

## PROTECTING THREATENED SPECIES FROM MINING

The Clinic completed its discovery and began preparing for trial in its continuing representation of organizations concerned about the impact of limestone mining in Pennsylvania on threatened species.

As previously reported in the Clinic's Fall 2011 newsletter, in Summer 2010 the Clinic agreed to represent the Juniata Audubon Society, the Center for Biological Diversity, and Laura Jackson in consolidated appeals of a small non-coal mining permit issued by the Pennsylvania Department of Environmental Protection to Catharine Properties, Inc. on a 7-acre parcel in Blair County, Pa. The primary legal issue raised by the appeal is whether or not DEP adequately considered and protected certain threatened species (the eastern small-footed bat and the Allegheny woodrat as well as a new species unique to the site known as the Heller springtail) as it issued the permit.

This case raises the question of how much work the DEP must do in order to meet its regulatory obligation to avoid issuing permits that will adversely impact the continued existence of endangered and threatened species, or affect or destroy their critical habitat. The permit at issue in this case seeks to allow preparatory work and preliminary mining on a small portion of a much larger parcel of land. On that larger parcel (but within 300 feet of the permitted parcel) are the Heller Caves, a series of 9 caves which has been surveyed and documented as a home for the threatened eastern small-footed bat. In addition, the talis, or rock rubble at the base of the cliffs, is also considered to be a potential roosting area for the bats as well as a nesting area for the threatened Allegheny woodrat. In connection with a possible permit to allow mining on the larger parcel, serious concerns about the bat and rat populations around the Heller Caves were raised by the Pennsylvania Game Commission, a state agency with regulatory authority over the eastern small-footed bat

and Allegheny woodrat populations. In letters to DEP prior to issuance of the small non-coal permit, the Game Commission recommended a 300 foot buffer, and letters after the issuance of the permit extended that buffer several hundred feet more in an effort to protect these threatened species. DEP issued the permit without recognition of or allowance for the 300 foot buffer. In addition, the appellants' expert, Dr. Michael Gannon, has testified that the buffer should in fact be much larger than 300 feet in order to protect the threatened species. The appeal therefore raises the question whether the DEP acted properly in issuing the small non-coal permit when it knew that the Game Commission did not want portions of the area covered by the small permit disturbed.

Picking up on work originally done by Clinic intern Claire Gargiulo '11, Clinic Student Attorney Brittney Berenato assisted Clinic Director Ken Kristl in completing discovery in the matter. This included preparing for 2 depositions of Game Commission staff, defending the depositions of the representatives of Juniata Audubon Society, the Center for Biological Diversity, and Laura Jackson, and procuring and issuing the expert report of Dr. Michael Gannon. At semester end, Brittney helped prepare the pre-hearing memorandum submitted ahead of the trial before the Environmental Hearing Board scheduled to begin February 27, 2012.

As the Spring semester commenced, the parties negotiated a settlement that will protect the bats, woodrat, and springtail until a large permit is issued, preserving the clients' ability to raise species protection issues in that permitting process. Claire (as staff attorney) and Brittany worked on formulating and drafting the settlement agreement. "This is a big win for our clients and the species," Clinic Director Ken Kristl said. "The clients really appreciated Claire's and Brittany's work."

## PROTECTING ORGANIC FARM FROM MARCELLUS SHALE GAS DRILLING

Harrisburg Student Attorney Bret Wiest helped organic farmers Tom and Jenny Lisak in their opposition to a proposed Marcellus Shale Gas Drilling pad on neighboring property.

The Lisak's filed an appeal with the Pennsylvania Environmental Hearing Board challenging an approval of an erosion and sediment control plan under Pennsylvania's general permit for the proposed gas drilling pad near Punxsutawney, Pa. After the appeal was filed, the Lisaks contacted the Clinic to assist in the representation. The Clinic appeared on behalf of the Lisaks in the appeal and conducted discovery throughout the Fall 2011 semester.

In connection with that discovery, Bret argued a Motion to Compel filed by Pennsylvania Department of Environmental Protection concerning certain documents cited in the Lisak's original appeal filing. Bret was able to secure a ruling which limited the relief to providing hard copies of web-based documents. Bret then oversaw the provision of those documents to the other side.

During the semester, it became obvious that the primary issue of the case is whether or not the discharges to a nearby high-quality waterway had been adequately analyzed under Pennsylvania's antidegradation regulations – a subject matter that the Clinic has litigated repeatedly, most recently in the Blue Mountain Preservation Association cases. This focus brought the parties to focus on resolving the issue through cross motions for summary judgment instead of the usual evidentiary hearing before the Environmental Hearing Board.

The new year brought good news to the Lisaks: the drilling company agreed to a settlement that will involve withdrawing the approval and thereby making drilling less likely in the near-term. As a result, the Lisak's organic farm has some protection for now and the ability to challenge any future attempt to drill.

This project is a good example of how different areas of the law can intersect and affect each other. The project will evolve into a review of DEP's proposed new General Permit to see if public comments are appropriate.

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## COASTAL ZONE ACT FIGHT GOES TO DELAWARE SUPREME COURT

The Clinic has taken the fight against a regional wastewater treatment facility in Sussex County Delaware to the Delaware Supreme Court.

Clinic clients Sierra Club, Citizens Coalition, Inc. and Southern New Castle County Alliance, Inc. requested that the Clinic pursue an appeal of an October 27, 2011 decision by the Delaware Superior Court affirming the issuance of a permit under the Delaware Coastal Zone Act allowing construction of the Wandendale Regional Wastewater Treatment Facility. The Clinic brought the initial appeal to the Coastal Zone Industrial Control Board IN August 2010, and after the Board affirmed the permit, the appeal to the Superior Court.

The Supreme Court appeal raises interesting legal issues under the CZA. These include: whether the Coastal Zone Industrial Control Board rendered a proper decision when 5 members of the Board orally voted to affirm the issuance of the permit but only 4 members signed the actual written decision and final order; whether the Facility satisfies the Act's definition of a heavy industry use such that it is subject to the prohibition against such uses in the Act; and whether the acknowledged failure to satisfy certain regulatory requirements should result in a reversal of the permit's issuance. The Superior Court found that the oral vote was sufficient, that the Facility was not a prohibited heavy industry use, and that—though there were clear violations of the governing regulations—the permit should be affirmed because it met the “spirit” of the regulations. The Clinic's appeal challenges each of those conclusions.

Clinic Student Attorneys Jessica Blome, Martin Reap, and Stephanie Venuti attended the oral arguments before the Superior Court in August 2011. After the Superior Court ruled, Stephanie was involved in drafting both the Notice of Appeal and the Opening Brief in the appeal. Stephanie had the opportunity to prepare the first draft of the Opening Brief, which was filed with the Delaware Supreme Court on January 6, 2012. The briefing on this and a related cross-appeal (in which the permittee challenges that it is even subject to regulation under the Act) will continue through the Spring semester.

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IS RIGHT FOR YOU!**

**Check out the For Students Page on the  
Clinic's section of [www.widenerELC.org](http://www.widenerELC.org)**

## **FIGHTING TO ELIMINATE FAILING SEPTIC SYSTEMS**

Harrisburg student attorney Brittany Berenato is helping a Clinic client deal with a failing septic system.

Wardeh Kawar owns a property in Williston Township that has a septic system which can no longer treat waste on the property. Ms. Kawar's daughter, Rosemary Groeff, contacted the Clinic seeking assistance to obtain relief by a connection to sewage treatment facilities in the nearby area. Williston Township had discussed the possibility of extending sewers into the area, but had not done so.

Brittany researched the issue and found that the Pennsylvania Sewage Facilities Act (Act 537) and its implementing regulations, require municipalities to develop and implement comprehensive official plans which provide for the resolution of the existing sewage disposal problems. The regulations require municipalities to review and revise their official plans whenever the municipality or Pa. DEP determines that the plan is inadequate to meet the existing or future disposal needs of the municipality or any portion thereof and to assure the proper operation and maintenance of sewage facilities within their borders. The Township's plan discussed the area in which Ms. Kawar's property was located. Brittany discovered that Act 537 allows an individual to make a private request to DEP that it order a municipality to implement relevant provisions of its Act 547 plan. Thus, Brittany worked to draft a private request and the Clinic submitted it to the DEP in November 2011. The DEP has held meetings with the parties and is helping the Township to work with a local homeowners association to allow a connection to an existing sewer line that would alleviate the problems on Ms. Kawar's property.

"This is an excellent example of how a Clinic student can provide real relief to a client of the Clinic," said Director Ken Kristl. "Brittany found the private request provisions of the Act and worked with the client directly and put together a request that is starting to produce movement towards positive results. Brittany's advocacy on behalf of her and the Clinic's client was central to our ability to move this process forward."

During the Spring 2012 semester, Brittany and the Clinic will continue to monitor the situation and hopefully guide the problem to a satisfactory resolution. This may include exploring how to obtain easements across neighboring properties to facilitate a sewer connection and monitoring the Township's and homeowners association's actions to protect the client's interest.

## **CLINIC ALUM, CLAIRE GARGIULO, HIRED AS STAFF ATTORNEY FOR HARRISBURG OFFICE**

Claire Gargiulo '11, one of the first students in the new Harrisburg office of the Clinic, has been hired as that office's staff attorney starting in January 2012. Claire is no stranger to the Clinic. She, along with 3 other Harrisburg students (Jennifer Berosh, Jon Johnson, and Steve Matzura) consulted with Clinic Director Ken Kristl and Harrisburg Civil Clinic Director Palmer Lockard to formulate the basic mission and key protocols for the Harrisburg office during the Fall 2009 semester. Claire was then one of the original interns in the Clinic, serving as an intern during the Spring & Fall 2010 semesters as well as serving as a summer intern during Summer 2010 and doing Clinic work via a directed research project during the Spring 2011 semester. After graduating in May 2011 and passing the Pennsylvania Bar, Claire now returns to the Clinic as its staff attorney, replacing Darlene Heep, who left for an administrative law judge position at the Pennsylvania Public Utility Commission.

"I am really excited to have Claire working with me in the Clinic," said Clinic Director Ken Kristl. "Claire brings a level of enthusiasm and commitment to this job that reflects her longstanding involvement with the Clinic. It is a testament to both Claire and the Clinic that a Widener student can be so successful in the Clinic she is the logical and best choice to fulfill the important role of assisting me and helping students learn how to service their clients and prepare for practice in the Environmental Law Clinic."

## **SERVING CLIENTS IN OTHER WAYS**

While the articles in the *Clinic News* identify some of the bigger projects that the Clinic handled during the Fall 2011 semester, they are by no means the only ones. Some other types of projects included:

- Student attorney Chris Hine looked at the effect of prior consent decrees upon enforcement actions against a municipality violating its Clean Water Act permit.
- Ted Henry and Ashley Talley began the Clinic's annual compliance sweeps for central violators in the Potomac Watershed.
- Benjamin Loomis prepared Public Comments related to a mining permit expansion for a limestone mine in Pennsylvania.
- Martin Read and Chris Hine examined issues related to Marcellus Shale gas drilling on an abandoned landfill, drafting Public Comments.

## LITIGATING (AND WINNING) TO PROTECT THE SHENANDOAH AND POTOMAC WATERSHEDS

The Clinic has successfully negotiated a settlement for its Clean Water Act enforcement case on behalf of Clinic clients Potomac Riverkeeper and Shenandoah Riverkeeper over discharges from Ox Paperboard's Halltown, West Virginia facility.

The Clinic initiated the CWA litigation in West Virginia federal court over alleged violations of the Act that included exceedances of the biological oxygen demand, total suspended solids, and ammonia nitrogen regulated pollutants that were being discharged from the facility into Flowing Spring Run and the Shenandoah River. Working with co-counsel Christopher Stroech of Shepardstown, WV, the Clinic's litigation attracted the attention of the West Virginia Department of Environmental Protection (which intervened in the case) and ultimately led to successful negotiation of a settlement agreement that would result in the installation of new equipment and processes designed to significantly reduce these pollutant discharges. A draft consent decree was negotiated and filed with the court as well as with the U.S. Department of Justice (which, under the Clean Water Act has a statutory right to review all proposed consent decrees in citizen suit litigation). The Clinic and its clients are now awaiting DOJ approval and the entry of decree by the federal judge.

Student attorney Edward Hughes worked with Clinic Director Ken Kristl in connection with conducting the discovery and reviewing technical information related to the proposed process and equipment changes at the heart of the consent decree. Ed had the opportunity to see the discovery and settlement processes up close and gain valuable experience through his role in the case.

## CLINIC PROVIDES SIGNIFICANT PRO BONO CONTRIBUTION

During the Fall 2011 semester, the Clinic provided significant pro bono representation. This work, on behalf of 40 clients over 42 different matters, amounted to the following:

Clinic Director	224
Student Attorneys	1343
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Total Hours	1567

## STUDENT ATTORNEY INSIGHTS FROM THEIR CLINIC WORK

Working in the Clinic gives Widener students the chance to see environmental law in action and up close. Here's how some of the Student Attorneys described their experiences:

*Unlike any other class in my law school experience, the Clinic has provided me with the invaluable opportunity to communicate with clients directly. Gathering all of the facts from a potential client about her problem and engaging in the process of evaluating her claim and the decision whether or not to take the case has been a great learning experience.*  
- Stephanie Venuti -

*I would just want others to be aware that the sewer overflows are happening. Before taking the Clinic and your Environmental Law class, I thought that the EPA took care of these types of violations and I did not think that there would ever be a reason for a citizen to file suit. Now I know that the EPA's efforts are not always enough and that the EPA, state, and citizens must work together to prevent violations.*  
- Jessica Blome -

*Current (and pending) drilling operations for gas in the Marcellus Shale are largely unregulated and, with no track record or historical data to go by, highly experimental. Until legislators can find time to begin regulating drillers directly, we need to find creative ways to bring them under some sort of regulation to protect people and the environment.*  
- Martin Reap -

*For more information on the Environmental and Natural Resources Law Clinic, stop by the Clinic (L256) or contact Professor Kristl (477-2053 or at [ktkristl@widener.edu](mailto:ktkristl@widener.edu)). The Clinic is open to second semester 2RDs, as well as 3RDs and 4EDs.*

