

DUKE LAW MAGAZINE

Fall 2007 / Winter 2008 | Volume 25 Number 2



Sustainable Advocacy

Duke Law alumni and faculty at the forefront of environmental law and policy

CRIVIAS

With vision and vigilance, Duke Law alumni have helped build, protect, and refine the laws and programs that underpin national and international environmental law and policy.

Sustainable Advocacy

The planet scored a huge victory in Montreal in late September, says Durwood Zaelke '72. For the first time, all developed and developing countries agreed to mandatory greenhouse gas reductions.

With an adjustment to the 20-year-old Montreal Protocol on Substances that Deplete the Ozone Layer — considered by many to be the most successful environmental treaty in history — 191 countries agreed to turn the ozone treaty explicitly into a climate treaty as well, and to accelerate by 10 years the phase-out of hydrochlorofluorocarbons. HCFCs, as they are known, are ozone-depleting chemicals that also are potent greenhouse gases, thousands of times more powerful than carbon dioxide at warming the planet. The treaty phases out 96 chemicals used in nearly 250 industry sectors, and provides for funding their replacement with less-damaging alternatives.

by Frances Presma

For Zaelke and his environmental non-governmental organization, the Institute for Governance & Sustainable Development, the agreement reached in Montreal last fall capped nearly two years of nonstop efforts to educate governments and build support for measures that protect the climate by strengthening protection of the ozone layer. “We worked hard to convince governments that accelerating the HCFC phase-out would buy us some much-needed time to avoid the ‘tipping point’ for abrupt changes to the climate, which has been estimated to be just 10 years away,” says Zaelke.

The Montreal Protocol’s phase-out, first of chlorofluorocarbons (CFCs), and then of HCFCs and more than 90 other ozone-depleting substances, will have reduced greenhouse gas emissions by the equivalent of 135 billion tons of carbon dioxide between 1990 and 2010. By comparison, the Kyoto Protocol’s initial commitment period from 2008 to 2012 mandates emission reductions of five billion tons, Zaelke explains. Scientists calculate the delay in climate change that will result from the Montreal Protocol’s success to be about a decade, he adds. “The climate mitigation under this treaty has literally saved the planet from the tipping point for abrupt climate change.”

Now Zaelke and his team are seeking to leverage their success in Montreal in the negotiations for a climate treaty to succeed the Kyoto Protocol; they are advising various governments and organized side-events at the opening negotiations in Bali in December 2007. “The success of the Montreal Protocol shows that global environmental problems can be solved through international cooperation when the right governance tools are used for the right parts of the problem,” says Zaelke. “It is critical to take a disaggregated approach that breaks the climate problem down into manageable pieces so we can design appropriate governance mechanisms for each piece, with financial and technical assistance for developing countries.”

Behind the scenes, the negotiations in Montreal showcased the stunning reach of Zaelke’s 35-year career in environmental law and policy, which began in the field’s nascent years and has included public service, scholarship, teaching, and private practice, along with seminal work in both international environmental litigation and sustainable development. More than a dozen international environmental leaders, including Argentina’s Environment Minister and her deputy, who emerged as chief advocates for the HCFC adjustment, were his former LLM students at American University’s Washington College of Law. A number of his close colleagues and co-authors were also key participants.

Zaelke’s leadership and legal creativity on a diverse range of environmental issues over a span of decades is characteristic of many in the Duke community. Using vision and vigilance to reach moral and practical solutions to complex problems, Duke Law alumni have helped build, protect, and refine the laws, regulations, and programs that underpin national — and international — environmental law and policy.

Present at the creation

“People have to realize that the country’s environmental infrastructure — public policy and law alike — is under 40 years old,” says Douglas P. Wheeler ’66, a partner at Hogan & Hartson in Washington, D.C., who served as California’s secretary for resources

from 1991 to 1999. Richard Nixon ’37 was the Duke Law alumnus “who had the most profound effect on America’s environmental policy,” according to Wheeler, who joined the U.S. Department of the Interior in 1969 and later became the deputy assistant secretary of Fish and Wildlife and Parks.

In addition to creating the Environmental Protection Agency by executive order, Nixon oversaw passage of the 1970 National Environmental Policy Act (NEPA), which provides the framework for evaluating the environmental impact of all federally sponsored or supported projects, “and [which] laid the groundwork for all that has followed since,” says Wheeler.

“Nixon was not an avowed environmentalist, but he recognized environmental protection as an emerging issue of public concern,” he adds. While Nixon was moved emotionally by two 1969 events that offered dramatic demonstrations of the cumulative effects of development — the blow-out of an oil well off the California coast near Santa Barbara that devastated waterfowl populations, and a fire sparked on the badly polluted Cuyahoga River in northeast Ohio — his policy was politically motivated, says Wheeler: the president anticipated facing Sen. Edmund Muskie, then chairman of the Senate’s Environment and Public Works Committee, in his 1972 bid for re-election.

Still, the effect was a flurry of groundbreaking environmental laws, including the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, and the Endangered Species Act, which Wheeler helped draft. NEPA’s express provision for public information and comment on federal projects, along with similar laws subsequently enacted by states, gave evidence that a new era of law and policy was officially underway.

A few visionary public interest attorneys, troubled by the effects of rampant development, waste dumping, and air pollution, already were trying to effect environmental policy through litigation. One of these was John Adams ’62, who co-founded the Natural Resources Defense Council (NRDC) in 1970, now an organization boasting more than 1.3 million members, with 300 attorneys and scientists on staff.

“We saw an opportunity in some very troubling issues and developments, though we didn’t know exactly what that opportunity was at the time,” says Adams. “We were there to help write the laws and regulations, and then to enforce them by bringing suits. We saw that as our mandate: to make sure that all of these great statutes — NEPA, the Clean Air Act, and the Clean Water Act, which significantly included the citizens’ right to sue for serious infraction — had ‘teeth’ and would clean up America.”

Jim Moorman ’62 was another early environmental advocate. Along with colleagues at the non-profit Center for Law and Social Policy, Moorman had launched a pre-NEPA challenge to the registration of the pesticide DDT, which had devastated bird populations. He also found new opportunities for environmental protection in NEPA’s provisions.

One early success Moorman recalls was the Supreme Court’s acceptance, in 1972, of his group’s construction for granting citizens standing in environmental disputes, which was advanced in an amicus brief filed in *Sierra Club v. Morton*. The Court held that to have standing, a party’s interest in an environmental issue has to extend beyond the merely intellectual, but need not be monetary. In that

case, the Court found campers' recreational interests in a Northern California valley sufficient to oppose the construction of a ski resort.

As a follow-up, Moorman helped secure the first significant decision under NEPA — an injunction, on behalf of the Wilderness Society, against the proposed Trans-Alaska Pipeline. “The federal government had not prepared an adequate environmental impact statement, and the courts had review,” recalls Moorman, who later became the first executive director of the Sierra Club Legal Defense Fund (now Earthjustice). “These were key decisions at the outset of

the environmental era,” he says. “It was an entirely new ballgame, and we proved NEPA was effective.”

With new and as-yet unregulated issues coming up frequently, the environmental era called for continual legal innovation.

As assistant attorney general in charge of the Lands Division of the Department of Justice during the Carter administration, Moorman launched 50 actions relating to hazardous waste sites. Because there was no statutory prohibition against toxic waste dumping, Moorman's team, which included Durwood Zaelke



Durwood Zaelke '72

PRESIDENT AND FOUNDER, INSTITUTE FOR GOVERNANCE & SUSTAINABLE DEVELOPMENT IN WASHINGTON, D.C., AND GENEVA

DIRECTOR, SECRETARIAT FOR THE INTERNATIONAL NETWORK FOR ENVIRONMENTAL COMPLIANCE & ENFORCEMENT

PARTNER, ZELLE HOFMANN VOELBEL MASON & GETTE

CO-FOUNDER AND CO-DIRECTOR, PROGRAM ON GOVERNANCE FOR SUSTAINABLE DEVELOPMENT, BREN SCHOOL FOR ENVIRONMENTAL SCIENCE & MANAGEMENT, UNIVERSITY OF CALIFORNIA, SANTA BARBARA

A groundbreaking environmental litigator domestically during his early career, in 1989 Zaelke co-founded the Center for International Environmental Law to help bring the strategies of the U.S. public interest environmental law movement to the international sphere. As a litigator, scholar, teacher, author, advocate, and activist, he has been inventive — and indefatigable — in his focus on issues that relate, in particular, to the developing world which, he emphasizes, must be brought into climate-policy solutions as quickly as possible on terms that are perceived to be fair by all parties.

“When you move from domestic to international environmental law, you quickly recognize that your responsibility is broader than just protecting the environment — it's sustainable development, which also is a human rights issue. Three million people die each year from the want of clean water. We have to protect the environment while ensuring its development and equitable use for all, including the poorest of the poor.

The U.S. environmental movement benefited from our strong legal system and our history of public interest movements. Early on, we said to industry, ‘This is what you *shall* do and when you *shall* do it.’ It worked, because of our strong rule of law. Enforcement of environmental laws involves detection of violators, prosecution of violators, sanctioning of violators, and deterrence of future violations.

If you leave OECD [Organization for Cooperation and Development] countries, you encounter progressively weaker rule of law — weak states, struggling states, and failed states. Many, including wonderful countries like Kenya, have weak government institutions and must fight widespread corruption. There is no regard for the rule of law in countries like Somalia or Sudan, let alone Iraq or Afghanistan. It is critical to understand different cultures and the way they perceive the rule of law.

In the developing world you have to broaden your approach to include non-litigation strategies, and focus more on compliance assistance, including assistance to help improve the performance of the government institutions that should form a country's rule of law architecture. Voluntary compliance works best when it's within a strong rule of law system with strong sanctions.

We need to consider how to incorporate strong human rights approaches, starting with an expanded approach to the rights of access to justice and to remedy. There will always be bad actors who need to be hammered by the law, and even those who comply voluntarily need the assurance that they aren't being naive.

In the absence of strong legal and governance institutions at the national level, you can't assume treaties will be complied with. We have to devote more resources to helping national governments build capacity for treaty compliance. The Montreal Protocol did a great job of this. The United Nations Environment Programme's Ozone Secretariat established and funded ozone offices in 145 developing countries. They shared good practices. The local staff became valued members of the international community. And the developed countries funded the incremental cost for the technologies that developing countries needed for compliance. This is a key reason for the ozone treaty's extraordinary success — as a well-funded partnership it was perceived as fair by all parties.

To mitigate climate change, it's essential to get developing countries, especially China and India, involved, along with the U.S., of course. The bottom line is that we know a good deal about designing an effective climate treaty and now we need to start in earnest, and then ensure that the treaty evolves as quickly as the political will and the technological solutions allow. We're in a race. On one side, we've got the ‘positive feedback mechanisms’ that are accelerating climate change and pushing us closer to the tipping point for abrupt change. On the other, we've got the accelerating innovations in technology that are pulling us to the tipping point for a climate-safe energy system. Law is the key to which side will win. ”

in a leading role and Steven Shimberg '78, brought the actions under the emergency provisions of the Resource Conservation and Recovery Act of 1976 (RCRA). Those actions, which included the now-infamous Love Canal litigation, hastened the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) — the “Superfund law” — in 1980, and were amended to continue under that statute, says Moorman. Now president of Taxpayers Against Fraud, Moorman practiced environmental law as a partner with Cadwalader, Wickersham & Taft for 20 years and remains involved in some environmental law matters.

“Second generation” strategy: Science, markets, and sustainability

For the most part, each of the early laws addressed a single environmental problem, regulating a single medium such as water or air, or targeting a single species, Wheeler points out. “This was really the only approach we could take early on, both with regard to science and our technical capability,” he says. “But we have come to realize that these problems are more complex than they first appeared and need to be dealt with comprehensively. They required — and still require — policy solutions which correspond to those complexities.”

The Endangered Species Act, which he helped draft, offers a good example. “When it was enacted in 1973, it was probably the



John Adams '62

**FOUNDING DIRECTOR,
NATURAL RESOURCES
DEFENSE COUNCIL**

CHAIR, OPEN SPACE INSTITUTE

The public interest law firm that Adams co-founded in 1970, and which he led as president until 2006, now has 300 attorneys and scientists on staff and a new office in Beijing. *Fortune* calls the Natural Resources Defense Council “one of the country’s most powerful players in corporate America’s efforts to go green,” referring to its advisory relationship with sports leagues and corporate giants — such as Wal-Mart — regarding environmentally sound business practices. NRDC also recently facilitated the buyout of energy giant TXU by private equity investors, securing the purchasers’ commitment to vastly scale back plans for new coal plant construction and to support federal global warming legislation. Adams, who also chairs the Open Space Institute, reflects on these initiatives geared at changing corporate behavior.

“Wal-Mart gets a lot of its products from China. If Wal-Mart can force its Chinese manufacturers to produce their goods in more sustainable ways, it will have a huge impact.

Sectors that are part of pop culture also help people understand environmental issues. That’s why we’re showing people that the Academy Awards and sports arenas can be ‘green,’ and that Warner Records can use paper packaging from renewable sources. While we address complicated, technical issues with the coal and oil companies and with car manufacturers, it helps to have Al Gore and Laurie David [executive producer of the documentary, ‘An Inconvenient Truth’] and others who reach the popular culture to be out there talking about these issues and encouraging people to make lifestyle changes.

We have to come up with political solutions for big coal producing and automobile manufacturing states which are afraid of losing their market share. For instance, on coal, we have to find a way to help [producers] to move into carbon capture and sequestration. That would make coal viable. They won’t do it on their own. All of those things are on the agenda now in Washington, and NRDC has a full team of advocates involved.

If 50 percent of the world’s energy comes from coal, we aren’t going to get rid of it, so we have to figure out how to make it work — from a strictly environmental point of view, of course. We have to persuade [producers] that it’s in their interests to move toward carbon capture, which is a viable and necessary option to get the level of emission reductions we need. The head of our Climate Center, David Hawkins, has spent more than three years specifically addressing coal issues, helping investors understand that coal plants that lack the ability to capture carbon are not good investments as we move quickly into a carbon-constrained world.

We also have been working to convince legislators, investors, and coal companies that making liquid fuels from coal will not work — it just burns carbon twice. They need to get moving in the opposite direction. It’s slow and steady work. We aren’t screaming at people, but letting them know there are alternatives.

We have created the ‘Center in Market Innovation’ in order to assist sectors that are going to have to control greenhouse gas emissions — to assess how much it will cost, and find ways to get it done so that they remain profitable. It’s important to do whatever it takes to get these controls and move these companies forward. Companies such as TXU, Dupont, and Caterpillar have joined with us in supporting a carbon cap regime, in fact.

This country has just woken up to climate, largely due to what happened in New Orleans. With states like California and others from Maine to Maryland passing new laws regulating greenhouse gas emissions and a change of congressional leadership, I don’t think we’ve ever been in the position we are in right now to see real progress on climate.”

most stringent environmental and land-use law ever enacted, in that it regulates private activity with regard to the use of land in order to protect individual species threatened with extinction. We have since come to understand that individual species function as parts of larger ecosystems, and so we have to focus on habitat protection as a preventive measure as well." Courts have ruled that the statute applies to ecosystem and habitat loss, and it was later amended to provide for habitat conservation planning.

"In the original law, if you wanted to build a road that would destroy a couple of red-cockaded woodpecker nests, the answer was simply that you couldn't do it," says Steven Shimberg. Now of counsel at DLA Piper in Washington, D.C., Shimberg helped design and write habitat conservation plans into the Act while serving as counsel to the U.S. Senate Committee on Environment and Public Works. "Habitat conservation plans allow you to set aside habitat elsewhere in such a way as to have a net benefit to the species. It's

not just a 'save one, destroy one' trade-off, but a qualitative improvement that more than offsets the harm caused by building the road."

As California's secretary for resources, Wheeler worked with the federal government to wed the notion of habitat conservation planning to similar state requirements in a program called "Natural Communities Conservation Planning," essentially a regional land-use planning initiative with habitat preservation as its focus. One county plan, for example, drew on the combined power of state and federal authorities to protect approximately 500,000 acres of habitat for threatened and endangered species and candidate species. "It gave us the opportunity to address the needs of species before they were in decline." [See Wheeler, below.]

Having spent the better part of a decade testing and strengthening the environmental regulatory system through litigation, John Adams and his colleagues also were expanding their approaches in light of scientific developments.

“Preventative habitat and ecosystem protection is essential to species preservation so that we can address the needs of species before they are in decline. Congress recognized this in the 1980s with amendments to the Endangered Species Act that allowed for habitat conservation plans. If a landowner's plan could be shown to protect habitat and, in fact, to enhance the status of species, then the incidental loss of an individual or two would be excused.

As secretary for resources in California, I encouraged the federal government to work cooperatively with the state to devise a program we called 'natural communities conservation planning,' in part to help resolve a substantial development conflict in California. It wed the idea of habitat conservation plans under the federal Endangered Species Act to a counterpart state program in order to provide a procedure for regional land-use planning with habitat conservation as its focus. Perhaps the best example is the Riverside County Multiple Species Habitat Conservation Plan, which today protects about 500,000 acres of habitat for threatened and endangered species and candidate species.

Conservation banking, which was adapted from wetlands mitigation banking, allows a developer to acquire mitigation credits from a bank of land that has been set aside to meet the habitat needs of a particular species. Because the bank can encompass a larger area — perhaps containing an entire ecosystem — it is likely to sustain a species more effectively than if the developer was required to protect a smaller on-site parcel as mitigation for development impacts.

Conservation banking facilitates large-scale conservation that could not be achieved solely through a regulatory program. The agency with regulatory authority, however, qualifies the bank and helps to establish the market for credits through its regulatory requirements. Essentially it works like this: If a specific parcel of real estate has high habitat value, the regulatory agency can agree to its protection in perpetuity. The landowner is required to restrict its use, protecting habitat values, and then sell 'credits' to another party which might be required, through regulation, to offset the impacts of its development project.

In mitigation banking we see, for the first time, a realization that wildlife habitat, in and of itself, provides an ecosystem service that is truly valuable, and for which a market will recognize a price that is set in the marketplace. By establishing a market for such ecosystem services, we can assure their protection in a market-oriented economy.”



Doug Wheeler '66

PARTNER, HOGAN & HARTSON

The broad range of federal regulatory issues Wheeler handles in his practice, including land use and growth management, along with resource, habitat, wetlands, and watershed management, draws on expertise honed over three decades in public service. Having served in the Department of the Interior — at one point overseeing the Fish and Wildlife Service and the National Park Service — in leadership positions with various national conservation groups such as the Sierra Club, and as California's secretary for resources from 1991 to 1999, Wheeler helped design many of the programs and strategies that are now central to national conservation and environmental policy. Among these are innovations in habitat conservation planning and "mitigation banking," a market-based approach to habitat conservation.

“It was clear that the issues were getting more complex,” says Adams. “Even in the ’70s we realized that climate was becoming a real problem — it wasn’t just about air pollution.” NRDC began adding scientists to its staff to help assess, to the best extent possible, “the big picture,” he says. Anticipating that international research institutions would focus on climate, his group focused on a related issue: how to compel utilities to reduce energy use through regulation and changes in business practices, while still remaining profitable.

“We assembled teams of people to deal with specific issues such as energy costs, efficiency, and conservation,” says Adams. “As we looked at strategies on climate change, we knew that power plants and cars were major contributors. So we decided to work at reducing pollution from those on a state-by-state basis and [facilitating] energy savings. We also took a hard look at coal: at the viability of

carbon capture as a means of reducing emissions and how to send a clear message to the coal and electric utility industries — through litigation and regulation — that they have to clean up their entire production chains, [eliminating] outrageous practices like mountaintop removal.”

A key set of “second generation” legislative initiatives were found in the bipartisan 1990 amendments to the Clean Air Act. “The case can be made that the 1990 amendments created the most sweeping and effective environmental statute in history,” says Gregory Wetstone ’78, who played a central role as chief counsel to the House Energy and Commerce Committee’s health and environment subcommittee along with other Duke alumni then on Capitol Hill, Shimberg and Stephen Roady ’76. “We changed the way that gasoline was formulated; established a new regime to reduce urban smog in our cities; tightened tail-pipe emission standards; phased



Gregory Wetstone '78

**SENIOR DIRECTOR,
GOVERNMENT AND PUBLIC AFFAIRS,
AMERICAN WIND ENERGY ASSOCIATION**

After law school, Wetstone focused on air and water pollution at the Environmental Law Institute, writing a manual on pollution law as well as a groundbreaking book on acid rain. He was able to address law and policy in depth over 12 years as chief environment counsel to the House Energy and Commerce Committee’s Health and Environment Subcommittee. After leaving Capitol Hill in 1995, Wetstone served as the first legislative director and then, for 11 years, as director of advocacy at the Natural Resources Defense Council. In his current post with the American Wind Energy Association, Wetstone is working to rally support among legislators for a new national renewable energy standard — a requirement that at least 15 percent of the nation’s electricity come from renewable sources, like wind and solar power.

“There are a large number of states — 24 at last count — that have renewable electricity standards of their own already in place. They have been very successful in securing dramatic growth in wind power and other clean alternative energy sources. Building on the states’ success to achieve a national program is a key priority right now, and can help to put us on a cost-effective path to reduce global warming.

This is a hopeful time in Washington, when clean energy is a key part of the environmental agenda, particularly as we look to domestic energy sources that can help reduce our contribution to global warming. There is strong support for a national renewable standard from across the political spectrum.

I think the success of the acid rain trading program [mandated by the Clean Air Act amendments of 1990] offers a good model for the current global warming issue. In 1990, we saw a variety of scientific reports that led to an effective regime using the first market-based regulatory system in environmental law. Climate change is a complex issue, but I am optimistic that once we get the political will — and I think we are very close — we can put an effective regime in place.

And I feel lucky to be promoting that agenda on behalf of an association of companies that produce pollution-free power in a way that is cost-competitive. It’s great to be able to advocate for green power in a way that emphasizes the economic gains, the opportunity to create jobs, and the reality that the ‘green agenda’ is not one that requires us to give up economic development. Our industry is proof that we can promote domestic economic growth and create jobs while we protect the climate.

It’s a dream job. I especially enjoy working with the tremendous network of public advocates that support us. It is not easy to suddenly change the energy mix in this country. But with the high level of public support for renewable energy, I think we can get there.

The first step in [combating] global warming is to make sure we don’t move from denial to despair. Wind power offers that hope. The technology works cost-competitively right now, so we can get started reducing carbon very quickly. That preserves our options to take other steps to deal with global warming down the line as technology develops. And we’re saving money. We have studies that show a saving to consumers of \$100 billion, because if we’re using wind-generated electricity, we are using less natural gas, lessening the demand for natural gas, and bringing prices down. ”

out the ozone-depleting chemicals that were [later covered by the Montreal Protocol]; and instituted a new — and very successful — trading program to reduce acid-rain pollutants.

“The 1990 Clean Air Act Amendments changed the way toxic air pollutants were regulated in this country by shifting to industry-specific approaches that were based on the best available technology,” adds Wetstone, now senior director for Government and Public Affairs at the American Wind Energy Association. “For the most part, every one of those programs has worked as well or better than anticipated. As a result, we’ve seen a reduction in toxic air pollution and acid rain, and dramatic improvements in the air quality in cities across the country.”

Manifest in the amendments, and characteristic of what Wheeler calls the “second generation” of approaches to environmental law and policy, is the emergence of market-based solutions that work in concert with a strong regulatory regime.

“Regulations are negative incentives in that they prohibit and proscribe, but do not encourage and [offer incentives], as markets do,” says Wheeler. “Lawsuits, too, can generally be brought only after the fact, at a point when the damage, by and large, has been done. Market mechanisms are well-attuned to anticipating the needs of the environment and incorporating them into plans for economic development. But it’s not an either-or proposition — both are essential. You wouldn’t have an incentive in the marketplace for, say, cap and trade or wetlands mitigation, if you didn’t also have a regulation which required that certain standards be met.”

Market-based solutions are now as central as regulation to environmental policy, used in everything from the conservation of wildlife corridors and fish stocks to wetlands preservation and, in energy bills currently before Congress, in the development of “clean” energy sources. These approaches are key to any resolution on climate change, the

“Everything I learned about public policy and how Washington works and how to deal with people — how to be fair, how to be in public service, how to negotiate — I learned from Sen. Chafee. He focused on reaching workable solutions that were not going to unfairly penalize anybody or be overly stringent, yet would adequately get the job done.

Now, in my governmental affairs practice, I tell clients that if they want to ‘sell’ a proposal on the Hill and garner the votes that will get it passed, they have to create unlikely supporters by meeting people halfway. But I also know that much of what has to be done in the environmental arena involves the balancing of risks and figuring out where money will be best spent. Sometimes the regulatory folks don’t see it that way — they just look at their own piece of it and say ‘This is what you have to do,’ regardless of the cost and without regard to whether limited funds might be better applied to a different environmental problem.

The threat of going out of business, closing factories, and laying people off was something I heard on a daily basis when I was on the Hill. I don’t think I ever succumbed to these threats, but you have to recognize the limit to which you can push people. There is very rarely a simple answer and a clear right and wrong position in this area.

Helping negotiate and ratify the Montreal Protocol were among my most satisfying achievements on the Hill. It was phenomenal to reach a global agreement to phase out a whole class of chemicals that were used everywhere by everyone — to set standards and then to find ways for meeting them. It represented the first time Congress had taken actions based on a vision of results that were 30 years out.

The key to the success of the Montreal Protocol, I think, was the fact that the major producer of CFCs at the time, Dupont, came to the realization that ‘Yes, we can do this; we can move to the next generation of safer chemical compounds.’ And they had a vested interest in making it happen. If there is a sufficient economic interest in getting something done, it will happen.

We’re seeing that kind of interest in addressing global climate change from a growing number of companies. Working with then-Sen. Al Gore, we tried to get the climate issue higher on the agenda in the early- and mid-’80s, as we worked on the Montreal Protocol. Now the issue is resonating with the public and some companies are realizing that they have an economic interest in getting something done and in place, and so will try to make it happen. That combination of public and economic support is really what it takes. ”



Steven Shimberg '78

OF COUNSEL, DLA PIPER, WASHINGTON, D.C.

Having started his career in the environment and natural resources division of the U.S. Department of Justice where he worked on the earliest toxic dumping cases, Shimberg was counsel to the U.S. Senate Committee on Environment and Public Works from 1980 to 1997, serving for several years as chief counsel and as staff director to its chair, Sen. John Chafee, R-R.I., Shimberg played a key role in the enactment of virtually every major environmental law in that period. He also played an integral role in the international negotiation and Senate approval of the Montreal Protocol in 1988 and the 1990 London Amendments to the Protocol, and was an active participant in the process that led to U.S. support for the United Nations Framework Convention on Climate Change (UNFCCC). In 1992, he served as an adviser to the U.S. Senate Observer Group at the United Nations Conference on Environment and Development in Rio de Janeiro — the “Earth Summit.” From 2001 to 2005, Shimberg helped lead the EPA’s national and regional enforcement and compliance programs as associate assistant administrator for the Office of Enforcement and Compliance Assurance.



Jim Moorman '62 helped launch a pre-NEPA challenge to the registration of DDT, which had devastated bird populations. He also found new opportunities for environmental protection in NEPA's provisions.

hottest topic on the environmental agenda. Cap-and-trade programs for greenhouse gases, currently used regionally in the United States and in Europe, are seen as a likely cornerstone of any national policy and international initiative on greenhouse gases.

Market forces are also central to the very notion of international sustainable development, which seeks to integrate poverty alleviation with protection of the resource base, Zaelke points out. "Development is essential, both to honor human rights and to reach political agreement between the more developed and the less developed countries of the world. We'll never achieve global consensus if our only strategy is to preserve the world as a wilderness." [See Zaelke, Page 17.]

The best part is that law can direct the market to respond by setting strict standards that send clear market signals, says Zaelke, offering as evidence the enormous success of the Montreal Protocol. The mandatory phase-out schedules for ozone-depleting chemicals "signaled that those who developed substitutes that were better for the environment would be guaranteed a market," he says, adding that he would like to see some of the chemicals currently covered under the Kyoto Protocol moved to the Montreal treaty for that reason. "The market would respond, as it always has, and we would get better results for climate and the ozone layer." Zaelke catalogued some of those innovations in his 2003 book, *Industry Genius: Inventions and People Protecting the Climate and Fragile Ozone Layer* (with Stephen O. Andersen).

Having stepped down as president of NRDC in 2006 but still active as founding director, Adams maintains that litigation still counts, and is proud of the many lawsuits his organization continues to bring against governments and polluters, as warranted, to enforce laws and regulations. But he also is convinced that industry is part of the solution to environmental problems and is actively engaged, through NRDC, in shaping corporate practices, views, and votes through a variety of initiatives. A June 2007 article in *Fortune* called NRDC "one of the country's most powerful players in corporate America's efforts to go green." [See Adams, Page 18.]

Wheeler also sees corporate engagement with environmental issues in his law firm practice. "Increasingly I'm being asked by investors — coming to me through our corporate and finance groups — about the implications of their investments for the environment," he says. "Growing concern about emissions of greenhouse gases and carbon controls has caused virtually every investor to be concerned about the consequences of their actions and the ways in which new investments can be made to enhance sustainability here and around the world."

Developments at Duke

Having attended law school at a time when few, if any, environmental law classes were offered (or invented), these alumni are delighted by the interdisciplinary research, scholarship, and educational opportunities that are now available and ongoing at Duke.

"Duke's combined strengths in law, public policy, and the natural sciences give it a huge comparative advantage in this area," says Wheeler, referring to the close ties between the Law School, the Nicholas School for the Environment and Earth Sciences, and the Nicholas Institute for Environmental Policy Solutions, led by Tim Profeta JD/MEM '97.

Three of the leading scholars in national and international environmental law and policy — Christopher Schroeder, Jonathan Wiener, and James Salzman — now make up the Law School's core faculty in this area. With deep experience in policymaking in the executive and legislative branches and in the corporate and non-profit spheres, and with cross appointments to Duke's Terry Sanford Institute for Public Policy and the Nicholas School, they bring essential interdisciplinary approaches — and diverse perspectives — to their scholarship and teaching. Experts in such areas as risk assessment and greenhouse gas emissions trading, ecosystems services markets, and issues relating to health, each of these scholars is actively engaged in developing environmental policy domestically and internationally. [See research profiles, Pages 28, 29, 30]

"These individuals are all doing critical work and making key connections between science and law," says Adams. "They have chosen fields that are putting Duke academically on the forefront of understanding the problems we face."

Duke's program in environmental law and policy has been further bolstered by alumni who serve as advisers and adjunct faculty; Wheeler and Zaelke both have taught at the Law School, and Stephen Roady, a senior attorney with Earthjustice, regularly teaches classes on ocean and coastal law and policy, as well as on environmental litigation. Adams, like Wheeler, is a life member of the Law School's Board of Visitors, and chairs the advisory board of Duke's new Environmental Law and Policy Clinic, which allows students from both schools to work together on complex regional issues in this area. [See Clinic, Page 27.]

"The clinic represents a fabulous opportunity for in-depth training and will help create the new leadership that is going to be needed on these issues," Adams says. "Duke is in the process of turning a whole group of young, well-educated, talented Americans into people who care about the environment — who understand the science behind environmental problems and who will truly make a difference."

"One thing that has become clear to me during my career is that environmental law has got to be a dynamic process to keep up with the accelerating nature of problems like climate change. We've got to learn how to adjust at a much faster pace, and we've got to learn how to make law more effective in speeding development of the technology solutions the world needs," says Zaelke. "Duke is making that possible. If you are lucky enough to go to Duke today, you are likely to emerge as one of the best-trained environmental lawyers in the world." ♡

Reunion 2007: Awards and Recognition

Outgoing Board of Visitors chair **Peter Kahn '76** was honored with the Dean's Alumni Achievement Award for his extraordinary service, commitment, and dedication to the Law School. A partner at Williams & Connolly in Washington, D.C., with a diverse international civil and criminal litigation practice, Kahn has served Duke Law School in many capacities, having joined the Board of Visitors in 1996. His six-year chairmanship of the board was marked by his commitment to developing Duke Law's international presence and to building board membership in the Law School's Heritage Society, which recognizes alumni who have included the Law School in their estate plans. He also served as a member of the Dean Search Committee, which was charged with finding Dean Katharine T. Bartlett's successor.

Professor Paul D. Carrington, who served as dean of the Law School from 1978 to 1988, was honored with the A. Kenneth Pye Award, which recognizes a member of the Law School community whose work in education reflects the life and ideals exemplified by Dean Pye — personal integrity, vigorous intellect, and compassion and concern for students. As dean, Carrington created Duke's international program, bringing in its first LLM students, strengthened the Law School's interdisciplinary model of legal education, and established the Alumni Affairs Office, among many other achievements. His scholarly and teaching interests include appeals, civil procedure, international civil litigation, and lawyers in American history. From 1985 to 1992, he served as reporter to the committee of the Judicial Conference of the United States, which advised the Supreme Court on changes in the Federal Rules of Civil Procedure. He is also active in judicial law reform efforts, particularly with regard to the jurisdiction of appellate courts, the rules of civil litigation, and the selection and tenure of judges in state courts.

Durwood J. Zaelke '72 received the Law Alumni Association's (LAA) Charles S. Murphy Award, which honors graduates whose career has been devoted to public service or education. A pioneer and leader in national and international environmental law and policy, Zaelke is currently the president and founder of the Institute for Governance and Sustainable Development, and also serves as the director of the International Network for Environmental Compliance and Enforcement (INECE) Secretariat. Also a partner at Zelle Hofmann Voelbel Mason & Gette, in Washington, D.C., Zaelke is the founder and director of the Research Program on International and Comparative Environmental Law at American University's Washington College of Law, and co-founder and director of the Program on Governance for Sustainable Business Practices at the Bren School for Environmental Science & Management, University of California, Santa Barbara. Zaelke has served on the White House Trade and Environment Policy Advisory Committee under Presidents Clinton and Bush. (For more, see page 17.)

Charles O. Verrill Jr. '62 was honored with the LAA's Charles S. Rhyne Award, presented to an alumnus whose career as a practicing attorney exemplifies the highest standards of professional ability and personal integrity, and who has made significant contributions in education, professional affairs, public service, or community activities. Currently a partner at Wiley, Rein & Fielding in Washington, D.C., Verrill represents clients on all aspects of international trade law and policy. A life member of the Board of Visitors, Verrill serves as president of the board of trustees of the International Law Institute, chair of the District of Columbia Cable Television Advisory Committee, and as a member of the Campaign Cabinet of the Penobscot River Restoration Trust. He is an adjunct professor of international trade law and regulations at Georgetown University Law Center and a senior lecturing fellow at Duke Law.

Jay Bilas '92 was presented with the LAA's Young Alumnus Award, given annually to a graduate who has made significant contributions of leadership and service to Duke Law School. Of counsel at the Charlotte office of Moore and Van Allen and a sports analyst at ESPN, Bilas has served on the Law Alumni Association Board of Directors and participates frequently in Law School panels, symposia, and classes. As an undergraduate at Duke, Bilas competed as a scholarship basketball player and member of the United States National Team, served on the NCAA Long-Range Planning Committee, and received the Duke University Senior Leadership Award. While earning his law degree, he served as an assistant basketball coach for the Blue Devils. Among his many charitable activities, Bilas serves on the Duke Comprehensive Cancer Center Brain Tumor Advisory Board and as chairman of the Duke Annual Fund.

Sibylle Gierschmann LLM '99 received the International Alumni Award, which is presented to an international graduate who has exemplified the highest standards of professional excellence, personal integrity, and concern for the common good in his or her own career and country. A partner with Taylor Wessing in Munich, Germany, Gierschmann's practice focuses primarily on the media and IT sectors, with special emphasis on data protection. Since receiving her LLM, she has been instrumental in establishing a "beachhead" for Duke University and the Law School in Western Europe, serving as co-president of the Duke Club of Germany and the German Alumni Association of Duke. She is a key organizer of the international reunion to be held in Germany in June. Gierschmann has also played a leading role in establishing a *verein*, or foundation, which will facilitate international fundraising efforts for Duke University.

save the date:
Reunion 2008
April 11-13