



IN THIS ISSUE



THE KATRINA LITIGATION 1, 9-13

WATER POLICY INSTITUTE 1, 4

ENVIRONMENTAL LAW SOCIETY 2

HOUCK RECEIVES ABA AWARD 3

ENVIRONMENTAL LAW JOURNAL 4

ENVIRONMENTAL LAW CLINIC 5

THE ENERGY LITIGATION 6

GOODBYE TO A PIONEER 8

NEW COURSES 3

FACULTY NOTES 13

GREENWORKS: ALUMNAE NOTES 14

The Katrina Litigation

The Levees, Engineers and Contractors, MRGO, Responders and Insurers



Photo by Paula Burch

As Hurricane Katrina, closely followed by Hurricane Rita, made landfall, the levees and floodwalls protecting the City of New Orleans and surrounding parishes failed. The loss of property, lives and income was massive, indeed unprecedented in U.S. history. As powerful as the storms were, losses were largely caused by human actions and human errors. The damages were compounded further by inadequate responses by government relief organizations (think: FEMA), insurance companies and environmental agencies responsible for toxic waste cleanup and the disposal of enormous volumes of demolition debris. The resulting litigation is, correspondingly, massive and diverse.

One striking aspect of the post-Katrina cases is that many of them raise issues of first instance, presenting new theories of action and new applications of old theories to a new, catastrophic situation. They are, further, constantly evolving as new actors step forward.

Continued on Page 9

Introducing: the Institute for Water Policy and Law



One of the several revelations of Hurricane Katrina has been the shortage of policy for water use and management. Instead, water issues are spread among a bewildering variety of agencies with missions that are often at cross purposes, and that can lead to tragic results. None the least of which are the drowning of New Orleans and the collapse of the Louisiana coastal zone. Katrina was a disaster, but it also an opportunity to refashion our approaches to water policy and to do serious academic work on similar issues around the country, indeed, around the world. To meet this opportunity, Tulane Law School is responding by re-forming its Institute of Environmental Law and Policy as an Institute of Water Policy and Law.

We are fortunate to have an experienced attorney, environmental leader and water policy expert to direct this new enterprise. He is Mark Davis, who has for the last twelve years directed the Coalition to Restore Coastal Louisiana, headquartered in Baton Rouge.

Continued on Page 4



Photo by Mary Reichert

TELS CALENDAR

- (1) Pre-Class BBQ with members of ILS, MLS, ELS and the LLMs in Audubon Park – 8/19
- (2) Welcome Back Pizza Dinner – 8/31
- (3) Annual Dessert Competition and Welcome at Professor Houck's House – 9/17
- (5) Canoe Trip on Mississippi's Wolf River – 9/30
- (6) Environmental Film Festival, Stone Auditorium, Tulane University Campus – 10/13-10/14
- (7) Fall Bike Trip to Ormond Plantation
- (8) January Paddle, Bayou Sauvage
- (9) Annual Environmental Law conference – 3/9-3/10
- (10) Atchafalaya Swamp Paddle – March
- (11) Camping, Horn Island – April
- (12) TBAs: Trip to N.O. Pumping Station; Beach Project; Summer Internship Panel

ENVIRONMENTAL LAW SOCIETY

TELS to sponsor first annual Film Festival

TELS will sponsor an "Earth to NOLA Film Festival" on October 13th and 14th in Stone Auditorium, Room 205 of the Woldenberg Arts Center. The festival's theme is "48 Hours to Start Local and Go Global," featuring environmental and human rights themes.

Entry will be free, with the exception of the 8pm Saturday showing of An Inconvenient Truth in McAlister Auditorium, which will cost a modest \$2 for students with ID and \$3 for non-students.

The festival opens on Friday evening with Nature: Katrina Animal

Rescue at 7:30pm, followed by Mardi Gras: Made in China, addressing the human rights effects of globalization, at 9:45pm. Q&A to follow with Director David Redmon.

The Festival will run through Saturday, with screenings to include Oil on Ice; Thirst; Razing Appalachia; DeNADIE and Blue Vinyl.

Co-sponsors include: Alianza; Human Rights Law Society; Student Animal Legal Defense Fund; Tulane Entertainment & Arts Law Society; Tulane Green Club (undergraduate); and Tulane University Campus Programming (Cinema Department).



Photo by Anthony Cerceo

ELS OFFICERS:

Mary J Reichert (President); Mary Nagle (Vice President); Andrew K Jacoby (Treasurer); Lindsay Carr (Secretary); Elizabeth Fisher (Newsletter); Jesse George (Outings); Heather Heilman (Conference Coordinator); Valerie Auger & Heather Gaw (Speakers); Jason Kafoury & Rebecca McDaniel (PR & Marketing); Rebekah Robinson (Food & Entertainment Chair); Jenn Hoekstra (Conference Day).

Conference planning in the works:

On March 9th and 10th Tulane Environmental Law Society will host its 11th annual Conference on Law, Science and Public Policy. This year's Conference will feature two plenary sessions and three concurrent semi-

nar tracks, one on post-Katrina litigation and planning, a second on national policy and a third on international issues and climate change.

For more information, contact Mary Nagle at: mnagle@tulane.edu

Professor receives ABA Award

On August 6, 2006 Professor Houck received the American Bar Association Award for Distinguished Achievement in Environmental Law and Policy. An excerpt from his acceptance speech follows:

"...Let me tell you what you, largely practitioners, already know about environmental law. Ours is a field that has evolved from the grassroots up. Indeed it has evolved largely from litigation, common law fashion, lots of cases; in this aspect, in the words of David Sive, "no other field is even close." And what we also know is that most of the new ideas, new theories and new remedies in our field come from practicing lawyers, often in small private or public interest firms, inventing and pushing solutions to problems. Of that you can be proud.

The corollary to this phenomenon is that there are literally hundreds of attorneys in America who could make legitimate claims to your distinguished environmental award. Off the top of my head I can think of three dozen who have made indelible contributions. I can also think of a solid cadre of environmental lawyers within government who would be equally eligible for this award — for innovative regulation (the no surprises policy of the Endangered Species Act comes to mind), for programmatic solutions (the PSD program of the Air Act comes to mind), or for, in these times,

simply holding the line against tremendous, adverse political pressure. But for the fact that recognizing them could put their jobs at risk. Maybe we need a new category: the Unsung Environmental Lawyer Incapable of Being Recognized Award. They come onstage with bags over their heads, as in the old Mafia hearings. I leave the format to you. ...

Let me close with an observation that I hope does not offend anyone, but that I firmly believe.

The thing that is special and difficult about our field is that, at the end of the day, there is right and there is wrong. To paraphrase Aldo Leopold, that which tends towards a sustainable planet is right. Things which derogate from that, whatever the objective and whatever the cover story, are environmentally wrong. So what may look to you and your clients as blind zealotry, NIMBYism and mindless opposition to their particular proposals is really just an effort to buy time until we reach some planetary sanity. Face it, if we don't open the Arctic National Wildlife Refuge today the question will still be there tomorrow. Nothing, under even the best of present legal schemes, is ever, truly saved.

I see the field that we share in environmental law as something like Hans Brinker, out there with his thumb in the dike until the townspeople came and saved the day. Will the townspeople come this time? I have no idea. But all of my life is about buying that time. What I hope, what I would like to think, is that this effort is what you are recognizing in your award.

Again, please accept my deep appreciation."



Left to right: Standing Committee Chair R. Kinnan Golemon, Oliver Houck, Conference Chair David Hodas and past Section Chair Kenneth J. Warren.

New Courses

Development and Disaster

-Professor Dannenmaier

The role of law in decisionmaking on environmental vulnerability and natural disaster. Students explore three propositions: (1) disasters are largely anthropogenic, not natural; (2) post-industrial development has increased community vulnerability; (3) legal frameworks can reduce vulnerability and increase resilience.

'Hegemonic vs. Universal' International Law

-Professor Handl

Contemporary U.S. policy and its impact on international law, societal structure and institutions. Especially: the use of force in international relations and incidents in which the U.S. by-passed established multilateral treaty regimes on arms control, human rights, environment and administration of justice.

Saving Louisiana

-Professor Houck

Examines the impacts of hurricanes Katrina and Rita and steps taken to protect, restore and maintain South Louisiana. Explores causes and remediation including levees, storm gates, marsh and wetlands, floodplain zoning and insurance.

Environmental Law Enforcement

-Professors Clark and Diaz

Combines elements of criminal, administrative and citizen enforcement of environmental law. Covers investigation, discovery, evidentiary issues, mens rea, trial, remedies and sanctions.

Toxic Tort Practice

-Professor Goodell

Treats real-time practice issues in the field; including complaint, discovery, litigation strategies, remedies and fees.



Tulane
Environmental
Law Journal

The Tulane Environmental Law Journal's 20th Anniversary volume will be published in two issues, available in mid-November 2006 and mid-March 2007. We are quite proud of our fall issue, which features the following articles:

Amy Leonard: "The Rise of Lobbyists in Labcoats and the

Laws that Deter Them"
Ronan Mel Kennedy: "International Conflicts Over Plant Genetic Resources: Future Developments?"

James Wilkins, et al.: "The Mouse That Roared: Can Louisiana's Coastal Zone Management Consistency Authority Play a Role in Coastal Restoration and Protection?"

Stanley Millan: "Cracking the Floodwall Code"

Zachary Tyler: "Saving Fisheries on

the High Seas: The Use of Trade Sanctions to Force Compliance with Multilateral Fisheries Agreements"

While the spring issue has not been finalized, we will continue the pace set by our fall issue, making this a banner year for the TELJ and celebrating our twentieth year in publication. Topics for the spring issue will include fisheries and fish-ranching, emissions trading, and of course much more.



TELJ takes on Big Oil

MEMORANDUM

To: TELJ members

From: EIC

Date: September 18, 2006

Subject: Fight to the Death

"We've tentatively scheduled a kickball match against the geologists and engineers of Shell Exploration and Production Co. (SEPCO). Saturday, Oct. 21, 2006, at 4 pm on the fly. This will be a grand event, at which Shell will be humiliated.

"This is what many have dreamed of – Tulane Environmental Law Journal battles Big Oil to the death. Or at least to the end of several innings of kickball. Followed by refreshments."

Water Policy Institute *Continued from Page 1*

The Coalition prepared the first coastal restoration plan for the state, and provided both the citizen voice and the expertise to motivate state and federal players in that direction. From those modest beginnings have sprung ambitious government restoration proposals with price tags upwards of \$20 billion. In Mark's words, there remains for the Coalition a vital role in "promoting and watchdogging Louisiana coastal restoration."

The role of the Tulane Institute, however, is "to stimulate a new kind of thinking towards water manage-

ment of all types", as wide-ranging as water use, sediment re-use, floodplain development, fisheries and global warming. All of which, he adds "are in a crises mode."

On the personal side, Mark is a graduate of Indiana University (BS), with a Juris Doctor also from Indiana and a Master of Laws in Taxation from Georgetown. A former Adjunct Professor of business law at Indiana and at Chicago-Kent, he went on to private practice in Washington, DC and Chicago, before coming to Louisiana in 1990. He is a member of the Governor's Advisory Board

on Environmental Quality, the Governor's Task Force on Water Policy and the Governor's Advisory commission on Coastal Restoration and Conservation.

His awards and recognitions include the EPA Environmental Excellence Award (1993), National Wildlife Federation Conservation Organization of the Year Award (1998), and the grandly-stated Environmental Hero Award [honest, that's the title, Ed.] of the US Department of Commerce, (1998). He resides in New Orleans with his wife, son, dog ... and many friends.

Don't Blame the Weather

by Professor Babich

ENVIRONMENTAL LAW CLINIC

Although people often refer to Hurricane Katrina as the force that shaped recent events in Louisiana, it is controversial in New Orleans to blame the weather.

Many residents trace current difficulties back—not to “the storm”—but to the failure of the U.S. Army Corps’ levees, whether due to poor engineering at the London Avenue and 17th Street Canals, or to forces that the Corps unleashed by digging the Mississippi River Gulf Outlet to the east.

Consistent with this perspective, the Clinic represents the Louisiana Environmental Action Network (LEAN) in its efforts to hold the Corps responsible for the spread of contaminated sediments in a New Orleans neighborhood. Our legal theory is that following years of pumping less-than-pristine waters from New Orleans streets into the London Avenue Canal, the Canal and its sediments met the definition of a solid waste disposal facility, contained by the Corps levees. By installing inadequately engineered levees and, after those levees failed, by failing to fully test the resulting spread of sedi-

ments, the Corps became responsible for solid waste that may present an imminent and substantial endangerment to health and the environment under the Resource Conservation and Recovery Act (RCRA).

An advantage of this approach is that RCRA contains powerful language that “waives any immunity otherwise applicable to the United States,” breaching the Flood Control Act of 1928’s otherwise intimidating provision that “No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.” LEAN’s theory is that if we can establish the Corps’ duty to evaluate and, where necessary, abate environmental contamination in one neighborhood, the Corps will be hard pressed to deny similar relief to other parts of the city.

The levee failures left more than potentially contaminated sediments in their wake. LDEQ’s “debris management” plan estimates that the disaster resulted in “more than 22 million tons or 55 million cubic yards of debris, including thousands of orphan drums of unknown origin

and content, over 350 thousand flooded and abandoned cars, over 60 thousand damaged vessels, over 1.5 million units of white goods, [and] over 500 thousand units of electronic goods.” Impatient with the normal permitting process for dealing with this debris, LDEQ has relied on “emergency orders” that dispense with public notice or opportunities for public comment or public hearings in advance of regulatory decisions.

On April 14, 2006—more than seven months after the storm—LDEQ granted “emergency authorization” for the new, unlined Chef Menteur landfill between the Bayou Sauvage wildlife refuge and a Vietnamese-American community struggling to reestablish itself in East New Orleans. And on August 28, 2006, LDEQ issued its seventh “Amended Emergency Declaration and Administrative Order” waiving a variety of water quality, air quality, and solid waste regulations.

On August 9, 2006, on behalf of LEAN and the Sierra Club, the Clinic filed a challenge to LDEQ’s emergency orders under 42 U.S.C. § 1983. The gravamen of this lawsuit is that the U.S. Constitution preempts LDEQ’s attempts to waive minimum environmental standards set by federal law. In other words, Hurricanes Katrina and Rita notwithstanding, Louisiana residents are entitled to the same environmental protections as other U.S. residents.

So the student attorneys in the 2006-07 Clinic have no shortage of challenges against which to test legal skills. To smooth the road following last year’s disruptions, the Louisiana Supreme Court and the U.S. District Court for Louisiana’s Eastern District have relaxed student practice requirements a little for the fall semester. Here’s hoping that our student attorneys can return the favor and, when they graduate, leave behind a regulatory system that is a little more effective.



Environmental Law Clinic Student Attorneys, 2006-2007. Photo courtesy of Adam Babich.

THE ENERGY LITIGATION

Over the past year, Hurricanes Katrina and Rita combined with national energy priorities to make Louisiana a testing ground for several major energy proposals. Chief among them are numerous Liquid Natural Gas facilities, aggressive new Oil and Gas Leasing schemes, and equally ambitious Wind Energy proposals, all centered on the Louisiana Gulf coast, the largest and most productive estuary in America. In overview:

LNG Facilities

by Jackson Logan (*LLM Cand. 07*)

Liquid natural gas is the fuel of the future, in the view of energy companies, and much of that future is slated for the coastal waters of South Louisiana. The environmental benefits of LNG are obvious; it burns clean, or at least much cleaner than other fossil fuel sources. The disadvantages lie primarily in the technology proposed for warming up the gas, which arrives from abroad in tankers, frozen to extremely low temperatures to facilitate transport. The cheapest way to warm up the gas is to run warm coastal waters around it, and then discharge the super-cooled waters back into the Gulf. Herein lies the rub.

The volumes of water needed for warming are in the order of millions of gallons per day, per plant, and in the process, everything in that water column from plant life to fish larvae to infant crustaceans is killed. The warming water also absorbs an array of toxins that, too, are discharged into the Gulf. Moreover, the terminal facilities are located in passes between coastal barriers that are also passes for migrating aquatic life, crabs, shrimp, menhaden, red snapper, speckled trout and other species that spend parts of their life cycles in both closed marsh and open water systems. Federal estimates of fisheries losses from even single LNGs are impressive. Louisiana has now five LNG applications pending, one granted, and at least double these numbers in the wings.

On the bright side, all of these impacts can be avoided by using closed loop cooling systems that recycle the water, instead of releasing

it to the Gulf. Closed loop is the rule in many places of the world.

An umbrella coastal organization, the Gulf Restoration Network, approached the Environmental Law Clinic for representation on these issues, seeking consideration of the cumulative impacts of these proposals and the adoption of closed loop technology. The Clinic filed suit against the federal approval of a Shell application, and the ripples are still spreading. In an opinion narrowly construing both NEPA and the Clean Water Act, the Fifth Circuit ruled that an impact statement that did not consider the associated impacts of other facilities passed muster, and that the rejection of closed loop technology was not arbitrary, essentially because of added cost. At the same time, the pressure of the Gulf Restoration Network, coastal scientists and the lawsuit encouraged the Governor of Louisiana to come out publicly in favor of closed loop systems, and to encourage other Gulf governors to do the same. Facing this opposition, Freeport McMoran, the next applicant in line, renounced its open loop proposal in favor of a closed system. Stay tuned.

Oil and Gas Leases

by Anthony Cerco (*JD Cand. 09*)

In 2006 the federal government attempted to accelerate oil and gas production in the Gulf of Mexico.

The new proposals have brought strong opposition from the State of Florida. Surprisingly, they have also brought opposition from Louisiana. The two lease sales that have engendered the most controversy are for Area 181 and Area 200.

Lease Area 181, located approximately 100 miles off the coast of Pensacola, Florida, has attracted attention because the Gulf States, including Texas, Louisiana, Mississippi and Alabama, are agitating for a greater share in the royalties paid to the federal government. Since the hurricanes of last year, Louisiana's state and federal politicians have justified their claim for a greater share by directing them toward the rebuilding and protection of Louisiana's badly-damaged coast.

In late summer, both the House of Representatives and the Senate passed energy bills including royalty sharing provisions that were significantly different, and must now be reconciled. As it stands, the states are likely to receive somewhere between 37.5% and 75% of all royalties produced from the area, but that percentage is also tied to the number of years after which extraction from the area has begun. Any way the pie is sliced, Louisiana's take will be large.

Over the summer, the state sought a preliminary injunction against the Area 200 sale, based on environmental harm. The court found that

Continued on Page 6





state may, perhaps ironically, end up sacrificing some measure of its environmental resources in order to raise money to restore them.

Stay tuned.

Wind

by *Gregori Mavronicolas (JD Cand. 07)*

Wind energy – ever the bridesmaid, never the bride – may finally see the altar in South Louisiana.

At, perhaps, considerable environmental risks a wind energy company, WEST, formed by two Louisiana businessmen, has proposed an ambitious array of wind terminals across the Gulf of Mexico. The turbines will be mounted on to tops of off-shore oil platforms in open water, as many as 100 terminals or more.

A review of WEST's proposal makes clear that the Louisiana gulf region has some of the best potential for wind power in the country, and that capitalizing on wind energy holds great promise. However, the Gulf coast at the base of the Mississippi River is also one of the most important migratory bird corridors in the world. The number of migrants in the Mississippi flyway equals

an injunctive relief would not be appropriate because there is not likely to be any activity that would cause environmental harm between then and the hearing on the merits, scheduled for November. Nonetheless the court went on to strongly suggest that the state's case on the merits was well founded. Come November, absent a federal-state settlement, the court may well impose a moratorium on any activities tied to Lease Area 200 until the federal government re-evaluates the impact of the sale and provides compensatory measures for its impacts.

The controversies surrounding areas 181 and 200 suggest that the

all other flyways combined, and the number of rare and endangered species is also high. The windmills are slated to be placed in the same jet stream currents that carry the birds. Further, the oil platforms that will host these windmills also serve as nesting and hunting areas for many of the species in migration. They serve as bird attractors. Hence, the avian impacts issue is a serious one, and will need to be resolved before wind energy proceeds on a widespread commercial scale.

WEST is currently installing a 150MW wind farm 8.5 miles offshore, south of the City of Galveston. It has leased 11,355 acres and has obtained a permit to operate the Texas General Land Office. A condition of the permit is that WEST research avian impacts. WEST claims that it has come up with well-founded methods to observe, count and record the avian interaction with offshore wind turbines.

Accordingly, they plan to: 1) install sensitive microphones on the turbine blades to record impacts; 2) install a laser barrier, which is below the rotating blades and will count any piercing of the barrier; 3) incorporate an adjacent observation platform that is suited for observers to use radar, infrared camera and night vision equipment and 4) involve environmental organizations such as the Sierra Club, the Audubon Society and the Wetland Society.

Stay tuned.

OUTSTANDING ENERGY EXPLANATION OF THE YEAR AWARD: IT DID NOT REACH THE OCEAN

In September 2006, British Petroleum was under Congressional investigation for oil spills from its facilities in Prudhoe Bay. The week of the hearings, BP had another 43,000 gallon pipeline spill in California, that went unreported until the following Tuesday (when the hearings had ended). The official explanation:

“BP spokesman Cyndy Wymore said that a news release was not issued earlier because the spill is handled jointly by the Coast Guard, the state Fish and Game Department and BP and all three decided that public notification was not needed earlier, especially since the oil did not reach the ocean.”

Los Angeles Times, September 13, 2006

GOODBYE TO A PIONEER: MIKE OSBORNE

This Fall New Orleans loses its original environmental litigator, Michael Osborne, who is moving north to join his daughter's family in North Carolina. Mike, whose career here spanned four decades, was among other things a 1960 Tulane Law graduate, back in the days when there was no environmental law in law school classes or anywhere else. So, out in practice, he made it up, and then began to work with the new environmental statutes when they came on line. In 1990 he became the first Chair of the Tulane Environmental Law Clinic's Litigation Review Board, which he served for more than 10 years. His patience, experience and good humor will be greatly missed.

By Professor Houck

When I first came to New Orleans in 1971 I asked around for the environmental lawyers. I was told there was one, Michael Osborne. For the next decade, as I commuted back and forth from Washington, D.C., there remained pretty much one environmental lawyer in the state, I mean someone who could take a case into state and federal court, and was willing to do it, largely pro bono, for a wide variety of clients who had in common that they had no money. I have always asked myself why we take on environmental cases, and the answers vary with the person, but for Michael it was obvious. Everything in Louisiana is about water, and he loved the water.

His first case I knew about opposed a bridge over a particularly beautiful stretch of the Tangipahoa river, a thin ribbon of clear water, trees and sandy beaches north of Lake Ponchartrain. They didn't get a Coast Guard permit, or some such. The Tangi lies deep in David Duke country, not exactly known for environmental concerns. But the lawsuit won, and the bridge was moved. Afterwards, I paddled the Tangi with Mike on an extremely cold Superbowl Sunday. Nobody was out of doors. The river was in high flood. I caught a snag and flipped his son into the water. The things we remember.

Michael maintained his own practice, the old-fashioned, handles everything kind that has been the

mainstay of the field, while he took on ever more ambitious environmental cases. He stopped a circumferential highway around the City of New Orleans. He stopped a fifty mile Corps of Engineers navigation canal in the heart of the Louisiana coast, a shameful boondoggle for the benefit of two local companies. I spoke at a subsequent public hearing in Morgan City, beneficiary country. Perhaps his most famous case was up in Avoyelles Parish, winning an opinion that bottomland hardwoods were wetlands, and that bulldozing them was a regulated activity under the Clean Water Act. Neither conclusion was where the Corps regulatory authorities wanted to go. Mike's most hard fought and heartfelt cases, however, were on behalf of remnants of the Houma Indian nation now eking out a living in the coastal marshes, and blocked by marsh landowners from accessing their fishing grounds. Mike would not admit to the word "landowner" in these lawsuits; he called them "water bottom claimants." The courts would not follow him, however, and the access barriers remain to this day. Mike was always about the underdog.

Louisiana now has its cadre of environmental lawyers. Most work for corporate law firms and do regular business and occasional battle with federal and state agencies. A dozen or so work outside that system, in small firms. We

even had an Earth Justice office here, once. There is also a steady business in toxic torts, in which this part of the world is never lacking. But the lawyers who amaze and impress me are the ones who are willing, for no prospect of a decent fee, to take on the public law case for clients like the Houma Indians or the Vietnamese residents of New Orleans East and burn up a thousand hours and come away with something. Or perhaps with nothing but a loss and a good try. They are in Mike's mold.

So I still see Mike here in my mind, sitting next to a river on the bow of his canoe, smoking a cigar, spinning a yarn, listening to what you said with that particular southern grace, a dead pause that makes a northerner like me think: "Did he hear what I said?" And then, finally, comes his reply, something funny, probably an anecdote, which he'd begin with "Well..." And whatever came next was worth the wait.



Photo by Nabil Baddour

Katrina Litigation

Continued from Page 1

The week of this writing, for example, both the Parish of St Bernard and the State of Louisiana joined a private lawsuit seeking not only damages but to shut down the Mississippi River Gulf Outlet as well. Meanwhile, a Louisiana Congressman has introduced a bill waiving federal immunity for post-Katrina damage claims, which would tip the balance in major ways.

A third, unique aspect of the litigation is the degree to which it rises from the frustration of the plaintiffs and their lawyers, several of whom are one and the same. More than one corporate lawyer found him- or herself with a house under water for more than a month, an office out of the city for half a year, inadequate insurance and a yet-to-be-delivered, several-dimes-on-the-dollar federal repair or buyout offer, before we get to the plight of the rest of the family. Which explains not only the number of actions, but their variety and ingenuity.

Of final note is the degree of Tulane Law School involvement in these cases. Tulane grads are presiding over several of the lawsuits, while others are presenting claims for individual plaintiffs and neighborhood organizations, for government and corporate defendants, and for third-party contractors, insurance companies and other intervenors. A summary of the action follows:

Levee and Related Cases

by Will Percy (1980)

As of September 2006, there

were thirty-two suits in federal court regarding the flooding of New Orleans by Hurricane Katrina. The first federal case was filed on September 19, 2005. On March 24, the Court ordered that the plaintiff and defendants' attorneys each be represented by a Master Committee to facilitate prosecution of the cases. On April 11, when the number of Katrina suits had grown significantly, they and all future ones were ordered to be consolidated for preliminary matters, and eventually all were assigned to Judge Stanwood Duvall and Judge Magistrate Joseph Wilkinson. The court created four litigation categories: (1)

Had the Corps' engineers and contractors been 'even half as competent and aggressive as their lawyers,' the biggest complaint after Katrina would have been, 'wet ankles.'

(2) Levees, (2) MRGO, (3) Insurance, and (4) Responders. Each suit must be sub-titled with one or more of these designations. In summary:

(1) **Levees.** The majority of the cases fall into this category. These are the "bad levees" cases. They primarily involve the design, construction and maintenance of the 17th Street Canal (which had one breach) and London Avenue Canal (two breaches). Levees at the Orleans Avenue Canal (which has overtopping but no breaches), the Industrial Canal (which had several instances of each), and along Lake Pontchartrain are also involved.

(2) **MRGO.** These are against the Corps and dredging companies it hired to build and maintain the Mississippi River Gulf Outlet.

(3) **Responders.** These suits cover the evacuation and how it was



Photo by Oliver Houck

prepared for and executed and enforced. They present a wide gamut of claims and several are *pro se*.

(4) **Insurers.** These are primarily suits against insurance companies that provided homeowners' insurance but claimed their policies contained several provisions on which they deny coverage.

We may now touch a little more fully on the nature of the claims.

The Corps

Had the Corps' engineers and contractors been, in the words of one plaintiff attorney, "even half as competent and aggressive as their lawyers," the biggest complaint after Katrina would have been, "wet ankles." Although the Corps has admitted to Congress and even the public that it made mistakes that, at the very least, contributed to the failure of New Orleans' levee system, it has made no such admission in court. Instead, the Corps has already made use of two laws not available to most defendants.

First, under the Federal Tort Claims Act, a plaintiff must first file a written complaint with a federal agency it wants to sue in tort, known as a Form 95. A claimant may file suit only if after 60 days/six months the agency denies or does not respond to the claim. In delaying what may be the largest class action in his-

Continued on Page 10

Katrina Litigation

tory, the Corps is requiring every man, woman and child to first file a Form 95 with it: 600,000 separate claims. And for the ones that have been submitted, the Corps has responded that the complaints are too vague and they must be more detailed and then re-submitted, with the clock starting over again. The judge has questioned the good-faith use of the Form 95 requirement, but the Corps will not waive it. To the contrary, it has even further delayed cases by returning completed forms and stating they must be more detailed and re-submitted.

The primary substantive defense at the Corps' disposal, however, is the statutory immunity it enjoys for damages related to its flood control work. When, in the Flood Control Act of 1928, Congress authorized the Corps to prevent future floods on the Mississippi River, it granted it immunity for damages related to work on the Mississippi River and Tributaries (MR&T) project, with very few exceptions. Subsequent case law, extended this immunity from the MR&T to all Corps flood control works, anywhere in the country. Setting aside the question of whether this extension was wise or necessary, this precedent may seem to immunize the Corps from a direct attack on its failed hurricane protection system along Lake Pontchartrain and the Industrial Canal.

Engineers and Contractors

Although suits against the Corps are still awaiting the Corps' denials of the Form 95s, suits are proceeding against the engineers and contractors who designed, built and maintained the levees, as well as the Orleans Levee Board. A typical suit is against the levee board (i.e., the Board of Commissioners for the Orleans Levee District) and the engineers and contractors who contracted with it and the Corps to build and maintain the levees, with allegations

such as failure to warn of weak soil, using "I-Walls" rather than "T-Walls" and failing to drive the sheetpiles deep enough to provide adequate strength and stability. Another important defendant in these cases is the Levee Board's insurer, St. Paul Fire and Marine Insurance company, which provided the Board with coverage of ten million dollars per occurrence.

By way of defense, the contractors and engineers claim that they performed no work on an area of a levee that failed (the "no services" argument), and, second, even if they had worked on a section that failed, the relevant preemptive period to bring a suit had passed before the failure occurred. In regard to the "job remoteness" argument, i.e. that a defendant may have worked on the levee system or a particular levee but not the exact section that failed, the plaintiffs argue that the levees should be considered a single complex and intertwined system and that evidence may show faulty work could prove to be systemic and a flaw in one section of the system of a levee could manifest itself in another.

There are also issues regarding the application of the appropriate preemption statutes. The current statutes provide a five-year period for both contractors and engineers. However, each of these statutes has been amended several times in recent years, and there is disagreement about retroactivity and which and when amendments (some of which provided seven and ten year periods) may apply.

Another defense for those who performed contracts for the federal government is the availability of the immunity provided in the "government contractor defense." Under this de-

fense, generally speaking, a federal contractor is immune from liability if it complies with the directives of the contracting agency (in this instance, the Corps and its designs and specifications) and performs all of its work properly and in accordance with the project plans and specifications. The defendant contractors are also claiming immunity under Louisiana law as well. In response, the plaintiffs have noted to the Court that if fraud is involved (such as a defendant knowing of a defect but doing nothing about it), that would disallow any preemption claim. "Fraud", they note "... may also result from silence or inaction."

MRGO

The Mississippi River Gulf Outlet was built by the Corps through the wetlands east of the Mississippi River as a more direct shipping route between New Orleans and the Gulf of Mexico. It is now clear that the canal caused a substantial amount of flooding by destroying over 30,000 acres of adjacent wetlands that had previously buffered the parish of New Orleans and St. Bernard, and by causing a so-called "funnel" effect of water that surged up the waterway and into the city. Plaintiffs claim that the waterway itself, not constructed under the MR&T authority, is not the subject of Flood Control Act immunity. The Corps has responded, in part, by claiming that Congress incorporated the MRGO



Photo by Paula Burch

levees as part of the New Orleans hurricane protection system, thus providing immunizing.

If Flood Act immunity is not available, the Federal Tort Claims Act allows suit to be brought against the United States for torts committed by government employees; similarly, the Suits in Admiralty Act allow suits against the United States when vessels are involved. Both statutes include several exceptions to this waiver of immunity, the most important of which is the “discretionary function” exception, which shields the government from liability for its failure to exercise or perform a discretionary function. The resolution of this issue may hinge on whether the Corps’ failures are viewed as policy decisions (discretionary) or a failures of implementation (non-discretionary)

If the Corps of Engineers is immune from these suits because of the discretionary function exception, this immunity could be extended to the dredging contractors by reason of the government agency and contractor defenses. On the other hand, if the contractors’ negligence was in substandard construction, operation or upkeep, their “discretionary” defense is vulnerable.

In addition to the MRGO litigation, a separate set of class action lawsuits are pending in New Orleans federal court before Chief Judge Ginger Berrigan arising out of alleged damage to the Lower Ninth Ward, Orleans Parish. These actions allege that certain companies negligently allowed a large barge to break its moorings and penetrate the banks of the eastern Industrial Canal, causing widespread flooding.

Other Flood Cases

There remain pending several unrelated cases seeking damages for the flooding, but not based on the negligence of Corps officials or their contractors. Two bear mention, for their underpinnings in environmental harm and law.

One seeks compensation from the oil and gas industry for the de-

struction of the Louisiana coastal zone, leaving New Orleans and its neighbors unprotected from Gulf storms. The facts of these harms – long in dispute – are now an open secret; indeed, they are the primary basis for the Louisiana delegation’s claims for greater royalty payments in compensation for this very impact on lining coastal resources. Translating these harms to civil liability, however, is a bridge-not-crossed, nor before now attempted to be crossed.

A second lawsuit targets a number of industries whose emissions have contributed to climate change, raising sea levels in the Gulf and, as above, increasing the hurricane vulnerability of New Orleans. Here again, the facts of sea level rise are strong, and the relationship of sea warming to hurricane frequency and intensity seems to be generally recognized as well. The connection between global warming generally and damages from these particular storms, however, will be difficult in fact and law.

Win or lose, these cases seem certain to prompt legislative and policy change. Long term, and perhaps irrevocably, it will not be possible for Louisiana or national politicians to avoid the now obvious and proven effects of rampant navigation canals, oil and gas extraction, and climate change.

Responders

The inundation of New Orleans brought about a nightmare scenario of government responses, many of which, too, have now ended up in court. Individuals who sought



Photo by Paula Burch

to escape the flooding of New Orleans by walking from the Convention Center over the Greater New Orleans Bridge into neighboring Jefferson Parish have filed a class action suit against the local police chief and sheriff for using physical force and firing loaded weapons to prevent them from crossing the bridge. Patients of local hospitals and their family members have filed suit against the hospitals for failing to properly care for the patients, including negligently causing their deaths or in some instances intentionally killing the patients. Another suit is by a local nurse who seeks damages for being forced to report to work by her health care employer during the conditions which followed Hurricane Katrina. Other cases involve tenants whose landlords discarded their property without notice while the tenants were evacuated. There was even, however briefly, a case filed by a boat owner against a neighbor who took the boat in order to rescue yet other neighbors stranded in their attics. It has since been withdrawn.

Among the two to three dozen class actions regarding the flooding are a small handful concerning the evacuation order and how the evacuation was handled. They generally claim that various public officials, particularly the mayor, the governor and law enforcement officials violated the rights of the city’s citizens in a plethora of ways - ordering the

Continued on Page 12

Katrina Litigation

evacuation at all, ordering it too late, enforcing it too harshly and enforcing it not harshly enough. None of these suits has made substantial progress, but the court has dismissed such claims in one suit, and its reasons are worth noting.

One of the first suits filed, back in September 2005, alleged numerous governmental entities and officials committed a multitude of torts and civil rights violations during events related to the evacuation.

In eventually dismissing the claims, the Court noted that “The City Defendants were faced with a natural disaster of catastrophic proportions,” and Louisiana legislation authorized the Mayor to declare a “local disaster or emergency” in his parish, and “is empowered to direct and compel the evacuation of all or part of the population from any stricken or threatened areas within the boundaries of the parish if he deems this action necessary...” The court then reviewed the many allegations of wrongdoing. Initially, many of the more vague ones were dismissed for “failing to state a claim.” Other allegations didn’t rise to the level of constitutional violations. Defendants also successfully raised the defenses of sovereign and/or qualified immunity.

The Insurance Cases

by Cayce Peterson (2008)

Conflicts between insurer and insured are nothing new to the Gulf States, but Hurricanes Katrina and Rita have spawned a host of insurance battles dwarfing previous disputes in numbers and scope. The most common conflicts involve the interpretation of homeowners policy exclusion provisions. These issues have come to a head in Berthelot v. Boh Bros. Constr. Co. The plaintiffs in Berthelot seek to prove that windstorm and negligence of the United States Corps of Engineers caused the destruction of their homes and that these are covered perils under their homeowners policies. The outcome of these disputes will not only effect the parties directly involved but may also dramatically alter the workings of insurance law in Louisiana and the Gulf States.

The hurricanes devastated many homes that had homeowners policies but did not have flood insurance policies. Most policies unambiguously state that they do not cover damages caused by “[f]lood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these whether or not driven by wind.” In perhaps the most important decision following Hurricane Katrina, the United States District

Court for the Southern District of Mississippi in Leonard v. Nationwide Mut. Ins. Co. held, “[t]he Leonards have the burden of proving that the insured property was damaged or destroyed by a cause within the insuring language of the policy during the time the policy was in force.” This decision places upon homeowners the burden of proving that wind, not water, destroyed their homes. The plaintiffs in Berthelot also allege that

the waters that flooded New Orleans and the surrounding areas were a result of windstorm. Although the case is still in pleadings, the decision in Leonard represents a significant obstacle to the plaintiffs in Berthelot. Courts are simply unwilling to interpret wind-driven water as a part of windstorm.

As for the Louisiana Valued Policy Law, the relevant statute states:

“Under any fire insurance policy insuring inanimate, immovable property in this state, if the insurer places a valuation upon the covered property and uses such valuation for purposes of determining the premium charge to be made under the policy, in the case of total loss the insurer shall compute and indemnify or compensate any covered loss of, or damage to such property...”

Policyholders have attempted to interpret this statute to mean that if both a covered peril and a non-covered peril contribute to the total loss of a home, they are entitled to 100% compensation from the insurer.

In 2004, Florida policyholders were successful in convincing the court that their state’s Valued Policy Law entitled them to full compensation for concurrent damages of flood and windstorm. Two years later, however, the United States District Court for the Northern District of Florida held that Florida’s VPL was not applicable to flood damages because flood claims are preempted by the National Flood Insurance Program.

Louisiana policyholders have had little more success. Recently, the United States District Court for the Eastern District of Louisiana held that, “Unfortunately, the Court must recognize that the VPL was designed to fix valuations of losses and was not intended to expand coverage to excluded perils.”

Berthelot actually includes several cases and numerous causes of action relating to the levee failures. The most germane count is the first: a call for declaratory judgment against all insurance companies to indemnify policyholders for their losses. The



Photo by Paula Burch

count attacks the ambiguity of policy flood exclusions, the definition of “flood” as presented by insurers to New Orleans policyholders, and the negligence of the United States Corps of Engineers, which plaintiffs purport as a covered peril. As seen in the Leonard case in Mississippi, attacking the ambiguity of policy language has garnered little success in the courts. However, attacking the definition of “flood,” as New Orleans residents have understood it, is a

novel idea that the courts have yet to decide upon. The Amended and Restated Complaint reads:

“The reasonable expectations of Louisiana policyholders is that “flood” encompasses overflowing of the Mississippi River, accumulation of surface water due to heavy rainfalls or similar phenomena, but not the failing of virtually all man-made structures containing Navigable Waters of the United States surrounding the New Orleans Metropolitan

Area due to negligent conduct beyond the policyholders’ control.”

Although the argument has potential to succeed in court, the parties will likely not reach a resolution for many months to come, and meanwhile policyholders remain uncompensated for their losses. One result of Katrina and Rita will be the closer examination of insurance policies. Another will almost certainly be the extent and conditions of policies in flood risk areas.

Faculty Notes

Gunther Handl:

Publications: “*Trail Smelter* in Contemporary International Environmental Law: Application to Nuclear Energy,” in R. Bratspies & R. Miller, eds., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* 143 (Cambridge University Press, 2006).

Presentation: “International Accountability for Transboundary Environmental Harm Revisited: What Role for ‘State Liability?’” International Symposium of the Elizabeth Haub Foundation, Murnau, Germany, Sept. 2006.

Other Activities: Special Adviser to the EU/Austrian Delegation to the United Nations Consultative Process on Oceans and the Law of the Sea, and to the Meeting of Parties to the Law of the Sea Convention, New York, June 2006.

Oliver Houck:

Articles: “*O Canada! Rafferty, Oldman and the Great Whale*,” Boston College International And Comparative Law Journal, Spring, 2006; “*Can We Save New Orleans?*,” Tulane Environmental Law Journal, Spring, 2006; “*Things Fall Apart: A Constitutional Analysis of Legislative Exclusion*,” Emory Law Review, Winter 2005; “*Light From the Trees: The Story of Minors Oposa and The Russian Forest Cases*,” Georgetown International Environmental Law

Review, Spring 2007.

Other publications: Book Review, “*Babbit’s Goodly Archipelago, A Review of Cities in the Wilderness: A New Vision of Land Use in America*,” Environmental Forum, Spring 2006; “*Reflecciones Sobre La EIA*,” Revista Andaluza de Administracion Publica, Spring 2006; “*You Can’t Have Your Wetlands and Eat ‘em Too*,” in “*After the Storm: Restoring America’s Gulf Coast Wetlands*,” Environmental Law Reporter, Spring 2006.

Presentations: Symposia on Hurricane Katrina, including Loyola Law School, September 2006 and Tulane Law Journal, October 2006.

Jonathan R. Nash:

Forthcoming Publications: *Framing Effects and Regulatory Choice* (forthcoming NOTRE DAME L. REV.); *Prejudging Judges*, (forthcoming COLUM. L. REV.); *The Illusion of Devolution in Environmental Law*, (forthcoming URB. LAW COLUM.); *Trading Species: A New Directio for Habitat Trading Programs*, (forthcoming J. ENVTL. L.).

Presentations (selected): *Taxes and the Success of Non-Tax Market-Based Environmental Regulatory Regimes*, Global Conference on Environmental Taxation, Ottawa, Canada, October 2006; *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, Midwestern Law and Economics Association Annual Meeting, Lawrence, KS, October 2006 (with Rafael I. Pardo); *The Unknowing Race to Capture*, Canadian Law and Economics Association Annual Meeting, Toronto, Canada, September 2006.



Environmental Law and Clinic Faculty: From left: Gunther Handl, Corrine Van Dalen, Jill Witowski, Lisa Jordan, Oliver Houck, Beatriz Perez, Elizabeth L. de Calderon, Adam Babich. Not shown: Eric Dannenmaier, Jonathan Nash.

Eric Dannenmaier:

Presentations: “The Joint Public Advisory Committee at 10” at the JPAC’s NAFTA strategic planning meeting in Mexico City.

Works in Progress: “Head of State Summits as Transnational Legal Process”; “Executive Exclusion and the Cheney Energy Task Force: Exploring the Limits of Discrimination in Presidential Policymaking”; “Katrina in Context: The Global Dimensions of a Local Disaster.”

Adam Babich:

Presentations: Participant in several Katrina impact seminars, including “Post Katrina Environmental Justice,” Texas Southern University, March 2006.

GREENWORKS: ALUMNI NOTES

The most gratifying aspect of any law program is to see its graduates out in the world, taking the issues to new levels (which we then, often, bring back into the classroom). Wherever you are, what we do here is all about what you are doing. And it is impressive.

John Andry (1990) is with Andry and Andry, a New Orleans law firm specializing in plaintiff and toxic tort practice. The firm is lead counsel in pending MRGO litigation.

Susan Armstrong (2002) writes: “I practiced environmental law for 4 years: 2 ½ at Fulbright & Jaworski (Austin) doing air regulations, then went to the [Texas] Attorney General’s office doing municipal solid waste enforcement. Now, I am doing what I will likely be doing for the rest of my career: land conservation. I am Executive Director of a land trust in the North Texas area, helping landowners preserve their land through conservation easements. We also work with developers to create alternative developments called Conservation Developments which set aside large tracts of open space with development. I draft conservation easements negotiate with landowners, and use my legal degree in a myriad of ways outside of the traditional law practice.”

Gerardo Arteaga (LLM 1997) reports, “three years ago I returned to my hometown, San Miguel de Allende in central Mexico. I got involved in politics, and was appointed as the head of the environmental department of the City. In order to run for the city council, I resigned from my position and started three months of a hard campaigning. Fortunately, I got elected and will start my new responsibility on October 10.” He adds: “I would like to mention that thanks to [Tulane’s] inspiration, during the time I served as the director of the San Miguel environmental agency we enacted new environmental regulations for the city. We also built a water treatment plant and an artificial wetlands, closed the landfill, and constructed a new waste treat-

ment and recycling plant, among other works.”

Adam Baron (2002) is working with EPA’s hazardous waste enforcement section in Region X, Seattle. He particularly enjoys the site visits and field work.

Tad Bartlett (2000) has moved his practice to Krebs, Farley & Pelleteri in New Orleans, where he advises property owners on environmental remediation and CERCLA issues and advises surety companies on environmental risks in bonding construction and remediation projects. As pro bono counsel, he assists a New Orleans non-profit administrator of grant funds provided by the State of Qatar for the rehabilitation of 100 houses in the Treme/Lafitte Corridor following flooding by Hurricane Katrina. He also has completed a manuscript for a novel set around the estuary system of Alabama’s Mobile Bay.

Blair Batson (1980) reports that she has left 1000 Friends of Oregon and is now with a forest management company that services institutional clients.

David Bendana (1982) is in solo practice in New Orleans, and involved in land use and planning issues. Latest coup: succeeded in limiting new bars on Maple Street, and fending off a SLAP suit in response.

Michael T. Behan (2000) has left his staff position with the U.S. Senate and has recently begun as General Counsel for ICDDR,B in Dhaka, Bangladesh, the only international health research centre in the developing world and the first-ever recipient of the Gates Award for Global Health. He will handle a range of

sponsored research matters supporting ICDDR,B’s public health mission, including its role in addressing the naturally-occurring arsenic that contaminates the water of tens of millions of Bangladeshis.

Karen Bishop (2005) is an Assistant General Counsel at the Florida Department of Environmental Protection in Tallahassee, where she has won her first landfill case, shutting down an out-of-control site in Pensacola. (“It’s about 50 feet too high, has been on fire, has no cover, and is outside the [permitted] footprint”).

Justin Bloom (1996) after a stint with the Hudson Riverkeeper, is now in New York City where “I have my own small environmental practice, focusing on plaintiff toxic torts; also working on environmental land acquisitions for municipalities and brownfield redevelopment projects for non-profits.” Most recently he has tied up with former Clinic Supervising Attorney **Charles Ellis** (LLM 1996), on a case in Shreveport, La, “a massive, nasty Chevron (Texaco) spill from way back.”

Kay Bond (2004) is with the Southern Environmental Law Center in Chapel Hill, North Carolina. “My work is focused primarily on NPDES permitting stormwater issues, and sensitive aquatic habitat. Right now we are working to protect one of the last populations of a freshwater mussel around the Charlotte area. When I’m not working, I enjoy being strategically located between the Appalachian Mountains and the Outer Banks.”

Warren Burke (1997) has completed his fifth year with the U.S. House of Representatives Office of the Legislative Counsel in Washington, D.C.,

drafting laws of all nature for members and staff. He has taken up “serious” kayaking, but retains his interest in the Louisiana marshes, see companion story.

Florian Buschler (2002) is with the firm of Bruno and Bruno in New Orleans which is playing a lead role in Post-Katrina levee litigation.

Cynthia Ceballos (1999) Has her own immigration law practice in New Orleans (“I love it”) and has been elected Secretary of the Hispanic Chamber of Commerce. And engaged to be married in December. Life is good.

William Coates (1994) is a law partner with Brett and Coats in Bellingham Washington, which does a considerable amount of pro bono work for the Whatcom Land Trust.

Anthony Cooke (1995) has left staff work with the US House of Representatives for the post of Chief Counsel for the National Highway

Traffic Safety Administration in Washington, DC.

Cleveland Coon (LLM 2004) is teaching environmental law at Southern Law School in Baton Rouge, as is **Judith Perhay** (LLM 2000).

Tina Crawford [Santopadre] White (1994) lost her home on Lake Ponchartrain to Hurricane Katrina and has now moved inland. She is a member of the Gordon Arata law firm in New Orleans, with a range of environmental work including transactional liability for hazardous wastes. She is also involved in assisting her father secure the necessary permits to restore the “riceland” wetlands along the Tchefunte River, a “duck hunter paradise.”

Laurie Dubriel (2000) is an Attorney-Advisor in the Office of the Administrator of EPA, in Washington DC. She is also working on her dissertation for a PhD in Public Health, developing a “risk based decision model for determining when the emergency authority under section 504 of the Clean Water Act should be employed by the EPA in sanitary and/or combined sewer overflow cases.”

Cynthia Ericson (2005) is practicing in Houston and “aiming for a litigation spot in the oil and gas practice area.”

Yarrow Etheridge (1999) writes: “Prior to Katrina, I was the Director of [City of New Orleans] Mayor’s Office of Environmental Affairs. Primary responsibilities included man-

aging the City’s Brownfields and Coastal programs, as well as promotion of the environmental sector as an important part of New Orleans economic growth. Following Katrina, I have been the Director of Public and Legal Affairs for Toxicological and Environmental Associates, Inc, a remediation and risk assessment firm based in Baton Rouge, with an office in Orleans that I opened in June. I have secured federal funding for the New Orleans Regional Business Park in eastern New Orleans to inventory, characterize and assess brownfields in this area, as well as funding for St. Bernard Parish to characterize and reduce environmental risks in the Parish. I also initiated the establishment of two non-profit organizations, the Louisiana Brownfields Association and Groundwork New Orleans, and sit on the executive committee of each.”

Douglas Frankenthaler (1999) with the firm of Cozen O’Cowan in Cherry Hill, New Jersey, and writes, “a substantial portion of my practice focuses on assisting clients through all phases of brownfield redevelopment, including negotiating agreements of sale, negotiating redevelopment and prospective purchaser agreements with state and federal regulators, and analyzing legal issues concerning remediation and environmental compliance. I am also assisting clients with compliance with the various product content restrictions enacted in the EU and many states.”

Elizabeth [Teel] Galante (1991, LLM 1999) is the Director of the New Orleans Resource Office & Center for Global Green, a national environmental organization addressing “three of the greatest challenges facing humanity: stemming global climate change by creating green buildings and cities; eliminating weapons of mass destruction that threaten lives and the environment; and providing clean, safe drinking water for the 2.4 billion people who lack access to clean

Alum in Trouble:



Adam Baron (2002), swamping in Boxcar Rapids on the Deschutes River in Oregon, late Spring 2006. He had just purchased the canoe and driven down from Seattle, only to discover that, apparently, nobody runs the Deschutes in an open canoe. In the following few weeks the Deschutes claimed five lives in separate incidents, all from rafts. Footnote: Adam’s bowman in the photo is Professor Houck’s younger son, Gabriel.

Continued on Page 16

Continued from Page 15

Alumni Notes

water.” She also supervises the Sustainable Design Competition and rebuilding initiatives including green affordable homes, schools and churches.

Dino Gankendorff (1990) writes: “I am co-managing partner for the New Orleans’ office of the Provosty law firm. My primary area of practice is entertainment law. I represent over 50 musical groups including the Estate of Mahalia Jackson, Mavis Staples, Galactic, Anders Osborne, etc. I was also on the Plaintiff Class Committee and filed one of the initial lawsuits in the *Re Vitamins Litigation* in D.C. which with the help of David Boies, whom I retained, we settled for in excess of one billion dollars. In short, life has been good.” Dino adds that he is also representing a Dutch engineering firm on water resources construction opportunities in South Louisiana ... which are of course, huge.

Clay Garside (2005) has recently bought “an unflooded house in the Treme neighborhood of New Orleans,” and has extended his clerkship with Judge Barbier in the Eastern District of Louisiana.

William Goodell (LLM 1987) is in Lafayette, Louisiana and “enjoying my twelfth year as a sole-practitioner plaintiff attorney suing oil and chemical companies for toxic injury to persons and property.” He is also into his fifth year of teaching toxic tort

litigation at Tulane, and “delighted to be afforded the opportunity to give something back to the school that helped me get where I wanted to be career wise.” He adds, “I still wade fish the Breton/Chandeleur island chain, or what is left of them, and caught and released a 500lb (estimated but not exaggerated) Blue Marlin in 6,000 plus feet of water 40 miles south of the mouth of the Mississippi.”

Paul Gormley (1994) is in Denver, Colorado with the Environment and Natural Resources Division of the US Department of Justice, and writes “I have a number of cases mostly involving superfund sites. The one I am enjoying the most is *United States v. Newmont USA Limited and Dawn Mining Company*, where I am lead counsel. It involves an inactive uranium mine on the Spokane Indian Reservation. The government is seeking a finding of liability under CERCLA for approximately \$13 million in costs already incurred by EPA, and a declaratory judgment that the parties are liable for future work at the site. The most recent publicly available estimate for cleanup is \$150 million. One of the key issues in the case is Newmont’s liability for cleanup costs, since Newmont is a parent of Dawn. As you may have guessed, Dawn doesn’t have much cash. Trial is set for September 2007.”

Ann Groninger (1994) is still in a litigation practice in Raleigh, North Carolina, about evenly split between criminal and civil cases. Few of them environmental but follows the local

issues.

Tim Hebert (1987) has left the Louisiana Department of Natural Resources for private practice in Lafayette, LA.

Maurya Kilroy (1990) is Assistant District Counsel with the Army Corps of Engineers in New Orleans. She writes: “Post-Katrina, we are busier than ever with efforts to restore and improve the hurricane protection systems. My practice includes compliance counseling, transactional work, and litigation. The transactional work includes the development of project cooperation agreements with attorneys from state agencies, levee districts, and other public entities, relative to cost-sharing and other obligations, such as the acquisition of real estate interests and the operation and maintenance of completed projects. As for litigation, I work with the Department of Justice on a number of condemnations to resolve title matters and/or to determine just compensation.”

Hiroshi Kobayashi (LLM 2005) writes from Tokyo, Japan: “I am currently involved in an environmental case in which a plaintiff we represent seeks to enjoin noise arising out of an urban “park.” Noise is recognized as a severe environmental problem in our country. This case is unique in that park use conflicts with the urban environment. It will take several months for a decision by the court.”

Itzchak Kornfeld (1990) has left private practice in Philadelphia to

Katrina Stories at Le Chat Noir

This Spring, TELS students presented a hit play by Mary Nagle, 2L and TELS Vice President. The play dealt with the mundane and the global decisions made by students, parents, the Mayor and the President, in the first awful days

of Katrina.

The play first ran at the law school, to an overflow crowd of students and faculty.

The second run, by invitation, was at Le Chat Noir, downtown, whose intimate setting lent atmosphere to the play.



Photo by Rick Olivier

pursue graduate environmental law work at the Georgetown Law Center.

Courtney Harrington LeBoeuf (2003) recently joined the law office of **John D. Edgcomb** (1983) in San Francisco. She “represents clients in environmental aspects of real estate transactions, in due diligence, and in complex, multi-PRP cost recovery actions, administrative enforcement, voluntary site cleanups and litigation.”

Murray Liebman (1991) writes from Washington, DC: “Liebman and Associates (L&A) is a clean energy and environmental lobbying and market consulting firm. We represent a number of Fortune 100 utilities, manufacturers and telecommunications providers. We facilitate public/private partnerships that advance cost-shared research, development and deployment of clean energy technologies. L&A is supporting some of the world’s largest and most progressive fuel cell, photovoltaic, biomass, and wind projects. Regarding fuel cells, we are working on the nation’s largest deployment of small hydrogen-based proton exchange membrane units. These units are being used as back-up power solutions at telecom cell sites. ... We are also engaged with an international manufacturer of mega-watt scale (one mega-watt is enough to power about 1,000 homes) solid oxide fuel cells. The photovoltaic (PV) market is very exciting and L&A is supporting the advanced manufacturing of thin-film PV that can be easily and inexpensively integrated into a building rooftop.”

John Manard (LLM 1999) is a partner with Phelps Dunbar in New Orleans where, among other casework, he is tracking the Katrina litigation and representing commercial clients on pharmaceutical, real estate and contaminated properties issues.

Ann Segrest McCulloch (1984) is Special Assistant to the President and CEO of Fannie Mae, which may at

the end of the day have more to say about the reconstruction of South Louisiana than anyone else [our observation, not hers, Ed.]

Robert McMillan (2004) was one of the many New Orleanians wiped out by Hurricane Katrina. “The water was over the roof of my home for days. Then Rita put 10 feet back in shortly thereafter.” He has relocated to Slidell, “in a house 12.5 feet above sea level.” On the professional side, “I have done some work on a tort cases involving toxic mold. Lesson learned: beware of telling client not to clean up mold because you are concerned about the evidence. Three months later, when photos are taken, what was minor mold has become, literally, mushrooms growing from wall and ceiling.”

John Misso (2000) writes: “I am still working as a Tax Attorney for ExxonMobil in Houston, largely in matters brought before IRS appeals. The last few years have been fascinating and I’ve had a good deal of success and a lot of fun convincing IRS that the positions their Exam Agents have taken are either complete nonsense and/or full of hazards. Last May I completed a MBA through Tulane’s executive program. ExxonMobil funded my tuition and I am actively using it to promote my career.” He adds “You may recall that I married **Kristin Gasser** (2000) three years ago today! We are expecting a baby girl next month. Kristin is working in-house for a company called Total Safety. She is their lead and only counsel and handles a plethora of issues.”

Michael Mogil (1988) is still in practice in South Carolina, and considering, once again, a business venture in clean cars. “On a comical note, I should just figure out a way to sell cheap cars to the Chinese, but on a



serious note, it is a disastrous thought.”

William O’Brien (LLM 1995) is an Assistant Attorney General for the State of Oklahoma, which includes a range of energy and natural resource issues. He also writes a weekly column for several newspapers, including a recent review of the Al Gore film “An Inconvenient Truth”.

Jon Owens (LLM 2000) reports, “After working at EPA for five years, I recently left to join the Army Corps of Engineers, Office of Counsel in their Baltimore District. I will likely run into matters involving wetlands, NEPA, and the cleanup of formerly used defense sites.” Looking back, he adds: “I dealt with some interesting cases in my last couple of years at EPA, clerking for their Administrative Law Judges (“ALJs”). For instance, I worked on a TSCA enforcement case filed against DuPont, involving chemicals (PFOA/C-8) used to produce Teflon. EPA’s enforcement office alleged that DuPont failed to disclose significant risks of those chemicals. That case was settled for the largest administrative penalty in EPA history and was written about

Continued on Page 18

Continued from Page 17

Alumni Notes

in the *Washington Post* and the *New York Times*. Among my recent EPA cases, the highlight was my travel to scenic Homer, Alaska to assist with a wetlands enforcement hearing.”

Marshall Paxton (2002) “worked for the first three years on a case involving a large Canadian oil company that operated in the Sudan, allegations included conspiracy/aiding and abetting genocide, mass displacement and some environmental damages issues”.

Hugh Penn (LLM 1975) has moved to Mississippi where he continues to nudge forward a project to restore Gulf Sturgeon to the upper reaches of the Pearl River (the dredging of which he successfully enjoined a few years ago).

Will Percy (1980) is with the Becnel law firm in New Orleans and heavily involved in the Katrina levee litigation; see related article.

Lili [Cowen] Petersen (1995) has joined the Alan Kanner law firm in New Orleans, specializing in toxic torts and creative litigation. The firm has recently won a major decision on behalf of the state of New Jersey in the recovery of natural resources damages. She is also presenting a course at Tulane with Alan.

Adam Reeves (1995) is in Durango, Colorado, “working with a firm that represents the Ute Tribes and a couple of reclamation repayment entities for the Dolores project, the Pine River project and eventually the Animas-la Plata project.” He is also doing “real property litigation, a little oil and gas, and just recently some archaeology law (didn’t even know there was such a thing.” On the personal side, he lives “four blocks from the Animas River from which are pulled 16 inch browns with increasing regularity as I learn the water, plus the pedestrian friendly efficiency of pre-automobile designed communities.”

Monica Reimer (1996) Has been a staff attorney with the Tallahassee Office of Earthjustice since 2003. She began her legal career as a researcher in 1987 and joined Earthjustice when it opened the Tallahassee office in 1990. She worked for Earthjustice while attending law school and then joined the Florida Attorney General’s office after a brief stint in private practice. She has participated in numerous trials in federal and state court, including complex trials in the areas of off-shore oil drilling, protection of navigable waters, water boundaries, fisheries, coastal protection and water pollution. In 2002, her victory in an off-shore oil drilling case was reported as a landmark case in the *National Law Journal*.

Elizabeth Barrett Ristroph (2004) is “all the way out in Saipan, Northern Mariana Islands (where I’m clerking for a judge).” Barrett Ristroph (2004) and **Ilya Fedyaev** (LLM 2003) have just published “Obstacles to Environmental Litigation in Russia and the potential for Future Actions” in the *Environmental Law and Policy Journal*, U.C. Davis, Spring 2006.

David Roman (LLM 1994) continues to direct the Environmental Law Program at the University of Puerto Rico.

Dana Shelton (1996) is with the Stone Pigman firm in New Orleans, where she specializes in energy law. She is also an Adjunct Professor here at Tulane, where she presents a course in Sustainable Energy.

Christina Sprecher (1996) is currently working with Harrell & Nowak, L.L.C., “a relatively new firm in New Orleans, mostly on plaintiff toxic tort and per-

sonal injury cases.”

Andrew Taggart (1984) who has directed political campaigns in Mississippi for Republican candidates up to and including the President of the United States, has co-authored a book just released entitled “Mississippi Politics – The Struggle for Power”. At the local level, he serves as a Supervisor for Madison County, where he has become a promoter of bio-fuels for timber wastes, including the massive felled stock from Katrina.

Jeffrey Thomas (2001) is with the Simone Peragine law firm in New Orleans, and playing a lead role in citizen representation on residual toxics and neighborhood reconstruction planning.

Lemuel B. Thomas (2003) writes: “I am an associate at Terns, Pravlik & Millian, LLP, a public interest law firm in Washington, D.C. My practice primarily involves representing plaintiffs in citizen suits under RCRA and the Clean Water Act. In addition, I have recently become involved in our firm’s representation of indigenous groups in Alaska in litigation against oil companies under the Marine Mammal Protection Act.”

Jason Totoiu (2004) has joined the legal staff at the Everglades Law Center, in Miami, Florida, where his focus area is “the lower glades, including south Dade and the Florida Keys.”

Tulane Environmental Law News

© Tulane Environmental Law Society

6329 Freret Street, New Orleans, LA 70118

504-862-8829 ELS@tulane.edu

all rights reserved

Editor Elizabeth Fisher	Faculty Advisor Oliver Houck	Photography Andrew Seidel
-----------------------------------	--	-------------------------------------

The Tulane Environmental Law Society would like to thank everyone who contributed to this issue.

Debora [Clarke] Trejo (1998) is practicing water and environmental law at the law firm of Kemp Smith LLP in Austin, TX, and writes: “I am involved in some interesting water rights litigation in the Texas Courts of Appeals on behalf of the Edwards Aquifer Authority. I am also working on rulemaking, environmental enforcement, permitting, litigation & providing legislative support on behalf of groundwater districts, local governments and landowners.”

Duangrak Trongmethirat (LLM 2004) has left the Attorney General’s office in Thailand where he was responsible for natural resources cases, to return to the United States for additional graduate work in Florida. He also writes that he was greatly saddened by the hurricanes: “Sometimes I dream of Tulane.”

Ashley Waddick (1991) reports that she works for “a Commissioner at the Texas commission on Environmental Quality (sort of the equivalent of LDEQ). With nearly 3,000 employees, no one contests the assertion that we are the second largest environmental agency in the world, after EPA. Previously I worked for the Texas General Land Office (the equivalent of LDNR), the Texas Lieutenant Governor (in a state where the Lt. Gov. is generally viewed as the most powerful person in state government, a post-reconstruction artifact).” She concludes: “I really thought studying the federal CAA under you cured me of any interest in a career in air [we are not sure how to take this, Ed.], but I love it. The 8-hour ozone standard is going to be a real challenge in our nonattainment areas and near-nonattainment areas.”

R. Brent Walton (1997) reports that he won a “great ruling” from the Alien Tort Claims Act [environmental human rights] case that he described in an earlier newsletter, and was “finalist for Trial Lawyer of the Year for the Hungarian Gold Train case” [we know nothing further

“I have been watching my old friend the hawk eat his catch up in the Magnolia tree. He is focused, ferocious, neatly plucking his feathers, its feet and its wings. Some of the feathers stick to his bright yellow beak and seem to annoy him. He spits them into the wind before beginning to dine. He is finished in five minutes. Now a soft rain is on the river and he has flown.”

-Hugh Penn (1975, LLM 1998)



about this case, Ed.]. And, most happily, the birth of his son, Dennin.

Joel Waltzer (LLM 1990) is in practice with his own firm in New Orleans, and has taken the lead in representing the Vietnamese-American community and environmentalists in litigation requiring source separation and strict controls of demolition debris waste following Hurricane Katrina. For a glimpse at the tortured path of this litigation, in which the Environmental Law Clinic is also active, see article this issue.

Alex Williamson (2006) is with the Maples law firm in New Orleans and writes, “I am working on a number of environmental cases, the most important of which is *Comer v. Murphy Oil USA, Inc.*, et al. in the southern District of Mississippi, in which a group of Gulf Coast homeowners are suing greenhouse gas emitters (oil, gas, coal, and chemical companies) for damages they sustained as a result of a global warming-intensified Hurricane Katrina. I am also working on a cleanup case involving Murphy Oil’s Meraux Oil Refinery million-barrel oil spill on August 29, 2005. Becky is singing with the New Orleans Opera again (Marriage of Figaro at McAllister first week of Oct.), and is getting her masters degree at Tulane. So things are going

pretty well, I must say.”

Nikki Adame Winningham (2004) is with Vinson & Elkins LLP in Austin, Texas. She reports: “although I started out in Houston, I am now practicing in the Administrative and Environmental Law section in the Austin office of Vinson & Elkins. In contrast to the corporate deals and CERCLA contribution litigation I worked on there, I now assist our clients in obtaining permits from state environmental agencies and advise them on other environmental regulatory issues. The rest of my time is spent enjoying Austin’s great outdoor farmer’s markets and kayaking the local lakes with my husband and fellow alum, **Charles Adame Winningham**, class of 2005.”

Janet Woodka (1992) is Legislative Director for Senator Mary Landrieu in Washington, DC. For the past seven years she was with the office of Van Ness Feldman, where she represented business clients and organizations on electric restructuring issues, energy policy, hydroelectric licensing reform, natural gas and LNG, and environmental issues. Previously she had served as an environmental attorney in the Energy and Environment Division of Coleman Research Corporation, a subsidiary of ThermoElectron.

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 a dozen 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 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 Post-Katrina New Orleans, the Lower Mississippi River and the Gulf Coast—provide a unique academic experience for those with an interest in environmental law and sustainable developmental policy. For more information, contact the Law School's admission office at John Giffen Weinmann Hall, Tulane University, 6329 Freret Street, New Orleans, LA, 70118, (504) 862-5930, or its web site at www.law.tulane.edu.

Outstanding Comment on Environmental Regulation

In January 1981 the U.S. Fish and Wildlife Service proposed regulations regarding mitigation for highway projects impacting wildlife

habitat. The Comment of a highway agency, and the Service's Response, follow:

“Comment: If you build something in a habitat, it just changes it to another habitat that some other animal or fish lives in – including the human being, although the Service does not seem to appreciate that. For example, if you build a

highway, it is bad for dogs, rabbits, opossums and field rats and such that get run over by cars and trucks, but it is good for crows and buzzards that eat dead meat.

Response: The Service has not come across many instances where crows and buzzards could be considered scarce: but when such a circumstance can be documented and verified, the Service will certainly try to protect and enhance valuable highway habitat.”

46 Fed. Reg. 7651 (1981)



Tulane Environmental Law News
6329 Freret Street
New Orleans, LA 70118-6231

