

Two Big Trends Around the Corner for Environmental Law



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I was asked to deliver some thoughts after dinner at the annual meeting of the Pennsylvania Bar Association’s environmental and energy law section. The dinner occurs on the evening between the two days of the annual Environmental Law Forum. What follows is the substance of those remarks.

Each day we all think hard about what is coming in our matters and we strategize how to do better for our clients. Occasionally—and the annual Environmental Law Forum is one of those occasions—we take a somewhat longer view. We consider what is likely to happen in our practice area over the following year or two, and we try to prepare ourselves to respond to clients on the new or changing questions that will appear in that time.

I want to consider two bigger trends that may not affect much that we do until later than that. I have been accused—pejoratively, I think—of looking around corners too much, and that’s what I’m doing here. But sometimes I think it can help. It can help frame arguments in current matters that may get no traction for a while, and it can help us understand the larger context of what we are doing and how we want to do it.

First, I think there is a change underway in what people generally think of as the “environment.” It may actually be a return to an earlier notion.

When I started practice in the 1980s, and for most of the time since, the core or true “environment” for many people has been either rural or wild. Because most people don’t live in rural or wild places, in this conceptual model they visit the environment when they go on vacation or take a weekend or a day trip.

Recently, we increasingly hear and think about the actual environmental quality experienced by people where they are. Environmental Justice concerns are an example of this. For sure, if you count up the liters of air that people breathe or liters of water that people drink, those liters are not breathed or drunk in rural or wild places.

What would prioritizing the environment that people actually experience mean? It would change what matters most. Urban parks and greenspaces—even street trees—might be more important than state forests. Indoor air and urban air might matter more than rural air. Drinking water systems might matter more than stream quality.

We might need better or expanded programs to address some issues. For example, we really don’t have anything like the land recycling program—Pennsylvania’s voluntary cleanup program—for contaminated buildings, only for “traditional environmental media.”

Notice that this refocus would also be a shift in who the environmental programs protect. The shift would change the politics of environmental programs. Visiting a rural or wild environment is mostly a discretionary activity that takes some means. But you have to breathe and drink and live where you are. Environmental degradation in rural and wild areas is most often a concern of rural people who experience the degradation and the well-off, or at least comfortable. Environmental degradation where most people live mostly affects poor people. If you have resources, you can move, or buy air filters for your air conditioner (which you probably have), or install activated carbon systems for your water.

Climate change highlights this point. When it’s 110 degrees, my mother is not going to die or get sick. She either has air conditioning or she can come to my house. She can leave town. Not so much for plenty of people in their 80s around Pennsylvania who do not have the means to escape the heat.

Second, we increasingly recognize that we have the wrong physical stuff to achieve environmental goals. If you were to design and to build the power generation fleet, the electricity transmission grid, the water distribution system, and on and on, you would design something different. If you were to invent a car today, it would probably be electric. Indeed, if all you knew was that one alternative thing was old and the other alternative was new, from an environmental impact perspective you would probably choose the newer one.

But that’s not how the environmental regulations work. The new one needs review and approvals. The new one has to meet rigorous performance standards. The old one is for the most part grandfathered. If you wanted to facilitate or to accelerate a technological fix to climate, air or water quality issues, drinking water concerns, or anything else, that would be backward. It is a thumb on the scale in favor of keeping the older and more environmentally impactful.

How would you fix that? Many programs allow emission or discharge reductions from existing sources to count as offsets for the impacts of the new source, but only if the reductions are legally required. Would you allow predicted market substitution to count as an offset even when you couldn’t have a binding commitment that, for example, the new power plant would displace the old? Would you give credits in environmental reviews under NEPA? Would you sunset permits so that after some time old facilities would have to reapply from scratch? Could you do any of that practically or constitutionally?

These questions are all going to be asked. They would have to be answered if we were to take seriously, for example, the Intergovernmental Panel on Climate Change's most recent conclusion that the window to avoid catastrophic climate outcomes is closing very fast.

I see these two themes, if you will, as likely to become increasingly important in much of what environmental lawyers do: in the policy discussion, negotiation with and by agencies, litigation, and so forth. I am not suggesting that these changes in perspective are good things or bad things. They are, however, changes that we all will have to take into account to represent our clients effectively or to make good policy. That won't happen right away, but I think it is around the corner coming up.

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