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What Should the Environmental Regulatory Phoenix Look Like?

By David G. Mandelbaum | December 17, 2024 | The Legal Intelligencer

The Nov. 5 election was not a good day for supporters of the current structure of environmental regulation. While I doubt that the burdens of environmental regulation figured prominently in the decision of many to vote for Republicans that day, one cannot doubt that at least some within the incoming national administration would like to burn the "administrative state" to the ground, including the environmental wing of that edifice.

That presents an opportunity for a thought experiment, no matter one's politics; columns like this are full of those thought experiments this time of year. If the flames consume the federal regulatory structure that we have known all our careers in the environmental legal field, what would you want to rise from those ashes, assuming the political pendulum swings back at some point. If you were able to advise the incoming administration from the inside, which rooms in the regulatory mansion would you save from the blaze?

Now there may be some who believe that nothing should survive the conflagration and nothing should rise from the ashes. I tend to believe that those individuals do not read an "environmental practice" column. The rest of us may want environmental regulation to a greater or lesser degree. Although we may think some of the structures erected over the past 55 years could do with a redesign many of us think that some features of them really do serve some purpose. If it all burns, surely many of us have some thoughts about what the Phoenix might look like. I offer a few to get the ball rolling.

CERCLA

To begin at home for me, the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. Sections 9601-75, surely occupies a lot of the public imagination when thinking about "environmental" problems. But, as the U.S. Court of Appeals for the Second Circuit has observed, CERCLA "is known neither for its concinnity nor its brevity." See *RACER Trust v. National Grid USA*, 10 F.4th 87, 92 (2d Cir. 2021); W.R. Grace & Co.-Conn. v. Zotos International, 559 F.3d 85, 88 (2d Cir. 2009).

Rethink the remedy selection criteria.

Sections 104 and 116 of CERCLA require the nation's most contaminated sites—the ones fit for inclusion on the National Priorities List—to be cleaned up using a remedy selected under the criteria derived from Section 121 and set out explicitly at 40 C.F.R. Section 300.430(e)(9)(iii). See 42 U.S.C. Sections 9604(c)(4), 9616(d), (e), 9621. There are nine criteria. Five of them are explicitly part of a multifactor balancing and two are "modifying" criteria that call for state government and community views to be taken into account. The two "threshold" criteria, applied before you even get to balancing or modifying,

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require the remedy to be "protective" and that it comply with all "applicable or relevant and appropriate regulatory standards." The program applies a strict standard of "protectiveness" and a broad application of ARARS that, necessarily, calls for more or different cleanup than would "protectiveness" alone. The result is a "CERCLA-quality" cleanup at a seriously contaminated site, a cleanup more thorough than often would be required were the site less of a priority.

Does that make sense? Should CERCLA require sites to be cleaned all the way up with a gold-standard approach or should CERCLA just call for the nation's worst problems to be cleaned up to the point that they are merely dirty post-industrial sites. State cleanup programs could take care of the rest and would differ in approach in different places. Pennsylvania, for example, would rely on pathway elimination. New York would rely on presumptive remedies. The role of the public would be the role that the state program assigns the public, and the role of what some might call the technocratic federal elites would be limited to just getting sites from quite risky to conventionally dirty. The cost of the CERCLA part of the cleanup would be much lower for almost all sites, and both the remedy selection and the work would be quicker.

Rethink private litigation.

Much, if not most, of what private CERCLA practitioners do focuses on reallocating the incidence of cleanup costs among responsible parties. The statutory vehicles to reallocate are complicated for no particularly good reason. Moreover, claims to allocate the costs of a response action are often asserted before any party has incurred or committed to incur all of those costs, or even more than its fair share of the costs. Why should anyone be able to force a costly a lawsuit that interferes with government efforts to recover a full cleanup, perhaps in increments rather than all at once, until the government has that commitment to implement the cleanup?

The limitations periods do not work well, including the period for asserting a contribution claim based upon an administrative (as opposed to judicially approved) settlement which does not seem ever to commence. See 42 U.S.C. Section 9613(g)(3)(B).

Substantively, the statute calls on courts to set fair shares of costs of response using "such equitable factors as the court determines are appropriate." That guidance is so vague that courts almost uniformly apply the "Gore factors" taken from a failed amendment to the original bill.

Sections 107(a)(1-4)(B) (private cost recovery), 113(f) (contribution), and 113(g) (limitations periods), should be overhauled to provide a single, simple claim for reallocation among private parties with a clear date when claims become ripe and another clear date when they become stale.

Economywide Regulation

Some environmental problems can only be addressed effectively and efficiently by taking markets and economy-wide effects into account. The major questions doctrine reads statutes skeptically when an administrative agency seeks to do so without very clear statutory authority. See, e.g., *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022).

If you are hostile to regulation at all you may like that outcome. However, it does tend to disable regulators from taking market effects into account when assessing the impacts of any new project. A new facility tends to crowd out older, less efficient, competitors. That also tends to replace dirtier operations with cleaner ones. If a regulator cannot take market substitution into account, new projects are harder to permit.

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One might want Congress to authorize economy-wide regulation and more pervasive consideration of market effects in all environmental programs.

Political Budget Constraints

We have been trained to think about assessing the acceptability of the cost that any environmental regulatory scheme will impose independently from the costs imposed by any other environmental regulatory scheme. But maybe a lesson of the last election is that the political consensus behind environmental regulation has a total budget limit. That is, if the public believes that the regulators are imposing more than an acceptable amount of cost in total across all programs, maybe the whole effort loses its political support.

That would suggest that policymaking should take tradeoffs into account. If EPA and state regulators are going to impose significant costs chasing cleanup of low concentrations of "forever chemicals," does that limit their ability to protect wetlands or endangered species or air quality? If even soft political budget constraints exist then organization of regulatory agencies by medium (air, water, and land, for example) may not be politically prudent. I am not talking about agency budgets here, but instead the cost of the regulatory requirements imposed by each program. If the wetlands protection program imposes a certain amount of cost, does that amount have to be traded off against the costs of air regulation?

And if that is what is going on, do we not have to sacrifice a lot of traditional environmental protection in order to form a political consensus to achieve climate change mitigation and adaptation? Assuming climate change is not a hoax, of course.

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