

# Environmental Law at Maryland

University of Maryland School of Law

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*Letter of thanks to John Barber, artist of the painting, "Kathryn," as shown on this cover page.*

*Dear Mr. Barber:*

*On behalf of the Environmental Law Program, our sincere thanks for granting us copyright permission to have your artwork grace our new front cover. With the Chesapeake Bay so vital to all of us, your picture symbolizes what our program strives to achieve -- clean air, clean water, a better environment. It is the goal of our Environmental Law Program to bring the beauty of what you depict in "Kathryn" to the open waters of our beloved Bay.*

*Sincerely,*

*Laura Mrozek  
Coordinator  
Environmental Law Program*

## Clinic Wins Two Year Battle

by Wade Wilson\*



*Wade Wilson, 3D, and Dan Smith, 2D, stand in front of smoke stacks and pipelines at Bethlehem Steel.*

In the Spring of 1999, one student attorney looked into the possibility of filing suit against Bethlehem Steel for its NPDES permit which had expired a decade before. Today, a strict new permit and consent decree have shaved thousands of pounds of conventional and toxic pollutants off the company's allowable discharge at its Sparrows Point facility. The site is one of the largest integrated steel mills in the country.

The Sparrows Point facility, which produces approximately 300 million tons of steel per year and discharges over 200 million gallons of wastewater per day, sits at the junction of Baltimore's Harbor and the Chesapeake Bay on the Patapsco River. The river itself is on the Clean Water Act's "303(d) List," impaired by nutrients and toxic metals among other pollutants. After

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*(left to right) Margaret Clune 2D, Jani Laskaris 2D, Wade Wilson, 3D, Jeff Herrema 3D, Terry Harris, 3D, Dan Smith, 2D, with friend Danielle Turner, Melanie Flynn, '00, and Clinical Director, Rena Steinzor with her children, Hanna and Daniel, celebrate Bethlehem Steel victory.*

spending \$600 million on new production equipment in the past several years, Bethlehem Steel will now have to invest in a new centralized water treatment plant, thanks to two years of work by the Environmental Law Clinic. The clinic represented the Cleanup Coalition of Baltimore, a non-profit grassroots group of community members from Baltimore interested in preserving the environment.

Over the past three years, the Clinic's small team of three student attorneys investigated why the company's National Pollutant Discharge Elimination System (NPDES) permit expired in 1990. The reason came as a shock to the fledgling attorneys: although the company had timely applied for its renewal permit in 1989, 10 years of backroom "permit adjudication" had been conducted between Bethlehem Steel and the Maryland Department of the Environment (MDE), delaying the renewal of the NPDES permit which normally only spans 5 years. Worse still, the clinic students discovered that the old 1985 permit which the company was thought to be operating under during the ten year "stay" had actually never been enforced at Bethlehem Steel's discharge. In its place, a consent decree issued in 1985, which was supposed to cover discharges only until 1988 when a new treatment system would be completed, had remained in effect for the entire 15-year period, allowing discharges between 300 and 1500 percent of Best Available Technology (BAT) limits.

Bethlehem Steel's strategy was to weaken and eliminate as many permit conditions as possible from the NPDES permit. Using its technical and legal resources to ask MDE for variances, credits, site-specific water criteria, dilution factors for mixing zones, and chemical and biological translators, the company invoked all methods of either weakening permit limits or eliminating them altogether.

The Cleanup Coalition retained the clinic to investigate. Student attorneys then engaged in the arduous task of commenting on a nearly 100-page permit.

fact sheets, and appendices. Last year, student attorneys Melanie Flynn, Jim Lichty and Wade Wilson focused on water quality based limits for the upcoming draft permit. The students, joined by Clinic Co-Director Rena Steinzor, Cleanup Coalition President Terry Harris, and scientific advisors Jackie Savitz and Katherine Squibb, took their case to EPA Region III when negotiations with MDE stalled. As a result of last year's efforts, a strong draft permit was proposed by MDE last Spring.

Nevertheless, this year, student attorneys Catherine Delorey, Daniel Smith, and Wade Wilson delved deeper into the technology-based permit limits and unscrambled a history of consent decree abuses and unpermitted new sources. As a result, in addition to the permit negotiations, two lawsuits were filed, one to get access to Bethlehem Steel's production data (which is the basis of technology-based effluent limits) and a second against an improperly permitted new \$300 million cold rolling mill that went on line in the Spring of 2000 without a permit modification to more strict effluent limits—new source performance standards.

In the midst of preparing the litigation, the clinic continued focusing on making the new NPDES comport with the requirements of the Clean Water Act. The clinic made two more trips to Philadelphia and EPA Region III, resulting in EPA's issuance of both general and specific objection letters to the MDE. The Clinic's second trip was at EPA's request and included a meeting of over 20 representatives from the Clinic, Chesapeake Bay Foundation, MDE, EPA, and Bethlehem Steel itself. Brad

# Clinic Escalates Case Against Air Pollution

by Jeff Herrema\*

add an additional 2500 tons per year of pollutants to Baltimore's already unhealthy airshed. The substantial increase in motor vehicle emissions allowed under the revision will likely interfere with Baltimore's ability to attain the ozone NAAQS. Further, as an organization committed to promoting smart growth, 1000 Friends is concerned that the roads that will be built under the new "budget" will only contribute to the urban sprawl that threatens to engulf the Baltimore/Washington D.C. corridor.



(left to right) Jeff Herrema, 3D, Brian Higgins, 3D, Clinical Director Rena Steinzor, Mark Sullivan, 2D, and Margaret Clune, 2D, work on reply brief for 1000 Friends case.

The Clean Air Act requires states to demonstrate through "photochemical grid modeling" that their air quality plans will provide for attainment of the ozone NAAQS by the statutory deadline. For Baltimore, that deadline is 2005. MDE failed to perform the requisite modeling when it submitted the plan revision to EPA. Nevertheless, EPA approved the revision,

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The United States Court of Appeals for the Fourth Circuit will be the battleground for the Clinic's latest effort to keep Baltimore on track toward meeting its air quality objectives under the 1990 Clean Air Act. The controversy that will ultimately be decided by a three-judge panel of the Fourth Circuit will test the scope of a provision of the Clean Air Act that requires states to verify through a complex modeling process that their air quality plans will provide enough pollutant reductions for nonattainment areas to comply with the National Ambient Air Quality Standard (NAAQS) for ozone. The suit is the first of its kind in the country, and could substantially change the way that state air quality planning agencies and the Environmental Protection Agency (EPA) evaluate air quality plans.

The Clinic filed the Petition for Review of Agency Action on behalf of its client, 1000 Friends of Maryland, after EPA approved a recent revision of Baltimore's air quality plan which was prepared by the Maryland Department of the Environment (MDE). In effect, EPA's approval will allow local transportation planners to proceed with plans to construct new roads and highways that will

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

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relying on subjective analyses and rationalizing that MDE could offset the emissions increases in future plan revisions. It is exactly this approach that has prevented Baltimore from attaining its air quality goals since the Clean Air Act was first enacted over thirty years ago.

The Clinic became involved in the challenging and oft-confounding world of air quality and transportation planning last Fall when 1000 Friends asked the Clinic to investigate MDE's and the Baltimore Regional Transportation Board's (BRTB) use of outdated motor vehicle registration data in Baltimore's air quality and transportation plans. The agencies were using 1990 fleet data which failed to account for the explosive growth of sport utility vehicles in the last decade. Until recently, SUV's were subject to less stringent exhaust controls than ordinary passenger cars. The use of the older data thus concealed the adverse impacts on air quality related to the SUV fad.

After a heated debate involving three federal agencies, MDE, BRTB, the Clinic and several public and private interest groups, both MDE and BRTB finally agreed to use 1999 fleet data in their planning forecasts. The use of that data forced MDE to increase the mobile source emissions budget in Baltimore's air quality plan, EPA's approval of which is the subject of 1000 Friends suit against the agency.

Clinic students Margaret Clune (2D), Mark Sullivan (2D), Brian Higgins (3D) and Clinic Teaching Assistant Jeff Herrema (3D) are preparing the case under the guidance of Clinic Co-director, Rena Steinzor. The case is currently being briefed. Higgins and Herrema will represent 1000 Friends in oral arguments before the Fourth Circuit sometime in April or May.

*\*Jeff Herrema is a third year law student and a teaching assistant for the Environmental Law Clinic.*

## NOTICE TO ALUMNI

If you changed employment or have moved, please contact Laura Mrozek. You may email to: [lmrozek@law.umaryland.edu](mailto:lmrozek@law.umaryland.edu) or call 410-706-8157.

## CONT'D FROM PAGE 2 CLINIC WINS TWO YEAR BATTLE

Campbell, regional administrator for EPA Region III, led the meeting in a productive but firm spirit of compromise on the remaining "show stopper" conditions of the new permit.

This January 25th, after weeks of negotiations and a cumulative two years of clinical effort, a renewal permit and consent decree were issued. The permit includes 10 separate WQBELs for toxic metals at Maryland Water Quality Criteria levels and much stricter levels for TSS, Oil and Grease, and Zinc technology-based effluent limits, among others. The consent decree calls for the construction of a major treatment plant capable of handling over 50 million gallons per day and a new treatment system for reducing ammonia discharges. In the 1980's Bethlehem Steel had submitted a variance from Best Available Technology (BAT) for ammonia produced in its furnace, and both MDE and EPA never made the determination whether one was appropriate, resulting in over a decade of unregulated discharges of ammonia at over 1000 pounds per day. In addition to Bethlehem Steel's commitment to build a new treatment plant to remove solids and dissolved metals, it will also install BAT treatment to oxidize ammonia.

As counsel to the Cleanup Coalition, the Clinic's ultimate goal was to force new treatment technology at the Sparrow's Point facility, since treatment results in lower loading of toxic pollutants to the Patapsco and the Chesapeake Bay. The perseverance of the Clinic's student attorneys, guidance of its technical and scientific advisors, oversight of EPA Region III, and, most important, leadership of Clinic Co-director Rena Steinzor has culminated in a strong NPDES permit and strict consent decree at Bethlehem Steel.

*\*Wade Wilson is a third year law student and a teaching assistant for the Environmental Law Clinic.*



# TOOLS OF THE TRADE: PROTECTING THE HISTORIC MANMADE ENVIRONMENT THROUGH HISTORIC PRESERVATION LAW

By John Cannan\*



*Eutaw and Baltimore Streets on the West Side of Baltimore. These buildings date from the 1830s and were used as the factory/showrooms of Baltimore's Knabe Pianos which was patronized by the likes of Tchaikovsky and Puccini. The building was more recently used by Sunny Surplus and is slated for demolition for the Hippodrome Theater renovations.*

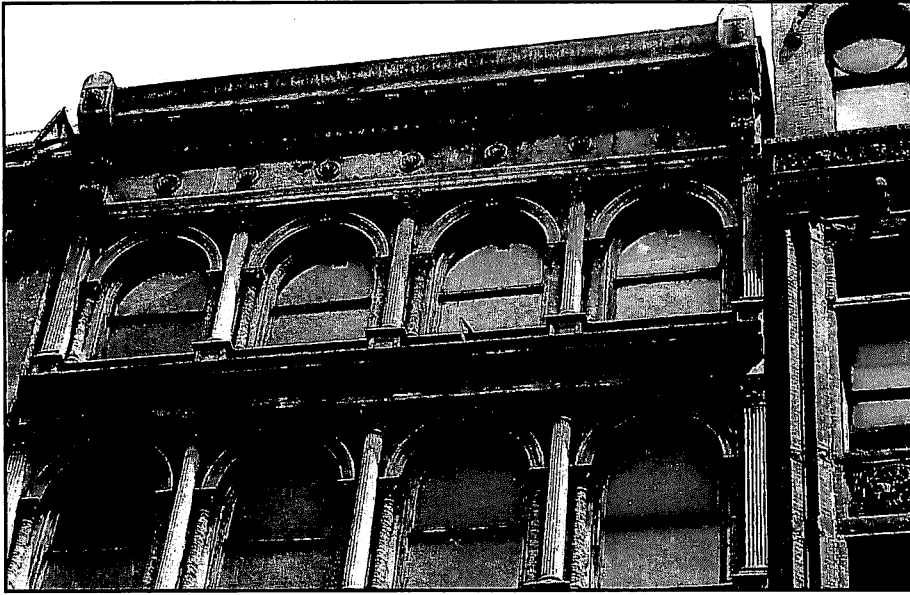
In June 1998, developers announced sweeping plans for Baltimore's West Side, an area of several blocks roughly bounded by Paca Street to the west, Camden and Pratt Streets to the south, Liberty and Park Streets to the east and Saratoga Street to the north. These ambitious designs envisioned settling "big box" retailers and urban professionals in this downtown area, once Baltimore's busiest and most elite shopping and theater district, as well as the stomping grounds of Hollywood stars. This district is currently a struggling deteriorating urban core. Realization of building the glittering new retail and apartment complexes would come at a price: the wholesale demolition of 150 historic structures: theaters, restaurants, stores, hotels, all places that played indelible roles in Baltimore's history. For preservationists dedicated to saving precious elements of Baltimore's historic manmade environment, the West Side plan was a call to arms, a cause celebre. Members of groups such as Preservation Maryland and Baltimore Heritage, Inc., West Side merchants and ordinary Baltimoreans organized to save the West Side's vintage Baltimore from destruction.

The battle for Baltimore's West Side is similar to many such fights being waged throughout the country: the attempt to save America's historic buildings and neighborhoods from destruction in favor of new development. Preservation

versus unrestricted progress: it is a contest reminiscent of ones being fought to save the environment from unlimited urban and suburban expansion. It is a controversy requiring lawyers schooled in historic preservation law. Historic preservation law is a combination of rules and regulations developed at the federal, state and local level to deal with protecting special elements of the manmade environment.

Perhaps the most famous preservation mechanism is the National Historic Preservation Act of 1966 (NHPA), 16 USC § 470 et seq.

Predating the National Environmental Policy Act (NEPA) by three years, and born as a reaction against the widespread destruction of historic buildings and sites wrought by highway construction and urban renewal in the 1950s and 1960s, the NHPA made historic preservation a priority in federal activity and spending. Section 106 has been likened to NEPA in that it is a "procedural" statute. Under Section 106 of the NHPA, federal agencies are required to take into account the effects of "undertakings" on properties listed or eligible for listing on the National Register of Historic Places, a catalog of historic buildings, sites and districts determined by the Secretary of the Interior as worth preserving for posterity. The law's definition of "undertaking" law now means a "project funded in whole or in part under the direct or indirect jurisdiction of a Federal agency." 16 USC § 470(w) Besides projects carried out on behalf of an agency, an undertaking includes projects carried out with federal financial assistance, requiring a federal permit or approval and some state or local programs subject to federal regulation or approval. Under regulations promulgated by the Advisory Council for Historic Preservation, 36 CFR Part 800, Section 106 review involves cooperation between the agency official in charge of the undertaking and the State Historic Preservation Officer (SHPO) who work together with local governments, the public and interested parties and organizations to identify historic resources within an undertakings' area of impact. If historic resources are found within this area of impact, the parties then work together to mitigate the undertakings' adverse effects upon these resources. If a federal agency's fails to comply with Section 106 and the NHPA, an action can be brought to enjoin the undertaking.



*The ornate cast iron front of the Alberti, Brink and Company building on 322 West Baltimore Street. Built in 1867, this building boasts one of the few remaining, and certainly the most ornate, cast iron fronts in Baltimore City. Retaining Baltimore's cast iron buildings in the West Side has been a leading concern of preservationists.*

The NHPA also encouraged and financed the creation of state preservation efforts. Many states responded with mini-NHPA acts of their own. The Maryland Environmental Policy Act, Maryland Code Annotated, Natural Resources § 1-301 et seq., for example, models the NHPA by requiring state agencies to consider the impact of their actions upon the environment which includes a consideration of historic resources and a command to consider mitigating any adverse effects such actions may cause. However, this act was yet to be employed in the historic preservation context.

Even localities have their own laws governing the protection of historic properties. In Baltimore City, Urban Renewal Plans for certain areas, which have the force of ordinances, can restrict demolition of structures considered historic. The degree of protection, though, is sometimes open to interpretation. A recent dispute involved the Baltimore City Financial District Urban Renewal Plan's demolition restrictions. Preservationists claimed language in the Plan required that historic buildings could not be torn down. Developers countered the same language meant they need only preserve structures listed for protection if it was financially feasible to do so. Local regulations for the demolition and use of places, the building code and zoning ordinance, also may provide protections for historic resources. A historic preservation lawyer may often find

himself or herself arguing a case in an administrative hearing; an informal though critical forum since matters not advanced before an administrative body can often not be raised on appeal before circuit or appellate courts.

Preservation law is not all "stick." There is a significant piece of "carrot" involved as well, offered primarily as an incentive to private developers to rehabilitate properties rather than demolish them. A federal government tax credit of 20% is available for such rehabilitation. Some states offer credits of their own. Maryland, for example offers a generous 25% credit, allowing developers to claim a total 45% credit for a historic renovation when combined with the federal credit. Lawyers can work with developers to insure they meet these credits' requirements.

Besides many laws and regulations encouraging preservation, historic preservation attorneys must hone skills in public relations, negotiation and compromise. A preservation battle can often be won by working with developers to realize the potential of rehabilitating structures or by massing public opinion to make civic leaders rethink wasteful plans. This was the case on Baltimore's West Side. By January 2000, the outlook for this historic part of Baltimore had changed, thanks to significant public pressure ignited by a protest and short film on the West Side (and starring William Donald Schaefer) shown at the Senator Theater. Instead of the massive demolition of historic structures, the State, City, developers and preservationists came together to negotiate a memorandum of agreement that makes preservation of historic structures a goal, not a hindrance or afterthought: now hundreds of structures will be preserved. This preservation agreement helps insure that the Baltimore West Side, once frequented by the likes of Frank Sinatra, Humphrey Bogart and Henry Fonda, will be saved for Baltimoreans of the present and future.

*John Cannan, '00, is an associate at The Law Offices of John C. Murphy.*



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# Student Attorney's Role in Phase I Environmental Assessment

by Mark L. Matulef\*

One of the decisions I faced as a student attorney in the Law School's Community Transaction Clinic was whether to walk into the flooded basement of an old industrial building. I was observing the reconnaissance segment of a Phase I environmental site assessment (ESA). The client had arranged for the ESA to determine whether it was necessary to include the remediation of environmental hazards in the building's renovation plans.

When I arranged for permission to attend the reconnaissance, I had three objectives in mind. First, I wanted to learn how a Phase I was conducted on site. Second, I wanted to keep the client informed about the activities and observations of the client's environmental professional, the person conducting the ESA. Third, I wanted to be in an informed position myself to advise the client. My clinic assignment was to identify available sources of funding to remediate possible environmental hazards.

## I. ASTM E 1527 and uses of a Phase I assessment

A Phase I assessment is a voluntary inquiry to rule out or not rule out possible hazards. Phase I is a form of risk assessment. It entails unobtrusive means to identify possible hazard – a review of archival data sources, interviews, and a visual inspection of the property. Phase I does not involve taking samples, or any other activities that would disturb the site. Yet, rather than calculating precise, quantitative risks to human health, the Phase I report lists recognized environmental conditions that might affect human health, the financial feasibility of real estate acquisition and development, and the practicality of the proposed uses. Recognized environmental conditions are defined as the presence or likely presence of hazardous substances or petroleum products on the property under conditions that indicate a recent or past release of such substances or a material threat of a release in the structures on the property, or into the ground, groundwater, or surface of the property. Hazardous substances are those defined by law.

The elements and legal sources behind Phase I are found in ASTM E 1527-97, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process* (American Society for Testing and Materials, *Annual Book of ASTM Standards 2000*, at pp. 777-800). Examples of these requirements are shown in the Exhibit on page 8.

Phase I looks at past, present, and possible future uses of a particular site. In addition, uses and conditions of properties and bodies of water in the surrounding area are to be noted in the report – if records obtained in the course of the review provide that information. ASTM E 1527 section 7.12, Approximate minimum search distances, contains a variety of specifications for the scope of records search and site reconnaissance for areas outside the property.

Determining property use and the presence of environmental conditions entails an examination of standard sources – generally, environmental protection agency databases. Also, the environmental professional conducting the ESA is to review other relevant local sources, such as real property records, permits, planning and zoning documents, past surveys and drawings, and the databases of environmental and health regulatory agencies. For example, records may indicate the presence of an industry known for the use of toxic chemicals or the storage of petroleum products. Plans may show that underground storage tanks (USTs) were installed. Applications for water release permits may have been filed.

The Phase I standards are designed to work with existing laws – in particular, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 USC s. 9601 *et seq.*). In real estate the expression is that price is a function of location, location, location. The environmental liability corollary to this real estate maxim is CERCLA, CERCLA, CERCLA. ASTM E 1527 was developed to satisfy a due diligence requirement of the innocent purchaser defense (ASTM E 1527 section 1.1). The purchaser of a contaminated property may avoid some environmental liability if the contamination was caused by a third party who was not an employee or agent of the purchaser. A Phase I ESA represents the exercise of due care with respect to hazardous substances and precautions against foreseeable acts and omissions of the third party (40 U.S.C. 9607(b)(3)).

## II. The lawyer's role

The lawyer's role in a Phase I ESA can entail a variety of services. Some of those services entail traditional legal practice provided prior to or following the ESA. Prior to selection of a contract inspector, the lawyer can identify what state licenses or certificates are required of environmental professionals. The lawyer can help draft advertisements or competitive selection documents. The

## Elements of a Phase I Environmental Site Assessment

<u>Components</u>	<u>Examples of elements</u>	
Records review	Standard sources	Federal NPL, CERCLIS, RCRA lists State hazardous waste sites State underground storage tank lists
	Additional sources	Fire, health, planning department Building permit, inspection department Local, regional water quality agency
	Mandatory standard physical setting sources	U.S. Geological Survey maps Soil conservation maps Other credible, ascertainable sources
	Standard historical property data sources	Aerial photographs, fire insurance maps Property tax files Recorded land title, zoning, land use records Other credible, ascertainable sources (e.g., newspaper archives)
	Surrounding area	Current, past use and other data on properties within <i>approximate minimum distance</i>
Site reconnaissance	Coverage of property use and recognized environmental conditions	Current and past use Geologic, hydrologic, topographic conditions Description: roads, sewage, water supply Hazardous substances, petroleum products Storage tanks, drums; drains, sumps, wells Pools of liquid; pits, ponds, lagoons Stained soil, pavement; stressed vegetation Solid, hazardous waste; waste water; PCBs
	Surrounding area/adjoining property	Current and past use: observed going to or coming from the property Geologic, etc., conditions observed from the periphery of the property
Interviews	Property	Owner, owner-designated site manager At least one local official (e.g., fire, health/safety, environmental protection)
Report	Contents	Environmental professional credentials Identification of site, client Sources identified for all findings Findings and conclusions

Source: American Society for Testing and Materials (ASTM), Standard Practice E 1527-97 (2000). Elements shown are excerpted and do not represent all required information.



lawyer can review the inspector's standard contract and propose necessary changes – especially to ensure that the scope of work follows ASTM E-1527. After the assessment, the lawyer can advise the client on next steps.

Another preparatory activity is obtaining sufficient site access to facilitate the Phase I examination – especially if the client is not the owner of the site. If the Phase I ESA cannot rule out environmental concerns, a Phase II ESA may be undertaken. Phase II is a more intrusive step: it entails collection of environmental samples. In that case, the prospective buyer and seller may want to negotiate and execute an agreement that gives the prospective buyer greater site control – such as a short-term lease or purchase option.

The various ways a lawyer can provide services during the Phase I ESA can be organized by the four components in ASTM E 1527: (1) records review, (2) site visit, (3) interviews, and (4) report.

**Records review.** The lawyer can assemble documents – for example, the legal description of the property, copies of construction or use permits, and title history.

Lawyers may be particularly helpful in ensuring that the archival sources of information identified in the contract are ones that may be relied upon. For example, the U.S. EPA and various state environmental regulatory agencies maintain websites with lists or maps showing sites with environmental hazards or facilities that must report air or water releases. These Internet-based services offer the public quick access to environmental information by geographic location – and nifty maps. Yet, these services are subject to a variety of limitations – such as missing the newest and oldest recorded environmental releases. Environmental professionals and environmental lawyers should know the difference between a reliable data source and one that is not so reliable

**Site reconnaissance.** There are several reasons why a lawyer might accompany the environmental professional on the site visit. First, the lawyer can confirm the site visit dates and of the location of observations. Second, the lawyer can identify any divergence between the practice specified in ASTM E 1527 and the activities of the environmental professional. Third, attending the site visit gives the lawyer first-hand knowledge that can be used in reviewing the accuracy of the Phase I report.

After the site visit, the lawyer might prepare a separate memorandum. A memo to the files or the client is good practice following any meeting or other business on client's behalf.

I want to emphasize the importance of writing down any communications between the environmental professional and the lawyer. It may be helpful to have a record of the environmental professional's verbalized observations – for example, to compare with the written findings. Because positive, as well as negative, conditions are to be included in the report, the lawyer or client may need to remind the environmental professional to include the positive conditions. More generally, a written record of the site visit may help keep the client informed – about environmental conditions and about the lawyer's representation of the client's interests.

**Interviews.** ASTM E 1527 requires the environmental professional to interview the owner and a key site manager designated by the owner. Requests for interviews are accompanied by requests for documents, including permits, Material Safety Data Sheets, environmental audit reports, and correspondence from government agencies on environmental law violations. Also, the environmental professional must attempt to interview at least one local official – for example, from the fire, health and safety, or hazardous waste disposal department.

The lawyer can assemble a list of possible contact persons. The lawyer can ensure that the report reflects interview results – not just findings of environmental conditions, but positive results, such as passing grades on inspections, remediation efforts, and the absence of certain environmental conditions.

**Environmental Site Assessment Report.** One of the most important roles for the client's attorney is to review the draft Phase I report. I emphasize draft, because the client needs to guard against the environmental professional including information or comments that are not covered under ASTM E 1527. To that end, it is advisable that the contract for Phase I services incorporate one or more drafts, review of the draft, and a final report responsive to the client's review.

The following 10 points are but a few dimensions of the report for the lawyer's review:

(1) **Internal consistency.** Make sure the report describes environmental conditions consistently and that conclusions are consistent with findings.

**(2) Locations and minimum search distances.** Makes sure the report makes references to precise locations on the property and properties within the approximate minimum search distances. Make sure that records or observations are for sites that are within minimum distances.

**(3) Chemical constituents and other conclusions.** The report should only reach conclusions about the chemical content of substances found on the property within the strict limitations of ASTM E 1527. Section 8.4.2.8 states that the contents of containers observed on-site should be identified as “unidentified,” even if the container is labeled. Furthermore, hazardous substances or petroleum products may be called out only if they are identified in records, during interviews, and if they are observed directly in the site reconnaissance. The detection of asbestos, lead-based paint, radon, or wetlands is out of the Phase I scope, unless requested by the party contracting for the ESA.

**(4) Sources of information and dates.** The report should include dates of data collection, on-site reconnaissance, and interviews. A list of persons interviewed should be included with complete names, titles, and affiliations of the subjects. Sources must be provided for all information.

**(5) Client and site identifiers.** The report should identify the client and specify that the client authorized the investigation. Also, the report should describe how permission was given for access to the site, access to records of the property owner, and access to the owner’s employees or other interview subjects.

**(6) Missing or unavailable information.** The report should identify which information was missing or unavailable. Also, the lawyer can ensure that the report includes descriptions of reasonable but unsuccessful efforts to obtain interviews.

**(7) Photos and diagrams.** All photos and other exhibits should be labeled with the appropriate date, location, and description.

**(8) Specifications.** The report should not include specifications for environmental remediation, unless requested by the client. That reflects a separate process. Although some environmental investigators provide remediation services also, it may be a conflict of interest for the same company or individual to conduct both the ESA and remediation activities.

**(9) Findings.** The report should reflect negative as well as positive findings – for example, ground that is *not* eroded or stained, intact paint on building surfaces, the lack of standing liquids, and the absence of USTs.

**(10) Conclusions and recommendations.** The environmental professional must not overreach. The decision to proceed to a Phase II assessment or to forgo further environmental investigation is up to the ESA client, the property owner, or other authority. Furthermore, ASTM E 1527 section 11.6 specifies what must be included in a conclusion – and gives the precise wording – as to whether all recognized environmental conditions have been ruled out or not.

Remember that the Phase I report is an important document that characterizes the presence or absence of environmental and health problems. The report will leave a strong impression – an impression that will have a likely impact on the value of the property.

### III. On-site

During the walk-through of the site, I took my own notes – notes of my own observations and, more importantly, of the environmental professional’s comments and questions. A two-hour walk-through gave me an opportunity to ask the environmental professional a few questions about findings from the archival search. She said she had discovered information on the predominant past land uses of the neighborhood through land use and other records. Although the property was not far from the present downtown, over 100 years ago the neighborhood was on the fringe of the developed part of the city and home to dirty industry, such as charcoal making.

We talked also about the age of the building systems. The age is important for several reasons. For example, building components or finishes may contain materials that have been banned or regulated after installation – materials such as lead-based paint or asbestos. Also, certain mechanical systems operate on various types of fuel and may still contain petroleum products, waste water, soot of various content, or other materials.

My experience with my client’s Phase I assessment was limited to visiting the site. Still, I did want to give the client the benefit of attending the site surveillance. So, I did what all good lawyers do: I prepared a memo.

I began the memo by identifying the name and company of the environmental professional, as well as the



date and location of the site visit. I organized the memo by five subheadings: (1) comments by the environmental professional on findings from the records search, (2) questions by the environmental professional on future use, (3) personal observations of changes in the state of the property since my last visit, (4) a description of the environmental professional's walk-through – with an emphasis on conditions that appeared to get the most attention, and (5) comments by the environmental professional.

The memo provided my client with a summary of communications with the environmental professional and a preview of findings from the records search. More importantly, the report prepared the client to look for on-site observations that could end up as written findings of environmental conditions that could affect the perception, value, and future use of the property.

#### IV. Final word

The lawyer's role in a Phase I examination can entail contract management, report review for legal sufficiency, and post assessment advice. As protector of the client's interest, the lawyer has to ensure that the environmental professional follows ASTM E 1527. That means making sure that required elements of the Phase I are not

excluded and that the environmental professional does not exceed the ESA scope. It is essential to understanding what a Phase I is (a screen to reduce health and financial risks) and what it is not (a chemical analysis or specifications for clean-up) – and it might be up to the lawyer on the team to confine the Phase I to its intended purpose.

In the end, I elected not to walk into the flooded basement, and neither did the environmental professional. It was more like a descent into the sewers of Paris than a gondola ride on the canals of Venice. The environmental professional did stand on narrow stairs to take pictures – perilously close to the water's edge. I didn't venture more than halfway down the stairs. I did climb steep metal stairs to the roof, walk across creaky floors, look into drums, and dodge the occasional low-flying pigeon.

*\*Mark Matulef, Ph.D., is a '00 graduate of the University of Maryland School of Law, receiving a Concentration in Environmental Law. He is currently working for the U.S. Department of Housing and Urban Development in its Legal Honors Program. No opinions or advice are attributable to HUD. The author attributes some of ideas on the lawyer's role in reviewing the Phase I report to Wibb Chesser '93 and Shek Jain '92 who taught the School's Business and the Environment course and who are alumni of the Environmental Law Program.*

## **ATTENTION!!! ENVIRONMENTAL PROGRAM ALUMNI JOIN OUR LISTSERVE**

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# ENVIRONMENTAL LAW PROGRAM CANDIDATES



**JOANNA GOGER, '00**  
**U. S. DEPT. OF JUSTICE**  
**HONORS PROGRAM**

Joanna Goger is currently working as a law clerk for U.S. District Judge Frederic N. Smalkin in the U.S. District Court for the District of Maryland. This fall, she will begin a position as a trial attorney for the Environment and Natural Resources Division (ENRD) at the U.S. Department of Justice. Joanna has a background in environmental law, having worked as an extern in both the Environmental Crimes Unit for the U.S. Attorney's Office in Maryland and for the Land Acquisition Section in the ENRD at the U.S. Department of Justice. She came to the University

of Maryland School of Law because of its nationally-ranked environmental law program and received the Certificate of Concentration in Environmental Law at graduation last spring. As an alumna of our Program, Joanna continues to remain active by coordinating the speakers for our Ward, Kirshaw & Minton Environmental Symposium on "Rising Tides, Eroding Shores: The Legal and Policy Implications of Sea Level Rise and Coastal Erosion" to be held on April 20, 2001. We see a bright future for Joanna in the environmental field and wish her well!

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**JEFF HERREMA, 3D**  
**U. S. ENVIRONMENTAL**  
**PROTECTION AGENCY**  
**HONORS PROGRAM**

After working as a second year law student for the U. S. Environmental Protection Agency (EPA) Summer Honors Program, Jeff Herrema was chosen for a permanent position upon his graduation in May 2001. Jeff's background in natural resources and his work with the environmental law clinic has served him well. In the environmental law clinic, Jeff has been lead counsel to our client, 1000 Friends of Maryland, on a variety of issues involving urban sprawl and air quality. He will be arguing a case before the 4th Circuit on behalf of 1000 Friends sometime this spring. Jeff brings to the Environmental Program an enthusiasm to make a difference and the ability to get the job done right. EPA could not have chosen a better candidate.



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# WELL REPRESENTED IN HONORS PROGRAMS

## ***GAIL ORENDORFF, 3D U. S. DEPT. OF JUSTICE HONORS PROGRAM***



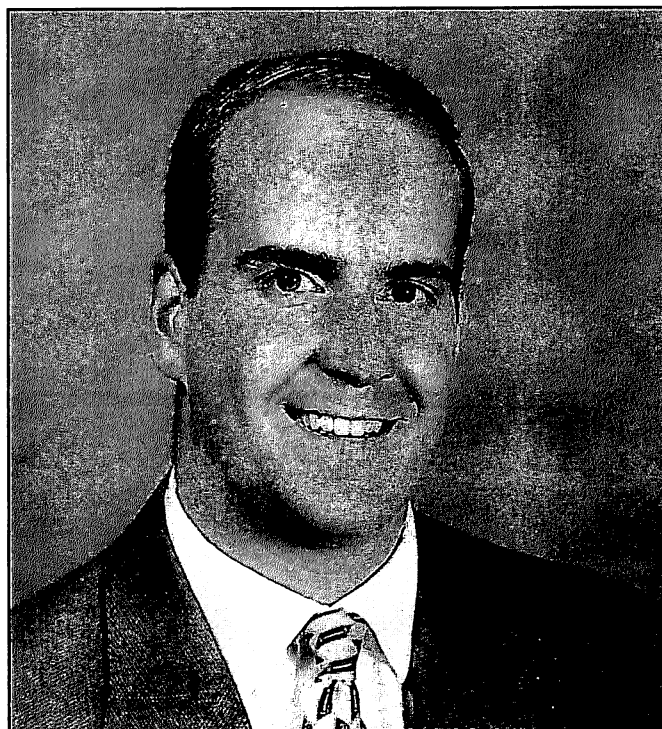
Gail Orendorff has accepted a position in the Department of Justice's Honors Program in the Environment and Natural Resources Division. After studying as an English Major in her undergraduate years, Gail entered law school with two main goals: to receive a concentration in environmental law and to pursue a career in environmental law at the federal government level. Working toward these goals, she took part in the Environmental Law Clinic, and performed an externship in the Environmental Crimes Unit at the United States Attorney's Office in Baltimore. Her dedication to the field of

environmental law has paid off, and she greatly looks forward to embarking upon her new career in the Environment and Natural Resources Division at the Department of Justice. Gail will be a great asset to the DOJ, just as she has been to our Environmental Law Program.

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## ***DREW BROUGHT, 2D U. S. DEPT. OF JUSTICE SUMMER HONORS PROGRAM***

As a second year law student, Drew Brought has been chosen for the Department of Justice's Summer Law Internship Program in the Environment and Natural Resources Division. Drew brings a knowledge of environmental law through his undergraduate degree in Forestry and Wildlife, having studied in Virginia, Montana and Australia. Drew worked for several years for a national trade association representing the forest products industry, and after his first year at law school obtained an internship with EPA's International Enforcement and Compliance Division. As a student in the Environmental Law Clinic, Drew has played a vital part as a team member on the Anacostia Riverkeepers case which deals with pollution issues. On another front, Drew is a Board Member of the Maryland Environmental Law Society, organizing hiking trips and other outdoor activities. We are thrilled to have such a well-rounded student as part of our Program.





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**THE MARYLAND ENVIRONMENTAL LAW SOCIETY (MELS)  
HOSTS ASST. ADM. OF EPA, AIR & RADIATION, ROBERT PERCIASEPE**



*MELS Board Member, Jessica Stuart presents a gift to Asst. Adm. of EPA, Office of Air & Radiation, Robert Perciasepe, speaker at the MELS annual Italian dinner.*

*MELS members gather for good food and an interesting speaker.*



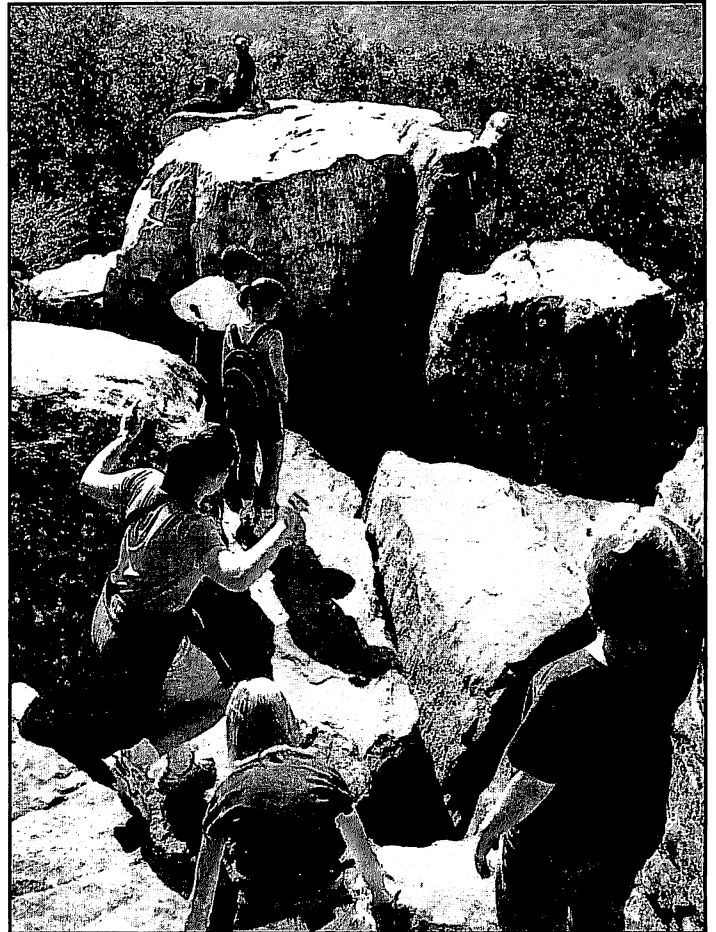
*Another successful MELS Program.*



# MELS MEMBERS TAKE TO THE MOUNTAINS IN MARYLAND



*MELS members enjoy hiking through Catoctin Mountain Park in Thurmont, Maryland.*

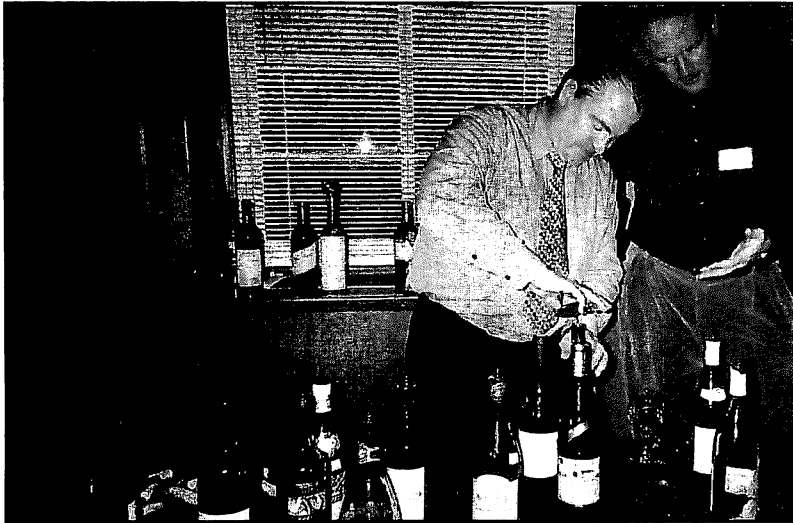


*Wow, what a view! Chimney Rock at Catoctin Mountain Park.*



*After a four mile hike, the students take a break and relax.*

# ALUMNI, FACULTY AND STUDENTS ENJOY



*Professor Bob Percival, Director of the Environmental Law Program, along with Tom Lavelle, '92, open one of the more than 70 bottles of wine at the annual winetasting party. Professor Percival supplies the wine with proceeds from his environmental law textbook.*

*Professor Ted Tomlinson with Christina McGarvey, a 2nd year evening student.*



*Alumni Rebecca Hirshorn, '98, Ann Hobbs, '91 and Chad Littleton, 4th year evening student.*

# THE PROGRAM'S NINTH ANNUAL WINETASTING



*Pat Deem, '97 with husband Kirk Ranzetta and Charlie Wagner, '99.*



*Jennifer Lewis, '97 and Susan Winchurch, '96.*



*Lorraine Ebert Fraser, '93, Tom Lavelle, '92 and Mary Raivel, '93 with friend Rich Moore.*



# THE WARD, KERSHAW AND MINTON ENVIRONMENTAL LAW SYMPOSIUM

FRIDAY, APRIL 20, 2001

WESTMINSTER HALL

8:30 a.m. - 4:00 p.m.

## *Rising Tides, Eroding Shores: The Legal and Policy Implications of Sea Level Rise and Coastal Erosion*

Global surface temperatures are rising even faster than anticipated according to a new U.N. report, causing potentially dramatic rises in sea level throughout the world. As a result, both the ocean shores and the shores of inland bays, lakes, and estuaries are eroding, and will continue to erode, throughout the United States.

The impacts of coastal erosion on both the natural environment and established coastal communities are readily apparent. On the one hand, marshes, wetlands, and dunes are disappearing, threatening habitat and destroying boundaries that buffer and filter pollutants. On the other, waters are encroaching closer to coastal real estate, coastal inhabitants are placed at greater risk, and recreational beaches are slipping away.

The economic, political, and legal debate over how to address the problem of sea level rise and coastal erosion rages on. Which of the many alternatives to combat coastal erosion makes the most sense? Who will bear the financial burden of the response -- government or coastal property owners? Should the solution be left to the states or can the federal regulatory structure lend a hand? Should there be a human response at all, or should nature be permitted to run its course? What are the rights of private property owners to protect their coastal

property? Must the government compensate private landowners when it seeks to protect public safety and coastal resources from rising sea level?

This symposium will explore creative responses to these questions, from the perspective of property owners, environmentalists, and state and federal government officials. The causes and consequences of sea level rise will be addressed, and response strategies will be presented and evaluated. The ultimate goal of this symposium is to create a dialogue between the various interests and perspectives on sea level rise and coastal erosion, as these issues promise to take on increasing importance for ecosystems and human populations throughout the world.

Joanna B. Goger, '00 Alumna  
Coordinator, Sea Level Rise & Coastal Erosion  
Symposium

# SYMPOSIUM SCHEDULE

8:30 a.m. - 9:15 a.m. Registration and Continental Breakfast

9:15 a.m. - 9:30 a.m. Welcoming Remarks - Dean Karen Rothenberg, University of Maryland School of Law

9:30 - 11:00 - **SEA LEVEL RISE - BACKGROUND AND IMPACTS ON OUR COASTS**

Moderator: Professor Steve Solow, Co-Director Environmental Law Clinic, University of Maryland School of Law

Mr. Bruce C. Douglas, Laboratory for Coastal Research, Florida International University - *Sea Level Rise and Beach Erosion in the 21<sup>st</sup> Century*

Mr. Chris Jones, Coastal Engineer, Christopher P. Jones & Assoc. - *Lucas v. South Carolina Coastal Council, An Update*

Dr. Donald Boesch, President, University of Maryland Center for Environmental Science, *A Report of the National Coastal Assessment Group for the U.S. Global Change Research Program*

15-minutes for questions and answers

**11:00 - 11:10 - Morning Break**

11:10 - 1:00 - **STATE RESPONSES TO SEA LEVEL RISE**

Moderator: Professor Rena Steinzor, Co-Director Environmental Law Clinic, University of Maryland School of Law

Mr. James T.B. Tripp, General Counsel, Environmental Defense - *Coastal Erosion, Sea Level Rise, and Global Warming: Implications for Long Island, New York and Coastal Louisiana*

Mr. David Burke, Director of the Chesapeake and Coastal Watershed Service, Maryland Department of Natural Resources - *A Sea Level Rise Response Strategy for the State of Maryland*

Ms. Lesley Ewing, Senior Coastal Engineer, California Coastal Commission - *The Significance of Sea Level Rise to Coastal Management in California*

Mr. Walter Clark, Ocean and Coastal Law Specialist, North Carolina Sea Grant, North Carolina State University - *North Carolina: Regulatory and Planning Responses to Sea Level Rise*

15-minutes for questions and answers

**1:00 - 2:00 - LUNCH**

2:00 - 3:30 p.m. - **BALANCING PUBLIC AND PRIVATE INTERESTS: WHAT ROLE SHOULD GOVERNMENT PLAY?**

Moderator: Professor Robert V. Percival, Director, Environmental Law Program, University of Maryland School of Law

Ms. Brenda Smith, Associate Attorney, Defenders of Property Rights - *The Role of Property Rights in Preventing Coastal Erosion: the Constitutional Balance of Burdens on the Government and the Property Owner*

Mr. James G. Titus, Project Manager, Sea Level Rise, U.S. Environmental Protection Agency - *Rolling Easements and Other Tactics for Balancing Property Rights and Environmental Protection*

Professor Marc Poirier, Professor, Seton Hall University School of Law - *Floods Again? A Critique of the Heinz Report*

15-minutes for questions and answers

3:30 - 3:45 p.m. Closing Remarks

**REGISTRATION IS FREE: SEATING IS LIMITED  
RESERVATION REQUIRED  
(continental breakfast and hot luncheon will be provided)**

**WARD, KERSHAW & MINTON ENVIRONMENTAL SYMPOSIUM**

**"RISING TIDES, ERODING SHORES: THE LEGAL AND POLICY  
IMPLICATIONS OF SEA LEVEL RISE AND COASTAL EROSION"**

**Friday, April 20, 2001**

**Westminster Hall**

**8:30 a.m. - 4:00 p.m.**

Please complete and return to:

Laura Mrozek  
Environmental Symposium  
University of Maryland School of Law  
515 W. Lombard Street  
Baltimore, MD 21201

or

e-mail registration to: [lmrozek@law.umaryland.edu](mailto:lmrozek@law.umaryland.edu)  
or fax to: (410) 706-2184

Name \_\_\_\_\_

Affiliation or Employer \_\_\_\_\_

Address \_\_\_\_\_

City/State \_\_\_\_\_

Daytime Telephone Number \_\_\_\_\_

**Funds for the 2001 Ward, Kershaw and Minton Environmental Symposium are administered by the University of Maryland Foundation, Inc.**

**Directions and Parking:**

From I-95 take route 395 (downtown Baltimore) and exit onto Martin Luther King, Jr., Blvd. Turn right at fourth traffic light onto Baltimore St. Turn left at second traffic light onto Paca St. Go 1/4 block and turn right into the Baltimore Grand Garage. Parking fees must be paid by participants.

**From Garage to Westminster Hall:**

Exit from garage onto Paca Street and make right to first light, which is Fayette Street. Make left on Fayette Street and walk to middle of block. Westminster Hall will be on the left-hand side of Fayette Street.

**Videotapes:**

Videotapes of the Program can be purchased for \$35.00. Make your check payable to: Thurgood Marshall Law Library, University of Maryland School of Law, 515 W. Lombard Street, Baltimore, MD 21201.