

Fall 2006

## Environmental Law News - Fall 2006

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# ENVIRONMENTAL LAW NEWS



GOLDEN GATE UNIVERSITY

School of Law

Fall 2006



## New Staff Attorney Brings Biodiversity Expertise to GGU Clinic

**B**rent Plater, the former Bay Area director for the Center for Biological Diversity, has joined Golden Gate University School of Law as a visiting assistant professor and staff attorney with the law school's Environmental Law and Justice Clinic (ELJC).

Plater's résumé reflects his longstanding commitment to environmental protection and experience as a teacher and litigator. In addition to directing San Francisco Bay Area programs for the Center for Biological Diversity, a nonprofit organization dedicated to protecting endangered species and wild lands worldwide, Plater has taught environmental law to undergraduates at Boston College and served as an environmental law fellow at Faegre & Benson in Minneapolis.

Plater also worked as a law clerk at the Environmental Law Foundation and as a conservation intern for the National Wildlife Federation. Plater continues to serve on the Wildlife and Endangered

“Creating a just and sustainable society begins in the classroom, but can be accelerated in the courtroom.”

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## GGU Hosts Renewable Energy Conference

Golden Gate University School of Law will host “Renewed Interest: The Renewable Energy Sector,” an all-day conference, on Friday, November 17.

The event is a companion to the forthcoming “Renewed Interest” Symposium Edition of the new *Environmental Law Journal* (see page 4). Mary Nichols, former secretary of the California Resources Agency, will serve as keynote speaker. The conference will feature presentations on renewable policy at the California Energy Commission, renewables under international trade agreements, and regulation of the wind, wave and solar energy sectors.

For more information, please contact Conference Director Paul Kibel at 510-499-1649 or [psk@policywest.net](mailto:psk@policywest.net) and see page 6.

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Visiting Professor Discusses Endangered Species Act at the Commonwealth Club

Environmental Moot Court Team Makes Quarterfinals

New Environmental Law Journal

Environmental Law Clinic's City Parks Project

Slovenian Environmental Law Professor Visits GGU

## GGU Students Place Second in Statewide Competition

**N**athan Whittington and Cember Picconi, now third-year law students at Golden Gate University, won second place in the 7th Annual Student Environmental Negotiations Competition, which was held at the UCLA School of Law in March.

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Cember Picconi and Nathan Whittington

## Clinic Earns Excellence Award

**G**olden Gate University's Environmental Law and Justice Clinic received the Clinical Legal Education Association's Spring 2006 Award for Excellence in a Public Interest Case. The ELJC earned the award for its 12-year effort working with community groups to rid Southeast San Francisco of fossil fuel power plants. More than 40 students worked on the project over the years, along with the Clinic's faculty attorneys and graduate fellows.

A predominantly African-American community of about 30,000 people, Southeast San Francisco has been disproportionately targeted for polluting industries. In fact, more than half the land in San Francisco zoned for industrial use is in the Southeast San Francisco neighborhood of Bayview-Hunters Point. There are two Superfund sites, two old and heavily polluting power plants, 100 brownfield sites, 325 underground petroleum storage tanks and more than a third of the city's 1,263 hazardous waste generators. The neighborhood is also home to a highly contaminated naval base and a sewage treatment plant that emanates noxious fumes while handling 80 percent of the city's solid waste.

As a result of ELJC's collaboration with community groups, two proposals to build new fossil fuel power plants in the area were defeated. Furthermore, PG&E shut down its half-century-old power plant this year and California plans to cancel its contract with the remaining plant in 2007.

The Clinical Legal Education Association was founded as a nonprofit in 1992 and now has more than 600 members.

## Thrillers, Killers, & Chillers

By Jill Goetz

*In a packed lecture at the Commonwealth Club, Visiting Professor Brent Plater made an impassioned plea to protect the Endangered Species Act—and vividly illustrated the dire consequences if we don't.*

**S**chool of Law Visiting Assistant Professor Brent Plater invoked the names of Ludwig von Beethoven, Michael Jackson, and Mark Twain in his lecture on the Endangered Species Act at the Commonwealth Club of California on September 25. But his goal was less to entertain than to entreat the approximately 40 members of the audience to fight for the Endangered Species Act in the face of formidable opposition.

In "No Room on the Ark? The 109th Congress' Attempt to Eviscerate the Endangered Species Act," Plater, a staff attorney with Golden Gate's Environmental Law and Justice Clinic, gave an overview of the landmark legislation enacted in 1973, described the impact it has had on several species in California and elsewhere, and discussed recent efforts in Congress to weaken the law. The lecture was cosponsored by the Center for Biological Diversity (where Plater directed Bay Area programs before joining GGU); Golden Gate University; and the Sierra Club National Wildlife and Endangered Species Committee.

"The rate of species extinction is as high as has ever been recorded," Plater said. "Here in California, we're very fortunate to live in one of the most important biodiversity hotspots on the planet. Portions of the San Francisco Bay Area have even been designated as a biosphere reserve by UNESCO, the same status given to Brazil's central Amazon rainforests."

Like the vulnerable ecosystems of the rainforests, the San Francisco Bay Area is losing species at an alarming rate, Plater said. For example, he said, since 1958 approximately 50 percent of the city's indigenous plants have gone extinct within the city's boundaries.

### ART IMITATING LIFE

Plater began his presentation with images and recordings of several species for which the ESA has (and has not) ensured survival. He played a 1987 recording of the last known male Kaua O'o, a bird native to Hawaii and now extinct whose call would once have been followed by a distinctive call-back from the female. Ornithologists captured his song, but were never able to record any response. The bird was declared extinct later that year.

He also showed clips of the red-capped mannequin of the Amazon, whose "moon-walking" abilities exceed those of Michael Jackson; and of the white-breasted wood-wren of Central and South America, whose song begins by mimicking those famous four notes opening Beethoven's Symphony No. 5.

"Not to suggest that Michael Jackson or Beethoven were stealing intellectual property from species around the globe," Plater quipped.

### LITIGATION UNDER THE ESA

Plater then turned from the natural sciences to the law, particularly the ESA, and described his over six years' experience litigating to protect wildlife (including killer whales)—experience he



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## Endangered Species ... continued from page 2

brings to Golden Gate University in his new role as visiting assistant professor and staff attorney at the Environmental Law and Justice Clinic, where he will teach students basic and practical skills in environmental litigation.

“The Endangered Species Act is at its heart a democratic statute, in that it empowers citizens, scientists, and conservationists to participate in the protection of species on the brink of extinction,” Plater said. “Indeed, this aspect of the act has been the driving force of the success of the statute.”

Before the ESA there were other laws and governmental bodies charged with protecting endangered species, he said, but until the ESA was enacted relatively little progress was being made in protecting wildlife and critical habitat.

Signed into law by President Richard Nixon in 1973, the ESA is an “extraordinary document,” Plater said, because it protects habitat critical to endangered species; provides checks and balances to ensure that decisions are based on science rather than politics; and demonstrates such a clear appreciation of what’s at stake.

The wording of the ESA reflected lawmakers’ understanding of the inherent values, both moral and utilitarian, of protecting species for future generations. “The ESA refers to

and sometimes at very high costs, Plater noted. In a landmark case in the 1970s, the US Supreme Court upheld a lawsuit brought against the Tennessee Valley Authority, whose Tellico Dam was flooding habitat critical for the endangered snail darter.



*The California sea otter is currently listed as threatened under the ESA. Photograph courtesy of Jeff Foott.*

“The Supreme Court recognized that because extinction is forever, there is no margin of error,” Plater said, “and affirmed the need to save endangered species—whatever the cost.”

documents that would show the ESA is not working. The political appointees claiming the ESA was broken responded to this request by stating there were no documents to support their claim.

“In fact,” Plater said, “over 98 percent of ESA-protected species have been saved from extinction—and without ESA protection, many more species would have already become extinct.” Plater also cited a just-released study by the US General Accounting Office that concluded 19 of 31 endangered species are now recovering and may be de-listed within 25 years.

“HR 3824 will rip the heart out of the Endangered Species Act,” said Plater, who urged audience members to write their senators (particularly California Sen. Dianne Feinstein, considered a possible swing voter on the bill) and ask them to vote against it. Plater said the bill undermines the basic tenets of the ESA by politicizing science; eliminating checks and balances (e.g., putting representatives of the timber and mining industries on the recovery teams charged with protecting species harmed by logging and mining operations); and, most importantly, by removing habitat protections.

“If this bill becomes law, critical habitat for many endangered species will disappear,” he said.

Passage of HR 3824 could result in the loss not only of species, Plater said, but of invaluable California history. “The endangered California red-legged frog, the subject of Mark Twain’s ‘The Celebrated Jumping Frog of Calaveras County’ and the source of sustenance for countless miners during the Gold Rush, is just one example of a species whose fate could rest on that of HR 3824,” he said.

*Jill Goetz is director of publications and media relations for the School of Law.*

**“The Endangered Species Act is at its heart a democratic statute, in that it empowers citizens, scientists, and conservationists to participate in the protection of species on the brink of extinction.”**

‘answers to questions we haven’t even yet learned to ask,’” Plater noted, and contains references to the potential pharmaceutical and other benefits that endangered species may offer for humans.

But jurists have demonstrated a willingness to uphold the ESA even for species that hold no obvious potential benefits for mankind—

### **A DIRE THREAT IN THE HALLS OF CONGRESS**

Plater spent the last part of his talk discussing efforts in Congress to weaken the ESA—particularly HR 3824, a bill introduced by California Rep. Richard Pombo in 2005 to amend and “fix” the ESA. Plater filed a Freedom of Information Act request for the

## Environmental Moot Court Team Reaches Quarterfinals



From left, Environmental Moot Court Team members Michele Hunton, Clarissa Cannavino, and Clarissa Kearns

**A** Golden Gate University team advanced to the quarterfinals at the 2006 National Environmental Law Moot Court Competition, which was held at Pace University School of Law in White Plains, New York, over three days in February. The competition is the pre-eminent one of its kind in the country.

Team members Clarissa Cannavino (now a third-year student) and Michele Hunton and Clarissa Kearns (who have since graduated) beat out a third of the 69 competing teams from across the country to reach the quarterfinal round.

**Environmental Law News** is published by the Golden Gate University School of Law. For more information, contact Clifford Rechtschaffen at [crechtschaffen@ggu.edu](mailto:crechtschaffen@ggu.edu) or (415) 442-5356.

Golden Gate University School of Law is fully accredited by the American Bar Association (ABA). In December 2005 the ABA placed Golden Gate Law's accreditation on probationary status because of a low first-time passage rate on the California bar exam. While on probation the law school remains fully ABA accredited, and all students who enter and/or graduate during this period are considered to have graduated from an ABA-accredited law school.

## Golden Gate Launches New Environmental Law Journal

By Jake Lubarsky

**G**olden Gate University School of Law's Environmental Law Program now has yet another accomplishment of which to be proud. This academic year, the law school has launched the *GGU Environmental Law Journal*, a student-run publication dedicated to exploring contemporary and emerging issues in environmental law and policy.

The ELJ will print biannually, first featuring a Symposium Edition and then a Pacific Region Edition. Each edition will include lead articles written by academics and professionals, as well as student notes, comments and summaries.

“The summer 2007 Symposium Edition will address the effect of the 1982 Warren County, NC, protests on the current environmental justice movement.”

The Symposium Edition will publish every summer to coordinate with the Environmental Law Symposium that Golden Gate University hosts in the fall. The edition will contain articles from environmental law faculty, professionals and scholars conforming to a specific topic. The Pacific Region Edition will begin publishing in the winter of 2007-08.

The summer 2007 Symposium Edition will address the effect of the 1982 Warren County, NC, protests on the current environmental justice movement. Those protests and demonstrations spurred an investigation into the presence of racism and injustice in the creation and implementation of environmental laws. The Pacific Region Edition will focus on environmental law and policy issues in the Pacific region including, but not limited to, the North American Pacific Coast and the Asian Pacific Rim and Basin. The symposium, titled “The 1982 Warren County Protests: Environmental Justice 25 Years Later,” will honor those who began this powerful movement for equality and also reflect upon the progress of the environmental justice movement.

Confirmed legal scholar contributors and speakers at the symposium include Luke Cole, Center on Race, Poverty and the Environment; Charles Lee, US EPA's Office of Environmental Justice; Veronica Eady, New York Lawyers for the Public Interest; Robert Garcia, Center for Law in the Public Interest; Professor Bradford Mank, University of Cincinnati College of Law; Anhthu Hoang, WE ACT Environmental Justice Center of New York; and Managing Director Caroline Farrell (GGU 99), Delano Office of the Center on Race, Poverty and the Environment.

*Jake Lubarsky is a third-year student at GGU School of Law and symposium editor of the new Environmental Law Journal.*

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## City Parks Project Progressing at GGU Environmental Law and Justice Clinic

By Paul Kibel

In the late summer of 2005, Golden Gate University's Environmental Law and Justice Clinic began work on its new City Parks Project. Directed by adjunct GGU Law Professor Paul Kibel, the project relates to urban green space issues covered in the Urban Environmental Law and Policy seminar he teaches. Below, Kibel outlines the project's scope.

**R**esearch and preparation of a report titled "Fair Share: An Environmental Justice Assessment of the East Bay Regional Parks District" represents the initial focus of the City Parks Project. The report will be published later this year. A follow-up workshop is planned to consider the question of equal access to public parkland and open space in the East Bay. Pam Palitz, a May 2006 graduate of GGU, provided research assistance on the report.

Recent years have seen considerable research and advocacy in environmental justice to address findings that minority and low-income communities are confronted disproportionately with high exposures to toxic substances. To date, the work has focused primarily on the "burdens" aspect of environmental justice—how poor and minority neighborhoods have been selected as sites for polluting facilities and industries.

In addition to the "burdens" aspect, there is also a "benefits" aspect—namely that minority and low-income neighborhoods have not historically received their proportionate share of environmental amenities. One of these amenities is well-maintained urban public parkland. The lion's share of public parkland and public parkland funds have often been provided to parks in high-income districts with low minority populations.

In the San Francisco Bay Area, such claims have been made in regard to the East Bay Regional Parks District, which is the regional agency that oversees much of the public parkland for Alameda and Contra Costa counties. Therefore, the starting point for the "Fair Share" report will be the EBRPD.

The report will consider controversies over EBRPD's proposed acquisition of Breuner Marsh in the City of Richmond and the agency's role in securing state funding for a new private crew boathouse along the Oakland Estuary. The report will also cover "Camperships", the agency's program to bring less affluent East Bay youth to parks in the Berkeley and Oakland Hills.

As with the GGU Environmental Law and Justice Clinic's previous research, teaching and advocacy, the goal of the City Parks Project is to identify opportunities to move the EBRPD beyond the "decide/announce/defend" model of environmental justice efforts, so that equity considerations are part of the agency's preliminary decision-making.

*The East Bay Community Foundation and the As Yow Sow Foundation provided grants to support work on the "Fair Share" report.*



*Breuner Marsh in the fall looking west. Photo courtesy of Robin Freeman.*

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## New Staff Attorney ...

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Species Committee of the Sierra Club and was recently appointed by the Secretary of the Interior to the Golden Gate National Recreation Area's Pet Management Rule-making Committee. His recent speaking engagements have included a talk at San Francisco's venerable Commonwealth Club (see story on page 2).

Plater received his bachelor's degree in Natural Resources and Environment from the University of Michigan School of Natural Resources and Environment; his law degree from Boalt Hall School of Law, University of California, Berkeley; and his master's in public administration from the Harvard University John F. Kennedy School of Government. At Golden Gate University, Plater will teach the Environmental Law and Justice Seminar.

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## Competition ... continued from page 1

The event, which is sponsored each year by the State Bar of California, hosted 20 teams from 16 schools around the state. This year negotiations centered on a simulated dispute over timber harvesting and destructive rainstorms in Northern California.

Whittington and Picconi received \$500 for their accomplishment. They were coached by GGU alumna Robin Salsburg (JD 02).

Historically, GGU students have done extremely well in the competition, with Robert Fletcher and Phillip Krayna taking first place in 2005.

The next negotiations competition will be held at GGU on March 23, 2007.

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Senko Pličanič

## Slovenian Authority on Environmental Law Teaches at GGU as Visiting Professor

By Clifford Rechtschaffen

Senko Pličanič a professor at the University of Ljubljana in Slovenia, visited Golden Gate University as a Fulbright Research Scholar during the spring 2006 semester. Widely regarded as the leading authority on Slovenian environmental law, Professor Pličanič helped draft a number of Slovenia's environmental statutes. His research at GGU focused on recent trends in US environmental law.

In a lecture hosted by the Environmental Law Society, Professor Pličanič outlined some of the innovative features of Slovenian environmental law. Unlike in the US, the adoption of the Slovenian Constitution in 1991 provided citizens with the right to a healthy environment, which is in line with other national constitutions enacted recently. Moreover, he said it imposes a duty on the state "to promote a healthy environment," and further mandates that economic activities "shall not be pursued in a manner contrary to the public interest." Pličanič argued that these latter provisions not

only permitted but required the Slovenian government to limit economic activity and the use of property in order to achieve and preserve a healthy environment.

Additionally, the Slovenian Constitution explicitly recognizes that private property has both ecological and economic (as well as social) value, and that all these values must be safeguarded. Article 67 of the Constitution provides that: "The manner in which property is acquired and enjoyed shall be established by law so as to ensure its economic, social and environmental function" (emphasis added). Despite this expansive language, regulatory actions affecting property may require compensation in Slovenia, as in the United States.

Slovenian courts follow the "proportionality principle" for determining when compensation is due. According to Pličanič, this means that parliament can limit ownership of property only to the extent necessary for protecting the environment; e.g., the government could prohibit farmers from using pesticides and nitrates in groundwater protection areas as

Slovenian environmental requirements. While Slovenia's umbrella "Environmental Protection Act" broadly authorizes citizens to sue anyone who has polluted the environment, Pličanič cautioned that such suits occur far less frequently than in the US because courts are much less powerful in Slovenia. He attributed this variation to the different culture and tradition of legal regulation in Slovenia, and Europe more generally.

Professor Pličanič did point out, however, that Slovenia is one of the leading countries of the European Union for providing citizens with the right to participate in the process of adopting secondary legislation or issuing authorizations (permits) for polluting the environment. The country also provides citizens with the right to challenge such legislation or authorizations. He concluded that such participation could "serve as partial counterweight to the absence of a strong judiciary ... but, of course, that requires an active, environmentally open-eyed citizenry."

**“ Slovenia has the second-highest percentage of preserved forests in Europe, largely unpolluted ground water, good air quality, no extinct species, virtually no genetically modified organisms and a strong network of organic farms.”**

long as the farmers were not completely restricted from using their land for farming, including farming organically or traditionally.

"Slovenia has the second-highest percentage of preserved forests in Europe," said Professor Pličanič, "largely unpolluted ground water, good air quality, no extinct species, virtually no genetically modified organisms and a strong network of organic farms." Professor Pličanič also discussed the ability of private citizens and environmental groups to enforce



Photograph by Perry Blecker

Professor Clifford Rechtschaffen is director of the School of Law's Environmental Law Program and can be reached at [crechtschaffen@ggu.edu](mailto:crechtschaffen@ggu.edu).

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