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Private Governance and the New Private Advocacy

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Environmental lawyers in the United States are reacting to the 2016 election by rethinking the actors and actions that drive environmental protection. The obvious first response for environmental lawyers—whether representing advocacy groups or corporations—is to step up lobbying and litigation directed at the executive, legislative, and judicial branches of federal and state governments. An exclusive focus on public governance and public advocacy, however, will miss opportunities to affect large aspects of the modern environmental regulatory landscape. We suggest that private advocacy and private governance, which often can bypass government altogether, will play a growing role in environmental law and policy as the federal role in environmental protection shrinks over the next several years.

Environmental governance today involves more than just actions by government. It involves new standards by retailers that restrict the toxic chemicals in thousands of products and private certification and standards programs directed at fish, forests, and many agricultural products. It also includes investor-driven organizations that create pressure for carbon disclosure, lender-driven requirements for environmental assessments, and private-sector initiatives that drive demand for renewable power. This is the world of private environmental governance. Private environmental governance (PEG) occurs when private organizations perform the environmental protection functions traditionally assigned to government. *See* Michael Vandenbergh, *Private Environmental Governance*, 99 Cornell L. Rev. 129, 132 (2013). PEG has become widespread in the last two decades, and private advocacy, in which lawyers direct their advocacy toward private organizations rather than governments, is playing an increasingly important role in environmental governance.

The leading forms of PEG have emerged only in the last two decades, but private governance has deep historical roots. As Stanford Professor Sara Soule has noted, Benjamin Franklin was an early social entrepreneur in this area, establishing private organizations for fire protection, libraries, and other now-common governmental functions. Even the original Boston Tea Party was an action by private parties against a private company designed to have public ends.

Many environmental lawyers have daily involvement with PEG but may overlook it, in part because PEG does not typically generate the court decisions, public regulatory processes, and legislation that are commonly tracked by lawyers, most of whom were taught that environmental law is a public law field. Even our vocabulary is a barrier: Terms such as "international" and "policymaker" imply that the actor is some form of government. We have found, though, that once the concept of PEG crystalizes for environmental lawyers, the scope of private activity becomes easier to see and a remarkable range of new private advocacy options become apparent.

This article highlights several areas where this new private advocacy could lead to more activity for practicing lawyers. We first ask several questions to examine the importance of PEG for environmental lawyers and to tease out the reasons why private advocacy likely will become increasingly important over the next several years. We then identify several specific new topics and areas of expertise that will be important for the new private advocacy.

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Overview of Private Environmental Governance

Why has PEG emerged in the United States? Many factors are driving corporations and other private actors to engage in PEG, but it is important to understand the core drivers. One is the gap between public demand for environmental protection and the response of government to that demand. Survey results over the last few decades have demonstrated that the American public fears big government but wants environmental protection. *See* Michael Vandenbergh & Jonathan Gilligan, *Beyond Gridlock*, 40 Colum. J. Envtl. L. 217, 225 (2015). Other studies demonstrate sharp increases in polarization regarding environmental issues in the public and in Congress beginning in the early 1990s. Aaron M. McCright et al., *Political Polarization on Support for Government Spending on Environmental Protection in the USA, 1974–2012*, 48 Social Science Research 251–60 (2014). Regardless of the cause of congressional inactivity, the pattern is clear: After a period of remarkable statutory activity between 1970 and 1990, in the next quarter century virtually no major new federal pollution-control statutes were enacted. Michael Vandenbergh, *The Emergence of Private Environmental Governance*, 44 Envtl. L. Rep. News & Analysis 10125, 10131–32 (2014). The only exception, the 2016 amendments to the Toxic Substances Control Act, may have resulted in part from the emergence of new private toxics standards, which encouraged the chemical industry to support updates to the federal program. Federal and state regulatory activity has been robust in some areas, but as developments over the last year have demonstrated, in the absence of legislative support the scope and permanence of many government regulatory regimes is limited.

How widespread is PEG, and what forms does it take? Although PEG may be flying under the radar screen of those of us who were taught environmental law as a subfield of administrative law or who work in government, it is remarkably widespread. PEG initiatives also address many of the same issues as public environmental laws, including toxics regulation, natural resources management, climate change, and others. Sarah E. Light & Michael P. Vandenbergh, *Private Environmental Governance*, in Decision Making in Environmental Law: Elgar Encyclopedia of Environmental Law 253–67, (Lee Paddock, Robert L. Glicksman, & Nicholas S. Bryner eds., 2016). In addition, PEG initiatives also deploy many of the same regulatory tools, including disclosure, prescription, and market leveraging. *See* Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 Mich. J. Envtl. & Admin. L. 1, 23–52 (2015).

For instance, PEG initiatives use disclosure in a variety of ways. More than 400 eco-labeling systems are in place around the world, many of them organized and managed by private organizations. *See* Steering Comm. of State-of-Knowledge Assessment of Standards & Certification, *Toward Sustainability: The Roles and Limitations of Certification* (2012), *available at* www.resolv.org/site-assessment/files/2012/06/Report-Only.pdf. Similarly, the vast majority of all global project finance lending occurs by banks that have committed to the Equator Principles, which require National Environmental Policy Act-like identification and disclosure of the environmental effects of project finance lending. See About the Equator Principles, www.equator-principles.com/index.php/about-ep/about-ep.

PEG initiatives also often use prescriptive command-and-control requirements. For instance, in the toxics area, private requirements are often adopted by major corporate buyers and imposed through supply chains. In the last several years, Wal-Mart and Target have become important private regulators of the toxics associated with the products they sell, and their standards affect which chemicals are manufactured and used in their massive supply chains around the world. In some cases private requirements are adopted unilaterally and included in supply-chain requirements, but in many cases private requirements are the product of multistakeholder processes that generate third-party certification systems. For instance, the Marine Stewardship Council (MSC), a private multistakeholder organization, sets standards for roughly 10 percent of the fish caught for human consumption around the world, with more than 250 fisheries certified. Consumers purchased over 650 million tons of MSC-certified seafood in 2015. Marine Stewardship Council, *From Sustainable Fishers to Seafood Lovers: Annual Report 2015–16*. The Forest Stewardship Council has certified more than 196 million hectares of forests around the world. Forest Stewardship Council Facts and Figures (Jan. 6, 2017), *available at* https://ic.fsc.org/file-download.facts-figures-january-2017.a-1297.pdf.

PEG is particularly important in the climate arena, and its role is likely to grow as the federal role in climate mitigation shrinks. Within hours of President Trump's announcement that the United States would withdraw from the Paris deal, many CEOs and investors voiced their support for global climate initiatives and even pledged to pursue the Paris goals in the absence of federal mandates. See, e.g., Hiroko Tabuchi and Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. Times (June 1, 2017), www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html. In the energy field, private-sector demand for renewable power is becoming common, both domestically and globally. Google, Apple, Facebook, and others are a leading source of pressure for carbon emissions reductions from the electric power sector in many states. This private-sector action has crossed international boundaries without the practical and political barriers that confront international climate mitigation processes. For instance, in 2015, Apple announced plans to build 2 gigawatts of solar power in China to meet its commitment to use renewable power, an effort that will reduce China's carbon footprint.

Disclosure also has been an important piece of this puzzle. Global investors representing more than $100 trillion participate in CDP (formerly the Carbon Disclosure Project), which has induced more than two-thirds of the corporations in the S&P 500 to disclose their carbon emissions. Carbon disclosure can create pressure for carbon emissions reductions, and thousands of companies have set carbon emissions reduction goals, in some cases including carbon neutrality. In addition, hundreds of major companies, including Microsoft, have established internal carbon prices to implement emissions reduction goals. Sarah E. Light, *The New Insider Trading: Environmental Markets within the Firm*, 34 Stan. Envtl. L. J. 3, 41–50 (2015).

PEG organizations also use several land use tools, including easements and options. Federico Cheever & Jessica Owley, *Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPCES)*, 40 Harv. Envtl. L. Rev. 1 (2016). As pressure on undeveloped land and endangered species has increased, private land trusts and conservation organizations have stepped up to protect undeveloped and agricultural land. Roughly 40 million acres of land in the United States are encumbered by conservation easements, an area almost the size of the state of Washington. *Id.* at 3. If the federal government divests some of its holdings in public lands, we can expect these land conservation organizations to become even more active.

These are all initiatives that perform the traditionally governmental functions of reducing negative externalities and managing common pool resources, and they are all managed by companies, advocacy groups, and other private organizations, not government agencies. Government regulation and resources are often in the background, but the actors and actions are private.

The New Private Advocacy

What are the implications of PEG for lawyers engaging in advocacy, whether representing advocacy groups, corporations, or government? We suggest that as PEG grows, private advocacy will become more important, and practicing in this area will provide many opportunities and challenges for lawyers trained in public advocacy. We identify several areas that could become more active practice areas for environmental lawyers, but these are just the tip of the iceberg.

Public and private advocacy to support private initiatives. Advocates are recognizing that they can focus not only on decreasing the supply of high-carbon energy, but also on reducing the demand. Private advocacy directed at increasing private-sector renewable energy demand can be expected to increase, whether through litigation, naming-and-shaming, disclosure, or more collaborative efforts. An increasingly important focus for advocates will be to reduce the public

regulatory barriers to private-sector demand for renewable power. Companies that seek to invest in renewable energy production face a range of barriers from utilities, state public utility commissions, and the Federal Energy Regulatory Commission, including problems procuring renewable power and selling excess power to the grid. *See* Peter Fox-Penner, *Why Apple Is Getting into the Energy Business*, Harv. Bus. Rev. (Nov. 25, 2016). Public and private advocacy for and against these private initiatives can be expected to increase and will require expertise in energy and environmental law as well as public and private advocacy.

Targeting reputation and the social license to operate. The emergence of PEG, combined with the shrinking federal presence, may lead to an increase in naming-and-shaming efforts directed at global corporate brands and at corporate reputations in local communities. For many companies, simple legal compliance is not the goal because, as University of Chicago Provost Daniel Deirmeier's book title suggests, "Reputation Rules." Similarly, although lawyers understandably often focus primarily on a company's legal license to operate, managers in the business world increasingly are concerned with a company's social license to operate. *See generally* Neil Gunningham, Robert Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 Law & Social Inquiry 307 (2006). Challenges by "social licensors" at the corporate and local level could become more common over the next several years and could present complex management and legal challenges. The future directions of private advocacy regarding reputation and the social license to operate are hard to predict, but it is clear environmental lawyers will need to account for these issues when engaging in or defending against private advocacy.

Public and private disclosure. Many private environmental initiatives focus on public disclosure, and private advocacy in this arena likely will increase as the federal regulatory role shrinks. Although the 2010 SEC climate disclosure guidance received a great deal of attention, see Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010), it simply provided clarity about the underlying statutory obligations, and its fate is unclear. Private groups such as Risky Business and Ceres have played a public-private advocacy role, policing corporate compliance with the SEC requirements while advocating for broader corporate disclosure. *See, e.g.*, Risky Business, National Report: The Economic Risks of Climate Change in the United States (June 2014); Ceres, Reporting Guidance for Responsible Palm (Jan. 2017).

In addition, private disclosure initiatives such as CDP are making carbon emissions data widely available and may be more resilient than government disclosure policies. CDP is a nonprofit organization that publishes self-reported climate change data from more than 4,000 corporations. The CDP model leverages investor pressure to encourage corporations to disclose their climate impact and reduce emissions. Over $100 trillion dollars in assets, managed by over 700 institutional investors, support the CDP. CDP has increased its focus on inducing disclosure from corporate supply chains, an effort that could expand motivations to reduce carbon emissions to large numbers of smaller firms around the world. As we mentioned above, lender disclosure standards, such as the Equator Principles, also may be an important focus of private advocacy moving forward. In addition, lenders have developed an analogous effort for climate-relevant lending: The Carbon Principles were designed to affect the climate diligence necessary for lending for new fossil fuel-fired power plants by requiring prospective borrowers to account for the risk of climate mitigation requirements when assessing the financial viability of the proposed plant.

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In the absence of federal regulatory pressure to reduce carbon emissions, advocates for environmental groups can be expected to increase pressure for disclosure of climate risks in public financial statements and to increase their focus on carbon emissions disclosure via CDP, the Equator Principles, and other private disclosure regimes. Advocacy groups and corporate lawyers will need to be familiar not just with SEC compliance, but also with the potential benefits and repercussions of disclosing carbon emissions data to CDP and other private groups.

The scope of due diligence. The emergence of PEG and private advocacy also may require updating conceptions of environmental risk in the diligence and disclosure conducted in connection with securities, lending, and merger and acquisition transactions. The increasing importance of accounting for PEG risks when identifying and disclosing environmental matters may affect the practices not only of lawyers who represent corporate clients, but also government and advocacy group lawyers. Recent public-private standard-setting for environmental accounting and risk disclosure has addressed some aspects of this issue. For many corporations, however, compliance with government requirements and tort risks may not address all important environmental risks. Vulnerability to naming-and-shaming campaigns, the need to comply with private certification and standards systems, and the supply-chain requirements of corporate customers may be equally important. This is particularly true for those corporations whose business is dependent upon their reputation with the communities in which their facilities operate; retail customers; or corporate consumers, investors, and lenders who are focused on environmental issues. An example is a recent effort by the Rainforest Action Network to estimate and disclose the carbon footprints of the lending portfolios of the five largest Canadian banks. Vandenbergh & Gilligan, *Beyond Gridlock*, at 265.

Private advocacy and the new private administrative law. The growth of private initiatives, particularly third-party certification and standards organizations, has generated demand for expertise in what might be called private administrative law. For instance, certification and standards organizations have proliferated in the last two decades, extending beyond general ecolabels, organic foods, seafood, and forests to crops such as cocoa and bananas, and to new issues such as animal welfare. Steering Comm. of State-of-Knowledge Assessment of Standards & Certification, *supra*.

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These private organizations often function much like public agencies: They develop standards through administrative procedures that involve collective decision-making about proposed standards, issue proposed standards, take public comments, and issue revised standards with explanations of changes. They also often involve third-party verification and dispute resolution. Lawyers for advocacy groups may focus on these organizations not only to influence the stringency and enforcement of the standards, but also because of the domino effect that can result from lax certification and standards systems. *See* Devika Kewalramani & Richard J. Soebelsohn, *Are You Being Greenwashed?*, 84 N.Y. St. B.J. 10, 13 (June 2012).

Private advocacy before these organizations has close parallels to public advocacy, including lobbying, drafting, counseling, and litigating. Environmental lawyers have engaged in these kinds of public advocacy before government agencies for decades, but now advocacy often may be required before private organizations. Although international law scholars have noted the importance of the emerging new global administrative law, Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 15 (2005), the importance of private domestic administrative law remains largely unexplored. The growth of private certification and standards systems suggests that private administrative law may require new approaches by corporate and advocacy group lawyers, as well as new academic research and training.

Antitrust law. Antitrust is another area of law that could become more important for environmental lawyers with the growth of PEG and private advocacy. Collaborative processes, whether the multistakeholder processes commonly used for standards and certification systems or industry-specific initiatives, can raise concerns about anticompetitive conduct. Antitrust liability concerns are not new to standard setting organizations. *Allied Tube & Conduit Corp v. Indian Head, Inc.*, 486 U.S. 492 (1988) (noting that "private standard-setting associations have traditionally been objects of antitrust scrutiny"). Third-party certification initiatives with multistakeholder participation such as MSC and the Sustainable Forestry Initiative are less inherently collusive than industry-only efforts but are still subject to concerns about industry capture that can translate into antitrust problems.

To the extent private initiatives that involve multiple industry participants proliferate, these initiatives are likely to raise a range of important antitrust concerns that are beyond the scope of this article. It is clear, though, that antitrust expertise will be important for lawyers engaging in the new private advocacy. Environmental lawyers with antitrust expertise may now be particularly valuable to corporate clients who seek counseling on antitrust concerns regarding private environmental standard-setting and enforcement. An awareness of antitrust issues also may enable advocacy group lawyers to identify the types of private initiatives that are likely to succeed while avoiding antitrust objections by the corporate targets of their advocacy.

The growth in private environmental standard-setting also is important for government antitrust lawyers. Although protecting competition is important, so is cooperation among corporations when it leads to environmental protection, particularly if the federal government continues to withdraw from the playing field. These potentially conflicting goals will require government antitrust lawyers to confront the extent to which they are tasked with improving welfare, not just protecting competitive markets, and to account for the benefits of collaborative efforts when adopting antitrust policies and exercising enforcement discretion.

Product claims. Green claims—which occur when a business makes an assertion about how environmentally friendly or sustainable a product or service is—are often an important part of corporate efforts to gain benefits from environmental improvements. These claims can be expected to grow if the gulf widens between government regulation and public support for environmental protection. In 2013, 71 percent of consumers admitted to "thinking green" when purchasing goods and services. Leon Walker, *71% of Consumers Think Green When Purchasing*, Environmental Leader, www.environmentalleader.com/2013/04/71-of-consumers-think-green-when-purchasing. At the same time, studies of consumer willingness to pay often suggest that although many consumers will opt for a green good when all else is equal, they will not pay a great deal more for environmentally preferable goods. Mark Cohen & Michael Vandenbergh, *The Potential Role of Carbon Labeling in a Green Economy*, 43 Energy Economics 1 (2012). Focusing just on consumer willingness to pay, though, may not convey an accurate sense of the influence of green claims. Rather than being concerned about consumer willingness to pay for green goods, retailers may worry more that generalized reputational concerns could keep customers from shopping with a retailer in the first place. In addition, retailers may respond to disclosure requirements by changing the mix of products available to consumers, even if consumer willingness to pay is weak. Sharon Shewmake, Mark Cohen, Paul Stern & Michael Vandenbergh, *Carbon Triage: A Strategy for Developing a Viable Carbon Labeling System*, Handbook on Research in Sustainable Consumption, at 285–99 (2015), *available at* https://ssrn.com/abstract=2353919.

Green claims also pose risks of greenwashing. The effectiveness of ecolabeling as a means of environmental governance thus rests on the accuracy of the labels and their effects on consumers and the firms that use them. *See* Jason J. Czarnezki, Andrew Homan, & Meghan Jeans, *Greenwashing and Self-Declared Seafood Ecolabels*, 28 Tul. Envtl. L. J. 37 (2014). The policing of ecolabeling occurs through advocacy group naming-and-shaming campaigns, investor pressure, and federal and state government requirements. For instance, the Federal Trade Commission's "Green Guides" provide guidance on the necessary support for environmental claims. Private and public advocacy directed at green product claims is likely to remain active, creating a need for environmental lawyers to understand federal, state, and foreign law in this area, as well as the literature on when labeling is effective and when it is not.

Supply contract policies, terms, and disputes. Private advocacy also may focus increasingly on the use of environmental supply-chain requirements by large corporations. These contractual requirements simply involve compliance with public environmental laws in some cases, but in others they impose additional requirements on suppliers. They also create the threat of private enforcement even in the absence of public enforcement. Environmental supply-chain contract requirements are surprisingly widespread, even in business-to-business sectors, and can cross national boundaries even in the absence of international agreements. *See* Michael Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. Rev. 913, 927 (2007). For example, just this spring, Wal-Mart announced "Project Gigaton," a plan to eliminate one gigaton of carbon emissions from its supply chain. This could give advocates additional leverage when lobbying those suppliers to lower emissions. To the extent advocacy groups ramp up pressure on corporations to adopt and enforce supplier standards, corporate environmental lawyers can expect to increase their participation in the responses to this private advocacy and to become more involved in the drafting of procurement policies and contract terms and dispute resolution.

In conclusion, the shrinking federal role in environmental protection is likely to stimulate new forms of environmental governance and increased levels of private advocacy. These developments will place a premium on the ability of environmental lawyers to embrace new conceptions of environmental governance and to develop new types of expertise. Although private advocacy can enable nimble, gap-filling responses to environmental problems, it also raises new risks. Negative spillover effects can occur—private initiatives can facilitate greenwashing or discourage more promising government initiatives. For some initiatives, the risks of anticompetitive behavior could outweigh the benefits of increased environmental protection. In the absence of democratic accountability, PEG initiatives could become untethered to public preferences and public welfare. These are all concerns that successful private advocacy can be expected to wrestle with as the environmental governance system evolves in response to the tectonic shifts in Washington.

2016-2017 COMMITTEE AWARDS

The following committees were recognized at the 25th Fall Conference for their success in the 2016-2017 ABA year.

BEST COMMITTEE

Superfund and Natural Resource Damages Litigation

Chair: John F. Gullace

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Environmental Litigation and Toxic Torts

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PHOENIX AWARD

Energy Infrastructure, Siting, and Reliability

Co-Chairs: Roger D. Feldman and Jason D. Gellman

The following received SPECIAL AWARDS for their incredible work and effort to keep Section members informed of fast-moving developments of the new administration.

Administration Tracker Webpage

Amy L. Edwards (http://ambar.org/environtransition)

WOTUS and the Reach of CWA Jurisdiction Webpage

Steven T. Miano (http://ambar.org/environwotus)