

Tulane Institute on Water Resources Law and Policy

Annual Report: 2009-2010



Tulane Institute
on Water Resources Law & Policy



Annual Report 2010

Water is an essential shaper of our society and its ecologic, cultural and economic well-being. The ways we use and manage water is as much about law and policy as it is about science and engineering, perhaps even more so. Those laws and policies are rooted in rights, experience and traditions that reveal much about who we are as a people. They will also change to reflect the society we want to become, particularly in light of changing climates, rising seas and growing competition for ever more scarce fresh water supplies.

The Tulane Institute on Water Resources Law and Policy is dedicated to fostering a greater appreciation and understanding of the vital role that water plays in our society and of the importance of the legal and policy framework that shapes the uses and stewardship of water. The Institute is program of Tulane Law School which complements the Law School's well regarded admiralty, maritime and environmental law programs.

The Institute's approach to its mission and programs is as multifaceted and dynamic as water itself. Through our partnerships, programs, and publications we:

- **Stimulate** an appreciation, understanding, and discussion of the role and value of water in our society and of the importance of law and policy its management and stewardship;
- **Educate** our students, the legal community, policy and decision makers, and the public about the legal regimes that control water use and management;
- **Advise** policy and decision makers, the legal community, advocates, and community leaders about developments in field of water law and policy; and
- **Consult** on the development of water related policies and programs.

This approach permeates all of our work and speaks to our commitment to create a space that frames water issues in meaningful , if sometimes nontraditional, ways while also helping advocates , planners, and decision makers to be better informed and more effective when it comes to water resource planning and management.

This report will summarize and highlight the activities and achievements of the Institute during the fiscal year that closed on June 30, 2010. None of this work would have been possible without the support of

the Institute's partners and friends to whom we owe a debt of gratitude. Special thanks are due The RosaMary Foundation and the Booth Bricker Fund for their invaluable support.

About the Institute---Structure and Governance

Founded in 2007, the Institute is an independent program of the Tulane Law School. The Institute's programs are developed to be consistent with its founding mission and the educational and public service missions of the Law School and the University. The Institute's activities and performance are reviewed annually by the Dean of the Law School.

Staff: The Institute has two full time staff members and receives administrative and research assistance from the Law School.

- Institute Director, Mark Davis. Mark is a Senior Research Fellow and Adjunct Lecturer at Tulane Law School. He has a BS and JD from Indiana University and an MLT from Georgetown Law School.
- Institute Program Manager, Ann Yoachim. Ann is also an Adjunct Instructor at the Tulane School of Public Health. She has a MPH from Tulane University's School of Public Health and Tropical Medicine and a BA from Dickinson College.

Advisory Boards: To help shape and guide its work the Institute has two advisory boards, one internal drawn from members of the Law School's environmental faculty, and one external composed of individuals with diverse and distinguished experience in planning and water law, policy and management.

The Institute's internal advisory board members are:

- Prof. Oliver Houck
- Prof. Gunther Handl
- Prof. Adam Babich

The Institute's external advisory board includes:

- James T. B. Tripp, General Counsel, Environmental Defense Fund, New York, NY
- R. King Milling, Chairperson, Governor's Advisory Commission on Coastal Conservation, Restoration, and Protection, New Orleans, Louisiana
- Keith Colvin, Partner, McGlinchey Stafford, New Orleans, Louisiana
- Allen Eskew, Principal, Eskew, Dumez, New Orleans, Louisiana
- Robert Dawson, CEO, Dawson and Associates, Washington, DC
- Linda Walker, JD, (Past member of Louisiana Groundwater Management Commission), New Orleans, Louisiana
- Eric Dannenmaier, Associate Professor of Law, Indiana University Law School, Indianapolis, Indiana
- Jerome Ringo, President, Apollo Alliance, San Francisco, California
- Susan Kaderka, Regional Executive Director, National Wildlife Federation, Austin, Texas

Program Highlights

BP Deepwater Horizon Spill Response

It would be impossible to discuss the Institute's work during the past year without starting with the consequences of the devastating BP Deepwater Horizon blowout. Although the blowout only began in late April of 2010 it transformed—and continues to transform—the way in which water and water related environments, cultures and economies are viewed and managed. In much the way that Hurricane Katrina forced a more comprehensive and purposeful approach to storm protection, the BP blowout has brought attention to the importance and vulnerability of the vast but threatened coastal and estuarine resources of the Gulf Coast. The blowout is much more than a tragic accident; it is also a moment of truth for the laws and policies that govern energy development in these water environments and for the efforts to conserve and restore the Gulf's chronically stressed ecosystems. These are the issues the Institute is focusing on. Our spill related work has focused on three areas in which we have both program priorities and distinctive expertise.

- **Public /Community Education:** Educating the general public through media and public forums about the history of coastal Louisiana; the possible implications of the spill on the natural resource, cultures and economy of the coast; the history of how environmental risk has been managed (or discounted) in offshore oil and gas development; and about the process for remediating damages after a spill and the role they might play in it. Just to illustrate the extent and breadth of our public education via media work on this spill (all of which has been unsolicited) we offer the following summary of stories in which we have been featured:
 - **ABC World News Tonight**
 - **"News Now" Canadian Broadcasting Corporation News (TV)**
 - **ABC News 26 (local)**
 - **USA Today**
 - **New Orleans Times Picayune**
 - **Baton Rouge Business Report**
 - **WILL Radio (University of Illinois)**
 - **New York Times**
 - **WVUE TV (New Orleans)**
 - **National Public Radio (All Things Considered)**
 - We have also done interviews on background or for broadcast with **Associated Press, WWL Radio (New Orleans) Al Jazerrah (English), Swedish Radio, Global Post, Public Radio International's "The World", and RTL (French Radio).**
- In addition to our media based outreach we been actively engaging community organizations involved in a wide range spill related work. Indicative of this was our co-

convening role of the **Strategic Responses to the BP Spill workshop** held on May 25th for about 30 organizations at the Ashe' Cultural Center

- **Policy Guidance:** This spill has exposed significant gaps in the policies that guide offshore oil development, natural resource damage mitigation, and the restoration of coastal ecosystems. The Institute has been sought out for guidance on those topics by Congressional Committees and by State, Federal and local agencies. It is clear that these are not short term needs that will diminish now that the well is capped, but rather will only increase in importance and urgency in the coming months. For example, we have been asked by officials with the President's Oil Spill Commission and the Secretary of the Navy for recommendations on integrating spill recovery work and the Natural Resource Damage Assessment Process (a provision under the Oil Pollution Act that requires polluters to restore the ecosystems their spill damage)with the broader coastal restoration efforts that have been underway in coastal Louisiana for some time. This is an area in which we have specific expertise. We have also worked with State of Louisiana officials with regard to the same subject.

- Our work in this area has included multiple meetings with senior members of the Obama Administration (e.g. White House Council on Environmental Quality chair **Nancy Sutley**, EPA Administrator **Lisa Jackson**, and National Oceanographic Administration head **Dr. Jane Lubchenco**) as well as personnel with the **Louisiana Attorney General's Office** and the **Governor's Office of Coastal Protection and Restoration**.

- **Natural Resource Mitigation/Coastal Restoration Coordination:** The Institute has been a pioneer in the field of integrating coastal restoration with natural resource damage mitigation. Under normal conditions, after a spill the "responsible party" (BP in our case) enters into discussions with a handful of governmental agencies that are "trustees" of the natural resources to hammer out an assessment of what was damaged and how to compensate for it. Typically these discussions would not include the public or most of the affected communities and would not normally reference any broader plans or programs to restore the coast. We believe this traditional approach, which can take years to play out, would only compound the tragedy of this spill. We are already working with state, federal and tribal leaders to shape a different approach to this Natural Resource Damage Assessment (commonly called a NRDA). Time is of the essence on this as policy decisions made in the coming weeks and months will determine the degree to which the potentially billions of NRDA dollars actually go to improving the health of our coast.

Louisiana Water Law Survey

Louisiana is entering a new era in which there will be unprecedented demands on its water resources. These are being driven by new needs such as natural gas extraction, freshwater demands associated with coastal restoration, and the growing needs of neighboring “water poor” states. They are also driven by existing water shortages such as those posed by the Sparta aquifer and the projected effects of climate change.

Being relatively water rich Louisiana has not seen the competition and conflict that fuels litigation and legislation in the ways that shaped water law in other states. Accordingly, Louisiana lacks a robust and comprehensive approach to managing its water resources although the need for a review of its existing laws and policies has been recognized by the State, most recently in the 2010 regular legislative session.

The Institute has foreseen this need and already begun a survey of Louisiana water law. Thanks to support from the Louisiana Sea Grant Legal Program and the Louisiana Disaster Recovery Foundation, we are well underway on this project.

Though we do not expect to be finished with the current phase of the project until the spring of 2011, our work has already led to one published article (Louisiana Law Review, Vol. 68 No. 2), several panel presentations and numerous consultations with State officials and community leaders on aspects of Louisiana water law. This work has put the Institute on the leading edge of water law and policy in Louisiana and clearly demonstrated our commitment to high value public service.

Building Resilience in a World of Water Risk

Water law and water policy are not abstract topics, they are fundamentally about how we live with water, especially with water related risks. Creating water resilient communities was a major focus of the Institute during the past year—as it has been since the Institute’s inception.

- **How Safe How Soon:** The Institute served as a key member of a 2 year collaborative effort designed to support three communities address immediate water related risks and plan for the future. In 2009-2010, the Institute continued to provide guidance on the laws, policies, and procedures that govern water resource planning; served as conduit for communication between the three communities and local, state, and federal government authorities, academia, and philanthropy; and provided technical assistance on emergency preparedness and long term hazard mitigation plans. The Institute also played a pivotal role in supporting the three communities in their fundraising efforts.
- **New Orleans Master Plan:** The Institute was a leading member of the team tapped by the City of New Orleans to develop a new comprehensive master plan guide the recovery and future development of the City. This project, begun in 2008, was

completed this year when the City of New Orleans gave final approval to the New Orleans 2030 plan on August 19, 2010.

The Institute's role in the plan's creation was largely in the sections dealing with sustainability and living with water. Notable features of the plan include its declaration of a near term goal of 1 in 500 year level of storm protection for the City (it currently is protected against a 1 in 100 year event), the recognition it is the City's responsibility to make itself safer and more resilient by its own land use and water management actions, and finally that the City's future is tied directly to the condition of the coast that surrounds it. The plan squarely puts the onus of making the City resilient from water related risks on the City and its residents and calls for the City to be an effective advocate for effective action on the coastal conservation, restoration and climate change fronts.

- **Assessment of Nonstructural Flood Protection:** Effective flood protection is not just about large public works projects such as levees, pumps, and locks. It is also about how and where we build. It is about how we protect key community and economic assets. And it is about getting people out of harm's way—and back when the risk of harm has abated. These are critically important to creating safe and sustainable communities but they don't just happen. Indeed they cannot happen without laws and policies. As communities and the nation come to terms with the risk posed by storms, coastal decline and rising seas the need for that legal and policy architecture is becoming clearer. To help with that process the Institute conducted a study of a wide range of "nonstructural flood protection" options (i.e. measures other than large public works projects that are designed to keep water away). This project, funded by the Environmental Defense Fund, has helped to inform community leaders about the elements of effective flood protection and their often varied legal foundations.

Bound by Water Summit/Percy Viosca Distinguished Speaker Series.

In April 2010 the Institute hosted the largest conference in its history, the Bound by Water Summit. This summit was cohosted by Tulane's amazingly energetic student led Environmental Law Society and was closely tied to the Tulane Environmental Law Journal summer 2010 issue that was devoted to water law and policy. (This was no coincidence, the Institute worked closely with the journal to develop the themes and solicit articles for that issue). The summit, which is described more fully later in this report, also include a keynote address on accretion and avulsion by the renowned water law scholar, **Professor Joseph Sax** of the University of California at Berkeley School of Law as part of the Institute's ongoing Percy Viosca Distinguished Speakers Series.

Institute Conferences and Meetings

Bound by Water Summit. April 9-11, 2010. Water as a resource that defines our environmental, economic and cultural sustainability was the theme of the 15th annual Tulane Law School Summit on Environmental Law Policy. The “Bound by Water” summit was hosted and planned by the Institute and the Tulane Environmental Law Society. The Summit’s more than 200 attendees were treated to a wide diversity of panels, speakers, field trips, and even a play written and performed by Tulane Law Students.

Among the highlights of the Summit were the keynote addresses delivered by U.S. EPA Administrator Lisa Jackson, Professor Joseph Sax of the University of California at Berkeley’s Boalt Hall Law School, and U.S. EPA Regional Administrator Al Armendariz, Ph.D.

The Summit could not have taken place without the support and sponsorship of the American Bar Association Section on Environment, Energy and Resources, the Louisiana Department of Natural Resources, Jones Walker, the National Audubon Society, Liskow and Lewis, the LSU Sea Grant Program, the Federal Bar Association, McGlinchey Stafford PLLC, the America’s Wetland Foundation, the Coalition to Restore Coastal Louisiana, Waggoner & Ball Architects, the National Wildlife Federation, the Sierra Club, the Lake Pontchartrain Basin Foundation, the Tulane Law School Intellectual Life Committee, the Student Animal Legal Defense Fund, the Tulane Law School Real Estate Law Society, Mr. Stephen M. Wiles, Esq., and Mr. James Guilbeau.

Institute Publications and Reports

“Security, Resilience and Opportunity: Planning For Water in Louisiana: An Issue Paper of the Tulane Institute on Water Resources Law and Policy”, Mark Davis, January 28, 2010

Publications and Presentations by Institute Staff

Publications

- Tulane Environmental Law Journal Special Issue on Water. Introduction by Mark Davis TELJ Volume 23, Issue 2. Summer 2010.
- Forthcoming Summer 2010. Mark Davis. “To the Heart of the Matter: Coastal Restoration and the Future of New Orleans”. To be published by the Brookings Institution and the New Orleans Community Data Center as part of their New Orleans at Five project.

- Forthcoming Spring 2011. Ann Yoachim and, Charles Allen. “Rights Based Approaches to Community Development: A Case Study of the Lower 9th Ward New Orleans” in *Rights Based Approaches to Public Health*. Springer Publishing.
- Forthcoming Spring 2011. Mark Davis, coauthor. “Resilience and Opportunity: Lessons from the U.S. Gulf Coast after Katrina and Rita”. Brookings Institute Press.

Presentations

- **Disaster As An Opportunity: A Case Study of the Lower 9th Ward.** Ann Yoachim, speaker, American Public Health Association Annual Conference (Philadelphia, PA). November 2009.
- **Bayou Bienvenue Restoration: A Summary of Property Rights Issues and Options.** Presentation by Mark Davis to the Governor’s Advisory Commission on Coastal Restoration and Protection (New Orleans, LA). December 1, 2009.
- **Regulatory Waters--The Regulation of Offshore Energy and its Ecological Impacts.** Presentation by Mark Davis at the Florida Symposium on Off Shore Energy-Part II: The Inshore Challenges of Offshore Energy Prospects, Florida State University School of Law (Tallahassee, FL). February 1, 2010.
- **Building Resilience Workshop.** Mark Davis, panelist (New Orleans, LA). February 26, 2010.
- **New Bull, Old Arena.** Presentation by Mark Davis at the American Planning Association’s Bettman Symposium, National Convention of the American Planning Association (New Orleans, LA). March 2, 2010.
- **Trouble the Water.** Mark Davis, panelist at national meeting of the National Association of Environmental Law Students (New Orleans, LA). March 6, 2010.
- **Water Wars: Lessons from the Front.** Mark Davis, panelist. Bound by Water Summit, Tulane Law School (New Orleans, LA). April 9, 2010.
- **Fit to Drink: Protecting our Water Supply.** Ann Yoachim, moderator. Bound by Water Summit, Tulane Law School (New Orleans, LA) April 10, 2010.
- **More than an Amenity.** Mark Davis, moderator and Ann Yoachim, panelist. CNREP 2010: Challenges of Natural Resource Economics and Policy (conference sponsored by Louisiana State University Center for Natural Resource Economics & Policy (New Orleans, LA). May 28, 2010.

- **The Louisiana United Houma Nation Case Study of Native American Adaptation and Mitigation.** Ann Yoachim, panelist. International Climate Change Adaptation Conference (Gold Coast, Australia). June 2010.
- **The Third Element-Building A Complete System of Resilience.** Ann Yoachim, co-presenter. State of the Coast conference (Baton Rouge, LA). June 2010.
- **How Safe, How Soon .** Ann Yoachim, speaker, Returning to Katrina: Bringing Hurricane Katrina Research Back to the Community conference (Long Beach, MS). June 2010.

Campus and Community Service

- **Tulane Oil Spill Response Committee:** Institute Director Mark Davis serves on this campus wide committee that is coordinating the University's research activity in areas relevant to assessing the impacts of the BP Deep Water Horizon spill and to improving management and response efforts.
- **Coastal Research Consortium:** Mark Davis serves as Tulane's alternate representative to the CRC's Technical Committee. The CRC is a collaborative between Tulane, Louisiana State University, University of New Orleans and the University of Louisiana-Lafayette that is intended to harness the talents and resources of those schools and others to support the ongoing state/federal efforts to conserve and restore the wetlands and estuaries of coastal Louisiana.
- **Mayor –elect Mitch Landrieu's Transition Team:** Institute Director Mark Davis served as Vice Chair of Mayor –elect Landrieu's Transition Task Force on Coastal Restoration and Flood Protection.
- **Groundwork New Orleans:** Mark Davis serves as a technical advisor to Groundwork New Orleans. The mission of Groundwork New Orleans is to bring about the sustained regeneration, improvement and management of the physical environment of the City through community based partnerships that promote economic, environmental and social well-being. It is one of twenty Groundwork organizations in the country.
- **Coastal Best Practices---Center for Planning Excellence:** Mark Davis was named an advisor to the Center for Planning Excellence's Coastal Best Practices project. This project seeks to establish best management practices for enhancing the resilience and sustainability of community's in coastal Louisiana.
- **Horizon Initiative:** Mark Davis is a participating member of the Horizon Initiative Water Management Subcommittee. The Horizon Initiative is independent, diverse

organization dedicated to expanding the prospects for growth and prosperity in New Orleans.

- **GNOF Environmental Advisory Board:** Mark Davis served as a member of the Greater New Orleans Foundation's Environmental Advisory Board.
- **United Way Safety Net Vision Council:** Institute Program Manager Ann Yoachim serves on this council which makes funding decisions for all grant applications from non-profit organizations that support emergency and disaster preparedness, long term recovery and rebuilding, and crisis management.
- **Hollygrove Market and Farm:** Ann Yoachim serves as an advisor to this important new community asset. In her role on the Market and Farm's advisory group, she provides technical support and guidance to assist in the development of a long-term strategic plan for the organization.
- **Tulane Law Community Service Projects:** The Institute provided public service opportunities for four Tulane law students during the year.

Tulane Institute on Water Resources Law and Policy

Financial Support

July 1, 2009- June 30, 2010

Grants and Contracts

| | |
|--|-----------------------|
| The RosaMary Foundation | 10,000 |
| Booth Bricker Fund | 30,000 |
| Env. Defense Fund | 25,000 ⁱ |
| Env. Defense Fund | 15,000 |
| LSU Sea Grant Legal Program | 9,834 |
| RAND | 13,590 ⁱⁱ |
| RAND (Peer Review) | 1,000 |
| Rockefeller Gulf Coast Fund | 6,000 |
| Coalition to Restore Coastal Louisiana/Blue Moon Fund | 10,000 ⁱⁱⁱ |
| Coalition to Restore Coastal Louisiana | 6,000 |

Donations—Individual and General 3,000

Sponsorship Donations—Bound by Water Summit^{iv}

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|--|--------------------|
| America's Wetland Fdn. | 1,000 |
| Waggoner and Ball | 1,000 |
| Lake Pontchartrain Basin Fdn. | 500 |
| Liskow & Lewis | 200 |
| LA Dept. of Natural Resources | 2,000 |
| James Guilbeau | 500 |
| National Audubon Society | 1,000 |
| McGlinchey Stafford | 500 |
| American Bar Association | 1,000 |
| Coalition to Restore Coastal Louisiana | 500 |
| Jones Walker | 1,500 |
| Sierra Club | 500 |
| Zuka Baby LLC | 500 |
| Steven Wiles | 5,000 ^v |
| Law School Intellectual Life Comm. | 1,500 |

Conference Registration Receipts

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|-----------------------|---------------------|
| Bound by Water Summit | 6,080 ^{vi} |
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|--------------------------|---------------------|
| Honoraria | |
| Florida State University | 2,500 |
| LSU | 500 |
| Other | |
| Reimbursements | 84.29 |
| Total | \$155,788.29 |

ⁱ \$5000 of this was still receivable on 6-30-10

ⁱⁱ The Institute has a 2 year contract with RAND to assist in a water risk assessment project. Under the terms of that contract the Institute received was to receive \$18,000 in the 09-10 fiscal year. Because the project is funded by NOAA it is University policy to charge overhead the grant at its 49% government rate. This left \$9,180 in direct funding for the Institute for the FY. To facilitate our ability to perform the contracted services the Law School and the Institute agreed to split the \$8,820 equally. The total funding for the Institute from the source was \$9,180 plus 4,410, or \$13,590.

ⁱⁱⁱ From CRCL as fiscal agent for Blue Moon Fund in support of How Safe How Soon project

^{iv} The Bound by Water summit was cosponsored by the Environmental Law Society. Some financial sponsors paid certain summit related expenses directly (e.g. Federal Bar Association and GHPSA). Those revenues are not reflected in this report.

^v This amount was still receivable at 6/30/10.

^{vi} This includes \$7,030 in total registration receipts net of \$50 in refunds.