Digital Commons @ LMU and LLS

Loyola Marymount University and Loyola Law School
Digital Commons at Loyola Marymount University and Loyola Law School

Loyola of Los Angeles Law Review | Law Reviews

4-1-1994

# Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility

J. William Futrell

Recommended Citation

J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 Loy. L.A. L. Rev. 825 (1994).
Available at: http://digitalcommons.lmu.edu/llr/vol27/iss3/5

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons @ Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

# ENVIRONMENTAL ETHICS, LEGAL ETHICS, AND CODES OF PROFESSIONAL RESPONSIBILITY

*J. William Futrell**

The environmental movement of the 1960s resulted in a massive legal response. American environmentalists and lawyers can take pride in the scope and intensity of their efforts and can point to many significant successes in cleaning up rivers, reducing pollution, and bringing endangered species back from the brink of extinction, even while acknowledging that these gains fall far short of lofty Earth Day aspirations. An increasing population, an eroding resource base, and delays in dealing with the unintended consequences of technologies still remain fundamental causes of environmental crises while our laws all too often merely address symptoms. Environmental law's ability to achieve unrealized aspirations will depend upon whether it can close the gap between environmental ethics and the professional conduct of practitioners who do not share the Earth Day generation's—or Congress's—goal of sustainability.

## I. THE EARTH DAY VISION AND CONGRESSIONAL ACTION

Environmental law's greatest achievement is its codification of a change in ethics, a legal recognition that in the second half of the twentieth century, both individual and federal agency responsibility extend to the natural world. During the next twenty-five years, the most important development in environmental law will be to implement that ethical advance as practitioners counsel reluctant clients, many of whom do not share in the vision of Earth Day.[1]

The Earth Day generation envisioned a new relationship between man and nature, calling for a fundamental change in religious and ethical thought. Albert Schweitzer's appeal for a new ethic embracing the natural world became a tenet of liberal Protestant thought resounding beyond the churches. He wrote,

---

* J. William Futrell is the President of the Environmental Law Institute. He received his undergraduate degree from Tulane University and his J.D. from Columbia University.

1. For a more detailed description of the transition from the older system of conservation law to the new environmental law, see J. William Futrell, *The History of Environmental Law*, *in* SUSTAINABLE ENVIRONMENTAL LAW 3 (Celia Campbell-Mohn et al. eds., 1993).

> The great fault of all ethics hitherto has been that they believed themselves to have to deal only with the relations of man to man. In reality, however, the question is what is his attitude to the world and all life that comes within his reach. A man is ethical only when life, as such, is sacred to him, that of plants and animals as that of his fellow men, and when he devotes himself helpfully to all life that is in need of help. . . . The ethic of the relation of man to man is not something apart by itself: it is only a particular relation which results from the universal one. . . .
>
> The ethic of Reverence for Life . . . .[2]

Rachel Carson, who dedicated *Silent Spring*[3] to Schweitzer's memory, and Aldo Leopold, who sought to show the relationship between land and the biosphere, carried forward Schweitzer's influence on environmentalism.

One of the most influential books for the environmental movement is Aldo Leopold's *Sand County Almanac*, in which he defined the need for a land ethic.[4] He wrote,

> An ethic to supplement and guide the economic relation to land presupposes the existence of some mental image of land as a biotic mechanism. We can be ethical only in relation to something we can see, feel, understand, love, or otherwise have faith in . . . . Land, then, is not merely soil; it is a fountain of energy flowing through a circuit of soils, plants, and animals . . . . A land ethic, then, reflects the existence of an ecological conscience, and this in turn reflects a conviction of individual responsibility for the health of the land. Health is the capacity of the land for self-renewal. Conservation is our effort to understand and preserve this capacity.[5]

This shift in environmental ethics was a powerful twentieth-century reformulation of the transcendentalist vision of Emerson and Thoreau that had inspired the earlier conservationists of the Progressive Era. Environmentalism and the hopes and expectations of the Earth Day generation cannot be understood without an acknowledgement of this ethical, indeed religious, shift—a shift as fundamental and disturbing to established

---

2. ALBERT SCHWEITZER, OUT OF MY LIFE AND THOUGHT 158-59 (C.T. Cameron trans., Henry Holt & Co. 1949) (1933).

3. RACHEL CARSON, SILENT SPRING (1962).

4. ALDO LEOPOLD, A SAND COUNTY ALMANAC 214-16 (1968).

5. *Id.*

social relations as earlier changes in thought leading to the end of slavery in the 1860s.

In the twentieth century, this renewed conservationist creed was first expressed in an expansion of parks, wildlife refuges, and wilderness areas. Congress passed the Wilderness Act[6] in 1964, the Land and Water Conservation Fund Act of 1965,[7] the National Historic Preservation Act in 1966,[8] and in 1968 the Wild and Scenic Rivers Act[9] and the National Trails System Act.[10] These laws and others such as the Endangered Species Act of 1973[11] and the Delaney Amendment to the Food and Drug Act[12] set absolute goals of protection, drawing a line against encroachment no matter how pressing the development.

The public and Congress, which were galvanized by a series of incidents in the late 1960s—including pesticide abuse, contaminated lakes and rivers, and smog-filled skies—demanded that the old conservation agenda be broadened to include clean up of industrial waste. As the 1960s ended the two strands of pollution control and resource management merged into the modern environmental movement.

During the 1970s Congress passed statutes covering the gamut of human activity. By the end of the decade, it had created an impressive framework to curb pollution. In 1970 Congress passed amendments to the Clean Air Act,[13] regulating hazardous air pollutants. In the same year Congress also passed the Occupational Safety and Health Act,[14] regulating work-place conditions, and the Resource Recovery Act,[15] establishing demonstration recycling programs. In 1972 Congress added

6. Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§ 1131-1136 (1988 & Supp. IV 1992)).

7. Pub. L. No. 88-578, 78 Stat. 897 (codified as amended in scattered sections of 16 U.S.C.).

8. Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470 to 470x-6 (1988 & Supp. IV 1992)).

9. Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§ 1281-1287 (1988 & Supp. IV 1992)).

10. Pub. L. No. 90-543, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. §§ 1241-1251 (1988 & Supp. IV 1992)).

11. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1988 & Supp. IV 1992)).

12. Food Additives Amendment of 1958, Pub. L. No. 85-929, 72 Stat. 1784 (codified as amended at 21 U.S.C. §§ 321, 331, 342 (1988 & Supp. IV 1992)).

13. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

14. Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-678 (1988 & Supp. IV 1992)).

15. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 91-512, 84 Stat. 1227 (1970) (codified as amended in scattered sections of 42 U.S.C.).

strong amendments to the Federal Water Pollution Control Act[16] and the Federal Insecticide, Fungicide, and Rodenticide Act.[17] The Safe Drinking Water Act[18] in 1974 was followed in 1976 by the Toxic Substances Control Act[19] and a major expansion of federal hazardous waste authority in the Resource Conservation and Recovery Act of 1976.[20]

Meanwhile, laws to protect natural resources went forward with annual efforts to strengthen the system. Congress passed the National Environmental Policy Act of 1969 (NEPA)[21] and the Marine Mammal Protection Act of 1972.[22] The Endangered Species Act of 1973[23] comprehensively reformulated the earlier acts of 1966 and 1969. The Deepwater Port Act of 1974,[24] the Forest and Rangeland Renewable Resources Planning Act of 1974,[25] the Fishery Conservation and Management Act of 1976,[26] the Federal Land Policy and Management Act of 1976,[27] the National Forest Management Act of 1976,[28] the Soil and Water Resources Conservation Act of 1977,[29] and the Surface Mining Control and Reclamation Act of 1977[30] advanced congressional efforts to bring agencies into line with the new environmental vision.

---

16. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.A.).

17. Federal Environmental Pesticide Control Act of 1972 Pub. L. No. 92-516, 86 Stat. 973 (codified as amended in scattered sections of 7 U.S.C.).

18. Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f to 300j-26 (1988 & Supp. III 1991)).

19. Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601-2671 (1988 & Supp. IV 1992)).

20. Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C.A. §§ 6901-6992k (West 1983 & Supp. 1993)).

21. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C.A. §§ 4321-4370d (West 1985 & Supp. 1993)).

22. Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1407 (1988 & Supp. IV 1992)).

23. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1988 & Supp. IV 1992)).

24. Pub. L. No. 93-627, 88 Stat. 2126 (1975) (codified as amended at 33 U.S.C. §§ 1501-1524 (1988 & Supp. IV 1992)).

25. Pub. L. No. 93-378, 88 Stat. 476 (codified as amended at 16 U.S.C. §§ 1600-1687 (1988 & Supp. IV 1992)).

26. Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-1882 (1988 & Supp. IV 1992) and 22 U.S.C. §§ 1972-1973 (1988)).

27. Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C.A. §§ 1701-1784 (West 1986 & Supp. 1993)).

28. Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.).

29. Pub. L. No. 95-192, 91 Stat. 1407 (codified as amended at 16 U.S.C. §§ 2001-2009 (1988 & Supp. IV 1992)).

30. Pub. L. No. 95-87, 91 Stat. 445 (codified as amended at 30 U.S.C. §§ 1201-1328 (1988 & Supp. IV 1992)).

In 1970 environmentalists saw executive agencies as the problem because the agencies were secretive and closed to public participation. Each agency focused on its narrow mission—whether it was building highways, digging barge canals, or applying pesticides—while ignoring environmental concerns. Environmentalists urged congressional action to compel the federal agencies and the states to higher levels of environmental performance. In response Congress narrowed executive branch discretion, transferred key management decisions from the states to the federal government, expanded citizen and press information rights, and created citizen-suit provisions to give watchdog groups a legal basis for monitoring agency implementation of environmental statutes.

The environmental plaintiffs of the 1970s found a sympathetic reception in the courts, which relaxed judicial doctrines—such as standing and scope of review—that could have barred citizen suits. Further, judges gave an expansive reading to the statutes, citing congressional intent to safeguard the environment as a reason to issue injunctions against destructive agency development plans.

Beginning in 1969, environmental law grew at an explosive rate. In 1971 the Environmental Law Institute published a summary of environmental law that filled more than 160 pages in the *Environmental Law Reporter*.[31] In 1994 the text of the acts alone took up more than 600 pages in the Statutes binder of the Environmental Law Institute's *Environmental Law Reporter*. The *Environmental Law Reporter* has published over 5000 federal court decisions.[32] As a result of the surge in environmental litigation, the courts rapidly created case law under the new federal statutes, and a mass of precedents in substantive environmental law took shape within a single decade.

Large citizen groups, which recruited millions of members, raised money to lobby Congress, and used the courts effectively, funded the litigation surge. In a three-pronged effort, they worked to open the legislature to lobbying campaigns, to open the courts to citizen suits, and to open the agencies to increased oversight and better environmental decision making. The Sierra Club, the Natural Resources Defense Council, and other groups used the courts to seek institutional reform of agencies, such as the Forest Service and the Bureau of Land Management, for violation of mandatory duties.

31. *See* 1 Envtl. L. Rep. (Envtl. L. Inst.) 10,000-167 (1971).
32. *See* [Indexes 1971-1993] 24 Envtl. L. Rep. (Envtl. L. Inst.) 1001-125 (1993).

## II. BACKLASH AND JUDICIAL RETRENCHMENT

The complexity of environmental regulation subsequently became the target of a political backlash aimed at reversing the tide of environmental controls. A counterrevolution, led by President Ronald Reagan, attacked environmental law as harmful to the economy. President Reagan tried to reduce regulation, cut government agencies, and restore a larger role for the private sector. James Watt, Secretary of the Department of Interior, and Ann Gorsuch Burford, Administrator of the Environmental Protection Agency (EPA), also sought to reduce regulation, to open up the public lands for more rapid energy development, and to subsidize resource sales of timber and minerals.

Congress checked many of these initiatives, but it was less successful in dealing with changes in the judiciary—changes that arose as Ronald Reagan and George Bush appointees charted a conservative course and espoused a philosophy of judicial deference to action by federal agencies bent on rapid development. A 1987 poll of judicial attitudes published by the American Enterprise Institute found that forty-seven percent of Republican-appointed judges, as opposed to nineteen percent of Democratic appointees, believed that environmental problems were not as serious as once thought.[33] These two conservative presidents have appointed the majority of today's judges—not only on the Supreme Court, but in the rest of the federal courts as well.

Consistent with the philosophy of judicial restraint enunciated by the new majority and by the presidents who appointed them, the increasingly conservative judicial branch seeks to curb court involvement in advancing environmental protection. The language of the judiciary both on and off the bench suggests an unwillingness to take the lead in policy making and a special discomfort with the complex administrative agency cases emblematic of environmental law.

The Supreme Court has raised hurdles to environmentalist participation in agency and court proceedings by returning to earlier, more narrow interpretations of judicial doctrines that define who can bring lawsuits. Further, the language of the Supreme Court suggests a chilly attitude toward environmental values.

In *Lujan v. National Wildlife Federation*,[34] the Court strengthened standing and ripeness requirements, thereby narrowing the qualified class of plaintiffs. Justice Antonin Scalia's attitude toward federal agencies

33. Althea K. Nagai et al., *The Verdict on Federal Judges*, PUB. OPINION, Nov./Dec. 1987, at 52.

34. 497 U.S. 871 (1990).

that violate their enabling statutes is representative of this changed attitude:

> Respondent alleges that violation of the law is rampant within this program—failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, failure to provide adequate environmental impact statements. Perhaps so. But respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department [of the Interior] or the halls of Congress, where programmatic improvements are normally made.[35]

The Court's hostility to environmental protection contrasts sharply with the opinions of the lower federal courts during the 1970s, which often contained strong language in support of achieving environmental goals. The Supreme Court gave short shrift to the national goal of sustainability, enunciated in the National Environmenal Policy Act of 1969[36] and championed in dozens of circuit court opinions, by holding it to be merely a procedural statute.[37] This chasm underscores the fundamental difference between Congress, environmentalists, and lower court judges on one hand, and the Supreme Court and some in the defense bar who give congressional mandates the narrowest interpretation on the other.

The environmental defense bar grew to rival the tax bar in both volume and intensity of opposition to government regulation as industry sought to avoid or delay the strictures of the new environmental laws. Indeed, industry successes in delaying and deflecting the purpose of the environmental laws led to a spiral of congressional reenactments that made environmental statutes increasingly detailed.

## III. Reactionary Rhetoric and Environmental Successes

This lobbying effort was accompanied by an across-the-board attack of reactionary rhetoric aimed at environmental programs. Opponents of change attacked, and continue to attack, programs aimed at improving public health and welfare "by unceasing disparagement." "Give a dog a bad name and then hang him" is the first principle of reactionary rheto-

35. *Id.* at 891.

36. 42 U.S.C. § 4331 (1988).

37. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (per curiam).

ric. Since Earth Day, enemies of environmental programs have libeled the statutes as ineffective, wasteful, and subversive. The underlying reality of environmental successes is lost in the volume of coordinated attacks that follow the classic lines of reactionary rhetoric.

Political scientist Albert Hirschman classifies the three engines of reactionary rhetoric as the perversity, futility, and jeopardy theses.[38] The perversity thesis alleges that unintended consequences of the program just make things worse. The futility thesis argues that any improvements from the program would have occurred anyway, and the jeopardy theory alleges that reform subverts fundamental legal and social values. A case in point is the Superfund program,[39] the most controversial of the environmental statutes.

The futility thesis argues that Superfund has not made a difference because so few sites have been permanently cleaned up. The emergency response portion of the Superfund law calls for rapid government intervention to *halt* the leakage and thus the threat to the ground water that provides half of the drinking water in the United States. Because remedial treatment entails astronomical costs, the best way to protect aquifers is to prevent their contamination in the first place. The emergency response program is one of the great environmental achievements of the last decade. Yet, the press and the EPA's friends are surprisingly silent about the aquifers saved in this unsung success story. Far from being futile, Superfund launched, and continues to further, a revolution in corporate boardrooms that would never have happened without effective hazardous waste management programs driven by strict liability for clean up. Prodded both by economic factors and by strong enforcement, industry is transforming our country's manufacturing practices for global competition by emphasizing pollution prevention and waste minimization. This new surge for pollution prevention is part of the total quality movement that will modernize American industry for global competitiveness in the new century.

The perversity thesis alleges that Superfund is a massive make-work program for lawyers and consultants, with transaction costs that devour clean-up dollars. This complaint focuses on Superfund's remedial response program, which is expensive, takes years—even decades—for each site, and entails extensive consulting and legal services.

---

38. *See* ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION (1991).

39. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991), created the Superfund program.

Superfund *has* produced a great deal of litigation as the federal government sues to recover its clean-up costs from the private-sector "responsible parties" who, in turn, sue each other for contribution to the final settlement.

The charge that lawyers soak up scarce Superfund resources is hard to examine because of the astonishing lack of data. A ground-breaking 1993 report from the Rand Corporation[40] found that transaction costs vary enormously among the limited universe of 108 firms surveyed at eighteen sites, but averaged much less than the anecdotal information.

Observers believe that transaction costs would skyrocket if Congress made extensive changes in the statute. The effect would be like turning over a sandglass: All the issues that had reached an angle of repose would be reopened. A decade of litigation and administrative interpretation would be scrapped to begin a new round of lawyering.

The jeopardy thesis is advanced by critics who claim that the liability system erodes the constitutional right of due process.[41] Using the statute's principles of retroactive and joint and several liability, the EPA and the Justice Department have forged the strongest enforcement tools of any environmental program. Superfund is *the* experiment using a liability scheme for clean up. The Resource Conservation and Recovery Act of 1976[42] uses classic command-and-control regulation. Additionally, federal facilities clean up is being implemented as a classic public works program—at a cost one-third higher than Superfund private-party clean ups.

The intensity of the attack on Superfund results from the effectiveness of liability systems in comparison to regulatory and subsidy systems. The courts reject the due process claims; yet, the critics press the claims, hoping for a congressional return to a regulatory or a subsidized clean-up system. The federal courts have deferred consistently to the EPA's judgment, and Congress has shown little desire to tinker with a program that has taken so long to settle down.

The United States is making solid progress in bringing its hazardous waste disposal problems under control. During the last fifteen years, U.S. policy has evolved from a local emphasis that resulted in a proliferation of polluting dumps to a national strategy of pollution prevention that reduces the amount of wastes produced. While the current Superfund program does require a mid-course correction—as do all ma-

40. LLOYD S. DIXON ET AL., PRIVATE-SECTOR CLEANUP EXPENDITURES AND TRANSACTION COSTS AT 18 SUPERFUND SITES (1993).

41. U.S. CONST. amends. V, XIV.

42. 42 U.S.C.A. §§ 6901-6992k (West 1983 & Supp. 1993).

jor environmental programs—its successes should be celebrated and built upon, not endangered because of reactionary rhetoric.[43]

## IV. THE NEW PROFESSION OF ENVIRONMENTAL MANAGEMENT

Inspired by the desire to do the right thing and sobered by heavy litigation costs, bad publicity, and exposure to open-ended liability, industry leaders moved to shape proactive approaches to environmental management. The private sector responded by creating a new profession of environmental management. Corporations use environmental auditing to avoid pollution incidents and governmental intervention.[44] At the same time, environmental strategists have begun to focus on laws that would encourage pollution prevention.

Currently, the EPA is emphasizing pollution prevention as a core strategy to achieve national environmental policy goals. Pollution prevention refers to the reduction or elimination of any pollutant *before* recycling, treatment, storage, or disposal. Pollution prevention can be achieved through a variety of methods, including substitution of raw materials, product reformulation, process changes in the factory, and improved maintenance and housekeeping. Pollution prevention requires a revolution in management psychology and an emphasis on planning.

## V. THE KEY ROLE OF THE PRIVATE BAR

The United States has built up a complex regime of laws and regulations designed to protect public health and the environment. But this system is not self-implementing. Achievement of the environmental protection goals envisioned by these statutes requires not only concerted enforcement efforts on the part of the government, but also the consistent cooperation of the private environmental bar, the lawyers representing the regulated industries.

The key role of the private bar is due to the unique characteristics of environmental law. Environmental law, with its mixture of science and

43. Hazardous waste problems are symptomatic of deeper, underlying problems in environmental management. We must move beyond the current set of statutes that independently address individual media: air, water, and land. The Environmental Law Institute has published a new treatise outlining a new and better approach. *Sustainable Environmental Law* outlines a new law of environmental protection that urges the integration of natural resource and pollution control statutes with a greater emphasis on prospective planning. *See* SUSTAINABLE ENVIRONMENTAL LAW, *supra* note 1. Hazardous wastes problems have caught the public's attention; law reformers must now direct the public's attention upstream through the earlier phases of industrial activity to close the resource-to-recovery cycle.

44. *See* FRANK B. FRIEDMAN, A PRACTICAL GUIDE TO ENVIRONMENTAL MANAGEMENT 3-14 (1988) (describing evolution of corporate management strategies).

policy, operates through a complex system of regulations that relies for its effectiveness on massive inputs of information and self-reporting by those regulated. The need for more explicit ethical guidance drafted with environmental lawyers in mind becomes greater as environmental regulations proliferate and lawyers take on an increasingly significant role in the administration of the environmental law system—through advising clients on compliance, negotiating with government authorities, and engaging in litigation. These lawyers are essential players in providing the information on which the whole system's performance depends.

Consistent compliance by the regulated community with ongoing regulatory requirements—the most important aspect of which is full and accurate reporting—is crucial to the smooth functioning of the environmental protection system. The lawyers' duty in advising their clients on compliance and reporting is key for the system to function and to serve the public interest in both environmental protection and the rule of law.

Current codes of attorney conduct do not directly address the heightened duties of environmental lawyers to assist their clients in implementing the new self-reporting schemes of the regulatory state. The current codes are based on a tradition of advising the client to offer as little information as possible in order to avoid self-incrimination. Under such codes discreet silence—not open disclosure—is the norm. This approach runs counter to the operation of our environmental laws.

### *A. Codes of Professional Conduct, Legal Ethics, and Environmental Ethics*

Traditionally, the sources of the rules regulating attorney behavior have been codes of professional conduct drafted by committees of lawyers and administered by state bar associations. Over half the states now have codes patterned after the American Bar Association's Model Rules of Professional Conduct; most of the rest base their codes on the Rules' predecessor, the Model Code of Professional Responsibility. Both the Model Code and the Model Rules implicitly assume that the adversarial system is the lawyer's proper arena. The paradigm case on which most of the rules were modeled is that of the lone criminal defendant, for whom a lawyer is the only means of asserting innocence and who seeks to prevail against the system by stonewalling the government. Although the rules have been supplemented to respond to problems unique to corporate clients, government lawyers, and other specialized practice groups, the underlying premise remains: Lawyers should subsume their personal ethical beliefs and moral stances to the positions that zealous advocacy of their clients' interests require.

Environmental lawyers are offered little guidance other than the minimum standards prescribed by attorney codes of conduct. Most of the literature in legal ethics and the focus of the profession has been on the letter of those codes, which set forth the lowest common denominator of conduct required to keep lawyers from being jailed or disbarred. Legal ethics—the ideals and aspirations that motivate the "good lawyer"—are seldom discussed, in part because of the reticence of the bar. There is little guidance on how legal ethics meshes with environmental ethics.

As lawyers become increasingly specialized, focusing on such well-defined areas as tax, securities, or banking law, the professional monopoly guaranteed to bar members may impose correlative duties to uphold certain standards of practice. These specialized practice areas involve complex regulatory systems that impose ongoing reporting requirements on clients. The reporting requirements, in turn, are driven by the public interest in full disclosure of information that is necessary to administer complex regulatory schemes enacted to protect the many from the manipulations of the few. But the government's ability to monitor compliance with these rules is minimal.

The duties of government lawyers also demand scrutiny. The intentional misrepresentation of facts or law is a generic problem in legal ethics, but is especially sensitive in the environmental law field with its law-science mix. The omission, suppression, or willful misinterpretation of facts or law should carry greater penalty in environmental law because of the need to apply uncertain scientific data. In *United States v. Envirite Corp.*,[45] for example, the court vacated a consent decree because the government withheld exculpatory documents showing that the EPA had failed to deliver crucial laboratory tests strengthening the defendant's case.

### *B. Searching for New Standards*

Increasingly, federal agency enforcement officials and others are responding to the critical role of attorneys in promoting or undercutting regulatory compliance by heightening attorney responsibilities under complex regulatory statutes to exceed levels of conduct mandated by state bar rules. Under this approach lawyers who fail to urge their clients to disclose information in doubtful situations may be charged with aiding and abetting—or even causing—any consequent violations. Alternatively, regulatory agencies may argue that the public law aspect of

45. 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,887 (C.D. Conn. Apr. 3, 1991).

the statutes they administer effectively renders attorneys fiduciaries—not of their clients alone, but of the public interest in implementing federal laws and regulations—thus imposing on the attorneys themselves an independent duty to disclose potential violations.

Most notably, the Federal Office of Thrift Supervision (OTS) recently applied such an approach to the law firm of Kaye, Scholer, Fierman, Hays & Handler, seeking $275 million in civil penalties against the firm for its alleged failure to disclose to the government the poor lending practices of its client, Lincoln Savings & Loan.[46] Before the OTS suit settled for forty-one million dollars, OTS Chief Counsel Harris Weinstein summarized the agency's view that the Model Rules and state analogues establish only minimum standards of acceptable attorney conduct. Weinstein argued that lawyers advising on regulatory compliance must instead practice "whole law," interpreting a regulatory scheme to fulfill its broad purpose of protecting the public interest, rather than seeking narrow technical constructions that can excuse a client from disclosure.[47]

Many aspects of environmental practice may be similarly ill-suited to the adversary model of professional legal ethics, with its creed of zealous advocacy with little regard for the public interest or moral norms. In fact, the practice of environmental law demands even stronger regard for the public interest than does securities or banking practice. Environmental statutes are motivated by a broad need to protect the public, often from harms that may not be immediate but are far-reaching in their ability to disrupt and destroy. For example, the preamble to the Clean Air Act expresses a statutory purpose "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[48] Observance of ongoing reporting requirements is essential to the effective administration of these laws and regulations; strict liability for nondisclosure is common.

Environmental law cannot protect society unless environmental lawyers ensure that it does so. Guidance on how to resolve the conflicting demands of client advocacy and protection of the public interest in

46. *See* Dorothy J. Glancy, *Ethical Responsibilities in Regulatory Practice: Where does* Kaye Scholer *Leave Us?*, *in* AMERICAN BAR ASSOCIATION SECTION OF NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW FALL MEETING 3, at 3 tbl. 17 (discussing application of ethical duties from savings and loan litigation, like *Kaye, Scholer*, to environmental lawyers).

47. *Speech by OTS Chief Counsel Weinstein on Duties of Depository Institution Fiduciaries*, 55 Banking Rep. (BNA) 510, 512 (Sept. 24, 1990).

48. 42 U.S.C. § 7401(b)(1) (1988).

environmental protection will benefit not only the legal profession, but society as a whole.

### C. *Bridging Legal Ethics and Environmental Ethics*

The legal profession's obligation and right to discipline itself has deep roots in our legal system. To earn the right to continue its monopoly in the practice of law and its primary role in the regulation of its members' conduct, the bar has an obligation to adapt its rules of professional responsibility to changing legal schemes and increasing threats to the ecological order. The Model Rules themselves supply a basis for further study of the demands the public interest may make on the environmental attorney in the regulatory world. Rule 2.1 states that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation."[49]

In searching for new standards, the rules of professional conduct may be a rich source of law. The National Association of Environmental Professionals (NAEP) encourages training and research into the ethical issues facing environmental consultants. A key component of the NAEP's Code of Ethics and Standards of Practice for Environmental Professionals is its provisions seeking to ensure the validity of data and guard against its misrepresentation. In a recent wrongful discharge case, an oil company employee was terminated after he refused corporate counsel's request that he revise environmental audit reports to shield company executives from knowledge of noncompliance.[50] The employee successfully argued that his termination violated public policy because it punished him for complying with the NAEP's Code of Ethics. Like many of the rulings—which are often from the bench or arise on a motion for sanctions—on ethical questions in environmental law, the result of this case is not reported.

Future developments in legal ethics should adopt the vast change in social values of the last twenty-five years as reflected in the development of environmental ethics. The new field of environmental ethics has generated new journals and intense discussion in the seminaries and philosophy faculties. Leaders of the environmental movement quote Aldo Leopold and Albert Schweitzer on the need for a land ethic and for reverence for life—fundamental concepts behind the call for biodiversity protection.

---

49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983).

50. *See* Christopher R. Bryant, *Court Recognizes Environmental Ethics*, POLLUTION ENGINEERING, May 15, 1992, at 29.

The source of the ethical principles that are needed to guide environmental lawyers may already exist, in the form of the environmental laws those lawyers are charged with interpreting and administering. The evolution of ethics occurs through law. As the ethical frontier in our democracy has advanced from the individual to the community, law has been the main instrument for teaching society the content of the ethical norms agreed on by the majority.

## VI. CONCLUSION

The Earth Day leaders persuaded Congress to graft Aldo Leopold's land ethic into the environmental statutes. Aldo Leopold convincingly articulated the idea of an environmental ethic and the vision of how that ethic could guide social development; he called for a land ethic reflecting a conviction of individual responsibility for the health of the land and its self-renewal.

During the 1960s Leopold's land ethic took hold in the United States among socially active individuals and ecological organizations. But this ethical ideal received its strongest and most significant endorsement, and became transmuted into a principle that would shape society, in the environmental protection laws passed by Congress in the late 1960s and early 1970s. These laws reaffirmed Leopold's ideas as legally binding goals and policies: They transformed the environmental ethic into a principle of public policy.

The most powerful expression of this change is NEPA: "[I]t is the continuing responsibility of the Federal Government to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the nation may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[51] Similarly, in the Federal Water Pollution Control Act Amendments of 1972, Congress again set goals that reflected its decision to choose the side of life. The preamble to that statute posits the goal of preserving the "biological integrity" of the nation's waters.[52]

Through these and other environmental statutes, Congress has incorporated the new vision of environmental ethics into law. Yet these laws are not self-effectuating. Environmental lawyers have a primary role in ensuring that the purposes of these statutes will be fully achieved. The principles of environmental ethics, now endorsed in national stat-

51. 42 U.S.C.A. § 4331(b)(1) (West 1985).

52. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C.A. § 1251 (West 1986)).

utes, provide the lodestar for the development of an environmentally and socially responsible code of behavior to guide the day-to-day actions of the environmental lawyer.