

Winter 2007

Environmental Law News - Winter 2007

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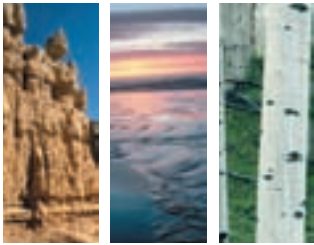


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Environmental Law & Justice Clinic Celebrates Settlement Between Its Client and West Berkeley Foundry

Winter 2007

By Jill Goetz

Pacific Steel Casting Company, the third-largest steel casting foundry in the United States, and Communities for a Better Environment (CBE) have settled CBE's citizen suit under the Clean Air Act to reduce air pollution from the company's foundry located in West Berkeley,



The ELJC team: back row, from left: Aaron Sandone (JD 08), Jim Treggiari (JD 08), Visiting Assistant Professor Brent Plater, and Eric Hoffman (JD 08). Front row: Clinical Program Assistant Fe Gonzalez, Benjamin Moore (JD 08), Associate Professor Helen Kang, and Benny Martin (JD 08). Not pictured: Katherine Bergman (LLM 05), Holly Bressett (JD 07), Christina Caro (JD 07), Albert Carrera (LLM 07), Maylene Gutierrez (JD 06), Jenny Maier (JD 07), Joshua Sigal (JD 08), Tracey Thompson (JD 07), Amy Cohen (JD 01), Professor Alan Ramo, and clinic scientist Ken Kloc.

California. The agreement, which will take effect after its approval in Federal Court and expiration of a review period by the US Attorney General and US Environmental Protection Agency, is a major victory for the Golden Gate University School of Law Environmental Law and Justice Clinic (ELJC).

The ELJC represented the Oakland-based client in its lawsuit, which charged Pacific Steel Casting Company with violating the Clean Air Act

by exceeding emissions limits and failing to comply with reporting requirements. Pacific Steel Casting denied violating the Clean Air Act.

Under the agreement, Pacific Steel Casting must implement a plan for selecting and inspecting materials in the scrap metal it uses for forming steel castings and ensure that the metal contains no lead or mercury. The company also must maintain a reserve fund of \$350,000 for emission reduction projects; establish a joint consultation committee that includes representatives from the company, CBE, and the union representing more than 600 steel workers at the site; and pay for CBE's legal costs associated with the lawsuit. The agreement allows inspections by CBE or its consultant of the company's scrap metal operations and emissions mitigation projects that commence as a result of the agreement.

"The lawsuit and the outcome are important because they have given some hope to West Berkeley residents who for so long felt the air pollution problem was not being addressed by government agencies,"

“The lawsuit and the outcome are important because they have given some hope to West Berkeley residents.”

— Associate Professor Helen Kang

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ELJC Hosts New Bay Area Environmental Health Collaborative

By Amy Cohen

One of the most substantial barriers to achieving environmental health and justice is the failure of regulators to protect communities from the hazardous effects of cumulative pollution exposures. While health hazards result from multiple exposures to a variety of pollutants, regulators still rely on a source-by-source approach to risk regulation. As a result, there is essentially no limit on the overall level of pollution and total health risk that is permitted in any area. Activists and advocates have long called for a new approach to health risk regulation.

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Administrative Law Judge Discusses Water Cases

By Kimberly Chew

The Environmental Law Society sponsored a talk in October by Administrative Law Judge John E. Thorson of the California Public Utilities Commission, who has also served as Special Master for the Arizona General Stream Adjudication. He presented some of the complex litigation issues that surround general stream adjudication, such as water quality and interstate water rights.

General stream adjudication cases, which determine water rights of interested parties, can take decades to adjudicate. These cases can have as many as 100,000 interested parties representing tribes, cities, multiple states, irrigation districts, mines, utilities, and recreational users and involve complex issues involving water law, Indian law, economics, hydrology, farming, fishing, and wildlife issues. These suits underscore the need to ascertain who owns the water and a management regime that would help allocate the water and protect the river and its uses.

Cases that involve interstate water issues are under the original jurisdiction of the US Supreme Court and are heard by Special Masters. The Special Master is an individual chosen by the Supreme Court justices to do the fact-finding on the case, which is ultimately decided by the Supreme Court.

In an effort to educate judges involved in these adjudications, Judge Thorson and Judge Dan Hurlbutt, a state district court judge in Idaho, initiated the Dividing the Waters Project, a 13-year project that brings together water judges, Special Masters, and referees to discuss the complex issues they all face. Participants share information on how different states handle their water cases, where to get scientific expertise, and how to deal with complex water law issues. This project has influenced judges on how they settle and promote settlements in their cases and how they manage their caseloads.

Kimberly Chew is a third-year law student at Golden Gate University.



From left, Ida Martinac (JD 06) and students Jake Lubarsky and Holly Bressett at the environmental law and policy symposium reception

Law and Policy Symposium Focuses On the Renewable Energy Sector

By Ida Martinac

On November 17, 2006, Golden Gate University School of Law hosted an environmental law and policy symposium titled "Renewed Interest: The Renewable Energy Sector." There were more than 90 attendees, reflecting the recent resurgence of interest in renewable energy.

The symposium focused on connecting the dots between energy generation, transmission distribution and consumption; foreign policy; the respective roles of the federal and state governments and the market in bringing about change; and the need for an immediate and massive paradigm shift toward sustainable energy policy. Many of the presenters at the symposium have been involved in work advocating renewable energy for several decades. While analyzing roadblocks to harvesting renewables, the presenters also related a wealth of experience in the trenches and pointed to creative solutions for overcoming a complex variety of challenges in the industry.

The keynote address was delivered by Mary Nichols, former California secretary for resources and current director of the UCLA Institute of the Environment. After discussing the environmental impacts of globalization, she stressed that current initiatives for combating climate change are insufficient, in large part because politicians tend to shy away from passing regulations requiring lifestyle changes from their constituents. Nichols believes that nothing short of lifestyle changes will reduce our dependence on fossil fuels and that AB32, which regulates carbon dioxide as a pollutant, is a first step in the right direction.

The first panel session focused on the regulatory framework in California. Panelists included Monica Schweps of the law firm of Bingham McCutchen, Hal La Flash of Pacific Gas & Electric, Traci Bone of the California Public Utilities Commission, and Matthew Freedman of The Utility Reform Network. This session took a look at regulatory, market and financing challenges to the growth of the renewable energy industry in California from the vantage point of generation, transmission and distribution.

The second panel session addressed the international arena, focusing on the roles that international financial institutions, the United States, and other countries play in the global expansion of the renewable energy sector. Presenters included Sandeep Kohli of the International Finance Corporation,

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Jennifer Prescott of the Office of the United States Trade Representative, and Jan Hamrin of the Center for Resource Solutions.

The third panel session took a comparative look at regulatory challenges to each separate source of renewable energy in California and nationally. Presenters included Commissioner John Geesman of the California Energy Commission, Jan McFarland of Americans for Solar Power, James Wilson of Planning Systems, Inc., and Nancy Rader of the California Wind Energy Association. Following an overview by Commissioner Geesman, panelists gave presentations on solar, wave and wind energy resources; the challenges faced; successes achieved; and the way forward.

provided grants to help underwrite the costs of the symposium.

The symposium was directed by GGU Adjunct Professor Paul Kibel. Its associate directors were GGU Adjunct Professor Robert Byrne and Ida Martinac (JD 06).

The symposium was planned in conjunction with the special "Renewed Interest" edition of *Golden Gate University Law Review*, which featured articles on renewable energy policy issues in California, nationally, and internationally. For this special edition, Daniel Kammen of the UC Berkeley Energy and Resources Group wrote an article about the role of renewable energy in US foreign policy; Bernadette Del Chiaro and Rachel Gibson of Environment California analyzed the role of the government



Rachel Van Cleave

Professor's Teaching and Scholarship Focus on Katrina's Impact

Professor Rachel Van Cleave is teaching "the Katrina Seminar" at Golden Gate University School of Law this semester.

The seminar gives students an opportunity to engage in research and writing that will directly benefit advocates in the Gulf Coast. Students are writing on property issues related to tenant's rights, zoning and eminent domain. They are also writing on California's emergency plan and what California can learn from the Gulf Coast disaster, as well as on criminal law issues related to treatment of elderly and disabled in hospitals and other facilities in the aftermath of Katrina. The students will present the results of their research at the Law School on Friday, April 20 from 11 am to 3 pm.

Professor Van Cleave's recent scholarship has focused on the importance of place and identity that people associate with a city like New Orleans as a lens through which to evaluate rebuilding plans. In January she presented a paper at the AALS Annual Meeting in Washington, DC, titled, "People and Place Matter—Rebuilding Community and Preserving Identity," as part of a "Katrina Workshop: Redeveloping After a Mega Disaster."

“While analyzing roadblocks to harvesting renewables, the panelists also related a wealth of experience in the trenches and pointed to creative solutions for overcoming a complex variety of challenges in the industry.”

Cosponsoring the symposium with the School of Law were the Center for Resource Solutions, Environment California, the Utility Reform Network, Pacific Gas & Electric, the Environmental Law Section of the Bar Association of San Francisco, the California State Bar Environmental Law Section, California Public Utilities Commission, and the California Energy Commission. The As You Sow Foundation of San Francisco and Pacific Gas & Electric

in creating a vibrant solar market in California; Joseph Romm of the Center for Energy and Climate Solutions urged California to reconsider its Hydrogen Highway; and Jan Hamrin of the Center for Resource Solutions related her experience as a California renewable energy policy expert in advising the Chinese government in drafting its Renewable Energy Law.

Ida Martinac served as editor of the "Renewed Interest" edition of the Golden Gate University Law Review.



From left, symposium panelists Monica Schwebs, Hal La Flash, Traci Bone, and Matthew Freedman

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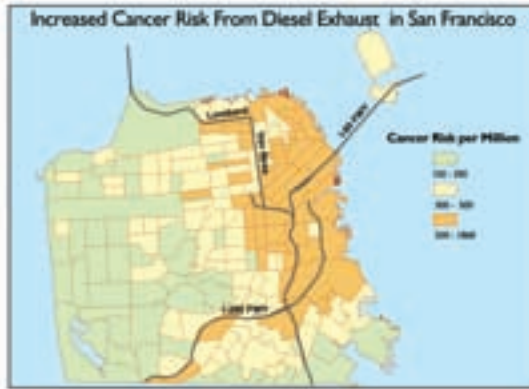
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In the fall of 2006, **Thomas J. Graff**, regional director for the Land, Water and Wildlife Program at Environmental Defense, spoke to GGU law students about the complicated issues in water use and allocation and watershed restoration and protection in California.

Environmental Law Clinic Uses GIS To Map Air Pollution in Neighborhoods

Many of the community groups with which the Environmental Law and Justice Clinic (ELJC) works are interested in understanding and reducing air pollution in their neighborhoods. One of the problems these groups face is knowing where air-polluting sources are located and what these sources are emitting into the air. The regulatory agencies responsible for controlling air pollution have compiled various databases of pollution sources and, in some cases, have made this information available to the public through web-based mapping facilities. However, not all of this information is readily accessible, and there is currently no website that offers up-to-date and comprehensive mapping of pollution sources for any region in California (or the nation).



To better assist community groups working to understand air and other pollution problems, the ELJC in 2005 began producing various pollution and risk-related maps using Geographical Information System (GIS) software. In one recent project, the ELJC prepared the accompanying risk map for one of its clients, the Chinese Progressive Association. Based upon information published by the US

Environmental Protection Agency, this map shows the distribution of estimated cancer risks due to diesel exhaust air pollution in the city of San Francisco. The clinic produced the maps with support of the California Wellness Foundation and the ESRI software company.

"The Bay Area groups that we work with have frequent need of pollution maps to help them in educating and organizing their constituencies on pollution and environmental justice issues," says Ken Kloc, an environmental analyst with the Environmental Law and Justice Clinic and head of the GIS program. "Because GIS software is expensive and technically challenging to use, our community clients would not otherwise have the resources to produce GIS maps on their own."

Health Collaborative ...

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In the fall of 2006, Golden Gate's Environmental Law and Justice Clinic (ELJC) teamed with community partners and others to launch the Bay Area Environmental Health Collaborative (BAEHC), a broad coalition of groups working to protect public health in communities heavily burdened by air pollution. The BAEHC will implement a regional campaign to press regulators at the Bay Area Air Quality Management District to adopt enforceable measures that reduce cumulative air pollution impacts and ensure better public access to decision-making processes. A key partner in this project, ELJC is advising the collaborative on policy development and legal and technical issues. The clinic is also hosting BAEHC staff, facilitating campaign development, and coordinating BAEHC activities.

Amy Cohen is a 2001 graduate of the School of Law and director of the Bay Area Environmental Health Collaborative.

Subscribe to the *Environmental Law Journal*!

Golden Gate's newest law journal, the biannual *Golden Gate University Environmental Law Journal*, is a student-run scholarly publication dedicated to exploring contemporary and emerging issues in environmental law and policy. Each edition includes lead articles written by academics and professionals, as well as student notes, comments, and summaries. The "Pacific Region Edition" published each winter will focus on environmental law and policy issues in the Pacific Region including the North American Pacific Coast and the Asian Pacific Rim and Basin. The summer "Symposium Edition" is published in conjunction with the Environmental Law Symposium Golden Gate University hosts in the fall.

The inaugural edition of the new *Environmental Law Journal*, the Summer 2007 Symposium Edition, will address the theme of the fall 2007 Environmental Law Symposium at Golden Gate: the effect of the 1982 Warren County, NC, protests on today's environmental justice movement.

For more information about the *Golden Gate University Environmental Law Journal* and to subscribe, email jfischer@ggu.edu.

Toxic Disclosure Should Be Expanded, Not Scaled Back

By Clifford Rechtschaffen

In the wake of a series of chemical spills in the United States and a disastrous accident at a chemical plant in Bhopal, India, that claimed thousands of lives, Congress 20 years ago passed the Emergency Planning and Community Right to Know Act. Under the Act, industrial facilities every year must report their releases of toxic chemicals into the environment, which the government then makes publicly available through its Toxics Release Inventory program.

The TRI program allows for public scrutiny of specific companies' polluting practices, which in turn creates a powerful disincentive to pollute. Despite dramatic reductions in toxic releases, however, industry-backed groups have sought to scale back this public disclosure—and found a willing ally in the Bush administration.

The Environmental Protection Agency announced in December that it will allow companies to use shorter, less informative reporting forms for small quantities of persistent bio-accumulative toxins that are dangerous even at very low levels, as well as releases of other TRI chemicals up to 2,000 pounds.



Ken Alex, supervising deputy attorney general with the California Department of Justice and GGU adjunct law professor, spoke to the GGU Environmental Law Society in October about using public nuisance actions to combat global warming. Alex is the lead attorney for the state of California in two innovative nuisance actions filed against the nation's five largest power producers and against the six largest automakers selling cars in the US for carbon dioxide emissions that contribute to global warming. Alex will be teaching "Global Warming in the Courts" this summer at Golden Gate.

“TRI allows ... for public scrutiny of specific companies' polluting practices, which in turn creates a powerful disincentive to pollute.”

The EPA also proposed last year to scrap annual reporting and allow polluting facilities to report releases only every other year. But this idea was recently abandoned under pressure from Sen. Frank Lautenberg (D-NJ) and others.

Rather than scale back public disclosure, we should build on the success of TRI. When TRI was implemented in 1988, it represented a paradigm shift in environmental regulation by recognizing a fundamental public right to know about chemical dangers. The approach appeals to both conservative economists, who believe that providing more information helps consumers and investors make better informed and more efficient decisions, and environmental advocates, who believe that information disclosure can promote citizen empowerment and create incentives for firms to reduce harmful activities.

And it works extremely well. From the first reporting year in 1988 to 2004, releases of toxic chemicals subject to TRI dropped by a remarkable 57 percent, or 1.71 billion pounds (this figure covers those chemicals that have been on the list for this entire period).

These reductions are spurred by the simple but powerful fact that companies desire to avoid negative publicity, including publicity regarding their environmental record. Companies report that TRI forced them to examine for the first time the extent of the waste they were producing. The Chemical Manufacturers Association in 1995 labeled TRI "a very successful venture," noting that its members "have gotten behind it and witnessed a 50 percent reduction in pollution."

TRI also helps promote democratic decision making, enabling citizens to participate on a more equal footing with regulated entities in permitting, land use, and other political decisions. From 1998 to 2004, over 200 reports were prepared by citizen groups using TRI data.

And TRI is highly cost effective. It imposes minimal costs on industry, since companies simply are required to report their releases. If they opt to reduce releases, it's their decision how to do so.

Environmental Law News is published by the Golden Gate University School of Law. For more information, contact Clifford Rechtschaffen at crechtschaffen@ggu.edu or (415) 442-6674.

The 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.

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From left, guest lecturer Peter Odhiambo, alumnae Kate Nooney (JD 98) and Jen Gadbow (98), and Professor Cliff Rechtschaffen

International Environmental Lawyer Draws Standing-Room-Only Audience

By Lucas Williams

On February 7, the Environmental Law Society, the International Law Society, and Golden Gate University Graduate Law Programs hosted a lecture on international environmental litigation by Peter Odhiambo, a doctoral candidate at Griffith University in Australia. Odhiambo delivered an engaging talk before a packed audience on the difficulty of holding transnational corporations liable for the environmental damage that they cause in developing countries.

Odhiambo outlined the way in which transnational corporations are able to violate human rights and create substantial harm to the environment in their host developing countries, in part because the legal structures and governmental resources of many developing countries are no match for the resources available to powerful international companies.

Using as a case study Freeport-McMoran, an American corporation operating the world's largest gold mine in Indonesia, Odhiambo demonstrated how transnationals are often able to evade liability under both international law and the law of the Western countries where they are incorporated. Odhiambo maintained that since the legal and governmental structures of developing countries are often ill-equipped to hold transnational companies legally responsible for their environmental conduct, the courts of developed countries offer the best forum to regulate and control transnational behavior.

However, courts in the United States and other Western countries have been reluctant to assert jurisdiction over corporations' conduct in foreign jurisdictions. For example, Odhiambo said, a US court found that it did not have jurisdiction over Freeport-McMoran, in a suit brought by Indonesian nationals under the Alien Tort Claims Act, for alleged environmental damage and human rights abuses. Despite the reluctance of the courts of developed countries to assert jurisdiction over corporate conduct in developing countries, Odhiambo persuasively argued that the courts of developed countries present the most realistic possibility of holding transnational companies responsible for their behavior in developing countries.

Lucas Williams is a second-year law student and chair of the Environmental Law Society at the School of Law.

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says Helen Kang, Golden Gate University associate professor of law and the Environmental Law and Justice Clinic's lead attorney working on the case. "Credit for this important victory goes to the neighborhood groups in West Berkeley, Golden Gate law students who figured out the legal angle to get the company to listen, and our client, who took a strong stance in the litigation."

Burning the Midnight Oil

The settlement resulted from countless hours of work over several semesters by Golden Gate students at the clinic. The case began in 2005 when a citizen contacted the clinic for help in addressing the intense odors in the area, the result of chemicals used in the mold for casting metal parts. Student clinicians filed numerous

Public Record Act requests and visited the local air agency to find evidence.

Next, the clinic filed Clean Air Act claims in the US District Court for the Northern District of California and made a preliminary injunction motion. Their efforts, which also included filing briefs, declarations, and responses to objections to evidence, had them "almost burning the midnight oil," Kang says, and led the parties to enter into settlement talks and ultimately reach an agreement.

"Working with Janice Schroeder from the West Berkeley community [who eventually became CBE's standing witness in the case] made me realize that environmental law involves much more than trees and creatures," says Holly Bressett (JD 07). "I would find myself looking forward to talking to Janice to give her updates and share discoveries I had made about the

law and facts of the case. That human element enriched and gave meaning to my legal experience." Another student, Jenny Maier (JD 07), says, "The challenges of this case were daunting at first, but eventually I gained the confidence that if we could tackle them here, we could tackle any complicated legal problem."

Participating Golden Gate student clinicians included Katherine Bergman (LLM 05), Holly Bressett (JD 07), Christina Caro (JD 07), Albert Carrera (LLM 07), Amy Cohen (JD 01), Maylene Gutierrez (JD 06), Eric Hoffman (JD 08), Benjamin Martin (JD 08), Benjamin Moore (JD 08), Jenny Maier (JD 07), Aaron Sandone (JD 08), Joshua Sigal (JD 08), and Tracey Thompson (JD 07).

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



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REQUIEM FOR A RIVER DOLPHIN

Fifteen years ago, Douglas Adams—author of the *Hitchhiker's Guide to the Galaxy*—entreated us to grab our towels, head for China's Yangtze River, and take advantage of our last chance to see the Baiji dolphin, the 20-million-year old Goddess of the Yangtze.

I didn't go. I took a reassuring look at my "Don't Panic" button and turned my attention to Dan Quayle's spelling error, and listening for Ross Perot's "giant sucking sound."

Now it's too late. Scientists recently declared the Baiji extinct. It's been two years since the species was seen in the wild; four since the last captive Baiji died. Perhaps some still ply the Yangtze's waters, but not enough for long-term survival.

“The Baiji's loss may not yet be cause for panic,
but certainly for pause and humble reflection.”

Does it matter that we've one less neighbor on Earth? After all, extinction is intertwined with evolution the way death is intertwined with life. The Baiji's loss may not yet be cause for panic, but certainly for pause and humble reflection.

In the Bay Area we're blessed to live in one of the world's most biologically diverse regions. We share our lands with California tiger salamanders, Presidio Manzanita, and dozens of species that, like the Baiji, are found nowhere else on Earth.

The Baiji's demise was caused by habitat destruction, unsustainable fishing practices, and boat collisions. It was river kill of China's impressive climb towards modernity, traded away for comforts most of us take for granted.

The Bay Area no longer faces such stark choices, but we face choices nonetheless. Hardly a day passes without new proposals to turn wildlife habitat into another ball field or dog park, condos or parking lot.

Will we trade away our green sturgeon for another irrigation pump? Our snowy plovers so dogs can roam off-leash? Our answers to these questions will define our biological legacy. As we contemplate these choices, let's pause for the Baiji, say "so long," and thanks for the solemn lesson.

With a perspective, I'm Brent Plater.

Brent Plater is visiting assistant professor of law and staff attorney with the Environmental Law and Justice Clinic. This essay aired on KQED-FM's "Perspectives" program several times in late January 2007.

Toxic Disclosure ... continued from page 5

The EPA, meanwhile, spends less than 0.1 percent of its annual budget administering the program.

Indeed, the EPA regularly touts TRI as one of our nation's most effective environmental laws. And it is now emulated throughout the world. There are similar registries in Canada, Mexico, Japan, Australia, the European Union, and other countries.

This record of success should encourage an expansion of TRI. The program currently covers 654 toxic chemicals, which represent less than one percent of the more than 75,000 chemicals manufactured in the United States. Companies should be required to publicly report releases of other harmful chemicals, including greenhouse gas emissions (required by the European Union and proposed in California). In addition, facilities currently exempt from TRI, such as sewage treatment plants, airports, large agricultural operations, and auto service stations, should be brought into the program.

TRI can also be strengthened to create additional incentives for pollution reduction. While TRI has prompted reductions in toxic releases, the quantity of toxic chemicals generated and used by facilities has declined only slightly.

Going forward, companies should be required to report information about their chemical use and the amount of chemicals that remain in products. This is an approach followed with success by Massachusetts and New Jersey and advocated by the EPA itself under the Clinton administration.

From policing programs to school performance to medical error rates in hospitals, the public today is demanding increased accountability from public and private institutions. We should require no less from companies who daily expose us to thousands of toxic chemicals. A strong TRI program will help us realize this goal.

Professor Clifford Rechtschaffen is codirector of the Environmental Law and Justice Clinic at Golden Gate University. This article is a reprint of an essay published by the Center for American Progress in December 2006.



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