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ETHICS AND DISCLOSURES

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Features

Environmental Justice: Merging Environmental Law and Ethics
Julia C. Rinne and Carol E. Dinkins

Race and socioeconomic status play a large role in the environmental health of communities throughout the nation. Federal, state, and local environmental justice initiatives attempt to address the disproportionate share of environmental hazards placed on minority and low-income communities. Because the merger of ethics and environmental law forms the foundation of environmental justice, successful implementation of these initiatives requires the consideration of many ethical concerns. This article explores the complicated issues that must be considered by regulatory agencies involved in environmental justice projects, including who should bear the burden of environmental hazards, how the burdened community should participate in the environmental decision-making process, and when and how enforcement of environmental laws should be undertaken. In addition, the article discusses various statutes, regulations, and polices that are currently in place to assist regulatory agencies in achieving the ethical implementation of environmental laws.

Playing Poker with Pollution: Why It Is Time to Change the CERCLA Reporting Obligations
Larry Schnapf

Three decades after the passage of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq*., this country is still adding to its inventory of contaminated sites. Many of these contaminated properties have been transferred or sold a number of times since CERCLA was passed, yet regulators frequently are not notified about the environmental conditions uncovered during due diligence. Often times, regulators and community officials may only learn about contamination after an owner has filed for bankruptcy or abandoned the property. This article argues that the CERCLA reporting obligations and similar state laws are contributing to the creation of brownfields or delaying remediation. It proposes administrative solutions that EPA could adopt that will accelerate the pace of cleanups and allow the public to access information about the potential risks posed by sites in their communities.

Environmental Law Practitioner's Guide to the Model Rules
Pamela R. Esterman

This article presents an overview of how the ABA Model Rules of Professional Conduct govern some of the more common ethical dilemmas that environmental lawyers may encounter in the field. From representation of multiple potentially responsible parties (PRPs) in a Superfund cleanup negotiation to retention of scientific experts for trial or compliance with environmental statutes' reporting provisions, environmental lawyers face a wide range of ethical obligations in their everyday practice. Moreover, many of these ethical duties are evolving as electronic record-keeping and online communication raise new questions about client confidentiality and attorney advertising. Incorporating these recent developments, this article surveys how ethical rules arise and interact in variety of environmental contexts.

Sustainability Is Driving Toxic Chemicals from Products
William J. Walsh and Michelle M. Skjoldal

Many chemicals now classified as "toxic" based on exposure of test animals or humans at high levels have long been used in the manufacture of products. The Environmental Protection Agency, states, and even retailers are taking preventive action to reduce exposure to toxic chemicals. Adopting more sustainable products as a matter of regulatory or statutory policy may require, or at least provide an incentive for, removal of "toxic" chemicals from products. This process highlights the inevitable trade-offs between the desire to expedite the existing chemical regulatory process and the economic burdens resulting from removing chemicals in some cases that may not present as significant a risk as these policies assume. To adapt Thomas Jefferson's statement concerning political liberty, the price of economic liberty is regulatory vigilance. This article examines how existing United States laws, proposed federal bills, recent state laws, European laws, and current private sector policies balance these factors.

Greenwashing: What Your Client Should Know to Avoid Costly Litigation and Consumer Backlash
Michelle Diffenderfer and Keri-Ann C. Baker

"Greenwashing" refers to the phenomenon of eco-exaggeration, that is, the practice of many companies who label and advertise their products as ones that are good for the environment when their products have little or no positive environmental benefits. At its heart, greenwashing is the act of misleading consumers regarding the environmental benefits of a product or service in order to entice the consumers to purchase that product or service. Ms. Diffenderfer and Ms. Baker discuss the actions being taken by the federal government, state governments, and consumers to combat those persons and entities that engage in exaggerated marketing of the environmental attributes of products, services, and companies. They catalogue the increase in public enforcement actions and civil lawsuits to combat greenwashing and provide advice for attorneys who wish to help their clients avoid consumer backlash and adverse public relations.

Nano Disclosures: Too Small to Matter or Too Big to Ignore?
Lynn L. Bergeson and Charles M. Auer

The presence of intentionally produced nanoscale materials raises interesting and generally unanswered questions regarding the obligation to disclose the presence of these materials. Federal agencies, including the U.S. Environmental Protection Agency and the Securities and Exchange Commission, have widely disparate interpretations of what type of information is reportable and when. This article explores the scope of these reporting obligations, identifies the lack of clarity as to what does and does not trigger reporting, and discusses the legal and policy considerations associated with resolving these matters.

Practical and Ethical Issues of Blogging in Environmental Law
Steven C. Russo and Ashley S. Miller

Blogging presents environmental attorneys with a low-cost and effective method of marketing but requires attorneys to navigate several technical and ethical issues. This article provides a summary of the practical steps required in setting up a blog, from picking a topic to choosing a software platform. It focuses on the ethical issues involved in legal blogging, including confidentiality, client solicitation, extra-territorial practice of law, advertising, liability protections, and avoiding the inadvertent creation of an attorney-client relationship.

The SEC Enters the Fray on Climate Risk Disclosure
Scott D. Deatherage

In 2010, the Securities and Exchange Commission (SEC) issued a document to provide guidance to publicly traded companies as to how to apply SEC rules to climate risk disclosure. The SEC discussed four items in Regulation S-K that apply to climate risk: Item 101, Item 103, Item 303, and Item 503. These items relate respectively to capital expenditures to comply with climate or greenhouse gas (GHG) regulations, climate litigation, management discussion and analysis related to climate and GHG regulations and impacts, and discussion of climate risk factors in SEC filings. In applying these regulatory disclosure items to climate risk, the SEC in its guidance document states that the four principal areas in which its rules may require disclosure relating to climate change are the impact of existing or pending legislation or regulations that relate to climate change; the effect of treaties or other international accords; the consequences, both positive and negative, including reputational harm, of regulations or

business trends related to climate change matters; and the physical impacts of climate change. This article will review these disclosure issues in the context of the guidance recently issued by the SEC and how management should evaluate and respond to the myriad of risks and issues relating to climate risk disclosure arising from SEC regulations, voluntary disclosure programs, and existing and developing state and EPA GHG regulations.

Ethics and Professional Conduct for Federal Government Attorneys
Peggy Love

Federal government lawyers have to comply with more than one set of ethics rules—the same ethics rules as their private practitioner counterparts, as well as the ethics rules and considerations applicable only to those in government service. These rules are not always the same, and some carry criminal penalties. The article will examine some of the important ethical obligations of federal government attorneys under the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, and the ABA Model Rules of Professional Conduct, which have been adopted by most states. In particular, this article will focus on outside activities, seeking/negotiating for employment, switching sides (entering or leaving federal service), and the Obama Ethics Pledge. Non-government lawyers thinking of entering federal service, federal government lawyers thinking of leaving federal service, and anyone thinking of hiring a federal government lawyer will benefit by knowing these rules.

Departments

Vantage Point
Interview: Thomas E. Spahn

Insights:

Ninth Circuit Upends the CWA Applecart
Mark A. Ryan

This article discusses the Ninth Circuit's recent decision in Northwest Environmental Defense Center v. Brown, in which the court invalidated EPA's regulation exempting logging roads from National Pollutant Discharge Elimination System (NPDES) permit requirements. The decision is significant because it changes years of settled law regarding forest roads, affects potentially hundreds of thousands of miles of roads, and reflects the courts' general disapproval of categorical exemptions from Clean Water Act requirements. The appeals in this case will be closely watched.

It Seems Everyone Is Protesting BLM Oil and Gas Lease Sales
Jean Feriancek

A July 2010 GAO report found that most federal oil and gas parcels offered by the Bureau of Land Management (BLM) for competitive lease sale are protested by environmental groups and a wide variety of other groups and individuals. BLM’s decisions about whether the protests have merit often are not issued until long after the lease sales, and data available to the public about protests on BLM’s website have been incomplete or inaccurate. The Secretary of the Interior announced oil and gas leasing reforms in May 2010 that should allow BLM to resolve a greater percentage of protests prior to the lease sale date, but whether they will result in a reduction in the number of protests is an open question.

The Duty to Preserve: Lawyers Beware!
John M. Barkett

In the electronic world, the duty to preserve can create jeopardy for litigants. Every employee is a file keeper and with the stroke of a key can delete information material to the pursuit or defense of a claim. Courts have taken opposite positions on when demand letters create a duty to preserve and how much knowledge, what type of knowledge, and who must possess the knowledge before a preservation duty arises. Because culpability standards—negligence, gross negligence, or bad faith—in the circuits vary, similarly situated litigants may be treated differently depending upon the venue. Hence environmental lawyers addressing notices of violation, records preservation clauses in a consent order, information requests, or notice letters must pay attention to this mosaic of case law to protect the interests of their clients.

The "Green" Supply Chain: A New Role for Lawyers?
Jonathan P. Scoll

Manufacturers, distributors, and retailers are increasingly faced with or adopting "green supply chain management" standards and practices. A recent high-profile example is the retailer Wal-Mart's announcement, in July, 2009, that all its suppliers must now evaluate and report to Wal-Mart on their conformance to Wal-Mart's published sustainability criteria. The trend presents both novel legal issues and practice opportunities for environmental lawyers.

Sufficient Cause to Just Say "No"? CERCLA 106 Orders
John R. Eldridge

CERCLA gives the Environmental Protection Agency (EPA) a powerful weapon to compel parties to remediate contamination, even when they may have defenses: Section 106 unilateral administrative orders, or UAOs. Non-compliance with a UAO can trigger major penalties. But, if a party has "sufficient cause" to decline compliance, penalties are not allowed. The cause (defense) must be based on objectively demonstrable, good-faith belief that it is viable, but it need not be proven. UAO recipients should consider "saying no" to coercive UAOs if they can meet the sufficient cause test.

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