

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.



Galveston Island, 2008
Courtesy of Eric Dannenmaier



LAW SCHOOL

Tulane Environmental Law News

6329 Freret Street
New Orleans, LA 70118-6231

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George and Martha Cordially Invite You: Water Law Institute Hosts CEQ Colloquium at Mount Vernon

In early October, a select cast of CEQ Chairmen, General Counsel, key staff, law professors, and other members of the federal family who have interacted with the White House environmental office since the 1970s met at Mount Vernon, Virginia, to discuss the future of CEQ as it enters its next and most challenging decade. Hosted by Tulane's Institute for Water Resources Law and Policy, and with support from the Henry M. Jackson Foundation, the two-day session was moderated by Nicholas Yost, General Counsel to the agency during its formative years, with a bipartisan cast including such well-known CEQ leaders as Russell Train, Michael Deland, Katherine McGinty, George Frampton and Dinah Bear, each of whom left a mark on the agency and on the nation's environmental policies.

The future of CEQ is far from clear. Created by the National Environmental Policy



Mount Vernon, VA – looking toward the Potomac River

Act in 1969, it emerged from the tug and pull of legislative debate as an advisor to the President, and little more. "Stop-order" power and other authority originally proposed for the agency were left on the cutting room floor. From these humble beginnings, CEQ began to establish itself as the expert on NEPA's environmental impact review process by issuing informal guidance to other agencies following key decisions from citizen suits brought by environmental plaintiffs. In 1977, a Presidential executive order invested CEQ with the power to issue formal regulations for the NEPA process that emerged with such clarity and detail that they, along with case

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Little Gypsy: Tulane Environmental Law Clinic Takes on Coal

At a time when regulators and courts in states across the country are rejecting plans for new coal-fired power plants, citing concerns about carbon emissions and climate change, the Alliance for Affordable Energy, Sierra Club, Louisiana Environmental Action Network, Gulf Restoration Network, and Mr. Sal Giardina, Jr., represented by the Tulane Environmental Law Clinic, are urging Louisiana to do the same.

Recent climate change policy and law has prompted the cancellation or disapproval of more than 50 coal-fired power plants—the nation's largest source of CO₂¹. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court ruled that the Environmental Protection Agency has the responsibility to regulate carbon and carbon-related pollutants. Congress is considering several competing climate change bills that call for as much as an 83-percent reduction in greenhouse gas emissions by the

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¹Regulators in North Carolina, Kansas, Florida, Oklahoma, Montana, Minnesota, Delaware, and Oregon, among others, have taken action to halt new coal-fired power plants.

The Conference: Hold The Date

Tulane hosts its 14th annual Environmental Conference on April 3, 4 of 2009. Presented in a multiple-venue format, the three theme tracks will focus on URBAN REDEVELOPMENT (zoning, transportation), INDIGENOUS COMMUNITIES (salmon, human rights), and COASTAL AND WATER RESOURCES (dead zones, coastal defense and coastal retreat). Plenary speakers and panels will address priorities of the new White House and Congress and other issues. Joint sessions will be held with the National Ethnobotany Conference taking place that same weekend here at Tulane.

The Conference is also fun, a jazz fest of offerings in and around the sessions. This year we will highlight local green-gardening movements, the Fourth Annual Student Play, field trips to nearby natural and archeological sites, two bands, a banquet dinner, and plenty of time for socializing and coming up to date. In our experience much of the discovery at these events comes interactively among all the attendees. We are the tent. You will be welcome.

Information on the conference and your questions and suggestions are also welcome. Please contact Conference Coordinator Lindsay Ellis at lellis@tulane.edu.

TELS Fall 2008 Calendar

October 14: Conference Planning Meeting
October 18: Canoe Trip on the Wolff River (Daytrip)
October 21: Bike Trip to Lake Pontchartrain
October 25: Canoe Trip on Red Creek (Overnight)

November 4: Conference Planning Committee
November 8: Bike/Ferry Trip to Algiers Point
November 11: Conference Planning Meeting



Current TELS Officers



Jerome Ringo, Keynote Speaker, TELS Conference 2008



Dr. Devra Davis, Keynote Speaker, TELS Conference 08

CEQ *Continued from front cover*

opinions, became the “law of NEPA”. Under chronic attack from the Forest Service, Federal Highway Administration, and other development agencies, and most recently the House Resources Committee, these regulations have stood the test of time.

Below this radar, CEQ has played another role in reconciling the projects and programs of other federal agencies with the goals of NEPA. Without the authority to countermand a proposal, this is a delicate business of jawboning, negotiating and otherwise attempting to arrive at consensus – sometimes between warring agencies – and avoid train wrecks. Anyone close to the process can call up instances in which CEQ brokered a better solution. Given the inherently off-budget nature of these negotiations, however, they are impossible to quantify, which made the participation of key CEQ players vital to the success of the Mount Vernon colloquium. Only they know the extent and effectiveness of this CEQ function, and how it might be enhanced.

What time has also shown is the necessarily close relationship to the President for an agency whose primary mission is to advise the President on environmental affairs. Some Presidents may want this advice more than others, and some may want advice more in harmony with their political programs. Even administrations with a greater priority for environmental protection, and congressmembers intimately involved in the creation of CEQ have from time to time opined that the agency, having done its essential business, could, in the name of administrative efficiency, now be put to pasture. On the Congressional side, meanwhile, a concerted attack on CEQ and its NEPA regulations in the early 2000’s only failed when new elections removed some of its floor leaders. All of which is to say that, unlike other mission agencies with specific statutory duties and economic constituencies, CEQ has always skated on thin ice.

Then there is climate change, the gorilla which has burst from the closet and is now a primary actor on stage. It

is not simply an environmental issue, it is an everything-issue from transportation and energy to flood protection, drought, forest fires, livable cities and species extinction. No federal agency lacks a role here. On something this large, then, another question of Mount Vernon was what CEQ’s role should be, what kind of entity with what kind of authority would be necessary to coordinate and, yes, even direct a response that involves virtually the entire federal government, before one gets to the states, many of whom are light years ahead of the federals in coming to grips with the challenge.

Back in 1969, the primary authors of NEPA saw an apocalypse. The Senate Report on the bill presents a parade of horrors from decaying cities to wasted landscapes, rivers on fire and vanishing wildlife. The authors came up with the most aspirational law legislators could devise. Much of this law remains unachieved. What has been achieved has come through the efforts of citizens to make one part of it, the environmental impact statement process, work largely against reluctant mission agencies through the courts. And through the creativity of CEQ in formalizing this process, and taking the rough edges off of federal proposals most in conflict with NEPA’s goals. Meanwhile, the apocalypse has not gone away. It has simply morphed into larger thunderheads. With a new President and administration coming on, the future of CEQ has never been more important. Nor its task more daunting.

The Tulane Institute will summarize the results of the Mount Vernon colloquium in a report that will be made available to members of Congress, members of the transition team of the President-elect, and to the general public.



Russell Train, First Chair, President’s Council on Environmental Quality, 1970-73



Katie McGinty, Chair, President’s Council, on Environmental Quality, 1994-98

Saving A River, One Swim At A Time *Jason Holleman, L'98*

You hear politicians being told to “go jump in the river,” but I have the distinction of being one of the few elected officials who took that advice.

I was elected to Metro Council in Nashville, Tennessee last September – in the wake of one of the worst droughts in the history of our city. Needless to say, stormwater management was not at the forefront of voters' minds. There weren't any storms. However, that was just the issue that my new colleague and long-time friend, Councilwoman Emily Evans, asked me to help take on days after we were sworn into office. The Cumberland River was badly polluted. City runoff was the cause. And EPA was breathing down our necks.

The question was money. We knew about Atlanta, where city officials were saddled with a federal mandate to launch more than \$300 million in infrastructure improvements, immediately, or pay tremendous civil penalties. Moving ahead of this curve, we identified \$84 million in needed improvements and recommended a stormwater utility fee of \$4.98 monthly per household to generate it. This would not be an easy sell.

The question became, “how do we get the media and the community to deal with this issue, to even discuss it? Councilwoman Evans' answer: “GO JUMP IN THE RIVER.” It was crazy. It might work.

It had worked before. About ten years early a local activist named Vic Scoggin donned a wetsuit and goggles and, smearing himself with antibacterial ointment, swam the LENGTH of the Cumberland River, all 697 miles of it. He drew public attention to the condition of the river at every stop. Tennessee and EPA began to crack down on industrial dischargers. But city runoff was a different matter.

Early this year, a handful of us started meeting for breakfast and planning a swim across the Cumberland in downtown Nashville, to celebrate a 20 billion gallon reduction in pollution discharge over the last 20 years AND,

more importantly, to call attention to the fact that more work remained to be done. We called constituents, we e-mailed, we enticed (Oh, Councilman, the sight of you in a bathing suit will really help us draw a crowd), we dared (all right, if you want to send the message that we are wimps, then don't come out), and, in the end, we garnered a team of public officials, business and community leaders, and a couple of wild cards, including Vic Scoggin back again, without a wetsuit this time. The list included five Council members, the Director of the state office of water quality, the former Deputy Governor, representatives of more than half a dozen city departments, and a representative of the U.S. Army Corps of Engineers.

On Thursday, June 19, 2008, we jumped into the water with crowds of onlookers on both banks of the river. In less than 5 minutes, we accomplished our goal; we made it across the river with every television station filming and every newspaper journalist snapping photos and jotting down notes. During the next few days, our city did what we hoped it would do: it talked

about the Cumberland River – sure some people talked only about how much \$4/gallon gasoline the Fire Department used to bring out the rescue boat to observe our swim, but at least they were talking about it in some way.

Now, just two months later, the Council has unanimously passed a resolution declaring the Cumberland River an important resource and has started serious negotiations towards a funding source for Nashville city runoff. Hopefully, when we repeat our stunt next summer, it will be to celebrate the passage of that legislation.

If you'd like to see our swim in action, go to: <http://www.nashvillecitypaper.com/mod/video/viewvideo.php?id=37>



Councilman Jason Holleman (L '98), center, lives in Nashville, Tennessee with his wife, Margaret (L '03), left, and their daughter, Cecilia (rear). Jason represents the 24th District on the Metro Council and works as the City Attorney for a neighboring municipality.

The Docket: The Environmental Law Clinic has 18 cases pending of which these are a sampling:

Atchafalaya Basinkeeper and Louisiana Environmental Action Network v. David Fruge, in his official capacity as Interim Director of the Atchafalaya Basin Program, and Sandra Thompson Decouteau, No. 6:08-1155 (W.D. La., Aug. 8, 2008) (Citizen suit against Atchafalaya Basin Program for failure to comply with Section 404 permit when dredging Bayou Postillion) (155-003).

Louisiana Environmental Action network, et al., v. Louisiana Department of Environmental Quality, No. 560,711 (19th Jud. Dist., July 28, 2008) (Won favorable ruling from judge denying Waste Management exception, which argued environmental plaintiffs did not have right to challenge DEQ issuance of water quality certifications for Chef Menteur landfill following Katrina) (101-103).

Save Our Wetlands v. Terrebonne Conservation District, No. 08-2159 (E.D. La., April 20, 2008) (Citizens suit against levee district for failure to obtain a Section 404 permit before filling wetlands to build Reach J1 of the Morganza-to-the-Gulf Levee Project) (163-001).

In re: Louisiana Department of Environmental Quality Permitting Decision: Permit for Louisiana Generating, L.L.C. Big Cajun 1 Power Plant Air Permitting Decisions (19th Jud. Dist., March 19, 2008) (Appealing decision granting Title V and related air permits).



TLS Environmental Law Clinic Student Attorneys 2008

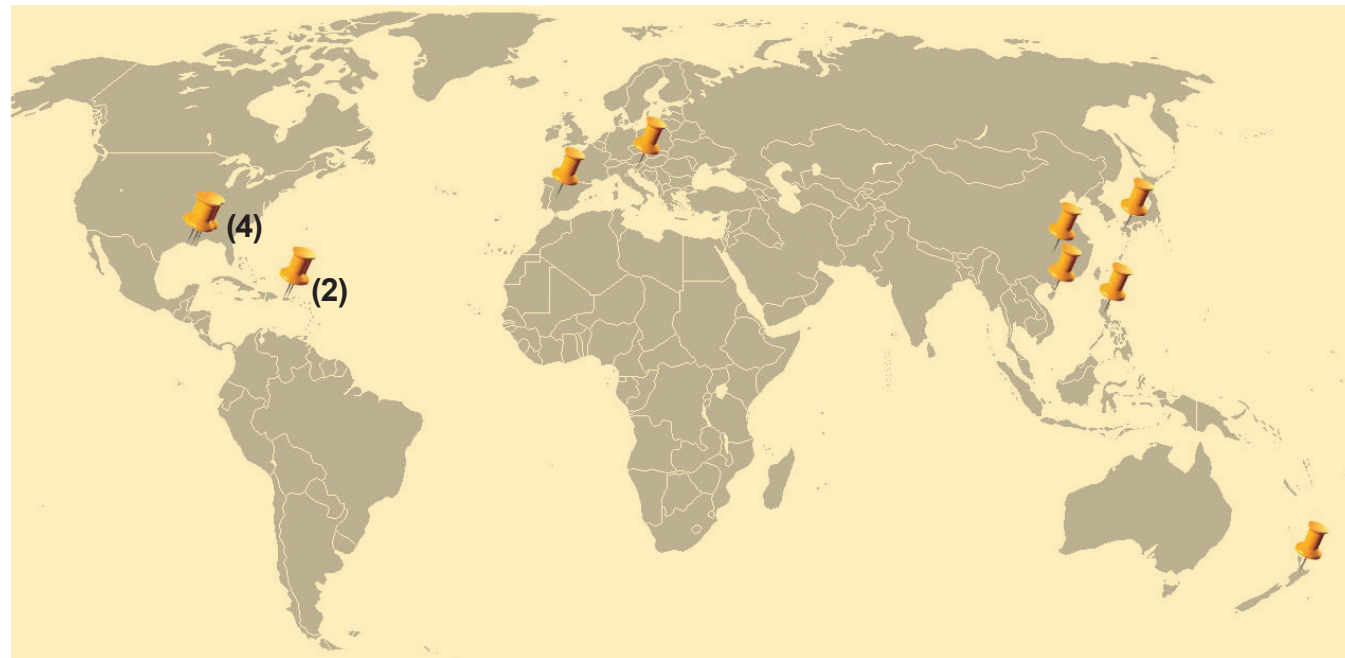
Louisiana Environmental Action Network, Citizens for a Strong New Orleans East, and the Green Zone Task Force v. Louisiana Department of Environmental Quality, No. 559,256 (19th Jud. Dist., Sept. 14, 2007) (Appeal of LDEQ decision approving Waste Management's plan to “close” Chef Menteur landfill by leaving waste in place without adequate monitoring) (101-111).

Gulf Restoration Network, Louisiana Audubon Council, Louisiana Environmental Action Network, and Sierra Club v. EnerVest Operating, L.L.C., No. 07-817 (W.D. La., May 9, 2007) (Seeking cleanup of hazardous waste released from more than 600 sites of leaking mercury meters in Union, Ouachita, and Morehouse parishes) (101-092).

Oakville Community Action Group v. Plaquemines Parish Council, No. 50-697 (25th Jud. Dist., Dec. 15, 2003) (Challenging a decision by the Plaquemines Parish Council to approve Industrial Pipe Inc.'s coastal use permit application) (104-011).

Bogalusa Waterworks, et al. v. Louisiana Department of Environmental Quality, No. 474-677 (19th Jud. Dist., Nov. 20, 2000) (Seeking remand of LDEQ's approval of a Clean Air Act permit to construct a ground-water cooled merchant power plant in Bogalusa, Washington Parish, Louisiana). In February, 2001, the Court remanded the permit decision to LDEQ, but retained jurisdiction over the case. LDEQ reaffirmed its permit decision in May 2002 and the appeal is pending (125-001).

Passing The Torch: Environmental Masters Graduates Now Teaching Environmental Law



Tulane Masters of Law alumni in Energy and the Environment have joined the faculties of law schools around the country, and the globe.

Pedro Brufao, LLM 1998,
Administrative and Public Law,
Universidad de Extremadur, Spain.

**Carmen Conaway-Medavilla,
LLM 2002,** Environmental Law,
Legal Research and Writing, Inter-
american University, Puerto Rico.

Cleveland Coon, LLM 2004,
Environmental Justice, Education
Law, Professional Responsibility,
Southern University Law Center, New
Orleans, Louisiana.

**Galahad Pe Benito, LLM
2004,** Environmental Law, Far
Eastern University Institute of Law,
Manila, The Philippines.

Želimir Gržančić, LLM 1997,
Administrative Law and Public Law,
University of Croatia, Rijeka, Croatia.

**Hiroshi Kobayashi, LLM
2005,** Environmental Law, Envi-
ronmental Dispute Resolution, Civil
Law, Nagasaki University, Japan.

San Don Lee, SJD 1983,
Environmental Law, International
Economic Law, Chung-Ang Univer-
sity, Korea.

Leslie Lunney, LLM 1993,
Toxic Torts, Environmental Law,
Loyola University New Orleans Col-
lege of Law, New Orleans, Louisiana.

Stan Millan, SJD 1990,
Environmental Law, Administrative
Law, Loyola University New Or-
leans College of Law, New Orleans,
Louisiana.

Judith Perhay, LLM 2002,
Toxic Torts, International Environ-
mental Law, Southern University
Law Center, New Orleans, Louisiana.

David Roman, LLM 1994,
Environmental Input Review, Envi-
ronmental Regulations and Permits,
University of Puerto Rico.

Prue Taylor, LLM 1992,
Senior Lecturer of Law and Founding
Member of the New Zealand Centre
for Environmental Law, University of
Auckland, New Zealand.

Mingqing You, LLM 2003,
Lecturer of Environmental Law,
Environmental and Resources Law
Institute, Zhongnan University of
Economics and Law, China.

The Institute: Water Notes

Not so very long ago, water resources policy was viewed as the special province of western states and public works projects. The realities of sea level rise, climate change, aquatic species collapse, and a world where fresh water is heralded as "the new oil" are changing that.

Some current program highlights:

How Safe, How Soon? Storm protection and coastal restoration are vital for the long-term survivability and sustainability of the south Louisiana. In the short term, however, increased resiliency will have to come from community solutions involving hard local choices. We are beginning with two communities in New Orleans (Carrollton/Hollygrove and Lower 9th Ward/Holy Cross) and the United Houma Nation in south Lafourche and Terrebonne Parishes to identify community level actions needed to improve their level of safety.

Coastal Restoration: From the Legal Side. The restoration of coastal wetland ecosystems has become both politically and generally popular, but progress remains frustratingly slow. One reason has been the difficulty of squaring bold plans with private property rights and a confusion of agency jurisdictions. Ecosystem planning is not meshing with the legal landscape. The Institute is working to educate decision makers on these issues.

Louisiana Water Law. Considering how much water Louisiana has, it comes as a surprise to many how poorly formed Louisiana law is with respect to the ownership and use of waters and waterbottoms. The Institute is presently working with the Louisiana Attorney General's office and the Department of Natural Resources to survey the status of Louisiana water law and policy.



Little Gypsy: Tulane Environmental Law Clinic Takes on Coal *Continued from front cover*

year 2050. Both presidential candidates have recognized the need to take action to curb greenhouse gases. These events, plus others, have made coal plants risky and expensive ventures.

Then, there is Louisiana.

Entergy Corp. has applied for state Public Service Commission approval to build a \$1.55 billion petroleum coke-and-coal-fueled facility about 20 miles up the Mississippi River from New Orleans. “Little Gypsy,” as it’s named, would emit more than 4 million tons of CO₂ annually, plus sulfur and oil. While Entergy promotes Little Gypsy as a means to reduce its dependence on natural gas, Clinic student attorneys have argued that the project is fiscally imprudent due to the uncertain costs of controlling CO₂ emissions once regulated. “Deciding now, in 2007, in the state of Louisiana, to achieve fuel diversity by investing in coal is simply not a responsible way to achieve fuel diversity,” said Mary Nagle, student attorney, in oral argument before the Louisiana Public Service Commission.

Nagle went on to point out that “emissions from this one plant here in Louisiana would void one-third of an unprecedented action taken by seven states,” referring to an initiative of mid-Atlantic and northeastern states to collectively reduce greenhouse gas emissions by 12 million tons per year. Ms. Nagle added that while “many Americans will eventually feel the cost of global warming, it is our residents here in Entergy’s service area—the citizens of Louisiana—who live at ground zero.”

Commissioner James Field, responding to Ms. Nagle’s remarks, pointed out that petroleum coke is a Louisiana product. “We would cripple our economy if the whole nation goes overboard with this emissions structure so that we can’t compete with the Chinas and Indias of the world,” Fields said. Commission Chair Jay Blossman also announced skepticism about global warming, stating, “I may be in the minority, but I don’t think global warming caused Katrina...Because if global warming causes bad hurricanes, did

they take a break the last two years?” [This colloquy took place six months before Hurricane Gustav slammed coastal Louisiana, sending more than 2 million Louisianans into evacuation and Hurricane Ike which leveled Galveston and left millions of Houstonians without power for several weeks.]

New student attorneys will be spending this semester writing briefs and presenting oral arguments on appeal of the Commission’s approval, while others will work on related matters involving Little Gypsy and other power plants (Big Cajun I and Big Cajun II) owned and operated by Louisiana Generating, LLC. Entergy plans to ask the Commission to approve a plan in which Entergy’s customers prepay for the coal conversion before the plant is in service. Pursuant to the D.C. Circuit Court’s ruling in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), Entergy will also have to obtain state-of-the-art permits for the emissions of coal-related toxic pollutants like arsenic and lead.

It will be a full plate.



Little Gypsy student attorney Erica Rancilio, Center, with supervising attorneys Corinne Van Dalen, left and Jill Witkowski

Entergy Corp. has applied for state Public Service Commission approval to build a \$1.55 billion petroleum coke-and-coal-fueled facility about 20 miles up the Mississippi River from New Orleans. “Little Gypsy,” as it’s named, would emit more than 4 million tons of CO₂ annually, plus sulfur and oil.

Legislative hearings on the *Little Gypsy* project were featured in the annual environmental play, *To The Seventh Degree*, written by student attorney Mary Nagle, '08 ... as follows:

SCENE EIGHT

State legislative hearing in the present time. The FIVE SENATORS are seated in a row.

Narrator: We are just getting started. As Chairman of this fine committee, I’d like to welcome y’all here. Good morning, ladies and gentlemen. Today, this committee must consider the question of whether or not to approve the proposed moratorium on building any coal-powered plants in this state. We have many groups here today that would like to testify, but I’m going to ask the Sierra Club to be first. So, if y’all would come forward. (*SIERRA CLUB enters*)

Sierra Club: ... and so this state stands to lose more than just about any other state in this country, given our two billion dollar seafood industry, our coastal cities, our culture, our way of life.

Narrator: Very nice. Any questions?

Senator Kragelpus: I’ve got a question.

Narrator: Okay. Senator Kragelpus?

Senator Kragelpus: First of all, I want to tell you thank you for coming, and I think you’re full of vigor. When I was – when I started in politics I was 28 and I used to have a lot of that. Sometimes I don’t have as much, but don’t lose it because you are – you’re going to make a fine politician someday.

Sierra Club: Thank you.

Narrator: Okay. I happen to be one and I may be in the minority, but I don’t think global warming caused Katrina. Okay?

Senator Frio: Yeah, ‘cause if global warming caused bad hurricanes, did they take a break in the last two years?

Sierra Club: I’m not sure that –

Narrator: We really haven’t had a real significant hurricane hit the United States in the last two years, so maybe it wasn’t so warm these last two years.

Senator Crackpot: It was pretty chilly at my house last night –

Senator Kragelpus: I appreciate your presentation and your comments, but again, we have freigel hazzen to retter listin and change our fuel mix –

Narrator: and we – this Legislature’s talked about that for years, and now we’re yutter lippin vicking stipend –

Senator Crackpot: no telling how the votes are going to turn out.

Narrator: Well, haggef fooper fipple.

Sierra Club: I’m sorry?

Narrator: I’m teasing. Okay, I don’t have anything further. Is there anybody else?

Narrator: Okay, we thank you very much for your time and your comments and your answers to our questions. I’ll just say I know everybody in the room worked hard, and here we are ready to vote.

Senator Frio: I just want to say to the Sierra Club,

Senator Caliente: I appreciate your testimony.

Senator Crackpot: This is not perfect by any means.

Senator Kragelpus: Hey, look; I voted for Al Gore. I voted for Al.

Narrator: Okay, would anyone like to vote in favor of the proposed moratorium on the building of new coal-powered plants here in this state? (*NONE VOICED*) Hearing none, it fails to pass and so is ordered.



Mary Kathryn Nagle, 2008, Playwright, “To the Seventh Degree”

Environmental Law Society in Action



Dante DiPasquale, TELS Vice President



First Annual all-woman human pyramid, plus one...



Homero Lopez, Actor, *To the Seventh Degree*



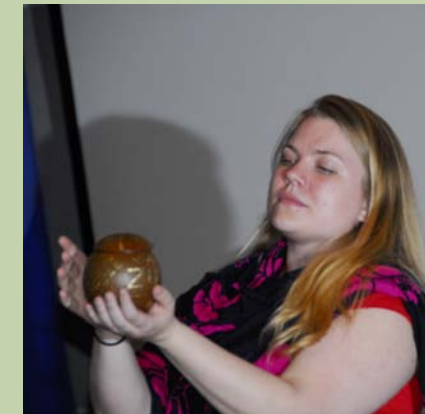
Galia Aharoni, TELS Board Member



Environmental students on a field trip



five seconds later...



Mary Reichert, Actor, *To the Seventh Degree*



Aaron Heishman with "Fish in Rings," Winner, Annual TELS Dessert Competition

The Journal: A New Partnership

Established in 1988, the *Tulane Environmental Law Journal* is ranked among the top in this field. With a student staff of forty members, the *Journal* publishes twice yearly on subjects ranging from traditional domestic law to international, maritime, administrative and constitutional law. See sidebar for recent issues. Additional specialty issues have featured Cuban Environmental Law and the Emerging Law of Fisheries.

This year marks the first collaboration between the *Tulane Environmental Law Journal* and *Environmental Policy and Law*, published by the International Council of Environmental Law. Student authors will be able to publish in the *International Journal*, reaching a worldwide audience. As in the movie *Casablanca*, we hope this to be the “beginning of a beautiful friendship”.

Tulane Environmental Law Journal Vol. 21, No. 2 Summer 2008:

- *Six Flags Over Jesus: RLUIPA, Megachurches, and Zoning*
- *Notice and Expectation Under Bounded Uncertainty: Defining Evolving Property Rights Boundaries Through Public Trust and Takings*
- *Making the Sale on Contingent Valuation*
- *China's Greatest Leap Forward and the Ones Left Behind—The Twofold Problem Causing the Rise in Land Disputes: Land Reclamation and Environmental Degradation*
- *Geopiracy as an Emerging Issue in Intellectual Property Rights: The Rationale for Leadership by Small States*

Vol. 22, No. 1 Winter 2008:

- *Governing Certain Things: The Regulation of Street Trees in Four North American Cities*
- *Toward Eradication: How Law and Public Health Practices can be Used to Prevent Childhood Lead Poisoning*
- *A Federal Midwife: Assisting the States in the Birth of a National Greenhouse-Gas Cap-and-Trade Program*
- *Paradoxical Conservation and the Tragedy of Multiple Commons*

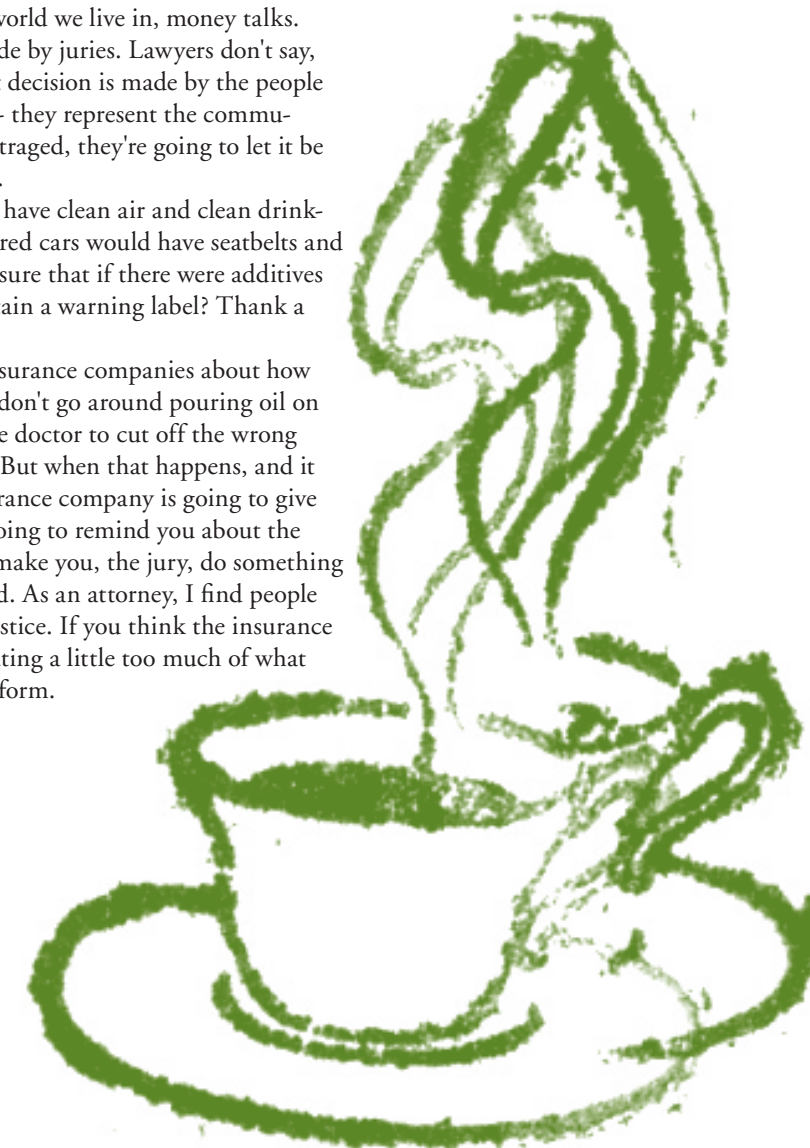
Tort Reform, The Famous Cup Of Coffee, And You *Brett Buchheit, LLM 2007*

In July 2008, *CityView* magazine of Denver published a now-familiar critique of tort practice today (plaintiffs and their lawyers out of control), leading to the rhetorical question, “When Big Tobacco loses, say, I don't know, \$300 billion in litigation payments, who do you think pays it?” The answer seemed to be that it was wrong to fine large companies for even the most egregious behavior (unless concealing evidence of addiction and cancer is not considered egregious). Sensing that there might be another point of view, *CityView* asked Brett Buchheit, a recent Tulane environmental law masters graduate, for a reply. We reprint a portion of his response below:

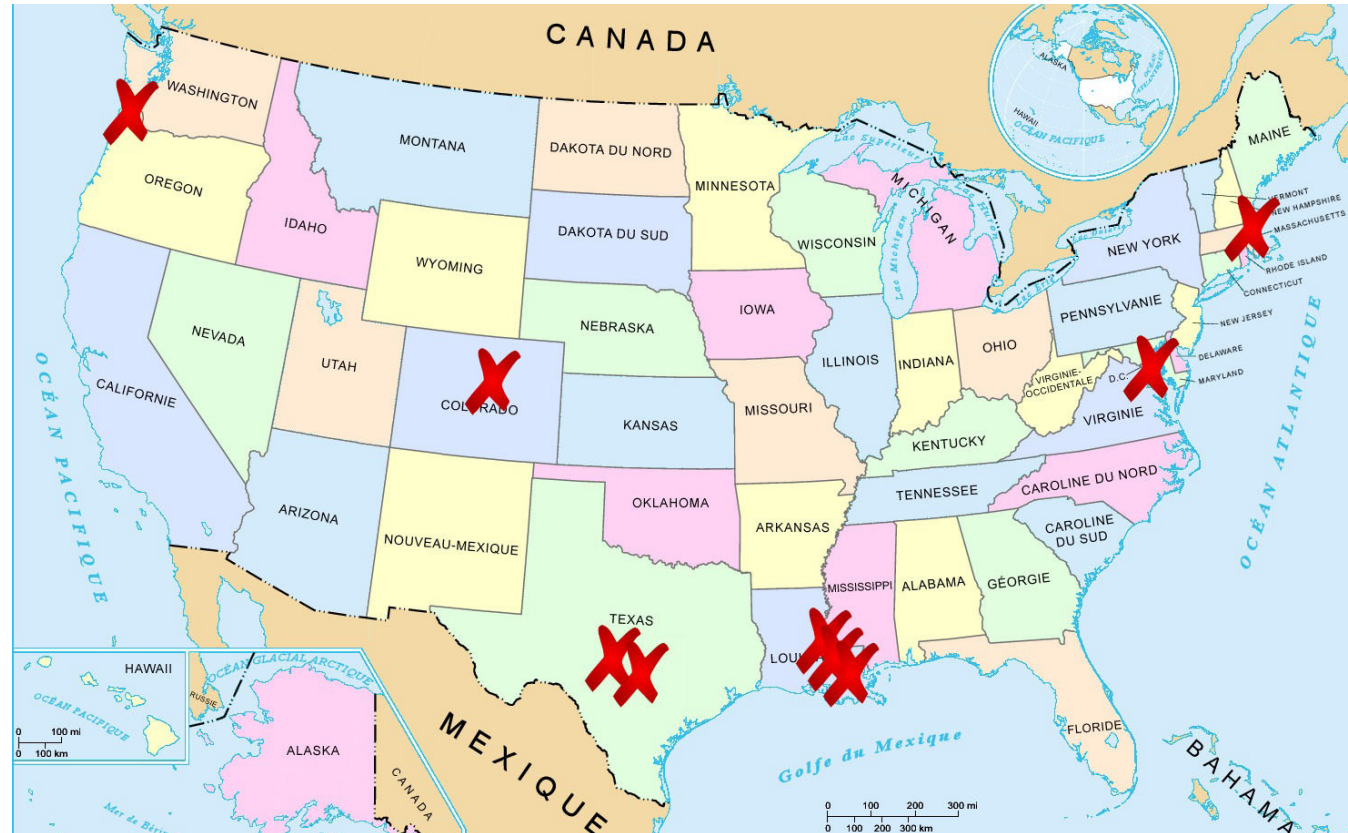
Somebody has to be held accountable, and in the world we live in, money talks. Think about who makes these awards. They're made by juries. Lawyers don't say, “We award the plaintiff eight billion dollars.” That decision is made by the people just like you and me. A jury is not a pack of idiots - they represent the community. And if the members of the community are outraged, they're going to let it be known. Lawyers aren't the ones writing the checks.

You want to thank the person who ensured you have clean air and clean drinking water? You want to thank the person who ensured cars would have seatbelts and air bags? You want to thank the person who made sure that if there were additives in food that could kill you that the food must contain a warning label? Thank a lawyer.

As easy as it is to eat what you've been fed by insurance companies about how lawyers need to be brought to their knees, lawyers don't go around pouring oil on the street to create car accidents. They don't tell the doctor to cut off the wrong leg. They don't give the drunk that one last drink. But when that happens, and it happens every single day, don't think that the insurance company is going to give you justice. The insurance company is, however, going to remind you about the McDonald's coffee case. They're going to try and make you, the jury, do something foolish. I guess that's where I differ from Mr. Creed. As an attorney, I find people who have been victimized, and I try to get them justice. If you think the insurance company is going to do that, maybe you've been eating a little too much of what they've been serving you – a healthy dose of tort reform.



The Best Of The Best: Where Are They Now?



In memory of the outstanding Tulane Law graduate, the **HABER McCARTHY AWARD** is given annually to the student who graduates with the best academic record in the J.D. Environmental Certificate Program.

DEBORAH CLARKE TREJO [1998] was a student attorney in the Tulane Environmental Law Clinic. She began practice as Assistant District Attorney for Cameron County, Texas and is now a partner with Kemp Smith, Austin, Texas in the Environmental and Public Law Department. She is also an Adjunct Professor in Texas State University's Aquatic Resources graduate program.

SHAWN RODA [1999] graduated *summa cum laude* and spent seven years with Kilpatrick Stockton in Atlanta, Georgia. She is currently in the Denver office of Holland & Hart, where she focuses on renewable energy projects such as wind farms and ethanol plants. She also as an Adjunct Professor of Law at the University of Denver teaching first-year Lawyering Process.

BRYAN MOORE [2000] was editor-in-chief of the *Tulane Environmental Law Journal* and began his career in Washington, D.C. at Beveridge & Diamond, PC. He is now with Vinson & Elkins in Austin, Texas where he has appeared before the U.S. EPA, and the Texas Commission on Environmental Quality.

JASON BARBEAU [2001] was a student attorney in the Tulane Environmental Law Clinic. He is currently a trial attorney in the Environmental Enforcement Section of the United States Department of Justice, Washington, D.C. His principal cases involve hazardous waste sites and oil spills in Louisiana, Texas, and New Mexico.

CHRIS WILLIAMS [2003] relocated to New Orleans in February 2008 after practicing law in South Carolina (where he is originally from) for 4 ½ years. "I fell in love with New Orleans while in law school and I feel very fortunate to return." His environmental practice is in regulatory compliance, mostly in the maritime context, but he also has litigated several matters arising under the OPA and CWA.

JOHN WAYNE PINT [2004] is currently with the Boston office of Proskauer Rose, representing companies invested in and developing green technologies, such as fuel cells and more efficient materials processing systems. He represents the Massachusetts Technology Collaborative in connection with trademark and branding efforts regarding the U.S. Offshore Wind Collaborative. He is married to Kara Thorvaldsen, TLS '04.

MEAGHAN SULLIVAN CURRY [2005] is currently an associate at Van Ness Feldman in their Washington, DC office. Her practice concentrates on government policy and regulatory issues in the areas of energy, environmental and natural resources. Prior to joining Van Ness Feldman, she served as a law clerk for two Administrative Law Judges at the Federal Energy Regulatory Commission.

ALEX WILLIAMSON [2006] was a student attorney in the Tulane Environmental Law Clinic. Post-graduation, he worked with a small firm in New Orleans, focusing on global warming litigation, and he drafted a class action complaint on behalf of coastal landowners whose homes and businesses were destroyed by Hurricane Katrina. The case was dismissed at the district court level, with the appeal now pending before the Fifth Circuit. Alex now works for Lehner & Rodrigues in Portland, Oregon.

OWEN COURREGES [2007] is with the Law Office of Sally Dunlap Fleming, P.L.C., a small general practice firm in New Orleans. He contributes to "Southern Appeal," a legal and political web log focusing on both regional and national issues.

MARY REICHERT [2008] is working for one year as a law clerk to the Honorable Martin L.C. Feldman in the U.S. District Court for the Eastern District of Louisiana. She graduated *summa cum laude* and Order of the Coif, took the California Bar in July, and hopes to practice environmental law in Washington, DC or Los Angeles post-clerkship.



Outside The Environment: A Maritime View:

A few years ago the Greek oil tanker Kirki (formerly named "Maritime Lawyer", we kid you not), suffered an unusual maritime accident. The front fell off. This prompted an imagined interview on Australian television, reproduced in part below. A priceless video of the full interview is available at: http://www.youtube.com/results?search_query=the+front+fell+off&search_type=&aq=f

Interviewer: This ship that was involved in an incident off Western Australia this week (*interrupted by Senator Collins*).

Senator Collins: Yeah, the one the front fell off?

Interviewer: Yeah.

Senator Collins: That's not very typical. I'd like to make that point.

Interviewer: So what do you do to protect the environment in cases like this?

Senator Collins: Well, the ship was towed outside the environment.

Interviewer: Into another environment?

Senator Collins: No, no, no. It's been towed beyond the environment. It's not in the environment.

Interviewer: From one environment into another environment?

Senator Collins: No, it's beyond the environment. It's not in an environment. It's been towed beyond the environment.

Interviewer: Well, what's out there?

Senator Collins: Nothing's out there.

Interviewer: There must be something out there?

Senator Collins: There's nothing out there. All there is is sea, and birds and fish.

Interviewer: And?

Senator Collins: And 20 thousand tons of crude oil.

Interviewer: And what else?

Senator Collins: And a fire.

Interviewer: Anything else?

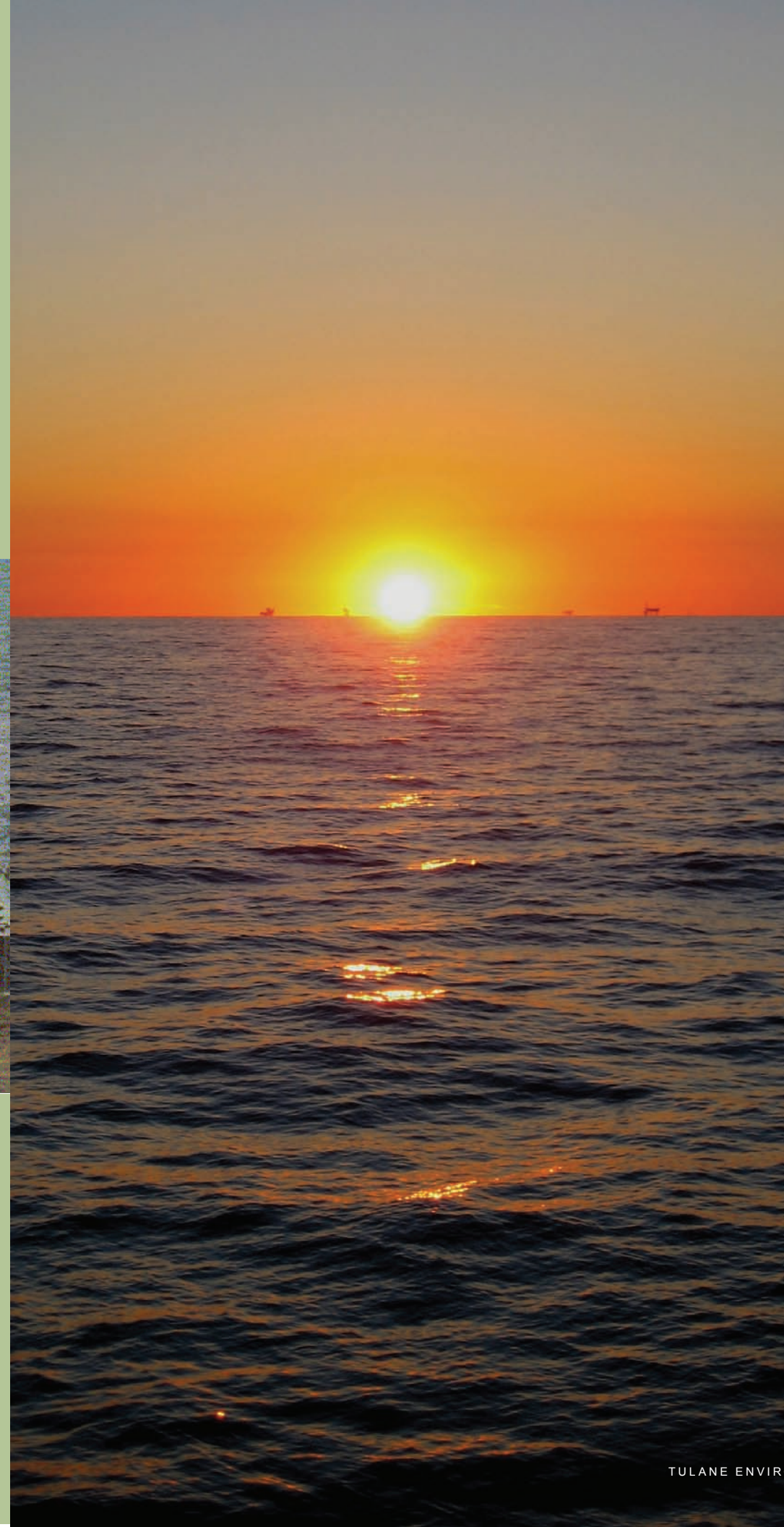
Senator Collins: And the part of the ship the front fell off. But there's nothing else out there.

Interviewer: Senator Collins? (*trails off*)

Senator Collins: It's a complete void.



The Front Fell Off



Outstanding Acronyms Award 2008: from the Idaho Express:

"DOE to do NEPA's EIS ON BNFL's AMWTP at INEEL after SRA protest, Nuclear waste incinerator to get full environmental study"



Greenworks: Alumni Notes

All we do is graduate them.

Here are some recent snapshots of our environmental law alumni in action.

William R. Borah [1960], who led a titanic fight to stop the Vieux Carré Expressway across New Orleans' historic Jackson Square, has just made an encore by drafting and securing City Council approval of a first-ever, legally-binding City Master Plan. The Plan will go to popular vote this fall.

Michael Brady [1989] has left large firm practice to start his own firm in Sacramento, specializing in environmental law with emphasis on RCRA, CERCLA. Latest win, a NEPA case over the access road to a gambling casino. He and his wife now also own a Bed & Breakfast in historic Clifton, Mississippi, and are looking forward to hosting classmates and others there in the years ahead.

Brett Buchheit [LLM 2007] is practicing in Denver, Colorado with the Franklin Law Firm, P.C. He has recently visited the National Mining Hall of Fame, "which is in... you guessed it... LEADVILLE!"

Ilya Fedyaev [LLM 2005] is in Moscow, Russia working as Chief Counsel at CARBO Ceramics (Eurasia) LLC, a subsidiary of the Texas corporation by the same name providing legal support for CARBO in Russia and Commonwealth of Independent States (CIS). CARBO produces ceramic particles that increase productivity in oil and gas wells.

Jamison Firestone [1991] remains in active practice with his firm in Moscow, Russia in the face of Russian government harassment of his clients that has raised protests from, among other organizations, the International Bar Association. Nonetheless, he "loves living in Moscow, despite the lack of law and the weather."

Clay Garside [2005] has an active docket of environmental citizen suits with Waltzer and Associates in Biloxi, Mississippi and New Orleans, Louisiana. Recently settled a CWA citizen suit near Monroe, Louisiana, for chronic permit violations from five sewer treatment facilities, but the consent decree covers 27 similar facilities under the same owner. He is working on another CWA suit over illegal cypress logging and a class action against the taking of private property for the Gentilly landfill.

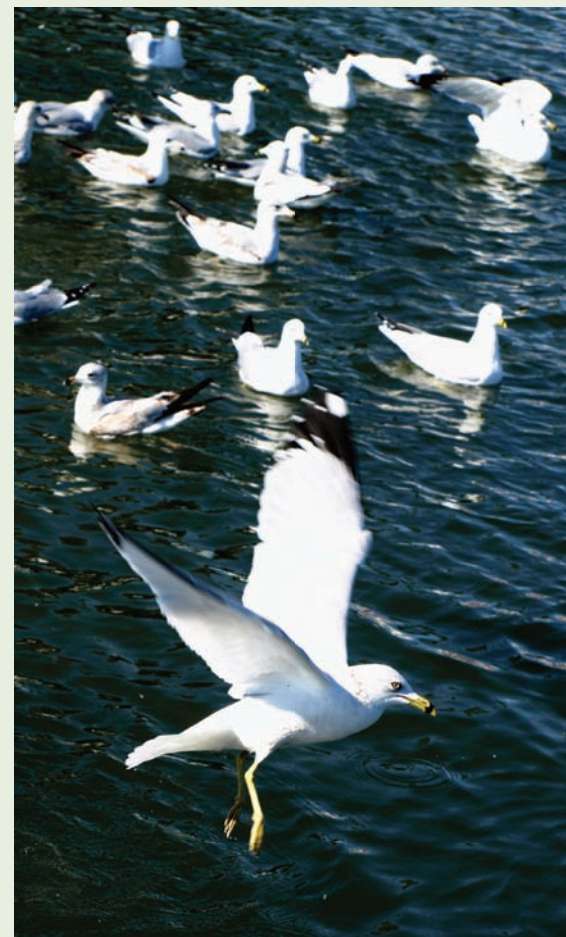
Jesse George [2008] has landed with the Alliance for Affordable Energy in New Orleans, where he is a policy analyst on rate and consumer protection issues.

Andrew Homer [2008] is with Pillsbury, Winthrop in San Diego, California, a firm with a large environmental practice. "Trying to believe my counsel helps our clients get incrementally better."

Christopher Keifer [1998] is representing the National Marine Fisheries Services in Sacramento, California. The case involves Endangered Species Act issues

related to California's Bay Delta and the combined operation of the State Water Project and the federal Central Valley Project, collectively one of the largest water projects in the world. Two pending cases raise the issue of whether ESA-based water requirements constitute "takings."

Leslie Keig [2003] has been the Board Treasurer for the Hill Country Community Clinic in Northern California. She was instrumental in developing LEED green building expansion guidelines embodying commitment to community health in the broadest sense. All this, with 90% of Hill Country's patients low-income and 30% uninsured.



Felipe Leiva [LLM 2002] is in Santiago, Chile, currently representing an Australian hydroelectric power company and "weighing US and EU precedents to help client[s] make sustainable decisions."

Neil Levine [1992] has left the Earth Justice Legal Foundation after fifteen years of service to join the Grand Canyon Trust in Denver, Colorado. He concludes, "not to get sentimental or anything, just wanted to say thanks. I still love what I get to do everyday - 16 years later."

Brian Murphy [2005] has a carbon credits business that is booming in his Washington DC firm, the Washington Group. He is heavily involved in legislative and agency actions. He honeymooned in the Shenandoah Park, hiking and kayaking with his new bride, Tracie, whom he reports "more beautiful than ever."

Brandy Parker [2007] is now with the Eighth Coast Guard District Legal Office in New Orleans, handling, *inter alia*, oil and chemical spills. New Orleans leads the nation in spillage, and Brandy's docket includes a major tank farm in Braithwaite, Fluoroscilic Acid, and the more recent T/V TINTOMARA and T/B DM932 collision and oil spill that shut down the lower Mississippi River for days. According to the press, the captain of the tug was not on board and had turned the controls over to a new apprentice. Sound familiar?

Jason Totoiu [LLM 2004] of the Everglades Law Center has been advancing the dialogue on climate change litigation by participating in the 14th annual University of Florida Levin College of Law Public Interest Environmental Law Conference as well as the annual Everglades Coalition Conference in Captiva Island, Florida.



Julia Magnus, '08, and friend.

Julia is litigating a case involving an Alaskan Malamute left by her owners at a dog kennel, and found on their return with an untreated broken leg. The dog had to be euthanized for her injuries. The lawsuit charges aggravated animal cruelty under Illinois law. Julia is also counseling clients on conservation easements, and has a case pending, *Bjork v. Draper*, questioning whether nearby neighbors of an easement holder may sue to enforce the original conditions of an easement that has been subsequently modified by the land trust. Both are cases of first impression.

Ashley K. Wadick [1991] is working for the Texas Commission on Environmental Quality (TCEQ), and has been appointed as "special counsel" on all "environmental matters" for the Houston Region, which many recognize as the "energy capital of the world." Previously she served as Deputy Commissioner for Resource Management at the Texas General Land Office.

Rachel Welch [2007] is a rates analyst in the energy department of the Minnesota Public Utilities Commission in Minneapolis, Minnesota. "Renewable energy and energy efficient technology was always my first love in environmental law, and so I feel very lucky to get the chance to work with policy and

implementation." Despite the amount of information and "complicated issues I have to dissect, I feel well prepared for the challenge given the instruction at Tulane."

Nicole Adame Winningham [2004] is an associate at Vinson & Elkins, LLP in Austin, Texas. She assists clients with environmental compliance, permitting, and enforcement matters relating to air, waste, and water.

Tulane Environmental Law News

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