Zygmun Plater is CLEAR’s next Scholar of the Month. Professor Plater is a Professor of Law at Boston College Law School where he currently teaches and researches in the areas of environmental, property, land use, and administrative agency law. He also serves as Coordinator of Boston College Law School’s Land & Environmental Law program, with further interests in comparative international law and public interest litigation.

Professor Plater earned his B.A. with Honors from Princeton University before going on to obtain a J.D. from Yale Law School and a Doctor of Juridical Science from Michigan Law School. He has taught on seven law school faculties and received student-voted honors including Faculty Excellence in 2000 and Public Interest Law Professor of the Year in 2011. Professor Plater was also awarded the David Brower Lifetime Achievement Award in 2005 for his work in the field of environmental law.

Professor Plater has been involved in a number of issues concerning environmental protection and land use regulation over the past 30 years, including, most notoriously, service as lead counsel and petitioner in the extended endangered species litigation over the Tennessee Valley Authority’s Tellico Dam. He represented the snail darter, farmers, Cherokee Indians, and environmentalists, arguing in the Supreme Court of the United States, during congressional hearings, and before federal agencies. He also served as coordinator of legal research for the State of Alaska Oil Spill Commission over a two-year period following the wreck of the M/V Exxon-Vaize. In addition to his work in the U.S., Professor Plater has also been a consultant on environmental and land use law issues in Ethiopia, Costa Rica, Colombia, Nepal and Japan. Professor Plater has authored numerous books and articles, several of which have been cited in U.S. Supreme Court decisions, which include analyses of environmental law issues, private and public rights in land and resources, equitable discretion, administrative law, and related fields.

In A Jeffersonian Challenge from Tennessee: The Notorious Case of the Endangered “Snail Darter” Versus TVA’s Tellico Dam – and Where was the Fourth Estate, the Press?, 80 TENN. L. REV. 501 (2013), Professor Plater discusses how the modern media now constitutes the essential public information source and plays a determinative role in the intensely political internal processes of modern government at every level. As a result, the modern media now in effect serves as a fourth branch of government, or “Fourth Estate,” which is central to modern civics and is most evident in the realm of governmental protection of environmental resources and values. To help display this concept, the article draws analysis from the real-life parable of the endangered “snail darter” from Tennessee, which was used by environmental groups to persuade the Supreme Court to block completion of the TVA’s final dam project more than three decades ago and reflects on the decisive role played by the acts and omissions of local and national media.

The article begins by discussing the origin and elemental role of the press in a democracy, as first articulated by Thomas Jefferson and James Madison, and how this role has developed over time. Jefferson and Madison felt that journalism must provide “essential information to the American public so that citizens can hold their government to its high calling.” Professor Plater explains that this concept of the press continues to provide the daily flow of facts and opinion that reaches the American public’s eyes and ears. Over past decades, thoughtful journalistic inquiry, or the absence of it, has repeatedly determined how well governmental decision-making and pressure politics (the use of mass media and communications to persuade politicians that the public wants or demands a particular action) have served the public welfare.

After establishing the pivotal role held by the media today in modern civics, the article then analyzes this concept in view of the “snail darter” challenge to the TVA Tellico Project. He explains how the TVA Tellico case reflects the Jeffersonian-Madisonian challenge through an extraordinary citizen effort in which the facts of the case in the official record became clearer and clearer and, therefore, reflected that the reservoir part of the project did not make sense. Despite this success, Professor Plater contends the unfortunate twist in the Tellico Dam case is that, for the majority of Americans who followed print or electronic media throughout the 1970s, the snail darter was depicted as little more than a lightweight joke. As a result, the challenge was not met and the project was allowed to continue. This failure was the result of the fact that the media, especially...
the local media, didn’t diligently look into the shaky economic facts of the case, which would have made it apparent that the project’s justifications were unwarranted and that other alternatives could have been undertaken. This reluctance was likely in part due to the history of the region and the importance other TVA projects had provided to the area. Given TVA’s widespread political power in the region, opposition to the TVA’s will was dangerous. The national press was also equally guilty, however, as major outlets such as the N.Y. Times trivialized the case. The national press’ failures were also likely due in part to the national reach of the regional agency’s power.

The media’s role in this classic case reflects an ambiguity in modern American democracy, explaining that in no other country in the world could a small group of people lacking in power and influence have challenged a politically powerful mistake for so long and so far through the highest branches of national government. Professor Plater feels that if there had been just one or two more important factual media revelations, this intelligent media coverage alone would almost surely have succeeded in keeping the river flowing today.

In Learning From Disasters: Twenty-One Years After the Exxon Valdez Oil Spill, Will Reactions to the Deepwater Horizon Blowout Finally Address the Systemic Flaws Revealed in Alaska, 40 ENVTL. L. REP. 11041 (2010), Professor Plater discusses whether after the Deepwater Horizon (“DH”) tragedy, a spill 20 times larger than the Exxon Valdez oil spill (“EVOS”) 21 years ago, systemic lessons and changes for the future will be adopted. There are many operational and institutional similarities between the two spills which reflect conditions that were and are all too prevalent in the oil production system and that neither spill can be dismissed as an anomaly.

That systemic analysis of issues raised in the public and corporate management of these complex systems can be divided into two major sectors: prevention, which covers issues of safe design, operation, and accident avoidance before the fact of an oil spill event; and response, which includes the technical quality, practical implementability, and readiness of spill response contingency plans and the command structure that will put them into effect. Lessons can be learned from the spills in both of these areas. In particular, the article notes issues in complacency and inappropriate collusion in the prevention component, in which regulators and regulatees played together in symbiotic relationships reflecting the fact they considered themselves part of the same unitary community. In regard to response, the two disasters reveal distressingly similar systemic failures and contingency plans that were largely fiction.

The EVOS was trivialized as an anomaly by narrowing it to the captain’s problem of alcohol in an attempt to serve the interests of all parties, despite the Alaska Commission attributing the spill to systemic shortcuts that meant the ship’s crew was understaffed and lacking in sufficient sleep, as well as other laxities not attributable to the captain. However, no such reductionism is possible in the Deepwater Horizon calamity in which the blowout was clearly caused by systemic failures, starting from the initiation of the well through ultimate failures to perceive and correct imminent safety hazard conditions. The greater visibility of causative conditions in the DH spill means that responsive corrective actions are likely to address the kinds of systemic flaws that were obscured in the 1989 incident.

The Obama Administration, after inheriting a dysfunctional status quo, is now appearing to take fundamentally rational but unprecedented steps to begin addressing systemic needs for reform through responsive improvements and distressing echoes of past political dysfunctions. However, there are still issues with federal officials downplaying continuing health, safety, and ecological conditions. Ultimately, vivid disasters create practical possibilities for systemic improvement, but only if systemic flaws are publicly perceived and systemic lessons learned; as a result, the actions taken in response to such disasters will reflect what lessons will actually be learned this time around.

Professor Plater continues his analysis in The Exxon Valdez Resurfaces in the Gulf of Mexico ... and the Hazards of “Megasystem Centripetal Di-Polarity,” 38 B.C. ENVTL. AFF. L. REV. 391 (2011), where he discusses the lessons we must finally learn in order to deal more seriously with the mega-risks posed when di-polar convergences occur in these megasystems. The standard governance design in modern society, including governance of megasystems like oil production and transportation, is implicitly a “di-polar arrangement – a public-private social governing structure comprised of two theoretically counter-balancing establishments with industry players in the marketplace on one side and regulatory agencies tasked with monitoring the industry and protecting the public from industry’s market failure externalities on the other side.” However, the EVOS revealed “iron triangles” and “agency capture” in which the counter-balancing poles too often incline centripetally into each other into a combined culture of complacency, collusion, and neglect. Major oil spill calamities have demonstrated that this standard di-polar governance model for oil megasystems is poorly coordinated, insufficiently vigilant, and a risk-prone nexus that cannot be relied upon for human or ecological safety and that changes must be made, especially as drilling pushes ever farther and deeper to develop hydrocarbons.

The article’s central proposition is that “megasystems, with the potential for mega-catastrophe, require significant expansion of institutional perspectives beyond the traditional default configuration of public-private industry governance.” The article suggests that a system of regional citizen advisory councils (RCACs) provide a potentially instructive model for managing oil production and other industrial megasystems in modern industrial democracies by providing a pluralistic structural design for governing which breaks up the centripetal tendencies of the usual agency-industry dipolar system. This concept was included recommendations after both the EVOS and DH. The question now is whether such systemic changes will be adopted as a result of lessons learned from these spills; failure to adopt such systemic changes for the future would be a doubly disastrous occasion and would let a serious crisis go to waste.

Professor Plater’s work showing the interaction among social governance, regulation, and economics helps give important insight into pervasive issues that often arise in environmental law, energy and land use regulation. His articles identify systemic flaws that have arisen while also providing innovative solutions and lessons to be learned from pivotal events.

By Kyle Peterson, UNC School of Law, Class of 2015