

**The Tulane Environmental Law Clinic:
A Voice for Louisiana Citizens**

By Suzanne S. Dickey

The Tulane Environmental Law Clinic¹ was founded in 1989 with two goals: training law students through the representation of actual clients; and providing free legal assistance regarding environmental matters to those who otherwise could not afford legal representation. In fulfilling these goals, scores of third-year law students at Tulane Law School have represented hundreds of individuals, community organizations and local governmental entities before state and federal courts and agencies, under the supervision of instructors and professors at the clinic.

The clinic has handled cases involving all aspects of environmental law, including air pollution, conservation of natural resources, urban land use and siting of waste facilities. The clinic has grown from a handful of students in its first year to a current roster of 26 student attorneys and three supervising attorneys. This article briefly outlines some of the key procedural and substantive legal issues that have been or are currently being handled by the clinic.

Procedural Obstacles

In representing their clients, clinic students have faced numerous procedural obstacles.

One of the clinic's initial battles was a familiar one for environmental advocates: standing. Under La. R.S. 30:3050.21, an "aggrieved person" may appeal a final permit action, enforcement action or declaratory ruling by filing a petition for review within 30 days after notice of the action has been given. In 1990, clinic students, representing the Vietnamese-American Voter's Association and 14 other groups, intervened in a settlement agreement between the City of New Orleans, the Louisiana Department of Environmental Quality (DEQ) and Recovery, a landfill operator, that allowed Recovery to reopen a closed landfill near New Orleans without a permit. Recovery challenged the standing of some of the organizations represented by the clinic to appeal the settlement. However, the 1st Circuit Court of Appeal found that all of the organizations were "aggrieved," and therefore had standing to appeal the settlement, because their members:

- lived, worked and recreated in the landfill area;
- observed and hunted wildlife in the area; and
- would be exposed to increased noise, odor and traffic as a result of the settlement.²

Another issue has been *where* to appeal. In 1996, the Louisiana Legislature amended the statute providing for judicial review of DEQ decisions, to transfer original jurisdiction of such review from the 1st Circuit to the 19th Judicial District Court.³ The Legislature made the measure retroactive, which required appeals of environmental matters to be transferred to the 19th Judicial District Court, even if they had already been briefed and argued in the 1st Circuit.⁴ Several citizen groups, unable to afford the additional costs of complying with the new procedure, were forced to abandon their appeals.

In 1997, the Legislature again amended the DEQ judicial review statute, to require judges to decide appeals regarding environmental permits no more than 90 days after receipt of the record from DEQ.⁵ Citing the amended statute, Westlake Petrochemicals Corp. moved to dismiss a citizen group's appeal of Westlake's air permit, which had not been decided within the new time limit, on grounds of abandonment. The 19th Judicial District Court granted the motion and dismissed the appeal. However,

the 1st Circuit reversed, finding that the statute encourages expeditious decision of appeals from DEQ, but does not provide for the penalty of dismissal.⁶

Clinic students also have had to litigate the trigger date for the appeal period. After a low-income, African-American citizen group appealed the grant of a permit for a landfill to be located next door to their homes, the landfill operator moved to dismiss the appeal as untimely. The 19th Judicial District Court granted the motion because the citizens had failed to file their petition within 30 days of issuance of the permit. However, neither the citizens nor their attorneys had ever been notified by DEQ that the permit had been issued. On appeal, the landfill operator claimed that the issue was now moot, since the landfill had been constructed and was operational. The 1st Circuit found that the case was not moot because the appeal challenged both the construction and operation of the facility, and reversed the lower court. The 1st Circuit held that the delay for appeal is triggered only by notice of the decision in question. Since DEQ had never notified the citizens of the permit decision, the appeal delays had never begun and the appeal was timely.⁷

In 1997, the Tulane Environmental Law Clinic gained national and international attention when it began representing citizens in St. James Parish who opposed construction of a massive chemical plant by Shintech, a Japanese corporation. The clinic represented the clients in opposing the air, water and coastal use permits for the Shintech project. The U.S. Environmental Protection Agency (EPA) agreed that the draft air permit issued by DEQ for Shintech's proposed plant failed to comply with federal regulations, identified more than 50 deficiencies in the Shintech permits and required DEQ to reopen the permits.⁸ The clinic also filed an environmental justice complaint with EPA on behalf of St. James citizens under Title VI of the Civil Rights Act.⁹

Subsequently, the clinic requested the secretary of DEQ and other DEQ administrators to recuse themselves in connection with the Shintech permits, which they refused to do. The clinic then sought and obtained supervisory writs from the 19th Judicial District Court, ordering DEQ to conduct an evidentiary hearing regarding whether recusal was appropriate. However, the 1st Circuit reversed, ruling that the district court did not have supervisory jurisdiction until the Shintech permits had actually been issued by DEQ.¹⁰ The recusal issue became moot when Shintech pulled out of St. James Parish and announced plans to build a smaller plant in Iberville Parish.

In 1999, the Louisiana Supreme Court amended the rule governing student practice before state courts to restrict the clinic's ability to represent citizen groups. Under the new rule, the clinic can represent individuals only if their income is below a certain level, and citizen groups only if the majority of the members of the group have income below that level.¹¹

Substantive Issues

Among the substantive issues handled by the clinic are the tax exemptions given to industry by the state in the name of economic development, such as those promised to Shintech for its proposed plant. Shintech would have received a \$94.5 million property tax exemption and a \$35 million sales tax exemption under its original proposal.

In 1994, the Louisiana Board of Commerce and Industry granted a manufacturing industry tax exemption to Rollins Environmental Services for a hazardous waste incinerator in East Baton Rouge Parish. Local citizens, represented by the clinic and later joined by the Louisiana Environmental Action Network and the Louisiana Coalition for Tax Justice, sued the board and Louisiana Attorney General Richard P. Ieyoub.¹² The citizens argued that the board exceeded its constitutional authority in approving the tax exemption because Rollins did not meet the definition of a manufacturing establishment. The 1st Circuit agreed and reversed Rollins' tax-exempt status, holding that a hazardous

waste incinerator does not qualify as a manufacturing establishment because the incinerator ash it produces is not a useful, marketable product.¹³

The clinic also has sought to ensure adequate consideration of alternatives to proposed actions. Since the Louisiana Supreme Court's 1984 decision in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*,¹⁴ state agencies are required to uphold their constitutional duty to act as public trustees of the environment by considering alternative sites, projects or mitigation measures, and by weighing the environmental costs of a project against its social and economic benefits.

In 1995, the 1st Circuit found that DEQ had failed to fulfil this obligation to consider alternative sites regarding a landfill in Calcasieu Parish.¹⁵ After initially denying a solid waste landfill permit to Browning-Ferris, Inc. (BFI) under Secretary Paul Templett, DEQ issued the permit under new Secretary Kai Midboe. Citizens who had actively participated in the permitting process appealed, arguing that BFI had submitted an insufficient alternative site study because BFI limited its search of suitable alternative sites to Calcasieu Parish. The 1st Circuit agreed and stated that it was not convinced that the alternative sites study was sufficient to enable the agency to protect the environment to the maximum extent possible.¹⁶

To fulfill its public trustee duties, an agency also must make both basic and ultimate findings that detail its reasoning in reaching its decision.¹⁷ Following one of several challenges brought by the clinic's clients to exemptions granted by DEQ for hazardous waste injection wells, the 1st Circuit issued precise instructions to state agencies regarding the materials that must be reflected in permit decisions, including a response to all reasonable public comments, a general recitation of the facts, a basic finding of facts, and a conclusion regarding the issues raised that support the order issued.¹⁸

Clinic students also have ventured beyond the field of pollution control. In *Baton Rouge Audubon Society v. Sandifer*, citizens represented by clinic students won a permanent injunction barring the Cameron Parish Police Jury from enforcing a grass and weed ordinance in a bird sanctuary.¹⁹ The Audubon Society had purchased land on Louisiana's Gulf Coast to provide a refuge for migratory birds and butterflies. Over the years, the Audubon Society had cultivated natural vegetation and, in conjunction with the U.S. Fish and Wildlife Service, planted trees for protection of the birds before and after their trips across the Gulf of Mexico. After some nearby residents complained about the sanctuary, the police jury amended its grass and weed ordinance to include the area and sought to clear the land. The court held that applying the grass and weed ordinance to the bird sanctuary was arbitrary and capricious and the police jury was permanently enjoined from enforcing the ordinance on sanctuary land.

Current Issues

Current cases involve a challenge in federal court to EPA's failure to act on the Baton Rouge ozone nonattainment area deadline²⁰ and a suit seeking to block removal of wild horses from the Kisatchie National Forest.²¹ In state court, students representing the Bogue Lusa Waterworks successfully challenged a permit issued to build a merchant power plant near Bogalusa that would have used inordinate amounts of water.²²

The clinic's efforts on behalf of Louisiana citizens have been recognized over the years with numerous awards. As early as 1990, the clinic was named Conservation Organization of the Year by the Louisiana Wildlife Federation and the National Wildlife Federation. In 1999, Louisiana Lieutenant Governor Kathleen Blanco recognized the law clinic's "ground-breaking work in environmental racism and outstanding service to the 'working poor.'" Also in 1999, the clinic received the Award on Clinical

Education from the Association of American Law Schools. In 2000, the clinic received the American Bar Association's inaugural Award for Distinguished Achievement in Environmental Law and Policy. Through controversy and struggle, the clinic continues to perform its dual role of educating students and representing its clients.

FOOTNOTES

1. Tulane also has Criminal, Civil, Immigration, Juvenile, Legislative and Administrative Advocacy Clinics.

2. In the Matter of Recovery I, Inc., 93-441 (La. App. 1 Cir. 4/8/1994), 635 So.2d 690. *See also* CLEAN v. Thompson, 93-1978 (La. App. 1 Cir. 7/14/1995), 661 So.2d 143.

3. Acts 1996, No. 41, *codified at* La. R.S. 30:2050.21(A), effective May 7, 1996.

4. Several citizen groups unsuccessfully challenged the constitutionality of the Act. In the Matter of Angus Chemical Co., 94-1148 (La. App. 1 Cir. 6/26/1996), 679 So.2d 454.

5. Acts 1997, No. 857, *codified at* La. R.S. 30:2050.21(G), effective July 10, 1997.

6. In the Matter of Westlake Petrochemicals Corp., 99-1726 (La. App. 1 Cir. 11/3/2000), 769 So.2d 1278.

7. In the Matter of Natural Resources Recovery, 98-2917 (La. App. 1 Cir. 2/18/2000), 752 So.2d 369.

8. The clinic filed a petition for objection to permit pursuant to Clean Air Act Section 505b. EPA's response can be found at www.epa.gov/Region7/programs/artd/air/title5/t5memos/shin1997.pdf.

9. EPA's response can be found at www.epa.gov/civilrights/shinfileapr98.htm. For a full discussion of the Shintech controversy, including the environmental justice complaint, *see* Robert R. Kuehn, "Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic," 4 Wash. U. J. Law & Policy 33 (2000).

10. In the Matter of Shintech and its Affiliates, 98-2024 (La. App. 1 Cir. 3/31/1999), 734 So.2d 772, *writ denied*, 99-1262 (La. 6/25/1999), 746 So.2d 601.

11. La. Sup. Ct. R. XX (Limited Participation of Law Students in Trial Work) (as amended March 22, 1999).

12. The attorney general was later dismissed from the action.

13. Robinson v. Ieyoub, 97-2204 (La. App. 1 Cir. 12/28/1999), 727 So.2d 579, *writ denied*, 99-933 (La. 9/17/99), 747 So.2d 1096.

14. 452 So.2d 1152 (La. 1984).

15. In the Matter of Browning-Ferris Industries Petit Bois Landfill, 93-2050 (La. App. 1 Cir. 6/23/1995), 657 So.2d 633, 639.

16. *Id.* at 12, 657 So.2d at 639.

17. Save Ourselves, 452 So.2d at 1159; American Waste, 642 So.2d at 1266.

18. In the Matter of Rubicon, Inc., 95-0108 at 11-12 (La. App. 1 Cir. 2/14/1996), 670 So.2d 475, 483.

19. 97-464 (La. App. 3 Cir. 10/29/1997), 702 So.2d 997.

20. Louisiana Environmental Action Network v. Whitman, 00-879 (M.D. La. 2000).

21. Coalition of Louisiana Animal Advocates v. USDA, 00-3539 (E.D. La. 2000).

22. Bogue Lusa Waterworks v. DEQ, 474677 (La. 19th J.D.C. 2000).

About the Author

Suzanne S. Dickey, law clerk to Judge James L. Dennis of the U.S. 5th Circuit Court of Appeals, received her JD degree, magna cum laude, from Tulane Law School in 1996 and an LLM, with distinction, in 2000. She received her BA degree from Davidson College. At Tulane, she was a member of the Order of the Coif and served as notes and comments editor for the Tulane Law Review. Upon graduation, she served as law clerk to Justice Walter F. Marcus, Jr. of the Louisiana Supreme Court and as an assistant district attorney for Orleans Parish. She was a supervising attorney at the Tulane Environmental Law Clinic from 1998 through June 2001. (Ste. 324, 600 Camp St., New Orleans, La. 70130)