Ethical Issues of Environmental Attorneys, Engineers, & Consultants Working Together

A&WMA
2013

Presented by:
Malcolm Richards, CH2M Hill
Steve Ramsey, ENVIRON
Jed Anderson, The AL Law Group
Malcolm Richards

Mr. Richards works to develop permitting and compliance solutions for clients in the chemical / petrochemical, refining, oil & gas, and electric generation industries at CH2M HILL. Mr. Richards has over twenty years of environmental consulting experience specializing in air quality related projects. Mr. Richards also has experience with waste and water related projects and critical flaw analysis projects for green field plant construction. Before joining CH2M HILL, he was most recently a Senior Project Manager in Houston leading projects for major companies in the oil and gas, chemical/petrochemical, and forging industries. He holds a Doctorate of Jurisprudence from Thurgood Marshall School of Law at Texas Southern University and a B.S. in Environmental Management from the University of Houston - Clear Lake.
Steve Ramsey

Mr. Ramsey is a Principal Consultant with ENVIRON in Houston, Texas. For over 25 years Mr. Ramsey has provided advisement and technical support services to a wide variety of private and public sector clients. His areas of expertise include air quality planning and management, optical remote sensing, Clean Air Act compliance, air quality permitting, Texas State Implementation Plan development and implementation, compliance auditing and greenhouse gas management. Mr. Ramsey has degrees from The Georgia Institute of Technology and the University of Central Florida in chemical engineering and environmental engineering, respectively. He is a registered Professional Engineer in Texas and Florida.
Mr. Anderson is a Principal Attorney with the AL Law Group PLLC in Houston, Texas. Jed's primary focus is air quality and climate change—assisting clients with issues from permitting and policy to compliance and enforcement. Jed was formerly with the law firms of Baker Botts L.L.P. and Vinson & Elkins L.L.P. Jed also was an Adjunct Professor of Law at the University of Houston Law School where he taught the Clean Air Act class. Before practicing law Jed worked with the South Dakota Department of Environmental and Natural Resources as a tribal relations liaison and ground water scientist. Jed received his J.D. from Baylor University School of Law and B.A. from St. Olaf College with a major in biology.
Corporate Attorney Len Allen Weir (LAW) has a deadline for a permit that requires a P.E. Seal. LAW has a friend that is an engineer, Phil Edwards (PE). LAW says that PE can Seal now and review later, that as long as he reviews it, it is O.K.
Scenario 1

Issues:

- Will it be OK if PE signs it and reviews it later?
- Has LAW created any ethical violations for himself or PE?
PE Rules of Ethics:
§ 137.33 Sealing Procedures; (a) The purpose of the engineer’s seal is to assure the user of the engineering product that the work has been performed or directly supervised by the professional engineer named and to delineate the scope of the engineer’s work.
(b) License holders shall only seal work done by them, performed under their direct supervision as defined in §131.81 of this title, relating to Definitions, or shall be standards or general guideline specifications that they have reviewed and selected. Upon sealing, engineers take full professional responsibility for that work.
Scenario 1

Attorney Professional Responsibility (PR) Rules: Texas Disciplinary Rules of Professional Conduct

4.01 Truthfulness in Statements to Others; In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

8.04 Misconduct
(a) A lawyer shall not: (1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship; (2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (4) engage in conduct constituting obstruction of justice;
Scenario 1

DISCUSSION
Scenario 2

► Phil Edwards (PE) works at the company’s chemical plant and is charged with determining compliance and handling the plant’s Title V deviation report. During an internal audit the Corporate Attorney Len Allen Weir (LAW) has determined that one emission source has two monitors and two sets of data. One monitor shows compliance, the other monitor shows a violation. PE has normally submitted the data showing compliance. Both PE and LAW know the definition of “deviation”. LAW decides to not rock the boat since compliance is being shown.

NOTE: 30 TAC 122.10(5) defines a deviation as: “Any indication of noncompliance with a term or condition of the permit as found using compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information.”
Scenario 2

**Issues:**

- Is it ethical for LAW to knowingly allow PE to submit this information?
- Is PE submitting this information promoting and protecting the public welfare?
**Scenario 2**

**PE Rules of ethics:**

§137.51 General Practice; In order to safeguard, life, health and property, to promote the public welfare, and to establish and maintain a high standard of integrity and practice [ . . .]

§137.55 Engineers Shall Protect the Public; Engineers shall be entrusted to protect the health, safety, property, and welfare of the public [ . . .]

§137.57 Engineers Shall be Objective and Truthful; [ . . .](b) The issuance of oral or written assertions in the practice of engineering shall not be: (1) fraudulent, (2) deceitful, or (3) misleading [ . . .]
Scenario 2

Attorney Professional Responsibility (PR) Rules:

4.01 Truthfulness in Statements to Others: In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

8.04 Misconduct: (a) A lawyer shall not: (1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship; (2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (4) engage in conduct constituting obstruction of justice;
Scenario 2

DISCUSSION
Pauline Edmond, Jr. (PE Jr.) works for Phil Edwards (PE). PE Jr. is aware of the fact that LAW has determined that one emission source has two monitors and two sets of data and that one monitor shows compliance, the other monitor shows a violation. PE Jr. also knows that PE has normally submitted the data showing compliance. Leslie Alice Waugh, Jr. (LAW Jr.) is a junior associate of LAW and also discovers the situation. All of the parities know the definition of “deviation”. PE Jr. and LAW Jr. finds out that LAW decides to not rock the boat since compliance is being shown. They both follow their boss’s lead.
Scenario 3

**Issues:**

- Does LAW Jr. have a duty to tell anyone of this situation? After all, she is just following her boss’s instructions.

- Does PE Jr. have a duty to tell anyone of this situation? After all, she is just following her boss’s instructions.
PE Rules of ethics: §137.63 Engineers’ Responsibility to the Profession [...] (b) The engineer shall ... (2) exercise reasonable care or diligence to prevent the engineer’s partners, associates, and employees from engaging in conduct which, if done by the engineer, would violate any provision of the Texas Engineering Practice Act, general board rule, or any of the professional practice requirements of federal, state and local statutes, codes, regulations, rules or ordinances in the performance of engineering services;
Scenario 3

Attorney Professional Responsibility (PR) Rules:

5.02 Responsibilities of a Supervised Lawyer; A lawyer is bound by these rules notwithstanding that the lawyer acted under the supervision of another person, except that a supervised lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional conduct.

8.03 Reporting Professional Misconduct; (a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority;
Scenario 3

DISCUSSION
### Generalized Roles of Technical and Legal Experts in Environmental Matters

<table>
<thead>
<tr>
<th>Type of Action</th>
<th>Engineer/Technical Role</th>
<th>Lawyer Role</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Litigation</td>
<td>Expert witness, possibly fact witness</td>
<td>Client advocate, litigation strategy, pleadings and papers</td>
</tr>
<tr>
<td>2 Legal Analysis</td>
<td>Develop facts</td>
<td>Identify or interpret legal requirements or legal responsibility</td>
</tr>
<tr>
<td>3 Enforcement actions</td>
<td>Develop facts</td>
<td>Develop facts, litigate or negotiate with regulators</td>
</tr>
<tr>
<td>4 Appearance before</td>
<td>Technical support</td>
<td>Required for corporate appearance in contested cases such as enforcement</td>
</tr>
<tr>
<td>enforcement body</td>
<td></td>
<td>matters, permit appeals and variance petitions</td>
</tr>
<tr>
<td>5 Contracts</td>
<td>Administer and implement</td>
<td>Draft, negotiate and interpret</td>
</tr>
<tr>
<td>6 Clean-up agreements</td>
<td>Implement and support</td>
<td>Draft, negotiate and interpret</td>
</tr>
<tr>
<td>7 Regulations</td>
<td>Implement by designing and constructing systems and facilities, can be very knowledgeable about specifics</td>
<td>Interpret requirements</td>
</tr>
<tr>
<td>8 Regulations development</td>
<td>Review and evaluate scientific basis; assist in negotiated rulemaking and standards development</td>
<td>Persuasively present facts in comments to proposed rules; challenge agency authority, scope and breath of regulations, vagueness</td>
</tr>
<tr>
<td>9 Appearance at public</td>
<td>Present the facts</td>
<td>Persuasively advocate on the client’s behalf</td>
</tr>
<tr>
<td>10 Environmental Management</td>
<td>Develop and implement the program</td>
<td>Develop and/or review the program</td>
</tr>
<tr>
<td>11 Compliance audits</td>
<td>Field investigation and report</td>
<td>Interpret results and determine preparation strategy for reporting liability or response</td>
</tr>
<tr>
<td>12 Transactions</td>
<td>Identify problems and risks through environmental assessment process</td>
<td>Recommend consultant; review assessment; collect corporate data; allocate problems and risks through preparation of legal documents</td>
</tr>
<tr>
<td>13 Permit writing</td>
<td>Develop technical facts; prepare forms</td>
<td>Determine if require; pre-submittal review</td>
</tr>
<tr>
<td>14 Technical submissions</td>
<td>Develop and prepare</td>
<td>Review in light of legal requirements</td>
</tr>
<tr>
<td>15 Engineering design</td>
<td>Design/construct remediation and treatment systems</td>
<td>Identify legal requirements and ensure they are achieved</td>
</tr>
<tr>
<td>16 Field investigations</td>
<td>Develop and implement sampling plans</td>
<td>Identify legal requirements and ensure they are achieved</td>
</tr>
</tbody>
</table>

**Source:** Effectively Managing Environmental Matters" ([see](http://www.nijmanfranzetti.com/articles/Effectively%20Managing%20Env%20Matters-Parts%20I,%20II%20and%20III.pdf))
Thank You!

Questions?
WEBINAR SURVEY

PLEASE STAY ON THIS SITE FOR A FEW MOMENTS TO COMPLETE THE WEBINAR EVALUATION

WE APPRECIATE YOUR COMMENTS AND SUGGESTIONS
Continuing Education Information

To request your certificate of participation, please follow these steps to verify your attendance:

1. Go to the following web page
   http://Events.awma.org/certificates

2. Complete the information requested
3. Click the submit button

Contact Gloria Henning for assistance:
   glhenning@awma.org
Upcoming Webinar
Save the Date

“Keeping the Cart out of the Ditch and $ in Your Pocket: Performing an Air Compliance Audit”

Thursday, January 9, 2014
1:00pm-2:30pm (Eastern Time)

Presenters:
Ken Faulkner, P.E., Principal Environmental Engineer
Betty Ruth Fox, Counsel with Watkins & Eager
Chris Wells, Senior Attorney, Mississippi Department of Environmental Quality’s Environmental Compliance & Enforcement Division

Moderator: Dallas Baker, P.E, Environmental Engineer
Upcoming Webinar
Save the Date

Towards Sustainable Value Chains
Wednesday, January 15, 2014
1:00pm-2:30pm (Eastern Time)

Presenters:
Jessica Wollmuth, Supply Chain Sustainability Practice Lead, CH2M HILL
Jameson Morrell, Sr. Energy and Sustainability Management Consultant, CH2M HILL
Lyra Myers, Genentech

Moderator:
Velislava Ivanova, Global Sustainability Practice Director
Webinar Ideas

If you have suggestions for other webinar topics, please email

Robin Lebovitz at
rlebovitz@awma.org

Suggestors Attend “Their” Webinar
FREE
To learn more about the Air & Waste Management Association and to become a member:

~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~

Please contact

Gerald Armstrong
Member Services Representative

garmstrong@awma.org
412-904-6018
Thank you for attending the A&WMA webinar:

Ethical Issues of Environmental Attorneys, Engineers, & Consultants Working Together

We look forward to you attending another webinar with the Air & Waste Management Association