

Holland & Knight

Avoiding Ethical Pitfalls While Working with Government in the Environmental Context

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The legal and ethical obligations to comply with environmental obligations and disclosures.

- Ethical and legal issues presented when lawyers, environmental professionals, and others have a duty to disclose information under various scenarios.

Why should disclosures be made?

- To comply with substantive law.
- To avoid criminal liability.
- To assist in attaining policy goals.
- To minimize or avoid bad publicity.
- To minimize risk of litigation or penalties.

Where do we find the obligations or prohibitions of disclosure?

- Ethics Rules
- Legal Obligations
 - Case law
 - Statutory requirements
 - Contract provisions
- Moral obligations
- Agency Guidance Documents – disclosure may be optional – know your forum

Ethics Rules for Lawyers

Rules of Professional Conduct 4-1.6(a) and (b)

- A lawyer “shall not reveal information relating to representation of a client” except in certain circumstances, unless the client consents.
- A lawyer shall reveal confidential information to the extent reasonably believed necessary:
 - To prevent a client from committing a crime; or
 - To prevent a death or substantial bodily harm to another.

Ethics Rules for Lawyers

Rules of Professional Conduct - 4-1.6

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
- (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
- (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (5) to comply with the Rules of Professional Conduct.

Trade Secrets

- Trade Secret information submitted to FDEP, as defined in section 812.081(1)(c), Fla. Stat., is confidential and permanently exempt from the sunshine laws which require public disclosure(section 119.07(1), Fla. Stat.).
- Unlike some agencies , FDEP does not have specific procedures governing the handling of trade secret and proprietary information.
- All trade secret, confidential and proprietary documents should be clearly marked as such before they are submitted to agency officials. See, eg., § 624.4213 (1), Fla. Stat (governing Florida agencies subject to the Florida Insurance Code)..
- See, e.g., State of Fla. Dep't of Env'tl. Prot v. Dan A. Hughes Co., OGC File No. 14-002, ¶ 23 (Consent Order in which confidential information in exhibits was filed separately and shielded from public disclosure).

Ethics Rules for Former Government Officers and Employees

Rules of Professional Conduct

4-1.11

- (a) May not represent a client in connection with a matter that he or she participated personally and substantially while in government unless the agency gives its informed, written consent.
- (b) That disqualified former public employee's firm is generally disqualified unless written notice is given to the agency and the employee is screened from the matter and the fee.
- (c) May not use confidential government information to represent a private client adverse to the person about which the confidential information was obtained by the government.

Ethics Rules for Current Government Officers and Employees

Rules of Professional Conduct

4-1.11

(d) Lawyer currently serving as a public officer or employee may not

i) participate in a matter which he or she participated personally and substantially while in nongovernmental employment unless the agency gives its informed consent.

ii) negotiate for private employment with any person who is involved as a party or as attorney for a party in which he or she is participating personally and substantially.

Ethics Rules for Other Professionals

- A professional geologist shall advise the appropriate public officials when the decision of an employer, client, or colleague violates any law or regulation if such violation “appears to materially affect the public health, safety or welfare.” Florida Association of Professional Geologists, Article 3.d., American Institute of Geologists Rules of Conduct, Rule 2.1.3.
- A Member shall not use, directly or indirectly, any confidential information obtained from or in the course of performing services for an employer or client in any way which is adverse or detrimental to the interests of the employer or client, except with the prior consent of the employer or client or when disclosure is required by law. American Institute of Geologists Rules of Conduct, Rule 3.2.1

Ethics Rules for Other Professionals

- The professional engineer shall notify his/her employer or client, and such other authority as may be appropriate if an engineer's judgment is overruled under circumstances that endanger life or property. Rules of Practice, 1.a., the National Society of Professional Engineers' Code of Ethics.
- A Florida licensed engineer can be sanctioned if he/she
 - discloses confidential information without the client's consent, except as authorized or required by law. FAC 61G15-19.001(6)(r) or
 - fails to inform his employer and the responsible public authority "of the possible circumstances" when an unqualified person has overruled the engineer's judgment with the result that public health and safety is threatened. Florida Department of Business and Professional Regulation. FAC 61G15-19.001(6)(l).

When? Threshold or Timing of “Harm”

- But, does a lawyer or other professional have an ethical obligation to disclose information in the following situations:
 - When chronic, long-term exposure may (or may not) cause death or substantial bodily harm in the future?
 - If the chances of developing cancer or some other disease due to exposure is 1 in 1 million?
 - What if the chances are unquantifiable?

Misrepresentation Can Derail Agency Action

- **RCRA, 40 CFR §270.43** allows the agency to terminate or non-renew a permit because of misrepresentation or failure to disclose fully all relevant facts
- **376.16(12) Pollutant Discharge.** Any person who makes or causes to be made a false statement which the person does not believe to be true in response to requirements of the provisions of ss. 376.011-376.21 commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
- **376.302 (1) Pollutant Discharge.** It shall be a violation of this chapter and it shall be prohibited for any reason: (c) To knowingly make any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter, or to falsify, tamper with, or knowingly render inaccurate any monitoring device or method required to be maintained under this chapter or by any permit, registration, rule, or order issued under this chapter. **See also 403.161**
- **376.302 (2)-(4)** Except as provided in s. 376.311, any person who commits a violation specified in subsection (1) is liable to the state for any damage caused and for civil penalties as provided in s. 403.141 as well as significant civil penalties and jail time.

Misrepresentation Can Derail Agency Action

- **373.243 Revocation of consumptive use permits.**—The governing board or the department may revoke a permit as follows: (1) For any material false statement in an application to continue, initiate, or modify a use, or for any material false statement in any report or statement of fact required of the user pursuant to the provisions of this chapter, the governing board or the department may revoke the user's permit, in whole or in part, permanently.

Environmental “Crimes”

- Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d) and (e) imposes criminal liability on persons who knowingly treat, store, dispose or transport hazardous waste or used oil in violation of RCRA (including, but not necessarily, where it places someone in imminent danger of serious bodily injury).
- Section 103(b) of CERCLA, 42 U.S.C. § 9603(b) imposes criminal sanctions for failure to report the discharge of a reportable quantity of a hazardous substance.
- Section 311 of the Clean Water Act, 33 U.S.C. § 1319(c) imposes criminal penalties for failure to report a discharge of petroleum or other hazardous substance into navigable waters, including **negligent** violations of a permit condition.
- Fla. Statutes § 376.302 and §403.161(3), (4) and (5) impose criminal sanctions for knowingly causing pollution, failing to comply with a rule or knowingly falsify a statement or report.

What is “contamination”?

- The presence of free product or any contaminant in surface water, groundwater, soil, sediment, or upon the land, in concentrations that exceed the applicable CTLs . . . or that may result in contaminated sediment . . .” FAC 62-780.200 (9) and (11).
- Are there other definitions?
- Do some clients have different expectations?

Case Law:

- Seller of residential property must disclose to a purchaser latent defects which may materially affect the home's value. Johnson v Davis, Florida Supreme Court, 1986.
- May be broader than Statutory Requirements
- Consider:
 - Lead-based paint/hazards (already disclosed pursuant to federal law)
 - Mold
 - Asbestos
 - Environmental release or contamination

Sample Statutory Requirements:

- Offsite contamination discovered during Site Rehabilitation – FAC 62-780.220
- Petroleum soil contamination FAC 62-780.210 or “incident notification” from storage tanks (see 62-761.450)
- Lead-based paint (or other surface coatings that contain lead equal to or in excess of 1.0 mg/cm² or 0.5% by weight) must be disclosed by seller to purchaser of residential property (HUD rule: 24 CFR 35; EPA rule: 40 CFR 745).
- Asbestos – A building owner and/or employer must determine whether the building contains any asbestos containing material of more than 1% asbestos *before* beginning demolition, repairs, maintenance, etc. 40 CFR 61.145

Sample Statutory Requirements

- Radon – Florida Statute 404.056 (5)
NOTIFICATION ON REAL ESTATE DOCUMENTS TO
TENANT OR PURCHASER —
- “RADON GAS: Radon is a naturally occurring radioactive gas that, when it has accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county health department.”

Who is entitled to receive disclosure of environmental concerns?

- Regulators
 - see Notice Requirements
- Property Owners
- Tenants
 - usually not, but must disclose asbestos if it will be disturbed during construction
- Employees
 - OSHA requires employers to notify employees if they are reasonably expected to be exposed (29 CFR 1910.1001)

How must disclosures be given?

- In writing
- Verbally
- Warning signs
- Public meetings

Moral Obligation

- Groundwater contamination
- Most soil contamination
- Residual contamination
- Timing – sooner rather than later?

Hypo - Asbestos & Mold at a Hotel

- Hotel owner is remodeling a section of the hotel property that contains asbestos and mold. Hotel owner/manager:
 - Must warn – verbally or in writing - the construction workers at the site. 29 CFR 1926.1101.
 - Must warn – verbally or in writing - any employee who may reasonably be expected to be exposed. 29 CFR 1910.1001.
 - Must place warning signs at the site.
- Should hotel owner notify hotel guests of the asbestos?
- Should hotel owner notify hotel guests of the mold?

The Problem with Mold

- “Contamination” under the regulatory definition may not include mold because no statutory standards exist.
- Nonetheless, good reasons exist to disclose the existence of mold:
 - Potential health problems;
 - Property damage and personal injury claims against insurers;
 - Construction defect claims against builders, contractors, and architects;
 - Personal injury claims against building owners and managers;
 - Workers' compensation claims against employers; and,
 - Contractual claims between occupants and landlords.

Hypo - Lead in Soil at School

- An elementary school property is found to have elevated levels of lead in the soil (below the EPA standard but above the State standard).
- Do school officials have an obligation to tell the students and parents?
- Do the officials have a moral or ethical obligation to disclose the contamination to students and parents?
- Does it depend on the severity of the contamination?

Hypo – Cost of Non-compliance

- Developer is anxious to complete a lucrative condo project and begins clearing the land prior to obtaining ERP permit from the Water Management District.
- Developer disclaimed knowledge of presence of conservation easement.
- What is appropriate penalty?
- Did developer consider potential penalty compared to the cost of waiting for proper approval?

Disclaimer

- The information and materials provided during this program present general information and should not be used or relied on as legal advice when analyzing and resolving a specific legal issue.
- Each fact situation is different; the laws are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult with competent legal counsel about your specific facts and the specific laws that apply.