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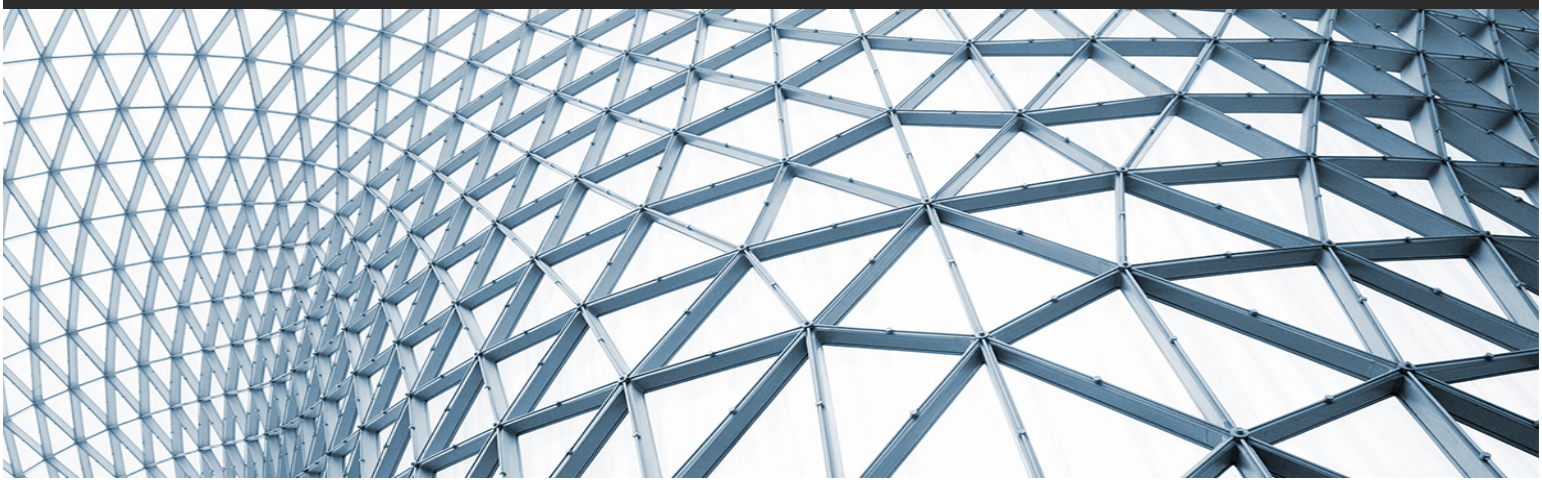
# What Next for Environmental Practice?





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**By David G. Mandelbaum | April 9, 2020 | The Legal Intelligencer**

Every so often, practitioners should probably reevaluate where the environmental legal market is going. That reevaluation helps direct all sorts of practice and personal development efforts. Now, in the middle of the shock created by the COVID-19 response, might be one of those times for reevaluation. When we all get back to the office, what will we be doing?

Now I am sufficiently gray, and probably adequately old, to pretend to profound wisdom on this score. But events affect different lawyers' practices differently, and this pandemic is not very like anything that has happened during the careers of anyone now practicing. So, what follows are just some impressions to trigger each lawyer's own thinking.

**Conventional Compliance and Enforcement**

During these weeks of social distancing to contain the pandemic, many businesses are disrupted. They may have lapsed in the strict compliance with their permits and settlement documents. Periodic monitoring, reporting, or even maintenance may be late or skipped.

As has been widely reported, on March 26, the U.S. Environmental Protection Agency issued a memorandum announcing EPA's exercise of enforcement discretion not to sanction certain lapses caused by COVID-19 or the social distancing response. Some of the emails you have received may have characterized this memorandum as suspending enforcement during the pandemic. That is not entirely fair.

One must comply if one can, and must come as close to compliance as possible if one cannot. One must tie any non-compliance to COVID-19 or the response to it, and one must document all efforts. The March 26 exercise of discretion does not apply to any obligations under the Superfund or RCRA corrective action programs because, of course, cleaning up contamination that has been in the environment for decades cannot wait, whereas monitoring current emissions and discharges can. It also does not apply to any program regulating imports.

But if this shut-down continues for any length of time, there will be instances of non-compliance that someone will question. Instances associated with real environmental problems – unpermitted or unexpected releases, emissions, or discharges, for example – likely lead that list. If the federal EPA will not investigate the circumstances around such an incident, the state, municipality, neighbors, or environmental groups may. Even if the federal exercise of discretion would bind or guide a state or a court, the March 26 memorandum puts enough conditions on taking advantage of that discretion that disputes will arise.

In Superfund or RCRA matters, parties may have instances where they have sought to seek case-specific exercises of enforcement discretion or the application of force majeure clauses  Again, disputes may arise.

**Private Lapses**

As this column has observed previously, 50 years after the first Earth Day, environmental compliance and the allocation of environmental liabilities turns on a complicated web of private contractual undertakings. Buyers indemnify sellers, sellers retain obligations under consent decree, parties sharing a common liability agree to divide the costs of compliance on a current basis, and all sorts of other arrangements allow regulated entities and responsible parties to manage their environmental liabilities. Those arrangements may be as simple as the obligation of a buyer to maintain the asphalt on a parking lot that caps contamination under Act 2 or to keep the electricity bill paid so that the leachate collection system in the process waste landfill continues to function.

The economic disruption of the pandemic will cause some to breach their obligations. That may produce unexpected new demands by regulators against the party that was the beneficiary of the promise. It may lead to private litigation.

More nuanced problems may arise when a client's counter-party (that is, the person who promised to undertake some compliance or to pay some cost) has not *yet* failed to perform, but appears to be in financial distress. Sometimes the client should step in to perform, sometimes it should take steps to put performance ahead of other obligations of the counter-party, and sometimes the client should just let the whole arrangement collapse.

**Back-End Price Negotiation**

Some of the transactions clients entered into in 2019 do not look so good for one party or the other right now. Disappointed parties may want to unravel or to renegotiate transactions using environmental conditions of the assets at issue as the tool. The disappointed party argues that the transaction was over-valued, for example, not because the pandemic response shut everything down for weeks or months, but because site contamination was not as represented or some permit was not exactly right. Disputes arise, and because the claims tend toward accusing the defendant of lying, they are hard to resolve.

**Toxic Tort Litigation**

The standard of care owed to others by a business, the owner of a premises, or an individual to protect against transmission of the novel coronavirus has been a bit of a moving target. Just before this writing, the Centers for Disease Control recommended that everyone wear a non-medical mask or face covering when out in public. The President promptly declared that he did not intend to follow what was only, after all, a recommendation. If someone who is infected but asymptomatic at the time did not wear a mask and then passed the infection to others, was that original infected person negligent? How tightly does the supermarket or pharmacy have to enforce social distancing rules to avoid liability? And so on.

In addition, as business resumes, businesses will want to have a way to assure that they maintain safety. There will be efforts to set up standards and certifications of non-infection. All those will spawn legal work.

**Insurance**

There has been business interruption and other losses due to (a) the virus and (b) the response. Those who pursue or defend against insurance coverage will see claims under conventional and pollution insurance programs for those losses.

**New Priorities**

All of the foregoing seems like what our practice conventionally does. The list closely resembles the list one rolls out every time the economy turns down. But this time is different. This time, we have intentionally shut the economy to address a real threat to human health in the ambient environment. As invasive species go, this one is pretty serious.

We are learning that, as with natural disasters, there are limits to what resources can be devoted to address a problem, and that those calls on resources have to starve other things. If there are long-term constraints on what the American economy can expend on environmental protection, do we have our priorities right? Will enforcement and standard-setting focus on the same things when all this is over?

Under the current federal administration, Superfund has been a focus of attention and resources. That is good for those of us who practice in the area, but does it make sense that EPA would not exercise enforcement discretion to extend deadlines for Superfund remedial design or responses to information requests, but would exercise enforcement discretion on air pollution monitoring requirements?

Have we learned that we don't always know better than the experts? Many were skeptical that the novel coronavirus would spread everywhere or cause much suffering. Many are also skeptical that climate change will cause suffering. Will priorities change? Will all of us environmental lawyers have different work to do?

It can get dreary working from home. But later this year, maybe we will all have interesting new problems to keep us busy. Perhaps that optimistic thought can take a little edge off the social distancing and the absence of sports on television.

**About the Author:**

David G. Mandelbaum is co-chair of the global environmental practice group of Greenberg Traurig. His principal office is in Philadelphia. Mandelbaum teaches "Environmental Litigation: Superfund" and "Oil and Gas Law" in rotation at Temple Law School. He was educated at Harvard College and Harvard Law School.