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Recommended Citation

Righter, Kimberly (2010) "Practitioner's Corner: Ken Markowitz on Serving as an Environmental Advocate," *Sustainable Development Law & Policy*. Vol. 2 : Iss. 1 , Article 4.
Available at: <https://digitalcommons.wcl.american.edu/sdlp/vol2/iss1/4>

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Practitioner's Corner: Ken Markowitz on Serving as an Environmental Advocate

By Kimberly Righter *

Background

From my past experience with Ken Markowitz, a 1989 graduate of WCL, I characterized him as dedicated to both the profession of environmental law and the school as an alumnus. When I contacted him about doing this interview, he confirmed my past impressions of him, by quickly responding to my invitation with a reply of “any time.” Ken seems always willing to help out students despite being extremely busy running his own public interest consulting firm, EarthPace LLC, in Washington DC.

Ken's firm advises organizations on using the Web and other emerging technologies to heighten public awareness of earth science and the law. Dramatically, technology can assist people in making more conscientious, cost-effective decisions regarding the environment. For extensive information on EarthPace, see the firm's website at <http://earthpace.com>.

Ken has pursued his commitment to the promotion of sustainable development and sound environmental practices at several places of employment since obtaining his law degree. Fresh out of school, Ken served as the Center for International Environmental Law's (CIEL's) first law associate. He never cut ties completely with CIEL or its president, Durwood Zaelke, and currently serves as both a web consultant for the organization and the Director of CIEL's Law and Technology Program.

After leaving CIEL, Ken became a senior counsel for the Environmental Protection Agency (EPA), Region III. For his performance with the agency, he received the Silver Medal for Excellence in Government in 1994. He also was a member of the National Superfund Team of the Year for 1993, which was recognized for implementing innovative legal approaches to enforcement in such emergencies as petroleum and hazardous waste spills. Additionally, Ken practiced with the international law firm of Kilpatrick and Stockton, LLP, and with Hall and Associates, where he served as expert regulatory counsel focusing on water law for municipal and corporate clients in over 30 states.

The Interview

I began the interview by asking Ken to share some interesting anecdotes about a few of his cases.

Kim: When you first started off you were working for CIEL...

Ken: When I first started working for CIEL, I was working 18-hour days, living in the house of my boss, Durwood Zaelke, and getting paid close to nothing – but it was great. I was able to be part of the launch of CIEL, the first public interest international environmental law firm. I handled a variety of cases including petitioning the Department of the Interior to ban the importation of certain kangaroo products because of illegal harvesting as well as evaluating criteria for CITES to protect African Elephants. After

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that, I took a position with the EPA, Region III, where I was an enforcement attorney that concentrated on ensuring rapid, effective response to environmental emergencies, such as oil and hazardous waste spills. With the EPA, I had the opportunity to work with most federal environmental regulatory programs, including CERCLA, The Clean Water Act, TSCA, EPCRA, RCRA, and OPA 90.

Kim: Especially given the context of the early 1990s, you must have taken on some fulfilling challenges.

Ken: Yes, actually that was around the time of the Exxon-Valdez oil spill. The Oil Pollution Act of 1990 had also just passed. Region III was the first to test out the enforcement provisions of the law on several novel cases that involved an underground plume of oil under a residential neighborhood. The case was a classic example of the dynamic between citizens, industry, and government in an environmental dispute. This one got so bizarre that the government actually had to sue a citizen's association to gain access to a strip of property to place containment equipment that was necessary to inhibit the progress of the plume. However, working with the company, state, local and county governments, and the citizen's group, we successfully lifted regulatory hurdles and the clean up was initiated timely.

Kim: What was the length of the case?

Ken: As far as I know, the clean up of that site may still be going on, and there still may be outstanding legal issues, but long term clean up and dispute are often inherent in remedying damage to our environment.

Kim: Was that one of the main cases that you worked on at EPA?

Ken: I was fortunate to work on many exciting cases with the EPA. Another challenging case involved an international vessel that lost over 400 barrels of arsenic trioxide off the coast of Cape Henlopen, Delaware. Working with the Coast Guard, EPA issued an administrative order to the responsible party to find and remove safely the barrels or pay the cost of the United States government in funding the response. This resulted in the first successful extraterritorial application of CERCLA, and the government ultimately recovered their costs from the responsible parties.¹ I have also handled many litigations before EPA administrative courts, including several Emergency Planning and Community Right to Know Act cases.²

Kim: Now, with the administrative law cases, how did you need to prepare differently as a litigator to go before an administrative law judge versus a normal courtroom setting?

Ken: For no rational reason, appearing before an administrative law judge seemed much less scary.

Kim: Was that because you found administrative law judges more predictable?

Ken: No, not necessarily, because often there is less precedent to guide the judges, which leads to greater unpredictability and risk in the outcome.

Kim: As a lawyer, what do you consider your most fulfilling position?

Ken: I really like what I'm doing now, developing technology based tools and communications strategies, which assist environmental stakeholders in performing their jobs more efficiently and make better long term sustainable decisions for the environment. For example, we are currently developing Web-based system and organizing a biannual conference for the International Network for Environmental

¹ See *U.S. v. M/V Santa Clara*.

² See *In the Matter of Genicom*

Compliance and Enforcement (INECE). We are also developing decision information systems to modernize the environmental impact assessment process under the National Environmental Policy Act (NEPA) and scenarios to improve communications during an emergency response to an oil spill.

Kim: And what exactly about developing new tools and strategies do you find satisfying?

Ken: Results: a better way of doing things.