

Relaxed Requirements ...

What Are Environmental Lawyers Supposed to Do Now?

At a moment when the *New York Times* is reporting on the hunt for “resistance” employees at the US Environmental Protection Agency by a public affairs firm hired by the agency itself, in a year when federal enforcement against polluters has already declined in comparison to prior administrations, and when a number of states and the District of Columbia have already filed suit against EPA Administrator E. Scott Pruitt in an effort to get him to designate areas of the country with unhealthy levels of smog as required by the Clean Air Act (*California v. Pruitt*, No. 3:17-cv-06936 (N.D. Calif. filed Dec. 5, 2017)), one cannot help but wonder what the environmental defense bar is up to these days.

Will environmental lawyers, particularly those working for big clients in Big Law, be sitting idly during the remainder of the Trump administration?

Not under any circumstances, of course, what with demands for billables being what they are. Despite the high-octane headlines all but declaring an environmental apocalypse, it might be a mistake to assume that very much about the day-to-day practice of environmental law has changed at all during Trump time or that the future of the practice, no matter what sort of client one happens to represent, is anything other than busy as well as bright.

Plus ça change

In some ways, environmental law practice under the “Make America Great Again” president remains the same. “Environmental law practice has continued to require staying abreast of policy changes being implemented by the various federal agencies that oversee

environmental issues,” says Laura Granier, a partner at Holland & Hart in Reno, NV.

Indeed, EPA’s jurisdiction over environmental matters is far from exclusive. The Departments of Interior and Defense tend to get in on the fun at the federal level, as do various regulatory commissions (think Nuclear or Federal Energy) depending on the precise subject matter at hand.

Since Donald Trump took office, “the actual practice of law has not changed in any substantive way,” acknowledges John Fumero, a shareholder with Nason Yeager in Boca Raton, FL, who works on environmental and land use issues. Instead, “the environmental regulatory agencies and their priorities have changed.” Agencies, subject to the vagaries of their funding, are facing reduced budgets and understaffing, Fumero says.

The current political climate is “oriented toward less bureaucracy and less regulation,” Fumero adds. The focus now is on greater efficiency. And jobs.

A Little Executive Fiat

To that end, Trump has issued “a lot of executive orders involving the environmental area where EPA has been instructed to review regulations that exist or are being contemplated and either revise, rescind, or repeal,” observes Pamela Barker, a member at Lewis Rice in St. Louis and a former chair of the ABA’s Section of Environment, Energy, and Natural Resources. Of the 50-plus executive orders President Trump has issued thus far, a number do affect the environmental spectrum, including:

- Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, Exec. Order No. 13,807 of Aug. 15, 2017, 82 Fed. Reg. 40,463 (Aug. 24, 2017), which proclaims that it is now the policy of the federal government to “conduct environmental reviews and authorization processes in a coordinated, consistent, predictable, and timely manner in order to give public and private investors the confidence necessary to make funding decisions for new infrastructure projects” (Sec. 2(f)) and “make timely decisions with the goal of completing all Federal environmental reviews and authorization decisions for major infrastructure projects within 2 years” (Sec. 2(h)).
- Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783 of Mar. 28, 2017, 82 Fed. Reg. 16,093 (Mar. 31, 2017) (directing the immediate review of all agency actions that potentially burden the safe, efficient development of domestic energy resources).
- Reducing Regulation and Controlling Regulatory Costs, Exec. Order 13,771 of Jan. 30, 2017, 82 Fed. Reg. 9,339 (Feb. 03, 2017) (requiring the identification of at least two existing regulations to be repealed for every proposed or promulgated new regulation).

The fallout from such an approach remains to be seen. “I think for the regulated community, as well as for clients, we are just watching and waiting to see the results,” Barker says.

Yet Trump’s habit of making change via executive order is not the only way environmental policy has been modified this year. For instance, since Trump entered office, both houses of Congress voted to kill the Bureau of Land Management’s Planning 2.0 rule, an Obama-era regulation that “would have implemented sweeping changes to the agency’s approach to land use planning,” Granier explains.

“This regulation was repealed under the Congressional Review Act, which also prevents the agency from issuing a new rule that is substantially the same without new authorizing legislation from Congress,” adds Granier. The Congressional Review Act, 5 U.S.C. §§ 801–808 was signed into law by President Bill Clinton back in 1996. It allows Congressional review of regulations issued by the federal government and, with a joint resolution, disapproval of those regulations.

In fairness, the Obama administration did promulgate the final Planning 2.0 rule, which would have increased transparency and public involvement, only while it was on its way out the door. The final rule was published in December 2016 and became effective on January 11, 2017, just days before the Trump inauguration. On March 27, Trump signed H.J. Res. 44 repealing it.

More Efficient or Less Effective?

Is the environment better or worse off? The answer, of course, depends on whom one asks. Just months ago, the ABA Section of Civil Rights and Social Justice, working with the Environmental Law Institute, published the first edition of a free e-book called *Environmental Protection in the Trump Era* that, according to its promotional materials, “provides a snapshot of major Trump administration actions on climate change, clean air and water, pipelines and offshore drilling, toxic properties and superfund sites, rolling back regulations, cutting budgets and agencies, and environmental justice.”

Of course, of the many problems that the planet happens to have, many long predate the current president’s tenure. Trump’s emphasis on infrastructure is perhaps not misplaced given events like the drinking water crisis in Flint, MI, which surfaced back in 2014 when Trump was not yet even running for office.

Flint switched drinking water sources to save money, and lead from old pipes leached

into the water. When residents complained, their concerns were dismissed by state and local officials for a period of time. The federal EPA eventually became involved but, in the minds of some, long after it should have. Even today, domestically, there are “aging infrastructure and aging pipe systems” along with “municipalities that are candidly having difficulty doing things,” observes Christopher Torres, a shareholder at Greenberg Traurig in Tampa, FL, who works on toxic tort defense and environmental litigation.

This notion that government officials are unable to act quickly enough spreads far beyond the water problems in the state that once billed itself as a Water Wonderland. EPA Administrator Pruitt wrote earlier this year that he was surprised to learn that there are still some 1,330 Superfund sites in the country and some have been listed as such for three decades.

The Superfund law, originally enacted in 1980, provided for the cleanup of contaminated sites. In May, Pruitt established a Superfund Task Force to provide recommendations on how the agency basically could speed up the process so that sites get cleaned up. It issued its recommendations in July.

“The goal was to get property back into use as quickly as possible,” says Jeffrey Karp, a partner in the Environment & Natural Resources Group at Sullivan & Worcester in Washington, DC.

Yet even as EPA leadership is trying to streamline certain activities, President Trump has sought to cut its budget by some 30 percent. “From a morale standpoint, a lot of communications out of the White House have had a profound demoralizing effect on a lot of the staff and management at EPA,” observed Andrew Levine, co-chair of the environmental practice group at Stradley Ronon in Philadelphia.

“Eventually, that reduction in federal resources will have an effect on the private sector’s ability to get things done,” predicts

Daniel Riesel, a principal at Sive, Paget & Riesel in New York.

The States Step In

Yet Trump’s efforts to enhance efficiency and promote economic growth ultimately may slow the corporate world down. As the federal government steps back, the states, at least some of them, are stepping in to fill the void.

“Initially, industry may be happy that the feds are stepping back,” says Karp. “We have seen this before.” Indeed, back in the 1980s, Ronald Reagan got into a bit of hot water after installing corporate sorts in high-level environmental positions and then cutting their budgets drastically. EPA Administrator Anne Gorsuch Burford, the mother of current Supreme Court Justice Neil Gorsuch, resigned from the agency in 1983 following Congressional investigation and accusations that the Superfund program was mismanaged.

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While some corporate interests might not be upset that federal environmental enforcement is not as strident as it used to be, they might do well to remember that EPA has actually delegated much of its enforcement authority to states which, in many cases, are authorized to impose more stringent standards than the federal government.

“States have taken the lead in regulatory programs,” observes Jerome Muys Jr., a partner in the Environment & Natural Resources Group at Sullivan & Worcester in Washington, DC, and co-leader of the firm’s Climate-Related Business & Technology

Group. “Most have gone beyond what EPA promulgated, with California being most rigorous,” he adds.

“The absence of EPA has led to industry having to deal with a multitude of differing obligations,” Muys says. Think complying with a single federal requirement is a big hassle? Try complying with 50 different ones on the very same subject.

In some measure, regulation and enforcement levels, as in other areas, are a bit cyclical. Push too hard and then ease up, relax a little and then come down forcefully.

Of course, enforcement levels and budgets in the states vary. Some are keener than others on keeping industry content. In New York, however, there has been no slacking in enforcement, observes Daniel Riesel, a principal at New York’s Sive, Paget & Riesel.

So chin up for those who are disheartened by environmental law and policy developments thus far. In some measure, regulation and enforcement levels, as in other areas, are a bit cyclical. Push too hard and then ease up, relax a little and then come down forcefully. “This is not the first time that we have gone from one type of administration to the other,” notes Richard Ericsson, chair of the Environmental Department at Cole Schotz in Hackensack, N.J.

“Contamination issues tend to live on,” explains Ericsson. “Even as some clients might now just be saying ‘maybe we will not have to clean up as much of this,’ in my experience, there is never political will to loosen contamination standards.” Even the most diehard state wants contamination cleaned up, he adds. ■

—Lori Tripoli

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What's Ahead: Hot Environmental Practice Areas Now

Almost a year in to the Trump administration, the environmental lawyers *Of Counsel* spoke to are anything but pessimistic about the continued prospects of practice in this field. Yes, President Trump is making some changes and cutting budgets, but the regulated community tends to have its own environmental programs firmly in place. What's more, a number of corporations, finding that they can save money if, say, they decrease their usage of resources like fossil fuels or water, have embraced the notion of sustainability.

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Here's what some practitioners are enthusiastic about now:

Extractive Industries

"There are going to be considerable opportunities for energy companies to advance their projects a little more quickly."—Daniel Riesel, a principal at Sive, Paget & Riesel in New York

"We are seeing an explosion in interest in investing in new pipelines."—Jerome Muys, a partner at Sullivan & Worcester in Washington, DC

"In Pennsylvania, what we are watching for the most has to do with hydraulic

fracturing. The prior administration was rather hostile; we do not sense that in the current administration. With a Secretary of Energy who comes from Texas, we want equal treatment under the law for our energy access."—Andrew Levine, co-chair of the environmental practice group at Stradley Ronon in Philadelphia and a member of the Greater Philadelphia Energy Action Team (a multi-industry initiative of the Greater Philadelphia Chamber of Commerce seeking to capitalize on the Marcellus and Utica natural gas reserves to establish the region as an energy hub and to promote pipeline development from Pennsylvania shale gas wells)

While some may remember protests about pipelines by indigenous people and environmental groups during the Obama administration, "a lot of tribes have natural resources to be developed. Many may see changes in this administration to encourage further development as welcome."—Jody Cummings, a partner at Steptoe & Johnson in Washington, DC, who was previously the deputy solicitor for Indian Affairs at the US Department of the Interior

Environmental Due Diligence and Transactional Work

"M&A work is going through the roof."—Jeffrey Karp, a partner at Sullivan & Worcester in Washington, DC

The dot-com boom and its need for "last mile" distribution centers have made environmental aspects of real estate and mergers and acquisitions a hot practice area. In port states like New Jersey, "there are strong needs for large properties for warehouses and distribution."—Catherine Bostock, a member at Cole Schotz in Hackensack, NJ

On the East Coast, there is limited land available, and developers “looking to build have to reach to properties that have more environmental baggage to get the assemblage of properties to support a million-square-foot distribution center.”—Richard Ericsson, chair of the Environmental Department at Cole Schotz in Hackensack, NJ

Water Rights

“Water law, especially in Nevada, is a hot practice area thanks to the scarcity of this particular resource.”—Laura Granier, a partner at Holland & Hart in Reno, NV

Zoning and Land Use

“Many local governments are now looking at revising their regulations to address environmental sustainability. Climate change, sea-level rise, and their impact on building codes are being actively examined by many local governments.”—John Fumero, a shareholder with Nason Yeager in Boca Raton, FL

Sustainability

While not necessarily a hot practice area, the notion of sustainability has gained a strong foothold with corporate clients, and some environmental lawyers are finding more work in this area.

“The legal work is in helping a company look at its processes. Many companies have

a general idea [about sustainability], but do not know how to incorporate it in their business practices. That is where lawyers can help.”—Pamela Barker, a member at Lewis Rice in St. Louis, MO

“We are seeing more and more projects in the area of solar energy. I recently permitted a 600-acre solar farm located in Okeechobee County, FL, in partnership with Florida Power & Light.”—John Fumero

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“Renewables are here to stay.”—Catherine Ward, co-chair of the environmental practice group at Stradley Ronon in Cherry Hill, NJ

Often, sustainability is “considered an internal corporate priority and is executed internally to promote the culture. We get brought in on isolated questions, like sustainability legal issues about getting appropriate LEED certifications or construction delays.”—Andrew Levine ■

—Lori Tripoli