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ENVIRONMENTAL LAW NEWS

WINTER 2006

GOLDEN GATE UNIVERSITY

School of Law



Loretta Lynch

Former PUC President Loretta Lynch Gives Firsthand Account of Energy Crisis

By Robert Byrne

During California's energy crisis of 2000–01, when the state experienced rolling blackouts and ratepayers were forced to spend as much as 300% more for their electricity due to market manipulation by generators, distributors, and marketers of energy,

the voice of one prominent regulator was often heard fighting to expose industry corruption, passive government, and the failings of deregulation. Loretta Lynch, then-president of the California Public Utility Commission (PUC), was that voice, and Golden Gate University was privileged to welcome her as a recent speaker to Rob Byrne's class on Energy, Electricity Deregulation, and Environmental Law.

On October 27, 2005 Lynch, who served on the PUC from 2000 to 2005, treated a group of energy students, LLM (Environmental Law) graduates, and GGU law professors to a firsthand account of the energy crisis and the state's fumbled history of electricity deregulation.

Known for her outspoken advocacy of ratepayers and her early criticism of deregulation, Lynch recounted the legislative and political maneuvering that led to enactment of AB 1890, the flawed law that created the state Independent System Operator (ISO) and the Power Exchange (PX). She suggested that the weaknesses of this law invited companies like Enron to engage in the now-famous price-gouging schemes known as "Ricochet," "Fat Boy," and "Get Shorty." These and other schemes were successful in gaming the new California power markets with obscenely profitable results for the energy companies that positioned themselves to take full advantage of AB 1890 and the complicated pricing and grid management system it established.

Lynch, a USC and Yale Law School graduate who appears in the film documentary *Enron—The Smartest Guys in the Room*, related how Enron officers appeared before the PUC as early as 1998, just a few years after the company's founding, to urge the commissioners to approve deregulation in California. Lynch believes Enron and other energy giants were already anticipating the benefits that deregulated power markets would provide them and their shareholders.

Once AB 1890 was passed, these companies were able to increase their influence over the system by holding positions on the newly constituted boards of the ISO and the PX and by helping to write the

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Lynch believes local governments are better situated to ensure that ratepayers receive affordable and uninterrupted service.

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GGU Students Win Statewide Competition



In spring 2005, GGU

School of Law students Phillip Krayna (left) and

Robert Fletcher won the Sixth Annual "Environmental Negotiations Competition" hosted by the State Bar of California. Golden Gate University defeated over 25 teams from law schools all over California, including Boalt Hall School of Law, Hastings College of the Law, and UCLA. The final-round judges said they were impressed with Robert's and Phillip's savvy negotiation skills and called them "naturally gifted negotiators." Kristin Henry (JD 02), an attorney with the Sierra Club, coached the student team.

Environmental Law & Justice Clinic Criticizes EPA Environmental Justice Strategic Plan

By Christina Caro

In June 2005 the US Environmental Protection Agency issued its proposed “Strategic Plan and Framework for Integrating Environmental Justice,” a nationwide strategy designed to identify the agency’s environmental justice objectives and track its progress in addressing environmental justice issues over the next five years, 2006-11. During the short public comment period that followed, GGU’s Environmental Law and Justice Clinic (ELJC) submitted comments to EPA on behalf of Bay Area clients from racially diverse and economically challenged communities, examining what we considered to be grave insufficiencies in the proposed plan’s target communities and the methods that EPA stated it planned to use to implement its objectives.

Under the proposed plan, the agency defined environmental justice as “the fair and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” We argued that this definition, which was intended to form the basis of the strategic plan, failed to address the very target communities that environmental justice is intended to protect: minority and low-income communities.

In 1994 then-President Clinton issued Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” which established environmental justice as a national priority and directed every federal agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority and low-income populations in the United States and territories.” Although each agency has used different methods of integrating

environmental justice considerations into their programming, all federal agencies are required to do so—EPA being no exception.

Although EPA guidelines following the executive order addressed the need to identify minority and low-income communities in evaluating proposed actions, a 2004 evaluation of EPA’s progress in addressing environmental justice, conducted by EPA’s Office of Inspector General (OIG), reported that the agency was not consistently implementing the intent of the executive order. The OIG criticized EPA for essentially reinterpreting the executive order to remove minority and low-income communities from its focus, an action EPA is not authorized to take.

The report, too, criticized the agency’s new definition of environmental justice “for everyone,” correctly observing that this was already EPA’s mission prior to implementation of the executive order. “We believe,” said the OIG, “the Executive Order was specifically issued to provide environmental justice to minority and low-income communities due to concerns that those populations have been disproportionately impacted by environmental risk.” The OIG called on the agency to reaffirm that the executive order indeed applies to these target communities.

EPA disagreed with the OIG, stating that the nation’s environmental laws do not recognize race, ethnicity or income as protected classes, and therefore the OIG’s approach was based on a “faulty interpretation” of the executive order. In our comments, the ELJC reminded EPA that, although the environmental statutes do not explicitly refer to race, the agency must comply with Title VI of the Civil Rights Act of 1964, which forbids discrimination by programs receiving



Courtesy of Communities for a Better Environment

federal financial assistance. In 1973, EPA adopted its own Title VI regulations, specifically prohibiting discrimination on the basis of race and other factors with regard to permitting and any other programs receiving EPA funding under the environmental statutes. And since almost every state environmental agency receives some funding from EPA, almost every state permit decision is therefore potentially subject to Title VI’s jurisdiction.

A second aspect of the strategic plan that we and others protested was EPA’s request to

“The OIG called on the agency to reaffirm that the executive order indeed applies to these targeted communities.”

commenters to rank a list of 12 environmental justice priorities from highest to lowest importance, so that it could ultimately select eight of them to focus on. The priorities ranged from ensuring safe drinking water and reducing childhood asthma to facility compliance and reducing exposure to lead, mercury, pesticides and more. All 12 priorities encompassed critical public health and environmental issues. Our comments highlighted the fact that these issues cannot and should not be ranked based on importance —

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Looking to the European Union for Leadership: Some Thoughts on EU and US Environmental Law

By Clifford Rechtschaffen



At the recent international talks on climate change in Montreal, the Bush administration isolated the United States from the rest of the world, seeking to block future negotiations on limiting greenhouse gas emissions. Indeed, despite a strong scientific consensus that the Earth's temperatures are rising due to human activity—and with 2005 on pace to be the hottest or second hottest year in recorded history—the administration clings to its obdurate opposition to any mandatory limits on greenhouse gases.

Meanwhile, the European Union is moving forward aggressively with controls. Earlier this year, it adopted a strategy modeled after the

market-based approach for controlling acid rain emissions pioneered by the US in the 1990s. About 12,000 industrial facilities are required to limit their emissions of carbon dioxide (a leading contributor to global warming) but have flexibility in how to achieve these limits, and can trade any reductions beyond those required.

Decisive action on global warming in the EU is the most prominent, but certainly not the only, example of a striking recent development. After leading the way in environmental law for the past three decades, the US is no longer the world's trendsetter. Increasingly, that role is being fulfilled by the European Union—a phenomenon I observed firsthand last spring as a Fulbright scholar teaching comparative environmental law at the University of Ljubljana (Slovenia), a former republic in Yugoslavia that became independent in 1991.

The EU likewise is forging ahead with its emerging "chemicals policy." In both the US and Europe, thousands of chemicals are used in commerce despite our knowing little about their potential toxic impacts. Currently, chemical producers are rarely required to test their chemicals before using them on the public; the government must demonstrate that a toxin is unsafe to halt its use. The EU's new policy will shift the burden of proof to chemical producers. Before chemicals that raise significant health concerns can be used, producers will have to show, through testing if necessary, that they are safe or that there are no available substitutes. Opponents claim the policy is unaffordable; in fact, reliable estimates put the costs to the chemical industry at \$2 billion to \$4 billion/year over a period of 11 years. Computed on an annual basis, these costs are equivalent to 1/16th of 1% of the EU chemical industry's annual revenues.

The EU also is leading the way in innovative recycling practices, including extended producer responsibility measures known as "take back" laws.

As the name suggests, these laws require producers to "take back"

products from consumers at the end of their useful life, and pay for their costs of recycling and disposal. In this way, the costs of these products will reflect the true costs that they impose on the environment.

www.eco-label.com

“The EU also is outpacing the US with incentives for some promising voluntary environmental strategies. ... [granting] positive recognition for businesses that adopt “environmental management systems”—internal company programs that systematically manage and improve environmental performance.”

For example, under recent EU directives, consumers can now return computers, electronic equipment, and automobiles at the

end of their useful life free of charge to certified collection centers. No such system exists in the US. (California in 2003 imposed a fee on electronics purchases to fund recycling facilities, modeled in part after EU law.)

We could also benefit from emulating the EU's even-handed treatment of new and existing facilities. Our environmental laws impose much stricter requirements on new facilities (on the theory that it's cheaper for them to implement controls from scratch than for an existing plant to retool its plant). While the rationale is understandable, this dichotomy creates incentives to keep less efficient plants operating and has led to system gaming, as, for example, older power plants have tried to escape requirements for modern air pollution control equipment by retooling entire facilities under the guise of making "minor" repairs to an existing plant. In the EU, by contrast, the key regulation governing industrial facilities applies across the board, with a phase-in period for existing facilities. This ensures that all regulated entities more equitably share the burden of pollution control.

The EU also is outpacing the US with incentives for some promising voluntary environmental strategies. The EU grants positive recognition for businesses that adopt "environmental management systems"—internal company programs that systematically manage and improve environmental performance. Likewise, the EU has taken important steps to promote a reliable market for environmentally friendly products. (See the EU's "green store," at www.eco-label.com/.)

The EU also goes further than we do in requiring that countries prepare "state of the environment" reports every four years, an important tool by which citizens can judge the performance of their environmental agencies.

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Lessons from the European Union

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(The Council on Environmental Quality prepared annual environmental quality reports from 1970 to 1997, but this practice was halted by Congress in 1997.)

The record, to be sure, is not completely one-sided; there are many areas where US law is still more progressive. The EU only relatively recently fully embraced the health-based, ambient air quality protection strategy that has been a cornerstone of the Clean Air Act since 1970. The Endangered Species Act (itself under serious attack in Congress) has more teeth and fewer exceptions than comparable EU laws. There is no EU equivalent to our Superfund statute, despite the tens of thousands of contaminated waste sites in Europe. And the EU is just now catching up with requirements for industry disclosure of toxic releases such as those found in our federal "right to know" law.

Perhaps the most notable area in which the EU lags behind the US is enforcement. The culture and practice of strong enforcement, including citizen enforcement that characterizes our legal system, is still taking root in many EU countries.

My inquiries about this in Slovenia revealed some interesting insights about the country's emerging legal system. Although the umbrella environmental law in Slovenia seems to broadly authorize citizen suits to remedy environmental harm, few if any such suits have been brought to date, for at least three reasons. First, environmental groups lack the resources to sue; a familiar problem, except that unlike here, in Slovenia there are no provisions allowing successful parties in citizen enforcement to recover attorneys fees. Second, there is a cultural reluctance to sue in a society that traditionally is far less litigious than the US. Third, there is less experience with (and belief in) the courts as a strong, independent branch that will hold agencies and public officials accountable.

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City Rivers Symposium Surveys Changes in Bankside Land Use

By Paul Kibel

On November 18, 2005, Golden Gate University School of Law hosted an all-day law and policy symposium titled "City Rivers: The Urban Bankside Restored." More than 80 people attended—an indication of the strong interest in the topic. The event coincided with the recent publication of the special "City Rivers" edition of the *GGU Law Review*, which features articles on such urban waterways as the Guadalupe River in San Jose, the Los Angeles River, City Creek in Salt Lake City, the Chicago River, the Detroit River, and the Anacostia River in Washington, D.C. Some of the contributing authors to the "City Rivers" *Law Review* edition also made presentations at the on-campus symposium.



The US Army Corps of Engineers is considering restoring this stretch of the Flint River in Michigan, a vivid example of destructive Corps flood control projects. US Army Corps of Engineers.

The symposium began with a keynote address by Ann R. Riley, author of the book *Restoring Streams in Cities* and a founder of the Urban Creeks Council of California and the National Coalition to Restore Urban Waterways. Riley's address was followed by three panel sessions.

The first panel addressed federal urban policy and included presentations by Melissa Samet (attorney with Americans Rivers), James Lyons (lecturer at the Yale School of Environmental Studies and former undersecretary for the US Department of Agriculture) and Ellen Manges (with the US Environmental Protection Agency). This session examined the urban river policies of the US Army Corps of Engineers, the Natural Resource Conservation Service, and the new federal Urban Rivers Restoration Initiative.

The second panel session focused on urban river restoration efforts here in California and included presentations by Ellison Folk (attorney with the law firm of Shute Mihaly & Weinberger), Robert Gottlieb (director of the Urban Environmental Policy Institute at Occidental College), and David Chesterman (former Guadalupe watershed manager for the Santa Clara Valley Water District). This session looked at the effect of Fifth Amendment regulatory takings law on riparian setback ordinances, recent efforts to ecologically restore the Los Angeles rivers and adjacent lands, and the adaptive management framework developed for the Guadalupe River.

The third panel looked at urban river case studies from around the country. Uwe Brandes (former project manager for the Anacostia Waterfront Initiative) discussed the multi-agency approach taken to coordinate reuse strategy along Washington, D.C.'s "other" river and the complex economic and racial politics involved. Ron Love (with the City of Salt Lake) provided an update of the status of plans to "day-light" City Creek, a tributary of the Jordan River that has been buried in a pipe beneath downtown Salt Lake City for the past 100 years.

The focus of the symposium, as with the *Law Review* edition, was not so much on water quality issues as on changing land uses along urban rivers. Bankside lands once used for maritime, industrial, warehouse, and surface transit (freeway) purposes are increasingly being looked to now for open space, parks, housing, and other uses. The "City Rivers" symposium explored the law and policy context in which this change is occurring.

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KATRINA WAVES:

Alumni Panel Discusses the Impact of Hurricane Katrina on the Environment

By Michele Hunton

If the wetlands around New Orleans had been better preserved, would Hurricane Katrina's devastation have been so great? Did burdensome environmental requirements frustrate the ability of the US Army Corps of Engineers to construct levees that might have better protected the city from the hurricane? What is the best way to clean up the damage caused by Katrina and rebuild New Orleans? Prominent environmental law practitioners Lynda Brothers (JD 76) and Robert "Buzz" Hines (JD 85) returned to their alma mater to answer these and other questions, as well as discuss some of their recent cases, in a November 2 panel discussion moderated by GGU School of Law Professor Cliff Rechtschaffen.

Brothers, an environmental law partner with Sonnenschein, Nath & Rosenthal, served as *Law Review* editor and Student Bar Association president while at GGU. She has had a long and distinguished career in government and the private sector, having served as assistant director with the Washington Department of Ecology; deputy assistant secretary for the environment with the US Department of Energy; and executive vice president of Raytheon Hanford, a \$5 billion/ year company.

Brothers described a recent four-year negotiation process in which her client sought to restore wetlands off the Louisiana coast as compensation for damage caused by an oil spill. (The negotiations fell apart at the last minute.) The proposed restoration site was in the direct path of Katrina.

Brothers suggested that if these wetlands had been restored and if others had not been filled, the result of the hurricane would have been much less destructive. She further noted the environmental justice implications of Katrina: Louisiana is one of the poorest states in the nation,

and Katrina inflicted a disproportionate amount of harm on minority and low-income residents in that state.

Hines is partner and chair of the environmental law department of Farella, Braun + Martel. He has nearly 20 years' experience practicing environmental law, having practiced (and chaired the environmental department) at Landels, Ripley, and Diamond, and having worked in the US Department of Justice honors program. He explored with students



some of the workings of his practice, including a recent case involving wetlands in East Palo Alto that were contaminated by arsenic. That restoration effort succeeded in creating both new habitat and recreational uses. As for how best to clean up New Orleans (which he noted some have described as a gigantic Superfund site), Hines recommended a locally led response. He also emphasized the desirability of public/private partnerships, such as carving out a key role for the scrap recycling industry, in the cleanup efforts.

Brothers and Hines opposed efforts to carve out large waivers of the National Environmental Policy Act (NEPA) during the rebuilding effort, while acknowledging the need for exceptions for true emergencies.

Brothers in particular rejected claims that NEPA challenges in the 1970s prevented the US Army Corps of Engineers from constructing needed levees outside New Orleans, noting that critics of NEPA periodically seized on events like Katrina as a pretext for attacking the statute. Brothers strongly defended the value of NEPA, pointing out that it leads to better decisions when implemented with integrity by federal agencies (while noting the Corps' spotty record of NEPA compliance over the years).

This well-attended lecture gave School of Law students a perspective on some of Katrina's environmental implications and a window on the practices and career paths of two well-known environmental alumni.

Michele Hunton is a third-year student at GGU School of Law and cochair of the Environmental Law Society.

KATRINA AFTERMATH: AN OPEN LETTER TO THE WHITE HOUSE

Following the Katrina disaster, students in Golden Gate's Environmental Law Society drafted an open letter to the Bush administration and key Congressional leaders, expressing their concerns about Katrina's impacts and about the direction in which this country is headed. The ELS circulated the letter nationally through the National Association of Environmental Law Societies, seeking sign-on from other law students.

According to lead author Ida Martinac, co-

chair of Golden Gate's ELS, "Whether or not we are 100% sure that the severity of Katrina was brought on by global warming, which in turn is brought on by irresponsible burning of fossil fuels, the connection is strong enough to warrant immediate action. As we are this country's future environmental law professionals, scholars activists, and leaders, we not only have a right to call for action, but it is our moral obligation to do so."

The ELS letter addressed a variety of topics, including (1) national security; the interplay of

military, economic and environmental security and the overstretching of our national defense resources; (2) environmental justice; (3) global warming and energy policy; and (4) Kyoto and other obligations of international law. Excerpts from the letter appear below.

Not only has the Bush Administration failed to protect the environment, but by abandoning its most vulnerable citizens in the hour of most profound need, it has undermined both its legitimacy within the nation and further deepened

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operating tariffs of these “non-profit public benefit corporations” that would be regulated by the industry-friendly Federal Energy Regulatory Commission (FERC) instead of by the more scrutinizing California PUC. From her vantage point on the PUC at the time, Lynch observed that this new market structure allowed the “foxes to enter the henhouse and to hold the door open for the other foxes!”

Lynch, who is teaching a course on energy politics at UC Berkeley this spring and writing a book about her experiences on the PUC during the energy crisis, told the class she supports “municipalization” of the natural gas and electricity markets. She believes that local governments are better situated to ensure that ratepayers receive affordable and uninterrupted service. But with the repeal of the Public Utility Holding Company Act by the new federal energy bill, Lynch does not hold out much hope that energy prices will come under strict control any time soon. She saw some benefits to the current system of regulation if California voters passed Proposition 80, an initiative on the November 2005 ballot that was defeated. Lynch surmised that Prop. 80, which would have “re-regulated” the electricity markets in California, might help to frustrate in the future the kinds of gaming and scheming that caused the 2000–01 crisis. But there can be little prospect of certainty in this regard, as the federal government continues its efforts to preempt the states’ regulation of the power industry and to create expanding opportunities for profitable ventures such as Liquefied Natural Gas (LNG).

Lynch believes one thing states like California can do to curb these expanding opportunities is to retire older natural gas-fired power plants and replace the electricity they generate with alternative, renewable sources of power. Lynch says to do so would render expanding natural gas ventures like LNG too cost-prohibitive and help increase California’s reliance on renewables by 20%.

Lynch does not hold out much hope that energy prices will come under strict control any time soon.

Energy, Electricity Deregulation, and Environmental Law is open to JD and LLM students and is taught every other fall semester by Adjunct Professor and California Deputy Attorney General Rob Byrne (who received an LLM in Environmental Law from Golden Gate in 2002).

The class presents a survey of the legal issues raised by energy sector regulation and examines the intersection of so-called “energy law” with the related disciplines of environmental law, natural resources law, and the law of publicly regulated industries. Students study the nature of regulated public utilities and consider their rate structures, specifically in the context of California’s experience with deregulation of the power industry and the 2000–01 energy crisis.

Students also examine in detail the environmental and regulatory issues relating to water power, coal, oil, solar, and nuclear power, as well as the international regulation of petroleum and the continuing problem of global climate change. Energy, Electricity Deregulation, and Environmental Law is of value to students interested in environmental law, natural resources law, public utilities law, water law, administrative law, and international law.

Robert Byrne is an adjunct professor in the School of Law.

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During one class discussion, for example, I explained that citizens had through lawsuits forced EPA to adhere to numerous statutory deadlines and requirements under the Clean Air Act. The hands of several students shot up. “But what if the agency refuses to comply?” they asked. “What can the court do? And what if the agency head simply ignores the court?” The students had some difficulty comprehending how powerful courts can be.

Similarly, an activist with a leading public interest organization recounted how the Slovene Ministry of Environment had blatantly excluded from its designation of a protected habitat area part of a mountaintop that was coveted for a wind power project by a private developer, even though the mountaintop area clearly met all the biological criteria for being included. When I asked him why his group didn’t sue to invalidate the unlawful omission, he expressed disbelief that the court would overturn what all recognized as a “clearly political” decision. I explained that in the US it was precisely when decisions were determined by politics rather than legal standards that activists turn to the courts for redress.

Despite these shortcomings, on balance the EU has been tackling its most pressing environmental problems with a focus and creativity that we can only envy. It has done so properly rejecting claims that strong environmental protection can only come at the expense of economic growth. We can and should learn from the EU’s innovating approaches—indeed California’s recent electronic waste law was based in part after Europe’s system—and in so doing start to reclaim our mantle as the world’s environmental leader.

Professor Clifford Rechtschaffen is director of the School of Law’s Environmental Law Program and can be reached at creschstschaffen@ggu.edu.

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Golden Gate University School of Law and its environmental law programs and clinic are fully accredited by the American Bar Association (ABA). On December 9, 2005 the ABA placed the School of Law on two years’ probation based on our first-time passage rate on the California bar examination. While the School of Law is on probation it remains fully accredited by the ABA, and students who matriculate and graduate from the school during this time can sit for the bar examination in any jurisdiction.

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they affect us all and are all equally important to address.

Dozens of communities, individual citizens and environmental groups wrote similar comments to EPA, calling on the agency to weigh all priorities equally, to reinsert "minority and low-income populations" into its definition of environmental justice and to require its regional offices to design programs that will take these groups' special needs into consideration before approving projects that add to the high levels of pollution to which they are already exposed.

Despite these comments, EPA responded in October 2005 by declaring that the agency "remains committed to ensuring environmental justice for all people, regardless of race, color, national origin or income." Although the agency claims it will continue to implement the executive order by "focusing attention on whether its actions may disproportionately affect minority and/or low-income communities," EPA says it will not use racial classifications as a basis for making decisions, because that "would raise significant legal issues."

EPA also selected eight priorities to focus on, eliminating "healthy schools," "increased environmental health along the borders of the United States," and "reduced exposure" to mercury, pesticides, and water-borne pathogens from further consideration.

For years, the environmental justice movement has championed the rights of those affected most severely by environmental pollution. It has demanded that those communities be given equal protection under the nation's environmental laws, to help safeguard them against the dangerously cumulative nature of multiple exposures to environmental health hazards and to help cure the historically unbalanced distribution of environmental hazards within our society.

Under the new strategic plan, these communities may be left largely unaided by one of the principal federal agencies charged with their protection. On a more local level, however, the revised strategic plan is now charging EPA's regional offices with designing regional action plans and local outreach for environmental justice issues. Citizens remain hopeful that, through its regional offices, EPA will fulfill its obligation to provide environmental justice for those communities that regularly bear a disproportionate share of society's environmental burdens.

Christina Caro is a second-year law student at Golden Gate. She drafted the comments submitted by the ELJC to EPA in July 2005.

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Mike Houck, director of the Urban Greenspaces Institute, made the final presentation, reporting on how Portland's Master Greenspaces Plan has helped restore lands along the Columbia and Willamette rivers.

Cosponsoring the symposium with the School of Law were the Environmental Law Section of the California State Bar; the Real Property Section of the California State Bar; the Environmental Law Section of the Bar Association of San Francisco; the American Bay Association's Subcommittee on Smart Growth & Urban Policy; the law firm of Fitzgerald Abbott & Beardsley; the environmental engineering firm of Clearwater Hydrology; Americans Rivers; and the Urban Creeks Council of California. The As You Sow Foundation of San Francisco also provided a grant to help underwrite the costs of the symposium.

The symposium was directed and moderated by GGU adjunct professor Paul Kibel, who also served as faculty editor for the "City Rivers" edition of the *Law Review*. Kibel is editing a forthcoming book for MIT Press, due out later in 2006, titled *Rivertown: Rethinking Urban Rivers*.

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the existing chasm between the US and the rest of the world. Moreover, it has become all too apparent that the United States, the global hegemon, is no longer in charge. While "projecting" its power in the Middle East, the hegemon's resources are actually overstretched, its power on the wane. Other powers, such as China and India, are on the rise, and one of the most salient questions in D.C. is, How are the rising powers going to balance—with us or against us? Frighteningly enough, it depends on this Administration.

The immense suffering and death that resulted from Hurricane Katrina point to shocking environmental injustice and demand immediate action. Tragedy struck mostly poor and mostly black residents. Pictures of black Americans drowning, crying for help, and suffocating in the sweltering heat of the Superdome are images that will stay with us for a very long time; images that demand very serious answers. Americans were left to fend for themselves in the face of an unprecedented disaster. Those who had the means left, and those who did not have the means were left to die. Where was the government? The government blatantly disregarded President Clinton's Environmental Justice Executive Order, which is legally binding, both in its decision not to provide for the evacuation of poor folks, and in its decision to cut the funding necessary for levee maintenance.

Katrina has made it apparent that natural disasters still pose a much more certain threat than the terrorist attacks that the Administration has been keeping us in fear of. In that regard, ELS calls on the Administration to reassess its national energy policy, to adapt it to the realistic needs of this century. Instead of granting billions of dollars in subsidies to oil, coal, and nuclear energy industries, the Administration should sincerely lead an all-out campaign to harness energy in sustainable ways so as to achieve true energy independence and to arrest the alarmingly escalating process of global warming.

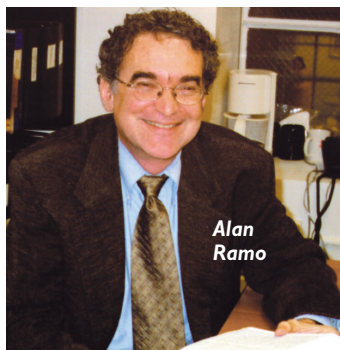
America has historically been the leader of the world community in articulating and pursuing goals; should we now not resume our place in the international community in leading it toward a sustainable future?

Go to <http://www.naels.org/projects/ccn/katrina.htm> for full text of letter.

Environmental Law & Justice Clinic Continues Battle To Phase Out Fossil Fuel Generation in San Francisco

By Alan Ramo

For most of its history, the Environmental Law and Justice Clinic (ELJC) has represented environmental activists in the predominantly African American Southeast San Francisco neighborhood of Bayview Hunters Point who seek to shut down nearby 60-year-old fossil fuel power plants. Over this time, one new power plant was blocked, and



another proposal continues to be suspended by the California Energy Commission. One of the two existing facilities is now slated for shutdown by Pacific Gas & Electric (PG&E) in April 2006, when the state's Independent System Operator (ISO), the electricity transmission grid manager, anticipates determining that new transmission

projects make the facility unnecessary.

That leaves the Mirant-owned power plant in the Potrero neighborhood. That facility under the ISO's action plan should be unnecessary in 2007, though Mirant refuses to agree that it will then shut it down. In the meantime, the facility continues to use Bay water for cooling, entraining aquatic organisms as it sucks in cold Bay water and discharges heated water in a vulnerable shallow area along the San Francisco shoreline. The facility also ranks as the largest stationary air polluter in San Francisco.

Bayview Hunters Point Community Advocates, a local group, and Communities for a Better Environment, a statewide environmental organization, are urging the Regional Water Quality Control Board to force Mirant to stop using once-through cooling or to upgrade its cooling technology to protect the Bay. If Mirant has to fully comply with environmental regulations and is not given a state contract for electricity, many believe the facility will be shut down as not sufficiently profitable for Mirant.

The main vehicle for implementing the Clean Water Act is the National Pollution Discharge Elimination System water permit, required under federal law but issued by the state's regional water quality control boards. Mirant's last "5-year" permit expired in 1999, though it remains in effect until a new one is issued under federal and state law. At the same time, the US EPA has issued new cooling water regulations pursuant to a court order issued to enforce §316(b) of the Clean Water Act. These regulations require a whole slew of studies to determine the best cooling water system to meet new performance standards for existing power plants.

ELJC's student clinicians have submitted numerous comments requesting that the local San Francisco Bay Area Regional Board issue a new permit that mitigates the damage to the Bay with improved cooling water technology, requires the 316(b) studies, and sets the stage for Mirant to get its discharges out of the Bay entirely. After over 15 months of workshops, comments, tentative orders and stakeholder meetings, the regional board has agreed to require Mirant to conduct the studies under its powers under Water Code §13267 and to issue a new permit in spring 2006.

The State Water Board that supervises the regional boards has also stepped into the fray, conducting two workshops in southern and northern California to develop a state policy on once-through cooling and 316b. An ELJC clinician addressed the board in Oakland in December 2005, asking for a policy that would end the use of once-through cooling in California and incorporate environmental justice concerns in evaluating cooling systems.

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