The Importance of Local Environmental Law

By John R. Nolon

Over the past few years, local governments across the country have adopted an impressive number of local environmental laws. These include a variety of novel ordinances designed to protect discrete natural resources such as trees, stands of timber, hillsides, viewsheds, ridgelines, stream beds, wetlands, watersheds, aquifers and waterbodies, and even wildlife habitat. At the same time, provisions designed specifically to protect environmental features from the impacts of development have been added to fundamental land use documents such as comprehensive plans and zoning ordinances.

Traditional land use regulations such as those governing subdivisions, cluster developments, and site plans are being amended with environmental protection in mind. There is something new in these laws that regulate the private use of the land in the interest of environmental conservation that bears examination. It is the purpose of this article to describe these local environmental laws, including excerpts from several of them, and to raise questions about the extent of the authority of local governments to act in this area.

It is widely understood that local governments have been given a key, if
President Bush, raised in the west Texas oil town of Midland, and catapulted into national office from the Lone Star state, was quick to respond with an energy plan formulated by a task force headed by Vice President Cheney, another oil man with western roots.

The Bush energy plan has been both touted and widely criticized as being an oilman’s dream -- pushing fossil fuel production, dismissing conservation, and reducing environmental protection.

The lecture will address the role of the federal government in Texas oil fields over the course of time both on the production side and the environmental side, and whether the conflicting goals of increasing oil and gas production and protecting the environment has been resolved in Texas.

This is the second Kerlin Lecture, last year’s inaugural lecture was delivered by Professor Carol M. Rose of Yale Law School.

Professor Kennedy Jailed in Harsh Sentence For Civil Disobedience in Vieques

By Scott Edwards, ’97

When I first was asked by Pace Law School Professor Robert F. Kennedy, Jr. to handle the litigation against the Navy’s activities on Vieques, I was determined to keep it a purely legal issue – this was simply going to be another case of a violator of environmental laws brought before an impartial federal judiciary. However, on my first trip to Puerto Rico, local citizens immediately educated me; Vieques was not simply an environmental issue, but an economic, social and political problem that transcended all categorical boundaries. More importantly, I was told that we could expect no impartial judiciary; the federal judges in Puerto Rico, led by Chief Judge Hector M. Laffitte, were highly political and pro-Navy.

Events this past year have borne out this belief. The Federal Judiciary in Puerto Rico has abandoned all pretense of impartiality with respect to the Navy’s activities, not only on Vieques, but across Puerto Rico. In many ways, the current Vieques trespassers’ trials...
Environmental Law in Manaus: Introduction

By Kristen Kelley, ’03

Manaus, Brazil is an anomaly, a bustling commercial center of nearly two million people, in the midst of millions of acres of rainforest. The Amazon basin, which covers approximately one-third of the country, is the dominant feature of Brazil’s landscape. With this Mecca, however, come new economic and environmental interests that exploit the rainforest.

This past June, under the direction of Professors Robert J. Goldstein and Ann Powers, six Pace law students dared to venture south of the Equator to see first-hand what was happening to the rainforest. Jet-lagged with a mere three-hours night sleep, our first day found us traveling down the Rio Negro (“Black River”) to see where it joins with the Rio Solimões (“Yellow River”) to form the Amazon River (known to the locals as the Oriomar, or “sea-river”). I imagined the Amazon rainforest to be full of exotic flora and fauna and an array of colors but I never expected to see colorful water!

The amount of water in the Amazon region is immense. Every year, this area receives anywhere from 1600 to 3600 millimeters of precipitation, submerging thousands of hectares of forest ground. The “Yellow” River is aptly named because of the great amount of fine clay sediments that are continually carried by the water. By contrast, the “Black” River carries very little in the way of sediments and appears black because of its high content of decomposed organic matter. Rivers of “green” water also exist, such as the low Tapajos River, but our expeditions did not carry us over these waters.

The Yellow River is the home to a much more abundant crop of fish and is flatter and more fertile than the Black River because it contains a greater level of nutrients.
Local Environmental Laws, from Page 1

not the principal, role in land use regulation. Zoning is the foundational device in this field. Local governments may adopt zoning ordinances and maps, and provide thereby for the future development of their communities. Comprehensive zoning began as a mechanism for protecting public health and safety by separating incompatible land uses from one another. In its application, zoning became design-oriented, focusing on the layout of streets and highways, the location of public buildings, the ability of fire trucks and firefighters to reach and fight fires, size and bulk requirements that protect property values, and infrastructure connections that create a workable community. After citing expert reports to sustain the constitutionality of zoning, the U.S. Supreme Court’s decision in Village of Euclid v. Ambler Realty Co., stated “[t]hese reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to raise children, etc.”

Subdivision and site plan regulations emerged to complement zoning and help localities implement their physical plans. Such regulations initially concentrated on the creation of safe intersections; the fluid movement of vehicles; the adequacy of road width, curbs, and sidewalks; the siting of buildings, and the prevention of off-site impacts such as flooding. In Golden v. Ramapo, the leading state court case sustaining local growth management ordinances, New York’s highest court referred to subdivision control as a mechanism “to guide community development in the directions outlined here, while at the same time encouraging the provision of adequate facilities for the housing, distribution, comfort and convenience of local residents.” In their inception, regulatory tools, such as subdivision and site plan regulation, were not designed to protect natural resources from degradation.

Beginning in the 1960’s, some communities used large lot zoning as a crude way of protecting open space and its associated natural resources. Upzoning occurred in some suburban areas, aimed principally at controlling population growth, maintaining residential property values, and containing the cost to the community of servicing development while, incidentally, limiting water use, preventing aquifer contamination, and containing non-point source pollution. As the environmental movement evolved and matured in the 1970s and 1980s, the sensitivity of local lawmakers was raised and early signs of the adoption of local environmental law became apparent. These emerged from a variety of sources, including the National Flood Insurance Program that required local governments to adopt and enforce floodplain management programs as a prerequisite to local eligibility for national flood disaster assistance payments. Catastrophes had their role in the movement, leading to stormwater management programs and regulations or stringent set back requirements along the coasts of barrier islands that are particularly vulnerable to hurricane damage. The 1990s saw the advent of more focused local environmental laws of the type mentioned above and these, in the aggregate, now constitute a significant body of practice.

Despite the existence of these laws, law school casebooks in both environmental law and land use law indicate that either field has not yet claimed “local environmental law.” The role of local governments is mentioned, usually very briefly, in environmental law classes and casebooks. When localities are referred to it is almost always in the context of their devolved authority under federal statutes such as the Clean Water Act, the Coastal Zone Management Act, the Wild and Scenic Rivers legislation, and the Endangered Species Act. Conceptually, the role of local governments is seen as that of a participant in a federal system of environmental law. There is much more to local environmental law than meets the eye when approached from this top-down perspective. A few land use casebooks cover local laws aimed at environmental protection, but their coverage is limited largely to one or more of the following topics: floodplain regulation, stormwater management, wetlands ordinances, agricultural zoning, or large lot zoning. Even these topics are covered, most often, as functions that are incidental to zoning, subdivision, and site plan control. Again, there is more to local environmental law, as it is being practiced, than is implied in these texts.

The gradual evolution toward environmental sensitivity in local land use controls has proceeded far enough that a distinct environmental ethic, as opposed to an incidental one, is evident. The role of local governments is mentioned, usually very briefly, in environmental law classes and casebooks. When localities are referred to it is almost always in the context of their devolved authority under federal statutes such as the Clean Water Act, the Coastal Zone Management Act, the Wild and Scenic Rivers legislation, and the Endangered Species Act. Conceptually, the role of local governments is seen as that of a participant in a federal system of environmental law. There is much more to local environmental law than meets the eye when approached from this top-down perspective. A few land use casebooks cover local laws aimed at environmental protection, but their coverage is limited largely to one or more of the following topics: floodplain regulation, stormwater management, wetlands ordinances, agricultural zoning, or large lot zoning. Even these topics are covered, most often, as functions that are incidental to zoning, subdivision, and site plan control. Again, there is more to local environmental law, as it is being practiced, than is implied in these texts.

The gradual evolution toward environmental sensitivity in local land use controls has proceeded far enough that a distinct environmental ethic, as opposed to an incidental one, is evident. Local governments have adopted a host of environmental regulations. In New York alone, local laws with the following titles can now be found and studied: cluster subdivision, environmentally sensitive area protection, erosion and sedimentation control, filling and grading, floodplains control, ground water/aquifer resource protection, landscaping, mining and excavation, ridgeline protection, scenic resource protection, soil removal, solid waste disposal, steam and watercourse pro-
tection, steep slopes, stormwater management, timber harvesting, tree protection, vegetation removal, and wetlands. Interestingly, many of these ordinances deal with the prevention of non-point source pollution which is an environmental problem that is generally conceded to be beyond the reach of federal environmental law.

These local environmental laws are implicated when developers propose projects to local administrative bodies charged with reviewing development proposals. Traditionally, local bodies, such as planning boards, review development proposals to determine if they comply with the provisions of zoning ordinances and subdivision and site plan regulations. These regulations are thought of as land use laws and are the province of land use lawyers and planners. The question that the adoption of local environmental laws raises is whether they are an extension of local land use law or whether they constitute a separate body of law known as local environmental law. The answer to this question has more than incidental consequences.

If these emerging environmental laws are an extension of land use law, they may be seen as a supplement to a coherent system that regulates land development at the local level. If they are a new body of law, or a discrete topic within the field of environmental law, they run the risk of conflicting with local land use regimes with all the consequent inefficiencies and problems that may involve. In more technical terms, the question is whether local governments derive their authority to pass environmental protection laws under their delegated land use authority, or under other provisions of state law.

### Delegation of Authority to Protect the Environment

In New York and some other states, local governments have direct home rule authority, or other delegated power, to protect natural resources and the physical environment. A quick look at the state of Georgia will provide a contrasting view of how local governments derive local environment-

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tal law authority. Georgia is regarded as a strict constructionist state where local governments only have powers expressly granted and any reasonable doubt about their authority is resolved in the negative. The delegation of comprehensive planning authority to local governments in Georgia, however, is tied to the state’s interest in protecting and preserving the natural resources, the environment, and the vital areas of the state. Certain elements are required to appear in local comprehensive plans, including plans for the protection of natural and historic resources. Under the rules of the Office of Coordinated Planning in Georgia, local land use planning is to strike a balance between the protection and preservation of vulnerable natural and historic resources and respect for individual property rights. Under separate state legislation, local governments in Georgia are required to identify existing river corridors and to adopt river corridor protection plans as part of their planning process. They have the further authority to regulate shoreland developments. Finally, Georgia municipalities may regulate land disturbing authority in order to control soil erosion and sedimentation.

Prior to 1964, there was considerable doubt about whether New York’s municipal governments were empowered to adopt local laws concerning their local property, affairs, and government. In Browne v. City of New York, local governments were found powerless to act other than pursuant to those areas of authority specifically delegated to them in state statutes. In direct response to the resulting ambiguity that existed over the extent of authority of local governments, the home rule article of the New York Constitution was amended in 1964.

The express language of the new article IX and legislation passed pursuant to it suggest that local governments are given broad home rule powers. The state legislature implemented article IX with the enactment of the Municipal Home Rule Law ("MHRL"), the provisions of which are to be "liberally construed." Under the MHRL, localities are given the authority to adopt laws relating to their "property, affairs or government." to "the protection and enhancement of [their] physical environment," and to the matters delegated to them under the statute of local governments. The statute of local governments delegates to municipalities the power "to adopt, amend and repeal zoning regulations" and to "perform comprehensive or other planning work relating to its jurisdiction." The MHRL has been regarded as a source of authority to regulate land use. It also has been interpreted to permit the enactment of purely environmental laws. For example, in Ardizzone v. Elliot the court stated that the municipality had the power to regulate the freshwater wetlands within its boundaries under the Municipal Home Rule Law. This is consistent with the plain meaning of the MHRL authority to adopt laws to protect and enhance the "physical environment." This broad authority is critical to enacting laws that protect resources such as wildlife and wildlife habitat that do not fit squarely within the orbit of traditional zoning laws.

The grant of authority encompassed in the MHRL provides a safety net for communities desiring to enact extensive environmental laws. This, combined with the power of local governments to adopt zoning and planning provisions under the Statute of Local Environmental Laws, Continues
Local Environmental Laws, continued

Governments provides ample authority for the state’s villages, towns, and cities to create an integrated set of land use laws. Environmental laws may be added to the municipality’s suite of land use laws by adopting them under the MHRL and zoning enabling act or the subdivision or site plan delegation statutes and by referencing the broad language of the planning enabling acts.

Conclusion

For those interested in determining the local environmental protection authority of local governments in other states than New York and those referred to above, it will be necessary to conduct an analysis of local authority under each state’s law. The law in other states may be less favorable to the adoption of local environmental laws. Their planning and zoning enabling acts may be more narrowly drawn, the court interpretations of them less expansive, and their home rule provisions more meager. It should not be surprising, even in states that are conservative in the delegation of land use power to their localities, to find specific provisions such as those in Georgia, that permit the adoption of local environmental laws.

That the authority of local governments to regulate the use of privately owned land can be expanded to meet the challenges of changing times has never been in doubt. In Berman v. Parker, the Supreme Court held that the public welfare that is to be advanced by land use regulations is broad and inclusive. “The values it represents,” wrote Mr. Justice Douglas, “are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully protected.” At the inception of the modern period of land use controls, the U.S. Supreme Court stated “while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operations. In a changing world, it is impossible that it should be otherwise.”

Footnotes

1 272 U.S. 365, 394 (1926).
4 GA. ANN. CODE § 36-70.1.
5 Rules of the Office of Coordinated Planning, Ch. 110-12-1.04(5) (2000).
6 Rules of the Office of Coordinated Planning, Ch. 110-12-1.04(5)(f)(1).
7 GA. ANN. CODE § 12-2-8(2).
8 GA. ANN. CODE § 12-2-5-241.
9 GA. ANN. CODE § 12-7-4.
10 241 N.Y. 96, 119-20, 149 N.E. 211, 218 (1925).
11 N.Y. CONST. ART. IX.
20 272 U.S. at 387.

Professor Nolon is a Charles A. Frueauff Research Professor at Pace, the director of the Pace Land Use Law Center, and Adjunct Professor at the Yale School of Forestry & Environmental Studies.

Editor’s note: Professor Nolon would appreciate receiving local environmental laws and commentaries for his on-going study of this subject. Contact: jnolon@law.pace.edu, or 78 North Broadway, White Plains, NY 10603.

Manuscripts are solicited for publication in the Journal of the Pace Center for Environmental Legal Studies. Short, law review quality articles and essays may be submitted by e-mail to the Editor, rgoldstein@law.pace.edu.
Environmental Protection in Brazil: From the Outside

By Robert J. Goldstein

On the occasion of my fourth trip to Brazil to lecture on environmental law I want to take time to reflect on the reasons that brought me to that fabulous country, and the goals of my work there. Four trips do not make me an expert on either the laws of Brazil or the environmental issues that face Brazilians, but they do give me added insight into such matters. I can generally measure the attitudes of audiences to my lectures by the questions that I am asked, and the feedback that I receive to my answers. Based on that analysis, I would like to deal with the two major issues that I have faced in teaching environmental law in Brazil. The first is whether environmental law is a luxury, and the second is whether Brazilian sovereignty is at stake in protecting the global commons.

The question of whether the environment is a luxury item is easily answered when you approach it from a macro level, the "bird's-eye view." At that level our best science shows us that global climate is at risk from the emission of greenhouse gases, while the earth’s ability to absorb these gases is being diminished with the reduction in carbon sinks, such as forests, as they are encroached by human development. The radiation protection afforded by earth’s ozone layer is subject to diminution by the use of chlorofluorocarbons (CFCs). Marine habitats are threatened by pollution, and ecosystems that have acted as buffers from the ravages of storms, and filters of pollution, have been destroyed. If everyone appreciated these threats (and these are only a select few), and acted upon them, they would be less potent. However, it is clear that individuals do not tend to act for the common good, especially when pressures on them to survive are great.

Of late, the United States has not led in this effort. Evidence of this is seen in a statement by Vice President Cheney that “conservation may be a sign of personal virtue, but it is not a sufficient basis for a sound, comprehensive energy policy.” This attitude, while acceptable in places where people live by subsistence farming, is not an acceptable statement from a country bathed in prosperity. So if environment is a luxury item in the United States, is must be so in Brazil.

Sadly this is not the case. The reality is that a clean and healthy environment is no luxury when viewed from ground-level. A precipitate that these necessities include clean water to drink and bathe in, as well as to irrigate crops and support farm animals. Polluted water jeopardizes all of these basic necessities. It is easily understood that the disposal of wastewater and sewage, into one’s drinking water supply is unhealthy and will lead to disease and premature death; but it is less obvious, yet equally deadly, to take fish from polluted waters and to eat them.

Water and food are basic to human life, and are no luxury, but there certainly are other aspects to environmental protection that are necessities. Clean air and protection from toxic substances come to mind. These will take longer to damage you than dehydration or starvation, but have the same result. They are also deceptively alluring to those who are impoverished or disenfranchised. Why not do work that’s damage will be measured in years, when one’s need for sustenance can be measured in days? But there is more than individual harm that is risked by this attitude, besides carcinogenic results, there are also possible transgenerational consequences of exposure to certain pollutants.

The answer to this oft-asked question is that environmental protection is no luxury, but rather is a necessity of life. One that we ignore at our own individual, as well as collective risk.

This leads directly to the second question. There are risks in ignoring the environment that will have direct and immediate effect, as we have seen with the discharge of waste into water supplies. We normally heed those warnings because they are imminent. We have greater difficulty in heeding the more attenuated warnings. For instance, “the hole in the ozone layer is over Antarctica and Australia -- we needn’t worry about that in the northern hemisphere.” Or, “global warming may affect low-lying areas, but not our home.” When you begin to rise above the ground-level view you begin to see that these issues are ignored at our own collective peril.

Once we take a global perspective, we can’t ignore the differing roles that each nation has in protecting the earth from environmental disaster based upon their geographical situation and their level of development. The United States, for instance, has the role as a developed country, to reduce dramatically the emissions that it produces. For the time being, the U.S. has chosen to take the ground-level view, ignoring its responsibility to reduce these emissions. That is unfortunate and will hopefully lead to political change in two years, when a new congress is elected. But note that the situation can be turned around rather easily with new policies. Even the current administration, with its regressive energy policies and disregard for the Kyoto Protocol, will not irreversibly damage the move toward reduction of greenhouse gases.

This policy shift, however, does not mean that any country can abrogate its responsibility to prevent this problem. The distinction is that sources of emissions can easily be stopped or reduced, while carbon sinks, forests in particular, take years to reacquire their ability to absorb carbon. In other words, Brazil simply can’t afford to make the mistake that is being made in Brazil View, continues
the United States. Or more broadly put, the world cannot afford political regression to allow the destruction of carbon sinks.

Does this reality infringe on the sovereignty of the carbon sink nations? I would have to agree that it does. Does this mean that Brazil should ignore the common good for some short-lived prosperity? Certainly not.

The mere existence of seminars of the type that took place in Manaus in June is clear evidence that Brazilians do not take the ground-level view of the condition of the world environment. Perhaps they look at the way the United States allowed its entire northeastern forest to be cut down for timber and charcoal in the 19th century, requiring decades for reforestation, and understand that it is not wrong, it is unsustainable. After all, Brazil is where the concept of sustainable development came of age. It is good that this spirit remains in Brazil, but it begs the question of the infringement of its sovereignty.

I think the answer to the question of the infringement of sovereignty is similar to one that I have studied from the ground-level perspective. I argue that owners of land must take into account the ecology of that land and the environmental ethics of the society that they live in. This, I agree, diminishes the individual's property rights to some degree – it prevents them from destructive behavior. Nevertheless, it is merely the recognition that some of the rights to the land they own are limited by reality. To translate this into the sovereignty question, Brazil is owner of the rainforest, it is only limited in its sovereignty by the laws of nature (ecology) and the understanding that they are a member of a larger – global – society, to which they must act with responsibility (environmental ethics). To do otherwise would jeopardize too much.

This article first appeared in the May, 2001 issue of ECO-21 Magazine, in Portuguese.

Kennedy Jailed, continued from Page 6

Judge Laffitte’s refusal to rule on our preliminary injunction motion.

It was against this backdrop that we learned that Judge Laffitte had assigned himself Kennedy’s trespassing case, while at the same time sitting on our civil case; we expected the worst and prepared for a display of judicial bias and impropriety rarely seen in federal court.

We had invited several members of Congress to view the proceedings, including Congressman John Conyers, head of the House Judiciary Committee, and the Reverend Jesse Jackson. They watched in disbelief as Judge Laffitte admitted evidence into the record without authentication, allowed Navy witnesses to identify trespassers with prosecution-supplied photos instead of in-court identification and automatically blurted out “overruled” to any defense counsel objection before any basis could be prof ered. He was so quick to disregard any objection that he shouted, “overruled” when Kennedy’s defense counsel, Benito Romano, stated that he had no objection to the admission of photographic evidence. Each move prompted Congressman Conyers and other members of the House Judiciary Committee to shake their heads in amazement.

At the end of the daylong trial, Laffitte sentenced Commonwealth Senator Norma Burgos to forty days in jail, but increased this to sixty days when he did not agree with her post-sentencing allocation. This was done without any finding of contempt or any other articulated basis for increasing the sentence.1

Professor Kennedy gave a pre-sentencing statement, concluding, “It was only with sadness and trepidation that I engaged in [civil disobedience], but I did it because of my love for my coun-

Footnote

1 The First Circuit has recently ordered Senator Burgos released after her forty-day sentence pending outcome of appeal, a strong indication that it also finds Judge Laffitte’s actions improper.
EPA’s Jurisdictional Limits in Regulating Pesticide Advertising on the Internet

By Robert DiSiena, ’02

The emergence of the Internet as a new medium for conducting business, has raised a whole host of legal issues pertaining to privacy, taxation, federal and state regulation and jurisdiction. Electronic commerce has redefined the boundaries of traditional business, as dealings between buyers and sellers are no longer constrained by geographical barriers. Since variations between state, national, and international laws may vary between parties, legislators and courts have struggled in their attempts at addressing the legal dilemmas that arise from this new market. Critics of EPA’s lack of enforcement against illegal Internet pesticide transactions are pushing for comprehensive and unwavering guidance on how federal environmental laws apply in cyberspace. Proponents of a greater regulatory presence by EPA are pushing for more agency involvement, arguing that it is needed not only to protect consumers, but also to protect pesticide distributors.

The regulation of product promotion on the Internet is not a unique concept. The promotion of pharmaceutical products has been closely monitored by the Food and Drug Administration (FDA) under the authority granted to them by the Federal Food, Drug and Cosmetics Act. Since 1995, the FDA has been investigating the potential statutory violations presented by the Internet pharmaceutical industry. Since 1996, the FDA has initiated numerous enforcement actions against those promotions it considered false or misleading.

The United States Environmental Protection Agency (EPA) through a cooperative federal/state outreach program with the Association of American Pesticide Control Officials (AAPCO) has become aware of numerous compliance problems that have appeared as a result of the growing affe- cation for electronic commerce, here-inafter e-commerce. Auction sites, commercial sites and shopping portals have been uncovered selling unregistered, suspended, and/or cancelled pesticides and pesticide devices, making false or un-approved statements regarding a pesticide’s use, and restricted-use pesticides have also been identified for sale to the general public. Compliance issues have also been identified where the advertising of a pesticide or use in one area reach users in another area where the pesticide or use is not authorized. Reports submitted to EPA headquarters, by the regional offices and preliminary research conducted by the EPA’s Office of Enforcement and Compliance Assurance (OECA), Office of Compliance (OC), Agriculture Division (AD) have identified these and other potential compliance problems associated with pesticide promotion on the Internet. When EPA began investigating the potential compliance violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) through the promotion of pesticides on the Internet, they soon discovered that through this highly unregulated and un-patrolled medium, pesticides that present serious health and environmental risks could be easily purchased, potentially putting people at risk for deadly pesticide exposure.

In the United States, FIFRA grants the EPA the authority to regulate the distribution, sale and offer for sale of pesticides. Under FIFRA, pesticides distributed and sold in the United States must first be registered with the EPA. In determining whether or not a pesticide should be approved for use, the Administrator must decide if a pesticide “when used in accordance with widespread and commonly recognized practice” will not “generally cause unreasonable adverse effects on the environment.” FIFRA §3(c)(1)(C) also requires each application for registration to include “a statement of all claims to be made” for the pesticide. The applicant bears the burden of proof to substantiate those claims made for the pesticide with test data, and the Administrator may not register the pesticide until he or she confirms the “composition is such as to warrant the proposed claims for it.”

FIFRA §12(a)(1)(A) and (B) make it unlawful for any person to “distribute or sell” any pesticide that is not registered, whose registration has been suspended or cancelled, or any registered pesticide if claims are made that substantially differ from any claims made as part of the statement required in connection with its registration. The term “to distribute or sell” is defined as, “to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive.”

In 1986, EPA proposed to treat as unlawful the advertising of among other things (1) any unregistered pesticide, unless the pesticide is not available for sale and the advertisement so states and (2) any registered pesticide for any other use not registered under FIFRA §3 or §24(c) and requested comments on their proposed interpretation. The EPA stated in its reasons for adopting the new regulation that the advertising of pesticides for uses, not by Robert DiSiena, ’02

The emergence of the Internet as a new medium for conducting business, has raised a whole host of legal issues pertaining to privacy, taxation, federal and state regulation and jurisdiction. Electronic commerce has redefined the boundaries of traditional business, as dealings between buyers and sellers are no longer constrained by geographical barriers. Since variations between state, national, and international laws may vary between parties, legislators and courts have struggled in their attempts at addressing the legal dilemmas that arise from this new market. Critics of EPA’s lack of enforcement against illegal Internet pesticide transactions are pushing for comprehensive and unwavering guidance on how federal environmental laws apply in cyberspace. Proponents of a greater regulatory presence by EPA are pushing for more agency involvement, arguing that it is needed not only to protect consumers, but also to protect pesticide distributors.

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Pesticides on the Internet, Continued

yet registered, particularly if the pesticide was available for other uses was likely to encourage consumers to use the pesticide in an unlawful manner. The Agency stated that the regulation of pesticide advertising would lessen the likelihood of pesticide misuse.

In 1989 the EPA published their final interpretive rule, but limited its coverage to advertisements that (1) are placed by persons who are in the pesticide business and (2) recommend or suggest the purchase of pesticides for certain purposes. The EPA published the final rule as follows:

FIFRA §§12(a)(1)(A) and (B) makes it unlawful for any person to “offer for sale” any pesticide if it is unregistered, or if claims made for it as part of its distribution or sale differ substantially from any claim made for it as part of the statement required in connection with its registration under FIFRA §3. EPA interprets these provisions as extending to advertisements in any advertising medium to which pesticide users or the general public have access.9

The enforcement of pesticide promotion on the Internet presents a unique jurisdictional issue because the geographical scope of the regulations may vastly exceed the regulatory responsibility of the EPA. The First Amendment to the Constitution protects a citizen’s right to free speech. EPA argues that the advertising it has proposed to regulate falls under the classification of “commercial speech.” Commercial speech can be regulated if there is a substantial governmental interest to be served by the regulation, the regulation directly serves that interest, and the regulation is the least stringent needed to accomplish that interest.10

In EPA’s view, the new regulation covers only advertisements that make unlawful offers to sell and may reach persons who may be led to use unregistered pesticides or pesticides for un-approved uses. EPA would argue in defending the limits on advertising that the protection of human health and the environment from unlawful pesticide use qualifies as a substantial governmental interest. The proposed restrictions are tailored to further the interest by ensuring only accurate and approved information is furnished to those who are likely to be subjected to pesticide advertisements. Finally, the regulation only covers advertisements making unlawful offers to sell pesticides and would not completely prohibit other types of advertising.

In addition to the First Amendment issue regarding limits on free speech, the EPA’s proposed regulation of pesticide advertising calls into question whether EPA has been delegated the power and possesses the jurisdictional right to regulate pesticide promotion on the Internet. While EPA has the authority to regulate pesticide labeling, Congress has specifically delegated the authority to regulate product advertising to the Federal Trade Commission.11

While EPA has the authority to regulate pesticide labeling, Congress has specifically delegated the authority to regulate product advertising to the Federal Trade Commission.

The agency took the position that §12(a)(1)(B) prohibited all unapproved claims in pesticide advertising, however the court stated that it was “unsuccessful” to accept such a broad interpretation of the statute to prove a violation occurred in this case. The court went on to add, “[t]he question of whether §12(a)(1)(B) prohibited all unapproved advertising claims need not be reached on this appeal; rather it is preferable to address that question in the context of the specific factual situations as they arise.”15 The court added however, that §12(a)(1)(B) “extends to claims made as part of the distribution or sale of a pesticide.” The court defined “distribution” to include the marketing and merchandising of a commodity. The court further defined “merchandising” to include “effective advertising and selling.”16 The Sporicidin court also stipulated that the claim must be disseminated with the intent to induce the purchase and use of a pesticide in addition to recommending the pesticide for an un-approved use. This ruling leaves open the issue of whether a violation has occurred if a company is making un-
approved pesticide claims, but is not offering the product for sale through its web page. A court ruling on this issue might still be inclined to view these claims as intending to induce the purchase and use of a pesticide if, for example, a consumer might be enticed, by the advertisement to make a purchase through some other medium, such as by phone, mail, or retail store purchase.

The Sporicidin court effectively redefined the phrase “to distribute or sell” to include the term advertising based on the courts understanding of the term “distribution.” However, there has been little guidance since the Sporicidin decision on further interpretations of the term “distribution” as it relates to the phrase “to distribute or sell” found in §12(a)(1) of FIFRA. The Environmental Appeal Board in Sporicidin noted that while a remedial statute is to be “construed liberally so as to effectuate its purpose,” the determination of whether a pesticide claim was made as part of its distribution or sale was “to be broadly construed.” The Board added that while the construction of the term “distribution or sale” was to be interpreted broadly, it was not to be interpreted so broad that the dissemination of scientific material within the scientific community would be denominated as promotional.

In an illegal pesticide promotion action, unless EPA chose to proceed under the interpretations of the term “distribution or sale” made in Sporicidin, a pesticide advertisement could potentially be litigated as an “offer for sale” listed in FIFRA §2(gg).17 In the United States Environmental Appeal Board decision in re: Tifa Limited,18 the court had the opportunity to clarify the phrase “offer for sale” found in §2(gg). The complaint alleged that Tifa had imported, offered for sale, distributed and sold pesticide products containing the canceled pesticide Rotenone. Counts 4 to 6 of the thirty-four-count complaint alleged that Tifa had offered for sale pesticide products whose registrations had been suspended, a violation of FIFRA §12(a)(1)(A).19

Since FIFRA §2(gg)20 defines the term “to distribute or sell” to include “offer for sale,” it is a violation of §12(a)(1)(A) to offer for sale any pesticide product whose registration has been canceled or suspended. The appellant argued that the phrase “offer for sale” had never been specifically defined by FIFRA or the underlying regulations and they relied on the interpretation of the court in In the Matter of Willis Stores,21 which defined “an offer” as a “proposal, presenting for acceptance, proffer or attempt.”22 The court in the Tifa case rejected appellants argument stating that Willis did not contain a meaningful discussion of what constituted an “offer for sale” under FIFRA and that the court did not find Willis altogether instructive on that issue.23 The Tifa court stated that since there was no legislative history to provide guidance on the issue of what constitutes an “offer for sale” under FIFRA, that this was a matter of first impression and the court would consult general contract law to assist it in determining what constituted an “offer for sale.” The court noted that the general rule of contract law is that a quotation of prices is not an offer, because it leaves open many of the terms necessary to form a binding contract. However, the court also referred to the decision in White Consolidated Industries, Inc. v. McGill Mfg. Co., Inc.24 where the court held a seller’s price quotation to be a valid offer because it clearly outlined the details of the contract and explicitly provided that the offer was subject to the buyer’s immediate acceptance. The Tifa court also quoted the case Litton Microwave Cooking Products, Inc. v. Leviton Manufacturing Co., Inc.,25 which stated, “it is quite conceivable that under certain circumstances a price quote or catalog may constitute an offer.”

The determination of whether an Internet advertisement is an operative offer, and not merely a step in the preliminary negotiations of a contract is a matter of interpretation based on the surrounding facts. A notable situation where pesticide promotion on the Internet can easily fall under the scope of an offer for sale is when a violation of federal pesticide law results from an illegal pesticide sale during an online auction. In such a situation, the winning bidder is subject to all conditions set forth in the terms of the winning bid, outlined by the seller. Typically, a bidder is bound to the seller’s payment methods, delivery options, and other conditions. It thereby seems to fit that where unapproved pesticide claims are made or unregistered, suspended or canceled pesticide products are offered for sale through an Internet auction, the EPA would be within its rights to enforce the violation under FIFRA §§12(a)(1)(A) or (B).27 This type of enforcement would be quite beneficial since the EPA could theoretically commence an enforcement action, depending on the length of time an item is up for bid, before the actual sale of the pesticide takes place.

A further issue that arises from the promotion of pesticides on the Internet is how will FIFRA regulations apply to foreign corporations whose sites are viewable by American consumers? Since technology has yet to provide ways to selectively allow consumers access to specific web pages depending on their geographic location, it is impossible for a pesticide promoter to properly make claims for his or her product without possibly contradicting another region’s pesticide regulations.

A national company therefore may still violate FIFRA, for making unapproved claims or selling unregistered, suspended or cancelled pesticides even if it had no intention of marketing a product to U.S. customers. U.S. courts, however, would likely lack the jurisdiction to hear such a case unless the corporation actually made a sale into the U.S.

In the United States, under International Shoe,28 a court may assert jurisdiction over a person not physically present within the territorial limitations of the court provided that there were, “certain minimum contacts with [the forum state] such that the maintenance of the suit did not offend ‘traditional notions of fair play and substantial jus-
Pesticides on the Internet, Continued

Jurisdiction over Federal Issues.30 Since jurisdiction in a FIFRA enforcement proceeding is typically in a federal administrative forum, in the form of a hearing before the EPA’s Office of Administrative Law Judges, the minimum contacts necessary to satisfy due process consists of the defendant’s aggregate federal contacts. Thus, in Cryomedics, Inc. v. Spembly, Ltd.,31 the court held that “when a federal court is asked to exercise personal jurisdiction over an alien defendant sued on a claim arising out of federal environmental regulations will affect the business world and what role federal environmental regulations will play in this new technological age.

Under the Code of Federal Regulations, an applicant not residing in the United States must designate an agent to act on behalf of the applicant in all registration matters.33 Paragraph (b)(3) further requires a foreign person to “designate a person residing in the United States to act as his agent.” The service of process provision found in the EPA Rules of Practice provides,34 “service upon a domestic or foreign corporation ... shall be made by personal service or certified mail ... directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by Federal or State law to receive service of process.” Personal jurisdiction over a foreign corporation making unapproved pesticide claims, who sells a registered pesticide into the U.S., may be satisfied through the distribution of its product within the U.S. and the required maintenance of an authorized agent to receive service of process.

The Office of Administrative Law Judges had the opportunity to rule on the issue of jurisdiction over foreign corporations who distribute misbranded, unregistered or registered pesticides bearing claims that differed from those approved at the time of registration. In the case In the Matter of Health Care Products, Inc.35 the court ruled that where a foreign corporation has registered a pesticide in the U.S., distributed it extensively throughout the country, and maintained an agent continuously, it is subject to service of process and its residence for venue purposes shall be “in the county, parish, or incorporated city where service was made.”36 The court added, in the context of a FIFRA enforcement action, “jurisdiction was obtained... by service on [defendant’s] United States agents. Venue may then be laid where those agents were served, where [defendant’s] current agent is located, or any other U.S. location convenient to [defendant] pursuant to 40 CFR §22.35(b).”37

As a result of the growing affection for e-commerce and the accompanied growth of pesticide demand, the Internet has served as a welcomed addition to both dealers and consumers, both of who are seeking easier, more effective means at promoting and purchasing pesticides and pesticide devices. While courts have yet to be confronted with some of the jurisdictional issues raised by EPA’s proposed enforcement of pesticide advertising, they remain lingering in the back of the minds of EPA attorneys as they try to develop some comprehensive guidance on how pesticide promotion can be legally regulated. While the Internet has redefined the way we once viewed traditional commerce, we have only yet scratched the surface in determining how this new technology will impact the business world and what role federal environmental regulations will play in this new technological age.

Footnotes
9 40 C.F.R. §168.22.
12 See General Counsel Opinion, Authority to Regulate Advertising of Pesticide Products (July 1973).
15 Id. at 39.
16 Id. at 40.
22 Id. at 3.
23 See Tifa, supra note 18, at 33-34.
24 165 F.3d 1185 (8th Cir. 1999).
25 15 F.3d 790 (8th Cir. 1994).
29 United States v. Aluminum Co. of America, 148 F.2d 416, at 443-44 (1945) where the court stated, “it is settled law... that any state may impose liabilities, even on persons not within its allegiance, for conduct outside its borders that has consequences within its borders.”
32 Id at 290.
33 See 40 C.F.R. §152.5(b) (1)(2001).
34 See 40 C.F.R. §22.05 (b) (Lexis 2001).
36 Id at 58.
37 Id at 61.
After seeing where the Amazon River begins, we stopped at a small loading/unloading dock on the perimeter of a forest and moved into a downsized version of our original motorboat. We next traveled through a much denser part of the rainforest by way of igarapés (igara means embarkation and pé means way). These rivers are classified as being courses of first or second order and are primary tributaries of smaller and larger rivers. These waterways act as corridors in the forest. Traveling through the winding vines and thick brush, I had the feeling that we were traveling through an “ecotunnel.” We would look up and see trees and leaves and an occasional ray of sunlight but for the most part we were surrounded by the forest’s life. As we wound our way through the trees, roots, mosses, ferns, and the occasional acrobatic monkey, we encountered Igapos. An Igapo is a thick marshy part of the flooded forest and is the kingdom of tortoises, crocodiles, fish, crabs, and otters. Most of these waters are classified as “dark” or “black” waters because of the large amount of suspended organic matter.

After the first few days out in the “field,” we headed inside to participate in a seminar on environmental law in the Amazon. During the following three days, we learned more about what was happening in the Amazon and exchanged ideas with Brazilian environmental and legal officials on how to protect their resources. The Amazon and its tributaries support the largest and healthiest biomass of freshwater fish species in the world. Researchers estimate that the Amazon is home to 2,500 species, half the freshwater species thought to exist on the planet. Compare this to the mere 500 species in North America or just the 150 species found in Europe, one quickly sees the reasons why the Amazon is so valuable. Of the most famous piscine dwellers, the deadly piranha, there are 20 species alone.

Even though the Amazon is immense and rich, one cannot be blind to its fragility. Local inhabitants rely on fish for their main source of protein. However, recent counts have shown that the most sought after species have rapidly declined in numbers. A major concern is that only about 10 species account for as much as 90 percent of the total caught for consumption. What is happening is that the most sought after species now make up a smaller-and-smaller part of the catch, and the ones that are caught are younger-and-younger. According to David McGrath of the WWF, “[t]he scarcity has to do with these certain species, rather than the fishery as a whole.” The new question is what can be done to fix this problem before it is too late, and these species are totally lost.

For a long time, Brazil's environmental policy had been based almost entirely on command-and-control (CAC) mechanisms. Even the 1988 Brazilian Constitution was clearly written with a CAC approach in mind, but there were also no major constitutional or legal impediments to the adoption of economic instruments of environmental policy. A different approach to environmental protection, Economic and Market Incentives as Instruments of Environmental Policies (EMIEP’s), has been very slow to gain popularity, but there appears to be some acceptance recently in academia. This method focuses more on economic instruments to influence environmental change. Prior to the 1988 Brazilian Constitution, the federal government was primarily responsible for implementing environmental laws. However, this Constitution considerably increases the enforcement power of the States and Municipalities to “protect the environment and combat pollution in any of its forms.” (Art. 23 parts VI and VII). In more recent years, President Cardoso has produced a document called the “green package.” This document unveiled specific measures that the Environment Minister and Brazil’s Environmental Protection Agency (IBAMA) are to take to preserve the Amazon from further destruction.

The continuous increase in population and the increased demand for drinking water in some states has prompted both national and legal legislation specifically targeting water quality. On the national level, Law 6,938 Articles 1 and 2, lay down the National Environmental Policy and its objectives. The goals of the National Environmental Policy are to preserve, enhance, and restore environmental quality essential to life. The rational use of water is specifically mentioned in Article 2, § II. In Sao Paulo, Law No. 9,866 establishes orders and regulations for the protection and recovery of watersheds for water resources of regional interest to the State of Sao Paulo.

Brazil Course, continues
Environmental Law in Manaus: Internationalization of the Rainforest?

By Rebecca Williams, '02

Controversy surrounded the 3rd International Seminar on Environmental Law held in Manaus, Brazil. The seminar was almost cancelled because a few Brazilian officials object to its original name, "the Internationalization of the Brazilian Rainforest." The seminar was allowed to continue only after the name was changed to "The Brazilian Amazon in an International Context." Nevertheless, the focus of the seminar was Brazil’s sovereignty over the Amazon, which is a sensitive topic in Brazil, but why?

A diverse number of flora and fauna live within the Amazon Rainforest, and unknown species are being discovered everyday. The Amazon is so vast that it creates its own microclimate and plays a crucial role in the carbon cycle, acting as a sink by removing large amounts of carbon dioxide from the atmosphere. However, environmentalists, ecologists and climatologists worldwide are concerned about the rapid deforestation that is occurring in the Amazon.

Brazil’s policy towards the Amazon in the past was to utilize the forest in order to promote settlement and economic activity. Due in part to that policy, large portions of the forest were destroyed. It has only been within the last decade that Brazil has taken steps to protect its rainforest. Still, deforestation continues at an astounding rate.

The main problem facing Brazil is the conflict of ensuring the economic sustainability of the inhabitants within the Amazon while at the same time protecting the Amazon from deforestation.

Another threat from developed countries is biopiracy, the unauthorized export and use of genetic resources. Large international corporations come to the Amazon to "find" obscure species of flora and fauna that have great commercial value. In most cases, without compensating Brazil for these discoveries, biopiracy is a point of contention with developed countries making a fortune off of products with ingredients that originate the Amazon.

With all of the richness the rainforest has to offer and with the threat of deforestation, experts worldwide have been voicing their opinions, seemingly telling Brazilians what to do with the Amazon. Brazil has been reluctant to accept help, due in part to suspicions that the United States and other foreign countries are trying to internationalize the Amazon.

This air of mistrust has arisen due in part to rumors and false information. Brazilian officials brought several of these rumors up during the seminar. One Brazilian ambassador bolstered one such rumor, noting that children’s geography texts in the U.S. contain maps that show Brazil without Amazonia. He cited "authority" that U.S. children are taught that the Amazon does not belong to Brazil, but to the U.S. A second speaker noted that the environmental organizations -- like WWF -- working to protect the Amazon, were really part of an international conspiracy. He went as far as to show a slide of who funded these organizations, with one funder noted as the Rothschild Bank.

Professor Goldstein, noted that the presentation was "reminiscent of Joseph Goebbels speech from the thirties."

Professor Goldstein said that, "these fears are played upon by jingoistic politicians, selling nationalism to the electorate. These demagogues inevitably point to outsiders as the cause of their problems."

One of the goals of the 3rd International Seminar on Environmental Law was to cast a bright light on these myths and to realistically put to rest any questions of Brazil’s sovereignty over the Amazon. Only then could we begin to discuss its protection. The Seminar clearly achieved this end.
Environmental Law in Manaus: A New Perspective

Manaus Journal Part III

By Stephen T. Redmon, LL.M. ’01

The international community is again focused on the status and the future of the Amazon region of Brazil. Since its exploration in the early 1500s the potential economic value of Brazil’s Amazon region has tempted exploitation. More recently, scientists have documented the global importance of Amazon rainforest biodiversity, hydrology, and the impact of deforestation on global climate changes. The Amazon’s vast natural resources makes it one of the richest regions in the world.

This potential is one that the Brazilian economy and the Brazilian government continue to pursue. Issues concerning the Amazon are dynamic and the global consequences are serious. Consequently, the United Nations, major economic powers (including the U.S.), non-governmental organizations, and private business concerns have intensified their efforts to encourage protective and sustainable development policies in the Amazon. In addition, the Brazilian government and human rights organizations are focusing on the devastating impact that deforestation is having on the indigenous cultures (Indians) of the Amazon region. The rights and protections of the indigenous cultures of the Amazon is a serious and contentious issue.

President Fernando Henrique Cardoso, the Brazilian government and her people must decide how to best manage its vast Amazonian resources, including the Indian tribes. This perspective, which is shared by most Brazilians who earnestly care about Brazil, is consistent with the view that people in the U.S. might have if the situation was affecting the U.S. directly.

One example concerns the current international debate about oil exploration and drilling in the Alaska region of the United States (a domestic natural resource with global impact). If faced with a similar domestic matter with global consequences, President George W. Bush and the U.S. Congress would consider several recommendations from various sources, including other nations and non-governmental organizations (NGOs). However, President Bush and the American people would aggressively oppose any proposal that implicated the internationalization of Alaska, regardless of its global environmental significance.

This viewpoint may be rejected by those who are paternalistic or disrespectful of the national sovereignty of other nations. However, the principles that uphold a nation’s sovereignty are a matter of international law, and remain almost inviolate.

The Brazilian government, in partnership with private industry and the scientific and legal community is taking significant steps to address the myriad of critical challenges facing the Amazon. The goal of sustainable development must be tempered with economic and social realities. None of the economically and technologically powerful nations have solved the environmental challenges faced by Brazil. In fact, most of the world powers have proposed environmental solutions for Brazil that they have not followed themselves. The global community is acutely aware of the many contradictions that exist.

The Brazilian government clearly understands its domestic and global responsibilities concerning the Amazon. Like other nations, the Brazilian government desires to do more to protect and sustain the Amazon rainforest. However, Brazil faces many challenges to fulfill its vision. Brazil does not have sufficient resources to fully protect, develop, and sustain its vast resources.

Brazil Course, continues

School children at the Seminar presented a clear message: Preserve our environment!
Complex economic issues, including conditions imposed by the International Monetary Fund make it more difficult for Brazil to realize its goals for the Amazon region. Also, Brazil’s democratic process require compromises that do not always yield the best environmental solution. These challenges are not unique to Brazil. Nevertheless, Brazil continues to be proactive and progressive concerning environmental protection and sustainable development.

The establishment of an Environmental Court in Manaus is a tremendous initiative that makes Brazil a “world leader in environmental stewardship,” according to Professor Nicholas Robinson, of Pace Law School. Judge Adalberto Carim Antonio of the Amazonas Environmental Court has created an international model for judicial environmental protection. In addition, the 3rd International Seminar on Environmental Law in Manaus represents a beacon of hope and optimism. The most encouraging aspect of the seminar is the opportunity for the panelists and participants to share ideas and solutions concerning the environmental challenges of the Amazon. No nation or group of people has a monopoly on knowledge, of course some nations are technologically advanced, but cooperation and communication must be indispensable components of this complex challenge.

Sustainable development of the new discoveries and the unexplored regions of the Amazon cannot be accomplished without cooperation and communication among the Brazilian government and parties with valuable information or expertise concerning the environment in the Amazon. Brazil must wisely balance many complex interests to shape its environmental policies and program in the Amazon. The balancing of these interests includes the indigenous cultures extant in the Amazon region.

The issues concerning the indigenous cultures is complex because there are many tribal groups and various viewpoints within each tribal group. When economic interests are involved,
the tension between the best interests of the indigenous cultures and these economic interests increases to dangerous levels. Brazil is addressing these issues but the debate concerning the government’s policies on economic development in areas occupied or needed by indigenous cultures is ongoing.

All nations have experienced both success and failures in the environmental area. The consequences of the economic and environmental decisions of the Brazilian government will have global impact. However, the global community must be prepared to assist Brazil with economic assistance, and not merely proclamations to allow them to make better scientific and humanistic decisions. In the absence of this global economic cooperation the world must be satisfied with the results of the Brazilian political process, whatever the global impacts may be. With 500 years of history and experience we must be confident that Brazil will make decisions that are as wise (possibly more wise) as those made by other nations.

Major Stephen T. Redmon is a military attorney and Professor of Law at the United States Military Academy at West Point. He recently completed his L.L.M. in Environmental Law at Pace University School of Law. The opinions expressed in this article are his own and do not represent the views or policies of the United States of America, Department of Defense, or Pace University School of Law.

Environmental Law in Manaus: A Unique Learning Experience

By Megan Brillault, ’03

Beginning last year, Pace Law School has co-hosted three international environmental seminars throughout Brazil. At the first two seminars, only professors attended. It was then decided that Pace would offer a class to students that allowed them to travel to Brazil and attend these seminars. The class was the first of its kind at Pace Law School.

The class consisted of several hours of preparatory classroom lectures, which included a brief introduction into Brazilian history, their legal framework and touched on some of the major environmental problems. A every class is required to give a grade to students, this class grade was based on a legal research paper. The topic was derived from one of the seminar topics. The research began before the trip to Brazil and an annotated bibliography was required before leaving. The research was to be combined with the information obtained at the seminar to write the final paper.

The seminar, Environmental Law, the Brazilian Amazon and Its International Context, was originally entitled The Internationalization of the Amazon. However, this title created so much controversy that the seminar was almost cancelled. Many Brazilians have a fear that the world, and particularly the United States, is trying to control the Amazon Rainforest. This was not the intention of the seminar. The intention was to exchange ideas about the successes and failures of different legal tactics in attempting to solve environmental problems. The name was quickly changed when it was realized the level of controversy it actually caused. A press conference was held the weekend prior to the seminar to help correct any misunderstandings of the intention of the seminar.

The seminar itself was a three-day event, attracting lawyers, judges, NGO’s and many others from all over Brazil. The speakers were both from Brazil and the United States, with Brazilians outnumbering Americans. The international context of the Brazilian Amazon is a broad subject so topics had a broad range as well. Topics included everything from environmental provisions in the Brazilian constitution, to

Pace Law 797: Comparative Brazilian Environmental Law Seminar. On-location at a nature reserve in Manaus. Students and teachers created a unique learning experience for all.

Pace law student Karen Johansen, researching the Amazonas Environmental Court, was interviewed by the media on-hand at the Seminar.

Brazil Course, continues
biodiversity and desertification, economic alternatives in the rainforest, the impact on indigenous cultures and the environmental court in the state of Amazonas. The topics were divided into panels, with each panel speaking on both sides of the issue. However, due to last minute changes and delays, this was not always the situation. All the panelists were very knowledgeable on their topics and responded to questions, even adversely posed questions by the opposition, very well.

Although the seminar itself was an amazing educational experience, many thought the highlight of the class was simply being in Brazil. A great seminar can be held anywhere, but having the opportunity to travel to where the environmental problems that are being discussed are occurring and getting a sense of the enormity and vastness of the Amazon Rainforest is what made the class experience exceptional.

As part of the class, there were several field trips throughout Manaus and the Amazon planned. The first was a boat trip down the Amazon River. The hotel was situated on the Rio Negro, which is one of the two major rivers that form the Amazon. A trip 45 minutes down the Rio Negro to where it meets the Solimões is where the Amazon River actually begins. The class was able to see freshwater dolphins, giant lily pads, hold a three-toed sloth and see the natives’ houses that were built right on the river. The class also took a boat up the Rio Negro to visit two “Eco-hotels.”

Eco-tourism is one alternative that countries have used to help preserve their natural resources while continuing to profit from them. A nother field trip the class took was a hike in a natural preserve in the Amazon forest. The class met Jose Eduardo L. S. Ribeiro, a botanist who has discovered and named many species of plants and insects in the Amazon. Everything in the Amazon is large, from the size of the leaves to the length of the vines to the number of insects that went crawling over one’s shoes or buried themselves in one’s hair.

A trip to Manaus allowed the class to visit the only court in the state of Amazonas dedicated solely to environmental cases and to meet Judge Carim, who oversees this court. From there, the class visited the Supreme Court for the state of Amazonas and was honored to meet the Chief Judge of the Amazonas State Supreme Court.

The last field trip that was taken was to the National Research Institute. The class was informed on the plant and animal species that are typically found in the Amazon. The guides and “volunteer” workers that help staff the Institute have often been convicted of committing environmental crimes, and have been sentenced to community service at the Institute.

The class was overwhelmingly successful. The students gained an amazing experience and a considerable amount of knowledge of Brazilian environmental law. The Brazilians were very receptive to the idea of U.S. students traveling to Brazil to learn and appreciate the difficulties and successes of preserving the Amazon and its people.
The Third International Environmental Law Seminar in Manaus Brazil in Pictures -- Part III

Right Top: The Seminar’s opening session included speakers who expressed the concerns of Brazil with regard to sovereignty issues.

Right Center: Pace students (from l. to r.) Stephen Redmon, Rebecca Williams, Megan Brillault, Christina Hendrix, Kristen Kelley, and Karen Johansen.

Below Left: Pace student Steve Redmon (first on l.) was dubbed the social director of the class. Although he spoke no Portuguese, he communicated with everyone. Here he leads (from l. to r.) Armando Ferreira, Eli Medeiros, Prof. Nick Robinson, and others in thanking our hosts upon return from a field-trip.

Below Right: Pace professors Ann Powers (left) and Betty Torrence (right) admire the enormity of the river, and the predominant means of transport along the Amazon, the houseboat.

Photo Credits: Robert J. Goldstein, Ann Powers, and Megan Brillault.
The Environmental Court of Manaus: Review and Analysis

By Karen Johansen, ‘03

Manaus, a bustling city nestled within the heart of the rainforest on the banks of the Rio Negro (Black River) in the state of Amazonas, Brazil, is home to a court like few others in the world. The Vara Especializada do Meio Ambiente e de Questões Agrárias (Specialized Court of Environmental and Land Use Matters), or VEMAPA, was created to address the environmental legal issues within the state of Amazonas, which encompasses much of the Brazilian rainforest. Before one can understand the function of this court, however, it is necessary to first understand the structure of the Brazilian political system and this court’s place within it.

Brazil’s Legal System

Brazil is a civil law country. After thirty years of military rule, Brazil enacted a new Constitution in 1988, Constituição da República Federativa do Brasil, which established Brazil as a federal republic with a democratic government. There are three levels of government – federal, state, and municipal – each of which possesses the power to legislate within the boundaries of the Federal Constitution. Similar to the Constitution of the United States, the Brazilian Constitution provides that federal power is limited to that which is enumerated within the text, while the states maintain legislative power over all that is not specifically granted to the federal government within the Constitution. The municipalities have the power to enact laws regarding predominant local interests, which overrides the states’ ability to regulate those areas. All laws created at each level must be in accordance with the Federal Constitution.

The federal court system has one Supreme Court, Supremo Tribunal Federal (Supreme Federal Court), or STF, which has appellate jurisdiction over constitutional matters, and original jurisdiction over matters enumerated in the Constitution. For the most part, these mirror the situations in which the United States Supreme Court has original jurisdiction. Below the Supreme Court are the upper federal courts, which are separated by subject matter and have appellate jurisdiction. These courts include the Electoral, Labor and Military courts, which are highly specialized, and the Superior Tribunal de Justiça (Superior Justice Court), or STJ, which presides over federal law matters that are not heard by any of the other three courts. There are federal trial courts within each state, which are the lowest level of the federal judiciary. At the state court level, the highest court of each state is the Tribunal de Justiça (Justice Court). There are several trial courts within each state that are separated by subject matter. There are no municipal courts; local matters are brought before the state trial court that has jurisdiction over that municipality.

The highest federal executive office is occupied by the president. He oversees the federal public ministries, which include the ministries of health, education, labor, science and technology, and environment, among others. The president also manages the federal agencies, including Conselho Nacional do Meio Ambiente (National Environmental Council), or CONAMA, which creates environmental resolutions, and Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (Brazilian Institute of Environment and Renewable Natural Resources), or IBAMA, which executes environmental policy.

IBAMA’s function is very similar to the EPA of the United States; both have rulemaking, adjudicative and investigative powers. At the state level, the governor supervises the secretaries of the state, whose offices parallel the federal ministries. It is the responsibility of the state secretaries to implement the federal and state laws regarding their respective offices. Municipalities are run by mayors, who nominate secretaries to implement local policies as needs arise. For example, the city of Manaus has a secretary of the environment who is responsible for city parks, educational programs, municipal sewage, and garbage collection.

The federal legislative branch is the Congress, which is divided into the Senate and the House of Representatives. They function in much the same way as the United States Congress. At the state level, the Assembleia Legislativa (legislative assembly) passes state laws. Municipalities have the Câmara de Vereadores (city council), which creates municipal law.

Brazil’s Constitutional Environmental Protection

Within the Brazilian Constitution, Articles 23, VI and VII; 24, VI and 225 specifically deal with environmental protection. According to Article 23, "The Union, the states, the Federal District and the municipalities, in common, have the power ... (VI) to protect the environment and to fight pollution in any of its forms; [and] (VII) to preserve the forests, the fauna and the flora." Article 24 provides that, "The Union, the States, and the Federal District have the power to legislate concurrently on... (VI) forests, hunting, fishing, fauna, nature, conservation, soil and natural resource preservation, environ-

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Article 225 [of Brazil’s Constitution] captures the spirit of the Brazilian environmental ethic. It states that, “Everyone has the right to an ecologically balanced environment...”
mental protection, and pollution control.\textsuperscript{15} Article 225 captures the spirit of the Brazilian environmental ethic. It states that, “Everyone has the right to an ecologically balanced environment, which belongs to the common use of the people, and is essential to the healthy quality of life, imposing to the public power and the society the duty to defend and preserve it for the present and future generations.”\textsuperscript{16} It is precisely these provisions of the Constitution that enabled the creation of VEMAQA just over four years ago.

The idea for an environmental court at the state level was conceived in 1994.\textsuperscript{17} However, bureaucratic roadblocks and a lack of state judicial support prevented the idea from being put into action.\textsuperscript{18} It took three years and an environmental disaster to see the establishment of the environmental court in Manaus.\textsuperscript{19} Before the creation of VEMAQA, environmental cases were theoretically handled by state trial courts with jurisdiction over the area where the problem occurred. However, because of other pressing needs in the communities, as well as the highly specialized knowledge required for deciding environmental cases, they were seldom heard at all.\textsuperscript{20}

Tragedy and Triumph: Creating the Court

In 1997, Manaus, as well as much of the state of Amazonas, was suffering from the effects of El Niño. The humidity level, which is usually a sultry eighty percent, dropped to forty percent.\textsuperscript{21} Dense fog on the rivers caused boats, one of the main forms of transportation in the region, to collide with alarming frequency.\textsuperscript{22} Fires ravaged the land.\textsuperscript{23} Many went without electricity.\textsuperscript{24} Disease was rampant.\textsuperscript{25} The local citizens were so distracted by the effects of El Niño that the state judiciary recognized the need and the constitutional obligation for the creation of the environmental court proposed three years earlier.\textsuperscript{26} The president of the TJ created VEMAQA through Resolution Five on July 25, 1997.\textsuperscript{27} The official inception of the court was September 10 of that year.\textsuperscript{28} This decision had great significance, as it was one of the first explicit incor- porations of Article 225 of the Brazilian Constitution, which makes clear the judicial duty to defend, guard and protect the environment for present and future generations.\textsuperscript{29}

At first, critics of the court were convinced that the court was a waste of resources, and it would not have many cases.\textsuperscript{30} However, once the people realized that the government had opened a channel for addressing environmental problems, cases came flooding in.\textsuperscript{31} Since the court opened four years ago, its docket has been active with over twelve thousand cases.\textsuperscript{32}

Anatomy of the Court

VEMAQA is unique, as it is a hybrid court; it can adjudicate both civil and criminal cases.\textsuperscript{33} It was designed this way so that the court has jurisdiction over all environmental matters, and avoids inconsistent decisions on similar issues from separate criminal and civil courts.\textsuperscript{34} However, the court was not designed to be a panacea for environmental harm.\textsuperscript{35} This would be an impossible goal that would leave the court overwhelmed and paralyzed. Instead, the court approaches the cases before it in a systematic and efficient way, striking a balance between needs and resources.\textsuperscript{36}

One way that the court does this is through its system of dealing with issues in remote areas of the state. The state of Amazonas encompasses just under 626,000 square miles and has a population of 2.1 million people. However, 1.5 million of those people reside in the city of Manaus, leaving half a million citizens scattered sparsely throughout the remainder of the state.\textsuperscript{37} Many of the people in these areas are members of indigenous groups living in remote areas of the rainforest. There are some places that take twenty-two days by boat to reach from Manaus.\textsuperscript{38} In these isolated areas, judges make periodic visits to deal with the everyday legal issues that arise. However, because of time constraints, the docket was prioritized in such a way that left environmental issues largely ignored. With the inception of VEMAQA, people living in these comarcas have periodic access to environmental justice, as the court owns its own fleet of boats, planes and other vehicles which are used to transport the VEMAQA staff throughout the state to deal specifically with environmental questions.\textsuperscript{40}

The procedure for bringing cases before VEMAQA depends on whether the case is of a criminal or civil nature. Criminal cases are brought by the Ministerio Publico, which operates much like a prosecutor’s office.\textsuperscript{41} The public attorneys who work there bring actions on behalf of the population. Civil cases, such as mass torts actions, on the other hand, can be brought by the Ministerio Publico, the state, a municipality, or a non-governmental organization (NGO).\textsuperscript{42} For an NGO to bring a civil action, however, it must be established for at least one year, and its bylaws must state an interest in environmental protection issues.\textsuperscript{43}

For an NGO to bring a civil action, however, it must be established for at least one year, and its bylaws must state an interest in environmental protection issues.
Environmental Court, continued

of the case. Thus, clever attorneys would be powerless to change venue even if it appeared to seriously impact the success of their cases.

Standing is often debilitating to environmental cases heard in the United States. However, there is no problem with standing in cases heard by VEMÃQA, as Article 23 of the Brazilian Constitution provides that the government has the power to protect the environment and preserve flora and fauna. A additionally, the jurisdiction of the court extends to all matters within cases of some environmental consequence. Thus, a case with environmental issues as well as other legal questions can be heard and adjudicated entirely by VEMÃQA, instead of VEMÃQA hearing only the environmental issues and then transferring the case to another court. This is called "extended jurisdiction." Not only does this ensure consistent judgments, it also appears to add credibility to the court, approaches law from a holistic perspective, and expedites the judicial process.

Judge Carim

Dr. Adalberto Carim Antônio has presided over VEMÃQA since its inception. He was instrumental in working toward the court’s creation, and has been a major influence in determining its current goals and direction. He has been involved with environmental law for thirteen years. He earned postgraduate degrees in Environmental Assessment and Environmental Law, from the University of Tennessee and in Brazil, respectively. He then completed the rigorous testing process to become a judge. He was chosen by the Tribunal Justica to preside over VEMÃQA because of his specialized knowledge of environmental law.

The attorneys who work at VEMÃQA also possess a highly technical background in science and environmental law. One of the challenges faced by Carim and VEMÃQA is finding more colleagues who possess the requisite degree of specialized knowledge. Since appointments last until the judge is seventy years old, which is the age of compulsory retirement, judges must constantly work to keep up with the rapidly changing body of laws and information relating to environmental law. Carim sees the law schools as a necessary place for the "seeds of the environmental conscience" to be planted and nurtured, so that the vision of VEMÃQA can continue to grow stronger as time progresses. In fact, the Federal University’s Law School in Manaus has required students to take a course on Environmental Law since the 1960’s, making it one of the first law schools in Brazil to offer and require such a course.

In Carim’s own words, one of the main goals of the court is to foster an ethic of “green justice” in the people of the state of Amazonas. A additionally, the court represents a commitment by the judiciary to publicly assume the responsibility for environmental protection provided for in the constitution. It is his hope that by setting this example, the other states of Brazil will begin to address environmental issues in their respective jurisdictions. Already, several Brazilian cities and states have started adopting a similar notion of "green justice." He strongly feels that a unified nationwide judicial commitment to the essence of Article 225 is vital to the success of each regional effort.

Alternative Sentencing

Carim was also ahead of his time in adopting a policy of alternative sentencing for those who came before him in criminal cases. He describes the court as being "heavily involved in the resocialization of the environmental delinquent." He recognized that the profile of environmental criminals differed drastically from the profile of traditional criminals. He was well aware of the problem with prison contamination: people guilty of lesser offenses went to prison with people who had committed serious crimes, many of whom were repeat offenders. They left prison as different people, having made disreputable connections and becoming accustomed to a harsh way of life. This was not the model that Carim wanted to follow. To him, penitentiary punishment was a last resort when more progressive means had failed. He employed a rehabilitation scheme based on Alternative Punishment Law that utilized a variety of types of community service, with the focus of encouraging people to develop a more personal and responsible relationship with the environment. For example, he discussed a case where a man was convicted for polluting the river, and was sentenced to feed manatees at a wildlife rehabilitation facility. According to Carim, “contact with nature is more profitable than contact with the bars of a jail cell.” And his plan seems to be working. Many of those who once stood in front of Carim facing charges relating to environmental crimes completed their sentence and emerged from the experience as "environmental justice soldiers." In addition to hearing cases involving individuals, VEMÃQA also deals with corporations that are accused of an environmental wrong. Carim has been creative in his dealing with corporations as well, through such sentences as community service and requiring the corporation to take out an advertisement relating to an environmental issue.
the power to penalize the corporations through access to the personal assets of the corporation’s board of directors, in addition to the corporate assets. The message seems to be sinking in here as well. Corporations have started to learn that it is cheaper to stay in compliance with the law than to face the consequences imposed by VEMAPA.

Carim also uses VEMAPA as a means through which environmental information is diffused to the public. Tens of thousands of pamphlets have been distributed to the government of Manaus, its schools, and its citizens as a way to let the population know that the provisions articulated in Articles 23, 24 and 225 of the Brazilian Constitution establish rights relating to quality of life, and are the responsibility of the government and the people to uphold and enforce through the courts. He hopes that this measure will help the citizens separate VEMAPA from the bureaucratic, ineffective image commonly associated with courts in Brazil, and embrace it as an empowering means to achieve environmental justice for themselves and their progeny.

New Environmental Crimes Law

VEMAPA gained its most powerful weapon several months after it opened with the passage of Law 9.605 in February 1998. Known as the Environmental Crimes Law, 9.605 was enacted to “regulate criminal and administrative penalties relating to behavior and activities harmful to the environment.” It incorporated many of the alternative sentencing ideas that Carim had already been using in VEMAPA. The statute also increased the ability of VEMAPA to try environmental cases by providing for non-natural persons, such as corporations, technical bodies, and boards to be held criminally responsible for environmental crimes, as well as additional parties who were aware of the above-mentioned groups’ activities and failed to take steps to prevent such crimes.

Prior to the enactment of 9.605, only natural persons could be criminally responsible for environmental damage. Corporations could only be held civilly liable. This strengthened the power of VEMAPA and environmental law in Brazil, since corporations are often capable of environmental damage on a much greater scale than even large groups of individuals. Specifically, the law allows the court to fine, suspend activities of the corporation, or prohibit the corporation from contracting with and obtaining subsidies from public authorities for a period of time, not to exceed ten years. It also provides the court the option of imposing a community service sentence on the corporation by requiring it to finance environmental projects, maintain public lands, and make contributions to environmental or cultural organizations.

The law also outlines a progressive schedule for restricting the rights of natural persons guilty of environmental crimes, as Carim had used in his alternative sentences. It identifies the following restrictions on individual rights to be used according to the seriousness of the offense and the person’s prior criminal history: completing community service, including working without compensation at public parks and gardens, or the restoration of damaged items, if applicable; temporary suspension of rights, which would prohibit the person from contracting with the government for a period of three to five years depending on whether the crime was fraudulent or negligent; partial or total suspension of activities; monetary payment, either to the victim of the crime, or to a public or private organization with social objectives, and house arrest. The guilty person could escape part of or all of the allowable penalty because of ignorance due to poor education, repentance demonstrated by voluntary reparation of the damage caused, or cooperation with environmental agencies. However, the guilty person could also aggravate the penalty by repeatedly committing crimes against the environment, or by committing the crime for monetary gain, in commission with another actor, while exposing the public or the environment to significant danger, while disrupting areas designated for conservation, while using cruel meth-
time will tell if it can be wielded with enough force to effect lasting change in attitudes and actions toward the environment, or if a lack of resources will render it nothing more than an idealistic edict.

Conclusion

Although VEMAQA appears to have demonstrated remarkable accomplishments in its short existence, Carim has been hesitant to prematurely declare it a success. However, he remains optimistic that the future will be marked with environmental victories resulting from the work of the VEMAQA staff, and will yield a new generation of legal professionals who embrace the ideals of “green justice,” an ethic toward which Carim and others have worked so vigilantly.

Footnotes
1 Dr. Adalberto Carim Antônio, Address at the Third International Seminar on Environmental Law: The Brazilian Amazon in an International Context (June 5, 2001).
2 Constituição da República Federativa do Brasil [C.F.] [Constituição] (Braz.).
4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
14 Constituição da República Federativa do Brasil [C.F.] [Constituição] art. 23, VI and VII (Braz.).
15 Id., art. 24, VI (Braz.).
16 Id., art. 225, introduction (Braz.).
17 Interview with Dr. Adalberto Carim Antônio, Judge of the Environmental Court of the State of Amazonas, Brazil (August 28, 2001).
18 Id.
19 Id.
20 Telephone interview with Dr. Adalberto Carim Antônio, Judge of the Environmental Court of the State of Amazonas, Brazil (August 28, 2001).
21 Interview with Dr. Adalberto Carim Antônio.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 The Tribunal de Justiça has the power to distribute the judges of the state to specific areas of law.
28 Telephone interview with Dr. Adalberto Carim Antônio.
29 Id.
30 Dr. Adalberto Carim Antônio, Address at the Third International Seminar on Environmental Law; Interview with Dr. Adalberto Carim Antônio.
31 Id.
32 Id.
33 Interview with Dr. Adalberto Carim Antônio.
34 Telephone interview with Dr. Adalberto Carim Antônio.
35 Dr. Adalberto Carim Antônio, Address at the Third International Seminar on Environmental Law.
36 Id.
37 Id.
38 Telephone interview with Dr. Adalberto Carim Antônio.
39 Id.
40 Id.
41 Id.
42 Id.
43 Interview with Dr. Adalberto Carim Antônio.
44 Telephone interview with Dr. Adalberto Carim Antônio.
45 This is one significant difference between VEMAQA and the Environmental Claims Part, or ECP, which was recently established in Westchester County, New York. The ECP does not have sole jurisdiction over environmental matters. An attorney wishing to bring a case before the ECP must file a Request for Judicial Intervention, or RJI, with the court, stating the nature of the case and the reasons why adjudication by the ECP is appropriate. Opposing counsel then has an opportunity to file a petition stating the reasons why the case should not be brought before the ECP. The Administrative Judge of the ECP makes the final determination as to whether the case is heard in the ECP. No appeals from this decision will be granted. Additionally, the Administrative Judge may, at a later date, transfer the case out of the ECP.
46 Constituição da República Federativa do Brasil [C.F.] [Constituição] art. 23, VI and VII (Braz.).
47 Telephone interview with Dr. Adalberto Carim Antônio.
48 Interview with Luciana Valente.
49 Interview with Dr. Adalberto Carim Antônio.
50 Telephone interview with Dr. Adalberto Carim Antônio.
51 Id.
52 Id.
53 Id.
Interview with Luciana Valente.

Telephone interview with Dr. Adalberto Carim Antônio.

Id.

Id.

Dr. Adalberto Carim Antônio, Address at the Third International Seminar on Environmental Law.

Id.

Telephone interview with Dr. Adalberto Carim Antônio.


Id.

Dr. Adalberto Carim Antônio, Address at the Third International Seminar on Environmental Law.

Telephone interview with Dr. Adalberto Carim Antônio.

Interview with Dr. Adalberto Carim Antônio.

Id.

Id.

Id.


Id., introduction.

Id., art. 2.

Dr. Adalberto Carim Antônio, Address at the Third International Seminar on Environmental Law.

Telephone interview with Dr. Adalberto Carim Antônio.

Id.

Id.

Id.

Código Civil [C.C.] 9.605, art. 21, 22.

Id., art. 23, I – IV.

Id., art 8, I – V.

Id., art. 9.

Id., art. 10.

Id., art. 12.

Id., art. 14, I – IV.

Id., art. 15, I.

Id., art. 15, I a, b, c, e, m, n.

Id., art. 29 – 37.

Id., art. 38 – 53.

Id., art. 54 – 61.

Id., art. 62 – 65.

Id., art. 66 – 69.

Id., art. 66.

Id., art. 68.

Id., art. 69.

Dr. Adalberto Carim Antônio, Address at the Third International Seminar on Environmental Law.

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Students attending the session was the Minister of the Environmental Ministry of Buenos Aires Province and the head of the federal hazardous waste registry. Professor Miller emphasized the constitutional and administrative law components because of their particular pertinence to the Argentine situation. The liveliest discussion, however, focused on hazardous waste management.

The Argentine constitution is modeled on ours. In fact, U.S. Supreme Court precedent is often cited in Argentine constitutional law decisions. Yet with regard to environmental and other aspects of law, they have not created a federal-state model. This results partly from political struggles between the provincial and federal governments, and partly from a poorly developed sense of federal commerce clause jurisdiction. Focus on our more robust development in these areas may point the way for them. At the same time, their system is a laboratory for the chaos that we could expect if the Court continues its retrenchment from our traditional broad interpretation of the federal commerce clause jurisdiction.

Looking at the administrative law of other countries makes you realize how important our avenues for public knowledge and participation are in providing transparency and accountability in government. Although the European Union is moving toward similar openness, it is entirely lacking in traditional civil law countries. It enables corruption and breeds public distrust of government. While we have our problems with corruption and accountability, they are nothing compared to Latin America. The openness of our administrative law explains much of the difference. Hence the constant emphasis on administrative law.

The students were particularly interested in RCRA because the one developed national environmental program they have, is modeled on RCRA. Both of the Argentine LL.M. students we have had at Pace Law School did guided-research projects comparing the two systems. Again, the Argentine

Non-Point Sources, continues
system is plagued with unresolved jurisdictional issues, which inhibit its effectiveness. As an interesting side note, the federal officials administering the program (all 30 of them) claim jurisdiction over hazardous air and water pollution, a reflection of the fact that there is no federal scheme for either. They inquired whether abandoned automobiles were hazardous waste under the U.S. system. This question was based on a current dispute in which the federal officials have told the Buenos Aires provincial officials that abandoned automobiles awaiting compaction and recycling in a provincial lot are hazardous waste, and cannot be kept in the lot or otherwise handled except in compliance with the federal system. Of course the conflicting policies for regulation of recycling make our definition of hazardous waste long, cumbersome, and complex. The added dimension of jurisdictional disputes, however, makes the Argentine version particularly dispute provoking.

During a visit to the hazardous waste registry, three of the students who were lawyers there, along with a couple of inspectors, explained their system, step-by-step. There were permit applications, permits, inspection reports, in a file for a randomly picked company that turned out to be Russian. Its business was bioremediation of oil soaked soil, which it had commenced during the cleanup of the Exxon Valdez spill.

The registry was reminiscent of the early days at EPA, when we were inventing everything for the first time; a heady experience indeed. Although overwhelmed by their need for resources, jurisdictional problems, and political pressures, the young officials were enthusiastic and infused by a sense of mission promising success in their work.

Professor Miller had plenty of opportunity to showcase the Pace environmental programs and did some active recruitment of a few potential students. The deans at Astral were interested in developing a program for JD student exchanges.

Congratulations, Amigo!

Héctor Russe Martínez, a friend of the Pace environmental program, and partner in the Caribbean-Mesoamerican Center for Environmental Law, was awarded the 2001 Environmental Quality Award by Region 2 of the United States Environmental Protection Agency.

According to the EPA: “During his eight years as Chairman of the Puerto Rico Environmental Quality Board (EQB), Héctor Russe Martínez, was an outstanding partner with EPA in the effort to protect and improve the beauty and quality of the environment in Puerto Rico. Prime among our cooperative projects was the development of the Comprehensive Conservation and Management Plan for the San Juan Bay Estuary, on which he was instrumental in obtaining the participation of key government representatives.”

The EPA further noted that “he was also centrally involved in former Governor Pedro Rosselló’s initiative to build the environmental protection EQB, and is practicing law in his hometown away from the city.

Energy Project’s Ed Smeloff to San Francisco Energy Commission

Ed Smeloff, Executive Director at the Pace Energy Project, was invited by San Francisco Mayor Willie Brown to become Assistant General Manager of Power Policy, Planning and Resource Development with the San Francisco Public Utility Commission.

Smeloff, a frequent contributor to this journal, will be moving to ground-zero of the energy crisis. No stranger to California’s energy issues, Smeloff was the Director of the Sacramento Municipal Utility District (SMUD) before coming to Pace in 1997. Pace Adjunct Professor Fred Zalcman has been appointed the Executive Director of the Pace Energy Project after a national search for Smeloff’s successor.

Joint Degree Program Established with the Yale School of Forestry & Environmental Studies

The first Pace law student enrolled in a new program aimed at producing environmental lawyers with strong backing in environmental sciences and policy, has begun her first year of law school at Pace. She is embarking on an educational program that will have her in residence at Yale for one-and-a-half years studying ecology and environmental management at the world’s finest school of environmental studies, the School of Forestry & Environmental Studies (F&ES) at Yale University.

F&ES, the alma mater of Aldo Leopold, offers a comprehensive program in many different aspects of environmental studies and science. Prospective and current Pace and Yale students may enter the program.
Sustainable Development Initiative: Pace Energy Project Goes International

By Dick Ottinger, Dean Emeritus

The Pace Center for Environmental Legal Studies, through its Pace Energy Project; The International Union for the Conservation of Nature and Natural Resources (IUCN - The World Conservation Union), through its Commission on Environmental Law; and The United Nations Development Programme (UNDP) have undertaken a Sustainable Energy Initiative for outreach to key developing country decision-makers on sustainable energy options.

The Sustainable Energy Initiative: is designed to build the capacity of decision-makers who will participate in the series of conferences leading up to Rio+10 in September, 2002, as well as their local constituencies of government representatives, NGOs and members of the private sector who influence their positions on sustainable energy policies. It is also designed to assist the countries in the region to adopt sustainable energy policies and practices.

In October 2000, the IUCN at its World Conservation Congress in Amman, Jordan adopted a resolution committing its extensive worldwide staff to assist the UNDP in its outreach efforts to disseminate information from its path-breaking publication, the World Energy Assessment Energy and the Challenge of Sustainability. The Pace Energy Project and IUCN’s Commission on Environmental Law have teams of energy law experts who will volunteer their time for these educational undertaking.

The World Energy Assessment (WEA), an initiative of the UN Department for Economic and Social Affairs (UNDESA), the World Energy Council (WEC) and UNDP, was developed to inform the preparatory process for the ninth session of the UN Commission on Sustainable Development (CSD-9) held in April 2001. The CSD-9 was the first international negotiating forum in which energy was extensively discussed. The conference outcome recognized among other things that 2 billion people, predominantly in developing countries are without access to modern energy services.

Unfortunately at the CSD-9, the delegates actually turned down recommendations relating to energy efficiency, renewable energy and elimination of subsidies for environmentally harmful resources. The basis of the rejection was the failure of the developing country representatives to see the relevance of sustainable energy practices to their economic and social development needs. This suggests that perhaps the delegates lacked a comprehensive understanding of the connection between economic development, sustainable energy solutions and climate. Thus, the urgent need for the kind of outreach effort proposed.

The WEA, which provides the most comprehensive compilation of sustainable energy options ever assembled, will serve as the information centerpiece in this Initiative. The Assessment evaluates all options for addressing energy needs in relation to countries’ development requirements; assesses the economic and environmental costs and benefits of each energy option; and gives examples of how these options are being applied and financed around the world.

The Sustainable Energy Initiative proposes to conduct five five-day training sessions before Rio+10. A pilot briefing is planned for English speaking African countries in Nairobi, Kenya in fall, 2001. This is to be followed by briefings for Eastern Europe in Russia; Asia in China; for Latin America in Costa Rica; and for French Africa in a country to be determined. The training seminars will engage the leaders in the host countries in a full day conference and will then encompass four-day train-the-trainer sessions for IUCN, UNDP, and other NGO personnel. The World Council of Churches regional staff has expressed interest in participating and the World Wildlife Fund has sent a message to its field offices about having its extensive staff participate. The Initiative is designed to charge the participants to conduct their own training sessions as well as individually brief their chief contacts in their regions.

The training will be done making maximum use of regional experts. Trainers will also include WEA authors and staff, Pace Energy Project personnel and other outside experts.

The Initiative will prepare and disseminate course materials and reports, in both hard copy and on line. The course materials, while maintaining a regional perspective will highlight the importance of energy to development goals, global warming, forests, agriculture and biodiversity; the costs and benefits of various energy options, both rural and urban; how to get technical help; the availability of and how to access both internal and external financial resources; and case studies of successful projects in developing countries, drawn from the particular region. Feedback loops will deliver information back to the Initiative on local needs, problems and requests for referrals to appropriate energy and financing experts. Linkages will also be established with the UNDP Sustainable Energy Network.

This is the first major international undertaking of the Pace Energy Project. The Initiative will be supervised by Pace Law School’s Dean Emeritus Richard Ottinger. The Climate and Energy Working Group of IUCN’s Commission on Environmental Law will assist the effort. It is hoped that this outreach effort will have a significant impact on the delegates and the outcome of the ongoing climate change negotiations, the Rio+10 conference, and the energy and development policies of the participating countries.

Director of Environmental Programs Robert J. Goldstein delivered the paper Putting Environmental Law on the Map: A Spatial Approach to Environmental Law Using GIS, at the Law and Geography Colloquium at the University College London, July 3, 2001.


Professor John R. Nolon has published the following articles in the NEW YORK LAW JOURNAL: Battle for the Ages: Defining Federal Power to Affect Local Land Use (Aug. 15, 2001); Supreme Court Takes a Look at Takings (Jul. 2, 2001); In Our Backyards: Analyzing Local Authority to Adopt Environmental Laws (Jun. 20, 2001); Smart Growth: The Duty to Supply Water to Developing Regions (Apr. 18, 2001); Our Town: What Is the Role of Local Government in Environmental Law? (Feb. 21, 2001).

Professor Ann Powers’ article Justice Denied? Issues in the Adjudication of Extradition Applications, will be published in the TEXAS INT’L L. J.
