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LEGAL ETHICS FOR ENVIRONMENTAL LAWYERS: REAL PROBLEMS, NEW CHALLENGES, AND OLD VALUES

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In 1991, Solano County Deputy District Attorney Mark Pollack filed criminal charges against the 16-lawyer San Francisco firm of Sullivan, Roche & Johnson and associate William Scherer, alleging that they encouraged a client to illegally abandon hazardous waste at its vacated headquarters.¹ Although a municipal court judge dismissed those and other subsequently filed charges against the defendants,² the debate about legal ethical obligations of environmental practitioners rages on. The controversy stems from the recognition that environmental lawyers, unlike their brethren in tax and banking, may actually identify with the agenda of the activist public regulators³ and thus face a moral crisis in choosing between their clients' and society's interests. Some commentators view the predicament that environmental lawyers face as an "either/or" dilemma—either act as a "hired gun" for a client who dumps hazardous waste upstream from an orphanage's playground or try saving the children by actually blowing the whistle on your client to the appropriate authorities. Such polarization, however, while providing fertile ground for academic speculation (and it does seem that most of these commentators belong to the academia), offers little guidance to practitioners who confront real world problems. *A more balanced approach, however, recognizes that the interests of the client and the*

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¹ Don J. DeBenedictis, *Advice is Legal: Pollution Charges Dismissed Against Law Firm, associate*, 77 A.B.A. J. 17 (Oct. 1991).

² Marianne LaVelle, *Judge Drops Charges Against S.F. Law Firm*, NAT'L L. J. (Apr. 6, 1992).

³ See David Dana, *Symposium: Business Lawyering and Value Creation for Clients: Environmental Lawyers and the Public Service Model of Lawyering*, 74 OR. L. REV. 57, 67-68 (1995).

As far as I know, aspiring tax lawyers do not generally have greater sympathy for the Internal Revenue Service than for taxpayers. Nor is there any reason to believe that aspiring banking lawyers are much more sympathetic to the positions of the banking agencies that they are to those of any banks.

Id.

public do not necessarily conflict and that a conscientious lawyer can reach the optimal solution without compromising his/her loyalty to either.

I. THE CONVENTIONAL MODEL—PROTECTING THE ENVIRONMENT VS. PROTECTING ONE'S FINANCIAL WELL BEING

The traditional discussion of ethical dilemmas follows familiar paths. The academic commentators lament the lack of ethical standards as though ethical quandaries can be reduced to a simple computer logarithm. They lament their perceived "sell-out" of environmental lawyers as though the responsibility of the latter somehow differs from the responsibility of the rest of the profession to provide a vigorous defense to their clients. Finally, they demonize the "hired guns" without ever addressing the benefits that the society gains from the under-enforcement of draconian environmental regulations. The practitioners respond to all these criticisms by noting that the integrity of the judicial system rests on the zealous advocacy skills of each side.

A. *If A, then B; if B, then C . . .*

Long before the institution of lawyers began its existence, the question of "right" and "wrong" has fascinated most philosophers. Unable to resolve every conflict, the philosophers resorted to simple guidelines defining the extremes while leaving gray areas up to individual interpretation. Certain religious movements have attempted to codify rules of behavior in every imaginable setting (e.g., Talmud in Judaism), but the resulting tomes have proven to be too cumbersome and, some would argue, unable to address societal changes. The legal profession chose the philosophical approach of relying on the judgment of its members when it adopted the American Bar Association's Model Rules of Professional Conduct or its predecessor, the Model Code of Professional Responsibility.⁴ As the following examples illustrate, while such guidance leaves many questions unanswered, it does provide sufficient framework for an attorney to choose the proper course of action.

1. Conflict of Interest in Superfund Litigation

⁴ See J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 LOY. L.A. L. REV. 825, 835 (1994).

Litigation under Comprehensive Environmental Response, Compensation, and Liability Act⁵ ("CERCLA" or "Superfund")⁶ presents the clearest illustration of the limitations that any codified system of legal ethics would have. Many law firms have long abandoned the principle that "no man can serve two masters" in pursuit of the possibility of multiple successes, the praise of the legal community, enhanced reputation for the firm, and an expanded client list.⁷ These firms sometimes forget that a continued representation of parties despite the existence of a conflict of interest can seriously injure a firm's reputation and possibly result in monetary damages and disciplinary action against the attorneys and the firm.⁸ The complexity and size of a typical environmental proceeding combined with a relatively small number of qualified firms increases the likelihood of a conflict of interest.⁹ Because under CERCLA, any person who has contributed to the disposal of hazardous substances can be held responsible, the number of potentially responsible parties ("PRPs") can reach well into the hundreds.¹⁰ The greater number of PRPs increases the likelihood that a single firm would represent several parties.¹¹ Although certain natural groupings of parties in Superfund litigation may benefit from multiple representation and survive potential conflicts because of the continuing relationship between them, practitioners should be wary of a potential conflict of interest in all other cases.¹²

Model Rule 1.7(a) provides that no lawyer shall engage in multiple representations of clients whose interests will directly conflict, unless he or she reasonably believes that the representation will not be adversely affected, and each client consents to the representation.¹³ While Rule 1.7(a) applies to "definite" conflicts, a milder Rule 1.7(b) applies to potential conflicts. Rule 1.7(b) bars the representation of the client only if the representation will be "materially limited" by the lawyer's outside interests or responsibilities.¹⁴ Rule 1.7 clarifies the requirements needed

⁵ 42 U.S.C. §§ 9601-75 (1994 & Supp. V 1999).

⁶ Patrick E. Donovan, Comment, *Serving Multiple Masters: Confronting the Conflicting Interests that Arise in Superfund Disputes*, 17 B.C. ENVTL. AFF. L. REV. 371, 372 (1990).

⁷ *Id.* at 372.

⁸ *Id.* at 371.

⁹ *Id.* at 372.

¹⁰ *Id.* at 373.

¹¹ *Id.*

¹² Donovan, *supra* note 6.

¹³ MODEL RULES OF PROF'L CONDUCT R. 1.7 (2001).

¹⁴ *Id.* at R. 1.7(b).

to conduct multiple representations under Canon 5 of the Model Code and Disciplinary Rule 5-105(A) and (C) by dictating that the client's informed consent must be independent of the lawyer's reasonable belief that the representation will not be adversely affected.¹⁵ Unfortunately, the Model Rules do not explain when it is "reasonable" for an attorney to believe that a multiple representation is permissible.¹⁶ Nor do they provide guidance in determining when a multiple representation becomes "adversely affected" aside from the observation in the comments to Rule 1.7 that adverse effect occurs "when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."¹⁷ Finally, guidance on what constitutes a "fully informed consent" is limited to advising one's client to consult a separate counsel before consenting.¹⁸ While Rule 1.7 addresses representation of multiple *current* clients, Rule 1.9 deals with representation that has an adverse impact on a *former* client.¹⁹ It prohibits the representation of a client who has a materially adverse interest with a former client in the same or substantially related matter unless the former client consents.²⁰ The comments to the Rule, however, allow the representation of a new client with adverse interests in a similar matter so long as the representation involves a wholly distinct problem.²¹

The vagueness and multiplicity of these rules poses substantial hazards for any law firm engaged in CERCLA litigation. The standards of liability established in section 107 of CERCLA and the application of joint and several liability not only discourage attempts at common defense but also encourage cross-claims between the defendants designed to limit individual liability.²² Given the potential magnitude of joint and several liability, parties invariably argue for apportionment.²³ However, transporters and *de minimis* generators protest such methodology and argue that the large-volume generators and generators of different hazardous substances should bear most of the burden.²⁴ The EPA's

¹⁵ Donovan, *supra* note 6, at 375.

¹⁶ *Id.*

¹⁷ *Id.* at 376.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ MODEL RULES OF PROF'L CONDUCT R. 1.9 (2001).

²¹ *Id.* at R. 1.9 cmt.

²² Donovan, *supra* note 6, at 381.

²³ *Id.* at 387.

²⁴ *Id.*

settlement procedures further intensify the adversity through the threat of disproportionate share of clean-up costs for non-settling litigants.²⁵ More specifically, the agency refuses to release vital volumetric data until after PRPs have answered informational requests.²⁶ Moreover, PRPs have a short timeframe in which to decide whether to negotiate with the government.²⁷ Finally, the use of contribution protection, non-binding allocations of responsibility ("NBARs"), *de minimis* contribution settlements, and mixed funding polarizes PRPs, particularly if a relatively small group of PRPs refuses to agree to a settlement proposal.²⁸ CERCLA protects settled PRPs both by allowing them to seek contribution from other PRPs and by not allowing other PRPs to seek contribution from them.²⁹ EPA utilizes NBARs as an optional tool to establish preliminary guidelines for allocation.³⁰ While NBARs can help a PRP class by providing an objective analysis of the situation, an attorney representing multiple clients may face an obstacle if one of his clients disagrees with the proposed allocation of responsibility.³¹

Such conflicts can be avoided when a group of PRPs share similar interests and obligations, as in the case of PRPs that operate in the same community and may feel mutually obligated to contribute to clean-up efforts to maintain their status and relationship with that community.³² The existence of a mutually beneficial business relationship may also entice parties to present a common defense to ensure the continuation of the relationship.³³ Aside from these natural groupings, the practitioner in a multiple representation should carefully consider not only the potential for current conflict, but the possibility of a future conflict as each PRP seeks to minimize its own liability through either settlement or litigation.

2. Attorney Fees in Citizen Suit Settlements

²⁵ *Id.*

²⁶ *Id.* at 384.

²⁷ *Id.*

²⁸ Donovan, *supra* note 6, at 388.

²⁹ *Id.* at 390.

³⁰ *Id.* at 391.

³¹ *Id.* at 391.

³² *Id.* at 394.

³³ *Id.*

The modern day citizen suit originated in the common law *qui tam* action.³⁴ "The *qui tam* action is a traditional remedy by which a citizen can bring a law suit 'in the name of the king,' particularly where the citizen has a direct personal stake in the prosecution."³⁵ A citizen suit puts the plaintiff's attorneys in an unenviable position of being between the proverbial "rock and a hard place" in settlement negotiations.³⁶ Because in these cases attorneys rarely have paying clients, they must recover their fees from the settlement proceedings through statutory fee-shifting provisions.³⁷ However, corporate defendants prefer to reformulate their products or provide warnings rather than pay the attorney's costs and fees. The issue of civil penalties closely relates to the fee problem.³⁸

Since penalties are not tax deductible and generate negative public opinion, a company may condition a settlement upon the absence of civil penalties. If large attorney's fees are part of the bargain, an attorney may be tempted to jump at the offer, without considering the role that the penalties play in (1) funding toxic cleanups, (2) enabling future enforcement efforts and (3) deterring future violations. Although this practice ensures the attorney sizable fees, it clearly leaves the government out of the loop by avoiding the seventy-five percent statutory diversion of those penalties, which in turn circumvents the public's interest in easing its tax burden and shifting the cost of hazardous cleanups onto polluters.³⁹

Attorneys, however, defend their high fees by noting that they bring cases that the government passes on and that they win thereby forcing entire industries to change behavior.⁴⁰ Observers further argue

³⁴ Julie A. Ross, Comment, *Citizen Suits: California's Proposition 65 and the Lawyer's Ethical Duty to the Public Interest*, 29 U.S.F.L. REV. 809, 810 n.4 (1995).

³⁵ *Id.* (citing ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 324 (1992)).

³⁶ *Id.* at 815.

³⁷ See, e.g., The Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-50 (2001).

³⁸ Ross, *supra* note 34, at 815.

³⁹ *Id.* at 815-16.

⁴⁰ *Id.*

that without high fees, the public-interest attorneys will be unwilling to bring citizen suits.⁴¹

Another method of circumventing the U.S. Treasury involves the use of "environmentally beneficial expenditures" ("EBE") in pre-trial consent decrees.⁴² At least in theory, EBEs deter future violations because the defendant must pay a large monetary fine.⁴³ Furthermore, the environmental groups use the funds to clean up the specific violations that the offender caused instead of the funds going to the general pool of finances used by the federal government.⁴⁴ While the United States Department of Justice ("DOJ") has consistently opposed the use of EBEs in Clean Water Act settlements because "they typically supplant the payment of civil penalties to the United States Treasury," the courts have split on whether to follow DOJ's lead and reject EBEs or to allow them, provided they have a sufficient nexus to the purposes of the particular lawsuit and the overall legislative intent of the statute being enforced.⁴⁵ Whereas one can at least understand the opposition to high fees as an alternative to civil penalties, the opposition to EBEs is puzzling since the money is not diverted for private use but is instead used to clean up the environment. It would seem that the opposition to EBEs stems from the long-standing belief of some government bureaucrats that only they can solve environmental problems. The idea that environmental groups may be more efficient not only bewilders these regulators but also threatens their substantial enforcement obligations. Environmental activists would suggest that, rather than opposing citizen suits, federal and state governments should welcome the help that they receive from highly qualified attorneys and dedicated environmental groups. Their single-minded dedication, however, is itself subject to criticism as being "agenda driven," rather than purely support of public policies.

B. *Conflicts of Conscience for Environmental Practitioners*

As the prior section illustrated, the environmental practitioners often face real ethical conflicts. These problems, however, should not diminish the opposition to the zealous tone of the environmental movement. While the debates about environmental issues have never

⁴¹ *Id.*

⁴² *Id.* at 820.

⁴³ *Id.* at 820-21.

⁴⁴ Ross, *supra* note 34, at 820-21.

⁴⁵ *Id.* at 821-22.

lacked self-righteous rhetoric, one of the commentators has really pushed the envelope by proposing a new environmental lawyer's creed that stated:

As a member of the learned profession of law and as a member of the practicing bar in the area of environmental law, I promise to:

Pledge allegiance to the Earth and to the Life it sustains.

Always strive to act in the manner, which most benefits the Earth, its biosphere, its inhabitants, and its natural resources.

Stay informed about issues, problems, and solutions concerning the environment.

Do my part to educate others, in particular my clients, about issues and problems concerning the environment and about all of the environmental consequences of their proposed actions, including the effects to low-income and non-white communities.

Include all interested or affected parties in environmental transactions in which I am involved so that the interests of all are considered before final actions are taken.

Propose and encourage methods and technologies that prevent pollution and minimize waste production.⁴⁶

Although some of these promises have merit, others put the attorney in a direct conflict between their clients and "the Earth."⁴⁷ Most environment-friendly lawyers do not go as far as the author of this pledge does. They do, however, all feel that their ethical obligations to the society exceed those of any other legal professionals. Such sentiments have certain merits.

Consider for example the question of attorney-client privilege. Extreme restrictions placed on a lawyer's ability to disclose information relating to the representation of a client, regardless of the social

⁴⁶ Olga L. Moya, *Adopting an Environmental Justice Ethic*, 5 DICK. J. ENVTL. L. POL'Y 215, 266 (1996).

⁴⁷ In *Sierra Club v. Morton*, the Supreme Court ruled that Sierra Club lacked standing to pursue a claim against the federal Forest Service's development of national forest into a ski resort. 405 U.S. 727, 741 (1972). Apparently, the Court did not view either "the Earth" or "Nature" as a party capable of asserting standing in judicial proceedings. *Id.*

consequences of nondisclosure, represent the most controversial aspect of legal ethics.⁴⁸ Model Rule 1.6 provides:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.⁴⁹

The narrowness of this rule led commentators to wonder about the duty that lawyers have to report criminal plans in cases where the victims will not otherwise be warned in time and about the duty to report criminal conduct likely to result in deaths that are not "imminent."⁵⁰ Model Rules create severe "moral" conflicts for practitioners. What should an attorney do when confronted with a client who dumped hazardous waste in a surface impoundment but did not tell the prospective buyer about it even when questioned directly?⁵¹ Clearly the attorney has no knowledge of whether the dumping would cause imminent death or substantial bodily harm and thus Rule 1.6 would preclude any disclosure.⁵² What if the

⁴⁸ Douglas R. Williams, *Loyalty, Independence and Social Responsibility in the Practice of Environmental Law*, 44 ST. LOUIS L. J. 1061, 1073 (2000).

⁴⁹ MODEL RULES OF PROF'L RESPONSIBILITY R. 1.6 (2001).

⁵⁰ Williams, *supra* note 48, at 1074-75.

⁵¹ *Id.* at 1076.

⁵² *Id.*

attorney hires an expert who confirms that the hazardous waste is extremely toxic but the client refuses to even hear the results? ABA Formal Opinion 92-366 explicitly concludes that a lawyer may not reveal a client's fraud.⁵³ A conscientious lawyer does have a way out—Formal Opinion 92-366 does allow for the possibility of a “noisy” withdrawal that would communicate to a prospective buyer that something is wrong.⁵⁴ To add the last wrinkle, what if the deal closes and the buyer announces plans to build a residential project with the aquifer under the property supplying the drinking water? Rule 1.6 appears to prohibit disclosure since it allows exceptions only for “prospective conduct” by the client, not to a client's past criminal acts.⁵⁵ Because the sale has been completed, the client's involvement would end and would thus constitute a completed, past criminal conduct. Amusingly, the attorney will be allowed to disclose privileged information if after the withdrawal the client refuses to pay the bill.⁵⁶

The impact of an environmental disaster, such as the Three Mile Island nuclear accident, on society far outweighs the risk of a tax evader or even a serial murderer. However, regardless of how appealing the desire of some lawyers to put the interests of the public ahead of their clients' might be, they still must ask themselves whether they can plausibly argue that the strength of their legal advocacy should ever turn on the moral culpability of their client and the magnitude of the violation itself. An environmental lawyer might be appalled at his client's omitting of pollutants into the air, but his distaste cannot possibly rival that of the lawyer called upon to defend John Wayne Gacy or other heinous criminals. Thus, our society has made a conscious decision to separate the roles of prosecutors and defenders. It set up a system in which a client can ask his lawyer for advice without any fear of that information being released to anyone else. Allowing lawyers to subordinate their clients' interests to their own ideological beliefs would discourage clients from ever seeking advice and preclude any environmentally-conscious legal practitioner from influencing the decision-making process. This, arguably, would result in even more environmental violations and worse, destroy the essential advocacy that supports our system of jurisprudence. Protecting the environment is a worthy goal but it cannot be achieved through the breach of a fiduciary duty. It can only be achieved by

⁵³ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992).

⁵⁴ *Id.*

⁵⁵ MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 12 (2001).

⁵⁶ *See id.* at R. 1.6(b)(2).

educating clients and the public. The lawyers themselves can serve as educators but their ability to influence will turn on the degree of trust that exists between them and their clients. And this trust cannot be maintained when the client lacks confidence in his lawyer's loyalty.

C. *Can Environmental Regulations Be Bad—Growth v. Preservation?*

To reflect the general tone of the discussion about legal ethics, previous sections have taken for granted the wisdom of environmental regulations and compliance therewith. In reality, the support for such regulations and underlying theories has been less than uniform. For instance, scientists have openly questioned global warming theory.⁵⁷ Also, President Bush recently criticized the Kyoto agreement and stated that the United States will not abide by it.⁵⁸

Nowhere is the split more divisive than in the ongoing debate about the proper balance between growth versus preservation. The early industrialists advocated growth at all cost and this ensured the economic dominance of this country. Of course, without proper enforcement of property rights they also polluted air, water, and land. Such outrageous conduct eventually led the early environmentalists to advocate preservation at all cost. The society, stuck between these two seemingly irreconcilable positions, attempted to chart a middle path thereby drawing criticism from both sides of the debate. Neither the early environmentalists' utter refusal to recognize that the society needs to engage in a cost-benefit analysis for judging industrial projects, nor the industrialists' inability to incorporate long-term consequences of those projects into the analysis, helped matters.

The real political battle began in the 1960s with the expansion of national parks, wildlife refuges, and wilderness areas when Congress passed the Wilderness Act of 1964,⁵⁹ the Land and Water Conservation Fund Act of 1964,⁶⁰ the National Historic Preservation Act of 1966,⁶¹ the

⁵⁷ Robert R. Britt, *The Greenhouse Effect and Global Warming*, available at <http://explorezone.com/weather/globalwarm.htm> (last visited Jan. 20, 2002).

⁵⁸ Robert N. Stavins, *President Bush's Withdrawal from the Kyoto Protocol Provides Opportunity for Meaningful Action*, Policy Matters 01-11 (Apr. 2001), available at http://www.aei-brookings.org/publications/policy/policy_01_11.asp (last visited Jan. 20, 2002).

⁵⁹ Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-36 (2000)).

⁶⁰ Pub. L. No. 88-578, 78 Stat. 897 (codified as amended in scattered sections of 16 U.S.C. §§ 14601-04, et seq. (2000)).

Wild and Scenic Rivers Act of 1968,⁶² and the National Trails System Act of 1968.⁶³ These, combined with the Endangered Species Act⁶⁴ and the Delaney Amendment to the Food and Drug Act,⁶⁵ assigned paramount value to the goal of preservation.⁶⁶ Responding to a number of pesticide abuses, contaminated lakes and rivers, and smog-filled skies, Congress enacted the next flurry of legislation in the 1970s.⁶⁷ By the end of the decade, it had added amendments to the Clean Air Act,⁶⁸ the Federal Water Pollution Control Act of 1972,⁶⁹ the Federal Insecticide, Fungicide, and Rodenticide Act.⁷⁰ Congress also passed the Occupational Safety and Health Act,⁷¹ the Toxic Substances Control Act,⁷² and the Resource Conservation and Recovery Act of 1976.⁷³ Not satisfied with earlier statutes dealing with the protection of natural resources, the Congress exploded with ten more statutes in just eight years—National Environmental Policy Act of 1969,⁷⁴ the Marine Mammal Protection Act

⁶¹ Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470-470x-6 (2000)).

⁶² Pub. L. No. 90-542, 82 Stat. 906 (codified as amended at 16 U.S.C. §§ 1281-87 (2000)).

⁶³ Pub. L. No. 90-543, 82 Stat. 919 (codified as amended at 16 U.S.C. §§ 1241-51 (2000)).

⁶⁴ Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-44 (2000)).

⁶⁵ Food Additives Amendment of 1958, Pub. L. No. 85-929, 72 Stat. 1784 (codified as amended at 21 U.S.C. §§ 321, 331, 342 (1994 & Supp. V 1999)).

⁶⁶ Futrell, *supra* note 4, at 827.

⁶⁷ *Id.*

⁶⁸ 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. (1994 & Supp. V 1999)).

⁶⁹ Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C. (1994 & Supp. V 1999)).

⁷⁰ 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. (2000)).

⁷¹ Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-78 (1994 & Supp. V 1999)).

⁷² Pub. L. No. 94-469, 90 Stat. 2003 (codified as amended at 15 U.S.C. §§ 2601-71 (2000)).

⁷³ Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-86 (1994 & Supp. V 1999)).

⁷⁴ Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-70d (1994 & Supp. V. 1999)).

of 1972,⁷⁵ the Endangered Species Act of 1973,⁷⁶ the Deepwater Port Act of 1974,⁷⁷ the Forest and Rangeland Renewable Resources Planning Act of 1974,⁷⁸ the Fishery Conservation and Management Act of 1976,⁷⁹ the Federal Land Policy and Management Act of 1976,⁸⁰ the National Forest Management Act of 1976,⁸¹ the Soil and Water Resource Conservation Act of 1977,⁸² and the Surface Mining Control and Reclamation Act of 1977.⁸³ Faced with inefficient agencies, Congress further "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."⁸⁴ The environmental plaintiffs of the 1970s also 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."⁸⁵

This plethora of rules and regulations inevitably led to a backlash by conservatives who argued that environmental laws harmed the economy. President Reagan tried to reduce the regulations by cutting government agencies and restoring a larger role for the private sector.⁸⁶

⁷⁵ Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1407 (2000)).

⁷⁶ Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (2000)) (reformulating the earlier acts of 1966 and 1969).

⁷⁷ Pub. L. No. 93-627, 88 Stat. 2126 (1975) (codified as amended at 33 U.S.C. §§ 1501-24 (1994 & Supp. V 1999)).

⁷⁸ Pub. L. No. 93-378, 88 Stat. 476 (codified as amended at 16 U.S.C. §§ 1600-87 (2000)).

⁷⁹ Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-82 (2000) and 22 U.S.C. 1972-1973 (1988)).

⁸⁰ Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701-84 (1994 & Supp. V. 1999)).

⁸¹ Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C. (2000)).

⁸² Pub. L. No. 95-192, 91 Stat. 1407 (codified as amended at 16 U.S.C. §§ 2001-09 (2000)).

⁸³ Pub. L. No. 95-87, 91 Stat. 445 (codified as amended at 30 U.S.C. §§ 1201-1328 (1994 & Supp. V 1999)).

⁸⁴ Futrell, *supra* note 4, at 829.

⁸⁵ *Id.*

⁸⁶ *Id.* at 830.

Under President Reagan, James Watt, Secretary of the Department of Interior, and Ann Gorsuch Burford, Administrator of the 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.⁸⁷ Whereas the Congress was able to limit the impact of some of these initiatives, Ronald Reagan and George Bush appointed sufficient numbers of conservative judges to the federal bench to ensure that the judiciary returned to an earlier, more narrow interpretation of the justiciability doctrine.⁸⁸ The Supreme Court's opinions also reflect a chilly attitude toward environmental values.⁸⁹ Justice Antonin Scalia summed up the Court's viewpoint in the following passage:

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.⁹⁰

Realizing this divergence of views between regulatory bodies and the courts, the industry strengthened its litigation efforts and the environmental defense bar grew to rival the tax bar in both volume and intensity of opposition to government regulation.⁹¹

While the self-serving goals of such litigation cannot be ignored, the opposition to environmental regulations might actually be about more than simple self-interest. The critics charge environmental laws as being ill-advised, ineffective, wasteful, and subversive.⁹² The problems with these laws appear most prominently in two areas: consumer recycling and the California energy crisis.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Futrell, *supra* note 4, at 831.

⁹⁰ *Id.* at 831 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)).

⁹¹ *Id.*

⁹² *Id.* at 832.

Recycling regulations have at least three adverse consequences.⁹³ First, since legislators do not personally bear the costs of their decisions, they react to the fad of the moment and thus the environmental legislation often “focuses on the trivial and ignores the important.”⁹⁴ Second, since legislation often benefits specific companies, “legislative proposals relating to solid waste automatically create special interest lobbies and lead to some unholy alliances between people who claim to be environmentalists and producers of particular products.”⁹⁵ As a result, diaper services have lobbied heavily for bans on disposable diapers, paper interests support the war on plastics, de-inking plants have a vested interest in mandating the recycling of newsprint, and recycling companies lobby for laws that would mandate that products contain a minimum percent of recycled content and would forbid the term “recycled” to describe products made with factory scrap.⁹⁶ Third, many recycling schemes have an unintended stifling effect on the development of more cost-efficient programs.⁹⁷ For instance, whereas most jurisdictions require household separation recycling programs, Chicago has successfully implemented a more efficient system in which all recyclables are collected in a single bag and compacted in traditional garbage trucks.⁹⁸ Finally, legislators often ignore facts to achieve notoriety for being environmentally friendly. Thus, Maine banned children’s aseptic juice boxes although at the time they constituted “only two-hundredths of one percent of the nation’s landfills,”⁹⁹ Portland, Oregon and Newark, New Jersey banned polystyrene food containers although they constituted “only two-thousandths of one percent of the nation’s landfills”¹⁰⁰ and many states have required newspaper recycling even though “newspapers constitute only 7 percent of the nation’s landfills and newspaper recycling itself has adverse environmental consequences.”¹⁰¹

⁹³ Lynn Scarlett, *A Consumer’s Guide to Environmental Myths and Realities*, Reason Found. Policy Report No. 165 (Sept. 1991), available at <http://www.ncpa.org/studies/s165/s165.html> (last visited Jan. 20, 2002).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* Chicago has also instituted a program similar to Pittsburgh’s. See City of Chicago, *What Happens to Your Blue Bag*, available at <http://www.cityofchicago.org/Environment/BlueBag/WhatHappens.html> (last visited Jan. 20, 2002).

⁹⁹ Scarlett, *supra* note 93.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Bad energy policy in California resulted in continuous rolling blackouts and thus illustrates the dangers of extreme environmentalism. California had the strictest environmental rules in the world, ensuring that no new dam or plant was built in the last decade.¹⁰² Now Californians fear, and sometimes experience, life without light and air-conditioning. California serves as a sad, but striking, lesson of the cause and effect of which critics have been warning.

It shows, step by step, what happens when pie-in-the-sky environmental policies—initiated by environmental groups, paid for by armchair environmentalists and pushed through by ambitious politicians—win out over a reasoned balance between humans and nature. California's electric demands have risen 25% over the past eight years, while the supply of new electricity has risen only 6%.¹⁰³

The environmental protests that precluded the building of the Auburn Dam, a hydroelectric facility with immense electrical potential, and the construction of the Rancho Seco nuclear reactor, account for some of the discrepancy. Severe air pollution regulations that kept plants from running at full capacity have also contributed to the problem.¹⁰⁴

Clean air and water are important goals. However, they need not be accomplished through heavy-handed centralized agencies and legislatures. "Market environmentalism" provides an approach that emphasizes the importance of wealth creation and incentives in environmental protection.¹⁰⁵

Greater wealth gives the society the wherewithal to solve environmental problems, while private property ownership and market forces offer incentives for individuals to conserve resources. When coupled with an appropriate liability system, property rights can also prevent individuals

¹⁰² Kimberly A. Strassel, *It's Not So Green in the Dark*, OpinionJournal (Feb. 8, 2001), available at <http://www.opinionjournal.com/columnists/kstrassel/?id=85000562> (last visited Jan. 20, 2002).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Cascade Policy Inst., *Free Market Environmentalism*, available at <http://www.cascadepolicy.org/env.asp> (last visited Jan. 20, 2002).

and companies from damaging land and property they do not own as well.¹⁰⁶

Market initiatives, such as pollution permits, allow private parties to patrol the environment. What idealistic environmental lawyers often forget is that progress has its price and that unless we, as a society, decide to live in caves, we will have to manage natural resources. Dedicated lawyers can best help the environment by encouraging their clients to engage in such a cost-benefit analysis.

II. AN INTEGRATED APPROACH—ENVIRONMENTAL LAWYERING IS NOT A ZERO-SUM GAME

While the environmental groups have continued their absolutist traditional opposition to industry development in front of the cameras, their behavior suggests a change of attitudes.¹⁰⁷

The Audubon Society owns a 26,000-acre wildlife refuge in Louisiana (the Rainey Wildlife Sanctuary), which contains fish, shrimp, crab, deer, ducks and wading birds and is visited by over 100,000 migrating snow geese each year. The Rainey Sanctuary also contains reserves of natural gas and oil that attracted commercial interest from drilling companies when they were discovered in the 1940s. Since the Audubon Society owns the land, and the mineral rights, it could have prevented drilling. Yet the Audubon Society allowed 37 wells to pump gas and oil from the Rainey Sanctuary in return for royalties that have added more than \$25 million to the Society's income. With ownership came the motivation to consider the costs and benefits of the decisions made. The Audubon Society obviously considered the risks of drilling, but it also carefully considered the benefits since those benefits were reflected in wealth it could capture and use for such things as buying additional sanctuaries and funding educational

¹⁰⁶ *Id.*

¹⁰⁷ Dwight R. Lee, *Let Audubon Society Decide the Fate of Alaska's Arctic Refuge*, (Oct. 19, 2000) available at http://www.onlineathens.com/stories/102000/opi_102000003.shtml (last visited Jan. 20, 2002).

programs. The Audubon Society obviously thought the benefits from oil drilling were greater than the costs.¹⁰⁸

If the Audubon society and oil companies can deal in a mutually beneficial manner, it is hard to believe that lawyers cannot also facilitate an essential balance, sometimes with their own clients.

The Model Rules of Professional Conduct clearly encourage lawyers to act as intermediaries between their clients and the general society. Rule 2.1 provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In 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."¹⁰⁹ The commentary to the Rule continues: "Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."¹¹⁰ Furthermore, the clients might actually welcome such advice. Most clients do not want their attorneys to advise them solely on the way to circumvent the law.¹¹¹ Due to an increasing demand for good corporate citizenship, corporations are concerned with their public image.¹¹² The clients may actually value their lawyer's political and moral judgments and view them as an essential viewpoint that may not otherwise have been considered in a boardroom.¹¹³ Unless one accepts the skeptical view that corporations are more concerned with marketing a good corporate image than actually living up to it, an environmentally-conscious lawyer should feel comfortable expressing his own views on the topic as part of his balanced and candid advice.¹¹⁴ Furthermore, the lawyers must realize that their clients' level of compliance will in large part depend on their perception of an underlying compliance culture.¹¹⁵ Lawyers might thus be encouraged to counsel their clients to do the "right thing" (assuming that the lawyer and the client agree, in general, on what the "right thing" is.) Finally, lawyers and clients must realize that an environmental regime that consistently fails to

¹⁰⁸ *Id.*

¹⁰⁹ MODEL RULES OF PROF'L RESPONSIBILITY R. 2.1 (2001).

¹¹⁰ *Id.* at R. 2.1 cmt.

¹¹¹ Williams, *supra* note 48, at 1072.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

deliver on its explicit and implicit promises because of a culture of noncompliance among regulated parties is an open invitation for public demands for more draconian governmental responses.¹¹⁶

III. CONCLUSION

This article poses more questions than it answers. That, however, is the point of the discussion. Legal ethics do not tolerate formalistic approaches, nor do they allow for self-congratulatory rhetoric. Lawyers who feel passionately about the protection of the environment should realize that by ignoring the interests of their clients, they are undermining the very foundation of our legal system. The discussion about the merits of the environmental regulations belongs in the legislatures and lobbying groups. It belongs in a conversation between an attorney and his client as they discuss the latter's options. However, it certainly does not belong in the mind of an attorney as he contemplates the *type* of the advice he is willing to offer his client. Practitioners who suffer from more acute crises of conscience should consider work for regulatory agencies or as prosecutors. Or, if they cannot resolve their moral dilemmas, they could exercise their discretion and just refuse to represent a client whose activities are inconsistent with their own beliefs.

¹¹⁶ *Id.* at 1073.