

Illegal Permit? Who Are You Going to Call? Your Local Environmental Law Clinic!

by Adam Babich

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Law school operated environmental law clinics—in addition to training students—can serve a vital function by expanding the public's participation in environmental decisionmaking beyond the national precedent-setting cases typically litigated by public-interest law firms. Such clinics can help individuals and grass roots organizations participate in the regulatory process on a persistent, decision-by-decision basis. Considered individually, most cases that such clinics handle may be of local, rather than national, importance. Cumulatively, however, with law school clinics scattered across the country, the effect may be analogous to water dripping on a stone, slowly wearing down barriers to a more sustainable relationship between industrial facilities and surrounding communities and eco-systems.

A central element of modern environmental law is public participation.¹ Empowered by citizen enforcement and judicial review provisions, citizen organizations have helped spark,² shape,³ and police⁴ implementation of environmental

statutes.⁵ The law's emphasis on public participation can give members of the public a voice in the decisions of unelected bureaucracies that can otherwise tend to stall or drift from congressionally authorized purposes.⁶

One way to think about public participation efforts is to divide them into two overlapping categories: The first and most famous is targeted, high-impact action, designed to achieve the maximum environmental progress possible given available legal resources. National environmental nonprofits often focus their efforts on this first category.⁷ The second category comprises more diffuse, day-to-day public involvement in the myriad decisions that affect the quality of the environment surrounding ordinary communities.⁸

damental to the effective enforcement of environmental legislation.”); Oliver A. Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases in Environmental Law, Never Before Published!*, 65 U. COLO. L. REV. 459, 499 (1994) (“the Endangered Species Act . . . has no mechanism [to force] federal agency compliance except citizen suits”).

1. See, e.g., Federal Water Pollution Control Act (FWPCA) §101(e), 33 U.S.C. §1251(e) (“Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.”); Resource Conservation and Recovery Act (RCRA) §7004(b)(1), 42 U.S.C. §6974(b)(1) (same); Clean Air Act (CAA) §502(b)(6), 42 U.S.C. §7661a(b)(6), requiring that state permit programs provide for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions . . . including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) §117, 42 U.S.C. §9617 (providing for public participation in government decisions about cleanup of hazardous substances).
2. See, e.g., *Illinois v. Costle*, 9 ELR 20243 (D.D.C. Jan. 3, 1979) (requiring EPA to comply with Congress' command to create a regulatory program for hazardous waste under RCRA).
3. See, e.g., *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 2 ELR 20262 (D.D.C. 1972), *aff'd*, 2 ELR 20656, No. 1031-72 (D.C. Cir. 1972), *aff'd sub nom. Fri v. Sierra Club*, 412 U.S. 541, 3 ELR 20684 (1973) (ordering creation of the Clean Air Act's prevention of significant deterioration program).
4. See, e.g., *Clean Air Council v. Sunoco, Inc.*, No. 02-1553, 2003 WL 1785879 at *8 (D. Del. Apr. 2, 2003) (“[T]he court recognizes that citizen suits are fun-

5. See generally Adam Babich, *Citizen Suits: The Teeth in Public Participation*, 25 ELR 10141, 10145 (Mar. 1995).

6. EPA has recognized that a realistic opportunity to challenge government action in court—in addition to opportunities to comment or attend hearings—is necessary if citizens are to have a real voice in agency decisions:

When citizens are denied the opportunity to challenge executive decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as through public comments and public hearings on proposed permits, may be seriously compromised. If citizens perceive that a state is not addressing their concerns about [] permits because the citizens have no recourse to an impartial judiciary, that perception also has a chilling effect on all the remaining forms of public participation in the permitting process.

Virginia v. Browner, 80 F.3d 869, 880, 26 ELR 21245 (4th Cir. 1996) (quoting an EPA notice of proposed rulemaking published at 60 Fed. Reg. 14588, 14589 (Mar. 17, 1995)).

7. See Barton H. Thompson Jr., *The Continuing Innovation of Citizen Enforcement*, U. ILL. L. REV. 185, 212 (2000) (noting the historic emphasis of national nonprofits “on making citizen suits workable enforcement tools, firming up the political power of the environmental movement, and influencing the interpretation of specific statutes”).
8. See, e.g., Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 5 (1998) (arguing that administrative processes often “fail to effectively incorporate an important form of public participation in decision-making—the participation by communities bearing the greatest environmental risks”); cf. Daniel C. Esty, *Unpacking the “Trade and Environment” Conflict*, 25 LAW & POL’Y INT’L BUS. 1259, 1282

The second, more diffuse category of public participation is resource-intensive, requiring sustained application of attorney time to a steady stream of citizen concerns about environmental proposals, decisions, and violations. But for a law clinic whose primary mission is to train students, this steady demand for resources is an advantage, providing a constant source for engaging student projects. And with law schools scattered throughout the country—more than 30 of which already have environmental law clinics⁹—the potential for a major contribution to implementation of environmental law is clear.

In 1989, Tulane Law School began its Environmental Law Clinic (TELC) primarily for educational reasons: to offer students the practical experience of representing actual clients in real environmental disputes. But the minute our students and staff attorneys accepted their first client, the focus changed. They became public-interest lawyers first, students and educators second. This is because lawyers and student attorneys are duty-bound to put their clients above their own interests and above the interests of their university, law school, clinic, and funders¹⁰—a realignment of priorities with a profound educational and practical impact. So our mission statement emphasizes service as much as it does education. That mission is to: (1) train effective and ethical lawyers by guiding students through actual client representation; (2) expand access to the legal system, especially for those who could not otherwise afford competent legal help on environmental issues; and (3) bolster the capacity of community members to participate effectively in decisions about environmental issues.

Our educational philosophy at TELC is straightforward. We believe that practicing public-interest law is the best way for our students to internalize the four key values at the core of the legal profession: (1) competence; (2) integrity; (3) loyalty to clients; and (4) respect for the rule of law.¹¹ We operate, therefore, much like a law firm. Rather than assigning work to students according to a preconceived pedagogical framework, for example, we staff cases based on our clients'

needs. Our experience is that most law students are capable of practicing on a high level, even in a complex field like environmental law.

Much of the guidance we provide is geared to helping students to communicate clearly and to put aside their preconceptions about how lawyers speak and write. We try to avoid the formalism and flourishes that sometimes bog down lawyerly presentations. If we present a complex, i.e., confusing, case, a judge will tend to defer to government or industry lawyers, rather than to law students representing citizen groups or residents.¹² So no matter how complicated a case looks to begin with, our students' primary task is to boil it down to something simple, compelling, and accurate.

On behalf of their clients, our students' work covers a wide range of environmental issues.¹³ They litigate (and negotiate) environmental citizen suits to abate industrial pollution, appeal permits for environmental pollution or destruction of wetlands, challenge agency regulations that fall short of legislative mandates, and prod government to perform statutory duties. Louisiana state courts and federal district courts in Louisiana have adopted "student practice" rules that allow TELC students to appear and argue in court.¹⁴

I. Cases

Like any law office, an environmental law clinic is defined by its work. Below are brief discussions of TELC cases (with an emphasis on our most recent decade) that, in hindsight, we rank among our most significant. While we hope that one or another of these cases will be cited as a matter of national precedent, overall the picture that emerges is one of cumulative impact. More details about many of these cases are available on TELC's web page, which includes a collection of legal documents from several of the cases discussed below.¹⁵

- **Toxics:** TELC recently settled a lawsuit about mercury—a neurotoxin—leaked from meters that measure pressure in natural gas pipelines in Union, Ouachita, and Morehouse parishes, Louisiana.¹⁶ After TELC filed the lawsuit, the defendant reached a voluntary cleanup agreement with the Louisiana Department of Environmental Quality (LDEQ), setting a cleanup standard of 2.3 parts per million (ppm). The settlement of TELC's clients' lawsuit reduces the average cleanup standard at each meter site to 1.5 ppm and to 1 ppm for sites located within 100 feet of a perennial stream

n.65 (1994) (arguing that "it is important to differentiate between (1) opening up decision-making so that interested parties can understand the process and contribute their ideas to the debate and (2) creating opportunities for special interests . . . to manipulate policy outcomes through privileged access . . .").

9. In addition to Tulane, the list of law schools with environmental law clinics includes those at the University of California, Los Angeles, Chicago Kent School of Law, Cleveland State University, the University of Colorado, Columbia University, the University of Denver, Duke University, Emory University, the University of Florida, Georgetown University, Harvard University, the University of Georgia, Golden Gate University, Indiana University, Lewis & Clark Law School, the University of Maryland, the University of Michigan, Nova Southeastern University, the University of Oregon, Pace University, the University of Pittsburgh, Rutgers University, the University of South Carolina, Stanford University, State University of New York at Buffalo, the University of Texas, Texas Southern University, the University of Vermont, the University of Virginia, the University of Washington, Washington State University, Widener University, and Yale University.

10. See, e.g., La. Sup. Ct. R. XX §6(g) (Each student attorney must promise not to "place his/her personal interests or clinic interests ahead of the interests of the client."); MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2003) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

11. See Adam Barchi, *The Apolitical Law School Clinic*, 11 CLINICAL L. REV. 447, 452-54 n.21 (2005) (discussing these four values).

12. Cf. *American Lung Association v. EPA*, 134 F.3d 388, 391, 28 ELR 20481 (D.C. Cir. 1998) ("Generally speaking, we will not second-guess EPA in its area of special expertise.").

13. See Suzanne S. Dickey, *The Tulane Environmental Law Clinic: A Voice for Louisiana Citizens*, 49 LA. B.J. 126, 126 (Aug./Sept. 2001) ("The clinic has handled cases involving all aspects of environmental law, including air pollution, conservation of natural resources, urban land use and siting of waste facilities.").

14. La. Sup. Ct. R. XX; Uniform Local Rules of the U.S. District Courts for the Eastern, Middle, and Western Districts of Louisiana, LR83.2.13.

15. Tulane Environmental Law Clinic website, http://www.tulane.edu/~telc/html/Legal_Documents.html.

16. Susanne Pagano, *Texas Oil Company Agrees to Clean Up Mercury Contamination at Louisiana Sites*, DAILY ENV'T REP (BNA), July 8, 2009, at A-9; *Stipulated Judgment, Gulf Restoration Network v. EnerVest Operating, L.L.C.*, No. 07-817 (W.D. La. July 2, 2009).

or a tower designed to raise the elevation of a meter in a flood-prone area. In addition, following TELC legal action—combined with pressure from other fronts—the two chlor-alkali plants in Louisiana have converted from “mercury-cell” technology to a “membrane cell” technology that does not release mercury.¹⁷

- **Water pollution:** In 2001, TELC filed a petition on behalf of a coalition of community groups asking the U.S. Environmental Protection Agency (EPA) to withdraw Louisiana’s authority to administer the Clean Water Act’s (CWA’s)¹⁸ discharge permitting program due to inadequate enforcement and other problems. EPA responded in early 2003 with a demand letter to Gov. Mike Foster (R-La.), raising “serious concerns” about the state program and setting forth a list of “performance measures” and schedule for the state to restore “program integrity.” In 2004, EPA found that LDEQ had completed the performance measures.¹⁹ TELC student attorneys continue to engage in citizen enforcement of CWA permits and appeals of LDEQ permits, especially for violation of the Act’s anti-degradation requirements.²⁰ In 2006, TELC obtained a federal court order enjoining a \$750 million U.S. Army Corps of Engineers (the Corps) project to expand New Orleans’ Industrial Canal because the Corps had failed to consider environmental impacts from disposal of contaminated sediments in Mississippi River Basin wetlands.²¹ TELC is proud to be part of the Mississippi River Collaborative, a team of nongovernmental organizations based up and down the river that the McKnight Foundation convened to use shared knowledge and resources to improve water quality in the Mississippi River Basin.²²
- **Air quality:** In 2005, a court found more than 2,600 Clean Air Act (CAA)²³ violations at an oil refinery in a citizen suit that TELC student-attorneys filed on behalf of a St. Bernard Parish community group.²⁴ In another TELC-handled case, the court vacated a permit in which LDEQ attempted to waive CAA requirements

for prevention of deterioration of air quality.²⁵ TELC-handled litigation has also resulted in admissions from LDEQ and EPA that Louisiana operated a “bank” for emissions trading that failed to meet federal requirements.²⁶ In addition, TELC represented the Louisiana Environmental Action Network (LEAN) in obtaining court orders that: (1) required EPA to make a determination to increase stringency of emission controls in the Baton Rouge area²⁷; (2) turned back an EPA attempt to extend Louisiana’s deadline for achieving health protection standards for ozone air pollution in the Baton Rouge Area²⁸; and (3) vacated EPA’s approval of an inter-pollutant trading plan that would have allowed Louisiana to increase emissions of volatile organic compounds in return for reductions in oxides of nitrogen.²⁹ In addition, TELC worked with a coalition of public-interest law groups and state governments to defeat a 2004 EPA attempt to roll back CAA protections for residents in areas where air quality violates health protection standards for ozone pollution.³⁰

- **Global warming:** On behalf of the Alliance for Affordable Energy, Sierra Club, LEAN, Gulf Restoration Network, and others, TELC has engaged in litigation to oppose construction of three new coal-fired power plants that, if built, would release pollutants associated with climate change. Construction of one of those plants is now suspended for at least three years,³¹ and litigation and negotiations are ongoing about the others.
- **Wetlands:** TELC student attorneys mounted a successful challenge to the Corps’ issuance of a permit to destroy wetlands in St. Tammany Parish, Louisiana, without considering cumulative impacts. The U.S. Court of Appeals for the Fifth Circuit issued an opinion in that case effectively rejecting the Corps’ general approach to analyzing mitigation and cumulative impacts when issuing such permits in southeastern Louisiana.³² Additionally, on behalf of a coalition of

17. See Press Release, Pioneer Companies, Inc., Pioneer Announces the Expansion of Its Chlor-Alkali Plant in St. Gabriel, Louisiana (Jan. 30, 2007) (“The project will include the conversion of the plant to membrane cell technology from the existing mercury cell technology.”); Press Release, PGG Industries, PPG to Install Membrane Technology, Eliminate Use of Mercury at Lake Charles (Aug. 4, 2005); see also Charlotte E. Tucker, *Senate Bill Would Require Phaseout of Mercury Use at Chlor-Alkali Plants*, DAILY ENV’T REP (BNA), July 13, 2009, at A-1 (noting that “[t]he four chlor-alkali plants still using mercury . . . are located in Ohio, West Virginia, Tennessee, and Georgia” (i.e., not in Louisiana)).

18. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

19. See 70 Fed. Reg. 810, 816 (Jan. 5, 2005). EPA’s demand letter is available at the Tulane Environmental Law Clinic website, http://www.tulane.edu/~telc/assets/agency/2-14-03_epa_demand.pdf.

20. See, e.g., David J. Mitchell, *Residents Group Sues Shrimp Plant*, BATON ROUGE ADVOC., Feb. 26, 2009, at 4B; *Sewage-Plant Controversy Brews*, NEW ORLEANS TIMES-PICAYUNE, Mar. 12, 2008, at B4.

21. See Holy Cross Neighborhood Ass’n v. U.S. Army Corps of Engineers, 455 F. Supp. 2d 532, 36 ELR 20208 (E.D. La. 2006).

22. See Mississippi River Collaborative website, <http://msrivercollab.org>.

23. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

24. St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C., 399 F. Supp. 2d 726, 35 ELR 20213 (E.D. La. 2005)

25. In re Waste Mgmt. of La., LLC, Woodside Landfill Air Permitting Decisions, 2006-CA-1011 (La. App. 1 Cir. 8/22/07); 2007 WL 2377337.

26. See LDEQ letter to EPA dated October 5, 2000 from Bliss Higgins, Assistant Secretary of State of Louisiana, to Carl Edlund, EPA, attached to Joint Motion for Partial Voluntary Remand and Stay of All Proceedings at 4, filed Oct. 6, 2000, LEAN v. EPA, No. 99-60570 (5th Cir. Oct. 6, 2000); EPA, *In re Operating Permit Formaldehyde Plant Borden Chemical, Inc. Geismar Ascension Parish Louisiana, Permit No 2631-VO*, at 14 (Dec. 22, 2000).

27. La. Envtl. Action Network v. Whitman, No. 00-879-A (M.D. La., Feb. 27, 2002).

28. Order Granting EPA Motion for Partial Remand, filed Feb. 25, 2003, LEAN v. EPA, 382 F.3d 575 (5th Cir. 2004) (No. 02-60991).

29. Order Granting EPA Mot. for Partial Vacatur, filed Nov. 20, 2003, LEAN v. EPA, 382 F.3d 575 (5th Cir. 2004) (No. 02-60991); see Adam Babich, *The Sting: How Louisiana’s Emission Credit Trading Chemical, Inc. Second Generation Issues Comm. Newsl.*, May 2003, at 11.

30. So. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 37 ELR 20003 (D.C. Cir. 2006), *clarified on denial of reh’g*, 489 F.3d 1245, 37 ELR 20136 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1065 (Jan. 14, 2008).

31. See Rebecca Mowbray, *PSC Orders Entergy to Suspend Work on Little Gypsy Project*, NEW ORLEANS TIMES-PICAYUNE, Mar. 11, 2009.

32. O’Reilly v. U.S. Army Corps of Engineers, 477 F.3d 225, 37 ELR 20021 (5th Cir. 2007).

environmental groups, TELC appeared as amicus in a case that rejected a Corps exemption from the CWA's permitting system for a cypress harvesting operation in wetlands because the Corps failed to show that the tree harvesting operation falls within the Act's "on-going silviculture" exception.³³

- **Landfills:** In a case that TELC handled on behalf of the Oakville Community Action Group, the court revoked a permit for expansion of the Industrial Pipe landfill, which looms over the predominately African-American community of Oakville in Plaquemines Parish, Louisiana.³⁴ In another TELC-handled case, the court set aside a contract for St. Helena Parish to host a new landfill for 50 years because of violations of Louisiana's open meetings law.³⁵ Also, after Hurricane Katrina and Hurricane Rita, LDEQ issued emergency orders to waive rules that normally prohibit disposal of most household wastes in landfills that lack protections against contamination of groundwater such as groundwater monitoring and leachate collection systems.³⁶ On behalf of LEAN and Sierra Club, TELC brought a lawsuit in federal court, alleging that federal law preempted LDEQ's waivers. While the lawsuit was pending, TELC and LDEQ engaged in negotiations that resulted in several improvements to the emergency orders. Specifically, LDEQ: (1) removed "household hazardous waste . . . where segregation is not practicable" from the list of materials that the landfills could accept³⁷; (2) added language to the orders to require compliance with CAA standards for asbestos disposal³⁸; and (3) narrowed the orders' application to seven landfills.³⁹ Ultimately, the court dismissed the plaintiffs' lawsuit, ruling that the plaintiffs lacked standing to sue.⁴⁰
- **Wildlife:** In 1997, TELC obtained a court order barring use of a local "grass and weeds" ordinance to destroy a Baton Rouge Audubon Society project to restore habitat for migratory songbirds and butterflies in Cameron Parish.⁴¹ Also, TELC represented Sierra

Club as amicus in an Endangered Species Act (ESA)⁴² case in which the court issued a 2007 order requiring the U.S. Department of the Interior to designate critical habitat for protection of the Louisiana black bear.⁴³ In 2002, TELC negotiated a settlement on behalf of the Coalition for Louisiana Animal Advocates that required the U.S. Army to refrain from roundup and removal of wild horses from Fort Polk in the Kisatchie National Forest until completing an environmental impact statement or environmental assessment.⁴⁴

- **Environmental justice:** In 1997, EPA granted in part a TELC and Greenpeace petition for an objection to Shintech Inc.'s air quality permit for a chemical plant in a predominately African-American and lower income community in St. James Parish that was already overburdened by sources of pollution.⁴⁵ In 2004, TELC challenged FTM and Associates, Inc.'s practice of spraying sewage sludge on sugar cane fields near the homes of St. James Parish residents. Shortly after TELC issued a notice of intent to sue, FTM announced that it would stop the spraying.⁴⁶ Also, TELC intervened on behalf of Citizens for a Strong New Orleans East and others in a lawsuit to support a cease and desist order that shut down the Chef Menteur landfill, located between a lower income Vietnamese-American community in East New Orleans and Bayou Sauvage National Wildlife Refuge.⁴⁷ TELC is involved in ongoing litigation to minimize the impacts of this unpermitted landfill on the neighboring community.⁴⁸
- **Rule of law:** TELC's litigation on behalf of its clients includes cases to enforce the duty of Louisiana agencies, as public trustees under the Louisiana Constitution, to evaluate impacts, costs and benefits, alternatives, and mitigating measures before approving action affecting the environment.⁴⁹ For example, in a 1995 TELC-handled case, Louisiana's First Circuit overturned a landfill permit because of LDEQ's failure to consider alternatives.⁵⁰ Also, on behalf of Concerned Citizens Around Murphy, TELC worked with Public Justice in 2008 to challenge EPA's planned experimental burn of

33. *Ogeechee-Canoochee Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 559 F. Supp. 2d 1336 (S.D. Ga. May 27, 2008).

34. *Oakville Cmty. Action Group v. Plaquemines Parish Council*, No 2008-CA-1286 (La. App. 4th Cir. 2/18/09); 7 So. 3d 25.

35. *George Washington, Concerned Citizens of St. Helena Parish & La. Envtl. Action Network v. St. Helena Parish Police Jury*, No. 18370 (21st Jud. Dist. June 7, 2005).

36. *E.g.*, LDEQ, Seventh Amended Declaration of Emergency and Administrative Order, A.I. No. 130534 (Aug. 28, 2006), <http://www.deq.louisiana.gov/portal/portals/0/news/pdf/HurricaneKatrina7thEmergencyOrder8-28-06.pdf>.

37. *See* LDEQ, Eighth Amended Declaration of Emergency and Administrative Order, A.I. No. 130534 (Jan. 19, 2007), <http://www.deq.louisiana.gov/portal/portals/0/news/pdf/HurricaneKatrina8thAmdDec011907.pdf>.

38. *Id.*

39. LDEQ, Ninth Amended Declaration of Emergency and Administrative Order, A.I. No. 130534 (Mar. 19, 2007), <http://www.deq.louisiana.gov/portal/portals/0/news/pdf/HurricaneRita7thAmendedDeclaration&AdminOrder3-19-07.pdf>.

40. *La. Envtl. Action Network and Sierra Club v. McDaniel*, 2008 WL 803407, No. 06-4161 (Sept. 5, 2007).

41. *Baton Rouge Audubon Soc'y v. Sandifer*, 97-464 (La. App. 3 Cir. 10/29/97), 702 So. 2d 997.

42. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

43. *Schoeffler et al v. Kempthorn*, No. 6:05-cv-01573 (W.D. La. June 26, 2007).

44. *Partial Settlement Agreement, Coalition for La. Animal Advocates v. U.S. Dept of Agric.*, No. 01-31361 (5th Cir. July 25, 2002).

45. EPA, *Order Partially Granting and Partially Denying Petitions for Objections to Permits, in the Matter of Shintech Inc. and Its Affiliates' Polyvinyl Chloride Production Facility*, Permit Nos. 2466-VO, 2467-VO, 2468-VO (Sept. 10, 1997).

46. *Allen Powell II, Convent Residents Claim Victory Over Sludge*, NEW ORLEANS TIMES-PICAYUNE, Dec. 18, 2004.

47. *Bruce Egler, Judge: N.O. Landfill to Stay Closed*, NEW ORLEANS TIMES-PICAYUNE, Oct. 14, 2006, at A1.

48. *See* Kari Lydersen, *Landfill Worries Cloud Hope for New Orleans Gardens*, WASH. POST, July 4, 2009.

49. This duty flows from La. Const. art. IX, §1. *See* *In re Rubicon, Inc.*, 95-0108 (La. App. 1 Cir. 2/14/96); 670 So. 2d 475, 483; *Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n*, 452 So. 2d 1152, 1157, 14 ELR 20790 (La. 1984).

50. *In the Matter of Browning-Ferris Indus. Petit Bois Landfill*, 93-2050 (La. App. 1 Cir. 6/23/95), 657 So. 2d 633.

asbestos-contaminated waste in St. Bernard Parish that would have violated EPA's own hazardous air pollutant regulations. In response, EPA dropped its plans to burn regulated asbestos-containing material during the experiment.⁵¹ In 1996, Louisiana's First Circuit established in the TELC-handled *Rubicon* case that when LDEQ issues illegal permits, those permits are not merely subject to eventual administrative correction, but are "null and void and must be vacated."⁵²

Environmental law clinics can have an impact even broader than the cumulative effect of the cases and negotiations its student attorneys handle. This is because the mere availability of such a clinic as a resource can empower community members in their dialogues with regulators and members of the regulated community. As the U.S. Court of Appeals for the Fourth Circuit has noted, "the comment of an ordinary citizen carries more weight if officials know that the citizen has the power to seek judicial review of any administrative decision harming him."⁵³

II. Controversy

Environmental law clinics' work on behalf of clients can be controversial. This is not surprising, since environmental disputes usually involve concerns about public health, economics, and the quality of life. Many of these disputes are driven by the disproportionate impacts that polluting facilities can have on lower income and minority communities and also by disparities between the abilities of regulated companies and ordinary citizens to influence agency decisionmakers.⁵⁴

In Louisiana, tensions became especially pronounced in the late 1990s when TELC represented St. James Citizens for Jobs and the Environment, LEAN, and others in opposing Shintech, Inc.'s proposal for a polyvinyl chloride plant in a predominately African-American and lower income community in St. James Parish, Louisiana.⁵⁵ In 1997, TELC and Greenpeace filed a petition for a formal EPA objection to the state's CAA permit for the plant, citing regulatory violations and environmental justice concerns. TELC also raised the environmental justice issues in a separate civil rights complaint filed with EPA. EPA responded with an order that objected to the permit under the CAA and noted that the environmental justice concerns "deserve serious atten-

tion" and that EPA would investigate them.⁵⁶ The next year, Shintech abandoned its plans for a St. James Parish facility and announced it would build a smaller plant elsewhere in Louisiana.⁵⁷

The American Bar Association honored TELC as co-recipient of its first Award for Distinguished Achievement in Environmental Law and Policy in 2000, largely due to the clinic's work on the Shintech case.⁵⁸ TELC was also a runner up for the *National Law Journal's* Lawyer of the Year award in 1998.⁵⁹ But the Shintech case also sparked a backlash. The governor asked Tulane's donors to withhold support for the university.⁶⁰ Tulane's president responded that TELC's students "have done nothing wrong; they have made a fine contribution to our state."⁶¹

After members of the business community asked the Louisiana Supreme Court to rein in TELC,⁶² the court, in 1998, revised the rule that allows law students to make formal appearances on behalf of clients.⁶³ The deans of Tulane and Loyola Law Schools, the American Association of Law Schools, and others objected to the changes, and the court softened some of them.⁶⁴ Louisiana's attorney general and state bar association, among others, asked the court to stay or rethink the revisions.⁶⁵ Law professors from across the country rallied with representatives of civil rights and environmental organizations in front of the Louisiana Supreme Court to protest the revisions.⁶⁶ Finally, the court further softened the revisions in March 1999.⁶⁷ As subsequently interpreted by the courts, the 1999 revised rule does not limit

51. Susanne Pagano, *EPA Cancels Project to Grind, Incinerate Katrina Debris Containing Asbestos*, DAILY ENV'T REP (BNA), June 18, 2008, at A-5.

52. In the Matter of *Rubicon, Inc.*, 95-0108, p. 12 (La. App. 1 Cir. 2/14/96), 670 So. 2d 475, 489.

53. *Virginia v. Browner*, 80 F.3d 869, 880, 26 ELR 21245 (4th Cir. 1996).

54. See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787, 810 (1993) ("In deciding both from where and to whom environmental risks should be reallocated in the treatment and prevention of pollution, lawmakers are necessarily more responsive to the demands of constituents who possess the greatest political influence."); see also Adam Babich, *Environmental Justice in Louisiana*, 51 La. B.J. 90 (Aug./Sept. 2003).

55. Susan Hansen, *Backlash on the Bayou*, AM. LAW., Jan./Feb. 1998, at 51; Marcia Coyle, *Governor v. Students in \$700M Plant Case*, NAT'L LAW J., Sept. 8, 1997, at 1.

56. EPA, Order Partially Granting and Partially Denying Petitions for Objections to Permits, in the Matter of Shintech Inc. and Its Affiliates' Polyvinyl Chloride Production Facility, Permit Nos. 2466-VO, 2467-VO, 2468-VO (Sept. 10, 1997), http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/shintech_decision1997.pdf.

57. Robert E. Holden & Tad Bartlett, *Leaving Communities Behind: The Evolving World of Environmental Justice*, 51 La. B.J. 94, 95 (Aug./Sept. 2003).

58. Pamela Coyle, *Tulane Law Clinic Honored for Work Communities Got Help in Environmental Cases*, NEW ORLEANS TIMES-PICAYUNE, July 5, 2000.

59. Mark Schleifstein, *Tulane Law Clinic Earns National Honor Review Cites Work in Shintech Case*, NEW ORLEANS TIMES-PICAYUNE, Dec. 22, 1998, at A2; see also the *National Law Journal* website, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426909943> (the award went to President Bill Clinton).

60. Marsha Shuler, *Foster: Threat Against Tulane Is Appropriate*, BATON ROUGE ADVOC., July 24, 1997, at 1A.

61. Eamon M. Kelly, Letter to the Editor, NEW ORLEANS TIMES-PICAYUNE, June 25, 1998, at B6.

62. La. Sup. Ct., Resolution Amending and Reenacting Rule XX, (Johnson, J. dissenting) (1999) at 1, <http://www.lasc.org/rules/supreme/resolution499.asp>.

63. Chris Gray, *Court Reins in Student Lawyers*, NEW ORLEANS TIMES-PICAYUNE, June 18, 1998, at A1.

64. Joe Gyan Jr., *Group Says Amended Law Clinic Rule Interferes With Learning Opportunities*, BATON ROUGE ADVOC., Aug. 26, 1998, at 3B; Joe Gyan Jr., *Law Clinics Ruling Softened*, BATON ROUGE ADVOC., July 2, 1998, at 1A; Michael J. Smith, *Deans Seek Public Hearing on Student Law Clinic Rules*, NEW ORLEANS TIMES-PICAYUNE, June 30, 1998, at A2.

65. Mark Schleifstein, *Teyoub Asks High Court to Suspend Clinic Rules*, NEW ORLEANS TIMES-PICAYUNE, Oct. 7, 1998, at A2; Joe Gyan Jr., *La. Bar Backs Clinics, Supreme Court Urged to Delay Rules Changes*, BATON ROUGE ADVOC., Sept. 9, 1998, at 2A.

66. Mark Ballard, *Prof's March on Louisiana Court*, NAT. LAW. J., Jan. 25, 1999, at A8; Joe Gyan Jr., *Law Clinic Restrictions Protested*, BATON ROUGE ADVOC., Jan. 8, 1999, at 1A.

67. La. Sup. Ct., Resolution Amending and Reenacting Rule XX, (1999), <http://www.lasc.org/rules/supreme/resolution499.asp>; see also Mark Schleifstein, *Rules on Law Clinics Relaxed but Fight Persists on Indigent Issue*, NEW ORLEANS TIMES-PICAYUNE, Mar. 23, 1999, at A1.

TELC's ability to represent clients on controversial or high-impact cases.⁶⁸

Today, TELC tries to defuse and manage controversy by stressing the duty of all lawyers to expand access to the legal system and to see that justice is not rationed by ability to pay or denied to those whose views might be controversial.⁶⁹ Under the Rules of Professional Conduct that govern Louisiana's legal profession, representing a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities."⁷⁰ Thus, former Tulane Law School Dean Lawrence Ponoroff explained to a local newspaper that: "The clinic is neither anti-business nor pro-business It is in the business of representing clients with legitimate claims under the law."⁷¹

As part of a law school or university, an environmental law clinic has such a broad and diverse constituency that it would be unreasonable to expect all its constituents to agree with every position that the clinic's students and lawyers take on behalf of clients. For example, we consider TELC's constituents to include everyone with an interest in Tulane University, environmental policy, or the rule of law, i.e., the entire Tulane University community (students, educators, alumni, and family), our client base, funders, colleagues, and members of the Louisiana bar, among others. But if an environmental law clinic's underlying mission is simply to train effective, ethical lawyers; expand access to the system; and bolster citizens' capacity to participate in decisions that affect their communities, that is something all constituents can take pride in, since it advances goals that are fundamental to the legal profession and the U.S. system of justice.

III. Media

Appearing on TV or in the movies is not part of an environmental law clinic's mission. But media exposure may help with fundraising and is, in any event, always a thrill. So far, these are TELC's greatest hits:

- The 2009 documentary "Abode" features footage of student attorney Mary Nagle's November 8, 2007, oral argument before the Louisiana Public Service Commission in opposition to plans for a new coal-fired power plant (and the resulting emissions of carbon dioxide) in St. Charles Parish, Louisiana.⁷²

68. See, e.g., *Southern Christian Leadership Conference v. Sup. Ct. of State of La.*, 252 F.3d 781, 784 (5th Cir. 2001) (holding that Rule XX "operates only to set forth the limited circumstances under which unlicensed law students may engage in the practice of law in Louisiana; it has no other reach"); see also Elizabeth Amon, *Law Clinic Battles It Out in Bayou, Tulane Environmental Law Clinic Wins Right to Fight in Court*, NAT'L L.J., Oct. 7, 2002, at A5; Adam Babich, *How the Tulane Environmental Law Clinic Survived the Shintech Controversy and Rule XX Revisions: Some Questions and Answers*, 32 ELR 11476 (Dec. 2002).

69. See Adam Babich, *The Apolitical Law School Clinic*, 11 CLINICAL L. REV. 447, 460 (2005); see also MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 5 (Dec. 2002).

70. Louisiana Rules of Professional Conduct 1.2 (b) (2003).

71. Megan Kamerick, *Hostile Environment*, NEW ORLEANS CITYBUSINESS, Nov. 18, 2002, at 10A.

72. See Abode film website, <http://www.abode-film.org>, The Internet Movie Database, <http://www.imdb.com/title/tt1379047>.

- PBS featured TELC's work on air pollution from an oil refinery in its July 15, 2005, episode of "Now" called "Formula for Disaster."⁷³
- The Lifetime Television drama "Taking Back Our Town" (broadcast on December 10, 2001) focuses on the Shintech case and features the work of TELC clinical instructor Lisa (Lavie) Jordan.⁷⁴
- Film producer and director Laura Dunn's 2000 documentary "Green" features TELC's work on the industrial corridor between Baton Rouge and New Orleans.⁷⁵
- The CBS series "60 Minutes II" covered the backlash against TELC's work on the Shintech case in its March 24, 2000, episode "Justice for Sale,"⁷⁶ as did PBS's November 23, 1999, episode of "Frontline," also called "Justice for Sale."⁷⁷

IV. Funding

The most apparent downside to law school clinics is the expense of employing enough lawyers to closely supervise student practice. Given the public-interest benefits of such clinics, however, outside funding may be available. Tulane University's financial support of TELC usually covers about 60% of our operations. TELC raises additional funds to: (1) achieve a ratio of student-attorneys to staff attorneys that allows us to train students within the context of non-routine cases; (2) supplement staff attorney salaries to attract and retain lawyers capable of guiding students through litigation of complex cases; (3) provide access to qualified expert witnesses and consultants; and (4) operate a community outreach program to manage relationships with constituents and help our client base make the best use of TELC as a resource.

To meet these goals, we rely on foundation grants, donations by individuals, families, and corporations, and recoveries of attorneys fees. Recently, we adopted the goal of using donations and fee recoveries to create a reserve equal to one year's budget. Our intent is to provide assurance to clients, students, and staff that occasional fundraising shortfalls will not disrupt TELC's ability to function.

V. Onward!

It is a major decision for any university to create a clinic to provide free legal services on environmental issues. Inevitably, the resulting expansion of residents' ability to be heard on environmental issues will sometimes threaten projects important to powerful members of society. Yet the ethical

73. See PBS website, Transcript, July 15, 2005, http://www.pbs.org/now/transcript/transcriptNOW128_full.html.

74. See The Internet Movie Database, <http://www.imdb.com/title/tt0284108>.

75. See The Internet Movie Database, <http://www.imdb.com/title/tt0465484>.

76. See CBS News website, *Justice for Sale: Dan Rather Follows Up on Louisiana Case*, Mar. 24, 2000, <http://www.cbsnews.com/stories/2000/03/24/60II/main175831.shtml>.

77. See PBS website, Transcript, Nov. 23, 1999, <http://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html>.

principles that govern lawyers' professional duties rule out any expectation that the clinic's lawyers will avoid representing clients on controversial cases.⁷⁸

In my nine years with Tulane, I have been proud to see the university and law school live up to the tradition they began 20 years ago when they established TELC. That tradition is one of support for the clinic's mission to educate students and expand access to the legal system, even when that support is far from convenient. I am also continually inspired by the courage of TELC's clients, who make the difficult calls about how to protect their communities, such as when to negotiate, when to litigate, and when to settle. We give them the best advice we can, but it is our clients who must live with the results.

There is a passage in one of T.S. Eliot's "Four Quartets" that, as I understand it, instructs life's voyagers to embrace our journeys: to "fare forward" because we may never know the satisfaction of "arriv[ing] at any terminus."⁷⁹ Those words can strike a chord with environmental educators and lawyers, since we are all unlikely to live long enough to see what long-term impacts our efforts may have. Will our students, or our students' students, help forge a sustainable relationship between industrial society and nature? Will the cumulative effect of our work—and that of clients, colleagues, and students—buy communities enough time for lasting solutions to emerge and take hold? We may never know. But we take satisfaction from the journey: from teaching our students to help one client at a time, from the thrill of victory when we manage a step forward (even if we take a step back the next day), and from knowing that we, and our colleagues in public-interest law and environmental education, are making the effort.

78. See MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (2003) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (Feb. 9, 1972) (It would be improper to require clinic directors "to seek, 'on a case-by-case basis,' the prior approval of the dean or a faculty committee before accepting a case involving an affirmative lawsuit against a federal, state or municipal officer."); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (Aug. 10, 1974) (It would not be improper to require prior consultation with an Advisory Committee that "consisted entirely of lawyers" if the committee "had no power to veto the bringing of a suit" and "did not in practice result in interference with the staff's ability to use its own independent professional judgment as to whether an action should be filed."); see generally Robert R. Kuehn, *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, 26 HARV. ENVTL. L. REV. 417, 433-36 (2002) (discussing "the duty not to refuse unpopular or controversial clients or causes").

79. T.S. Eliot, *The Dry Salvages*, in *FOUR QUARTETS* 35, 41 (Harcourt Brace Jovanovich, 1971).