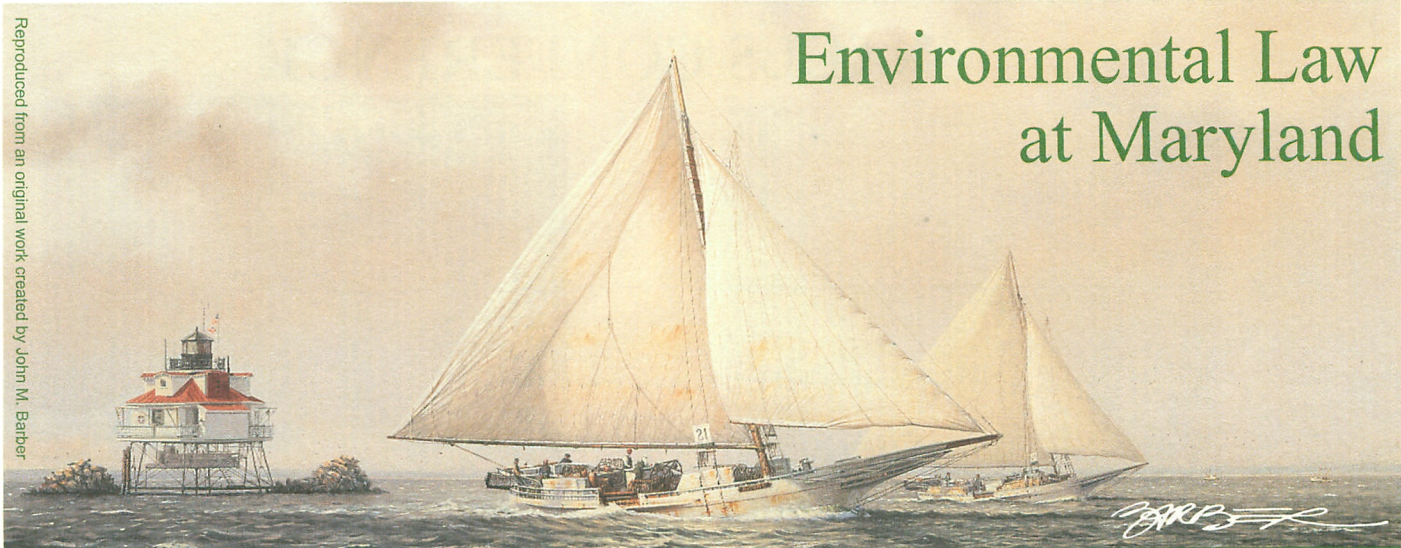


Environmental Law at Maryland



University of Maryland School of Law

Winter-Spring, 2003, No. 16

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NAELS CONFERENCE BRINGS RECORD TURNOUT TO LAW SCHOOL



2003 NAELS Conference
University of Maryland School of Law

*This newsletter is published by the
University of Maryland
Environmental Law Program.*

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Contributors to this newsletter
include faculty, alumni, students, and
friends of the Environmental Law
Program.

More than 130 environmental law students from 40 law schools throughout the nation came to Maryland in March for the annual conference of the National Association of Environmental Law Societies (NAELS). The three-day conference featured presentations from dozens of speakers and a gala reception and dinner at Baltimore's National Aquarium.

Among the featured speakers were Georgetown University law professor Lisa Heinzerling, Dan Magraw, executive director of the Center for International Environmental Law, National Audubon Society senior vice president Robert Perciasepe, University of Washington law professor William Rodgers, Eric Schaeffer, director of the Environmental Integrity Project, Southwestern University Law professor Eileen Gauna, and NRDC attorney Melanie Shepherdson. Professor Rena Steinzor, director of Maryland's Environmental Law Clinic, addressed a plenary session on "The Challenges You Face" (see page 1 of this newsletter).

NAELS CONFERENCE



Professor Bob Percival, panelist on the "Regulatory Reform" panel.



Professor Lisa Heinzerling from Georgetown University Law Center speaks on the "Regulatory Reform" panel.



Jeremiah Baumann with U.S. PIRG and Professor William Rodgers with Univ. of Washington School of Law speak on the "Current Issues in Environmental Legislation" panel.



Melanie Shepherdson with Natural Resource Defense Council speaks on the "Agricultural and the Environment" panel.



Stewart Greenebaum with Greenebaum and Associates and Dru Schmidt-Perkins with 1000 Friends of Maryland speak on the "Smart Growth" panel.



NAELS Board members hold annual meeting.

NAELS CONFERENCE IS A HUGE SUCCESS!!



*Keynote Speaker, Robert Perciasepe,
National Audubon Society*

A year of hard work and planning paid off in March when the Maryland Environmental Law Society (MELS) hosted the annual National Association of Environmental Law Societies (NAELS) conference. More than 130 students from 40 law schools traveled to Baltimore to attend the conference entitled "Protecting Our Planetary Backyard." The conference depended on the hard work of students, faculty, staff, and the generous sponsorship of the law firm Ward Kershaw, LLP, the American Bar Association Section of Energy, Environment and Resources, the Maryland Student Bar Association, and the Chesapeake Bay Foundation.

Local, regional, and national speakers on a range of current issues helped make the conference a success. Keynote speaker Robert Perciasepe of the National Audubon Society provided a historical perspective of changes in environmental law and politics. Highlighting the fact that environmental policy has strayed from its bipartisan beginnings to become increasingly fractious, he suggested that the environmental community must recreate its broad and far-reaching message to regain a more productive atmosphere. Maryland's Professor Rena Steinzor delivered the plenary talk, discussing the many challenges that future environmental lawyers will face (see page 11 for presentation).

Addressing local issues with nationwide relevance, there was a panel on smart growth and agriculture. Dru Schmidt-Perkins, local conservationist and Executive Director of 1000 Friends of Maryland, and local developer Stuart Greenebaum, talked about the on-the-ground functioning and effect of Maryland's smart growth laws. On the Agriculture panel, third year clinic student Shana Jones and Maryland alumna and Natural Resources Defense Council attorney Melanie Shepherdson discussed Maryland's agricultural nutrient runoff problems. Jones evaluated the state's attempt to manage nutrient pollution from the poultry industry while Shepherdson focused on the shortcomings of EPA's total maximum daily load program to address agricultural pollution.

Drawing on national and international environmental experts, the conference also included several panels with a broader focus. For example, the current controversy over the Bush administration's efforts to change the Clean Air Act's New Source Review program was debated by Eric Schaeffer of the Environmental Integrity Project, Professor Eileen Gauna from Southwestern University School of Law, and Maryland alumna Melissa Hearne of Piper Rudnick LLP, representing private industry. Other panels included Regulatory Reform, Current Issues in Environmental Legislation, and Developments in International Environmental Law.

In addition to dynamic panels, students were treated to the best of Baltimore. A "tavern tour" on Friday night provided an introduction to some of Baltimore's unique neighborhoods, including Fells Point and Federal Hill. The conference gala dinner was held at Baltimore's spectacular National Aquarium where participants could tour the tanks at leisure while enjoying food and drink. The only disappointment was when the Baltimore Orioles abruptly canceled their exhibition game with the New York Mets that the NAELS participants had been scheduled to attend at Camden Yards.

MELS received rave reviews about the conference which made all of the hard work worthwhile. Next year the annual conference will be hosted by Lewis & Clark College of Law in Portland, Oregon.

NAELS CONFERENCE



Students and guests fill classrooms to capacity to hear panel discussions.



Above - Speakers on panel "Developments in International Environmental Law," from left to right, Daniel McGraw, CIEL, Paul Hagen, Beveridge & Diamond, and Karin Krchnak, NWF.

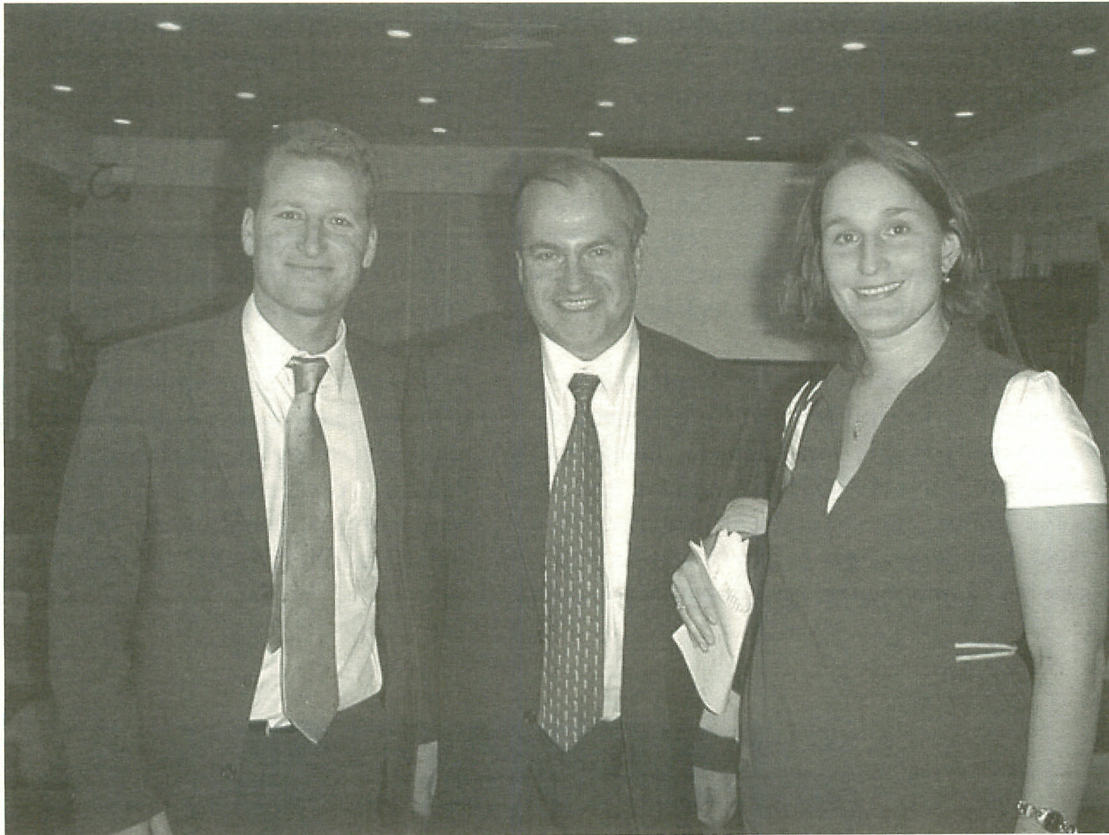


Above - Panelists Eric Schaeffer with Environmental Integrity Project, Melissa Hearne with Piper Rudnick, LLP, and Professor Eileen Gauna with Southwestern University School of Law, speak on the "Clean Air Act and New Source Review" panel.

Right - Conference coordinator, Alison Prost, 2D, University of Maryland; Jessica Merrigan, NAELS Chair, Washington University; Dan Worth, Executive Director, NAELS; Katie Kolarich, NAELS Chair, Lewis & Clark; and Katherine Baer, 2D, conference coordinator, University of Maryland.



MARYLAND HELPS ESTABLISH SOUTH AMERICA'S FIRST ENVIRONMENTAL LAW CLINIC



Professor Robert Percival (center) flanked by University of Chile Environmental Law Professor Patricio Leyton and Valentina Durán Medina from the University's Centro de Derecho Ambiental following Professor Percival's lecture in Santiago on "Que Tan Seguro Es Seguro?"

During the fall semester of 2002, the University of Maryland Environmental Law Program worked with the University of Chile on a project to establish South America's first environmental law clinic. The project, funded by the World Bank and the Chilean Ministry of the Environment, sent Professor Robert Percival, director of Maryland's Environmental Law Program, to Chile for two weeks in late October and early November. Percival spent the time serving as a visiting professor at the University of Chile School of Law, the country's premier law school, which is located in the capital city of Santiago.

While in Chile, Professor Percival, who founded Maryland's highly successful environmental law clinic, advised a multi-disciplinary team of faculty on the details of how to establish and run an environmental law clinic. The University of Chile's School of Law already

operates several clinical law programs, and it has recently established the Centro de Derecho Ambiental (Center of Environmental Law) which conducts research on issues of environmental law and policy.

In preparation for his visit to Chile, Professor Percival made a 55-minute film describing the operation of Maryland's Environmental Law Clinic. The film, which was narrated in Spanish by Associate Dean Jose Bahamonde-González, featured a tour of Maryland's Clinical Law Offices conducted in Spanish by student attorney Jomar Maldonado. It included scenes of clinic students in action and an interview in Spanish with Thomas Perez, director of Maryland's clinical law program. The film, which Percival showed to the University of Chile's law faculty, served as a vehicle for jump-starting discussions concerning the operation of an environmental law clinic.

While at the University of Chile, Percival met daily with faculty working on the environmental law clinic project and he gave three guest lectures to an environmental law class on issues of rulemaking, enforcement, and lessons that can be learned from the history of U.S. environmental law. He also met with the leaders of several Chilean environmental organizations to discuss opportunities for working with the new environmental law clinic. On November 7, Percival presented a major public lecture at the University's Centro de Derecho Ambiental. The lecture on "How Safe Is 'Safe'?" ("Que Tan Seguro Es Seguro") was simultaneously translated into Spanish and accompanied by a Spanish-language powerpoint presentation.

Following Percival's trip to Chile, Maryland hosted two professors from the University of Chile School of Law. Maria Nora González Jaraquemada, director of the University of Chile's clinical law programs, and Lorena Lorca Munoz, director of the environmental law clinic project, spent two weeks in late November and early December examining the operation of Maryland's

environmental law clinic. The professors attended clinic meetings and environmental classes and seminars. They presented a lecture on environmental law in Chile and prepared a comprehensive report making recommendations for how the University of Chile's environmental law clinic will operate. Professors González and Lorca joined Professor Percival's family for a traditional American Thanksgiving Day celebration and they toured Washington including visits to the Supreme Court, Congress, and the World Bank.

It is anticipated that this project will be the first in a series of exciting collaborative projects between Maryland's Environmental Law Program and the University of Chile. The University of Chile had asked Professor Percival to participate in this project as a result of his national reputation in the environmental law field, without knowing about his special relationship to Chile. Percival's daughter is Chilean and he has visited Chile repeatedly, including a return trip last July with his family and the families of other adopted children from Chile.



Maryland environmental law student Jomar Maldonado with University of Chile Professors Maria Nora González and Lorena Lorca during their visit to Maryland.

Maryland Team Wins First Place at National Environmental Negotiation Competition



Christina McGarvey, Paige Poechmann, and Robin Milch

The University of Maryland Team won first place in the Robert R. Merhige, Jr. Environmental Negotiation Competition at the University of Richmond. Maryland was represented by negotiators Robin Milch and Paige Poechmann and coached by Christina K. McGarvey. All three students are in Professor Rena Steinzor's new Counseling and Negotiation: Enforcement and Policy class. The skills that the students learned in Professor Steinzor's course prepared them for the competition, which favors a cooperative style of negotiation. The negotiation competition's philosophy is that a cooperative style of negotiation is more productive and leads to a better result for the client.



Robin Milch and Paige Poechmann receive the award from Judge Robert J. Merhige, Jr.

The problem for this year's competition focused the land application of biosolids. In different rounds, the negotiation team represented a corporation that applied biosolids, a waste treatment authority, an employee indicted for illegal dumping, a county Board of Supervisors, and a water treatment district. The attorney who designed this year's negotiation problems sought out Robin and Paige after the competition to complement them on their "brilliant negotiation" and "flawless execution." A panel of three judges, including Judge Merhige, judged the final round. All three judges complemented the team on developing a solution that not only would benefit their client but that also would benefit the community as well.

STUDENTS WIN "BEST APPLICANT MEMORIAL" AWARD AT STETSON INTERNATIONAL ENVIRONMENTAL COMPETITION



Tracy Kulikowski, Jomar Maldonado, and Shana Jones

Shana Jones (3D) Tracy Kulikowski (4E) and Jomar Maldonado (3D) participated in the Seventh Annual Stetson International Environmental Moot Court Competition held at the Stetson College of Law in Gulfport, Florida last October. Shana, Tracy and Jomar represented the Applicant (plaintiff), a developing country and small island nation, before the International Court of Justice in a dispute with a larger developed country over its transboundary shipments of highly-enriched uranium through the territorial sea between the two countries to a coastal nuclear facility with a history of safety "incidents" reported to the International Atomic Energy Agency. Countering arguments that the developed country's national security interests in light of the September 11th terrorists attacks allowed it to withhold information about the nuclear shipments, they argued that the developed country ignored its affirmative duty under international law to prepare a

new environmental impact assessment, failed to notify and consult with the developing country in violation of several environmental and nuclear safety treaties, and violated the precautionary principle by not suspending the shipments.

Their memorial (brief) won the "Best Applicant Memorial – 2002" award for the competition and was ranked third overall. The University of Maryland team competed against 24 other teams from Australia, New Zealand, India, Canada, Costa Rica and the United States. Students interested in competing in the fall 2003 competition should view Stetson's moot court website at <http://www.law.stetson.edu/excellence/mootct/moot.htm> and see Laura Mrozek.

From the Supreme Court to a Local Brownfield: Environmental Clinic Has Exceptional Year

by Rena Steinzor*

This year's Environmental Law Clinic enrolled ten students for two semesters, with the expectation that each would spend 16 hours/week on clinic work. At the rate that practicing attorneys work, this time translates into three to four full-time attorneys, even when you consider the fact that some students worked more hours than the minimum. (And I know that my former students are rolling their eyes heavenward as they read these lines.) Viewed in this context, the 2002-2003 Clinic's accomplishments were truly remarkable.

To begin at the top level of decision-making bodies, and work down, Christina McGarvey and Christopher Gozdor drafted an amicus brief urging the Supreme Court to grant certiorari in a case involving the disposal of nuclear waste on behalf of the South Carolina chapter of the Sierra Club and the Environmental Working Group. The petition for cert was filed on behalf of the governor of South Carolina who was informed by the Department of Energy that unless he agreed to the federal government's waste disposal plans, the radioactive materials in question would be left in the state indefinitely. Unfortunately the Court denied cert at about the same time the governor's bid for reelection failed, although the legal issues in the case remain relevant to future policymaking in this area.

Gozdor and McGarvey then drafted a set of comments filed with U.S. EPA in a rulemaking to define "maximum achievable control technologies" for brick and structural clay products manufacturing under the Clean Air Act, this time on behalf of the Natural Resources Defense Council (NRDC). The rule was especially important to national environmental and public health organizations because it represented one of the first times that EPA would experiment with risk-based "off ramps" for regulated factories, an outcome that NRDC believes is illegal under the Act. This project had a happier outcome, with EPA reversing course and instead issuing a purely technology-based regulation.

Katherine Baer and Alison Prost also worked on matters for NRDC, ranging from drafting comments on EPA water quality trading policies to the preparation of a 60-day notice letter under the Endangered Species Act. Water quality trading work included the preparation of a

letter to 50 state environmental commissioners outlining the restrictions the Clean Water Act imposes on trading programs and urging the states not to adopt programs that are environmentally damaging and illegal. The notice letter alleges that EPA has illegally failed to consult with wildlife experts at other federal agencies concerning the adverse impact of atrazine exposure on endangered species of turtles in the Chesapeake Watershed. Atrazine is a pesticide used commonly on corn crops. Research by Tyrone Hayes at the University of California indicates that it is an endocrine disrupter for frogs and possibly other aquatic species.

Jomar Maldonado and Jennifer Abbruzzese drafted NRDC's comments opposing impending guidance from EPA that would give far greater latitude to sewage treatment plants that wish to bypass treatment systems when wet weather causes overload on their biological systems.

In another national project, Kristen Klick and Matthew Steinhilber represented Congressman Henry Waxman in his ultimately unsuccessful efforts to file an amicus brief before the D.C. Circuit Court of Appeals in a case brought by the state of Nebraska alleging that the Safe Drinking Water Act is unconstitutional. Although they were disappointed that the court denied the extensive motions made on the congressman's behalf, the oral argument indicated very strongly that the court was inclined to dismiss the case, as the congressman had hoped to urge it to do.

Meanwhile, closer to home, a six-person team of student attorneys (Jennifer Abbruzzese, Jeffrey Barmach, Shana Jones, Kristen Klick, Jomar Maldonado, and Matthew Steinhilber) spent four months at the request of state Senator Brian Frosh researching and writing a report entitled *Keeping Pace: Maryland's Worst Environmental Problems and What We Can Do to Solve Them*. The report involved legal and scientific research, as well as interviews with some 40 stakeholders representing federal and state environmental agencies, industry groups from the Chamber of Commerce to the Farm Bureau, and statewide environmental organizations. It focused on (1) ozone non-attainment in the Baltimore/Washington metropolitan areas; (2) nutrient loading of the

Chesapeake Bay; (3) suburban sprawl; (4) the adequacy of fresh water resources; and (5) the remediation of abandoned brownfields, especially those located in the inner city.

The report concluded that "Maryland's efforts are a mixed picture of success, failure, and perhaps most important of all, lost opportunities. We aren't losing ground in most areas, but we aren't moving forward either, and our worst problems continue to grow." The report said that Maryland had no chance of achieving attainment with Clean Air Act ozone standards by 2005, risking the loss of millions in federal highway funding. It also found that the Chesapeake Bay is "no healthier than it was ten years ago" primarily because of nutrient loading from point and non-point (run-off) sources. Senator Frosh released the 157-page report in December 2002. For a PDF copy or a hard copy, please see order information below.

***TO OBTAIN A COPY OF
KEEPING PACE:
AN EVALUATION OF
MARYLAND'S
ENVIRONMENTAL PROBLEMS
AND WHAT WE CAN DO
TO SOLVE THEM***

For a PDF copy of this document in its entirety, go to the University of Maryland Environmental Law Program webpage at:

<http://www.law.umaryland.edu/environment/>

To order a spiral-bound copy, printed in color, send your name, address, phone number, and email address, along with a check made payable to **University of Maryland** for the amount of \$35.00 to:

**Carole Marshall
Environmental Law Program
University of Maryland School of Law
500 W. Baltimore Street
Baltimore, MD 21201**

Clinic students Jeffrey Barmach, Katherine Baer, Alison Prost, Jomar Maldonado, and Chris Gozdor worked on behalf of the newly-created Patapsco Riverkeeper on a variety of projects, including an inspection of Clean Water Act permit files for five major dischargers along the river. The Riverkeeper recently urged Governor Robert Ehrlich to issue an overdue strategy for lowering discharges of nitrogen and phosphorus from sewage treatment plants.

Shana Jones, Kristen Klick, Matthew Steinhilber, and Chris Gozdor represented the Aberdeen Proving Ground Superfund Citizens Coalition in its ongoing efforts to obtain information from the Army regarding contamination of public drinking water by perchlorate, a component of weapon-grade rocket fuel. They recently completed work on an article entitled *Where the Streets Have No Name: The Collision of Environmental Law and Information Policy in the Age of Terrorism*, to be published in an upcoming issue of the *Environmental Law Reporter*.

At the local level, Jennifer Abbruzzese served as a prosecutor working with the state's attorney on cases alleging violations of the lead paint provisions in the housing code. With Jomar Maldonado, she also provided representation to non-profit Urban Artists, a group offering art education to children, with respect to the donation of building and grounds for after school programs. Student attorneys discovered that the previous owner, a paint manufacturer, had heavily contaminated the property with chemicals, making it unsuitable for the client.

As I trust the above brief summary has demonstrated, the Clinic's track record would be impressive for a small firm of full-time professionals, much less part-time, newly-minted environmental lawyers in waiting.

**Rena Steinzor is Director of the Environmental Law Clinic at Maryland.*

The Challenges You Face

Presentation by Professor Rena Steinzor at the
National Association of Environmental Law Societies Conference (NAELS)
March 28, 2003, Baltimore, Maryland



Professor Rena Steinzor

I often say that I have one of the best jobs in the world. The opportunity to work with young people just beginning to discover the promise and the pitfalls of their chosen careers is never dull, often humorous, and usually inspiring.

When I began teaching at Maryland in 1994, at least half the students enrolled in my clinic had no firm commitment to practicing environmental law. Our school requires that all students take a clinical course before they graduate so there is a steady supply of people who have not chosen a legal specialty. In recent years, though, enrollment patterns have changed and now the vast majority of my students are determined to practice environmental law. It is pretty clear what accounts for this level of commitment: as the earth grows hotter, as new discoveries regarding the effects of pollution proliferate, and as the law becomes ever more complex, this area of practice appears to offer full and challenging employment in a very compelling context.

And yet, none of us can have failed to notice signs that all is not well in our corner of the universe. Beginning with the president of the United States, other concerns have pushed environmental issues off the front page and, some would say, into oblivion. The tragedies that began on September 11, 2001, fundamentally changed not only the nation's priorities, but its basic culture.

A couple of weeks ago, as if to illustrate the profound implications of these changes, the Department of Defense asked for a wide range of permanent exemptions from such environmental laws as the Endangered Species Act, the Marine Mammal Protection Act, and the Resource Conservation and Recovery Act. DOD contends that its mission to ensure national security is not consistent with the requirement that it comply with those requirements. People I talk to on Capital Hill think this breathtaking proposal has a very good chance of passage – and they are staff who work for members that irrevocably oppose the legislation. It is just a matter of time before regulated industries point out the hypocrisy of exempting the government's polluting practices but making them toe the line.

When I graduated from law school in 1976, EPA was only a few years old, and Congress had yet to pass most of the landmark legislation that defines the nature and scope of the legal practice you will undertake. In 1983, I joined the staff of Congressman James Florio, who, along with Congressman Henry Waxman, Senator Bob Stafford, and others too numerous to mention, was instrumental in passing those laws. By that time, a second wave of environmental activism was sweeping the nation, in part as a rebuke to otherwise popular president Ronald Reagan. President Reagan, whatever else he may have been, was no friend of the environment. In fact, he is famous for the claim that trees cause pollution, prompting one demonstrator against his environmental policies to mount a sign on a tree saying: "Cut me down before I kill again." In those days, environmental legislation was a genuinely bipartisan endeavor, motivated by a powerful groundswell of public opinion supporting aggressive government intervention.

Today, you emerge into practice in no less interesting, but in many ways more challenging, times. Without any evidence that public opinion has changed, the regulatory regime is under sustained and increasingly debilitating attack. Bipartisanship, with a few notable exceptions, is gone and even partisan Democrats are too preoccupied with the dangers of terrorism abroad to attend to this domestic agenda.

My goal this morning is to lay out the challenges you will face as you move into practice, predicting what lies ahead for you, a generation charged with the responsibility for making a major mid-course correction in the development of environmental law at a time when regulation has allegedly become burdensome and unnecessary for too many powerful constituencies. At times, these predictions will sound negative, even demoralizing, although I do not intend to convey any sense of hopelessness and ennui. Ultimately, for the same reasons I enjoy my job, I am confident that you will find a way out of this quagmire, for the sake of my children, your children, and their children.

Conditions Precedent

Because I am an academic, and we are paid to think this way, I have organized my predictions into themes, presented below in rough order of their likely importance to your professional lives. As you consider these predictions, please keep a few conditions precedent firmly in mind.

The first condition precedent is that, for the foreseeable future, Congress will remain gridlocked on environmental issues, unable to take decisive action in any particular direction. In many ways, on domestic issues like the environment, the country remains as closely divided as we were right after the Supreme Court's disgraceful coda in *Bush v. Gore*. Only an event as powerful as September 11 could obscure this fundamental fact. With Congress essentially out of the action, except with respect to sporadic and damaging lawmaking by appropriations rider, most of the action is at the administrative level.

Unfortunately, it is increasingly clear that at that level, EPA is not the master of its own destiny. I am not someone who believes in the Marxist dialectic – that is, let's let everything get really, really bad, and then – in the crucible of revolution – we can forge a new world. Rather, as a committed pragmatist, I was relieved when Christie Todd Whitman was appointed EPA Administrator. But it has become clear that EPA under Whitman has no

real clout within the Administration and too often is pushed to the forefront to disguise anti-environmental policies with her moderate face. Those policies are developed within the White House, particularly at the Office of Management and Budget.

Another place where a lot of action is underway, for both good and bad, is at the state level. Some important innovations are occurring there, as well as considerable mangling of regulatory requirements and, as a result, the rule of law.

Finally, it is worth remembering that the most important breakthroughs in environmental policy over the last 100 years have been produced by catastrophes, and this particular cycle is unlikely to prove an exception. From the green rivers of Rachel Carson, to the steaming heaps of toxic waste at Love Canal, to the dense clouds of smog that choke our major cities, we get inspired when we can see what we are doing to the environment up close and personal.

OK, so where does that leave us: Congress paralyzed, deregulators in the driver's seat, states both the hope and the bane of the future, and catastrophe a likely catalyst? Sounds pretty bad. But as Margaret Mead once said, "Never doubt that a few good people can change the world. Indeed, it is the only thing that ever does." Here are my predictions of what you will face and what you might do about it.

Major Themes

Theme 1: Unduly complex, "technified" law and hollow government are cruising for a bruising, as the country singers would say.

When I last calculated EPA's budget in real dollars – that is, I took the dollar amounts of the budgets for the last several years and translated them into current dollars, taking into account inflation and other effects on EPA's purchasing power, the analysis showed that the Agency had essentially the same purchasing power in the late nineties as it did in the mid-eighties, before passage of the 1990 Clean Air Act, the Superfund Amendments and Reauthorization Act, and major reauthorizations of the Clean Water Act, the Safe Drinking Water Act, and other major laws. The gap between the money and the mandates is frightening, not least because it is never acknowledged by EPA's leadership. Six administrators, from Russell Train to Christie Whitman have not cried "crisis."

The lack of money means, among many other things, that EPA almost never is on time with regulatory activities, even when Congress orders it to take action by a certain date. Think about that for a moment: what kind of hell do you suppose would break loose if Congress ordered any agency to do something, and it routinely failed to respond to the mandate? The entire state of affairs damages the integrity of the administrative state and, ultimately, the American people's faith in Congress.

At the state level, the situation is even worse, with no end in sight. Consider that the Maryland Department of the Environment had a budget of \$232 million in FY 2000. In FY 2001, that amount dropped to \$160 million, a precipitous decrease. The budget for this year is supposedly \$169 million, but rests on such crazy bookkeeping that the outcome is likely to be much less.

As a practical matter, what does this mean? This fall, the Environmental Clinic did a report for state Senator Brian Frosh entitled "Keeping Pace: Maryland's Most Important Environmental Problems and What We Can Do to Solve Them." Among other things, the students studied the resource to mandate ratio of our state environmental agencies. They discovered that there are just 18 qualified inspectors to check on compliance with the Clean Air Act at some 10,000 permitted sources within the state.

Imagine yourself in private practice here – or in your state since I am confident things are the same everywhere in this respect. What would you tell a client who asked what the chances are that regulators will ever check compliance? Although I fear it may sound like self-interested whining, the combination of hollow government and stringent law puts environmental lawyers in an awful position. You can tell the client she is unlikely to be caught, but if she is caught, the consequences are daunting.

Your generation – if you do nothing else – must persuade the American people that we must spend more on government, or risk losing ground not only with respect to environmental quality, but to the credibility of government as a whole.

Theme 2: Contrary to a very expensive and unrelenting media campaign by regulated industries and their conservative allies, so-called "first generation" environmental problems are not solved.

Some commentators on environmental law have grown bored with the so-called "first generation" environmental problems, and repeatedly urge us to move on to "second generation" concerns. They also couch the argument in terms of "low hanging fruit," contending that we have mastered the easiest and best sources of pollution and must now move on to more subtle, more intractable problems.

Again, let's use Maryland as a test case for these assumptions. Maryland's air quality consistently fails to meet federal health standards for ground-level ozone or smog. The Baltimore metropolitan area and adjacent counties are ranked as "severe" nonattainment, while the Washington metropolitan area and adjacent counties are now ranked as "serious" nonattainment, but will soon be moved up to "severe." In fact, the Baltimore metropolitan area has the fifth worst air quality in the nation for ozone.

If you and your families live near Houston, New York, Atlanta, Chicago, Los Angeles, or any of the couple of dozen major metropolitan areas now choking on their ambient air, you know the gravity of these situations. Ground-level ozone, or smog, has been linked to a wide range of adverse health effects, from respiratory diseases to headaches and nausea. Children, the elderly, and those with respiratory problems are especially at risk for ozone related respiratory problems. Some 50,000 children with pediatric asthma suffer from these conditions, along with 208,000 adult asthma victims. You can look up the numbers for your own state and city on the American Lung Association web site.

Congress first set deadlines for urban areas to achieve compliance with the ozone NAAQs by 1977. These deadlines were extended twice, most recently in 1990. The Washington, D.C. metropolitan area was required to come into compliance by 1999, and the Baltimore metropolitan area is required to meet the ozone NAAQS by November 2005. No one – I repeat, no one – with any understanding of what is really going on in this area thinks we will make that deadline, although government officials have yet to admit that sad fact publicly. When EPA's new fine PM and ozone standards go into effect, we will fall even further behind in the attainment marathon.

Now the manufacturing sector often argues that the root cause of this dilemma is the SUV. Or, in other words, the problem R Us. While there is substantial truth in the contention that motor vehicles must be dealt

with if we are ever to solve this problem, this observation must not become a smoke screen for other root causes. Again, to use Maryland as a case study, the precursors of ozone are NO_x and VOCs. Large stationary sources contribute 49% of NO_x emissions, and smaller area (industrial) sources contribute another 5 %.

Like citizens of many other states, Marylanders also face the emerging threats of hazardous air pollution (HAP) and fine particulate matter (PM) pollution. HAPs travel through the ambient air as gases or are attached to fine particulate matter (PM), and include such substances as benzene, which is found in gasoline; perchlorethylene, which is emitted from some dry cleaning facilities; and methylene chloride, which is used as a solvent and paint stripper by a number of industries. Diesel particulates from large trucks are another major source of such pollution. Fine PM poses an even more serious health threat than ozone pollution because it easily reaches the deepest recesses of the lungs, where it can accumulate in the respiratory system, causing both chronic and fatal adverse health effects.

ZZ

Once again, while cars are a source of hazardous air pollution, the manufacturing sector, and the heavy trucks that support it, cannot be overlooked.

Your generation – if you do nothing else – must resist facile but tempting arguments that we have solved the problem of industrial pollution and can move on without looking back. We must move on, to be sure, but we cannot afford to abandon the search for more effective control on this sector of the economy.

Theme 3: We have yet to find the political will and the financial resource we need to address so-called “second generation” problems.

There are many examples of such challenges:

- Nutrient loading in our great lakes, rivers, gulfs, and bays caused by run-off from agricultural land, which causes red tides and other increasingly severe ecological disasters. This is the major threat to the Chesapeake Bay;
- Climate change, which involved emissions from every country, with the developed world providing the lion’s share;

- And, as we have already seen, human kind’s love affair with the automobile.

My generation has been commendably creative in this area, developing all kinds of alternatives to traditional regulation. Most prominent among them are proposals to use emissions trading, a la the acid rain program, to allow sewage treatment plants to subsidize nutrient reductions by farmers, and developed countries to subsidize pollution prevention in undeveloped countries.

The major fly in the ointment here is that we cannot implement these alternatives effectively without a lot more information about two distinct issues:

1. Levels of actual pollution emitted by sources now. If we do not have reliable monitoring data we will never know what we are trading and trading will sag under the weight of fraud and other financial opportunism;
2. Levels of contamination that the air and water can sustain without destroying nature and public health. If we do not know what pollution burden any given natural resource can sustain, we will trade for the sake of reducing compliance costs without making anything better.

So, the good news is that my generation has had some bright ideas. The bad news is that we will inevitably leave them to you to implement successfully.

As for the lurking and important question of how we lick the problem that pollution R us – my generation is, quite frankly, an embarrassment. Assuming that most of you have yet to amass the resources to become truly selfish and destructive consumers, and that on that basis there is hope for the world yet, consider what your elders have done, again using good old Maryland as an example. Some 54% of the state’s emissions of the second precursor of smog – volatile organic compounds – are contributed by mobile sources such as cars, SUVs, vans, and trucks.

As all of us know, cars are getting bigger and dirtier all the time. Congress repeatedly ducks improvements in fuel economy standards and even where we have made gains in suburban sprawl and population control, those gains are eaten up by our gas guzzling transport and our penchant for roaming the roads. In Maryland, the increase in vehicle miles traveled has outpaced population growth by a significant margin.

Over the long-run it is not an exaggeration to say that our cities will become uninhabitable – resembling a scene in a “Mad Max” movie – unless we accomplish behavior change at the retail level. Your generation – if you do nothing else – must convince the American people that the price we pay for driving whatever we want are no longer supportable.

Theme 4: There are multiple problems with the ways we process science:

1. We struggle with a huge information gap.
2. Science in the regulatory arena is rigged and biased
3. We are in an absolute muddle about the distinctions between policy and science and law and science

The gaps in our basic knowledge about the toxicological effects of common chemicals are shocking. In the context of this almost unimaginable ignorance, and the completely inadequate efforts to address the gaps in our knowledge, demands by industry and others that regulatory action stop until scientific certainty is achieved are in fact a recipe for interminable gridlock in the absence of a large influx of government money for scientific research.

For example, in a report covering 2,863 organic chemicals produced or imported in amount above one million pounds annually, EPA concluded that there is no toxicity information available for 43% of such chemicals and that a full set of basic toxicity information is available for only 7%.

The American Chemistry Council (ACC) finds this situation sufficiently troubling that it volunteered in 1999 to conduct tests of some of those chemicals. The total budget for this testing program is \$67 million, with annual spending reaching a peak of \$25 million. No question that this amount is impressive, especially in the context of how little has been spent to date. But before we get too excited, we must also consider that in June 2002, the Council announced that it has decided to launch a new advertising campaign to improve the public image of the chemical industry. The price tag of that effort will reach \$50 million during the peak year of the campaign, and a total of \$86 million will be spent overall.

Your generation – if you do nothing else – must champion a thirst – no, a demand – for better knowledge about chemicals and their interaction with the environment, moving us from ignorance to wisdom.

A second aspect of the science dilemma that confronts you is that, when we do have information, it is invariably generated by companies who make the products we are concerned about. Now, don't get me wrong – I am not arguing that turning this job over to the government is a silver bullet for this problem, and – in any event — that outcome is extremely unlikely. Industry scientists will remain front and center as we struggle to use science more wisely. The real issue is not their participation, but the lack of participation by other experts.

For centuries, scientists have engaged in their search for the truth by circulating the results of original research among their colleagues, first for informal discussion and then for formal, external peer review.

Progress is made when colleagues first repeat work accomplished by others and then extend the experiments into additional areas. By exposing all of the underlying elements of one's work to inspection by dispassionate peers, and revealing details sufficient to replicate results, researchers build on others' successes and avoid others' failures.

The transparency of results and the impartiality of conclusions derived from those results are the indispensable foundation of sound science. Peer review and replication are the only reliable methods to ensure that experiments are conducted in a scientifically appropriate manner and that the results and conclusions presented by the researchers are supportable by the data generated.

Industry scientists and technical experts overwhelmingly dominate the scientific advisory groups used by EPA and other agencies to set policy. They are powerful enough to have achieved the following in just the last couple of years: (1) persuaded EPA to downgrade the toxicity of the notorious chemical vinyl chloride by 20-fold; (2) stifled the release of a 10-year study showing that dioxin is even more dangerous to public health than originally thought; and (3) badgered EPA Administrator Christine Todd Whitman to withhold a rule toughening standards for arsenic in drinking water despite extraordinarily persuasive scientific evidence that existing, 50-year-old standards were far too weak.



In a similar vein, the General Accounting Office concluded in June 2001 that EPA's Science Advisory Board (SAB) routinely neglected to obtain information regarding the sources of funding received by candidates for peer review panels appointed to assure the soundness of the scientific research used by the Agency to make decisions. As just one example of the implications of this negligence, GAO found that two of the panelists who participated in a decision *not* to upgrade butadiene to a known human carcinogen in fact owned stock in companies that marketed the chemical. Neither made this disclosure prior to their selection.

It has also become far too common for industry scientists to submit studies to EPA without disclosing the underlying data that supports their conclusions. In the absence of this data, any effort to double check the reliability of the study conclusions is crippled at the outset.

Your generation - if you do nothing else - must find a way to return us to the ideals articulated by Albert Einstein, when he said:

The right to search for truth implies also a duty: one must not conceal any part of what one has recognized to be true.

Theme 5: Last but not least, we have the growing dilemma of secrecy, motivated by our fear of terrorism and flagging commitment to open government.

No one can question that recent attacks on America, from assaults on the military and our embassies abroad to the slaughter of thousands on September 11, 2001, have changed forever the nation's willingness to provide opportunities for terrorists to wreak havoc on our democratic way of life. Extraordinary times require extraordinary efforts. As we sit here on this lovely spring day, the nation is at war abroad. At home, the federal government is determined to ensure that the freedom of our society is not used to sabotage it.

One byproduct of that commitment is a new law, the Critical Infrastructure Information Act, which was passed as part of the Homeland Security Act. The Act allows companies to submit "critical infrastructure information" voluntarily to the department of Homeland Security, receiving in return:

1. Permanent protection from disclosure; and

2. A bar on the use of the information to impose civil liability on the submitter in either state or federal court.

Critical infrastructure information (CII) includes virtually any information about physical or cyber infrastructure that could prove useful to terrorists or others intent on causing damage to the facility and is not otherwise in the public domain.

Now, you may say, that makes sense. I'd rather give up access to details about the local chemical plant or water treatment facility than run the risk that Osama bin Laden will download the same data from the Internet and use it to harm me and my neighbors. I'm with you on that one.

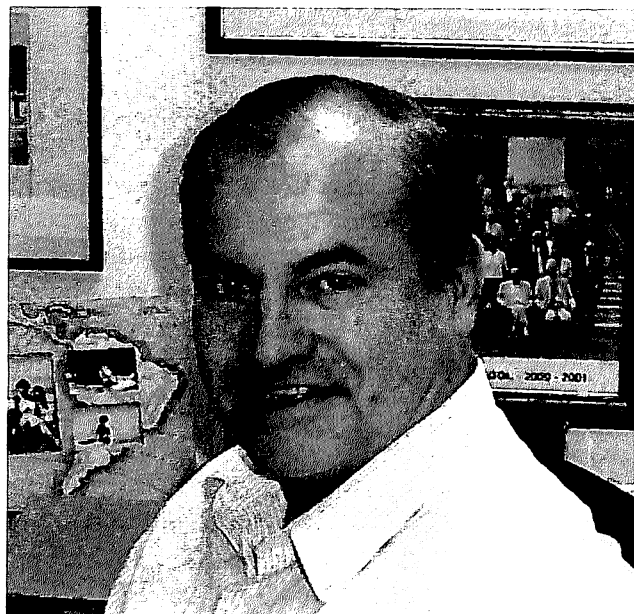
But consider the plight of about 10,000 ordinary people who live near the Aberdeen Proving Ground, about 30 miles north of here. The Army has discovered perchlorate in their drinking water. Perchlorate is a component of rocket fuel and is both persistent and mobile in the environment. It disrupts the uptake of iodine by the human thyroid, and can be extremely harmful to the developing fetus. To this point, the Army, and the companies that manufacture the chemical – huge defense contractors Lockheed Martin and Martin Marietta — have stonewalled any effort to divert this contamination from the community's drinking water wells. Recently, it became difficult for the community to get clear information on the location of the chemical plume in relationship to the drinking water wells supplying water for their homes.

Osama bin Laden, in the remote event that he would be interested, should not be given information that would allow him to blow up those wells. But there is a steep price to pay if we simply shroud such information in secrecy, cutting off the public's right to know.

Your generation - if you do nothing else - must find a way to make sure that we do not play into the hands of those who would destroy us by turning our society into one that is more like theirs.

COMPARATIVE ENVIRONMENTAL JUSTICE PROJECT TRAVELS TO JAPAN

PROFESSORS TO CO-TEACH COMPARATIVE LAW



Professor Robert Percival

In April, Professor Robert Percival, director of Maryland's Environmental Law Program, traveled to Japan to present a paper and to deliver a public lecture as part of a continuing project on comparative environmental justice. Percival presented his paper, "The Multiple Dimensions of Environmental Justice: Equal Protection, Regulatory Fairness and Intergenerational Equity – The Case of the United States," at a conference on Perspectives on Environmental Equity in Japan, Germany, and the U.S. held in Shonan, Japan from April 11-14.

The conference, which was sponsored by the Japan Foundation Center for Global Partnership and the Tamaki Foundation, brought together environmental scholars from Japan, Germany, Great Britain, and the United States to discuss how issues of environmental justice are addressed in each country. The conference was organized by Professor Miranda Schreurs of the University of Maryland's Department of Government and Politics, who is leading the Tamaki Foundation's project on comparative environmental justice. Conference participants will reconvene in Munich, Germany in late August to present the final versions of their papers, which will be incorporated into a book on comparative environmental justice to be published next year.

Following the conference, Professors Schreurs and Percival delivered public lectures at a Symposium on the Equity Dimension in Environmental Policy, which was held at Aoyama Gakuin University in Tokyo on April 16,

2003. Professor Percival spoke on "The Globalization of Environmental Justice" while Professor Schreurs spoke on "A Comparative Examination of the Link Between Equity and Environmental Protection."

During the spring semester of 2004 Professors Percival and Schreurs will co-teach a seminar on Comparative Environmental Law and Politics. The seminar will include both law students and graduate students from the University of Maryland at College Park with each set of students participating in classroom sessions through videoconferencing technology. Videoconferencing also will be used to present guest lectures from leading environmental scholars around the world.

While in Japan, Professor Percival was excited to attend a Japanese baseball game at the Tokyo Dome and to discover that all New York Yankee games are broadcast live there due to Hideki Matsui joining the team.

PERCIVAL SERVES AS LEWIS & CLARK DISTINGUISHED VISITOR

In September 2002, Professor Robert Percival, Director of Maryland's Environmental Law Program, spent a week in Portland as the Distinguished Visitor at Lewis & Clark's Natural Resources Law Institute. During his week at Lewis & Clark, Professor Percival gave guest lectures on environmental enforcement and presidential oversight of rulemaking and he led an L.L.M. seminar discussion of Bjørn Lomborg's *Skeptical Environmentalist*. Percival's review of Lomborg's *Skeptical Environmentalist* "Skeptical Environmentalist or Statistical Spin-Doctor?: Bjørn Lomborg and the Relationship Between Environmental Law and Environmental Progress," has been published at 53 Case W. L. Rev. 263 (2002).

On September 26, Percival delivered Lewis & Clark's annual Natural Resources Law Distinguished Visitor Lecture. His topic was "Greening the Constitution – Harmonizing Environmental and Constitutional Values." The lecture focused on why constitutional concerns should not be an obstacle to efforts to protect the environment, despite increased efforts to use constitutional issues to challenge federal regulatory programs. Percival's lecture has been published in Lewis & Clark's law review at 32 Env. L. 809 (2002).

Environmental Enforcement in Australia

by Jonathan D. Libber*



Presentation in Sydney to the New South Wales Environmental Protection Agency.

I recently made a series of twelve presentations in Australia regarding environmental enforcement issues on behalf of the U.S. EPA. The presentations occurred in Perth, Adelaide and Sydney. The main topics of the meetings were: EPA's civil penalty program; the U.S. experience with its community right to know law, EPCRA; the EPA's use of civil judicial and administrative enforcement approaches, the use of supplemental environmental projects (SEPs) to mitigate civil penalties; and the EPA's experience with its enforcement audit policy (i.e. violators that self report violations and agree to promptly correct them only have to pay the economic benefit portion of their civil penalties).

The audiences were an environmental law workshop for the public held at the Western Australia School of Law in Perth; a joint meeting of the South Australian branches of the Waste Management Association of Australia and the Institute of Environmental Engineers (these groups are composed of companies and consultants in the solid waste and hazardous waste industry); and various groups of enforcement personnel from the environmental agencies of the three Australian states that I visited.

In Australia, virtually all environmental enforcement occurs at the state level in the form of criminal prosecutions. In addition, the tradition in Australia is that it is inappropriate for prosecutors to argue for a specific

penalty amount as judges will see it as impairing their discretion to set penalties. This makes it impractical for enforcement personnel to make a case for a certain penalty in the enforcement action. Rather, the attorneys representing the enforcement agencies talk to the presiding judges about the level of criminal fine in a very general sense. There was naturally a great deal of interest in the U.S. EPA's civil judicial and administrative enforcement approaches.

There was also a great deal of interest in EPA's civil penalty authority and its policy of recapturing any economic gains a violator may make as a result of its violations. There was thought among many of the enforcement personnel that it would be appropriate for the government attorneys to make a judge aware of how much money was probably saved through the violator's illegal conduct. Thus there was very keen interest in my demonstration of the computer model BEN¹. BEN is a user-friendly computer model that quickly calculates a violator's economic savings from delaying and/or avoiding noncompliance. Many thought that the BEN model approach could be implemented easily in Australia. There was also interest in EPA's greatly simplified "rule of thumb" approach for calculating economic savings. This approach predated the BEN model by about nine months but has been used sparingly. Nevertheless, for small uncomplicated cases, this approach might be very effective.

In regard to United States experience with its EPCRA statute, the Australian audiences were interested in a comparison with its Australian counterpart, and they wanted to know how it was working. The Australians have started with a very cautious approach to this type of regulation. Their statute only covers less than 100 substances, and the reporting requirements are not mandatory for many regulatees. I contrasted the U.S. approach with its mandatory reporting, EPA's enforcement against nonreporters. I then discussed the Toxics Release Inventory (TRI) and how it has revolutionized the dialogue between concerned citizens and the producers and users of toxic chemicals.

Perhaps the greatest area of interest was in EPA's administrative and civil judicial enforcement program.

The fact that an environmental enforcement agency could bring its own civil proceedings against polluters was a somewhat novel idea. Many of the Australian enforcement professionals were clearly frustrated with the limitation that all enforcement was criminal. Not only did they really like the idea of using a streamlined enforcement process, but they liked the idea of having a cadre of administrative law judges specializing in environmental law. In one of the states, South Australia, the state parliament was considering legislation to grant that authority to the South Australian EPA. During the question and answer period of my presentation, the agency people responsible for proposing the legislation were taking notes and modifying the draft legislation in response to some of the issues discussed.

There was only mild interest in U.S. EPA's use of supplemental environmental projects (SEPs) to mitigate penalty liability. In order to promote settlement and gain the most for the environment, EPA will allow a violator to agree to perform an environmentally beneficial project not required by law in order to mitigate the civil penalty. EPA must decide if the SEP is acceptable and determine how much mitigation is appropriate. EPA could decide that the project is unacceptable, or that it is only entitled to mitigation worth 60% of it out of pocket cost to the violator. While some of the enforcement professionals found this intriguing, there was a real question of how usable this idea would be in Australia at the current time. Since virtually all of the enforcement is criminal, and there is very little negotiation over the penalty for fear of interfering with judicial prerogatives, the SEP concept is probably not useable in its current form in Australia.

Similarly, there was only mild interest in the U.S. EPA's enforcement audit policy. As mentioned above, the EPA gives substantial penalty breaks for entities that voluntarily report violations before we discover them. The usual offer we extend is eliminating the gravity (i.e. the seriousness) part of the penalty and only seeking to recapture the violator's economic savings from violating the law. While this has worked very well in the United States, it would not have much relevance in Australia due again to the lack of civil judicial and administrative enforcement authority.

I did manage to have some close encounters with some of the unique fauna in Australia. As a reward for flying



Feeding a kangaroo in Adelaide.

half way around the world, my contact at the EPA of South Australia took me for a tour of the Cleland Wildlife Park located in the hills surrounding Adelaide. We saw a large number of reptiles native to Australia including a number of very poisonous snakes. We also saw a large variety of marsupials including bilbies (they look like a cross between a kangaroo and a rat), wombats, kangaroos, koalas, Tasmanian devils, and some mouse-like creatures. The Park's personnel will actually allow physical contact between the visitors and some of the animals, so I got to hand feed some of the kangaroos and pet a koala. We also saw some native birds including parrots, budgerigars, black swans, coots, plovers and ducks.

One of the key advantages of e-mail is that now that I have established contact with the enforcement personnel in the three states I visited, I have been getting a steady stream of inquiries regarding various aspects of EPA's regulatory program. While we tend to be highly specialized, and the questions are frequently out of my area of expertise, I can usually locate someone in the EPA to respond to their questions. Thus the exchange of ideas that marked my two weeks in Australia is continuing.

¹The BEN model can be downloaded from internet at: <http://www.epa.gov/compliance/civil/programs/econmodels/index.html>.

**Jonathan Libber (J.D. Maryland 1978) currently serves as a Senior Attorney in EPA's Office of Enforcement and Compliance Assurance. He has been there for the past 24 years where he works primarily on civil penalty issues and financial issues that impact enforcement litigation. This article expresses the views and observations of the author and does not necessarily reflect the views of the U.S. EPA.*

The University of Maryland School of Law
Environmental Law Program
and the
American Bar Association
are pleased to announce:

***CONFERENCE ON WATER WARS IN THE EAST:
THE NEWEST LEGAL BATTLEFIELD***

May 30, 2003

8:00 am - 6:00 pm

University of Maryland School of Law, Nathan Patz Law Center

Sponsors: American Bar Association Standing Committee on Environmental Law, ABA Section of Administrative Law and Practice, ABA Section of Environment, Energy, and Resources, ABA Section of State and Local Government Law

Join lawyers, water consultants, and other professionals for this interdisciplinary law and policy conference that brings into focus critical water supply challenges that have begun to face the Eastern United States. The growing frequency of water shortages has led to water use bans, development limitations, and interstate struggles over shared water supplies. A mix of local zoning regulations, state-wide "smart growth" policies, federal utility licensing requirements, and regional watershed agreements, among other factors, complicates the search for solutions. Faculty will address FERC relicensing; interstate battles over water; state law developments; local regulation of water use; and the future of water supply in the East. The law firms of Blank Rome LLP and Beveridge & Diamond, P.C., will host a reception following the program. Please visit <http://www.abanet.org/publicserv/environmental/> to view the brochure on-line and to register. You also may call the ABA at 202-662-1694 to request a printed brochure.