The Transition to Sustainable Development Law

Synopsis of the Ninth Annual Lloyd K. Garrison Lecture on Environmental Law
Presented by J. William Furtell, delivered March 31, 2003

When discussing sustainable development, we must speak across gaps of culture and time and be aware of differences between generations. Each generation has its own defining experience and cast of mind. There is a cyclical theory of American history whereby people go through passion and exhaustion cycles among generations. The heroic generation is defined by an event. A classic example of this is the GI generation. A generation such as this goes out and does something of importance in the world and is renewed with the sense of unity. Sons of the heroic generation want the change their parents sought. The GI generation came back and created environmental law: David Sive and Edmund Muskie were of this heroic generation. Nicholas Robinson and I are sons of this generation. Now, it is time for the next heroic generation to make a stand. With the events of September 11th, people of this generation must decide who will win the struggle for freedom and the safety of the republic. Ultimately, they will come back renewed with a sense of the common good and public welfare.

We must keep this in mind when looking at sustainable development. This past year the World Summit for Sustainable Development took place in Johannesburg, it was a major conference that convened international agencies and leaders. At the conference we compared Johannesburg to the original Rio Earth Summit. This conference produced two official documents: a political statement from the heads of state reaffirming their commitment to sustainable development and an assessment on specific sectors such as forestry, fisheries, and mining. Unfortunately the summit did not advance the transition to sustainable development law. Still there was value in the summit since it was the first meeting of international agencies, governments and the civil society since the terrorist attacks of September 11. The United States pledged a 50 percent increase in foreign aid and to assist in forest regeneration in the Congo. More than 250 such partnerships were announced at the summit. Disappointments should not outweigh the fact that some positive steps were taken at the meeting. When comparing it to Rio, it was quite different, due largely to the state of the world. The spirit of Rio was wonderful because Rio followed the fall of the Berlin wall. Johannesburg, on the other hand, convened under the clouds of war, terrorism, and a sense of world-weariness.

Because of the world context, citizen groups were denied access to meetings and information. Much of their anguish stemmed from the fear that the free trade agenda was overwhelming the sustainable development agenda. Clearly much more could have come from the summit; this was the world summit of sustained denial. The most important sustainable development issues were handled obliquely, if at all.

Representatives from the Yale School of Forestry discussed the possibility of a World Environment Organization, but even if international environmental organizations are strengthened and enforcement is increased, nations will still fail to address one of the most fundamental problems. Environmental laws are the result of unsustainable activity. They are a reaction to, and they often sanction, unsustainable patterns of development.

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Golden and Its Emanations: The Surprising Origins of Smart Growth

By John Nolon

How effectively can local governments prevent the effects of sprawl? Are they empowered to adopt smart growth strategies? Can they, acting alone, create balanced and orderly land use patterns? Does danger lurk in empowering local governments to act aggressively regarding such matters, in the absence of statewide or regional planning? These questions, despite their contemporary relevance, are not new. Thirty years ago, land use practitioners and scholars hotly debated growth management, regionalism, and the preemption of local land use authority.

A 1972 case decided by New York’s highest court catalyzed this national debate. A hesitant court of appeals ceded Ramapo, a single town in the path of metropolitan area development, authority to control growth. In doing so, it set in motion three decades of experimentation and creativity responsible for a plethora of techniques now available to fight sprawl: the toolbox practitioners use to achieve smart growth at the local level.

The town’s zoning regime, it said, is ‘burdened by the largely antiquated notion which deigns that the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others.’ The revolution has not succeeded, despite all the attention given to the efforts of states to create statewide, counter-regimes under the rubrics of growth management, sustainable development, and, recently, smart growth. After analyzing recent state planning and smart growth legislation, a preeminent practitioner and scholar concludes that one of the major problems called “Residential Development Use,” and prospective subdividers were required to obtain a special permit. The permit could not be issued unless a critical mass of infrastructure was in place to serve the subdivision, including roads, sewers, drainage, parks, and firehouses. Several provisions of the Ramapo amendments softened the effect of the temporary restraints on development including a variance process and the fact that developers could provide the infrastructure themselves to qualify for a special permit.

Judge Scileppi, writing for the majority of the New York Court of Appeals, upheld Ramapo’s land use amendments as being within the delegated authority of local governments, decided that the eighteen-year suspension of the right to develop did not constitute a regulatory taking, dismissed the town’s claim that some of the landowners’ claims were not ripe, established the concept that local zoning may not be exclusionary, carefully defined the role of the courts in land use matters versus that of the state legislature, and deferred to fact-based determinations of local lawmakers. In all of these respects, the decision clearly forecast the ensuing thirty years of land use policy and litigation.

The Ramapo Plan comprised not one, but ten mechanisms aimed at growth control. Many of them were unknown or untested at the time. All but one—the Village Incorporation Law—enjoyed considerable success. These mechanisms included:

- Comprehensive Plan. The town conducted population projections, prepared detailed water, sewer, and transportation studies, confirmed that the present rate of growth was unsustainable, and articulated a policy of growth control. This led to the adoption of a comprehensive plan that contained a phased growth strategy.

- Concurrency. The Town of Ramapo’s “invention” of requiring currency between land development and the regulation of land use and development is uniquely a function of local government ....

At precisely the same time, a revolution to wrest land use control from local governments was begun. It was one fueled by the understanding that local control of land use creates serious inefficiencies and inequities. A report entitled “The Quiet Revolution,” prepared for the Council of Environmental Quality in 1971, contained a powerful statement of the problems caused by the delegation of land use control to towns, villages, boroughs, cities, and townships: “This country is in the midst of a revolution in the way we regulate the use of our land .... The ancient regime being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others.” The revolution has not succeeded, despite all the attention given to the efforts of states to create statewide, counter-regimes under the rubrics of growth management, sustainable development, and, recently, smart growth.

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Golden and Its Emanation

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doing and supportive infrastructure was novel and, although not wholly new, brought the concept to the nation’s attention, largely by prevailing in the Ramapo litigation.

- **Special Permit Point System.** The subdivision of land for residential purposes was designated a special use for which a special use permit was required. No special permit could issue unless the proposed residential development accumulated fifteen development points, to be computed on a sliding scale of values assigned to specific improvements under the statute.

- **As-of-Right Use.** The owners of land rendered ineligible for subdivision were allowed to develop the unsubdivided parcel as-of-right under the current zoning, giving them the ability to utilize their land for a limited economic use.

- **Reduction of Tax Assessments.** Owners who could not develop their land for several years were provided a method of obtaining a reduction in their property tax assessment.

- **Acceleration.** A prospective developer could advance the date of subdivision approval by agreeing to provide services and improvements to bring the proposed plat within the number of development points required to qualify for a special use permit.

- **Vested Rights.** Developers were allowed to apply for a special permit vesting their rights to proceed with their development in the future when the required infrastructure and services were in place.

- **Hardship Variance.** Upon application to the town board, the development point requirements could be varied should the board determine that such a modification was consistent with the ongoing development plan.

- **Affordable Housing Program.** The town board balanced the effects of growth control on affordable housing by taking direct action to produce over 800 units of public and subsidized housing.

- **Village Incorporation Law.** The town board adopted a law that prevented incorporation of additional villages within the town unless the town board determined that such incorporation was in the best interests of the town as a whole. The provision was later invalidated in Marcus v. Baron. 16

The Town of Ramapo blazed a bright trail of invention in the late 1960s. The Ramapo court sustained the town’s power to do so and, for thirty years, local governments have been ever bolder in developing smart growth solutions to their unique land use problems. They are adopting novel local environmental laws, transferring development rights from one part of town to another and from one community to another, providing zoning incentives to developers, creating overlay zones to protect watersheds and provide for traditional neighborhood development, adopting performance-based zoning ordinances, floating bonds to acquire funds for the purchase of development rights, and creating a number of impressive intermunicipal land use councils to achieve sub-regional coherence. This trend toward local invention owes much to the Town of Ramapo, including its local officials, Professor Robert H. Freilich, and the New York Court of Appeals.

While criticizing local control and calling for the legislature to accommodate regional needs in some fashion, the Ramapo court empowered local governments, in the absence of a better approach, to deal aggressively with a number of land use issues that have become all the more pressing since its decision in 1972. Despite much criticism of localism, effective strategies to preempt or direct local land use decisions have been slow to materialize: fifteen years of regulatory takings cases have not defined clearly the constitutional limits of local regulatory authority. New Jersey’s aggressive, state-mandated fair share housing policy has been emulated timidly in just a few states, regional and statewide land use planning has not emerged in most states to effectively constrain or guide local land use planning, and a series of reform movements (growth management, sustainable development, and smart growth) have failed to dictate the outcomes of local land use disputes in most states.

The top-down reform, command-and-control approach suffers its own shortcomings. State governments experience political and practical inhibitions that frustrate their preemption of local authority, and there are judicial doubts about the existence of federal jurisdiction to preempt local land use authority. 17 Further, federal or state enforcement of land use standards at the local level where conditions are highly diverse is prohibitively costly and of doubtful efficacy. Federal and state lawmakers and agency personnel have neither the time, resources, nor information to micro-manage the development of individual parcels, establish plans and visions for individual neighborhoods and communities, or to monitor water, soil, and other conditions in all places over time. Local citizens, their lawmakers, and land use agencies have the most immediate stake in these matters and have a legitimate role to play in protecting their quality of life. Local officials in Dover, New York, for example, used Ramapo-like inventions to take control away from a state agency whose policies were not synchronized with critical local environmental interests.

Although incremental strategies that provide for coordination among communities rather than mandated regional planning such as the Hudson River Green-way Communities Council have not been popular with regional activists and many scholars, 18 there is evidence of new curiosity among academics and practitioners about the effectiveness of voluntary networks as means of achieving regional coherence. There is considerable interest in other regions in this grassroots approach. Envision Utah, for example, is a network of interest groups working at the regional level along a 100-mile corridor running north and south of Salt Lake City. It comprises eighty-eight local governments and 80 percent of the state’s population. Assisted by state grants, Envision Utah is a nongovernmental alliance with significant private funding. Envision Utah conducted extensive opinion surveys of residents who demonstrated a strong preference for walkable, transit-oriented development, infill strategies, and redevelopment of urbanized portions of the region. Based on grassroots-derived implementation strategies, the state legislature passed the Quality Growth Act in 1999, established a commission, and charged it with assisting local governments with grants and technical assistance. The commission is also responsible for coordinating the work of six state agencies. Envision Utah developed a toolbox of techniques that can be used by local governments and intermunicipal councils to create their own visions and implement the regional vision. 19

Peter Calthorpe and William Fulton conclude that the Envision Utah experience “demonstrates that a regional plan is often more a process than a set of policies or a map. It is research, discovery, and education combined. The process itself can fundamentally reframe the issues of growth and community and create a new vision of the region’s economic and environmental future.” 20 Robert Fishman observes, “American planning today is most effective and comprehensive precisely when it eschews all-embracing powers and works instead within the limits of pluralistic systems ... that actually define America-built environments.” 21

The Ramapo story, its emanations, and the recent national experience suggest a number of practical recommendations for the adjustment of the typical state-created land use control system. These recommendations fall short of a systemic fix that will lead to the provision of affordable housing for all in need, the proper balance of land uses, and the appropriate location of regionally significant projects. They have more modest aspi-

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Two Different Worlds

By Loni Gardner

The first day of Yale School of Forestry and Environmental Studies (FES) stood in stark contrast to the first day of law school and law school in general—no assigned seating, no Socratic method, addressing professors by their first name and, the most difficult for me to adjust to, a “shopping” period where you try out classes for two weeks and then register for them well into September. While we pondered the words of Justice Cardozo on the first day of law school, our first day at FES began “under the big oak tree” where we introduced ourselves to our new comrades, most of whom we would know very well after “mods.” Mods take place over a three-week period, two of those weeks spent in the field at two different forests. While mods are an introduction to plant identification, forestry, and using maps and compasses, they are really designed as an elaborative icebreaker that is part of an FES tradition. Most importantly, mods provide an opportunity to begin networking with a very diverse group of peers, some fresh out of undergraduate school, but most with some professional experience and 30 percent from foreign countries.

Despite its laidback atmosphere and freedom to choose from a wide range of course offerings, FES is quite mobilized to train the next generation of environmental managers, foresters, and environmental scientists. In order to fulfill the requirements of the Master’s of Environmental Management (M.E.M.) degree, for example, a focal area is chosen and there are general science, management, and policy requirements.

Why would a law student that attends one of the top ranking environmental law programs need to stray from the traditional three-year path? While I personally didn’t think twice about “why,” there are a few good reasons. First, I have one more year to contemplate (not procrastinate!) my desired career path. Face it; very few people enter law school knowing what awaits them when they graduate. The additional time is helpful, but it is during this time that you are in contact with not one, but two sets of peers, two sets of alumni, and two sets of career development offices. Second, I have another summer to try something off the beaten path without worrying that I cannot also have a more traditional “2L summer experience” at a law firm.

For example, this past summer I worked for the Land Trust of Napa County, a non-profit organization dedicated to preserving agricultural and open space land in Napa Valley, California. My work clearly required skills learned in both law school and the M.E.M. program at FES. Part of my time was spent in the field (this is where compass skills are handy) collecting information for baseline documentations, which are required by the IRS for property owners who have voluntarily donated a conservation easement on their property to the Land Trust. The remainder of my time was spent creating the baseline document itself. In addition, I worked on a component of a land management plan for a preserve owned by the Trust, as well as a project reviewing and streamlining conservation easement language.

Overall, the training and knowledge base gained at law school and FES are complementary in nature and invaluable for a future attorney in the environmental field. One of the most important aspects of the dual degree program is seeing legal education from an interdisciplinary perspective since so much of environmental law is based in science, economics, and public policy.

More Than a Master’s Degree

By Arlindo Daibert

I come from Brazil, a country that, despite of the size of its territory, the immense natural resource reserves and its people’s energy, is a nation full of inequalities and contradictions. Brazil is the tenth largest economy in the world but at the same time ranked as the 65th nation in terms of human development, according to the United Nations Development Program. (This indicator assesses the performance of a country considering data such as life expectancy, illiteracy, access to public services, infant mortality, income distribution, education, etc.) As a matter of fact, the Brazilian social problems are much bigger than the country’s apparent, and by no means actual, economic good performance. Therefore, it is no small wonder that environmental conflicts in Brazil are much more influenced by the seriousness of the country’s social reality than by any economic factor, regardless of the profound connection between all these issues.

The opportunity to take the LL.M. at Pace came exactly at a moment when I was seeking new avenues that could help me analyze the situation in my country, a situation I could not see clearly for I was too close to the problems. I needed a new perspective, a view from afar, and the prospect of looking at the problems through the lens of environmental programs at one of the best environmental law schools in the United States was extraordinary. After all, a comparison between Brazil and the U.S. in the environmental field was more than tempting and very few people had done this.

Besides, Brazil and the U.S. had a similar beginning as colonies of European nations. At a certain stage in the past they were simply two developing countries. So, why didn’t Brazil have the same economic fate as the U.S.? Why are environmental conditions in the U.S. so different than those in Brazil? Is the different historical pace of environmental law and the actual degree of environmental degradation linked to America’s economic prosperity or to Brazil’s social tribulations? Is there any relation among the environmental and economic dissimilarities of the two countries, the fact that many pristine places, like Amazonia, still exist in Brazil, and the declaration of the U.S Bureau of the Census, by the last decade of the 19th century, that the American unsettled west frontier no longer existed? How do all of these factors affect the development of environmental law?

Those questions and many others would not find better ground to be developed and discussed than at Pace Law School. Because of my experience over the last year, today I am more convinced than ever that the environment must neither be used as some sort of “currency” to pay the “social debt” in poor nations nor as a kind of “fuel” to irresponsibly keep up anybody’s way of life in wealthy countries — that states must assume full responsibility for the cumulative effects of their past actions in the

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Looking Back: A Graduate’s Perspective on the Pace Environmental Program

By Michelle D. Land (’02), Program Coordinator, Pace Academy for the Environment

I was working as a wildlife biologist at the World Bird Sanctuary, in St. Louis, Missouri when I decided to apply to law schools in 1998. Although the field of law had interested me before, I became more focused on environmental law after several years at a non-profit conservation organization. In conducting my search for the perfect match, Pace Law School rose to the top of my list based on location, diversity in curriculum, reputation, and opportunity for practical experience.

The most impressive aspect of the program, however, was the extensive opportunity for involvement beyond coursework. Once at Pace and in my first year of law school, I impatiently waited to begin the environmental certificate program. Although my hands were tied with the usual first-year core, I was offered a glimpse into the environmental issues of smart growth and sustainability through the Land Use Law Center’s Spring semester “associate program.”

There I conducted research on protecting wildlife through municipal ordinances. My involvement continued at the Land Use Law Center as a research assistant during the remainder of my time at Pace Law School, ultimately leading to a chapter contribution in “Preserving Natural Resources Through Local Environmental Laws: A Guidebook for Local Governments.”

An energizing outlet for first-year students anxious to begin the environmental program is the Environmental Law Society (ELS). ELS is a student-run organization which raises funds for environmental causes, holds informational seminars with speakers, and gets members involved in local community issues. My involvement in ELS provided an opportunity to begin interacting with environmental law faculty and forge associations with fellow students — an experience I highly recommend for any law student interested in the environment.

The Pace Environmental Litigation Clinic is an outstanding opportunity for budding environmental attorneys. Because the Clinic was on my radar before I had even arrived on campus, I submitted an application at the earliest opportunity. I was accepted for the summer session and was given two cases to manage. As a clinic intern, one of my main responsibilities was drafting legal documents. As such, I wrote an Opposition to A Motion to Dismiss on the ‘Esopus Creek’ case. The Clinic recently won the case in a landmark decision against the New York City Department of Environmental Protection.

More Than a Master’s Degree

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present and that although global environmental responsibilities are differentiated, we must not forget they are also equal and demand that we act as one — and the sooner we realize that the better.

It was particularly fitting that I was able to end my studies at Pace, by first helping to develop a new Brazilian comparative law curriculum that will be used at Pace, and then hosting several Pace students and faculty in my home city of Rio de Janeiro. For me Pace was about more than just environmental law, it was about all of the love and friendship I received from Pace Law School students, staff, faculty and alumni. As time passes new challenges will come, but my moments at Pace will live forever in the place where the best memories of all souls are kept by angels.

Editor’s Note

Mr. Daibert is a member of the City Attorney’s Office for the City of Rio de Janeiro and a 2003 LL.M. graduate from Pace University School of Law. He helped develop Pace’s new Brazilian Comparative Environmental Law curriculum, hosted Pace students and faculty in Rio de Janeiro this year as part of the Brazilian Comparative Law Course and will continue to work with Pace on environmental law issues under a Memorandum of Agreement signed this spring between Pace University School of Law and the Rio de Janeiro City Attorney’s Office.

During my second year of Law School, I finally had the freedom to dive into the diverse environmental curriculum at Pace. In addition to the courses, the potential to participate in moot court and law review was also presented. Pace has an International Environmental Law Moot Court team that goes to Stetson University in Florida to compete in a competition that explores issues of international environmental law in the context of a dispute before the International Court of Justice. Additionally, Pace Law School hosts the National Environmental Law Moot Court Competition. Although Pace students do not participate in this competition, there are numerous ways to participate in an organizational context. Under the guidance of Professor Jeffrey Miller, I undertook the task of writing the Judges’ Bench Memorandum for the 2001 Moot Court Competition, which is being published in the Pace Environmental Law Review along with the winning moot court briefs.

The second year experience is also a time when students begin their work on law review, if selected. Fortunately, I was able to serve on the Pace Environmental Law Review first as an Associate Candidate and then as Editor-in-Chief in my third year. This experience was intimidating, challenging, exhausting, and ultimately very satisfying (in that order). Also during my third year I elected to take the Environmental Law Externship course, which placed me at the Department of Environmental Conservation (DEC). While at DEC, I worked closely with an attorney in charge of Clean Air Act violations and assisted with consent orders, document requests, and enforcement hearings.

As I reflect here on my experiences at Pace Law School, I think back to the high expectations I had set for the program before arriving in New York. Clearly, my hopes of seeing environmental law from many angles and practicalities were fulfilled — and exceeded. Because my three years at Pace were so rich and diverse, I did not hesitate to accept a position offered by former Hudson Riverkeeper, John Cronin, to assist him in running the newly established Pace Academy for the Environment. As Program Coordinator of the Academy, I am focusing on the role of the university in environmental protection. And in the Spring 2004 semester, knowledge I gained from the expertise of our environmental law faculty will be shared with undergraduates at the Dyson College of Arts and Sciences where I will teach an environmental law course.
From Fighting Wildland Fires to Redesigning Wildland Fire Laws

By June Psaltis

I have always loved the environment and wanted a career dedicated to protecting our natural resources. On the weekends, while studying for my undergraduate degree in Soil and Water Sciences from the University of Arizona, I worked as a Wildland Firefighter/E.M.T. for the Mount Lemmon Fire Department. Mount Lemmon is located about forty-five minutes from Tucson, at the top of the Santa Catalina Mountains. During my Master’s degree program in Renewable Natural Resources Management at the University of Arizona — where I used dendrochronology (tree-ring dating) to study forest ecology, climate change, and fire history — I discovered that, although I loved field research, it was the policy and legal aspects of management that had a more profound impact on me. As a result, I decided to pursue a degree in law and, after extensive research and visits to environmental law schools around the country, chose Pace Law because of the friendly atmosphere, the depth of the courses available, and the accomplishments of the faculty members.

One of those courses, the D.C. Externship Program, proved particularly intriguing because it allowed me to meld my earlier firefighting career with my background in the sciences and my interest in environmental policy. Through the professional contacts of the Pace faculty and staff I was able to work at the National Academy of Public Administration with Dr. Bruce McDowell, who is the Director of the Wildfire Hazards Mitigation Incentive Project at the Academy, and under the supervision of Suellen Keiner, Director of the Center for the Economy and the Environment.

The Academy is a congressionally chartered, nonprofit organization, dedicated to improving government and public policy. The Academy includes several Centers, each addressing a different aspect of government administration. They problem solve, conduct research, analyze and share information, and develop strategies for change. The Academy has a full time support staff of researchers and consultants for each project. A panel of experts in public administration, most of whom are “fellows” of the Academy, oversee the research on each project and is responsible for final recommendations made to Congress or to governmental agencies.

I worked on the Wildfire Hazards Mitigation Incentive Project. My project team spent the summer learning about the federal funds available to communities threatened by wildfire. One of my assignments was to analyze the legal restrictions on community assistance grants by federal agencies. I also analyzed recently proposed legislation to make recommendations on possibilities for amendments or if there should be completely new legislation drafted. My research was presented to the panel at the end of August 2003.

My summer was extremely rewarding. Every person I met at the Academy greatly expanded my way of thinking. They included me in intellectual conversations and treated me like a colleague, not just an intern. I participated in interviews with top Bureau of Land Management and Forest Service fire officials, as well as experts from many other agencies. I even attended a five-hour Senate hearing on the Healthy Forests Restoration Act, where I witnessed testimony and discussions over the controversial legislation.

This summer was especially memorable because while I was in D.C. working on ways to protect our communities from the devastation of wildfire, a fire started a few miles from the town whose fire department I had worked for on Mount Lemmon. Fire crews were unable to contain the fire. Three days later it swept through the town of Summerhaven, consuming most of the homes. I am confident that the work done by the Academy will make it possible for other communities to protect themselves from this type of tragic event. I know that I helped contribute to this work, thanks to the encouragement and assistance from the people I have met at Pace Law and the National Academy of Public Administration.

2003 NAELS Conference

By Emily Collins

The National Association of Environmental Law Societies (NAELS) was formed by a small group of law students in the late 1980s to create a national network of law students focused on environmental law. NAELS now boasts a membership of 60 environmental law societies from schools throughout the United States. NAELS is actively involved in encouraging the formation and development of environmental law societies and bringing ELSS together for dialogue, cooperation and inspiration. NAELS also actively fosters the study of environmental law through expanded curricula and materials. Yet another essential aspect of the NAELS agenda is activism in the public interest and the promotion of awareness of environmental issues among the general public, the law school community, and the law community generally.

NAELS helps ELSSs across the country organize and carry out specific programs. For example, the Acid Rain Auction Project assists ELSSs in purchasing SO2 and NOx allowances at EPA’s annual auction. NAELS also helped student members attend a United Nations Commission on Sustainable Development meeting in New York in late April of 2003.

Pace’s Environmental Law Society (ELS) renewed its commitment to NAELS in 2003 as highlighted by its attendance at the 2003 annual conference held at the University of Maryland. The Conference, entitled “Protecting Our Planetary Backyard,” covered a broad range of current environmental issues including regulatory reform, using nuisance to address environmental problems, the new source review program under the Clean Air Act, developments in international environmental law, and current issues in environmental legislation. Pace returned from the Conference with two of its ELS members on the Governing Board. Nicole Simmons heads the website committee and I now serve as the organization’s regional representative for New York.

The New York region of NAELS plans to hold several events this coming school year. In addition to a day-long regional conference, NAELS members can also look forward to a new pilot project that will combine interdisciplinary efforts of various organizations to assist law students in identifying areas of environmental law that are either in need of new legislation or in need of reform. After these issues are identified, NAELS will assist students in actually writing legislation and comments to administrative agencies to achieve the needed reform measures.

Although a relatively new organization, NAELS seeks to expand the reach of environmental law studies and practice through the commitment and motivation of its members. As the number of members climbs, the ability of law students to engage in a critical dialogue and to inspire new ways to look at environmental issues will increase.
Environmental Litigation Clinic Update

The Environmental Litigation Clinic is currently involved in several key cases including:

**Riverkeeper v. Crotty**: The Danskammer Electric Generation Plant at Danskammer Point in the Town of Newburgh has been operating under an expired Clean Water Act permit since 1992. The plant uses obsolete “once through” cooling water technology that requires the withdrawal of huge quantities of Hudson River water, and kills millions of Hudson River fish annually. Despite provisions in the Clean Water Act that require permits to be renewed every five years and be subject to public notice and comment renewal proceedings, the NY Department of Environmental Conservation (DEC) has allowed Danskammer to operate on “administrative renewal” without public review since 1992, simply by taking no action on Central Hudson’s permit renewal application. The Clinic filed a demand letter on behalf of Riverkeeper in 2001 seeking public notice and comment, and an adjudicatory hearing, on the permit renewal. DEC denied this request after another 18 months of delay, in a decision that claimed that environmental organizations had no standing to enforce the timing requirements and public notice requirements of DEC’s uniform procedures.

The Clinic then filed an Article 78 petition in Albany County Supreme Court seeking mandamus to force DEC to hold the required notice and comment hearing proceedings. After hearing oral argument, Albany County Supreme Court Justice Kavanaugh issued an interim order requiring DEC to publish a draft renewal permit for public comment by July 1, 2003.

**Millennium Pipeline**: The Federal Energy Regulatory Commission has granted a certificate approving construction of a natural gas pipeline across the Southern Tier of New York State from Lake Ontario to Westchester County. The pipeline would cross sensitive fish nurseries of Haverstraw Bay in the Hudson River. Recognizing these impacts, the New York Secretary of State has refused to give a Coast Zone consistency determination. Because the approved route ignores the impacts of sensitive fish habitat, the Clinic, representing Riverkeeper, has filed a petition for review with the Court of Appeals for the District of Columbia Circuit. This petition for review has been adjourned pending disposition of an appeal of the Coastal Zone Consistency ruling to the Department of Commerce.

**Riverkeeper v. Ash, et al.**: The Palisades Interstate Park Commission runs the Bear Mountain Park and picnic area. The sewage treatment plant for the park has been in nearly continuous violation of its permit for fecal coliforms and chlorine levels. In addition, the Park has several unpermitted direct, untreated discharges from rest rooms and animal pens at the Bear Mountain Zoo. Riverkeeper served a notice letter under the Clean Water Act and commenced suit in federal district court to enforce permit limits in December, 2002. The case is currently in settlement discussions.
Pace Law School Signs Agreement with Rio de Janeiro City Attorney’s Office

On April 30, 2003, Pace Law School and the Rio de Janeiro City Attorney’s Office signed a five-year Memorandum of Agreement designed to foster comparative environmental law work between Brazil and the United States. Under the MOA Pace and the City Attorney’s Office will work together on several issues.

The City Attorney’s Office will host the Brazil portion of the Pace’s annual Brazilian Comparative Law course. This year over 100 members of the City Attorney’s Office, Pace students and members of the public attended a two-day seminar jointly sponsored by the City Attorney’s Office and Pace Law School.

The City Attorney’s Office will continue to send staff to Pace for LLM degrees. A second member of the City Attorney’s Office is attending Pace Law School this fall.

Pace and the City Attorney’s Office will develop training seminars that can be broadcast from Pace to Rio de Janeiro. Finally, Pace will work with the City Attorney’s Office to strengthen the City Attorney’s law library.

Pace Faculty Lecture at Brazilian Conferences

Professor Ann Powers presented a keynote lecture on U.S. water law at an environmental law conference in Rio de Janeiro organized by Supreme Court Chief Judge Maria Collares Felip da Conceição and co-sponsored by the International Network for Environmental Compliance and Enforcement (INECE). Professors John Humbach, Jeffrey Miller, Ann Powers, David Cassuto, Marla Wieder and Lee Paddock presented a daylong environmental seminar for the Rio de Janeiro City Attorney’s Office and interested members of the public. Professors Ann Powers and Lee Paddock also delivered lectures in São Paulo at the annual Environmental Law Conference of the Lawyer’s Institute for a Green Planet, considered by environmental lawyers and judges to be the premiere conference on environmental law in Brazil each year. Additionally Professor Powers spoke to a group of judges and prosecutors in Curitiba, Brazil on water law issues.

Brazilian Student Exchange Program

While in Brazil this year, Pace students and faculty met with three law students from the Federal University of Rio Grande do Sul (UFRGS) who are attending Pace University this fall as part of a program sponsored by the U.S. Department of Education through its Fund for the Improvement of Post-Secondary Education (FIPSE) and the Brazilian Ministry of Education (CAPES). This four year program will bring a total of twenty U.S. students to Brazil for semester-long study programs at either UFRGS or the Federal University of Pará in Belém and 30 Brazilian students to the United States to study at Pace and at the University of Texas (Austin), Pace’s partner school under the grant. Three law students from the Federal University of Pará are also attending Pace University this fall. The FIPSE/CAPES grant is coordinated by Dr. Catherine Tinker on behalf of Pace University and Dr. Claudia Lima Marques, the Director of Post-Graduate Legal Studies at UFRGS.

Through its support for this exchange, the U.S. Government provides opportunities for students to learn from other students outside of the formal classes, as well as supporting foreign language study and comparative studies. The FIPSE program operates in other areas of the world as well as in Brazil, although the Brazil program is relatively new. Only ten consortia receive FIPSE-CAPES grants for Brazil each year, making the program highly competitive. For more information, go to www.pace.edu/Brazil or www.ed.gov/offices/OPE/FIPSE/Brazil.
Brazil Comparative Law Course

In June, twelve Pace University School of Law students and faculty participated in Pace’s third annual Brazil Comparative Environmental Law Program. The Rio de Janeiro City Attorney’s Office cosponsored the program that was co-taught by Arlindo Daibert, a member of the Rio City Attorney’s staff and a 2003 LL.M. graduate from Pace Law School, and Professor David Cassuto. Pace students participated in a weekend seminar in White Plains before traveling to Rio de Janeiro for three additional days of classes. Brazilian professors and government officials and professors from Pace spoke on environmental crimes, land use, water pollution control, oil spill remediation, hazardous waste management and differences in the structure of the Brazilian and United States legal structures. A side trip to a forest preserve and a day of sailing along Copacabana beach punctuated the more serious discussions of environmental law. The contingent then traveled to Porto Alegre in the southern part of Brazil where the students were part of a day long seminar on environmental legal education at the Federal University of Rio Grande do Sul (UFRGS).

Profiles

Sean Nolon, New Director of Land Use Law Center

Professor Sean Nolon has a B.S. in aquatic ecology from Cornell University and a J.D. from Pace University School of Law. As an undergraduate, his original major was in natural resource economics, a field exploring how society uses resources and how money drives decisions. While at college, he attended a speech by a planner who dealt with riparian ordinances, inspiring him to learn about aquatic ecology.

He then decided to attend law school. After graduation from law school, his litigation experience led him to look for better ways to solve conflicts. He realized that sustainable resolutions only occurred with long-term solutions where all of the parties have a stake in the outcome, so he chose to promote mediation. He admits that most people are hesitant to use mediation, but this only motivates him to demonstrate that mediation can work. Sean Nolon was recently named Director of the Center after heading up the mediation program for several years. He also is an adjunct professor.

The Center received a grant from the William and Flora Hewlett Foundation to help expand interest in mediation and bring it to the local level. Over the last seven years, the Center has trained over 600 people in the Hudson Valley in land use law including an introduction to mediation techniques. The Center also offers an externship program where law students work and meet with local officials in communities. The students first study the situation in a community to determine whether mediation can help. Then, the student goes with an assessor and does a conflict assessment. The students assist in writing the conflict assessment.

Professor Nolon also works with the Westchester County Mediation Center where he mediates disputes outside of the land use arena. He also conducts small claims mediation and arbitration at the County Courthouse in White Plains.

Sean’s main goal through his work is to teach communities to be concerned with their future and he wants to be “deeply involved with helping local communities shape sustainable futures.” As well as shaping the future of local communities, he, along with his wife, Andrea, stay busy shaping the future of their 18-month-old boy, Ian Blake. Currently Sean’s main hobby is trying to show Ian the world and teach him how to talk.

Fred Zalcman, Director of the Pace Energy Project

Professor Fred Zalcman holds a B.A. in History from Washington University and a J.D. and M.P.A. from Indiana University. Although he always had an interest in environmental law, policy, wildlife, and land use, his interest in those issues really took hold when he worked with National Wildlife Federation in their “Rails for Trails” program. After graduation, Fred became the director of the Strategic Planning Section of the Illinois Department of Energy and Natural Resources. There, he was responsible for developing statewide policies and programs for electric and gas integrated resource planning (IRP), energy conservation, renewable energy development, competitive resource bidding and power plant siting and certification.

Fred came to Pace in 1994 as a senior attorney representing environmental groups and consumer interests before the Public Service Commissions in New York, Pennsylvania and New Jersey on matters related to the environmental impacts of the electric power industry and the development of sustainable energy options. He has been team leader on a number of consensus building activities including among NGOs on electric energy restructuring, and among insurance companies on the benefits of sustainable energy investments. Fred focuses his efforts on removing economic and regulatory barriers to the development of clean “distributed” generation technologies. He is also involved in issues of energy market development and consumer education about the availability of sustainable energy products on the market. Fred also teaches Energy and Natural Resources Law at Pace Law School.

Fred admits that there is a lot of work to be done around the world with energy issues, but his focus is right here in the United States because much of the energy that drives our economy is inefficiently produced, creating serious environmental problems. Further, our country’s energy policies affect the rest of the world in significant ways. He feels that if the United States becomes more energy efficient, we not only lessen global environmental impacts, but also create models that others can adopt worldwide. Fred believes that the single most important thing he can do with his life is use the law to create change that will not only affect our generation, but future ones as well.

When Fred is not busy trying to change the world by changing U.S. energy policy, he pursues his favorite hobbies: bike riding, baseball, traveling, and eating.
Golden and Its Emanations
Continued from page 3

economic development. The market system doesn’t have a classic conception of
profitability. It is more complex and dynamic. It can respond to a change in the market
by changing the supply or demand. This process is referred to as the invisible hand.

States can intentionally work to reduce the fragmentation of efforts and to experiment with integration strategies. The most effective method of responding to the complex and rapid changes caused by the nation’s sprawling development pattern is to create a coordinated and integrated response. This requires, initially, a commitment to cooperation and to learning how to assign to each level of government its most appropriate role.

For a more complete exposition on Ramapo and its emanations see 35 Urb. Law. 15 (Winter 2003).

FOOTNOTES:
3. Fred Bosselman & David Callies, Council on Environmental Qual-
ity: the Quiet Revolution Local Use Control 1 (1972).
5. Fredicsch, supra note 4, at 40.
7. Id. at 294.
8. Id.
9. Id.
10. Id. at 293.
11. Id. at 295.
12. Id. at 296.
13. Fredicsch, supra note 4, at 52-53.
17. Early attempts by EPA to reduce air pollution by interfering in local development matters were recognized as a threat to the power of the states to control land use, secured by the Tenth Amendment. U.S. Const. Amend. X. Such concerns led to 1977 amendments to the Clean Air Act, which stated that “nothing in this Act constitutes an infringement of existing authority of counties and cities to plan or control land use, and nothing in this Act provides or transfers au-
thority over such land use.” 42 U.S.C. § 7415 (1994). More recently, the efforts of the Army Corps of Engineers to prevent the construc-
tion of a landfill by a consortium of municipalities in the Chicago area were struck down by the U.S. Supreme Court. In Solid Waste Agency of N. Cook County v. United States Corps of Eng’rs, the court held that the Army Corps lacked jurisdiction under the Clean Water Act to regulate development of intrastate, nonnavigable waters solely on the basis of the presence of migratory birds. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs, 553 U.S. 359, 171 (2004).
18. See David E. Boshart & Judith E. Innes, “Network Power in Collab-
orative Planning”, 21 Planning Educ. & Res. 221, 225 (2002): “While new kinds of collaboration have emerged in the private sec-

Sustainable Development Law
Continued from page 1
law; it focuses on human activity. It traces each issue from resource to recovery. The problem in the current system is that our laws all focus on resource processing, not on resource extraction. Only later on in the evolution of environmental laws did they include resource recovery through legislation like the Resource Conservation and Recovery Act (RCRA). If we focused more on re-
source extraction, however, we could lessen the burden on both industries and consumers and advance the principles of pollution prevention.

We must also realize that sustainable development will not occur without a change in economics. The market system doesn’t have a classic connection with the goals of the environment. This is why we need to develop a roadmap in our system to make changes. We must incorporate sustainable development into torts, contracts, and civil law. This roadmap should be incorporated into state laws that affect a broad range of issues including agriculture, finance, secured transactions, and se-
cured creditors. This process falls within the state. We must prevent unsustainable, unleashed development through a commitment of change in commer-
cial law, torts, and property law.

We should look at Aldo Leopold’s land ethic and see that health is the capacity for self-re-
newal. It requires changes in the way we think as a person. This kind of political change is intimi-
dating, but we must remember that it is no worse than at the time slavery was attacked. Slavery was simply accepted in politics. However, when poli-
tics developed a platform for speaking against slavery across the Atlantic things started to change. Fairly rapidly, within fifty years, the dream of banning slavery had become interna-
tional. Like at the time of slavery, we must not allow unsustainable activity and unsustainable legal institutions to continue. In order to change these unsustainable activities and institutions, we must spread the word, build political momentum and build a roadmap at the state and local levels. The new heroic generation must face up to this challenge. They will have to balance interests in a new way—not only weighing the interests of the Northeast with the Midwest on acid rain or wet and dry regions as we have done with inter-basin water transfers, but also balancing the interest of generations across time, balancing the interest be-
tween the present and the future, seeking not only equity between nations and classes, but jus-
tice between generations.

About the Speaker
J. William Futrell recently retired as President of the Environmental Law Institute (ELI), a national nonprofit research and education institu-
tion with an interdisciplinary staff of lawyers, economists, and scientists who work to advance environmental protection by improving law, policy, and management. At ELI, he led the largest continuing education program in envi-
rionmental law and management in the United States. Approximately 40,000 attorneys have at-
tended ELI’s training courses. The Institute maintains an extensive publishing program (Envi-
ronmental Law Reporter and The Environmental-
ment, and did postgraduate work in the East European
Institute of the Free University of Berlin as a Flu-
orite scholar. He is a graduate of Columbia Uni-
versity Law School and has published exten-
sively in the fields of environmental policy and administra-
tive agency law.

The Pace Land Use Law Cen-
ter will hold a conference on strategies for resolving land use disputes on November 8, 2003 at the New York State Ju-
dicial Institute on the Pace Law School campus in White Plains. For more information on the conference contact Ann Marie McCoy at (914) 422-4262.

“Strategies for Resolving Land Use Disputes: When to Litigate and When to Collaborate”
Meeting of the Minds

Pace Hosts Academy of Environmental Law Meeting
Hans Blix Expresses Support at UN Briefing

Environmental law professors from 21 countries, representing every region of the world, gathered April 13-16 to set the stage for the creation of a new international Academy of Environmental Law. Pace Law School Professor Nicholas Robinson, Chair of the International Union for the Conservation of Nature and Natural Resources (IUCN) Commission on Environmental Law hosted the meeting held at the Rockefeller Family Fund’s conference center in Pocantico Hills, New York near the Pace Law School campus.

The Academy is sponsored by IUCN, a Swiss-based organization. The IUCN membership includes 75 countries (the U.S. has belonged since the Reagan administration), 120 ministries and agencies like the U.S. National Park Service and Forest Service, and 480 non-governmental organizations. It is the world’s oldest intergovernmental and international organization specialized in the environmental field. Pace Law School’s Center for Environmental Legal Studies is a member of IUCN.

The Academy will work to improve environmental legal education, will coordinate legal research among participating universities, and is expected to create training programs and manuals that will help improve the capacity of government agencies, the judiciary, and the public to address environmental problems.

“This is the first time in the history of this field that university environmental law groups will be linked in a permanent working relationship,” said Professor Robinson.

The Pocantico Hills organizing session was funded by a grant to the Pace Law School from E.K. Quansah from the University of East London, Richard Ottinger from Pace University School of Law, Lee Paddock from Pace University School of Law, E.K. Quansah from the University of Botswana, Nicholas Robinson from Pace University School of Law, Dinah Shelton from Notre Dame University, David VanderZwaag from Dalhousie University in Nova Scotia and Wang Xi from Shanghai Jiao Tong University.

Additional information about the colloquium is available by contacting Lee Paddock, Director of Environmental Law Programs at Pace University School of Law, lpaddock@law.pace.edu or by contacting Professor Wang Xi, Director, Environmental and Resources Law Institute (ERLI) School of Law, Shanghai Jiao Tong University, 1954 Huashan Road, Shanghai, 200030, China; tel & fax: 0086 21 6293 2250; e-mail: wangxi@sjtu.edu.cn, wangxi6324@peoplemail.com.cn.

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Law of Energy for Sustainable Development

The First Colloquium of the IUCN Academy of Environmental Law
Shanghai, People’s Republic of China

The IUCN Academy of Environmental Law will convene its first annual colloquium to address critical areas of environmental law at Shanghai Jiao Tong University in Shanghai, China, in November. The program, co-sponsored by IUCN, Pace Law School, Shanghai Jiao Tong University and several other international agencies, will focus on law reform needed to support renewable and sustainable energy programs, with special emphasis on developing countries. Pace Law School Dean Emeritus Richard Ottinger observed that the colloquium is focusing on sustainable energy because “developing countries cannot afford to follow the western example of using expensive, imported, polluting fuels and then paying again for cleaning up the resulting contamination of land, air, and water resources.”

Additional information about the colloquium is available by contacting Lee Paddock, Director of Environmental Law Programs at Pace University School of Law, lpaddock@law.pace.edu or by contacting Professor Wang Xi, Director, Environmental and Resources Law Institute (ERLI) School of Law, Shanghai Jiao Tong University, 1954 Huashan Road, Shanghai, 200030, China; tel & fax: 0086 21 6293 2250; e-mail: wangxi@sjtu.edu.cn, wangxi6324@peoplemail.com.cn.
Professor John Nolon

In Praise of Parochialism: the Advent of Local Environmental Law,” in 26 Harvard Environmental Law Review 2 (2002) was selected by the Land Use and Environmental Law Review as one of the top ten of over 400 environmental and land use articles published last year. The two level process involving 60 reviewers that resulted in this selection. It will be published in volume 34 of the Land Use and Environmental Review published by West in September.

Successful Community Strategies to Protect Open Space” in 33 Environmental Law Reporter 7 (July 2003).


Land Use Law Center

Starting Ground Series: 12 small books on local land use and conservation practices.

Each book is a concise and readable summary of research papers prepared by professors, staff attorneys, or senior law students written in response to local questions. The books contain appendices including references to additional readings, New York statutes and cases, and other information that supplements the text's clear and concise description of the subject matter. Most of the books are about 100 pages in length. The following are available for purchase: Basics of Land Use Practice, Ground Rules: Answers to Common Smart Growth Questions, Smart Growth Strategies, Smart Growth Case Studies, Local Environmental Strategies, Local Environmental Ordinances, Environmental Review of Land Use Projects, Open Space Preservation, Meeting Housing Needs, Intermunicipal Land Use, Cooperation Common Ground: Land Use Mediation, and Significant Land Use Cases.

Professor Ann Powers


Marco Olsen

(Pace Law School S.J.D. 2002)


Dean Emeritus Ottinger


Lee Paddock

Director of Environmental Law Programs

Lee served as a Senior Consultant for the National Academy of Public Administration’s A Breath of Fresh Air: Reviving the New Source Review Program (NAPA April 2003) and for The Environmental Integrity Project’s Assessing State Enforcement: Too Many Claims, Too Little Data (April 2003).

Nicole Harkin, a 2nd year Pace environmental law student, received a Fulbright student grant for the 2003-2004 year. The Fulbright is the most prestigious scholarship awarded by the U.S. government, enabling students to gain international experience and develop international competence in an era of increasing global interdependence. This year's competition for student scholarships was the most competitive in the 50 years of the Fulbright student scholarship competition, with nearly 5,300 students competing for 700 awards.

Nicole will examine German land use law in Bonn as it relates to U.S. urban sprawl and energy consumption. She proposes to study the German system of dealing with environmental problems through the lens of their land use controls on the local, state, and federal levels. Nicole was the Chairperson of the 2003 National Environmental Law Moot Court Competition and Environmental Law Society Board member.

Lee Paddock, Director of Environmental Law Programs, has been appointed Chair of a newly established Specialist Group on Enforcement and Compliance housed within the International Union for the Conservation of Nature’s (IUCN) Commission on Environmental Law. The Specialist’s Group will develop training materials, workshops and conduct other activities to support better enforcement of national environmental law and international environmental agreements.