

## Is Environmental Law Dead?

Joseph F. Guida©

September 2017

With the dramatic change in the governing philosophy of the nation's commander-in-chief, coupled with Republican domination of Congress and state governments, some are wondering: Is environmental law dead?

The answer to this question has critical relevance to risk managers who focus on identifying, evaluating, and anticipating enterprise risks to their organizations. Those tasks necessarily entail a sober assessment of future regulatory trends and their impacts on governmental enforcement and private tort liabilities. Accordingly, the overall purpose of the following discussion is to highlight the continuing importance of environmental protection standards and obligations in our economy and legal system notwithstanding shifting political trends.

### Some Background

A recent article in the *New York Times* observes that in the first four months since taking office, Scott Pruitt, Administrator of the U.S. Environmental Protection Agency ("EPA"), "has moved to undo, delay or otherwise block more than 30 environmental rules." (<https://www.nytimes.com/2017/07/01/us/politics/trump-epa-chief-pruitt-regulations-climate-change.html>). The article goes on to observe that this amounts to "a regulatory rollback larger in scope than any other over so short a time in the agency's 47-year history, according to experts in environmental law."

Those who are old enough to remember what was perceived by many as Ronald Reagan's anti-federal environmental regulation revolution during the years following his victory in 1980 also may recall that the EPA and environmental regulation managed to survive the predations of Anne Gorsuch Burford as EPA Administrator and James Watt as Secretary of the Interior. Other initiatives that seemed to bode an environmental Armageddon also ultimately failed to achieve a significant regulatory rollback.

However, for those who would take comfort from past experience, it is not especially comforting when one realizes that, unlike the present circumstances, Republicans never controlled both houses of Congress during Reagan's tenure in the White House. In addition, even though the Republican Party held a majority in the Senate for a substantial amount of time in the Reagan presidency, the Republican leadership in the Senate was generally moderate. (During the last part of Reagan's presidency, both houses were controlled by the Democratic Party.)

In addition, to the extent that Reagan succeeded in thwarting new regulations and underfunding existing regulatory programs at the federal level, a majority of state governments, under control of more environmentally activist Democratic Party adherents at that time, were, to an extent, able to fill gaps in environmental regulation and enforcement. Today, the Republican Party, with its more business-friendly agenda, dominates the majority of state governments. Also, many states are now subject to statutory limitations that govern the adoption of regulations that exceed federal requirements. So, unlike the Reagan era, many of the state governments will not necessarily be filling gaps left at the federal level.

So, is it really different this time? Will the Trump revolution succeed in largely dismantling the nation's environmental protection infrastructure that has grown steadily since President Richard M. Nixon created the EPA by executive order on December 2, 1970? This article concludes that the answer is "no."

The following discussion showcases the elements of the American environmental protection infrastructure that, in the aggregate, will continue to act as a countervailing force against shifting political trends in Washington, D.C. and in the state governments. This does not mean that significant alterations in direction cannot occur on regulatory and enforcement fronts, but rather that a full-scale paradigm shift does not appear to be feasible or likely. The perceived mandate from the 2016 election for a regulatory roll back may prove to be as ephemeral as the flow of a west Texas stream in the summer.

## **Overview**

Well over 50 years have passed since Rachel Carson published *Silent Spring*. Almost 50 years have passed since the infamous Cuyahoga River fire in 1969 and the founding of EPA. Since those watershed events, an elaborate infrastructure of environmental protection protocols, customs, and safeguards has been cemented into the American legal system, business practices, and institutions of government at all levels. Barring an almost unimaginable political or economic cataclysm, that infrastructure will continue to exist regardless of periodic efforts to reduce the scope and cost of environmental regulation. Many of the basic elements of this infrastructure are set forth below with a brief discussion of each.

## **Countervailing Forces to An Environmental Rollback**

### *Pre-existing statutory and regulatory standards*

There are at least twenty (20) major statutes including the Federal Insecticide, Fungicide, and Rodenticide Act, Toxic Substances Control Act, Clean Air Act, Clean Water Act, Solid Waste Disposal Act, and Comprehensive Environmental Response, Compensation, and Liability Act. Moreover, just the EPA portion of the Code of Federal Regulations is comprised of 37 volumes. In sum, there is a huge number of environmental regulatory programs that impinge upon a broad universe of industrial and commercial activities that have arisen over the last several decades that arguably could take almost as long—and as much stakeholder work—to reverse as they did to create given the political, regulatory, legislative, and judicial hurdles to be overcome in achieving such a reversal.

### *Citizen suits by non-governmental organizations and private citizens*

The multiplicity of regulatory requirements also affords fertile ground for non-governmental organizations (“NGOs”) (e.g. Sierra Club, Natural Resources Defense Council, Earthjustice), and other individual actors, to police the regulated community through private attorney-general actions, also known as “citizen suits.” In addition, the constant need to periodically review the protectiveness and suitability of various rules under the Clean Air Act provides ample opportunity for NGOs to push for continued tightening of environmental requirements under judicial mandates.

Indeed, it appears that a number of NGOs are gearing up for a long-term campaign against Trump-style regulatory reform. It has been reported that donations to the Sierra Club have increased tremendously since the last presidential election, along with donation surges for other environmental NGOs.

### *The ever-present threat of criminal prosecution*

Although the ability of EPA and the U.S. Department of Justice to pursue criminal enforcement cases could be significantly compromised by sharp budget cuts, it does not mean that criminal enforcement will completely stop. Regardless of the occupant of the White House, a notorious criminal case with significant public health and environmental impacts will be an enforcement priority. Who wants to play Russian roulette with a potential criminal enforcement action? The fact that no one knows at any given time that a particular transgression could lead to becoming a poster child for criminal conduct remains a strong incentive to observe regulatory requirements even in the face of reports of a recent drop in civil enforcement cases and penalties.

### *The level playing field*

Recently, former EPA Administrator Gina McCarthy had sharp criticism for a Trump Administration plan to cut EPA’s funding by 31%. She reportedly indicated that, among other negative consequences, industry would be opposed to an EPA that fails to enforce regulations and thereby undermines a level playing field for all segments of industry. Past regulatory and enforcement experience does support the notion that industry likes a level playing field. Companies react strongly to perceived differences in treatment of one member of the regulated community over others. These differences often result in complaints of unequal treatment and pressure for agency enforcement against competitors.

### *Duties of directors and officers to the corporation and its stockholders*

Under long-standing principles of corporate law, corporate directors and officers have a fiduciary responsibility to the corporation and its stockholders. “Fiduciary” responsibilities, which are intended to fulfill the obligations in a relationship of trust, include (among other things) the duty to exercise reasonable care in making decisions about the business of the corporation, to put the interests of the corporation ahead of individual interests, and to make full disclosure of material facts underpinning business decisions. In the case of public companies, these duties have been heightened by the elaborate system of internal controls mandated by the Sarbanes-Oxley Act of 2002. Material violations of environmental requirements put officers and directors in jeopardy of violating their fiduciary duties and can lead to shareholder actions and

individual civil and criminal liability. Therefore, officers and directors have many incentives to ensure that their organizations are in compliance with regulatory requirements.

#### *Common law tort liability*

Violations of regulatory requirements that affect third parties (e.g. neighboring landowners) can often easily give rise to personal injury and property damage claims against a business. One important way to avoid such tort claims is to comply with existing requirements. Although such a policy does not insulate a business from such claims, it should serve to avoid them. In some cases, regulatory violations can amount to negligence *per se*.

#### *Environmental liabilities involved in property and business transfers*

Ignorance or indifference to non-compliance with environmental requirements can complicate or frustrate purchase and sale or leasing of real property and other corporate assets. Indeed, unresolved environmental conditions at a site can render it unmarketable. Moreover, in recognition of no-fault federal and state environmental response and remediation statutes, any prudent purchaser of real property and any prudent entity seeking a corporate acquisition or merger will ignore at its peril potential liability for environmental remediation and governmental fines and penalties for operational non-compliance. The risk of expensive post-closing liabilities drives purchasers and sellers to provide for environmental compliance measures as part of any legitimate business deal.

#### *Lender liability requirements*

In order to protect their investments, commercial lenders often impose environmental due diligence requirements and compliance responsibilities on borrowers. Failure to comply with environmental obligations can be grounds for loan default. That is another powerful incentive for businesses to comply with regulatory requirements.

#### *Union oversight*

Although labor unions have diminished in strength in recent years, they can still be a potent source of oversight relative to environmental protection. In the interest of protecting employees from dangerous conditions arising from non-compliance or protecting them from liability for decisions made by management, labor unions can apply substantial pressure for corporate environmental compliance. Frequently, unions and their members can become “whistleblowers” (discussed in more detail below) that can cause big problems for management where significant non-compliance exists.

#### *Environmental regulation in European trade markets*

Environmental regulation in the European Union also drives environmental process and product standards of multinational firms. From a political as well as economic standpoints, it is difficult to justify adherence to strict environmental protection standards in Europe that are not reflected in the United States. In addition, European companies are able to demand compliance with their environmental product standards relative

to products manufactured in the United States. In addition, ISO 14000 establishes an international set of voluntary standards for environmental management systems that, when being observed, serve to validate corporate internal controls to outside third parties and, in so doing, afford a an economic advantage relative to less qualified competitors.

#### *Public Opinion and Public Relations*

Public opinion polls continue to show that environmental protection remains high on the list of issues that are important to Americans. A company that visibly fails to observe environmental standards can expect market impacts to its products. Indeed, public opinion may be the most enduring obstacle to wholesale rollback of environmental protection programs. Given the general support for environmental protection among the public, it would appear that fundamental changes will have to be driven by the public at large rather than perceived mandates from a single presidential election. So far, that does not appear the direction that the public is headed as evidenced by the resistance to steep EPA budget cuts from both sides of the aisle in Congress.

#### *Securities law disclosure and internal controls*

Securities laws require public companies to report significant environmental enforcement proceedings and material liabilities associated with environmental compliance and conditions (e.g. climate change) and remedial matters. Negative disclosures can have a substantial effect on a public company's reputation in the investment community and can lead to tangible impacts on its ability to attract investors. Symptomatic of these problems are public company shareholder challenges that arise over environmental policy.

#### *Employee retention and morale*

Given the potential for individual civil and criminal liability for violations of environmental laws at all levels of a company, companies with lax environmental programs can expect to lose employees and have trouble recruiting new ones.

#### *Whistleblowers*

Each of the major federal environmental statutes has non-retaliation provisions for employees who report environmental violations to management or the government. The ever-present possibility that a company's own employees can be environmental policeman is a strong incentive for a company to comply with environmental requirements.

#### *Insurance coverage*

Insurance companies demand business practices that prevent or avoid liability for personal injury and property damage. One primary method of achieving that objective is compliance with environmental requirements. Insurance company audits can expose flaws in compliance programs and put pressure on companies to remedy non-compliances or take the chance on losing coverage or making it more expensive.

### *Municipal activism*

Local governments, particularly larger urban cities and counties that trend more Democratic politically, are becoming more active in legislating and enforcing standards in the area of environmental protection. In some cases, this will compel continuation of existing compliance measures or observance of stricter ones.

### *Corporate policies and self-enforcement*

U.S. Sentencing Guidelines, internal control requirements, potential tort liability, and public relations all compel companies to adopt and monitor compliance with corporate environmental policies. These policies also incentivize companies to ensure that their policies are being observed down the chain of management.

### *The potential for the next administration to embrace more aggressive enforcement policies.*

No one knows how the next presidential election will turn out. It remains entirely possible that the next administration will adopt policies that are the polar opposite of the current one. Companies that don't hedge their bets of environmental compliance matters by continuing responsible compliance programs run the risk of finding themselves seriously behind their competitors if the game changes in four years.

### **Conclusion**

In conclusion, anyone tempted to believe that environmental law and regulation have become quaint relics of the past, and that disregard of laws and rules is a risk worth taking in the current political environment, does so at his or her own peril. Risk managers in all business sectors will want to take heed.

*©Copyright Joseph F. Guida 2017. All rights reserved.*