



GEORGETOWN LAW  
INSTITUTE FOR PUBLIC REPRESENTATION

# **2007 – 2008 ANNUAL REPORT**

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# **INFORMATION ABOUT IPR**

## **OVERVIEW**

IPR is a public interest law firm and clinical education program founded by Georgetown University Law Center in 1971. Attorneys at IPR act as counsel for groups and individuals who are unable to obtain effective legal representation on matters that have a significant impact on issues of broad public importance. IPR's work currently focuses on communications law, environmental law, and general public interest law, including employment discrimination and the rights of persons with disabilities.

This report summarizes IPR's projects over the last year, illustrating the impact of our work on our clients and their communities. However, all of the projects serve not only clients, but also a parallel clinical education function. The IPR program gives students and graduate fellows an opportunity to work on unique, large scale projects raising novel legal issues and requiring extensive research and writing.

These projects involve both challenging issues and challenging legal materials. For example, most of our projects require students to develop and master extensive factual records that often relate to technical issues like telecommunications systems or pollution control. Gathering facts and the creation and use of administrative records is an important part of the experience for many of our students.

We also frequently require students to research regulatory material and administrative law issues. While students are usually familiar with how to find and use case law, they often have had little exposure to municipal law and regulations or to such materials as the Federal Register and the Code of Federal Regulations. Similarly, few students have used legislative history material or the extensive looseleaf services in areas such as environmental law. With the help of IPR attorneys and the professional staff at the Law Center's library, IPR students explore the uses of these tools (often through on-line services).

The students also must consider questions of strategy, issues of client autonomy, problems of professional responsibility, the need for careful preparation and planning, and how to mesh client goals with the applicable law and facts. Students have the opportunity to learn the skills of communicating orally and in working with community groups, other public interest organizations, and expert witnesses. Like other clinics at Georgetown, we place our students in situations where they must assume responsibility for the quality of their own work and for the success of their clients' cases. However, most of the work at IPR is collaborative, with the graduate fellows and faculty working with the students at each step of the case. Students learn from observing the work of experienced attorneys who are practicing law along with them. The students, therefore, not only have the chance to perform and critique their own work, but also to observe and critique the performance of their supervisors.

The day-to-day work on cases is supplemented by weekly seminars and weekly clinic meetings, at which we review cases and current issues. IPR seminars are an integral part of the students' educational experience. The format and subject matter of the seminars vary. Some require students to formulate positions in small groups before meeting together with the other students, while others involve role-playing or simulation. Many require that students draw on and share their experiences on their project. While most of the seminars are led by IPR faculty and graduate fellows, some may be taught by other professors or visitors. The materials used in the seminars include judicial decisions, pleadings from IPR cases, law review articles, legislative materials, real and hypothetical fact patterns, and excerpts from non-legal literature. In recent terms, seminar topics have included rulemaking, litigation planning, discovery, remedies, appeals, statutory interpretation, working with the press, professional responsibility, and negotiation.

Students at IPR work with three faculty members and five graduate fellows. Selected from a national pool of several hundred applicants, the fellows are an essential part of the IPR program. They are responsible for the day-to-day supervision of the students and spend much of their time guiding students in conducting legal research, reviewing student drafts, and preparing the students for oral presentations. The fellows also work as members of IPR's legal staff, and have represented clients in hearings before federal and state courts and local and federal administrative bodies. Of course, not all IPR students will go into public interest practice, as traditionally defined. Nevertheless, the work at IPR presents a valuable and perhaps unique setting in which to raise and discuss issues that arise in all sorts of law-related work. While the focus of the seminars is on public interest practice, the issues we deal with are inherent in being a lawyer, regardless of practice context. Our goal is to ask students to think broadly about what it means to be a lawyer, about the implications of their work for others (including, but not limited to, their clients), and about how students can use their skills most effectively to achieve their professional goals.

## **STAFF**

Angela J. Campbell, Director  
Hope M. Babcock, Director  
David C. Vladeck, Director  
Martha L. Rodriguez, Office Manager

## **GRADUATE FELLOWS – 2007-2008**

**Erik Bluemel** is a graduate of the New York University School of Law and the University of California at Berkeley. During law school, Erik served as Editor-in-Chief of the Environmental Law Journal and as a research assistant to Dean Richard Revesz and Professors Vicki Been, Richard Stewart, and Paul Chevigny. Following law school, Erik served as a judicial law clerk for the Honorable Barefoot Sanders of the Northern District of Texas and the Honorable Kermit E. Bye of the Eighth Circuit Court of Appeals. Erik has worked with the United Nations Development Programme, the Natural Resources Defense Council, Environmental Defense, and Sive, Paget, & Riesel, P.C., an environmental litigation boutique in New York City, and served as Vice-Chair of the New York County Lawyers' Association Committee on Environmental Law. Erik currently serves as a member of the IUCN-World Conservation Union Commission on Environmental Law and as an advisor, board member, or consultant to various local, national, and international environmental organizations. He has received numerous accolades for his work in environmental law and has published articles on national and international environmental law, indigenous rights, and global governance. Upon completing his IPR fellowship, Erik joined the faculty of Denver University Law School.

**Melanie Kleiss Boerger** graduated from the University of Minnesota Law School with a joint M.S. degree in Science, Technology and Environmental Policy. During law school, Melanie worked as a research assistant for Professors Jim Chen and Jamie Grodsky, served on the Minnesota Law Review, won awards in the National Environmental Law Moot Court Competition, and studied comparative law for a semester in Berlin. Her work experience during law school included positions at the Minnesota Center for Environmental Advocacy, Earthjustice, and Faegre & Benson LLP as a Sierra Club fellow. After law school, Melanie clerked for the Honorable David S. Doty of the District of Minnesota and the Honorable Robert R. Beezer of the Ninth Circuit Court of Appeals. She also taught legal writing at the University of Minnesota. Melanie has published articles on the National Environmental Policy Act and salmon hatchery policy.

**Jessica Gonzalez** graduated from Southwestern Law School in 2007 and was recognized for academic excellence in Legal Research and Writing, Civil Procedure, and Interviewing, Counseling and Negotiation. In 2002, she obtained her undergraduate degree in Communication Studies and Spanish from Loyola Marymount University. While in law school, she researched for a Media and Telecommunications professor, and the director of the Legal Research and Writing program. She served as an editor for the

Journal of International Media and Entertainment Law, and a staff member on the Journal of International Law and Trade in the Americas. At Southwestern, she was President of the Media Law Forum, and a member of the Curriculum Committee. In the summer of 2005, she studied International Media Law in London. The following summer she received a Telecommunications Fellowship to work for the Media Access Project. Before attending law school, she taught high school English and Spanish in Los Angeles, California.

**Kathryn Sabbeth** received her B.A. in Sociology, *Phi Beta Kappa*, from the University of Michigan in 1998, and graduated in 2003 from New York University School of Law, where she was an Arthur Garfield Hays Civil Liberties Fellow, an editor for the Review of Law and Social Change, and the recipient of the Arthur Jarecki Memorial Prize for outstanding work in NYU's clinical program. During law school, Kathryn worked at civil rights organizations including the NAACP Legal Defense and Educational Fund, Inc., the New York Civil Liberties Union, the ACLU of Alabama, and the labor and employment firm of Vladeck, Waldman, Elias & Engelhard, P.C. After graduation, Kathryn spent two years as a staff attorney at South Brooklyn Legal Services, where she represented low-income tenants in housing litigation. Prior to joining IPR, Kathryn clerked for the Honorable Warren J. Ferguson of the United States Court of Appeals for the Ninth Circuit, and the Honorable James C. Francis IV, United States Magistrate Judge in the Southern District of New York.

**Coriell Wright** graduated cum laude from the Washington College of Law at American University in 2006 and was awarded particular distinction for her studies in administrative law in 2005. In 2002 she received her undergraduate degree in political science with honors from the University of Michigan. While at American University, she worked as a student attorney in the Glushko-Samuels Intellectual Property Clinic and as a research fellow for professors prominent in copyright and constitutional law. She was also the Founder and President of the first Communications Law Society at her law school and was American University's 2006 nominee for the American Bar Association's Jan Jancin Award for Intellectual Property. During law school she clerked for FCC Commissioner Jonathan Adelstein and in the FCC's Media Bureau. She also worked as an intern for the Media Access Project. Prior to attending law school, she worked as a reporter for a National Public Radio affiliate in Ann Arbor, Michigan.

**LAW STUDENTS**

**FALL 2007**

MOLLY AICHELE  
REDDING CATES  
RYAN COSTELLO  
PETER DENTON  
JENNIFER DILLARD  
DEANNA DURRETT  
ANDY EBERLE  
HEATHER GOLDMAN  
LAUREN HAYTER  
CONSUELO KENDALL  
SANDY LYN  
JEFF MYUNG  
COURTNEY RICE  
ANDREW SCHATZ  
JONATHAN SMALL  
TREVOR STANLEY  
LUCY TUFFS  
JOY WELAN

**SPRING 2008**

LOUISE McGAULEY BETTS  
EMIL BOVE  
JOSEPH FIORILL  
DAREN GARSHELIS  
KRAIG JENNETT  
NITIN JINDAL  
ANTHONY KIM  
TED KORNOBIS  
GEORGE MONTGOMERY  
IRFAN MURTUZA  
ANGELA NAVARRO  
DORIT RADZIN  
MATTHEW TEAMAN  
ERIC UBIAS  
JUSTIN WADE  
STEPHANIE WAGNER  
KENDRICK WILSON

## ANNUAL REPORT

### I. CIVIL RIGHTS AND PUBLIC INTEREST LAW

IPR represents individuals and non-profit organizations in a wide variety of cases and non-litigation projects relating to civil rights, civil liberties, open government, and public health and safety. Set forth below are the key cases that we worked on during the 2007-2008 academic year.

#### A. Employment Discrimination

##### 1. *Warner v. GPO*

IPR has a long history of representing employees at the United States Government Printing Office (GPO) in employment discrimination cases. IPR represented Kimberly Warner who currently manages the GPO's Digital Print Center. When her former supervisor was promoted, Ms. Warner assumed his responsibilities, but was not promoted into his vacant position. Despite her increased duties, Ms. Warner had not been recognized or compensated appropriately, while many of her male colleagues and supervisors were promoted repeatedly.

Ms. Warner filed an administrative complaint with the Equal Employment Opportunity Commission (EEOC) *pro se*, alleging violations of the Equal Pay Act and Title VII of the Civil Rights Act of 1964. After filing her complaint, Ms. Warner contacted IPR for assistance. After conducting discovery and preparing for a hearing before an EEOC Administrative Judge, IPR successfully negotiated a settlement on Ms. Warner's behalf.

IPR is still actively engaged in representing Ms. Warner in matters relating to the implementation of the settlement.

##### 2. *Hyatte v. Mukasey*

IPR represents Joi Hyatte, an African-American woman who has been employed in the Civil Rights Division of the United States Department of Justice (DOJ) since 1995. Ms. Hyatte currently works as an Equal Opportunity Assistant in DOJ's Voting Rights Section. Ms. Hyatte's supervisors have assigned her the work of a Civil Rights Analyst (CRA) and consistently rated her performance on these jobs "outstanding," but DOJ has repeatedly overlooked Ms. Hyatte for promotions to a CRA position. Ms. Hyatte alleges that this is just one example of a widespread pattern of keeping African-American employees of DOJ from competing for promotions to vacant positions, while actively recruiting Caucasian and Latino candidates from outside the government.

Ms. Hyatte also alleges that managers of the Voting Rights Section have fostered a racially hostile environment for African-Americans, pushing out many with decades of experience in government service. Another African-American employee has stated that one of the managers “talked to us as if we were illiterate cotton-pickers.” A Caucasian employee who has since left the Department has said about the same manager, “[She] was overly suspicious and scrutinizing of African-Americans. [She] asked white and Latino employees to be her ‘eyes and ears’ keeping watch over the black employees.”

Ms. Hyatte filed a *pro se* administrative complaint with DOJ’s Equal Employment Opportunity Office, alleging race discrimination under Title VII of the Civil Rights Act of 1964. She then contacted IPR for assistance. On May 29, 2008, IPR filed a federal lawsuit on Ms. Hyatte’s behalf in the United States District Court for the District of Columbia.

The parties are currently engaged in settlement discussions.

### **3. *James Nix and Yvonne Davis v. Library of Congress***

IPR represents James Nix and Yvonne Davis, two retired Library of Congress employees who participated in a 1982 class action, which alleged race discrimination in violation of Title VII of the Civil Rights Act of 1964. The underlying case was settled in September 1995, through a court-approved agreement that included a non-retaliation clause. In July 1997, the plaintiffs class filed a motion to enforce the settlement, which included claims that Mr. Nix and Ms. Davis had been retaliated against in contravention of the settlement agreement. The government argued that the United States District Court for the District of Columbia had not retained jurisdiction over the retaliation claims, but in May 2006 the D.C. Circuit ruled that the district court had retained such jurisdiction.

IPR agreed to represent Mr. Nix and Ms. Davis on remand. In early 2007, the Library filed a motion for summary judgment, which IPR then opposed. In February 2008, IPR filed a Notice of Supplemental Authority, and IPR is currently awaiting the Court’s ruling on the Library’s summary judgment motion.

### **4. *K.H. v. Employer X***

IPR represents K.H., a longtime federal employee who has repeatedly been denied promotions on the basis of race. In August 2007, K.H. filed a *pro se* administrative complaint with the Equal employment Opportunity Office of the federal agency, alleging violations of Title VII of the Civil Rights Act of 1964. The EEO Office has completed its investigation of K.H.’s complaint, and IPR is currently awaiting the agency’s final determination. IPR plans to file an action in federal court on K.H.’s behalf in August 2008.

## **B. Federal Preemption**

### **1. *Altria v. Good***

This action was initiated by long-term smokers of Marlboro Light cigarettes who alleged that Philip Morris had engaged in unfair and deceptive practices in its design and marketing of Marlboro Lights. Plaintiffs claimed that Philip Morris promoted these cigarettes as “light” and “low tar and nicotine” to convince the public that they were less dangerous than normal cigarettes, despite the company’s knowledge that its product was no less dangerous to consumers’ health. Plaintiffs alleged that the company’s misrepresentations violated Maine’s Unfair Trade Practices Act. The district court ruled that such claims were preempted by the Federal Cigarette Labeling and Advertising Act, and dismissed the action. The First Circuit reversed, and defendants filed a petition for certiorari, which was granted in January 2008. In June, IPR filed an amicus curie brief on behalf of the Tobacco Control Legal Consortium, AARP, and Public Justice arguing that the action is not preempted by federal law and should be permitted to proceed to the merits. Argument is scheduled in October 2008.

### **2. *Warner-Lambert v. Kent***

This case began as a class action by Michigan citizens injured by the prescription drug Rezulin, marketed and sold by Warner-Lambert. Initially approved by the Food and Drug Administration (FDA) for treatment of diabetes, Rezulin caused at least 94 cases of liver failure, including 66 deaths, and the FDA eventually requested that the drug be removed from the market. Plaintiffs alleged that Warner-Lambert knowingly concealed material facts about the safety of Rezulin from the FDA, and that, had those facts been disclosed, the FDA would not have been approved the drug or would have removed it from the market sooner. The district court granted Warner-Lambert’s motion for a judgment on the pleadings, on the basis that the plaintiffs’ state law claims were preempted by federal law. The Second Circuit reversed, and Warner-Lambert filed a petition for certiorari, which was granted by the Supreme Court. The primary questions on appeal concern the relationship between “fraud-on-the-FDA” claims and the traditional tort claims contemplated by the relevant Michigan statute. In January 2008, IPR submitted an amicus curiae brief to the Supreme Court on behalf of AARP. In March 2008, the Court affirmed by an equally divided Court the Second Circuit’s decision that the plaintiffs’ claims were not preempted by federal law.

### **3. *Wyeth v. Levine***

Diana Levine suffered severe injury and the amputation of her arm as a result of an injection with the drug Phenergan, an anti-nausea medication manufactured and sold by drug company Wyeth. Ms. Levine brought a tort action in Vermont State court, alleging that Wyeth knew of and was negligent in failing to provide adequate warnings of the dangers of injecting such a drug directly into patients’ veins. The jury found for Ms. Levine, but Wyeth claimed that the trial judge should never have allowed the jury to

consider plaintiff's claims, because they conflict with federal regulation of prescription drug labels. Wyeth asserted, at both the trial and appellate level, that Ms. Levine's failure-to-warn claim was preempted by the FDA's approval of Phenergan's label and "rejection" of proposed revisions to that label. The trial and appellate courts rejected Wyeth's argument, and the company then sought Supreme Court review. The Court granted certiorari in January 2008. IPR has been asked to file an amicus curie brief arguing against Wyeth's pro-preemption position by former Commissioners of the Food and Drug Administration.

## **C. Open Government and Government Accountability**

### **1. *Bloche v. DoD***

IPR represents two prominent experts of bioethics, Jonathan Marks, a professor of bioethics at Pennsylvania State University, and M. Gregg Bloche, M.D., a professor of law at Georgetown, in a Freedom of Information Act (FOIA) matter against the Department of Defense and other federal agencies. Our clients seek access to information concerning the participation of government and civilian medical personnel in the design and implementation of potentially abusive torture techniques.

After filing FOIA requests with the relevant agencies in 2006 and 2007, and receiving no documents in response, IPR filed a FOIA lawsuit on behalf of the experts in November 2007. The Court has ordered the government defendants to turn over relevant documents by the end of July 2008. Hundreds of pages have now been released, but there is still a great deal the government is withholding based on allegations that the documents are exempt from FOIA. In addition, some government agencies still have not completed their searches. In September 2008, the parties will begin briefing the issues of whether government searches have been adequate and whether the government's refusal to turn over records violates FOIA.

### **2. *Consumer Federation of America v. U.S. Department of Agriculture***

The Consumer Federation of America (CFA) is a nonprofit research, education, and advocacy organization that, in August 2004, filed a FOIA request with the United States Department of Agriculture (USDA), seeking copies of calendar records memorializing *ex parte* meetings between USDA officials and industry representatives. After the USDA denied CFA's FOIA request, IPR filed suit on CFA's behalf in the United States District Court for the District of Columbia.

The parties cross-moved for summary judgment and, in July 2005, the court dismissed the case on the grounds that the calendars were not "agency records" under FOIA. CFA appealed to the United States Court of Appeals for the D.C. Circuit. In June 2006, the D.C. Circuit reversed. *Consumer Federation of America v. Dep't of Agriculture*, 455 F.3d 283 (D.C. Cir. 2006), *reversing* 383 F. Supp. 2d 1 (D.D.C. 2005).

On remand, instead of releasing all records covered by the decision of the D.C. Circuit, the USDA revealed that it had failed to search for, segregate, and preserve many of the calendar records, despite the ongoing litigation, and that hundreds of calendar days were now missing. In March 2007, the parties again cross-moved for summary judgment, and this time CFA asked the court to sanction the USDA or order it to take steps to ensure that such behavior would not be repeated. In March 2008, the Court denied CFA's motion for summary judgment but ordered USDA to submit to the Court a detailed procedure for preserving documents in the future.

In part as a result of the litigation, the USDA now issued a new departmental regulation, DR 3090-001, describing the agency's litigation retention policy for documentary materials including electronically stored information, as well as a new set of FOIA guidelines describing search and preservation obligations and procedures under FOIA. IPR is awaiting the court's final ruling. In the meantime, IPR and the government have agreed to settle IPR's fee request.

### **3. *NRDC v. Department of Defense***

This is a FOIA action that IPR is handling on behalf of the Natural Resources Defense Council, a national environmental organization. The case was filed in March 2004 in the United States District Court for the Central District of California. It seeks to compel the EPA, the Defense Department, and the Office of Management and Budget to disclose information about the extent of perchlorate contamination in certain areas of the country, any assessments of the health risks posed by the contamination, and any records relating to measures being implemented by the government to eliminate or mitigate the contamination.

In 2005, the government moved for summary judgment with respect to the EPA and Department of Defense, and the Court, in a lengthy opinion that is quite favorable to our position, denied that motion. *NRDC v. Dep't of Defense*, 388 F. Supp. 2d 1086 (C.D. Cal. 2005). In 2006, the Court issued another lengthy opinion again denying the government's motion for summary judgment and ordering the defendants to turn over significant numbers of records to the NRDC. *NRDC v. Dep't of Defense*, 442 F. Supp. 2d 857 (C.D. Cal. 2006). After extensive discovery proceedings that revealed gaping holes in their searches, the defendants agreed to turn over numerous additional documents. Thereafter, there was a third round of summary judgment briefing, resulting in yet another complete win for NRDC. As a result, the agencies have released thousands of pages of additional records and the NRDC has determined that it has received all of the information on perchlorate that it needs. The parties are in the midst of settlement discussions over NRDC's fee request.

### **4. *In re. Petition of Nat'l Sec. Archive et al.***

In the 1950s, Julius and Ethel Rosenberg were indicted, convicted, and executed for conspiracy to commit espionage by providing the Soviet Union with the secret of the atomic bomb. These events were arguably the defining moments in the early Cold War.

The convictions convinced many Americans that Soviet infiltration of American society was pervasive, while proving to others that the United States government was overreacting, becoming increasingly oppressive, and engaging in prosecutorial misconduct.

Scholars and other members of the public remain fascinated by the *Rosenberg* case, and numerous questions remain unanswered. We represent historians who seek the unsealing of the records of the grand jury proceeding that led to the Rosenbergs' indictment.

IPR filed a petition for the unsealing of the records in January 2008. Oral argument on the petition was held on July 22, 2008. The next day, the court ordered the release of the testimony of a number of most of the witnesses and scheduled a conference for August 26, 2007 to address the remainder.

### **5. *Wilner v. NSA***

Thomas B. Wilner, a partner at Shearman and Sterling LLC, along with twenty-three other lawyers representing individuals detained at the Guantánamo Bay Naval Station in Cuba, have reason to believe that, pursuant to the warrantless wiretapping program authorized by President Bush shortly after September 11, 2001, the National Security Agency has intercepted their electronic communications with clients, witnesses, and others with whom they must communicate in the course of their work. Represented by the Center for Constitutional Rights and Butler, Rubin, Saltarelli & Boyd LLP, the Guantánamo lawyers filed a FOIA request with the National Security Agency and DOJ, seeking records of government interception of their communications. The government responded to a portion of the request by claiming it could neither confirm nor deny the existence of any such records.

IPR was asked to step in, and a FOIA suit was filed in the Southern District of New York, seeking to compel the government to turn over the records. The government filed a motion for summary judgment, raising what is commonly known as a “Glomar” defense, alleging that the government agencies cannot even confirm or deny the existence of any relevant records without compromising national security. Plaintiffs responded that disclosure of the requested information would not compromise any lawful national security objective, as any warrantless wiretapping of plaintiffs in the course of representation would be unconstitutional. Since *Glomar* protects legitimate government interests and does not provide a basis for hiding records of unlawful government activity, the government failed to meet its burden.

On June 25, 2008, the district court granted the government's motion in relevant part. Plaintiffs then moved for entry of a final judgment. The court granted plaintiffs' motion and, on July 31, 2008, certified the *Glomar* claim for appeal. Plaintiffs are currently preparing their appeal to the United States Court of Appeals for the Second Circuit.

## **D. Disability Rights**

### **1. *In re Arons***

This is the latest chapter of IPR's long-running effort to ensure that Delaware parents have assistance when they battle school boards in order to secure educational services for their disabled children. A few years ago, we represented parents who argued that the Individuals with Disabilities Education Act (IDEA), the federal law governing the rights of disabled children to a free and appropriate public education, guaranteed parents a right to be assisted by non-lawyers in the due process hearings that are held under the Act. The issues and procedures involved in these hearings are very complex, and few, if any, lawyers are willing to represent the parents. In contrast, the school boards have access to lawyers and experts. The Delaware Supreme Court rejected our argument as a matter of law, but urged the parents to file a petition with the Court to modify Delaware's rules forbidding non-lawyers from practicing law. Specifically, the Court indicated that it would consider the adoption of a rule permitting lay representation in a limited class of cases, "[i]f it could be demonstrated that an unmet need exists and that the local bar could not adequately respond." *In re Arons*, 756 A.2d 867, 874 (Del. 2000).

In the meantime, the Supreme Court has issued two rulings that deal a further role to the ability of low and moderate income parents to assert rights under IDEA. *In Arlington Central School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006), a case handled by IPR, the Court ruled that parents are not entitled to reimbursement of the costs they pay to experts, even when the parents prevail. And in *Schaffer v. West*, 546 U.S. 49 (2005), the Court ruled that parents, not school boards, bear the burden of proof in IDEA cases. IPR has been asked to consider filing a petition to the Delaware Supreme Court asking the Court to modify its unauthorized practice rules to permit non-lawyers to assist parents in IDEA cases. This is a matter that we are considering.

### **2. *Students v. D.C. Public Schools and Bureau of Prisons***

The Individuals with Disabilities Education Act (IDEA) requires states to provide a free appropriate public education (FAPE) to students with disabilities who are convicted as adults under state law and incarcerated in adult prisons. In 2001, the Lorton Correctional Complex in D.C. was closed and all D.C. offenders were transferred to federal custody pursuant to the National Capital Revitalization and Self-Government Improvement Act. However, D.C. offenders in federal custody are not receiving the special education services they are entitled to under IDEA. Therefore, IPR is working with the U.D.C. David A. Clarke School of Law's Juvenile Law Clinic to bring a class action to ensure that all eligible D.C. offenders receive IDEA services while in federal custody. IPR has developed draft materials and we are working with UDC Law School and others to identify potential plaintiffs.

## **E. Educational Rights**

### **1. Mississippi School Board**

A number of public school systems in Mississippi suffer from a long, bitter history of race discrimination. In one city in particular, local parents have made efforts to effect change in the curriculum and discipline practices but have met steadfast resistance by a Caucasian-majority school board. After a string of measures to block parent involvement, the board took the final step of changing its meeting time to 2:00 p.m., when most of the African-American parents and community members are unable to attend. Mississippi Youth Justice Project, a project of the Southern Poverty Law Center, asked IPR to get involved on behalf of the parents and grandparents in the community.

In the fall of 2007, we drafted a complaint and motion for a preliminary injunction, seeking to force the school board to move its meeting time to after-business hours, when parents can reasonably attend and participate in decisions shaping local education policy. In December 2007, we traveled to Mississippi and met with parents and co-counsel and discuss their grassroots organizing efforts related to the school meeting time.

In February 2008, under political pressure, and with the possibility of a lawsuit, Vescia Smith, an African-American woman was appointed to the school board, creating a new African-American majority. In March, African-American John Thigpen assumed the position of President, and on April 10, 2008, the board successfully voted to change their meeting time to 5 p.m., so parents and community members will now be able to influence school policies.

## **F. Other Matters**

### **1. *United States of America v. Philip Morris***

IPR has long been involved in tobacco control litigation, and IPR was asked by the Tobacco Control Legal Consortium to file an amicus brief on its behalf before the United States Court of Appeals for the District of Columbia Circuit in the government's civil RICO (Racketeer Influenced and Corrupt Organizations Act) action against the tobacco industry. This is a massive case that took nearly a year to try and resulted in the publication of an opinion spanning nearly 1,700 pages in Federal Supplement. IPR was asked to file a brief that concentrated on two issues: first, whether the district court's order requiring the tobacco companies to refrain from certain advertising and promotion practices violated the First Amendment, and second, whether the tobacco industry's advertising practices were protected by the *Noerr-Pennington* doctrine, a doctrine that protects collective action to influence government policy. IPR's brief argued that the district court's order is fully compatible with the First Amendment and that *Noerr-Pennington* provides no immunity for false or fraudulent statements. The brief points out

that the district court had found, as a matter of fact, that the statements and practices subject to its order were in fraudulent. Argument in the case has been scheduled for October 14, 2008.

## **II. FIRST AMENDMENT AND MEDIA**

During the 2007-2008 academic year, the projects of IPR's First Amendment and Media Project focused on harnessing new technologies to advance the public good, as well as promoting the public interest in the "old media," such as television and radio, that continue to play a fundamental role in our society. IPR's projects in this arena aimed to promote access, limit excessive concentrations of power, and foster a multiplicity of information sources for the public. IPR has worked to ensure that both "new" and "old" media serve the needs of the public and not just the demands of special corporate interests, and to pursue our clients' goals of adequate service for segments of the public, such as children, the poor, people of color, women, and people with disabilities, which have traditionally been underserved or may require special protections.

### **A. Media Ownership**

IPR advocates on behalf of numerous citizen groups that are concerned with the negative impact of concentration of media ownership. In the past year IPR has filed pleadings at the Federal Communications Commission ("FCC" or "Commission") and in the courts to promote diverse broadcast ownership.

#### **1. 2006 Quadrennial Regulatory Review of the Broadcast Ownership Rules**

In 2004, IPR successfully argued to the Third Circuit that the FCC's media ownership order went too far in deregulating the media industry and asked the Commission to provide better justification for its positions on remand. In response, the Commission voted on a new ownership order on December 17, 2008. Before the vote, students worked on various comments aimed at molding the Commission's decision. Once the order was published, students crafted both administrative and litigation responses to it.

#### **2. Comments and Complaint on the Ownership Studies**

In late summer of 2007, the Commission released ten studies aimed at supporting the Commission's media ownership decision. The Commission put these studies out for public comment. IPR students dug into the details of the studies and picked them apart on factual, statistical, and legal grounds. Students conducted extensive factual research to determine the validity of the studies and then composed comments and reply comments, which they submitted to the Commission on the viability of the studies. The comments and reply comments contained critiques of the various studies, and advised the Commission on whether its ownership decision could be justified in light of the studies. One student drafted a Data Quality Act complaint, advising the Commission of the administrative shortcomings of several of the studies.

### **3. Comments on Chairman Martin's Proposal**

In late Fall FCC, Chairman Kevin Martin proposed a new media ownership rule and invited public comment. Students drafted comments on the proposal that were filed with the Commission on behalf of UCC, NOW, Media Alliance, Common Cause, the Benton Foundation, and several other public interest groups. One student drafted a critique of the proposal's inadequate notice under the Administrative Procedure Act. Other students advised the Commission to tighten the newspaper-broadcast, local television and local radio rules on the grounds that the proposal as it stood would diminish viewpoint diversity, was too vague, and would be difficult to enforce.

### **4. Petition for Reconsideration of the Ownership Order**

During the Spring semester, students drafted a petition for reconsideration of the ownership order that IPR filed with the Commission on behalf of Common Cause, the Benton Foundation, the National Hispanic Media Coalition, and several other public interest advocacy groups. The students collaborated on this petition with co-counsel from the non-profit law firm, Media Access Project. The petition for reconsideration argued for revision of the newspaper-broadcast cross-ownership rule, enhanced public notice requirements for licensees seeking waiver of the rule, and the closure of a loophole that has allowed many licensees to prolong their noncompliance with the rule. It also asked the Commission to reverse its decision to grandfather five newspaper-broadcast cross-ownerships and to tighten the local radio and television ownership limits. The petition is currently pending before the Commission.

### **5. *Media Alliance v. FCC* (9th Cir. No. 08-70830)**

During the Spring, students worked on various litigation filings related to the media ownership order and strategized about the long-term litigation plan for this very complex case. Students collaborated with co-counsel at the Media Access Project and drafted petitions for review of the order filed on behalf of UCC in the Sixth Circuit and Media Alliance in the Ninth Circuit. One student also drafted a motion to transfer the case to the Third Circuit panel that retained jurisdiction over the case on remand in 2004. Another student wrote a motion to dismiss broadcasters' notices of appeal that were filed simultaneously with their petitions for review because notices of appeal and petitions for review are mutually exclusive. The various petitions for review and notices of appeal of the ownership order are now consolidated in the Ninth Circuit, which will decide whether to transfer to the Third or the D.C. Circuit, or keep the case itself.

## **B. License Renewal Challenges**

In previous years, IPR filed petitions to deny license renewals of broadcast licensees that had violated Commission rules or were failing to serve the public. In Fall 2007 and Spring 2008, the Commission granted several waivers of its rules to allow these

delinquent licensees to transfer and/or continue holding their broadcast licenses. IPR has mounted challenges to those decisions at the agency and in the courts.

### **1. Tribune-Zell Transfer**

In Fall 2007, the Commission blessed the wholesale transfer of the Tribune Company to Samuel Zell. This transfer was approved despite that various Tribune holdings are in violation of media ownership restrictions. IPR students drafted a petition for reconsideration that was filed at the Commission as well as litigation documents that were filed in *Tribune Co. v. FCC* (D.C. Cir. No. 07-1488).

One student helped draft a petition for reconsideration of the FCC's decision with co-counsel at the Media Access Project. The petition, filed on behalf of UCC and Media Alliance, argued that the Commission had inappropriately deviated from its citizen standing requirements. Then in the Spring of 2008 IPR intervened in *Tribune Co. v. FCC* on behalf of Media Alliance and the UCC. Students drafted motions for leave to intervene and to hold the case in abeyance, and crafted arguments used to support a motion to dismiss the entire case. IPR won both its motion to intervene as well as its motion to hold the case in abeyance. The case is now in abeyance pending the FCC's resolution of the related petition for reconsideration.

### **2. Media General License Renewals**

During the Spring of 2008, the FCC Media Bureau granted license renewals to four Media General-owned broadcast licensees that were not in compliance with neither the new nor the old newspaper-broadcast cross-ownership rule. The Bureau based its decision on the Commission's media ownership order, which grandfathered the waivers of the four Media General properties. An IPR student conducted extensive factual and legal research and then drafted an application for review of the Bureau's decision. IPR filed the application for review on behalf of Free Press and the NAACP – the Commission has yet to issue a decision on the application.

## **C. Children and Media**

IPR works with a number of organizations concerned with the effect of media on the health and well-being of children. IPR's advocacy has focused on the provision of quality children's programming, preventing unfair marketing to children, and examining the effect of media on childhood obesity.

## **D. Supreme Court Amicus Brief Regarding FCC Indecency Rules**

In Spring 2008, IPR students provided research for an *amicus curiae* brief, which was filed in the *FCC v. FOX Television* case before the Supreme Court. The case concerns the legality of an FCC determination that "fleeting expletives" could be found

to violate federal restrictions on the broadcast of indecent programming. The brief, which was filed on behalf of a coalition of children's advocacy groups, including the American Academy of Pediatrics and Parent Teacher Association, supported none of the litigants in the case. Instead it was submitted to emphasize the importance of the Court's continued recognition of the constitutionality of the FCC's statutory public interest oversight of television broadcasters, especially as they apply to promoting informative and quality programming for children. Additionally, the brief sought to inform the Court about the efficacy of blocking technologies, such as the "v-chip," and explained that due to both technological and practical limitations such tools have had limited effectiveness in helping parents block programming, which they may find objectionable for their children to watch. The brief was drafted along with attorneys from the firm of Spiegel McDiarmid.

Oral arguments in this case are scheduled for Fall 2008, and a decision is not expected until 2009.

## **E. Comments Filed With FTC On Behavioral Marketing Practices**

In Spring 2008, IPR students researched, drafted, and filed comments with the FTC on the issue of online behavioral marketing. Online behavioral marketing is the practice of tracking consumers' activities online in order to gather information and target advertisements to them. IPR's comments, which were filed on behalf of children's advocacy groups, including Children Now, the American Academy of Pediatrics, and Campaign for Commercial Free Childhood, urged the FTC to adopt proposed industry guidelines to protect children and teens from such practices, pointing out that, although behavioral advertising raises privacy and security issues for all consumers, the concerns intensify when advertisers gather data on minors.

In particular, IPR comments focused on the vulnerabilities faced by children and teens, who have become an increasingly attractive demographic for advertisers. Additionally, children and adolescents have more difficulty understanding privacy policies and are at a developmental disadvantage to give meaningful, informed consent to data collection. IPR proposed that the industry agree to not collect sensitive personal information on children under 18 years of age, and to require affirmative express consent from parents when advertisers collect information used to send individualized ads to children as part of behavioral advertising. This proceeding is still under consideration at the FTC.

## **F. Public Interest Obligations of Local Television Broadcasters**

### **1. Enhanced Disclosure for Local Television Stations**

In February 2009, all television stations will transition from analog to a digital format. Digital broadcasters can simultaneously broadcast up to six different program

streams, offer high definition programming, and provide interactive features. For nearly 10 years IPR has advocated on behalf of the Public Interest Public Airwaves Coalition, an alliance of consumer groups including Common Cause and Campaign Legal Center, to urge the FCC to address how DTV broadcasters should serve the public interest in light of their new capabilities. In particular, IPR proposed the adoption of broadcaster reporting requirements to increase public awareness and information about broadcasters' fulfillment of their public interest commitments.

In November 2007, the FCC adopted nearly all of the proposals made by IPR and issued a comprehensive set of rules requiring broadcasters to inform the public about how they are fulfilling their license obligations to their local audience. The new rules require broadcasters to make their public files available to the public via the internet, and to file quarterly a standardized disclosure form reporting on the amount of local news, public affairs, public service announcements and other types of programming they provide.

The adoption of these "Enhanced Disclosure" rules culminates a decade of advocacy by IPR on behalf of its clients to increase transparency and public awareness of how local TV stations are serving the public. In past semesters, students have drafted comments and met with FCC commissioners and staff to advocate for the new rules. In Spring 2008, IPR students laid the groundwork to safeguard the new rules against industry challenges both at the FCC and in court. IPR students researched and drafted Petitions for Reconsideration and Oppositions at the FCC and prepared filings to help defend the rules in court. Presently, proceedings are still pending at the agency and in the U.S. Court of Appeals for District of Columbia.

## **2. Localism Comments**

In the Spring of 2008, the Commission sought comment on ways it could prompt local broadcasters to serve their communities of license better. The Commission asked for comment on various initiatives that IPR originally proposed in 2004 on behalf of the Public Interest Public Airwaves Coalition. The proposals included the implementation of processing guidelines and community advisory boards. IPR students consulted with clients and drafted comments and reply comments on behalf of the Public Interest Public Airwaves Coalition, the Center for Creative Voices in Media, Free Press and the National Hispanic Media Coalition.

The comments advocated for shorter license renewal terms, adoption of community advisory boards, and implementation of license renewal processing guidelines, under which broadcasters may provide better quality programming and avoid over-commercialization in exchange for an expedited license renewal. The reply comments rebutted broadcasters' claims that such guidelines would be burdensome and unconstitutional and further demonstrated why such measures are necessary.

### **III. ENVIRONMENTAL LAW**

Since 1991, IPR has offered low income and minority residents of the Washington metropolitan area as well as local and regional environmental groups legal representation on environmental issues. During the 2007-2008 semester, IPR students continued to provide these services on several major projects, including one, the California Clean Air Act waiver case, which continued the clinic's involvement in air pollution issues of significant national and local concern even though the case involved an initiative and one client far removed from the Washington area.

#### **A. Air Quality**

##### **1. California's Clean Air Act Waiver**

In Spring 2008, IPR prepared amicus briefs on behalf of the National Association of Clean Air Agencies ("NACAA") and the Monterey Bay Aquarium in support of the State of California's petition to the U.S. Ninth Circuit Court of Appeals to review the U.S. Environmental Protection Agency's denial of California's request for a Clean Air Act waiver to enforce greenhouse gas standards for cars and light-duty trucks. Under the Clean Air Act, California is the only state that may regulate mobile source emissions, and the remaining states may enforce either California's or federal standards. EPA's decision leaves cars and trucks unregulated for the emission of greenhouse gases because no federal standards exist. IPR's brief on behalf of the Monterey Bay Aquarium discusses the impacts of greenhouse gases and climate change on California's coast and ocean. The brief prepared for NACAA addresses the interests of states and localities in having the ability to abate greenhouse gas emissions in light of the public health and welfare. The Ninth Circuit recently dismissed the petition for lack of jurisdiction, and the case will continue in the D.C. Circuit. This summer, IPR filed motions for leave to file the briefs in the D.C. Circuit.

##### **2. Intercounty Connector**

In August 2006, Environmental Defense and Sierra Club requested IPR to represent them in litigation over the proposed Intercounty Connector ("ICC"), which is an eighteen mile, six lane toll road intended to link I-270 and I-95/US 1 within central and eastern Montgomery County and northwestern Prince George's County. The ICC was first proposed in 1953 as part of an outer beltway for the metropolitan Washington region, which was later abandoned by planning officials throughout the region. Although various federal agencies condemned the proposed ICC as environmentally unsatisfactory, planning agencies nevertheless carried it forward for detailed study, and a decision approving the toll road was issued in mid-2006.

IPR represents Environmental Defense and Sierra Club in their efforts to stop the ICC. Air pollution from the proposed road into the region, which already exceeds

national air quality standards for a variety of pollutants emitted by motor vehicles, is expected to increase the incidence of asthma, respiratory disease, cancer, and cardiovascular disease in the neighborhoods surrounding the proposed toll road.

An IPR student drafted portions of a thirty-eight count complaint that was filed in the United States District Court for the District of Columbia December 2006. The complaint alleges violations of the Clean Air Act, Administrative Procedure Act, National Environmental Policy Act, Federal-Aid Highway Act, and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), by, *inter alia*, the Federal Highway Administration and the National Capital Region Transportation Planning Board. An IPR fellow presented an overview of the legal claims asserted in the complaint at a press conference attended by a variety of local and national media outlets.

The National Capital Region Transportation Planning Board and the Federal Highway Administration filed motions to dismiss the claims alleging violations of the national transportation planning objectives to “serve the mobility needs of people and freight and foster economic growth and development within and between States and urbanized areas, while minimizing transportation-related fuel consumption and air pollution.” In opposing the motions, IPR students drafted successful motions seeking the right to conduct preliminary discovery relating to the status of the National Capital Region Transportation Planning Board as a federal agency. IPR students also worked on the briefs filed in opposition to the motions to dismiss. After the case was transferred to the District of Maryland to be consolidated with another matter challenging the proposed ICC and subjected to an expedited briefing schedule, IPR successfully negotiated Environmental Defense and Sierra Club’s right to re-assert their arguments in another proceeding not subject to the expedited briefing schedule.

After reviewing the 300,000 page administrative record and relying on the work of IPR students, an IPR fellow drafted and filed a motion for partial summary judgment on the National Environmental Policy Act, Federal-Aid Highway Act, and the Administrative Procedure Act claims in July 2007. Defendants filed their cross-motion for partial summary judgment and opposition to the motion in August 2007. IPR students and fellows prepared and filed a reply and opposition to Defendants’ cross-motion in September 2007. An IPR fellow argued the motion on behalf of Environmental Defense and Sierra Club.

In mid-August, IPR filed a motion for partial summary judgment seeking vacatur of the conformity determination of the proposed ICC under the Clean Air Act. Defendants filed their cross-motion for summary judgment on the Clean Air Act claims in mid-September. IPR filed a reply in early October 2007, and Defendants filed their reply in mid-October. Co-counsel Bob Yuhnke argued the motions before the court after mooting the argument before IPR students and fellows.

In late October, IPR students and fellows prepared and filed a motion for partial summary judgment requiring Defendants to prepare a supplemental environmental

impact statement pursuant to the National Environmental Policy Act. Defendants filed their cross-motion for partial summary judgment in late October, and IPR students and fellows prepared and filed a reply brief in early November.

On November 8, 2007, the District Court for the District of Maryland ruled in favor of Defendants. IPR assisted Environmental Defense and Sierra Club in preparing their appeal to the ruling, which is currently pending before the Fourth Circuit Court of Appeals.

### **3. Potomac Riverkeeper – Mirant Potomac River Generating Station**

Since Fall 2005, IPR has represented Patuxent Riverkeeper and Potomac Riverkeeper (collectively, “Riverkeepers”) in their efforts to close down or significantly limit the emissions of the Mirant Corporation’s Potomac River Generating Station (“PRGS”). The PRGS is a coal-fired power plant in Old Town Alexandria on the shores of the Potomac River that has been a major source of pollution to the river and the city. In May 2007, IPR became aware that the Virginia Air Pollution Control Board (“Board”) had noticed the renewal of Mirant’s Permit for the Control of SO<sub>2</sub> for public comment. On May 21, 2007, IPR filed comments on behalf of the Riverkeepers, again voicing their concerns about the plant’s continued operation on public health and water quality. The Board issued a permit with stringent SO<sub>2</sub> limits, and Mirant filed a petition in Virginia Circuit Court to review the Board’s decision. In Fall 2007, an IPR student drafted a motion and amicus brief in support of the Board’s decision. In March 2008, the court dismissed Mirant’s petition.

Mirant and the City of Alexandria have since settled to allow the PRGS’s operations to continue under certain circumstances. The Board recently issued a comprehensive permit for the PRGS, which IPR is currently reviewing with its clients to see what options there may be for further action.

### **4. Particulate Matter Rulemaking *Amici* Brief**

In December 2006, the American Lung Association brought suit against the Environmental Protection Agency in the United States Court of Appeals for the District of Columbia Circuit, claiming that the new national ambient air quality standard for fine particulate matter (soot) is not sufficiently protective of human health. Fine particulate matter is emitted by motor vehicles and is known to cause a number of adverse human health impacts.

In January 2007, IPR began representing the American Thoracic Society and other medical associations in their efforts to promote a more protective standard for soot pollution by filing an amicus brief in the American Lung Association lawsuit. An IPR student contacted opposing counsel to obtain consent to file the *amici* brief and drafted the motion for leave to participate as *amici*, which was granted by the Court. IPR students

and fellows drafted the amicus brief on behalf of the medical associations. The brief was filed on October 9, 2007, and oral argument before the Court is scheduled for September 15, 2008.

## **B. Water Quality**

### **1. Mattaponi Tribe – King William Reservoir**

Since 1996, IPR has represented the Mattaponi Indian Tribe in its opposition to the construction of a large-scale reservoir located near its reservation in southeastern Virginia. The project would threaten more than two hundred and fifty Indian archeological sites, many of which are eligible for inclusion in the National Register of Historic Places, and would result in the largest destruction of wetlands in Virginia since the passage of the Clean Water Act. The Tribe's reservation is on the banks of the Mattaponi River, three miles downstream from where water will be withdrawn to fill the proposed reservoir. The Mattaponi people subsist on an annual shad harvest from the Mattaponi River, and the proposed intake pipe for the reservoir is located in the middle of prime shad spawning grounds. The Tribe is deeply concerned that the water withdrawal would impair its ability to continue its culturally and economically vital shad fishing.

The City of Newport News ("City"), on behalf of a group of cities and counties in Virginia's lower peninsula called the Regional Raw Water Study Group ("RRWSG"), has obtained all state and federal permits necessary for the project. For many years, the Tribe challenged one of the state permits in the Virginia state courts. IPR students drafted complaints, prepared motion briefs, worked on discovery, prepared for trial, and helped prepare IPR staff attorneys for oral arguments. Ultimately, IPR achieved a favorable settlement for the Tribe that preserved the right to continue its lawsuit in federal court challenging the Clean Water Act permit (see below), to speak publicly about its opposition to the project, to participate in administrative hearings related to the project, and to pursue litigation in state court if the reservoir project changes significantly from the current proposal.

The Tribe is currently involved in a lawsuit challenging the issuance of the King William Reservoir's federal Clean Water Act permit, which is pending in the United States District Court for the District of Columbia. Along with three environmental groups, the Tribe brought claims in late 2006 against the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("the Corps"), alleging that the federal permit violates the Clean Water Act and the National Environmental Policy Act. Although the Corps produced a large administrative record relating to its decision to grant the permit, EPA refused to produce any documents to support its decision not to exercise its authority to "veto" the permit. On August 30, 2007, IPR filed a motion on behalf of the Tribe to compel EPA's production of a record. An IPR student drafted the reply brief. The magistrate judge granted the motion and ordered EPA to produce an administrative record.

From September 2007 to May 2008, three IPR students drafted the majority of a summary judgment motion on behalf of the Tribe. IPR filed the motion on July 15, 2008. Further briefing and oral argument will occur this fall and winter.

## **2. Zoning Regulation Amendments**

In Spring 2008, IPR prepared comments on behalf of Earth Conservation Corps and Maryland Native Plant Society regarding the District of Columbia's proposed amendments to the District's floodplain, wetlands, and stream valley zoning regulations. An IPR student and fellow prepared comments on the proposed regulations, seeking clarification on a number of issues and asking the District to limit development that would adversely affect neighboring properties by increasing the risk of flooding or degrade wetlands or stream quality. IPR is currently awaiting the Office of Planning's response to the comments.

## **3. Smith Automobile Recycling**

In the late 1990's, IPR had represented the Anacostia Watershed Society in taking legal action against Joseph Smith & Sons, Inc. ("Smith"), an auto recycling facility in Cheverly, Maryland, that abuts the Lower Beaverdam Creek, a tributary of the Anacostia River. The case ended in a settlement requiring Smith to take numerous corrective actions to protect the creek. In Spring 2008, various environmental and citizens' groups asked IPR to determine whether Smith continues to violate any environmental laws. Among other things, the groups are concerned about Smith's potential toxic discharges into the creek. An IPR student attended client and public meetings and drafted information requests to federal and state agencies on behalf of the groups. IPR is currently reviewing the documents it received in response to these requests and will draft an opinion letter to the groups regarding legal options.

## **C. National Environmental Policy Act and Endangered Species**

### **1. Fort Dupont Transfer**

In Spring 2008, IPR submitted information requests to various federal and district agencies on behalf of Maryland Native Plant Society regarding the proposed transfer of jurisdiction of portions of Fort Dupont Park for recreational development. The proposed recreational development could include expansion of an ice rink and the Washington Nationals youth baseball academy into a globally rare ecosystem in the Park known as a terrace gravel forest ecosystem, exposing the forest to invasive species and degradation. The National Park Service is analyzing the environmental impacts of the proposed transfer pursuant to the National Environmental Policy Act. Pursuant to NEPA, IPR obtained a request for an extension of time to ensure fuller public participation in the comment process. In Spring and Summer 2008, IPR submitted comments on behalf of Maryland Native Plant Society, Audubon Society of the District of Columbia, Audubon Naturalist Society of the Central Atlantic States, Anacostia Watershed Society, Casey

Trees, and the Sierra Club (D.C. Chapter) on the proposed transfer of jurisdiction, calling on the National Park Service to abandon its proposal to transfer jurisdiction of portions of Fort Dupont Park to the District for recreational purposes. IPR is awaiting the National Park Service's response to the comments.

## **2. Rock Creek Park Wireless Telecommunication Plan**

In Spring 2008, IPR students and fellows sought and obtained information regarding, and an extension of time to comment on, the National Park Service's proposed Wireless Telecommunication Facilities Plan for Rock Creek Park. IPR students and fellows drafted comments on the proposed Plan on behalf of Audubon Naturalist Society of the Central-Atlantic States, Inc., Audubon Society of the District of Columbia, Crestwood Neighborhood League, DC Environmental Network, Friends of the Earth, Friends of Rock Creek Environment, Maryland Native Plant Society, Maryland Ornithological Society, Montgomery Bird Club, National Parks Conservation Association, and the Sierra Club (D.C. Chapter). The comments identified that the environmental assessment relied on by the National Park Service to authorize wireless telecommunications facilities in Rock Creek Park incorporated a flawed legal analysis, failed to demonstrate a need for additional facilities in the Park, improperly dismissed or failed to consider other reasonable alternatives, and failed to consider a variety of impacts from the proposed plan, all contrary to the requirements of the National Environmental Policy Act. IPR is currently awaiting the National Park Service's response to the comments.

## **3. Synergics Wind Energy**

In July 2004, IPR began representing D. Daniel Boone, Alice Eastman, the Maryland Alliance for Greenway Improvement and Conservation, and the Audubon Naturalist Society of the Mid-Atlantic States regarding the application of Synergics Wind Energy LLC to construct a 24-turbine, wind-powered electricity generation facility in Garrett County, Maryland. The group is concerned that constructing the wind farm will harm endangered and protected species, including birds and bats. Over Synergics's opposition, IPR convinced the Maryland Public Service Commission (PSC) Hearing Examiner to allow the group to participate in the application proceeding as intervenors, thereby granting them all the rights of parties to the proceeding.

IPR students and staff worked throughout 2004 and 2005 reviewing record evidence, developing evidence, preparing expert testimony, and preparing for an evidentiary hearing regarding the application in May 2005. Shortly before the hearing, Synergics submitted a short Supplemental Application, proposing a project with fewer, but larger turbines. After considering a motion written by an IPR student and oral argument presented by an IPR fellow, the PSC Hearing Examiner stayed the proceedings pending presentation of further supplemental information by Synergics. Synergics filed a Supplemental Application, which IPR and its retained experts reviewed, and an evidentiary hearing was held on the Supplemental Application in September 2005.

After reviewing the hearing transcripts and available evidence, an IPR student helped draft two post-hearing briefs, which were filed with the Hearing Examiner in late 2005. IPR argued that the available testimony and record evidence showed that the Hearing Examiner should either deny the application because the project could not be constructed or operated in accordance with applicable environmental laws or grant the application with conditions recommended by Maryland Department of Natural Resources and IPR's clients.

In Fall 2006, the Hearing Examiner issued a proposed decision approving Synergics's application with the conditions recommended by Maryland Department of Natural Resources. An IPR student reviewed the proposed decision and drafted a memorandum of appeal to the PSC of the proposed decision on behalf of Alice Eastman, D. Daniel Boone, and Maryland Alliance for Greenway Improvement. On behalf of all of IPR's clients, an IPR student drafted an opposition to Synergics's appeal of the proposed decision. In May 2008, Synergics withdrew its application for a Certificate of Public Convenience and Necessity from the PSC.

## **D. Solid Waste and Toxics**

### **1. Potomac Riverkeeper – Seneca Creek Lead Contamination**

Since the summer of 2003, IPR has represented Potomac Riverkeeper, Inc. ("PRK") in a dispute surrounding the operation of a skeet and trap shooting facility operated by the National Capital Skeet and Trap Club (the "Club") and located in Seneca Creek State Park, near a tributary of the Potomac River. Lead shot from the facility collected for more than fifty years in the tributary, in an adjacent wetland, and in the floodplain. IPR's actions on behalf of PRK resulted in the facility ceasing operations, but the lead contamination still remained. From July 2004 to January 2005, IPR negotiated with Maryland Department of Natural Resources ("MDNR") and the Club regarding appropriate remediation measures. Because a satisfactory agreement could not be reached, in February 2005 IPR commenced a civil action against the Club and MDNR's Executive Secretary in the U.S. District Court for the District of Maryland, alleging violations of the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA").

Following cross-motions for summary judgment and the survival of PRK's RCRA claim, the parties were able to agree to a settlement in principle in September 2006 before a Magistrate Judge. MDNR agreed to remediate the site to levels of 5 mg/L or less lead when tested using the Toxicity Characteristic Leaching Procedure (TCLP). (5 mg/L TCLP is the EPA standard for what constitutes non-hazardous waste.) In April 2007, PRK and MDNR disagreed about the size and location of "the site" to be remediated. PRK believed that MDNR should test to determine the extent of contamination, but MDNR agreed instead to remediate 10 acres, an increase from its originally proposed 7.6 acres. MDNR likely spent over \$1 million to remediate, which was completed in June 2008. IPR is now negotiating with MDNR to finalize the settlement and ensure the safety

and health of the site should any lead contamination remain. Should these private negotiations not be successful, the matter will return to the Magistrate Judge in an attempt to resolve any remaining differences or may ultimately have to be resolved in court.

## **2. Poplar Point**

Since the summer of 2007, IPR began working with Earth Conservation Corps (“ECC”) on issues related to the proposed development at Poplar Point. Poplar Point is a 110-acre federal parkland located on the east bank of the Anacostia River, bounded by I-295 and the Frederick Douglass Memorial Bridge. Although the National Park Service technically manages Poplar Point as part of Anacostia National Park, the site has been neglected for decades.

In late 2006, Congress authorized the transfer of ownership of Poplar Point from the federal government to the District of Columbia. The legislation authorizing transfer requires the Department of Interior to certify a development plan for the site that preserves at least 70 acres for “park purposes” prior to transfer. Proposals for the site include development of residential and commercial activities, retention of the entire site as parkland, and a mix of uses of the site. The National Park Service is vetting various alternative uses of the site through the National Environmental Policy Act, and IPR is heavily involved in the review and planning process, attending various community meetings and preparing comments throughout the process.

Poplar Point is highly contaminated with arsenic, polyaromatic hydrocarbons, polychlorinated biphenyls, pesticides, metals, and other pollutants from prior activities of the United States Army Corps of Engineers, Department of the Navy, Architect of the Capitol, National Park Service, and the District of Columbia. Given the present threats to human health and the environment from the contamination of the site, an IPR student drafted a notice of intent to sue those federal and district entities under the Resource Conservation and Recovery Act on behalf of Anacostia Riverkeeper, ECC, DC Acorn, Friends of the Earth, Potomac Riverkeeper, and the Sierra Club (D.C. Chapter). The notice of intent, which was sent out in June 2008, informs the federal and district entities that the coalition will sue after ninety days if the entities have not abated the imminent and substantial endangerment to human health and the environment presented by the contamination on the site by that time.