a comparison of integrated pollution control measures taken in the United States and the European Union, and a

proposal to add environmental protection amendments to the U.S. boundary waters treaty with Mexico.

Our Spring issue will be a symposium on water management issues, and will include an article on the Edwards Aquifer written by the special master of the *Sierra Club* legal dispute, and another on the Klamath River Salmon protection controversy that erupted earlier this year. We are currently soliciting companion pieces on water issues, including the use of aquatic indicators in environmental decisionmaking, and water conservation and management strategies for

subsurface waters. The Journal will sponsor a panel discussion at the Spring Conference on our symposium topic, and we have invited authors to attend.

If you have any questions about the Journal, or would like to order a subscription, please call our office at (504) 897 3662, or email us at elj@law.tulane.edu. More information about the Journal is available through the Tulane Home page under "Resource Network."

—**Scott Anderson**, 3L *Scott is this year's Journal Editor in Chief*

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— in some cases rights that exceed those of domestic enterprises and even sub-national governments — citizen groups and non-governmental organizations (NGOs) are given no formal role in the formulation or negotiation of the agreement, and as yet have no proposed role in its implementation. The business community has had a relatively high level of access to negotiators through "business council" meetings that are staged to coincide with trade ministerials. But formal input from non-profit or public interest NGOs has been confined to the machinations of a "Committee of Government Representatives on Civil Society" (CGR). The CGR has limited its public input to a formalistic written comment procedure, and this "post office box" approach so offended environmental organizations that many boycotted the process outright. The CGR's output has been as constrained as its input, and to date it has performed no apparent analysis, and limited reporting to a statistical summary of comments received. Not surprisingly, there appears to be no influence on the negotiating text emanating from the CGR process.

Some governments (notably the US and Canada) have independently reviewed NGO input across a range of issues, sponsored forums for civil society dialogue, and have even tabled suggestions from civil society in the negotiating process. But the 34-nation negotiating group of finance ministers and trade representatives has paid little heed to this public input to date. This situation may soon be ameliorated as the Quebec Summit Action Plan called for a reexamination of the CGR process with a view to improvement — but the Action Plan appears more aimed at improving the CGR's efficacy as a promoter of the FTAA, not as a transparent public input mechanism. And still, under the draft FTAA itself, no formal mechanism has been proposed to create meaningful public participation in the agreement's

implementation — nor even to allow affected communities the right to intervene in investor cases that affect local interests.

The good news is that behind the scenes and the street demonstrations, in preparatory meetings leading to Quebec and in subsequent advocacy and dialogue, there is a persistent and growing effort to address environmental concerns in the context of the FTAA. While some advocates take the position that the agreement should be stopped in its tracks, most accept the proposition of an FTAA, and are working to debate and improve the rules under which regional economic integration will occur. At the root of this effort is the conviction that the economic liberalization process in the Americas can promote conservation and environmental protection at the same time that it promotes long-term economic growth — and an expectation that trading rules can be shaped to respect national environmental policies; perhaps even to frame better regional policies.

There are a number of ongoing, serious efforts to engage FTAA negotiators and environmental officials in dialogue about environmental concerns over the FTAA. Much of this work counts on the direct support of governments (again, notably the US and Canada), and its ultimate success will depend on the involvement of all the FTAA partners. Among these efforts, the Organization of American States Inter-American Forum for Environmental Law (OAS/FIDA) has begun a new multilateral project to sensitize government officials to the environmental challenges of trade liberalization, and help them to address these challenges based on their national experiences and interests. Tulane's Institute for Environmental Law and Policy will play a role in this debate, the outcome of which is today far from certain.

—**Eric Dannenmaier** *Mr. Dannenmaier is the incoming Director of the Institute for Environmental Law and Policy. See article this issue.*

CASE LAW DEVELOPMENTS: Three From The South

Environmental Law — in a daily battle between those who would apply it fully and those who would limit or avoid it altogether—pro-grades and re-grades among the federal courts like an unstable delta. So it has been with the Fifth Circuit, illustrated by three recent decisions interpreting the Endangered Species Act (ESA), the National Forest Management Act (NFMA) and NEPA. By happy coincidence, each of these cases was brought by alumnae and close allies of the Tulane environmental law program: **Esther Boykin**, LL.M. '94; **Ashley Wadick**, J.D. '91; and **Robert Wiygul** of the New Orleans office of the Earth Justice Legal Defense Fund. The upshot: two solid wins and one, en banc, razor-thin loss ... precedents that will affect environmental law across America.

CASE ONE – CRITICAL HABITAT COMES OF AGE: *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001).

If the Endangered Species Act is, as it is often described, the “pit bull” of environmental law, then designations of critical habitat under the Act are its incisors, the teeth that grab and hold. Or at least, were intended to do.

The ESA requires the Departments of Interior and Commerce to designate “critical habitat” areas that are “essential to the conservation” of listed species and require “special protections.” Leaving nothing to chance, the Act further defines “conservation” to mean “all methods and procedures necessary to recover a listed species to the point where special protections are no longer necessary.” Federal agencies must ensure that their actions will neither “jeopardize” listed species nor modify their “critical habitat.” One might think, therefore, that nearly all listed species would have designated critical habitats, and that federal agencies would be taking special care to protect them.

One would then be quite wrong. As of 1999, the government had designated critical habitat for only ten percent of listed species – 120 designations out of some 1,181 listings – and most of these had come by court order, over a reluctant agency, through citizen suits. What went awry?

Two things went awry. As a

political matter, “critical habitat” is bitterly opposed by federal agencies, developers and private landowners who, quite rightly, see the teeth of the ESA. A prohibition on modifying critical habitat is more specific – and therefore more enforceable – than a prohibition against jeopardy. For the biological agencies, it is far easier to try to work out “jeopardy” on a case-by-case basis without having to deal with critical habitat. In short, the agencies don’t do critical habitat because they don’t want to.

They also don’t do critical habitat because the Department of Interior, under former Secretary James Watt, issued a bizarre set of ESA regulations defining “jeopardy” and “critical habitat” in identical terms, and limiting the application of both concepts only to actions that would impair the survival of a species. These regulations did two things. They made critical habitat a redundant restatement of the jeopardy standard, and they invoked ESA protections only where an action would affect the immediate survival of a species; conservation and recovery be damned.

These regulations, then, became the basis for routine and ubiquitous findings from Interior and Commerce that designations of critical habitat were not “prudent” because they would add no more protections than “jeopardy” standards would. In effect, having defined critical habitat to have no meaning it was then unnecessary to designate it.

In March, 2001, a unanimous panel of the U.S. Court of Appeal for the Fifth Circuit finally stopped the play. In *Sierra Club v. U.S. Fish and Wildlife Service*, the court held not only that the Service’s failure to designate habitat for the Gulf Sturgeon was unlawful but, more importantly, that the Service’s slight-of-hand regulations were also unlawful. The Court noted:

“The Service’s argument would effectively prevent all threatened species from receiving critical habitat designation. It is difficult to reconcile this result with the ESA, which states that critical habitat “shall” be designated for threatened, as well as endangered species. The agency’s interpretation would read these provisions out of the statute. ... Given the extent of the Services’ reliance on an invalid regulation, we conclude that the 1998 decision [not to designate] was arbitrary and capricious.” 245 F.3d at 445.

It remains to be seen how the Service will react to this opinion. The political difficulties of critical habitat and the resulting agency reluctance to designate it remain. On the other hand, the leverage of designated critical habitat in limiting what are otherwise highly political decisions under the ESA is undeniable. Indeed, this leverage is at the root of the controversy. In a way, the controversy over critical habitat is a microcosm of the ESA itself, a protection that some see as too strong for its own good, and others see as the only real strength in town.



Canoeing through a cypress stand

Three from the South

CASE TWO – CUMULATIVE IMPACTS AND CASINOS: *Friends of the Earth v. US Army Corps of Engineers*, 109 F Supp.2d. 30, (DDC 2000).

Gambling casinos, once the exclusive province of Atlantic City and Las Vegas, have begun creeping their way to the southern part of the US, with none as prominent as Mississippi. Nearly a decade ago the Mississippi legislature overcame the objections of its fiscal and moral conservatives to approve casino gambling along the Mississippi River and the Gulf Coast. By a “strange quirk” the casinos were to be restricted to floating vessels, in keeping with the image of riverboat gambling. Casino operators had a different image in mind, however, and began constructing platforms neither designed for nor capable of navigating either the River or the Gulf, and mooring them in berths dredged into the riverbanks and coastal wetlands. From the point of view of riparian habitat and coastal marshes, these were the worst locations imaginable, bringing invasion-scale access roads, parking lots and the associated flotsam of fast food eateries, gas stations, and trinket shops. From the point of view of Tunica on the Mississippi and Biloxi on the Gulf, however, they were money from heaven.

Located, by law, in waters of the United States, the Mississippi casinos required Clean Water Act Section 404 permits from the US Army Corps of Engineers. No problem: a string of permits marched casinos down the Mississippi and in great concentration along the beaches, inlets, and interior bayous of the coast. The permit decisions, viewed in isolation, were no brainers: the impact of no one casino would eradicate the natural values of the coast, and besides, since required to be in wetlands, no less-damaging alternative locations were available. And so, in at least facial compliance with Section 404, the game went forward. But not in compliance with NEPA.

From the very beginning, the Corps had taken the position that each casino application was a decision apart, the impacts of which were described in a cursory environmental assessment and routinely concluded to be without “significant impact.” The biological agencies of the federal government objected that the casino permits were not isolated actions but, rather, part of a total assault on some of the most important aquatic resources of the American South. They requested a moratorium pending an EIS on the impacts of all casino development on the Gulf Coast. The request fell on deaf ears. The last thing the Corps wanted to do was get crosswise with Senate Majority Leader Trent Lott of Mississippi, and with county zoning and land use decisions that were laying out the welcome mat to coastal casinos ... the more the better.

The present case arose from three more casino applications on the coast. It sought a comprehensive EIS on casino development and it should have been a lay down. The regulations of the Council on Environmental Quality define cumulative impacts broadly and require them to be considered in a single statement. These are not happy days for NEPA cases, however, as an increasingly conservative federal bench — emboldened by the Supreme Court which has yet to rule in favor of the application of NEPA — has cut back on even the informational requirements of the statute. It was refreshing, therefore, to have the court in this case see the facts for what they were, read the regulations as they were written, and blow the whistle. Noting that the “proliferation of casinos” would have the effect of foreclosing environmental decisions before they could be made, the court held that “the significant cumulative impacts of the multiple casino projects along the coast warrant the preparation of an EIS.” It voided the permits, pending compliance with NEPA.



Bald cypress in the Atchafalaya Swamp, Louisiana

Score one for an aging environmental statute so simple in its demand, and so resisted in its application, even to this day. The outer boundaries of “cumulative impacts” are no easier to define than they were in 1970, but it is not the difficulty of defining those boundaries that arises in these cases. Rather, it is the difficulty of asking for a larger, longer view in a society in which every economic and political time-frame runs in exactly the opposite direction.

CASE THREE – NATIONAL FOREST DECISION-MAKING; IS THERE EVER A GOOD TIME FOR REVIEW? *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000).

The national forests in Texas have been at issue in some of the longest-running environmental litigation in the country. While others have changed philosophies to accommodate emerging principles of ecosystem management, Texas has remained steadfast in its priority towards commercial timber. In psychological terms, it is a very hard case.

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Environmental Rights and the Alien Tort Claims Act Continued from page 1

tional law, fundamental human rights, and established international environmental laws.

The *Sarei* case is the latest in a series of ATCA cases on human rights. Among other things, it asserts liability under ATCA for environmental pollution, analogizing that the pervasive pollution-stream violated certain international rights just as though it had been a bullet from a gun. It seeks to pull environmental issues within the ambit of customary international law.

Natural Environment of Papua New Guinea & Bougainville

The book, Jean Michael Cousteau's *PAPUA NEW GUINEA JOURNEY*, aptly described the remote and pristine Papua New Guinea:

"The past half century has brought slow but inevitable change, yet throughout the main island and among the confetti of six hundred smaller islands off its shores, great pockets of antiquity endure. There are people who have had only the vaguest contact with the modern world. There are tracts of rain forest still unsurveyed by terrestrial biologists, and seas that remain largely unknown to marine science. Moreover, these natural habitats are thought to be among the richest and most diverse remaining on the planet."

Before Rio's construction of the Panguna mine, Bougainville featured a tropical rain forest, criss-crossed with clean rivers that supported most links in the food chain for the indigenous people. One such river was the Jaba River, which rushed from the Crown Prince Mountain Range through the Kawerong and Jaba valleys westward to the Empress Augusta Bay in the Solomon Sea. Islanders hunted all along the river, farmed its banks and floodplains, and lived on fish and shellfish that flourished all the way to Empress Augusta Bay. But not today.

The Panguna Mine

Rio entered Bougainville in the 1960s. It began mining operations with the removal of the indigenous people from their land. The *Sarei* plaintiffs resisted Rio's intrusion and treated Rio's agents as trespassers. In 1965, they expelled

Rio's exploration team that had set up camp on their land. In response, the Australian government jailed 200 from Bougainvillea, including elders, some of whom were beaten in

custody. Eventually, they were forcibly relocated.

Rio next excavated in the rain forest. It decimated the raw forest through its use of chemical defoliants and bulldozers, then sliced off an entire mountain. Cousteau, who observed the mine in 1988, described its size:

"Arriving at the Panguna mine, the team is astonished

by the scope of the operation. Surrounded by dense rain forest and tropical stillness lies one of the world's largest man made holes in the ground. When the ore is completely extracted, the pit will measure nearly 8,000 feet across and around 1,200 feet deep. It would take two Golden Gate Bridges to span the hole, and if the Empire State Building were set at the bottom, only the antenna on top would rise above the rim of the mine."

Copper was discovered in 1964. The ore is extremely low grade, however. Thus, to make the mine profitable, Rio needed to churn a tremendous volume. Rio's operation had 4,000 people working in three eight-hour shifts seven days a week; the result was a production of some 130,000 tons a day for processing to copper concentrate. At peak operations, tailing discharges were running at a massive 70,000 tons a day — totaling 34,376,000 tons between January 1972 and June 1973 alone.

Rio secured government cooperation by agreeing to pay a royalty of 19% of the mine's profits. This amounted to 18% of PNG's total annual revenue during its operation, 36% of its export earnings, and 10% of its gross domestic product. By 1973, the mine was not only Rio's most profitable single venture, with profits running at around \$158 million, it was also the most successful company in Australian corporate history to that time. As of 1999, Rio had consolidated assets of US\$12.8 billion.

The Environmental Impact

Over the years of the its operations, the mine dumped billions of tons of toxic waste, filling major rivers with tailings, polluting the Empress Augusta Bay and Pacific Ocean miles away. The Jaba River choked, stagnated and changed its course, (see photos accompanying this article). The tailings spread out over an area of 4,000 hectares, turning the fertile river valley into wasteland. The entire length of the valley is covered by mine sediment up to 60m deep and 1km wide. Three thousand hectares of land were totally destroyed, covered with chemically contaminated tailings where nothing will grow.



The Jaba River before and after

Aquatic life could not survive this sedimentation, quite apart the chemical pollution that included substantial quantities of such toxic pollutants such as copper, zinc, cadmium, mercury,

molybdenum and arsenic. Where there was once a plentiful supply of fish and shellfish, the area is now desolate, inhabited by sick crocodiles and dead water rats.

Rio also destroyed villages to construct the pit, and dozens of villages miles downstream were moved because tailings destroyed the land. In 1988, Perpetua Serero, leader of

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the island's matrilineal landowners, told a visiting reporter:

"We don't grow healthy crops any more, our traditional customs and values have been disrupted and we have become mere spectators as our earth is being dug up, taken away and sold for millions. Our land was taken away from us by force: we were blind then, but we have finally grown to understand what's going on."

The destruction of the land was undermining the health of the people as well. Deaths from upper respiratory infections, asthma and TB increased. Obesity, particularly among women, became common when they had to abandon their traditional diet for European tinned and packaged foods. A deep sense of social malaise ensued which expressed itself in clan tensions, depression, alcohol abuse, rage, traffic accidents and incidents of violence — all distress signals of a people severed from their roots. About this time, the people, in desperation, responded.

Ken Lamb, Professor of Biology at PGN university has called the Bougainville experience "disastrous." An Australian engineer working on the mine was more direct; commenting on the mine's impact on the local people, he declared: "It's f k d them." In 1988, the PNG Environmental Minister found the pollution "dreadful and unbelievable."

Efforts to Regain the Mine and Armed Force

The reaction was violent. In November 1988, militants began blowing up power pylons and engaged in other acts of sabotage that forced the mine to close. Faced with a popular uprising, Rio turned to the government to quell the uprising and reopen the mine. PNG called in its defense forces.

The army arrived in 1989, with a license to kill. Growing human rights violations committed by the PNG army, with the alleged support of Rio, culminated in the St. Valentine's Day massacre on February 14, 1990, in which many civilians were killed. A vicious war ensued in which Bougainville civilians were the primary victims, and continued until 1999. Presently, a negotiated peace accord is awaiting PNG ratification. By the time the war ended, 10% of the population of Bougainville, approximately 15,000 civilians, had been killed.

The plaintiffs' complaint asserts that Rio was responsible for the PNG's reprisals. First, plaintiffs assert that Rio employed economic coercion to cause PNG to use its military to quash the islanders' uprising and reopen the mine. Plaintiffs also allege that Rio provided equipment to the PNG military including troop transport vehicles and company helicopters for use in "Operation Bulldog," one of the first operations. They also allege that Rio encouraged the PNG government to hire outside mercenaries who could clean the government's hands of the task of suppressing Bougainville citizens and reopening the mine.

The blockade of Bougainville lasted seven years, and resulted in a shocking lack of medical supplies on the island. Hospitals were forced to close, women died needlessly in childbirth and young children died from easily preventable diseases. According to the complaint, Rio's manager at Bougainville encouraged continuation of the blockade, tell-

ing PNG officials to "starve the bastards" out. According to the Red Cross, the blockade killed more than 2,000 children in just its first two years of operation.

Pushing the Envelope of an Old Law

ATCA is the law that gives *Sarei like* plaintiffs the ability to bring their complaint in the U.S. *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2nd Cir. 1995); *Filartiga v. Pena Irala*, 630 F.2d 876, 887-88 (2nd Cir. 1980). Enacted by the First Congress in 1789, the purpose of ATCA was to express the commitment of the thirteen original American colonies — now a single nation — to conform to accepted norms of international law and to vest in the national courts jurisdiction over torts committed in violation of international law. 630 F.2d at 877-78. The law states: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

Although part of the first Judiciary Act of 1789, ATCA was not commonly used as a basis for litigation. It was not until *Filartiga*, where a Paraguayan family brought claims of torture and murder against a Paraguayan police officer, did ATCA begin to take hold as an avenue of justice for human rights claimants. Since *Filartiga*, plaintiffs have brought ATCA claims alleging torture, rape, genocide and other atrocities against former Philippine president Marcos, Radovan Karadzic, a former Bosnian-Serb general, and former Argentine general Suarez-Mason, to name but a few. In this vein, the *Sarei* plaintiffs allege Rio's conduct violated customary international law, including the *jus cogens* prohibitions against crimes against humanity, racial discrimination, and war crimes.

However, the *Sarei* plaintiffs also assert that Rio's conduct violated the plaintiffs' rights to life, health and security through deliberate and pervasive environmental pollution. They argue the right to life is protected by customary international law. According to an affidavit in the case submitted by Tulane Professor **Gunther Handl**, the right to health also is protected by customary international law such that "a right to freedom from deprivation of health ... cannot be seriously called into doubt."

In response to these and other allegations, Rio moved to dismiss the complaint. Among other defenses, Rio asserted



The Jaba River

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Federal Circuit held that that plaintiffs' non-military claims involved only environmental harm, which Rio asserted, is not recognized as customary international law. Rio's argument was predicated principally on *Beanal v. Freeport McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999). In *Beanal*, brought by indigenous people for the environmental destruction allegedly caused by a Freeport mining operation, the court determined that three principles of environmental law—the Polluter Pays Principle, the Precautionary Principle, and the Proximity Principle—had not attained the status of customary international law, because they have not been adopted in international accords sufficient to establish widespread international acceptance. *Id.* at 167.

Plaintiffs attempted to distinguish the *Beanal* decision as one focused solely on principles of environmental law and did not address violations of the rights to life and health. Plaintiffs argued the mere fact that Rio's denial of these rights was perpetrated in part through environmental destruction does not absolve the company from liability.

Tentative Ruling Rejects Plaintiffs' Environmental Claims

On July 9, 2001, Judge Morrow issued a lengthy, 87-page tentative ruling that in large part denied Rio's motion to dismiss. The court found that the plaintiffs stated valid claims for war crimes, genocide, racial discrimination, and others. However, the court rejected plaintiffs' arguments concerning the environment and its relationship to the rights to life, health, and security. In rejecting plaintiffs' environmental argument, the Court was persuaded by the *Beanal* decision and others. The

court reasoned that the relevant inquiry "is not how plaintiffs characterize the conduct ... (e.g., environmental harm versus deprivation of rights to life and health), but whether a 'specific, universal, and obligatory' norm prohibits the activity." The Court found the plaintiffs unable to describe the specific legal standards to impose by such rights, even assuming they included environmental harms.

Can Old Laws be Taught New Tricks?

The Court's tentative decision confirms judicial reticence to recognize international norms of environmental protection. The challenge here, and the next indicated step for legal scholars and lawyers considering the application of customary international law to environmental claims, is to identify the "specific, universal, and obligatory" norms implicated by this body of law. Such norms evolve over time; it is not an impossible task. It is simply that we have yet sufficiently to articulate them.

—**R. Brent Walton** *Mr. Walton is a 1997 graduate of Tulane Law School and an associate with Hagens Berman LLP in Seattle, Washington. He represents the plaintiffs in the Sarei litigation. The opinions expressed do not reflect the plaintiffs' or those of Hagens Berman, and the facts presented are based on allegations in the complaint, which have been taken as true for purposes of this article.*

Three from the South Continued from page 9

As early as 1978, plaintiffs sought to enjoin clear cutting on the Texas forests pending environmental review under NEPA. Subsequent cases challenged the Forest Service's pest-management programs, and later its protections for the endangered Red-cockaded Woodpecker. The early 1990s saw a new round of suits against the Service's land and resource management plan, alleging violations of the diversity requirements of NEPA and the highly specific regulations requiring monitoring and protection of species diversity. These succeeded at the district court level, lost before the Fifth Circuit, won again on remand, and came back to the Fifth only to run into a new argument: the forest plan at issue was not an agency action reviewable under the Administrative Procedure Act. The argument lost before a Fifth Circuit panel, but the full court agreed to hear the issue.

The *en banc* court split, 7-1-5, on the reviewability of the plan. A major-

ity, citing *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) held that the challenge was too "generalized" to permit judicial review. 228 F.3d at 567-8. The concurring opinion noted review would be possible if specific timber sales were challenged. The dissent pointed out that specific timber sales *had* been identified in the complaint and included in the challenge, thus distinguishing *Lujan* and legitimizing review.

The result of *Sierra Club* is a legal and practical morass. A morass created by the Supreme Court's *Ohio Forestry* opinion holding forest plans, without more, unreviewable on ripeness grounds. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). On the other hand, other circuits have since found review appropriate under circumstances virtually identical to the case at hand.

The practical difficulty of holding the lawfulness of forest plans unreviewable is that review postponed to a later date, and on only a specific, timber sale

basis, comes too late to cure the problem, and after the investment of considerable resources towards its implementation. Agency personnel and industry rely on forest plans for budget, investment and personnel decisions years into the future. To say that the plans are not reviewable until the trees are sold is to make judicial remedy – even for the most blatant violations of the most specific planning requirements – ineffective in securing what Congress intended: not better timber sales, but better plans.

We would not think of deferring review of a conspiracy because they have not yet acted. We should apply the same common sense to the equally discrete plans of federal resource management agencies.

—**Oliver A. Houck** *Professor Houck teaches at Tulane.*

WHISTLE BLOWING Continued from page 3

the standard of the employee's reasonable belief in a violation should be "irrefragable" proof that the employer has committed a violation. According to *Webster's Dictionary*, "irrefragable" means "incapable of being overthrown, incontestable, incontrovertible, or undeniable." By imposing such a high burden of proof, the Federal Circuit has *sua sponte* changed the standard from a reasonable person standard to even more than "beyond a reasonable doubt."

The Federal Circuit struck again in *Huffman v. Office of Personnel Management*, 2001 U.S. App. LEXIS 18421 (Fed. Cir 2001), holding that a report of misconduct to a wrongdoer is not a disclosure, reasoning "The purpose of the statute is to encourage disclosures that are likely to remedy the wrong. The wrongdoer is not such a person." This analysis ignores the plain language of the Act, which covers "any disclosure." It also illogically concludes that wrongdoers always know that they are taking wrongful action and cannot (and will not) correct their action once brought to their attention. Both assumptions almost gratuitously undermine the WPA.

The WPA suffers another limitation in statutory scope. Disclosing information of a violation of law is but one aspect of whistle blowing in the federal bureaucracy. Consider the case of Ian Thomas, a contract employee for the U.S. Geological Survey, who made the tactical error of posting a map of the caribou calving areas in the Arctic National Wildlife Refuge. At the same time, Secretary of the Interior Gale Norton was visiting Alaska to promote drilling for oil in the Arctic National Wildlife Refuge. Within days, Ian Thomas' contract was revoked and all his postings to the USGS website were removed or stamped with a warning that the information might not be "accurate."

Ian Thomas had not alleged a violation of law nor agency impropriety. He had simply posted factual information that tended to contradict the party line. The Department now claims that its

actions had nothing to do with political pressure; rather it claims he was fired for posting an "inaccurate" map of an area beyond the scope of his contract, something he had allegedly done 20,000 times before. In fact, his USGS supervisors and co-workers had previously "encourage[d] [him] to troll for new satellite images and wildlife data, which led to more eclectic projects, including a 'global environmental atlas' that won an agency award for Best Geospatial Web site." [cite: JM] One has to wonder. Political cartoonist Gary Trudeau certainly did, and published a series on the Thomas scenario (see www.doonesbury.com - May 15-19th, 2001). Politics aside, the legal problem here is that,

even if the dismissal were purely political, Thomas is unprotected under the WPA.

With these weaknesses in the WPA, organizations such as the Public Employees for Environmental Responsibilities (PEER) have been founded to fill the gap. Using employee surveys and "white papers," PEER serves as an outpost for employees concerned with what is going on within their agency. For example, field biologist for the Fish and Wildlife Service recently denounced their Agency's decision to allow sport hunting on tundra swans. Afraid of retaliatory measures, the group published an anonymous "white paper" entitled "Swan Drive," outlining the plight of the tundra swan and critiquing the Service's own analysis. The hope is that, with "white papers" in the public domain, the public itself will enforce the law, if there is a legal violation involved, or will use the revealed information in other positive ways. In the meantime, the employee is not on the firing line for reprisals or other improper personnel actions.

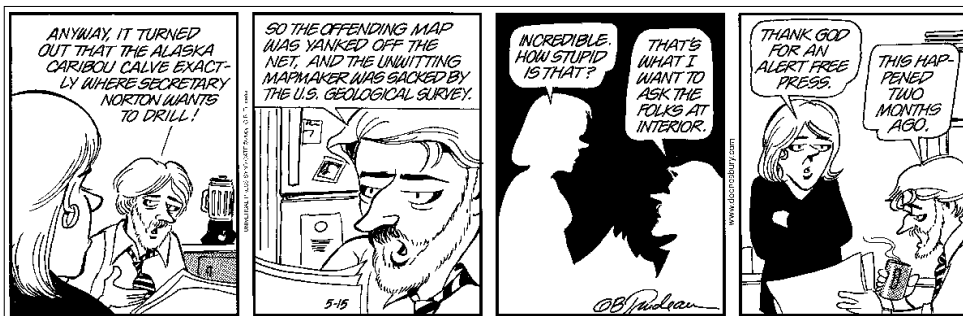
Similar organizations are GAP – the Government Accountability Project and the National Whistleblower Center (NWC). GAP's mission is to protect the public interest and promote government and corporate accountability by advancing occupational free speech, defending whistleblowers and empowering citizen activists. The NWC (www.whistleblower.org), likewise, seeks to ensure that people that can do something about improper governmental actions that risk the environment and public health, by protecting disclosures; and those who disclose.

The chronic nature of these cases illustrates that public agencies and their employees have a problem that has not been completely addressed by current laws. It is not simply the redress of an injury to a fired employee that is at stake here. Nor the prevention of violations by parent agencies. There is a larger injury to the general public, a falsification of information, a fraudulent decision. There is a need to recognize the deter-

rence and chilling effect of stifling information a phenomenon common to all who serve in the crucible of public natural resources and

environmental issues. We need laws that protect against retaliation for all forms of disclosure. We also need sanctions against those who seek to muzzle public servants for partisan reasons.

–Jennifer Mogy, 2L Jennifer is writing a law review note on whistleblower protection and retaliation in environmental policy, and this article is drawn from her research.



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INSTITUTE AGENDA: 2001-2002

Tulane's Environmental Law and Policy Institute will be active over the coming year on projects including:

Legislative and Regulatory Reform

Assistance to governments including the Dominican Republic, Panama and Cuba in design and implementation of environmental laws and regulations. Norms under consideration range from basic water and air regulations and more sophisticated market based instruments that provide incentives for businesses seeking to meet and exceed baseline requirements.

Environmental Security

The Institute will explore linkages between national and regional security and environmental performance. In the coming year, further scholarship and dialogue will be sponsored on the allocation of security resources in light of emerging environmental threats.

Trade and Environment

In partnership with the OAS, World Resources Institute and The University of Miami's North South Center, the Institute will assist in an environmental impact assessment of the Free Trade Agreement of the Americas (FTAA) in South and Central America. This assessment

will target sectors likely to grow significantly under the proposed 34 nation trade



Environmental security concerns such as water scarcity are among the Institute's priorities for the coming year. Here, residents of Serejeka, Eritrea draw water from a well with buckets and ropes immediately contaminating the town's drinking water and continuing the cycle of diarrheal disease that is so prevalent in the country.

regime, and the Institute will support U.S. trading partners in meeting environmental challenges through legal and policy reform. Results of the work will also be provided to officials negotiating the FTAA.

Environmental Technology & Efficiency

Design and implementation of regulatory policies that promote new investments in energy efficiency and industrial clean production in Southeast Asia as well as Latin America and the Caribbean. This support includes an Internet based "virtual dialogue" on industrial incentive policies among government officials and experts in Andean countries.

Climate Change Policy

Facilitate an inter disciplinary dialogue among high level government, industry and NGO leaders to explore climate change policy options. This discussion will be aimed in part at promoting innovative national greenhouse gas emission reduction policies in the US and overseas – policies that remain critical despite the current impasse over the future of the Kyoto Protocol.

Environmental Governance

Promote the adoption and implementation of legal frameworks that provide a voice for communities and citizens in the design and implementation of environmental policies and programs. This work will inform the legislative program and also serve as an area for research and scholarship.

NEW DIRECTOR Continued from page 1

governments and citizen groups working to reform and modernize national environmental laws and institutions. At an international level, Dannenmaier has participated in projects as far reaching as training local environmental officials in Southeast Asia, supporting environmental agenda implementation for the Summit of the Americas, and shaping a Western Hemisphere strategy on public participation and access to justice. For the past several years, Dannenmaier has chaired the OAS Inter-American Forum on Environmental Law, and the Inter-American Water Policy Roundtable, and he will continue in these positions while at Tulane. He will also continue to serve as a project advisor to the World Resources Institute's Public Participation Project and Partners of the Americas' Inter-American Democracy Network, and as a member of the Board of Directors for McGill University's Centre for Law and Sustainable Development.

Dannenmaier also brings a strong background as an educator to Tulane Law School. He served for six years as an adjunct professor at American University Washington College of Law, where he taught international environmental

dispute resolution, democratic environmental governance, comparative environmental law and international development law. He also served as Visiting Chair of Natural Resources Law at the University of Calgary Faculty of Law, where he taught International Development Law. Dannenmaier has also developed and taught a course in comparative urban environmental law through regional programs in Asia, Central and South America.

Dannenmaier plans to continue the tradition of the Institute's involvement in Louisiana and the Gulf Coast region while building stronger international ties through an array of friendships and contacts he has forged through his work overseas. One priority he sees is "to further integrate the law faculty and students, as well as the broader university community, into the work we do locally and internationally."

Dannenmaier arrived in New Orleans in early September with Arlo, his Golden Retriever, and is settling in at a home near campus. Tulane Law School is pleased to welcome Eric (and Arlo) to its family and is excited about the new dimensions he will give to the work of the Institute.

—**Jamie Taylor, 2L**

Environmental LLM Program: *International Experience Goes to School*

Tulane's Environmental LLM candidates join the program with a range of geographic, cultural and personal backgrounds and interests. Below is a sample from some of the class of 2002.

Ana Graces. Puerto Rico. “In the summer of 1999, I worked at the Department of the Interior, in the Office of the Assistant Secretary for Water and Science in Washington, D.C., an experience that deepened my interest in this field. I would like to help rewrite the environmental laws of Puerto Rico, which are weak and obsolete.”

Sharon Pitts. Belize “Upon my return to Belize, I plan work as an advisor to the Coastal Zone Management Authority & Institute. Additionally, I hope to promote eco-cultural tourism while safeguarding the environment as a government minister. I know I will return to Belize with a ‘greenprint.’”

Carmen L. Conaway-Mediavilla. Puerto Rico. “I have studied international law in Spain, and worked on environmental issues with a legislator in the House of Representatives of Puerto Rico.”

Felipe Leiva. Chile. “I have lived in several environments in Chile, from the desert to the mountains to Santiago. The beauty of these places lit my interest in nature and our relationship to it. I was selected to work at Arcadis Geotecnica Consulting, a private company which assesses mining and industrial projects. Deciding to dig deeper into the subject, I moved to the National Commission for the Environment, Chile’s environment agency.”

Carole Raffermei. France. “I’ve always been interested in environmental law, and worked in a general practice law firm on a case involving water pollution. I hope to pursue international environmental law; as we know, pollution knows no boundaries.”

Akio Zaitoku. Japan. “My concern for environmental issues began with an air pollution incident near my residence, when I was an undergraduate in Tokyo. I joined a citizen group to struggle with the problem, and came to realize the importance of environmental law.”

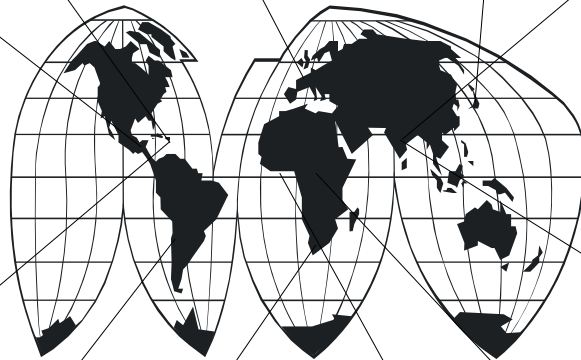
Aarthi Sivanandh. India. “I have majored in corporate law, but I volunteered for an environmental grassroots NGO called the Citizen Consumer and Civil Action Group, preparing issue statements and newsletters, even writing a few myself.”

Rajeshree Daulaghar. India “Although I majored in Labor Law, I was really more interested in doing the Environmental Law program. My passion towards the environment led me to volunteer at a state level environmental program called ‘Janma Bhumi’ (Mother Land). My work there inspired me to write an article on “Prevention of Mass Extinction,” and to pursue an LLM.”

Jacobus Joubert. South Africa “I initially pursued a career in the Environmental Sciences, hoping to specialize in Conservation. But then, having completed my degree in Botany, I felt that I should become familiar with the laws that regulate the subject matter I felt strongly about – so that I might be able to make a difference on another level.”

Alfred L. Brownell. Liberia. “Over the past years I have worked with the Global Environment Facility, where I presently serve as the Operational Focal Point for my country, and with UNEP, Fauna and Flora International, as well. I organized a group of young lawyers into Liberia’s first not for profit environmental defense organization, *The Green Advocates*, of which I am president.”

David Aweda. Nigeria. “I took an environmental course in my law school curriculum in Nigeria, and fell in love with this branch of the law. Nigeria experiences massive oil pollution, deforestation, and dumping of toxic wastes on our coastal shores. Nigerian environmental laws and policies need drastic reform; I intend to go back to Nigeria and pursue that reform.”



SIX VIEWS OF THE ELEPHANT: *Summer Clerkships in Environmental Law*

Theresa Lesh, 3L

Theresa worked for Lord Bissel & Brook in Chicago, where she focused on real estate transactions and zoning. “Some people assume that business equals bad guys,” says Theresa, “but there’s a gray area where it’s not about being good or bad, but rather how best to follow the rules. Interesting stuff, coming from a ‘green’ perspective, I don’t think you really believe there’s a middle road until you’re walking it.”

Doug McLand, 2L

Doug spent his summer at the Defenders of Wildlife Washington D.C. headquarters, working on public lands issues and western water rights. Inter alia, he developed a briefing document on oil and gas exploration in Finger Lakes National Forest. “My work on the FLNF brought major players into opposition to the proposal, which led to a moratorium on drilling being written into the Energy appropriations bill in the Senate.”

Punam Parikh, 3L

Punam Parikh worked in the Environment & Natural Resources Division of the Department of Justice, in Washington D.C. She assisted attorneys in document production, depositions and researching legal handles on various cases, including the EPA’s suits against seven of the country’s largest power companies for violations of the Clean Air Act. Punam found it “exhilarating” to be part of the action.

Amy Stengel, 3L

Amy spent her summer in Denver at Earthjustice Legal Defense Fund. Of the summer associate program, Amy says “it is a great way to be exposed to public lands issues and wildlife protection, where my heart lies.” Amy was able to work on a number of Endangered Species Act critical habitat cases, and assisted attorneys preparing for oral argument in the District Court and 10th Circuit Court of Appeals in Denver.

Jamie Taylor, 2L

Jamie spent her summer working at Brietstone and Company, a consulting firm in Long Island that handles unique insurance products for clients with specialized needs, including landfill closure and post-closure care of a wide variety of industrial sights. Her responsibilities included reading and analyzing a Phase One Superfund report, creating concept drawings, and assessing insurance requirements of wireless telecommunications companies.

Collin Williams, 2L

With Martzell & Bickford in New Orleans, Collin worked on a case that examined asbestos exposure and the synergistic effect of smoking in causing lung cancer. The cases raised factual and legal difficulties of concurrent causation and the fault attributed to each. Collin says “I think these suits make corporations put some thought into materials they use, their overall safety evaluations and their cost/benefit analysis.”

ALUMNAE NOTES

Dennis R. Hughes, 1995, writes that he is working in Holland & Knight LLP’s Washington office, “where historic preservation is a big part of my practice. Primarily, I am a zoning/land use attorney working almost exclusively on commercial projects in the District of Columbia, including the MCI Center, DC’s new Convention Center, the Newseum, IMF Headquarters, numerous foreign missions, university campus plans and others. One of the most rewarding projects has been the redevelopment of a former department store building and neighboring properties into a mix of commercial and residential uses. The building, which is a prominent local historic landmark, had sat vacant for nearly a decade in the center of the city. Its redevelopment is seen as a key to the future of downtown D.C. Another project I am quite proud of involved another landmark, the former headquarters of the United Mine Workers of America. As part of its conversion to an apartment house, we were successful in changing the text of the DC zon-

ing regulations to create an incentive for developers to rehabilitate historic landmarks (in their entirety rather than simply as facades).”

Wendoly Ortiz, 2000, writes: “I am an assistant regional counsel with EPA - Region I, based in Boston. I split time between the Office of Regional Counsel and Office of Environmental Stewardship. In theory it is a 50/50 split, but there is so much work to be done that it inevitably equals 150%.” On her plate are approvals of state drinking water programs, solid waste program delegation and Superfund cost-recovery cases. “In a nutshell,” she concludes, “I really enjoy what I am doing. I am gaining a great amount of exposure. It is a wonderful position for someone straight out of law school.”

Jon Owens, LL.M., 2000, reports that, “Until recently, I’ve been working at law firms in Atlanta NOT doing environmental law. Earlier this year, I was offered a position as an Attorney-Advisor for the EPA’s Office of Administrative Law Judges (“ALJ”s) in Washington, DC, which I gladly accepted. I draft opin-

ions for the ALJs on fines and permits issued by the EPA. It is a great opportunity to see and learn every law the EPA administers. I have no doubt that my LLM at Tulane helped me towards this position and this experience.”

J. Jason Reiger, 2001, reports: “I am very excited to be working for the California Public Utilities Commission.” He is currently involved in an investigation of whether revenue that gas and electric companies are allowed to charge customers for safety, upkeep and maintenance is being diverted to other expenses. His other focus is on bankruptcy issues. “As part of CEQA (California’s own NEPA) the CPUC is the lead agency for certain projects. We do the EIR and the company seeking a permit reimburses us for consultant expenses. One company, and given the current state of imperfect deregulation and economic downturn probably many more companies in the near future, has gone bankrupt, leaving the taxpayers of California eating the extensive cost of these environmental reviews.”

Enhancing the Curriculum

Visiting and Adjuncts

Professor Patricia Birnie

This fall, Professor Birnie is presenting a concentrated “mini-course” on “The Law of BioDiversity Post Rio.” She graduated with a degree in Jurisprudence from Oxford University in 1947 (prehistoric! she writes), and was called to the Bar in 1951, but subsequently became an academic. She has taught at Edinburgh University, Scotland, and the London School of Economics, specializing in Law of the Sea and International Environmental Law. She has written numerous articles and books, including *INTERNATIONAL LAW AND THE ENVIRONMENT* (1992) with Alan Boyle, and delivered conference papers around the globe from Samoa to Hungary to Waikiki. As a widow with three adult children, she says that she also enjoys looking after her six grandchildren from time to time.

Allan Kanner

Allan Kanner will again be teaching a Toxic Tort Litigation seminar focused on private law remedies for environmental injury. Allan has participated in civil tort cases in 39 states, including the Three Mile Island litigation, and in several large damage actions in Puerto Rico. A second edition of his book,

Environmental and Toxic Tort Trials, will be issued by Lexis next spring.

Stan Millan

This fall, Dr. Stanley Millan is teaching a new seminar entitled “Environmental Law and Business,” treating environmental liability, auditing, reporting, and operational and transactional due diligence. The law and business students enrolled are assigned “case studies,” realistic environmental problems to negotiate and solve. Dr. Millan has practiced environmental and administrative law for over thirty years. Currently special counsel in environmental law at Jones, Walker in New Orleans, he is in the process of finalizing for publication a new book for the West Group Louisiana Practice series, “*Louisiana Environmental Compliance*.”

Paul Zimmering

Paul Zimmering was introduced to utility law at the New Orleans firm of Stone Pigman, where he has long represented the Louisiana Public Service Commission. He has also been teaching public utility law at Tulane for the last 11 years. Zimmering uses his own materials drawn from practice, including the case of *Mississippi Industries v. Federal Energy Regulatory Commission*, 808 F.2d 1525 (D.C.Cir.

1987), relating to the cost allocation for the Grand Gulf Nuclear Unit, in which Louisiana taxpayers were spared about \$400 million in the first year of operation. Zimmering confers the “Golden Basset” Award to the top student performance in class -- a tribute to his lifelong interest in Bassett Hounds. As he describes the search for an energy-appropriate trophy symbol, he wanted a lightbulb to sit atop the base, but the trophy shop did not have a lightbulb; nor did it have his second choice, an oil derrick, nor his third choice, the scales of justice. He settled for a statue of the hound.

Lloyd Shields

Lloyd N. Shields is a partner at Shields Mott Lund, L.L.P. in New Orleans. A graduate of Tulane Law School and the School of Architecture, he has been active in historic preservation causes for many years, having served as chairman of the New Orleans Historic District Landmarks Commission and as president of the Preservation Resource Center, the Garden District Association and other preservation organizations. The Historic Preservation Law course he teaches is an overview of local, state and national preservation methods, and uses the variety of current issues in New Orleans as course examples.

Planning for Annual Spring Conference Underway

The annual Tulane Environmental Law Conference is in planning for 2002 – with a target date in late February 2002. Since its inception, the Conference has integrated perspectives from science, law and the public interest on “hotspots” in environmental policy.

This year’s conference will incorporate several session styles (roundtable discussions, workshops, expert panels, and a town-hall meeting format) on concurrent tracks, over a two-day period. This design will ensure that there are programs to fit every interest and learning style. And of course, participants will have the opportunity to exchange ideas and catch up with old friends and colleagues at the keynote banquet, the popular evening socials and the traditional round of Sunday fieldtrips. Sessions include a panel hosted by Environmental Defense on coastal issues, a workshop on environmental ethics by the Tulane Center on Ethics and Public Administration, and presentations by contributing authors of the Tulane Environmental Law Journal’s symposium edition on Water Law, due out in the summer of 2002.

Each year the conference draws upwards of 300 participants from academia, law firms, business and advocacy groups, and the general public. Participants from conferences past have praised the format that comingles legal analysis with scientific discussion in plain English, and provides explanations and practical advice in an accessible and interactive atmosphere. As one of the conference cofounders has said, “it’s an environmental festival; a lot of topics and a lot of fun.”

ENVIRONMENTAL ENFORCEMENT

Continued from page 2

About a year ago, the state Water Pollution Control Board raised the idea of combating this problem by issuing stop-work orders to the developers. Our office reviewed the idea and determined that the state water quality statute was not broad enough to allow the administrative board to issue such orders. However, this proposal led our office to adopt the position that we would bypass the administrative process in these situations and file original actions in chancery court asking the court grant to enjoin all construction until the developer came into compliance. So far, the courts have been very receptive to this strategy and the rogue developers have found that complying with the state environmental requirements is much less expensive than halting work on a major construction project for several weeks.

Our first priority when enforcing a judgment is to ensure that the state's natural resources are protected and that any environmental harm is remedied. This means that sometimes we have to think outside of the box with enforcement strategies. One such creative enforcement strategy is the concept of the supplemental environmental project (SEP). SEPs are environmentally beneficial projects that a defendant agrees to undertake in settlement of an enforcement action, but which the defendant is not otherwise legally required to perform. Properly done, and this is the key caveat, these projects provide a win-win situation for both the overburdened state environmental agency and the financially-challenged defendant.

One of the most successful SEPs that we completed was in East Tennessee, where a scrap dealer faced several thousands of dollars in civil penalties for improperly disposing of waste tires on his property. After cleaning up his own tires, we negotiated with the defendant to remediate two abandoned waste tire disposal sites in the area, sites that had been on the TDEC's "most wanted" list for some time. The solution was favorable for all parties. The defendant avoided civil penalties that he could not afford, and averted the possibility of having the state collect on its judgment by executing on his equipment. Meanwhile, the state was able

to have two of its worst dump sites cleaned up without having to incur the fiscal and administrative burden of employing an outside contractor. Finally, the agency was spared the time and expense of executing upon the defendant's property to collect on the judgment.

TDEC also used SEPs when a recent audit of the Tennessee Department of Transportation (TDOT) revealed environmental violations in many of the state's fleet maintenance garages. Rather than undertake the legally tedious and politically sensitive task of having one state agency collect civil penalties from another state agency, the two departments entered into a memorandum of understanding: TDOT would implement a remediation plan to resolve its compliance issues, and then, would engage in several SEPs, to include surveying many of the state park boundaries and cleaning up more large dump sites on the state's most wanted list.

I find my work in environmental enforcement to be a complicated process where each case must weave its way through a labyrinth of administrative and judicial corridors before finality can be reached and compliance achieved. Common sense has been my best guide, and the best solutions have come from the goal of pursuing a pragmatic course on environmental protection. My best weapon, however, is knowing my legal "handles," the law that I have in reserve against unwilling parties, learned on a journey of law that began six years ago at Tulane.

—**Jason Holleman** *Mr. Holleman is a 1998 graduate of Tulane School of Law. While at TLS, he earned a Certificate of Environmental Law and was an active member of the TELS, the Clinic and the Journal. Jason is now an Assistant Attorney General in the Environmental Division of the Office of the Tennessee Attorney General and a reporter in Nashville.*

Down On The Bayou

Putting down the textbooks and pulling on their boots once again this year, students from Professor Houck's Coastal and Wetlands Seminar headed "down the bayou" for the traditional weekend retreat at the Louisiana University Marine Consortium research station in coastal Louisiana. They may be the last generation to do so; the coast is disappearing at a rate of 40 square miles a year. Students joined researchers in small boats and on foot, took soil and water samples,

seined fish and crabs, lost their sneakers in the marsh, slapped mosquitoes, and took the pulse of a salt marsh ecosystem. "Eating lunch while up to our waists in marsh grass and within sight and sound of operating oil and gas wells brings a lot of the environmental and energy curriculum together," says Ellen Cogswell, a 3L from Pittsburgh.

—**James Johnston**, 3L



Progress can be slow in the Coastal Zone

RECENT PUBLICATIONS BY OUR FACULTY

Gunther Handl

The Legal Mandate of Multilateral Development Banks as Agents for Change toward Sustainable Development, in S.A. Bronkhorst, Ed., *LIABILITY FOR ENVIRONMENTAL DAMAGE AND THE WORLD BANK'S CHAD CAMEROON OIL PIPELINE PROJECT*, 62 (2000).

"Corporate Conduct Abroad as a Global Governance Issue," presented at joint meeting of American Society of International Law and the Australian and New Zealand Societies of International Law, Sydney (June 26, 2000).

MULTILATERAL DEVELOPMENT BANKING: ENVIRONMENTAL PRINCIPLES AND CONCEPTS REFLECTING GENERAL INTERNATIONAL LAW AND PUBLIC POLICY, (Kluwer International, 2001).

Human Rights and Protection of the Environment, in A. Eide, C. Krause & A. Rosas, eds. *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A Textbook* 303 (Martinus Nijhoff Publishers, 2nd revised ed. 2001).

"Human Rights and the Environment: States' Positive Obligations flowin from the Right to Life," at American Branch of the Internationa Law Association, Annual Meeting, New York City (October 26, 2001).

Eric Dannenmaier

Industrial Clean Production Policy Alternatives, University of Miami North-South Center Press (2001).

Meeting Sustainable Development Commitments in the Americas Progress to Date, Leadership Council for Inter-American Summitry Policy Paper (2001).

Environmental Security and Governance in the Americas, Canadian Foundation for the Americas (FOCAL), Policy Paper No 01-4 (March 2001).

Achieving Meaningful Compliance with Global Climate Change Commitments, Pew Center on Global Climate Change (Fall 2000).

Adam Babich

Legal Ethics & Representation on Environmental Justice Issues, 17th Annual NAACP Lawyers' Continuing Legal Education Seminar, New Orleans, LA (2001).

Environmental Liability, Federal Judicial Center & Tulane Law School Program for U.S. Bankruptcy Judges, New Orleans (2001).

Recent Developments in Environmental Law, 12th Annual Tulane Law School CLE by the Hour, New Orleans, LA (2000).

Oliver Houck

THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY AND IMPLEMENTATION, Environmental Law Institute (2000).

Environmental Law in Cuba, JOURNAL OF LAND USE AND ENVIRONMENTAL LAW (Fall 2000).

Is that All?: A Review of The National Environmental Policy Act, an Agenda for the Future, DUKE ENVIRONMENTAL LAW AND POLICY FORUM (Spring 2000).

Sandra Zellmer

The Devil, The Details, and the Dawn of the 21st Century Administrative State: Back to the New Deal? 32 ARIZ. ST. L.J. 941 (2000).

The Virtues of Command and Control Regulation: Barring Exotic Species from Aquatic Ecosystems through the Clean Water Act, 2000 U. ILL. L. REV. 1233 (2000).

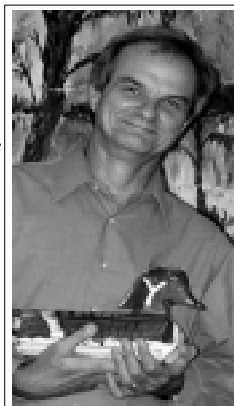
Enjoy the Donut: A Regulatory Response to the White Paper on Preventing Invasions in the Great Lakes by Exotic Species, 2 TOL. J. GREAT LAKES LAW, SCI. & POL'Y 207 (2000).

Conserving Ecosystems Through the Secretarial Order on Tribal Rights, 14 NAT'L RES. & ENVT 162 (2000).

JERRY SPEIR BECOMES EMERITUS

On August 31, 2000 Institute Director Jerry Speir officially retired his number and became an emeritus of the Tulane Environmental Law Program. Jerry has guided the Institute since its inception, and he has been central to the success of a range of domestic and international programs. His daily presence will be missed at TLS, but he will continue to work on projects of interest – concentrating on forest resources and community participation. Jerry kindly agreed to celebrate his

freedom by hosting the fall environmental law party at his home – a traditional shotgun dwelling which his wife and he have improved to feature secret fountains, eclectic architecture (there is a suspicion of spare automobile parts), and a large, outdoor mural depicting a mountain scene from the Chilean Andes. At the gathering, Jerry was awarded the ceremonial Sitting Duck Award, a locally-carved decoy with vague resemblance to a wood duck ... but painted an inexplicable green.



Why a [green] Duck?

"(1) It is really beautiful, isn't it?, (2) it is utterly un-realistic it bears no relation to real life, and (3) it is green It is a perfect metaphor for environmental law."

THE FOUR PILLARS:

TULANE'S ENVIRONMENTAL LAW PROGRAM

The Tulane Environmental Law Program is one of the largest and most diverse in the United States. Each year Tulane graduates more than forty Juris Doctor and fifteen Masters candidates with specialties in environmental law. What distinguishes Tulane's program in addition to the experience of its faculty is the scholarship of its journal, the strength of its clinic, the international projects of its institute, and the momentum provided by an engaged group of students. These

four components of Tulane's program—in the extraordinary setting of New Orleans, the Lower Mississippi River, and the Gulf Coast—provide a unique academic experience for those with an interest in environmental law and international sustainable developmental policy. For more information, contact the Law School's admissions office at John Giffen Weinmann Hall, Tulane University, 6329 Freret Street. (504) 862-5930, or its web site at <http://www.law.tulane.edu>.



“Bring out your social remedies! They will fail, fail every one, until each man has his feet somewhere upon the soil.”

David Grayson, ADVENTURES IN CONTENTMENT (1907)



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