

DUKE ENVIRONMENTAL LAW

Spring 2006

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Nicholas Institute and Law School help California design regulations for greenhouse gases

THE FUNDAMENTAL PURPOSE FOR DUKE'S NICHOLAS Institute for Environmental Policy Solutions, launched last September, is to find practical solutions to pressing environmental problems. With its involvement in the California Climate Change Project, it is doing just that, taking on one of the most pressing—and often highly politicized—environmental issues: greenhouse gases and their effect on global climate change.

PHASE I: COMPILING DESIGN PRINCIPLES FOR CAP AND TRADE SYSTEM

The Institute is providing a practical research base to California policy-makers who are investigating options for a state-run system to regulate greenhouse gas emissions. The first phase of the Institute's contribution, led by Director Tim Profeta JD/MEM '97 and Brigham Daniels, a PhD student at the Nicholas School of the Environment and Earth Sciences, offers design principles for a market-based "cap-and-trade" system that would establish emissions caps for emitting sectors and allow the economy and the system's flexibility to drive the necessary adjustments under those caps. Their document, "Design Principles of a Cap and Trade System for Greenhouse Gases," provides policy-makers with lists of options for such a regulatory approach—an alternative to traditional "source-by-source" emissions regulation—as well as the policy implications of each.

"We wanted to provide a comprehensive, accessible overview of relevant issues and choices facing policy-makers considering reducing greenhouse gas with a cap-and-trade system," said Profeta, adding that the document was written to have "national applicability at the state level" and is available to other states' regulators and policy-makers, many of whom have indicated their interest in climate change issues.

"Many politicians and policy-makers may already have some idea of what they want to do with cap-and-trade and how they want to handle greenhouse gases, but this document is particularly useful to those who may need an introduction," Daniels said.

The document also offers an analysis of a much-criticized cap-and-trade system, the Regional Clean Air Incentives Market (RECLAIM) program established in southern California in 1993 for industrial facilities emitting nitrogen oxides and sulfur oxides. "While we provide an even-handed analysis, we also tried to alert policy-makers



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Greenhouse

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ers to potential pitfalls,” said Daniels. “We wanted those making decisions to understand that the problems with RECLAIM can be avoided by carefully designing a cap-and-trade system.”

The Energy Foundation, which helped fund the Project, sought the Nicholas Institute’s involvement because of Profeta’s expertise in climate change policy. As former counsel to the environment to Senator Joseph Lieberman, D-Conn, Profeta was the principal architect of the McCain/Lieberman Climate Stewardship Act of 2003, which dealt specifically with cap-and-trade policy proposals on a national scale. Daniels, who received his MPA from the University of Utah and JD from Stanford Law School, practiced environmental law, natural resources law, and land use with Parsons Behle & Latimer in Salt Lake City before coming to Duke. His PhD advisor is Professor Jim Salzman, who holds joint appointments at the Law School and Nicholas School.

PHASE II: ANALYZING LEGAL ISSUES IN CAP AND TRADE APPROACH

The second phase of the Institute’s involvement, which is already underway, will analyze the legal issues that California and other states face in trying to establish and implement cap-and-trade regulatory systems. Profeta and Daniels have enlisted the assistance of Duke Law experts Erwin Chemerinsky, Alston & Bird professor

of law, Christopher Schroeder, Charles S. Murphy professor of law and public policy studies, and Professor Neil Siegel to examine the legal implications of the design principles. Four law school students serve as research assistants on the project.

Once one gets into the details of a state-based cap-and-trade system, a number of constitutional concerns become apparent. For example, significant cap-and-trade design considerations revolve around the



complex yet fundamental issue of “leakage”—i.e., emissions from nearby, non-regulated states and the possible effect these emissions might have on California’s ability to realize any real reductions through cap-and-trade regulation. Because successful cap-and-trade design for any state would likely necessitate some form of regulation beyond its own borders, the legal inquiry, noted Profeta, is critical in light of the

Dormant Commerce Clause, which provides a significant barrier to state actions impacting interstate commerce.

With this current research into the legality of various cap-and-trade design choices, the Institute hopes to provide policy-makers who are interested in adopting cap-and-trade systems helpful guidance about how to do so within the boundaries of the law.

THE INSTITUTE’S APPROACH: INTERDISCIPLINARY, COLLABORATIVE

Profeta explained how this collaboration between the Institute and the Law School provides a model for future Institute initiatives. By bringing together Institute and faculty expertise, the Institute hopes to provide innovative and comprehensive answers to environmental concerns by incorporating the University’s broad academic resources into the solution-making process. “There are a lot of cutting edge policy questions that have a significant legal component and the Institute will often need the help of the Law School. Through the Institute, the University is becoming less of an Ivory Tower and more of a practical resource for people grappling with the tough and complicated decisions posed by environmental challenges.” ♣
— T.J. Mascia '08



SEE DESIGN PRINCIPLES OF A CAP AND TRADE SYSTEM FOR GREENHOUSE GASES
<http://www.env.duke.edu/institute/califcapandtrade.pdf>

NICHOLAS INSTITUTE
FOR ENVIRONMENTAL POLICY SOLUTIONS
DUKE UNIVERSITY





“THE FRENCH ARE AGHAST AT AMERICA’S WITHDRAWAL FROM THE KYOTO PROTOCOL AND ITS INVASION OF IRAQ. BUT AT THE SAME TIME, PARISIANS TOLERATE MANY RISKS AMERICANS WOULD NOT.”

A Tale of Two Cities (in One) Jonathan Wiener reports from Paris

WHO IS MORE FAITHFUL to the precautionary principle – the United States or Europe? In the post-Cold War era of transatlantic competition, that question seems to be asked all over Paris, where Professor Jonathan Wiener, Perkins professor of law and environmental and public policy studies, is spending his sabbatical year. The common wisdom is that the United States paid more attention to protecting against risks in the 1970s, while in recent years Europe has been more protective. But the reality, Wiener is finding, proves more complex.

To understand this debate, Wiener has been spending the academic year in at l’Ecole des Hautes Etudes en Sciences Sociales (EHESS) and at the Centre Internationale de Recherche sur l’Environnement et le Developpement (CIRED). “Paris shows both sides. In Paris the parks are clean, cars are gas-sippers, and the Métro is a marvel,” he observes.

“The French are aghast at America’s withdrawal from the Kyoto Protocol and its invasion of Iraq. But at the same time, Parisians tolerate many risks Americans would not. Métro doors open before the train stops, motorcycles drive on the sidewalks, and cigarette smoke is everywhere.” Wiener and his family live in an apartment in Auteuil in southwest Paris, home to Molière when it was still a village outside the city walls. “Every day as I cross Pont Mirabeau, I look up the Seine and see the Eiffel Tower and a replica of the Statue of Liberty. Then I look downstream and see Lafarge and Béton de France—two huge cement plants—and the tall smokestacks of the municipal waste incinerator, one of which just burned down. Paris is enlightenment on one side, gritty industrial development on the other – two sides of progress.” He has also had a close-up view of social unrest in France, with riots in the fall and national strikes in the spring. Not to mention avian flu.

Writing in the March/April 2006 issue of *The Environmental Forum*, and with colleagues in the October 2005 issue of *Risk Analysis*, Wiener argues that the focus of the precautionary debate has been misplaced. Sharp transatlantic contrasts tend to be drawn from an unrepresentative sample of only a few policies. Across a wider array of risks – the paper in *Risk Analysis* studied almost 3,000 risks over the last 35 years – the U.S. and EU turn out to exhibit parity in the overall level of precaution. The interesting question, writes Wiener, who is completing a book on *The Reality of Precaution*, is why the EU and U.S. occasionally diverge on the individual risks they worry about most. Wiener’s research blends two fields of law – environmental regulation and comparative law – in an effort to find constructive new perspectives. “Rather than debating who is ‘ahead,’ we should be learning from policy experimentation, evaluation, and borrowing,” he urges. “We should be



“BENJAMIN FRANKLIN... ARTICULATED WHAT HE CALLED HIS ‘PRUDENTIAL ALGEBRA’: A PRAGMATIC ANALYSIS FOR MAKING DECISIONS. EVERY U.S. PRESIDENT SINCE THE 1970s, IN BOTH PARTIES, HAS REQUIRED A VERSION OF FRANKLIN’S ALGEBRA TO ASSESS THE IMPACT OF NEW REGULATIONS. NOW EUROPE IS FOLLOWING SUIT.”



Paris
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identifying better laws, not just more laws. Instead of a race to the top, the United States and the EU should be developing a transatlantic policy laboratory.”

In the City of Light, Wiener has been living in that laboratory. Immersed in the development of European law and policy, he has found a community of colleagues in law, social sciences, and science, who are thirsty to exchange ideas with American institutions, such as emissions trading, policy analysis, and the economic analysis of law. Wiener has shared his expertise and spread the Duke profile through numerous presentations. For example, he gave talks on precautionary regulation in Zurich in November, and on climate policy at the French Institute for Sustainable Development (IDDRI) in January. That month he also spoke at the U.S.-EU High Level Regulatory Cooperation Forum in Brussels, and in February he testified on options for future climate change policy before a panel of the French National Assembly (in French). In April he will be advising the Organisation for Economic Cooperation and Development (OECD) on risk and regulatory governance, and in May he will speak on “Better Regulation” in London.

“Benjamin Franklin – who was of course the U.S. Ambassador to France – articulated what he called his ‘prudential algebra’: a pragmatic analysis for making decisions. Every U.S. president since the 1970s, in both parties, has required a version of Franklin’s algebra to assess the impact of new regulations,” says Wiener, who helped draft President Clinton’s executive order on regulatory review in 1993. “Now Europe is following suit: the EU Treaty requires assessment of benefits and costs, and the EU’s ‘Better Regulation Initiative’ is creating a system of regulatory impact assessment.” But Wiener sees a need to go further. “First, Europe needs to empower an office akin to the U.S. Office of Information and Regulatory Affairs to oversee these analyses and ensure they influence policy choices for the better. Second, in both the U.S. and Europe, impact assessment has been *ex ante* (prospective), which is necessary but not clairvoyant. Countries now need to add *ex*

post (retrospective) analysis of regulations in order to see which policies are achieving results, what revisions are needed, and how to improve the accuracy of the *ex ante* methodologies for the next round.”

Meanwhile, borrowing works both ways. Wiener thinks the U.S. can learn from Europe’s new greenhouse gas emissions trading system, involving all 25 member states, which was launched in January 2005 to implement the Kyoto Protocol. “It’s an important case of European innovation in environmental law that could be used in the U.S.,” he says. “Critics feared it would fail or costs would escalate. In fact, the market is working. The price of carbon has been roughly \$30 per ton—squarely in the range of the prices that economists were forecasting.” Emissions trading, used successfully in the U.S. to phase out lead in gasoline in the 1980s and to control acid rain in the 1990s, was advocated by Wiener and others for global greenhouse limitation, and adopted in the Rio treaty and Kyoto Protocol -- at U.S. insistence over European reluctance. But then Kyoto was rejected by the current Bush administration. Now Europe is implementing the market-based incentive system that Americans had urged. To study these developments, and how China and other major developing countries could be engaged, Wiener is organizing a conference in Paris to be co-sponsored by Duke’s Nicholas Institute for Environmental Policy Solutions along with CIRED and IDDRI.

“It’s an especially exciting time to be in Europe,” says Wiener. “With the EU expansion from 15 to 25 member states, ‘Better Regulation,’ the largest emissions trading program, popular unrest and elite struggle over social benefits and corporate takeovers, and of course the debate over the EU Constitution (which is up in the air after being rejected in France and Holland), there are elements resonant to Americans—from the founding, the New Deal, and the modern regulatory era—but they’re all happening at once. As Ben Franklin might have known, the debate over precaution as a principle is giving way to a search for policies that work in practice.” ♣



Recent Environmental Faculty Presentations

Joost Pauwelyn

Presenter, "International Institutions Linking Trade to Environment," conference on "Global Trade: Enemy or Friend of Sustainable Development?" organized by Duke Student International Discussion Group (SIDG) and the Nicholas School of the Environment and Earth Sciences, Duke University, February 2006

Presenter, "How Strongly Should we Protect and Enforce International Law?," at the International Law Workshop, University of Chicago School of Law, March 2006

Jedediah Purdy

Respondent, Carol Rose's "Privatization - The Road to Democracy?," St. Louis University Law School, September 2005

Presenter, "People as Property: On Being a Resource and a Person," faculty workshop, University of Georgia School of Law, November 2005

James Salzman

Focus group participant, "How the U.S. Forest Service can or should incorporate ecosystem services and perspective into its operations," U.S. Forest Service, Minneapolis, April 2005

Panelist, "Sustainable Development," "The Big Questions: 125 Years of Science," Washington, D.C., May 2005

Presenter, "A New Currency for Conservation: Markets and Payments for Ecosystem Services from Our Nation's Forests and Farms," U.S. Forest Service, Washington, D.C., May 2005

Presenter, "Conservation Incentives that Work for People on the Land," workshop co-sponsored by Stanford University, The Nature Conservancy and World Wildlife Fund, Stanford, CA, May 2005

Speaker, "Creating Markets for Ecosystem Services," Rocky Mountain Mineral Law Foundation's Biennial Institute for Natural Resource Law Professors, Santa Fe, June 2005; public lecture, University of North Carolina, Chapel Hill, September 2005

Presenter, "Thirst: A Short History of Drinking Water," lead paper for panel on *Nature*, faculty workshop, Brigham Young University, March 2005; faculty workshop, University of North Carolina, September 2005; "The Properties of Carol Rose: A Celebration," Yale Law School, November 2005; faculty workshop, University of Arizona, Tucson, February 2006; faculty workshop, University of Utah, March 2006

Fall 2005 Distinguished lecturer, "Next Steps for Ecosystem Service Markets," *Journal of Land Use and Environmental Law*, Florida State University Law School, Tallahassee, October 2005

Presenter, "Creating Markets for Ecosystem Services," faculty workshop, William & Mary Law School, Williamsburg, VA, March 2006

Keynote speaker, "Making the Environment Pay," summit for North Carolina's conservation funding organizations, Raleigh, March 2006

Presenter, "Farm Conservation in the States and Down Under," national conference for Australian farm policy, Canberra, Australia, March 2006

Presenter, "Ecosystem Services - Law and Policy Beginnings," symposium on the Law and Policy of Ecosystem Services, Florida State University, Tallahassee, April 2006

Speaker, "Ecosystem Service Market Innovations in Australia," Environmental Workshop Series, Stanford University, Stanford, invited for May 2006

Christopher Schroeder

Speaker, "History and Prospects for the Environmental Justice Movement," forum in honor Martin Luther King, Jr.'s birthday, January 2005

Radio Call-in Guest, Minneapolis, on New Progressive Agenda for Public Health & the Environment, February 2005

Presenter, "The Hydrogen Economy," Berkeley Environmental Law Workshop, April 2005

Invited speaker, "Hydrogen," Presented to the Berkeley Environmental Law Workshop, April 2005

Invited speaker, "The Law of Risk Analysis," joint Statistics Department and Institute of Statistical Studies workshop, Iowa State University, October 2005

Invited speaker, "Environmental Regulations: What They Do and Why It Matters," Michigan State Environmental Speaker Series, November 2005

Speaker, "The Changing Laws Governing Risk Assessment," Duke Integrated Toxicology Program, February 2006

Speaker, "The Implications of the Clean Air Act for Climate Change," Interdisciplinary course on Energy Policy and Climate Change, February 2006

Invited speaker, UCLA Meeting of Environmental Law Programs, April 2006

Invited speaker on the Role of Environmental Law in Catastrophe Management, Frankel Symposium, UCLA School of Law, April 2006

Laura Underkuffler

Presenter, "The Scalian View of Takings and Property," Faculty Workshop, University of Connecticut Law School, February 2005

Presenter, "The Just and the Wild," conference, "The Properties of Carol Rose: A Celebration," Yale Law School, November 2005

Jonathan Wiener

Speaker, "Precaution in the U.S. and Europe," conference on "Better Regulation: The EU and the Transatlantic Dialogue," co-sponsored by the European Policy Centre, the European Commission, and the U.S. Mission to the EU, Brussels, March 2005

Speaker, "Beyond Kyoto: Moving Climate Change Policy Forward," Yale Center for Environmental Law & Policy and School of Forestry and Environmental Studies, Yale University, New Haven, April 2005

Speaker, "Precaution in Single-Risk versus Multi-Risk Models," Risk Assessment Forum, Yale University, New Haven, April 2005

Discussant, "The Making of Environmental Law," commentary on book and talk by Richard Lazarus, Resources for the Future, Washington D.C., May 2005

Discussant, "Global Administrative Law," discussant on papers on environmental and labor law developments, New York University Law School, April 2005

Speaker, "Hormesis and Regulation," keynote address, Fourth Annual International Conference on Hormesis, University of Massachusetts - Amherst, June 2005

Speaker, "Climate Change Policy," Nicholas Institute for Environmental Policy Solutions launch, September 2005

Speaker, "Precaution Against Terrorism," Yale/Eurasia Group/National Intelligence Council meeting on Managing Strategic Surprise, New York, September 2005

Speaker, "Comparing Risk Regulation in the U.S. and Europe," and "Precaution Against Terrorism," at Univ. of Zurich & ETH Zurich Polytechnic, joint Law & Economics Workshop, November 2005

Speaker "L'Economie Politique du Changement Climatique et les Relations Transatlantiques," ("The Political Economy of Climate Change and Transatlantic Relations"), Centre Internationale de Recherche sur l'Environnement et le Developpement (CIRED), Paris, December 2005

Speaker, "EU and U.S. Regulatory Environments, Current and Future Priorities, and Federalism and Preemption," U.S. - Europe High Level Regulatory Cooperation Forum, Brussels, January

Speaker, "The Institutional Origins of Transatlantic Discord on Climate Change," Institut du Developpement Durable et des Relations Internationales (IDDRI), Paris, January 2006

Witness, "Après 2012," Mission d'Information sur l'Effet de Serre, de l'Assemblée Nationale de la France, (testified before the Task Force on the Greenhouse Effect of the French National Assembly), February 2006

Speaker, "Le rôle des modèles dans l'expertise publique aux USA," Colloque International sur "Modèles et Fabrications du Futur: Du débat sur la Croissance au Changement Climatique," Ecole Nationale des Ponts et Chaussées, Paris, March 2006

Faculty, "The Transatlantic Debate on Risk and the Environment: Precaution, Climate Change, and the Future of Public Policy," a short course, as part of the master's degree program in the economics of sustainable development of environment and energy, jointly run by Université de Paris-10, EHESS, INAPG, ENGREF, Ecole Polytechnique, ENPC, and ENSMP.

Speaker, Changement Climatique et les Relations Internationales, at Sciences Politiques, March 2006

Speaker, "L'ACB dans le Droit," conference sur l'Analyse Cout-Benefice, (on "Benefit-Cost Analysis in the Law," conference on benefit-cost analysis), Université de Toulouse, April 2006
Participant, "Risk and Regulatory Governance," OECD Working Party on Regulatory Management, Paris, April 2006

Speaker, "Risk and Regulatory Governance," OECD Working Party on Regulatory Management, Paris, April 2006



Student Profile



Marjorie Mulhall '08

MARJORIE MULHALL '08 MAY ONLY be in her first year of law school, but she has already helped shape environmental law in North Carolina. As coordinator of a campaign jointly launched by Environmental Defense and the Southern Alliance for Clean Energy, Mulhall spent 16 months working to pass the North Carolina Global Warming Act, helping that bill take shape and rallying stakeholder and legislative support. Ratified by the General Assembly in August 2005 and subsequently signed into law by Governor Mike Easley, the Act represents the first major step by any Southeastern state to address the issue of global warming.

The Act establishes a legislative commission to investigate ways North Carolina can reduce its global warming pollution while capitalizing on economic opportunities such as those generated through emerging emissions trading markets and renewable energy technologies. The commission, whose members include legislators, academics, and representatives from economic sectors affected by global warming, will also evaluate the risks global warming poses to the state, and investigate realistic goals for reducing global warming pollution. It held its first meeting in February.

Mulhall signed on with the campaign just as it was getting started in April 2004, relocating to Raleigh from Olympia, Washington, to satisfy a long-standing

interest in environmental law and policy. "At that time, global warming was not on the radar of most citizens, businesses, and decision-makers in North Carolina, and many of those who had heard of it questioned the science," she said. Traveling across the state raising awareness with public meetings, the media, and stakeholders such as foresters, hog farmers, tourism representatives, scientists, and community leaders, Mulhall said she quickly learned the importance of balancing information about the hazards of global warming with a positive economic message.

"Global warming can cause extensive economic harm—coastal tourism could suffer with sea level rise, and changing climate might imperil the mountain ski industry, or the growth of tree species on which the forestry sector depends. But it was exciting to also deliver a message of hope and good common sense. The state's hog farmers and forestry sector could benefit from carbon credits in an emerging carbon marketplace," said Mulhall. She recalled one meeting with hog farmers at a barbecue restaurant in eastern North Carolina.

"We sat there, talking about methane capture from hog waste lagoons, talking about our common interests—'you are out to make a living, and we're out to protect the environment, and in this instance, our interests coincide.' To see that mutual understanding dawn was really great." Mulhall added that it was particularly gratifying to have the bill receive its N.C. Senate sponsorship from Senator Charles Albertson, whose constituents include a large number of hog farmers.

By the time the General Assembly went into session in January 2005, legislators were asking for presentations on global warming, said Mulhall, which the campaign delivered with a roster of speakers that included Dean William Schlesinger of Duke's Nicholas School of the Environment and Earth Sciences, and the content of the

bill began to take shape. Mulhall largely credits its eventual passage, though, to the "chorus of voices" that pushed legislators to action—the members of partner organizations who sent their elected officials e-mails and letters, newspaper editorials, and non-traditional allies in faith communities and industry groups who also got involved.

While slightly different versions of the global warming bill passed by overwhelming majorities in both the N.C. Senate and House of Representatives in May 2005 and July 2005, respectively, their disparities hadn't been ironed out as the legislative session neared its close in August. In a sprint to ensure the bill's final passage, Mulhall started her first semester of law school squeezing campaign conference calls in between classes, writing "action alerts" to spur voter comment whenever she found a few moments, and "making many, many trips" between Duke and the capital. The N.C. Global Warming Act was ratified on August 31, the last day of session.

Mulhall traces her desire to practice environmental law back to third grade. On hearing that her teacher's daughter was going into the field, she recalled thinking that it sounded rewarding. She has been focused ever since, majoring in biology at Bucknell University on the advice of environmental practitioners she sought out while still in high school, and taking a year to work as an environmental educator in Costa Rica with WorldTeach, a volunteer organization. She has always been interested in working to help draft and pass environmental legislation, and she said her work on the campaign to pass the N.C. Global Warming Act just cemented her goals.

"I think the campaign helped launch my career, and the JD will aid me in getting to the next stage," she said, noting her excitement over the prospect of an environmental clinic getting established at Duke. "I definitely have found the area of law I'm passionate about." ♪



THE ENVIRONMENT AT DUKE

STANBACK INTERNSHIP PROGRAM OFFERS DUKE STUDENTS ENVIRONMENTAL INTERNSHIPS

Thanks to the generosity of Mr. and Mrs. Fred Stanback, dozens of Duke students will earn \$4,000 this summer working for one of 37 environmental non-profit organizations.

The Stanback Internship Program is a partnership between the Nicholas School of the Environment and Earth Sciences and targeted state and national conservation organizations. The purpose of the program is to provide students with significant work experience in grassroots conservation, advocacy, applied resource management, or environmental policy.

All Duke students who have at least one full semester remaining as a Duke student following the internship are eligible to compete for the internships. Graduate and undergraduate students in all programs are eligible, and many law students have benefited from this program. ♡

NEW STUDY LOOKS AT RACIAL COMPONENT OF ASTHMA PREVENTION



BARAK RICHMAN

Together with a Duke social psychologist and pulmonary specialist, Law Professor Barak Richman has launched a project which tests whether adherence to asthma prevention regimens can be improved among minority youth if they and their caregivers receive instructions from minority physicians. The team is producing videos shot with identical scripts and two different actors delivering medical and environmental instructions relating to prevention—dusting, limiting exposure to mold, pets, smoke, washing things in hot water.

The project is funded by the University's Environmental Health Sciences Research Center (EHSRC), which supports interdisciplinary research into environmental health issues pertaining to vulnerable populations. Duke's is the only one of 33 EHSRCs in the country to include an Environmental Policy Research Core, led by Christopher Schroeder, Charles S. Murphy professor of law and public policy studies.

Richman, an emerging scholar in health law and policy, says the Environmental Policy Research Core offered him a welcome opportunity to build on his interests in reforming Medicaid policy. He feels strongly that effective health care policies, especially towards the poor, demand a behavioral paradigm in addition to a medical paradigm.

"Part of my whole argument is that there are a lot of low-cost networks, support networks, that can really improve health outcomes. And once we start understanding how pervasive the role of race is, you would be better able to inform those other kinds of interventions." ♡

DELPH SYMPOSIUM FOCUSES ON OCEAN ECOSYSTEM MANAGEMENT

On October 21, *Duke Environmental Law & Policy Forum (DELPH)* brought together a group of interdisciplinary experts in ocean and coastal law and policy to discuss the future of an ocean governance system in the United States. Student-organized and co-sponsored by the Law School and Duke's Nicholas Institute for Environmental Policy Solutions, Nicholas School of the Environment and Earth Sciences, and Terry Sanford Institute, the day-long symposium addressed the opportunities presented by the recent reports of the U.S. Commission on Ocean Policy and the Pew Ocean Commission, which both recommended ecosystem-based management of the marine environment with emphasis on regional ocean governance systems.

"The two commission reports have made 2006 a year for oceans reform, but there has always been a disconnect between our academic understanding and people in decision-making positions," said Nicholas Institute Director Tim Profeta '97 in introducing the symposium's final roundtable, an attempt to tease out from the day's discussion concrete design principles for oceans policy reform.

There was general consensus among participants that

institutional reform was essential. "Ocean and coastal policy in this country developed without a structure and a plan," observed participant Laura Cantral of the Meridian Institute, which coordinates the design and implementation of the Joint Ocean Commission Initiative, an effort that synthesizes the work of the two commissions. "There were good, valid, and valuable resources, but there has never been an opportunity to see how they relate to each other, how they are not relating to each other, and perhaps how they should."

Participants engaged in a lively debate as to whether reform should be "evolutionary" and incremental or "revolutionary" and sweeping, and discussed, in practical terms, how regional strategies can be used to address national goals, in ways that can best avert transactional costs.

Sarah Doverspike '06, *DELPH* editor-in-chief, was pleased with this discussion. "I strongly believe we achieved our goal of significantly furthering the ongoing debate about the most effective way to implement an ecosystem-based approach to ocean management in the U.S." Articles by the speakers will be published in *DELPH's* Volume XVI, Issue 2. ♡



Alumni Profile



Linda Malone

'77

LINDA MALONE'S SCHOLARSHIP and activities span the fields of environmental law, international law, and human rights, areas that she says are fundamentally connected. "If you don't have the environment you need in order to live, function, and thrive, you cannot say the individual is fully benefiting and able to exercise basic human rights," says Malone, Marshall-Wythe Foundation professor of law and the director of the Human Rights and National Security Law Program at the College of William and Mary School of Law, and a life member of Duke Law School's Board of Visitors. "In places where we see that basic human rights are denied, very frequently part and parcel of that is a total disregard for the environment in which those citizens live."

Having started her career as an environmental lawyer and advocate with Ross, Hardies, O'Keefe, Babcock and Parsons, in Chicago, Malone was involved in some of the leading cases of the day on takings and the application of the National Environmental Protection Act, issues that were being seriously examined for the first time. She became interested in environmental issues related to agriculture while teaching at the University of Arkansas School of Law in the early 1980s, realizing that it was only a matter of time before agriculture would be subject to regulation.

"At that time, the agriculture industry audiences that I addressed were skeptical of

this basic premise. After a long history of exemptions for agriculture from most forms of federal regulation—whether in antitrust, labor, or safety regulation—the assumption was that the environmental explosion would never reach agriculture, no matter how extensive its impacts on the environment." Malone's articles and congressional testimony assisted in the formulation of conservation programs of the 1985 Farm Bill, which was highly innovative in promoting agricultural and environmental preservation.

Malone's interest in the nuclear industry's impact on agriculture led her to her first foray into international environmental law, a groundbreaking article on transboundary nuclear pollution. Published just a few months after the 1986 Chernobyl nuclear accident, it gained considerable international attention.

"The impact of the Chernobyl accident on general perceptions of international environmental preservation was profound," she says. "Until then, international environmental law was seen as a theoretical, esoteric area of little practical value or significance. Images of parents in Poland dispensing iodine to their children to prevent thyroid cancer, livestock being slaughtered in Europe for fears of contamination, and maps of radiation reaching the United States brought home, literally and figuratively, the interconnectedness of all of our lives and environments."

In 1992, Malone represented the London-based Center for International Environmental Law as a delegate to the U.N. conference on the Environment and Development in Rio de Janeiro, better known as the "Earth Summit." Among other international appointments and honors, she was recently elected to the newly formed Environmental Law Commission of the World Conservation Union, the oldest international environmental organization. Domestically, Malone has served on numerous agencies and advisory commissions considering environmental, agricultural, and natural resource issues, including those reporting to the U.S. Environmental

Protection Agency and the National Academy of Sciences, and is the author of the water quality chapter of the Final Report of the congressionally created U.S. Ocean Commission.

A prolific author, Malone's most recent book, *Defending the Environment: Civil Society Strategies to Enforce International Environmental Law*, written with former student Scott Pasternack, offers legal blueprints for citizens groups seeking to address specific problems, should states fail to act in enforcing environmental norms.

"Litigation is only one strategy for, say, an indigenous group dealing with the consequences of global warming on the environment on which they depend for food," Malone notes. "There may be a way to lobby the U.N. for regional enforcement, or strategies for public discourse."

Equally active in the field of international human rights law and litigation, Malone was co-counsel to Bosnia-Herzegovina in its genocide case against Serbia and Montenegro before the International Court of Justice (ICJ), leading, in part, to her ongoing involvement in issues relating to the systematic use of rape as a tool of war, and a Bosnian program that fosters understanding among teenagers of different ethnic backgrounds. She is a member of the ABA's Special Subcommittee on the Rights of The Child and is working to amend the Federal Rules of Criminal Procedure to require consular access rights for foreign nationals arrested in the United States. Currently a consultant to the Regimes Crimes Liaison Office (RCLO) of the Department of Justice, which advises the Iraqi tribunal trying Saddam Hussein, Malone and her students prepare legal memos for use by Iraqi prosecutors and judges.

Carrying her wealth of experience into the classroom, Malone is known as an inspiring teacher and mentor. Still, she says her proudest accomplishment is her close relationship with her daughters, 16-year-old Erin, and 11-year-old Corey, who travel with her extensively and "take quite naturally to the kinds of issues that I address." ♡



Alumni Profile



Randy Benn
'87

WHEN HE WAS IN LAW SCHOOL, Randy Benn '87 recalls being interested in a number of broad areas, such as regulatory work, litigation, government, and international law and policy. He found a way to pull these interests—as well as his life-long affinity for lakes, rivers, and streams—together in his second week as an associate with Winston & Strawn in Washington, D.C. “The environmental group just dumped so much work on me that I never really emerged from it,” he says with a laugh.

Water became Benn’s focus in 1991, when he followed Winston partner Lajuana Wilcher to the Environmental Protection Agency after she was appointed by President George H.W. Bush to serve as assistant administrator for water, charged with overseeing the entire U.S. water program.

“The Exxon Valdez spill occurred in my first week on the job, and in my second week, I pulled an all-nighter, briefing EPA Administrator Bill Reilly on the Clean Water Act,” Benn recalls. “It was a great job. As attorney-advisor, I worked on the hot issues, gave many speeches, and met a lot of folks on Capitol Hill and in the Executive Branch—in spite of being a Democrat.” While at the EPA Benn led the Office of Water’s effort to authorize the Clean Water Act, working with members of Congress and their staffs as well as representatives of other federal agencies and the regulated community. He also had a significant role in the Office’s international

initiatives and became “through osmosis” an expert on the EPA budget.

His intimate knowledge of the budget process helped Benn add a thriving legislative practice to his environmental law specialty when he returned to Winston & Strawn in 1993. Four years later he joined LeBoeuf Lamb and is now a partner in the firm’s environmental and legislative departments.

A current focus of Benn’s practice is hydro-electric relicensing, work he says he loves for its combination of resource protection and complexity. Hydro-electric projects tend to control entire river systems and watersheds for long terms—30 to 50 years on average—and involve myriad stakeholders and review under numerous federal statutes, ranging from the Federal Power Act to the Clean Water Act to the Americans with Disabilities Act (ADA).

“When you sit down to talk about how you are going to manage a river system, it’s no longer just about how you are going to manage it for the benefit of the power generator; it’s also how you are going to meet the interests of the states, the Fish and Wildlife Service, the Forest Service, the National Parks Service, and all sorts of groups that represent paddlers, hikers, homeowners, and county and municipal governments who are looking for tax revenues,” Benn says. He calls the negotiation of a settlement allowing the Federal Energy Regulatory Commission (FERC) to relicense client Alcoa Power Generating Inc.’s Tapoco Project “one of the best things I’ve ever worked on—a great example of a win/win situation for everyone involved.”

The Tapoco Project on the Little Tennessee River is the main source of power for Alcoa Inc.’s aluminum manufacturing operations located near Knoxville, Tennessee. The river runs from Knoxville, through the Smoky Mountains, and down into Asheville, North Carolina, Benn explains. Seven years of negotiations produced a settlement agreement that accomplished many different goals.

“We protected an important source of clean power and the 2,000 jobs tied to it, added thousands of wilderness acres to the Great Smoky Mountain National Park, restored a part of the river that had been dry, re-established four endangered fish species, and created a white water rafting business that is getting national notice. We upgraded piers to ADA standards, worked with the Cherokee Indians, and gave both American Rivers and union workers things they were looking for,” says Benn who also drafted the federal legislation which redrew the boundaries of the Great Smoky National Park. He notes with pride that the Project won last year’s top award from the National Parks and Conservation Association, and this year will receive the Outstanding Stewardship of America’s Rivers Award from the National Hydropower Association.

In addition to environmental infrastructure, Benn’s legislative practice focuses on arts and culture. He has an ongoing relationship with Jazz at Lincoln Center and its artistic director, Wynton Marsalis. Benn has most recently assisted Marsalis with congressional testimony and other initiatives related to rebuilding his hometown of New Orleans following Hurricane Katrina.

Also active as a musician and in pro bono work on behalf of such organizations as Habitat for Humanity and the Coalition to Stop Gun Violence—one of the organizers of the Million Mom March—and the National Network for Youth, as well as with his church and three children’s activities, Benn describes himself as a “big believer in balance.” Professionally, he considers himself extremely fortunate to be able to do work that both pays the bills and that he finds rewarding.

“I never have seen myself as a traditional lawyer—I’ve chosen an unusual path in a lot of ways in which I’ve been able to follow my passions. It wouldn’t have happened if there hadn’t been people at each step in my career who weren’t willing to let me take risks and try something different.” ♡