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## The Mulching Of Louisiana

One of the indelible symbols of Louisiana and the Deep South is the cypress forest, “bearded in moss and in garments green,” an ecosystem so vast and beautiful that it overwhelms the imagination. In the early 1900s the same logging frenzy that cleared the Northeast and then the Ohio Valley also seized Louisiana’s Atchafalaya, Pearl River and Maurepas swamps, clearcutting square miles of cypress at a time and creating a succession of booms and busts.

What remains of these cypress are the doors and sidings of many New Orleans homes, while in the backwater habitats young cypress have struggled to survive. As they have matured, the remaining cypress stands have become the object of a second logging frenzy, not for construction material, which has gone to faster growing timber and lumber substitutes these days, but for, of all things, garden mulch. The battle for the cypress is on.

Cypress forests are Louisiana’s signature. You cannot find a state brochure, film or documentary without them. Not only are these majestic trees integral to Louisiana’s culture and tourism, we are finding that they provide perhaps the best natural line of defense against hurricanes the size of Katrina and Rita. Where they were present, they protected the levees and the people behind them. Where they were absent, the levees were overwhelmed. See Environmentalists Say Cypress Belongs in Swamps, Not Gardens, Herald-Tribune, April 28, 2007 (“Preliminary results show that cypress and tupelo swamps the width of a football field can suck 90 percent of the

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## Tulane Hosts Waterkeeper Conference

This June saw the first ever national Waterkeeper Conference in the Deep South, at Tulane, featuring keynote speeches by Robert F. Kennedy, Jr. and Professor Houck. The Waterkeeper organization is an umbrella for hundreds of baykeepers, lakekeepers and riverkeepers around the country, and now, around the world. At the conference, applications from several Latin American groups were made, considered and approved, including two on the Baja Peninsula. In his address, Robert Kennedy outlined the politics of clean water today and their challenges in Washington, while Mr Houck spoke more to the history of waterkeeping, its current reach and its inherent social and psychological challenges.

The Waterkeeper movement was launched in the United States on the Hudson River, an outgrowth of the struggle over a pumped storage hydro electrical power project at Storm King Mountain. The Second Circuit opinion in the ensuing lawsuit, Scenic Hudson Preservation Council, could make a fair claim to jump starting modern environmental law. (For a description of the case and its impacts, see Robert Kennedy Jr, *The Riverkeepers* (1997), or in more

*Continued on Page 2*



Robert Kennedy, Jr. at the June 2007 Waterkeeper Conference at Tulane

**SEPTEMBER**

Environmental Dessert  
Competition  
City Bike, New Orleans

**OCTOBER**

Red Creek Canoe Paddle  
Studio in the Woods Bike Trip  
Recycling Conference

**NOVEMBER**

Year End by the Mississippi  
River

**JANUARY**

Bayou Sauvage Paddle

**FEBRUARY**

Bike the Mississippi

**APRIL**

The Conference  
Horn Island Camp Out

## Keeping Cool: The Annual Tulane Environmental Law Conference

The thirteenth annual Environmental Conference on Law, Science and the Public Interest, sponsored in part by the Environmental Law Society, will focus on climate change and its expected effect on our natural and built environments. Panel topics include the Kyoto Treaty and beyond, carbon sequestration and emissions trading, species impacts, water resources impacts, social justice, health and disease, carbon trading, and disaster insurance, among others. An exciting lineup of experts (see below) and musical guests is currently forming, and the conference is expected to

attract hundreds of environmental law attorneys, scientists, government personnel, students, environmental group members and, to tell the truth, anyone interested. The conference is scheduled for April 4-5, 2008 and will take place in Weinmann Hall, the law building of Tulane University.

A traditional rendezvous (now in its thirteenth year), the conference mixes law and jazzfest in a New Orleans fashion. All panels are CLE accredited, and feature the substance and policy of their issues as well as developing law.



Mark Plotkin (C) with Colleagues in the Amazon

### Conference Keynote

Keynoting this year's conference will be Dr. Mark J. Plotkin, whose seminal work with indigenous peoples and the biological resources of their surroundings has propelled an entire movement in ethnobotany and some much needed reforms in ownership rights for native uses. Co-founder of the Amazon Conservation Team and author of *Tales of a Shaman's Apprentice*, Dr. Plotkin has been hailed by *Time* magazine as an "Environmental Hero for the Planet." Known for his engaging storytelling, Dr. Plotkin will share the breadth of his knowledge in a speech entitled, "Rain, Rainforests, Shamans, and Climate Change," on April 5, 2008, on Tulane's campus.

### Waterkeepers *Continued from page 1*

brief, Oliver Houck, "Storm King," in "Unfinished Stories," *Colorado Law Review* (2002)). Though not involved in the original proceedings, Robert Kennedy was a mover in several subsequent clean water fights, including a series of massive hydroelectric projects on Cree Indian territory in Canada, leading to what is probably the most famous "canoe-in" of all time, a several hundred

mile journey of canoes and kayaks down the Hudson to New York City. Facing a strong public reaction, the State subsequently cancelled power contracts for the project, effectively sidetracking it.

The game plan of Scenic Hudson and the Canadian cases is very much the style of Waterkeeper organizations today, a mix of public education, water science, policy initiatives and strategic litigation. People like water, and they

want clean water. Those beliefs and desires will support the continued growth and effectiveness of these groups as they go forward.

Among some 250 participants in the June 2007 Waterkeeper conference were three TLS graduates who went on to Waterkeeper work: Justin Bloom (JD '96), Michelle Merkel (JD '95), and Elizabeth Nicholas (JD '98).



## Katrina Litigation: The Second Wave



Still Boarded Up, 2 Years Later

The damage from Hurricane Katrina was unprecedented; several hundred thousand homes and businesses just to start with, and to no one's surprise, the number and nature of the lawsuits in reply are without precedent as well.

As described in last year's newsletter, after various consolidations and early demises the major litigation boiled down to three camps: civil actions by residents, businesses and others flooded by the levee breaches; recovery actions against insurance companies for these and other damages; and an ambitious set of actions predicated these losses on the impacts of oil and gas activity in the coastal zone, and on coal and oil industry emissions leading to storm surges due to global warming.

This litigation pits strong equities against entrenched jurisprudence. The legal theories advanced challenge several hoary legal doctrines, including the immunity of the federal government for its flood control program, the sanctity of insurance contracts and their exclusionary clauses, and causation in public and private law. The cases are still unfolding, but here is a snapshot of where they stand.

### THE CANAL CASES

These cases allege negligence by the Corps of Engineers, its contractors, and other government agencies in the

construction and maintenance of two massive canal systems; the MRGO to the south of the City, and the drainage canals leading from the City east to Lake Pontchartrain. In short, the MRGO led to the drowning of St Bernard, the Ninth Ward and New Orleans East, whereas the Canal breaches inundated Lakeview, Central City and Gentilly. The government defense in each case asserts general Corps of Engineers immunity under the Flood Control Act of 1928, and, should that immunity be breached, then exception from Federal Tort Claims Act liability under the "discretionary function" doctrine. These defenses are, of course, critical, because as an abundance of independent engineering and press investigations have reported, the negligence allegations appear strong: shoddy planning, design, and construction, failure to investigate subsoils, failure to incorporate more serious storm surge data, failure to maintain. The immunity defenses, then, are key. They are likely to be disposed of differently, however, in the cases of MRGO and the drainage canals.

The more advanced of these cases is *In Re Katrina Canal Breaches Con-*

solidated Litigation, reported at 471 F. Supp. 2d 684. Here, Judge Duval of the Eastern District of Louisiana denied a government 12 (b) motion to dismiss based on the FCA and FTCA provisions described above. His ruling was based on a review of the sometimes contradictory interpretations of the Flood Control Act immunity provisions, and relied on a Supreme Court opinion, *Central Green Company v US*, to the effect that flood damages from multiple causes, some immune, some not, could be bifurcated. The central holding, though, was to find a genuine issue of fact as to whether the MRGO was a flood control project, thus immune, or a navigation project, thus not. The same issue of fact obtained for resolving whether the Corps allegedly negligent acts were "discretionary" (ie matters of policy) or not. Our guess is that the ruling has the Corps nervous, but there is always the 5th Circuit, rarely friendly to plaintiff claims.

In the Canal cases, also captioned Civil Action 05-4182 et al, Judge Duval appears to be leaning towards the opposite conclusion. Plaintiffs here claim that the Canals do not give rise to immunity because they were routine drainage conduits, not flood control structures, and because, additionally, the Corps had

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**"There is no question that, whatever the Court does, it's indeed lamentable, that it certainly, that it may be that I rule in favor of the Government, that in essence the King can do no wrong."**

— Judge Stanwood Duval, *In Re Katrina Canal Breaches Consolidated Litigation, Transcript of Motions Hearing Proceedings, August 16, 2007*

# Book It!

## New Courses for the 07-08 Academic Year

*Supplementing its traditional curriculum, the environmental law program offers a selection of new courses, three of which are being offered by visitors who are the top of their field. On this page, we preview those courses being taught by visiting scholars. The facing page reviews new courses taught by current faculty.*

### THE VISITORS



Vicki Arroyo

#### **Pew Foundation Presents Course On Climate Change**

This new seminar presents the evolving law, science, technology and policy of climate change, the issue that, just perhaps, will in turn change the climate on environmental protection worldwide. IT will be led by Vicki Arroyo, the Director of Policy Analysis of the Pew Center on Global Climate Change. The Center's professional staff of scientists and economists has published over 50 reports on this issue, including several authored by Ms. Arroyo. A magna cum laude graduate of Georgetown Law Center, Vicki also received a Masters of Public Administration from Harvard's Kennedy School of Government and has worked subsequently for the federal EPA, the Louisiana DEQ, and the private firm of Kilpatrick Stockton in Washington, DC. An actress and jazz vocalist, Vickie is also returning to her hometown roots in this gig in New Orleans and, we are sure, will bring a jazzfest element to one of the most important and intractable issues of our time. We are fortunate to have her joining us.



Nicole Duarte

#### **Law Scholar And Practitioner To Teach Science And The Law**

Nicole Duarte will offer a course at the interface of science and the law, on the most difficult marriages in all phases of environmental policy. An honors graduate of LSU with a degree in Anthropology, Nicole was a standout student at the Paul M. Hebert Law Center and went on to an active law practice with Lemlie & Kelleher in New Orleans, and now, post Katrina, in Texas. Her primary emphasis has been in complex litigation, appellate and toxic tort work, and her cases have included the gamut of fate, dispersion, exposure and risk assessment familiar to anyone working the private or public law side. An accomplished linguist, Ms Duarte has also presented courses and lectures in Russian and French. She is, as we speak, in addition, the vice President of the Catahoula Owners and Breeders Research Association, and Head Coach of her Neighborhood Flag Football Program. Which means, among other things, that she has dogs, kids and energy. We look forward to having her with us.



Luke Danielson

#### **Mining Expert Treats International Mining And Sustainable Development**

This course focuses on the unique intersections of cultures, political systems, economies, and legal systems that arise from relationships between mining, oil, and gas development. It addresses conflicts between these industries and local populations, as well as common interests. It explores ways in which these conflicts are, and are not, and could be, mitigated. The course is being taught by Luke Danielson, former Chairman of the Colorado Mined Land Reclamation Board, and the first Director of the Mining Policy Research Initiative at the International Development Research Centre. He also served as the director of the largest research project undertaken to-date, which explored the development impacts of minerals investing for the International Institute for Environment and Development.

## Additional New Courses

**Animal Law Seminar** – This course examines the substance and principles of existing laws with regard to non-human animals, including criminal law, torts, property, constitutional law, contracts, wills and trusts, and animal-focused federal statutes. The seminar will also treat how cultural traditions affect conceptualization of legal protections and existing rights with which legal systems and lawyers must deal with regarding animal issues. The course is being taught by Marilyn H. David, a private attorney also specializing in federal, state, and municipal government contract litigation.

**Disasters: Response & Recovery** – This course will focus attention on the nation's evolving program for disaster preparedness, response, and recovery, with particular attention paid to New Orleans and the Gulf Coast following Hurricanes Katrina and Rita. The full

range of protection, evacuation, infrastructure, transportation, education, business, and residential reconstruction will be addressed, particularly within the context of the Stafford Act and other applicable laws and policies. It is offered by Marc Roy, former counsel to FEMA, currently to Donald Powell, the federal coordinator of recovery post Katrina.

**Land Use Planning/ New Orleans** – This traditional land use and planning course will place particular emphasis on chronic and emerging issues of New Orleans and the Gulf Coast Region. Presented by Professor Stacy Seichshnaydre.

**Saving Louisiana** – This course focuses on the steps and remedies that must be taken to save coastal Louisiana in light of the devastating effects of hurricanes Katrina and Rita and coastal erosion. The course explores the unique vulnerabilities of the state, their causes, and the remedial systems that have been

developed for them, including levees, storm gates, marsh and wetlands creation, floodplain zoning and insurance. Taught by Professor Oliver Houck.

**Toxic Tort Litigation Practicum** – This is a skills course, following the basic Toxic Tort class, guiding students through the investigation, complaint, and discovery of complex toxic tort cases. Offered by William Goodell, a toxic tort practitioner in Lafayette, Louisiana.

**Water Resources Policy** – This course will cover the role and influence of law on the use, allocation, and stewardship of water resources in the United States and Louisiana. It includes concepts of public trust, use, ownership, allocation and transfer of water resources; the roles of resource management agencies such as the Army Corps of Engineers and the Bureau of Reclamation. Storm protection, drought, ecosystem restoration and sea level rise are examined as emerging policy issues.

## Tulane Environmental Law Journal

The *Tulane Environmental Law Journal* (TELJ) is kicking off its 21st volume with a move to a new office space, where it will have more square footage and better natural light. The TELJ is striving to work more closely with its advisory board, which was partially updated last year. It also hopes for more participation via suggestions, articles and subscriptions from the Journal's former members and editors – 20 years' worth, and counting.

The Winter issue will focus on water management issues, with a special essay by Professor Houck on the history and nature of water keeping. The issue will also include two Clean Water Act articles on Rapanos/Carabell (wetlands jurisdiction) and CWA implementation in the Chesapeake Bay. The issue closes with an article on environmental justice in New Orleans.

The TELJ website has also been recently updated, and includes contact and subscription information. Please visit us at: <http://www.law.tulane.edu/tlsjournals/enviro/index.aspx>. We are looking forward to another successful year and hope to hear from our alumni and friends.





## Environmental Law Clinic: Fall 2007

The Tulane Environmental Law Clinic's cases generally fall into four major initiatives: 1) air quality protection, 2) water quality protection, 3) wetlands protection, and 4) preservation of Louisiana communities. Cutting across all of these initiatives is an emphasis on expanding citizen participation in environmental governance and defending the rule of law. Over the past year, the Clinic has succeeded in major litigation that spans every aspect of environmental law and worked with community groups throughout the Gulf South on issues of environmental importance. The following are some highlights from the past year:

- **Wetlands:** On January 21, 2007, the Court of Appeals for the Fifth Circuit upheld our clients' victory in a wetlands preservation case under the National Environmental Policy Act. (*O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007)). The trial court had prohibited the Army Corps of Engineers from allowing destruction of wetlands without first 1) analyzing the cumulative impacts of wetlands destruction in the area, and 2) providing support in the record for the Corps' conclusion that the permittee would mitigate wetlands impacts. This is an important victory because the court rejected a typical governmental approach to justifying wetlands destruction, which is to invoke "mitigation" efforts without ever conducting the scientific inquiry needed to determine whether the mitigation will be effective. Similarly, the Corps has tended to dismiss the importance of cumulative impacts by arguing - without investigation or evidence - that because prior permit recipients were required to take mitigation measures, impacts from prior projects need not be considered. Before the Fifth Circuit ruled in this appeal, the Corps did not consider the district court's decision to be a binding precedent and therefore had not modified its policies in response. Now that the Fifth Circuit has ruled, Corps officials have assured us that there will be changes in the Corps' approach.
- **Community Preservation (and Water Quality):** After years of litigation and negotiation, the Clinic's clients prevailed in federal district court in their challenge to the Army Corps of Engineers' project to expand the Industrial Canal, which goes through the Holy Cross neighborhood in New Orleans' Lower Ninth Ward. (*Holy Cross Neighborhood Ass'n v. U.S. Army Corps of Engineers*, 455 F. Supp. 2d 532 (E.D. La. 2006.)) The court issued summary judgement on October 4, 2006, ordering the Corps to stop its \$650 million project until the Corps conducts a full assessment of environmental impacts, including water quality impacts from disposal of contaminated sediments. On April 17, 2007, the Court issued final judgement for our clients. The Corps has filed an appeal with the Fifth Circuit, but government lawyers tell us that the government has not yet decided whether to prosecute the appeal or accept the district court's ruling. The Industrial Canal project would impose years of disruption on an historic New Orleans community that is struggling to recover from flooding damage due to the breach of the Industrial Canal's levees. For years, taxpayer groups have complained that the project's huge costs cannot be justified by potential navigational benefits.
- **Water Quality:** On behalf of the Gulf Restoration Network, the Clinic notified the City of McComb and the Mississippi Department of Environmental Quality (MDEQ) about Clean Water Act violations at the City's east sewage treatment plant on December 6, 2006. The city responded by negotiating a draft compliance schedule with MDEQ. Next, during negotiations with the Clinic and Gulf Restoration Network, MDEQ and the city tightened the schedule and finalized it on February 22, 2007.
- **Air Quality:** On December 22, 2006, the D.C. Circuit Court overturned an EPA regulation that denied Clean Air Act safeguards to residents of Baton Rouge and other areas that have never attained the federal health protection standard for ozone pollution. The Court explained that because Congress had enacted specific language to "reduce EPA discretion," EPA could not ignore the law to implement its own "preference for regulatory flexibility." (*South Coast Air Quality Management Dist. v. EPA*, No. 04-1200 (D.C. Cir. June 8, 2007)). The Clinic represented the Louisiana Environmental Action Network ("LEAN") in this case, and worked with a coalition of public interest lawyers.

*by Professor Adam Babich*



Environmental Law Clinic  
Student Attorneys 2007

## Road Rage: Commodifying Road Access And The National Traffic Jam

After a half century of heroic federal highway expenditures, traffic congestion on the nation's highways is at an all-time high. Now, New York City, Professor Nash's home town, is proposing an idea that has already been launched with some success in Europe. The proposal lodges neatly at the axis of environmental law and law and economics, as we shall see.

We are stuck in traffic. We face longer time delays in daily commuting and freight hauls. The environmental impacts, formerly considered in terms of local quality, have now expanded to climate change. *Traffic congestion has also become a precursor of assaultive, even homicidal, "road rage," and has even been implicated in obesity. The traditional solution to this problem has been simple: Build more roads.*

More highway capacity is not, however, an efficient answer. Even if congestion is temporarily relieved, the fact remains that providing roadway capacity fails to address the fundamental underlying economic problem: the ability of roadway users to externalize costs on other roadway users and on society at large. The provision of new roadway capacity does not require or lead to the internalization of costs. As such, it encourages an inefficiently high level of use of the resource. Neither does new capacity allocate roadway capacity efficiently, to those who value it most.

Moreover, not only is the generation of new roadway capacity not an efficient way to address congestion, over time new capacity may serve to exacerbate congestion problems. This is because of the phenomenon of "induced travel." Essentially, new roadway capacity may induce additional travel that would not have taken place but for the new construction.

By contrast, congestion charges offer an alternative. As opposed to simple tolls (which tend to be uniformly priced and are intended to finance highway programs), congestion charges



Interstate 10 – New Orleans, LA

are, simply put, tolls that are designed to force drivers to internalize the congestion costs that their driving imposes on other drivers. By forcing drivers to internalize at least some of the negative externality that they impose by using roadways, a system of congestion charges is likely to reduce roadway usage to a more efficient level. Also, the use of charges is more likely to result in the allocation of the resource of roadway usage to those who value it most.

In recent years, Congress has authorized pilot congestion charging regimes. Moreover, experimentation with congestion pricing programs is growing overseas—including a notable program in London—and a serious proposal for congestion pricing has emerged to govern and reduce traffic in New York City's central business district. President George W. Bush has appointed as Secretary of Transportation a strong advocate of congestion pricing. This suggests that, while political economy tends to be a powerful force, it is possible for concerns of efficiency to override (or

at least to curtail) that force when the inefficiencies of a response grounded in political economy become too large.

Yet, even in the face of weighty efficiency arguments in favor of congestion pricing, political opposition to such programs remains strident and often successful. Consider that, even in New York City – a relatively politically homogeneous municipality where public transit is already well established – opposition to congestion pricing has stalled the pricing initiative. Only this past summer, Mayor Michael Bloomberg was exuberant at the prospect of receiving federal funding to implement congestion pricing in Manhattan south of 86th Street. In the end, all that has happened thus far is the appointment of a commission to examine the idea further.

The grounds for this opposition are varied. Some raise concerns of equity, asking what will be the distributional impact of congestion pricing. Others object to congestion pricing on privacy grounds, insofar as implementation of congestion pricing would require the government to keep track of exactly where certain vehicles are at certain times. Still others see it as a new form of taxation. And there are those who believe that market mechanisms are not properly invoked to achieve environmental goals.

Some of these issues can be resolved directly. We can, for example, price roadway access differently for people at different income levels. On the question of whether market-based mechanisms are well suited to attain environmental goals, they are often well designed to do so. Much as a carbon tax would cause actors to internalize the costs of their activities that lead to global warming, so too will congestion pricing cause drivers to internalize the significant costs they impose on others. To be sure, pricing things long assumed to be free is a challenge. At the end of the day, however, once one recognizes the real costs, congestion pricing gains significant advantages over regulation. New York City has the opportunity here to lead the way.

*by Professor Jonathan R. Nash*





Ivory Swamp, Atchafalaya Basin Before (left) and After Mulching (right)

storm surge out of a hurricane.” ) available at <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20070428/NEWS/704280458>.

Unfortunately, the threat to cypress is more than logging. Salt water intrusion and changing hydrology, often caused by canal levees and spoil banks, have left the state’s remaining stands highly vulnerable. Dr. Gary Schaffer, a wetlands scientist and cypress expert at Southeastern University, states that “of roughly 200,000 acres of cypress swamp forest in the Maurepas and Pontchartrain basins,” once cut, “80 percent is highly unlikely to regenerate. Landowners, loggers, environmentalists and politicians wrestle over the declining health of south Louisiana’s cypress forests, *Gambit Weekly*, June 21, 2005, available at [http://www.bestofneworleans.com/dispatch/2005-06-21/cover\\_story.php](http://www.bestofneworleans.com/dispatch/2005-06-21/cover_story.php). Cut cypress in these environments do not grow back. This fact will have large legal consequences.

Enter a new market craze, supported by the Louisiana Department of Agriculture and by the Louisiana State Forester, who have backed a welter of new mills to chip entire cypress trees into garden mulch. Not very good mulch, biologically, as it turns out. But mulch with a lot of cachet. It sounds better than your neighbor’s mulch.

### The legal response.

Faced with a problem without a handle, permit writers within the Corps New Orleans District began applying Section 10 of the Rivers and Harbors Act to the practices, which they saw as “altering the course, condition or capac-

ity” of adjacent waters. This assertion of authority drove Louisiana Senator David Vitter, at the behest of local loggers, to the extreme of sponsoring a rider prohibiting the Corps from limiting cypress logging on this basis. The bill failed, closely, but another control was needed as well.

Because cypress grows in wet areas, environmental groups began to look to the Clean Water Act to restrict the logging. They have focused their efforts on Section 404 which allows the Army Corps of Engineers to issue permits allowing people to discharge dredge or fill material into U.S. waters, including wetlands. In cypress swamps, access roads and the logging itself usually require fill. Loggers reply that they do not need a 404 permit, because they are engaged in “normal silviculture,” which is exempt under 404 (f). Environmentalists rebut, pointing to the definition of “silviculture” by the Society of American Foresters as the use and management of woodlands “on a sustainable basis.” *Dictionary of Forestry*, Society of American Foresters (emphasis added). Because, in fact, much of the logged cypress will not grow back due to changing salinity, cypress logging is not sustainable and, so, not exempt from Section 404. In Louisiana, the EPA has adopted this position on a case by case. An environmental group in Georgia has filed suit challenging a silviculture exemption the Corps granted for cypress logging in that state, which the Tulane Environmental Law Clinic is supporting with an amicus brief.

### Non-legal approaches

Concerned by the disappearing cypress swamps, Louisiana Governor Blanco assembled a Science Working Group in order “[t]o provide information and guidelines for the long-term utilization, conservation, and protection of Louisiana’s coastal wetland forest ecosystem, from both environmental and economic perspectives.” See <http://www.coastal-forestswwg.lsu.edu/objectives.htm>. The Science Working Group issued its Final



Atchafalaya Basin Keeper Dean Wilson and his Tulane Law Clinic Attorney Jill Witkowski

Report on April 25, 2005. Nearly two years later, the Working Group, with a heavy representation of timber interests, came up with a series of meaningless compromises that provided no solution or strategy to protect Louisiana’s coastal forests. Proposals for state acquisition, for restrictions on mulching, or for partial bans in areas least likely to regenerate, fundered.

Meanwhile, environmental groups, several of them Clinic clients, have launched a campaign to persuade the big box garden suppliers Wal-Mart, Lowe’s, and Home Depot to stop selling cypress mulch. The Save Our Cypress Coalition asked the stores to live up to their claims of environmental responsibility. They produced videos and reports showing that, indeed, cypress logging was ubiquitous and not restricted to the leftovers from lumber mills: whole cypress trees were being turned into mulch. In a breakthrough, early this September, Wal-Mart announced that starting next January it would no longer sell cypress mulch harvested, bagged, or manufactured in the state of Louisiana. Lowe’s, in turn, stated that it would impose a moratorium on purchasing cypress products harvested south of I-10/I-12. Stay tuned.

*by Jill Witkowski and Professor  
Oliver A. Houck*



# Environmental Law Society in Action



PHOTO BY WILFRED FERBOS

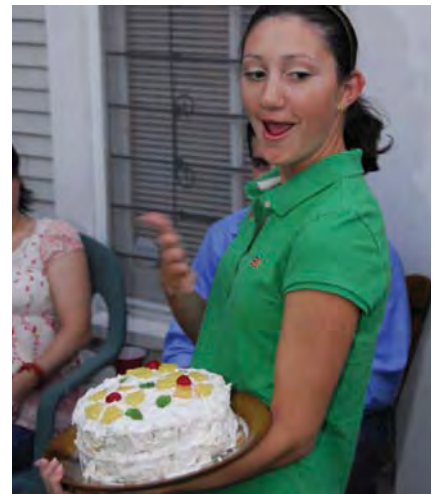
Current TELS Officers



Andrea Albright (JD '09), TELS President



The Cast, The Katrina Play, Author Mary Nagle (bottom row center) (J.D. 08)



Elizabeth Fisher (JD '08), 2006 Newsletter Editor



Wick Shreve (JD '08), Jason Kafoury (JD '08) in The Katrina Play



The All Ladies Pyramid 2007



The All South Dessert Contest; Winning Entry "Polar Bear in Trouble"



## Katrina Litigation

*Continued from page 3*

permitted dredging activity that undermined the security of these structures, and this dredging was unrelated to the project, even were it viewed as flood control. In a related action, yet other plaintiffs claimed Admiralty jurisdiction on the basis that the Canals were navigable waters, even had boats docked in them, and thus the immunity provisions were not applicable. The government pointed out, however, that the canal levees were not navigation structures and were specifically incorporated into the Lake Pontchartrain Hurricane Protection System, a stronger claim for flood act immunity. Judge Duval ruled first on the navigable waters claim, in the negative. And as the sidebar quote indicates, he will in all likelihood deny the relief in this case as well. Leaving half the city without legal remedy.

### THE INSURANCE CASES

This litigation brought by homeowners and others against their insurance companies reveals a split in views between the trial and appellate levels. To review the bidding, most homeowners were covered by policies that included wind but excluded flood damages. The question in all of these cases has been whether the particular damages experience was caused by wind and wind-driven water, or by flood. An early Mississippi decision, *Leonard v Nationwide Mutual Ins. Co.*, required plaintiffs to prove that wind, and not flood water, destroyed their homes. Tie went to the insurance company. A federal Louisiana court, in *Humphreys et al v Encompass Ins. Co.*, interpreted some insurance policy clauses clearly to exclude flood waters, but others ambiguous, particularly with regard to waters produced by levee breaches and not the natural overtopping of riverbanks or levees. In cases of ambiguity, tie went to the insured. The Fifth Circuit would have none of it, reasoning that the common meaning of "flood" included inundation of whatever cause, and that since there was no ambiguity, there was nothing to interpret in favor of the insured.

Meanwhile, however, the same issue



Still in Trailers, Two Years Later

has been sneaking its way up the state court chain, and in *Sher v Lafayette Ins. Co.* a 91-year old holocaust survivor contested his insurance award, from which flood losses had been excluded. The oral argument, held in August before the 4th Circuit Court of Appeals, was a replay of those in the federal cases. Assuming that these cases, whatever their outcomes, are then appealed to the Louisiana Supreme Court, a nice conflict of laws question arises as to whether the State interpretation of its insurance contracts trumps. Stay tuned.

### THE INDUSTRY DEFENDANT CASES

Two attempts to pin Katrina damage responsibility on heavy industries in Louisiana and elsewhere have, so far, had small luck. In the first of this, flooded plaintiffs cited the literature on oil and gas destruction of coastal marshes, particularly those immediately south of New Orleans, with increased storm surge and, hence, storm damages. The commonly-stated rule of thumb for this relationship is that a mile or two of intact marsh can reduce wave heights, basically by friction, by from several inches to as much as one foot. Intact cypress swamps are even more effective. Fifty miles of wetlands and cypress swamps used to lie between New Orleans and the sea. The hydrology of those marshes has been badly altered by the oil and gas industry. Most reports put approximately fifty percent of all Louisiana coastal marsh loss to these impacts. Without a marsh/swamp barrier, surges from Katrina and Rita came north unabated. These assertions notwithstanding, the

case was rejected on a motion to dismiss, largely on causation issues, the attribution of these losses to those defendants.

The same fate awaited the climate change case, but on grounds that were stated, although a civil damages case, to be based on "standing." However phrased, the issue was causation, again. Plaintiffs claimed that the contributions of the coal and oil industries to climate change were indisputable, and that climate change also led to warmer seas and more frequent and severe storms. They were buttressed, they believed, by the Supreme Court's recent opinion in *Massachusetts v EPA*, finding standing for the state and environmental plaintiffs in a statutory action against the environmental agency. The trial court, in *Comer v Murphy Oil*, Civ Act No 1:05CV436, Aug 30, 2007, would not take the leap. Reasoning that "all of us are responsible" for contributing to global warming, none of it was attributable to these particular defendants, no matter how significant their loadings, but rather "to larger groups that are not before this Court." Bottom line, no cause of action.

Again, stay tuned. One of these days a civil damages action may win, and at that point, like the tobacco cases, there will be a rush by the industry towards climate change regulation, if only in self defense. You heard it here, not necessarily first, but we too are saying it.

*Professor Oliver A Houck with Caycee Peterson (JD '08) contributing*

*For fuller articles on Hurricane Katrina, see Faculty Notes.*

## Faculty Notes

### Adam Babich

Presentations: Speaker, Waterkeeper Alliance Conference, June, 2007; Speaker, American Association of Law Libraries, Southeastern Chapter Annual Meeting, April 2007

### Mark Davis

Publications: "It's a Whole New Ballgame: Coastal Restoration, Storm Protection and the Legal Landscape after Katrina," *Louisiana Law Review* (2007)

Book Reviews: Peer Reviewer, "Coastal Elevations and Sensitivity to Sea-Level Rise," forthcoming from the U.S. Climate Change Science Program.

Presentations: Speaker, Disaster Recovery: Issues in Law and Society, Federal Judicial Center, May 2007; Speaker, National Waterkeeper Conference, June 2007; Speaker, Friends of New Orleans Capital Hill Briefing, July 2007; Speaker, National Association of Appellate Court Attorneys Educational Conference, August 2007; Presenter, National Research Council Peer Review Committee Meeting on the Corps of Engineers' Louisiana Coastal Protection and Restoration Planning Efforts, August 2007; Speaker, Senator Landrieu's Hope and Recovery Summit, August 2007; Speaker, Hurricane Katrina Anniversary Event, Washington Battery Park, August 2007; Panelist, Gulf Coast Recovery Funders Forum, September 2007; Speaker/Participant, Balancing Private and Public Rights in the Coastal Zone in the Era of Climate Change: The Fifteenth Anniversary of *Lucas v. South Carolina Coastal Council*, September 2007; Speaker, Clean Gulf Conference, November 2007.

### Günther Handl

Publications: "International Accountability for Transboundary Environmental Harm Revisited: What Role for State Liability?," *Environmental Policy and Law* (2007); "Transboundary Impacts," *Oxford Handbook of International Environmental Law* (Oxford University Press, 2007).

Book Reviews: "Environmental Liability in International Law – Towards a Coherent Conception," *Review of European Community and International Environmental Law* (2007).

Other Activities: Member, United Nations Environment Programme Advisory Expert Group on Liability and Compensation for Environmental Damage, 2007.

### Oliver Houck

Publications: "Light from the Trees: The Story of Minors Oposa and the Russian Forest Cases," *Georgetown International Environmental Law Review* (2007); "Retaking the Exam: How Environmental Law Failed New Orleans and How It Might Yet Succeed," *Tulane Law Review* (2007); "Lessons Unlearned: Hurricane Katrina and Flood Control," *Loyola Law Review* (2007); "The Scientists Speak," *National Wetlands Newsletter*, Fall 2007.

Book Reviews: "Babbitt's Goodly Archipelago," Fall 2006; "The Uncontrol of Nature," March 2007; "The Worst Hard Time," May 2007; "The Golden Spruce," *Environmental Law Forum* July 2007.

Works in Progress: "Standing on the Wrong Foot: the Case for Equal Protection," *Syracuse Law Review*; "Beauty and the Beast Within: On the Special Nature of Natural World Law," *University of Washington Law Review*; "From Holy Places: The Stories of Cedar Tree and the Taj Majal," not yet submitted; Book Review, "Collapse," *Environmental Law Forum*.

Presentations: Keynote Speaker, National Waterkeeper Conference, May 2007; Distinguished Visiting Scholar Lecture, Vermont Law School, June 2007.

### Jonathan Nash

Publications: "Trading Species: A New Direction for Habitat Trading Programs," *Columbia Journal of Environmental Law* (2007); "Framing Effects and Regulatory Choice," *Notre Dame Law Review* (2006); "Prejudging Judges," *Columbia Law Review* (2006); "The Illusion of Devolution in Environmental Law," *URB LAW*; "Grandfathering and Environmental Regulation: The Law and Economics of New Source Review," *Northwestern University Law Review* (forthcoming 2007); "Standing and the Precautionary Principle," *Columbia Law Review* (forthcoming 2008).

Presentations: Speaker, Second Annual Conference on Empirical Legal Studies, November 2007; Speaker, Eighth Annual Global Conference on Environmental Taxation, October 2007; Speaker, Midwestern Law and Economics Association Annual Meeting, October 2007; Speaker, Canadian Law and Economics Association Annual Meeting, September 2007; Speaker, Law and Society Meeting Annual Meeting, July 2007; Speaker, International Society for New Institutional Economics Annual Meeting, June 2007; Speaker, Harvard-Boalt-UCLA Workshop for Junior Environmental Scholars, June 2007; Speaker, Stanford-Yale Junior Faculty Forum, May 2007



2007 Environmental Faculty and Clinic Staff. From left, Günther Handl, Corinne Van Dalen, Jill Witkowski, Lisa Jordan, Oliver Houck, Beatriz Perez, Elizabeth Calderon, Adam Babich. Not shown: Mark Davis, Jonathan Nash, Mike Murphy, Linda Swanner



# Greenworks: Alumni Notes

All we do is graduate them. Here are some recent snapshots of our environmental law alumni in action.

## GREENWORKS AT HOME

**Eric Ames (J.D. 1990)** has returned from a language-learning sabbatical in Mexico to senior attorney status with the New Mexico Department of Environmental Quality. His work includes air quality enforcement (particularly excess emissions at natural gas processing plants), a cross-state program by western governors to grapple with greenhouse gas emissions, and the California clean car standards. Eric reports that he also gets a regular complement of waste disposal cases, including construction activities and, the latest, swimming pools.



Adam Baron (J.D. '02) and Friend

**Adam Baron (J.D. 2002)** is doing enforcement work with EPA Region XX, in Seattle. Following an inspection trip in Alaska, he seized the opportunity to participate in a salmon derby where he caught the second largest fish of the day, see proud photo. He also flew by helicopter over the region and saw fifteen brown bear stalking the riverbanks as the salmon ran.

**Kim Bender (J.D. 2006)** is living in Boston and working at a boutique law firm that specializes in environmental law called Mackie Shea O'Brien, PC. Recently, she assisted a client secure a government bond to build a recycling plant. She has also started a law school alumni association in Boston, and encourages all students or alumni interested in attending networking events, or settling in the Boston area, to get in touch with her at [kimberlybender@yahoo.com](mailto:kimberlybender@yahoo.com)

**Kay Bond (J.D. 2004)** is working as a Lecturer/Supervising Attorney at the Denver College of Law's Environmental Law Clinic. Reports that she is "really into" the job.

**Michael V. Brady (J.D. 1989)** is the Chairman of the Board of Directors for Diepenbrock Harrison of Sacramento, Cal, and past head of the firm's Environmental Section (now numbering fourteen attorneys). Michael plays "a low profile role in two high profile disputes", including the litigation between automobile manufacturers and the State of California over greenhouse gas emissions and the Delta Smelt cases where new law is being made under the state and federal endangered species acts. He also managed a \$200 million mitigation settlement for the impacts of a casino. Finally, he reports that he and his wife have opened a bed and breakfast in Clinton, Louisiana ([www.thewildflowerinn.com](http://www.thewildflowerinn.com)), which they are, for now, managing from afar.

**Brett Buchheit (LL.M. 2007)** has just published a law review article "The American Southwest Water Crisis: Impending Disaster and the Road to Collapse, in the Appalachian School

of Law's Natural Resources Law Journal and he is "shopping out" another one on sustainable energy. He is also overseeing an internship program with an ethanol company based in Denver, which places undergraduates, law students, and business school students. He also reports getting "an enormous kick" out of job interviews that ask him what he got out of his LLM at Tulane, and thinking "standing shin deep in the swamps, pulling oysters out of the muck at LUMCON and learning things no book could teach".

**K. Florian Buschler (LL.M. 2002)** clerked in Frankfurt before earning admission to the German Bar and completing his Ph.D. in Energy and Environmental Law at the University of Houston. Shortly after Hurricane Katrina, he joined New Orleans' Bruno & Bruno, where he serves as advisor and litigation coordinator for the firm's Katrina Canal Breaches Litigation project. He is particularly involved in the logistics of suing the Army Corps of Engineers; by highlighting the lack of Congressional involvement in design-stage alterations to major Corps projects, he seeks to circumvent obstacles of sovereign immunity, thereby placing Louisiana-size teeth in the Federal Tort Claims Act. Florian has also become an international arbiter, with experience in life sciences, information technology and professional sports.

**Jeffrey K. Dorso (J.D. 2001)** became a partner at Diepenbrock Harrison, Sacramento, earlier this year. He is the lead attorney for the largest brownfields redevelopment in the western United States – the Sacramento Railyards – a 240 acre redevelopment

site at the western terminus of the trans-continental railroad. Jeff handles the land use work, which requires him to appear before numerous state and local agencies and coordinate the efforts of many attorneys and consultants.

**John Edgcomb (J.D. 1983)** has formed the Edgcomb Law Group in San Francisco, California, representing a “diverse, loyal client base of Fortune 500 companies, small businesses and individuals”. He invites contact at [www.edgcomb-law.com](http://www.edgcomb-law.com).

**Elizabeth Teel Galante (J.D. 1991, LL.M. 1999)** continues as Director of the Global Green project in New Orleans, providing expert services and stimulating interest in energy efficient and low-impact reconstruction in the city and the region. One of her collaborators, the actor Brad Pitt, is supporting new housing in the badly flooded Ninth Ward that features, inter alia, solar panels.

**Stephen Gilliam (J.D. 1998)** sends in the following Endangered Species Act question: “X is a developer. He gets a section 10 permit for an incidental taking, duration 30 years. The conditions of the permit require annual surveys and the collection of data. He fulfills this obligation while building and selling, until he has sold all the homes. Query: who, if anyone has the obligation to continue the surveys and data collection?”

**Bill Goodell (LL.M. 1987)** writes that has sent his first born son off to college, continues to play rugby, taken senior status in his practice, has never met a suit against an oil company he didn’t like (or collect on), and played his first blues guitar gig in Lafayette, Louisiana this past spring.

**Chris Graham (LL.M. 1993)** is now in Wichita with his family, serving as the General Counsel, Litigation and Compliance, of INVISTA, which is one of the world’s largest integrated fibers and polymers businesses. The corporation has operations in North and South America, Europe,

and Asia. Chris maintains a focus on environmental matters, but notes that his new position allows him to appreciate such issues on a worldwide scale.

**Seth Hennes (J.D. 2006)** is enjoying his experience as a clerk for several judges in the Civil Division at the Circuit Court in Orlando, Florida. He previously held a judicial clerkship in Alexandria, Louisiana.

**Jason Holleman (J.D. 1998)** practices with the law firm of Farmer & Luna, PLLC in Nashville, Tennessee. He works in the areas of state & local government, land use & zoning, and environmental regulation. Prior to joining the firm in 2002, he served as an Assistant Attorney General in the Environmental Division of the Tennessee Attorney General & Reporter and as an Assistant General Counsel in the Office of General Counsel for the Tennessee Department of Environment & Conservation. On September 11, 2007, he was elected to serve a 4-year term on the Metro Council (the legislative body for the Metropolitan Government of Nashville-Davidson County). He and his wife, Margaret live in the Sylvan Park neighborhood with their 6 month-old daughter, Cecilia Charlotte.

**Kumar Percy Jayasuriya (J.D. 1989)** is the Associate Director of Patron Services at the Georgetown University Law Library and an adjunct member of the Georgetown law faculty. He currently teaches Advanced Legal Research. While earning his degree at Tulane he helped found the Tulane Environmental Law Journal and was one of the initial members of the Tulane Law Clinic. After graduating from Tulane, he practiced admiralty law in San Francisco, focusing on cargo claims and environmental actions. He then earned a Masters in Information and Library Science, focusing on web development and information policy, and joined the reference staff at Boston University, where he taught as a member of the BU Legal Writing faculty. He subsequently served as the Head of Faculty and Research Services at the University of Texas School of Law, and taught advanced legal research for over

## The Most Bizarre Defense Since the Last One

“The DA has filed a lawsuit against The Pacific Lumber Company (aka Palco) in 2003, which was dismissed without leave to amend after Palco filed a demurrer. The lawsuit is based on the DA’s authority to file actions under California’s unfair competition law, and alleges that Palco committed fraud in connection with the formulation of an Environmental Impact Report pursuant to the California Environmental Quality Act, which is functionally equivalent to the preparation of an EIS under NEPA. Palco’s demurrer successfully argued that the DA is precluded from suing Palco for fraud committed in the EIR process because, among other things, representations made during that process constitute First Amendment protected speech under the Noerr-Pennington doctrine.”

**Exam question: Does the First Amendment protect (assumedly) false statements to government agencies in the environmental impact review process because one is “petitioning the government”?**

– Christa McKimmy, J.D. 1995

## A Solution We Never Thought Of

“When are local officials going to use vision and foresight to serve their constituents and make more driving lanes out of those useless neutral grounds [on Interstate 10 in New Orleans]? Parishes would not have to cut the grass. Installation of concrete barriers would save lives when someone loses control and causes a head-on collision.”

– Letter to Times-Picayune, April 3, 1999



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

seven years at the University of Texas. Kumar has published on topics regarding maritime law, affirmative action, abortion, and legal information policy. He publishes an annual review of admiralty articles published in non-admiralty journals. His latest book is entitled *Grutter v. Bollinger and Gratz v. Bollinger Litigation Documents: A Documentary History of Affirmative Action in Higher Education*. Kumar and his wife Betsy Jayasuriya dated while both were in law school and have a two year old son. They live in Silver Spring, Maryland.

**Damon Kirin (J.D. 1996)** has started his own law firm, Diliberto & Kirin, L.L.C., and is personally engaged in a broad practice that includes environmental, toxic tort, business law, and commercial litigation. Damon has also started a title company, Actual Title & Abstracting, L.L.C., and performs real estate closings as well as title work for the Army Corps of Engineers.

**Itzchak Kornfeld (J.D. 1990)** says: "I graduated this past May with an LL.M. degree with distinction from

the Georgetown University Law Center with a concentration in International Environmental Law. I was also a Maimonides Fellow and a reporter and editor for the Georgetown Law Weekly, the law center's weekly newspaper. During my year in Washington, D.C., I worked with Congresswoman Shelley Berkeley (1st Dist. of Nevada) on issues related to water reclamation and sustainability in the greater Las Vegas Metro area (report "Rolling Snake Eyes?: Las Vegas', Nevada's, and the Southwest's Water Future, A Failure of the New Federalism." As an outgrowth of my research at Georgetown and my work for Congresswoman Berkeley, I have authored 4 articles that have been or are in the process of being submitted for publication." In October, Itzchak will be moving to Israel to study for the Ph.D. in law at the Hebrew University of Jerusalem Faculty of Law. He has also been invited to conduct research with Professor Yuval Shany of Hebrew University, a world renowned expert on international courts and tribunals. His proposed dissertation will address how environmental law has fared, both procedurally and substantively, before international courts and tribunals. Finally, Itzchak reports that he is applying for teaching positions at a number of American Law Schools.

**Marian Macpherson (J.D. 1991)** is working in a policy position with the National Marine Fisheries Service, where she is charged with implementing the Magnuson-Stevens Reauthorization Act's mandate to "streamline" NEPA and MSA.

**Julia Magnus (J.D. 2006)** works with specialized real estate issues in metropolitan Chicago, primarily those involving conservation easements, expanding the scope of private land conservation. Her work in the field has allowed her not only to bring together local government entities, nonprofits, and private landowners, but also to enjoy the resulting preservation of historic sites, open space, and natural habitats. Between approaching parties and enjoying the benefits of partnership, Julia spends a great deal of time negotiating compromises across an endless field of potential



## Late-Breaking News From the U.S. Forest and Paper Service

“The lead Department of Agriculture attorney on Forest Service issues, Jan W. Poling, will leave that position and work for the American Forest & Paper Association (AFPA). She will serve as general counsel for AFPA. Poling follows in the footsteps of former Deputy Under Secretary of Agriculture Dave Tenny, who left that position in February to become AFPA Vice President for natural resources and environment. To close the circle, Tenny’s former boss, Under Secretary of Agriculture Mark Rey, once worked for AFPA.”

— *Land Letter*, September 2007

## ...and the U.S. Army Corps of Engineers

“The Corps’s manipulation of its habitat model in analyzing fish mitigation gives new meaning to the phrase ‘result-oriented decision-making’....Several elements discussed above lack factual support or substantial evidence but, more disturbingly, the Corps has demonstrated its willingness to do whatever it takes to proceed with this project—change definitions, abandon core assumptions—even if it means ignoring serious environmental impacts.”

— *Environmental Defense v. US Army COE*, September 2007

uses. Her current project, for example, involves interior and exterior preservation of an historic arts and crafts house north of Chicago and her work addressing the property’s surrounding woodlands is an outgrowth of her experience on the controversial side of open space protection. In particular, her first legal experience after Tulane led to trial and appellate defense of landowner rights in a case staked on the unsettled issue of easement amendments. Despite the long nights, Julia has begun taking clients in another field of interest, animal law. Its common link to her work with easements seems to be an attraction to new and emerging issues, as she is now preparing the first case filed under the Illinois Humane Care for Animals Act.

**Christa McKimmy (J.D. 1995)** reports on a varied legal career, spanning tax law, civil litigation, commercial bankruptcy, and public service. Currently, Christa works as a prosecutor for the District Attorney of Humboldt County. Christa’s position as a DA will also allow her to pursue her interests in environmental law and consumer fraud, see sidebar on page 13.

**Joel Merkel (J.D. 2006)** writes: “I left Tulane after Hurricane Katrina, one week into my 3L year. I spent my 3L year at the University of Washington where I participated in the Environmental Law Clinic. I then practiced environmental and utility law in Seattle, with a focus on Washington water law. That was short lived as Senator Cantwell asked me to join her staff in January of this year to work on natural resource and energy issues. My portfolio includes Interior and public lands issues, power marketing administration (PMA), utility, transmission, and energy market manipulation issues, Hanford cleanup issues, and of course salmon recovery issues. My work on electricity issues and salmon recovery are related to issues from the Columbia and Snake rivers, where the Bonneville Power Administration (BPA) markets power from 31 federal dams. This cheap, clean, and renewable federal hydropower is the backbone of the Northwest economy. Of course, the electricity and economic

needs of the Northwest must be balanced with the need to recover our salmon populations. I also work on Puget Sound salmon recovery issues (which are very different from Columbia/Snake River issues, biologically and politically).”

**Stacey Mitchell (J.D. 1994)** has become Section Chief of the Environmental Crimes Section of the US Department of Justice in Washington, DC.

**Michael Mogil (J.D. 1988)** argued his first case nearly 20 years ago in a hostile Baton Rouge courtroom, fighting BASF and Witco deepwell injection, and, later, a Waste Management Inc. operation spotted from his prop plane. His life has since sent him from big firm practice to public interest, brick and mortar business to shrimp farming, and most recently to Hilton Head, SC, where his practice includes immigration, real estate, and pro bono. He continues to try to balance his venture interest in environmental automobiles against his interest in his hungry children. Michael muses, “isn’t it ironic that Waste Management is now ‘the green company’ promoted during NFL games by all-American kids on bicycles?” He adds that if you are in Charleston/Savannah/Hilton Head, or a graduate anywhere looking to make a career move, you are invited to contact him at [mmogil@mogillaw.com](mailto:mmogil@mogillaw.com)

**Brian Murphy (J.D. 2005)** is a Manager in the Carbon Management & Sustainable Strategies practice area for Pace Global Energy Services, a consulting firm headquartered in Fairfax, VA. He is accurately described as a frequent traveler and environmental strategist, crossing the globe to promote renewable resource technologies, counsel clients on regulatory compliance, and whet industry’s appetite for responsible energy use. He particularly enjoys engaging “the big, nasty clients,” affording him an opportunity to clean and green on a large scale through simple, bottom-line installations, such as cork flooring and energy-efficient windows. Brian has witnessed first-hand the momentous contraction of corporate interests and eco-stewardship. “I went off to Denmark, and they had everything together,” he says, reflecting

on sustainability measures he observed through Tulane's exchange partnership with the University of Copenhagen's Faculty of Law. Highlighting technology's role in this sea change, Brian notes, "I came back and people just looked at me like I was crazy...but within three years, the whole world had changed." Brian, too, has changed in a short span, moving from anti-nuclear work at Yucca Mountain to counseling nuclear clients on uranium-mining issues. While he's at cruising altitude, Brian enjoys designing sustainable educational products for Bennekov & Murphy, LLC, a multi-national organization (Denmark included) of which he is founder and managing partner.

**Noah Perch-Ahern (J.D. 2006)**

writes: "I'm at Paul, Hastings, Janofsky, and Walker in DC. It's largely a transactional practice, but I've worked on some interesting compliance, litigation and regulatory/governmental affairs issues. Notably, we did a general political landscape piece on regulation of automobile emission standards, including the various angles from the courts, agencies, and Congress. As for takings, a colleague defends embattled Key West against private claimants. I've been involved to a very small degree, but I'm about to do a bit more."

**Rebekah Salguero (J.D. 2005)**

practiced environmental litigation in New Orleans before returning home to Florida to concentrate on land use and zoning law as an associate with Ft. Lauderdale's Greenberg Traurig. In two

years she's covered all ends of the spectrum, from site plan approval to rezoning, Developments of Regional Impact to due diligence. She is thrilled to be on the ground floor of Broward County's first Transit-Oriented Development project, which she calls, "an urban design answer to the huge traffic issues facing metropolitan cities." Rebekah stresses that a TOD not only frees residents to live, work, play and ride locally, but also provides a fresh answer to persistent questions of affordable housing. Through her firm's involvement with the Urban Land Institute, she has carved an outlet by personally researching housing issues for shareholders. Rebekah's other professional focus continues to be assistance in "going green," specifically preparing clients to earn Leadership in Energy and Environmental Design accreditation.

**Dan M. Silverboard (LL.M. 2001)**

is a senior associate at Diepenbrock Harrison, Sacramento, who left the Department of Justice to learn California environmental law. He has worked with fellow alumnus Jeffrey Dorso on a brownfields redevelopment project, and is handling a number of cases under the Clean Water Act, NEPA, and CERCLA.

**John Suttles (J.D. 1988, LL.M. 2002)**

spent a decade championing toxic tort litigation as a partner at New Orleans' Schafer & Schafer. After earning his LL.M., he served as Deputy Director of the Tulane Environmental Law Clinic before joining the North Carolina Office of the Southern Environmental Law Center, where he serves as a senior attorney counseling Clean Air Act and Clean Water Act litigation. He is presently representing several national public healthcare groups in an unprecedented joinder suit, challenging the EPA over its Clean Air Mercury Rule. In what he calls his "spare time" he is also litigating for watershed protection and responsible development along the Outer Banks.

**Andy Taggart (J.D. 1984)**

writes: "After graduation from Tulane Law School in 1984, I took the job as Executive Director of the Mississippi

Republican Party. I then spent several years in the practice of law at the Butler Snow law firm in Jackson, Mississippi. In late 1991, I was asked by Governor-Elect Kirk Fordice to serve as his Chief of Staff, and I stayed in that role until May of 1994. I spent four years in a government relations and lobbying practice, then returned to the law practice at Butler Snow in 1998. In 2002 I established my own law practice, and also took on the role of President/CEO of the Mississippi Technology Alliance. In the latter role, I had responsibility for the Mississippi Alternative Energy Enterprise, and later helped create the Mississippi Bio-Mass Strategic Initiative. In December of 2007 I will conclude a four year term as an elected County Supervisor in Madison County, Mississippi and return all my energies to my law practice. November of last year the University Press of Mississippi published my first book, co-authored with Jere Nash: Mississippi Politics: The Struggle for Power, 1976-2006. "My wife Karen and I are parents to three sons - Drew, a senior at Ole Miss; Rob, a freshman at Mississippi College; and Brad, a high school junior."

**Courtney Taylor (J.D. 2000)**

works at the Department of Justice in its Wildlife Section litigation division, where she focuses solely on defensive litigation. She is currently defending the government decisions on the Florida black bear listing, the North Cascades Grizzly Recovery Plan, a biological opinion on the Columbia River Bull Trout, and the Gunnison sage grouse listing determination.

**Deborah Trejo (J.D. 1998)**

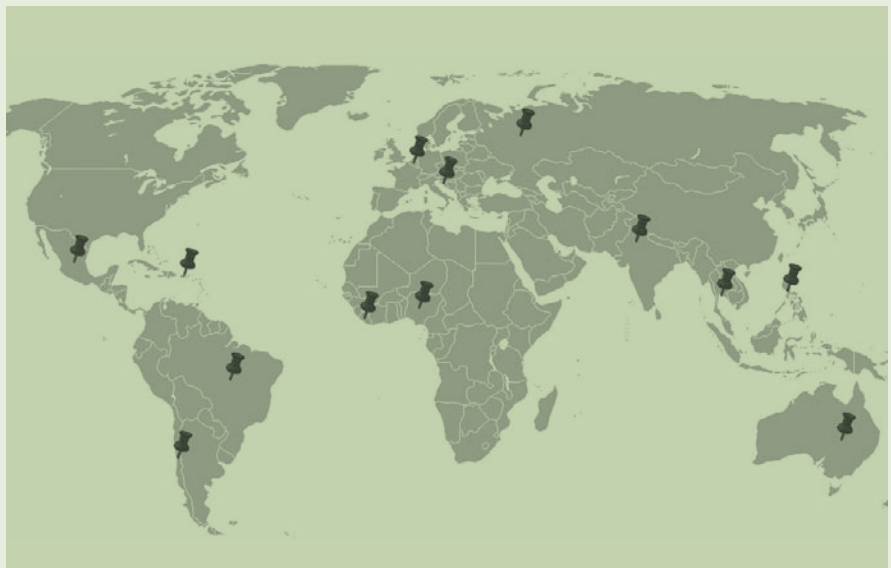
is a partner in the Environmental, Administrative and Public Law Department of the Austin office of an El Paso-based law firm, Kemp Smith LLP. Deborah represents groundwater conservation districts, local governments, businesses, and individuals in connection with environmental matters. She also has a number of "extracurricular" activities, including membership as a part of Austin's 2008 Essential Class, a good government organization of business and social leaders.



**Stephen Wiles (J.D. 1986)** is practicing in New Orleans and Mississippi, and is a lead attorney in the post-Katrina damages litigation, including levee failures and climate change. He reports: “we are staying the course.”

**Alexander Williamson (J.D. 2006)** is associated with Stephen Wiles, above, “licking his wounds” following the dismissal of their climate change case on grounds of “standing”, and preparing the appeal.

**Janet Woodka (J.D. 1992)** is now serving as Director of Legislative Affairs for the Federal Coordinator for Gulf Coast Rebuilding. This office, created by Executive Order on November 1, 2005, is responsible for coordinating the actions and activities of federal agencies after Hurricanes Katrina and Rita. Prior to this position, Janet was the Legislative Director for Senator Mary Landrieu. During her tenure with Senator Landrieu, Janet worked on issues related to the recovery efforts in Louisiana. However, she was also the lead staffer responsible for the Gulf of Mexico Energy Security Act, better known in some parts as the Outer Continental Shelf revenue sharing bill – a bill that gives the Gulf Coast producing states 37.5 percent of the revenues produced for coastal restoration activities. As the legislative director, Janet was responsible for drafting legislative language, developing strategy, negotiating with other members in both the House and the Senate, and securing passage of the bill.



## Greenworks Abroad

**Paul Bettens (LL.M. 1994)** writes from Belgium, where he started his own law firm in July 2005, after working with another law firm since 1994. His practice focuses on commercial and transport law, and his expertise includes international cargo claims, and international sale of goods and port-related commercial matters, such as storage, logistics services, and agency contracts. Paul writes, “At Tulane, I took an LL.M. in Admiralty and followed some environmental law courses. I enjoyed very much the inspiring courses of Professor Oliver Houck. I do still follow up the changes and case law in environmental law here in Belgium, and, once in a while, I am involved in cases on soil pollution and environmental permits.” Paul tries to escape industrial Belgium at least every two years to enjoy and explore the outback country in Latin America—particularly Venezuela and Brazil along the Orinoco and Rio Negro Rivers. He takes canoe trips on his own with indigenous guides deep into the rain forest, something he has been doing since graduating from Tulane in 1994. Paul says, “Right after graduation I traveled throughout South America for a period of three months and lost my heart over there. And also in New Orleans!” Paul was last in New Orleans in March 2007 for the Admiralty Law Institute.

**Alfred Brownell (LL.M. 2002)** serves as the President of Green Advocates, a group that advocates on behalf of Liberia’s native population and seeks to provide them with greater rights and control over that country’s lands, which have generally been ceded to multinational corporations through the government’s efforts to exploit Liberia’s vast natural resources. He notes that the country’s wealth of natural resources and dearth of political freedoms highlights the paradox known as the “resource curse,” in which governments tend to rely exclusively on the money paid to them by corporations for revenues and, consequently, do not turn to the citizenry to fund its programs. As a consequence, the citizenry have little involvement with, or control over, the government. Green Advocates seeks a “paradigmatic shift,” whose aim is to vest the citizenry with greater control over their natural resources. His organization has recently launched a lecture series on the Liberian environment at the University of Liberia is preparing to launch a quarterly journal that will focus on these issues. It also does its own grass-roots lobbying and last year, for example, succeeded in convincing the United Nations to release a report on human rights conditions on a plantation in Liberia controlled by a multinational corporation.



**Pedro Brufao (LL.M. 1998)** has published an updated version of *Aguas Limpas, Manos Limpas*, treating corruption and irregularities in the water resources domain in Spain. He continues as a board member of *Rios Con Vida*, and was a guest presenter at the Waterkeepers Conference in New Orleans this past Spring, see related article.

**Suzanne Dickey (LL.M. 1987)**, is practicing in Australia, is a founding member of Finlaysons Roundtable on Greenhouse (FROG), which she describes as “a diverse group of lawyers, corporates and academics that get together to discuss climate change, adaptation, and response.” The next meeting of the organization will offer a panel presentation on South Australia in 2050 – what it will look like, what its energy and water demands will be, the means of transportation, and food production. Suzanne’s professional practice focuses on contaminated land and climate change issues, although she notes that she has recently provided advice on water rights being transferred in the sale of a winery and license negotiations with the EPA for a mining operation. Were that not sufficient, Suzanne also serves on the managing committee of the Environmental Defenders Office (EDO) of South Australia, which is a non-profit community-based organization providing legal assistance for environmental problems. The EDO offers professional legal advice, research, education, and sometimes representation. Suzanne also has a message for all readers of this newsletter – she asks that we “drink more Australian wine!”

**Iliia Fedyaev (LL.M. 2005)** has moved to the energy side of the equation as General Counsel to CARBO Ceramics (Eurasia) in Moscow, a subsidiary of a Texas corporation of the same name. CARBO produces ceramic mixtures designed to repair hydraulic fractures and increase oil well productivity. He and his wife have two children, and he reports that, beyond his work, the “only environmental thing I do is cook BBQ in the open air.”

**Ana Garces (LL.M. 2002)** is Director of the Division of Legislation with the US Department of Justice in San Juan, Puerto Rico. Her primary responsibilities include working with judges, legislators and private attorneys throughout the island.

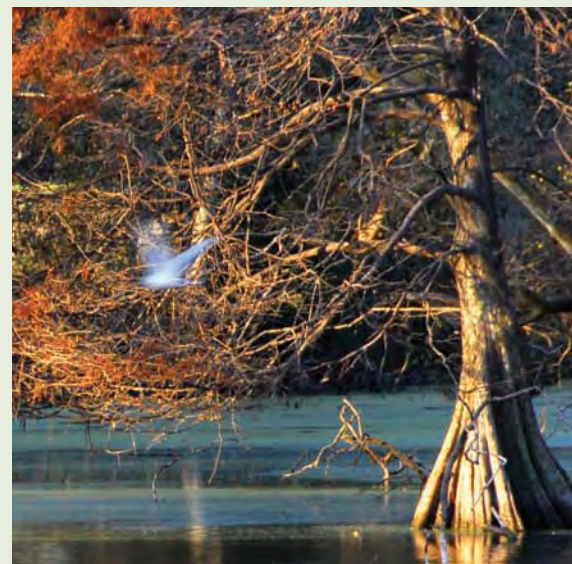
**Zelimir Grzancic (LL.M. 1997)** reports that, after 15 years as an attorney in the private sector, with as much environmental work as he could attract, he has joined the faculty of the University of Croatia in Rijeka, teaching administrative and public law, with a first-ever environmental law course in the wings. He and his wife Stoska have a five year old boy who, spending “every free hour outside”, is already an “experienced mountaineer and very much into wildlife.” Zelimir adds that he was recently visited by Gerardo Arteaga (LL.M. 1997) and that, after a trip to the closest bar, exchanging war stories, Gerardo, under the influence, proclaimed, “[expletive deleted], Gelierno, you are definitely becoming the [same expletive, gerund form] Houck of Croatia!”

**Hiroshi Kobayashi (LL.M. 1995)** writes that he is doing general civil litigation with his firm in Tokyo, a mix of contract, labor and construction cases. He has also been appointed to the national Project Team for the Evaluation and Assistance of Human Rights and Corporate Responsibility, and in that capacity drafted environmental standards for CSR reports filed by Japanese corporations each year. He will give a lecture on CSR to the Japanese Bar Association this fall, and says that “without the environmental LL.M. program of Tulane Law School, I would never have had these opportunities.” He will be transferred, next year, to the Nagano prefecture, where he was born, and hopes at some point to become a lecturer in environmental law at Nagano Law School.

**Ekwurinu Nwokeji (LL.M. 2007)** is working on a thesis proposal for an SJD, topic: Designing Policy for Ethanol Development, Management and Protection of the Environment: A comparative analysis of Brazil and US policy”.

**Galahad Pe Benito (LL.M. 2003)** is a law professor at the FEU-Institute of Law, Manila, the Philippines, teaching courses on environmental law and conflicts of law. Benito reports that teaching environmental law has been a great experience, because it is a new concept for his students. Benito notes that the Philippines has passed a lot of environmental protection statutes, which the general population supports, but that enforcement has been “difficult”.

**Duangrak Trongmethirat (LL.M. 2004)** is an attorney for the Pollution Control Department of Bangkok’s Ministry of Natural Resources and Environment. The scope of Duangrak’s work with non-point source pollution is staggering; he has developed a hybrid regulation/incentive approach to Bangkok’s environmental concerns, but has also adopted an in-person, field mediation strategy to reduce open burning on farmland. Since earning his LL.M., he has criss-crossed the Pacific for the EPA’s NPDES Permit Writers Course, as well as draft and revision consultation for free trade agreements. He writes that he is “adamant about placing the environment at the heart of these trade discussions.”





Osprey Over Louisiana Marsh

## Tulane Institute on Water Resources Law & Policy

### Shaping Coastal Plans

South Louisiana faces two enormous challenges. The first, and the subject of massive media attention, is the restoration of the City of New Orleans. Less heralded is the job of restoring the five million acre Louisiana coastal zone, which has already lost nearly a million acres to levees, canals, saltwater intrusion and natural subsidence, and lost many thousand more to Hurricanes Katrina and Rita in the course of two weeks. The new Water Resources Development Act authorizes an ambitious range of projects to address this problem, some

designed for coastal restoration and others, unfortunately, designed to levee-off these same coastal areas for current and future development. These projects raise huge questions of science, engineering, economics and politics.

The second, which hasn't gotten so much attention, is the fact that there is a legal landscape paralleling this same challenge. Private and public property rights, generations of public works projects, and myriad state, federal, and local resource management programs all rooted in law already populate the Louisiana's three million acre coastal zone and won't just disappear in the face of new priorities. Helping planners and decision makers understand and come to terms with this landscape is priority of the Tulane Institute on Water Resources Law and Policy.

The institute is assisting two efforts:

### Hazard Mitigation Through Land Use Planning

We are working with the SeaGrant Legal Program at Louisiana State University and the Coalition to Restore Coastal Louisiana on a survey of the current capacity of local governments in coastal Louisiana to require hazard mitigation measures through programs like planning and zoning. This project has become a foundational piece of the State of Louisiana's Comprehensive Master Plan for a Sustainable Coast

### Atlas of the Legal Landscape

Following Hurricanes Katrina and Rita, Congress directed the Army Corps of Engineers to develop a comprehensive coastal protection and restoration plan that addresses the need for bold integrated action to make the communities and coastal wetlands of the region sustainable. The Institute is working with the Corps to develop an Atlas of the Legal Landscape which will identify major mineral land owners, major state, local and federal programs and projects, and the like that have preexisting legal rights and mandates that will need to be addressed if bold plans are to ever become effective actions.

*By Mark Davis, Director*



## 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 five 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 development 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, 504.865.5930, or its web site at [www.law.tulane.edu](http://www.law.tulane.edu).



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