Superfund Is Unscathed So Far—What Does That Imply?

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Since January, the new national administration has engaged in a large number of actions addressing scores or hundreds of regulations and programs, including environmental and energy programs. However, environmental lawyers have surely noticed that the federal Superfund program under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) seems to have escaped direct attention.

The decision to leave Superfund mostly alone surely has many motivations. However, do note that the Superfund program—more so than almost any other environmental regulatory program—fits a zero-sum conceptual model. In a zero-sum world, for someone to win, someone else has to lose. Most environmental regulation proceeds from an understanding that governmental or collective action to restrain, to encourage, or to remedy some behavior will yield benefits generally, including for the regulated entity. That is not so clear for the environmental site contamination programs. That this administration may favor Superfund (or disfavor it less) not only has implications for our Superfund practices but may also tell us something about the rest of the environmental programs. It may represent a poor allocation of limited resources and a missed opportunity to address persistent issues.

The Trump administration has embarked on an explicit effort to dismantle, or at least to remake, the "administrative state." Some of that effort has taken conventional forms of rulemaking and adjudication under the Administrative Procedure Act. Other parts of that effort have proceeded under presidential declarations of emergency purporting to suspend conventional rules or simply proceeded by fiat.

This column is too short to catalogue all of the actions that affect environmental practice. They began with two executive orders on Jan. 20, 2025, titled "Unleashing American Energy" and declaring a national energy emergency. See EO 14155, 14156, 90 Fed. Reg. 8353 and 8433 (Jan. 29, 2025). An executive order directed the administration not to enforce regulations deemed "unlawful." See EO 14219, 90 Fed. Reg. 10,583 (Feb. 25, 2025). They proceeded from there: streamlined reviews of new nuclear power, objection to the New York congestion pricing plan, restrictions in how NEPA will be applied, and, in Congress, revocation of the "California waiver," to name just a few actions.

But in the core of environmental regulation, the Environmental Protection Agency seems to be using conventional means to implement its agenda. On Feb. 4, Administrator Lee Zeldin announced "five pillars" of the agency's "Powering the Great American Comeback" initiative: Clean Air, Land, and Water for Every American; Restore American Energy Dominance; Permitting Reform, Cooperative Federalism, and Cross-Agency Partnership; Make the United States the Artificial Intelligence Capital of the World; and Protecting and Bringing Back American Auto Jobs. See, https://www.epa.gov/newsreleases/epa-administrator-lee-zeldin-announces-epas-powering-great-american-comeback (lack of parallel

construction in the original). On March 12, the EPA issued a list of what it described as 31 anticipated actions summarized in 22 bullets.

Other than general cuts in agency manpower and budget, essentially none of these announced actions seeks to dismantle any significant portions of the Superfund program. Practitioners will recall that the Superfund program was perhaps the only environmental program that the first Trump administration seemed to favor.

Many have observed that this administration sees public policy generally through a zero-sum lens. Superfund has many of those features. Its purposes are to clean up contaminated sites quickly and to "assure that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S. Rep. No. 96-848 at 13 (1980). The latter objective is known as the "polluter pays principle." Congress intended CERCLA to confer a benefit on those who own or have exposure to a contaminated site at the expense of the "polluters."

As it turns out, the Superfund program applies a very capacious notion of "polluter" that includes parties who did nothing "wrong." And even for corporate responsible parties, the actual "polluters" —the human beings involved in releases of hazardous substances—rarely bear any costs of response. Cleanups are funded by revenues from current operations when the shareholders, directors, officers, and employees of most businesses have changed since the time of any "polluting" activity.

Perhaps that levy on responsible parties to fund a cleanup is not strictly zero-sum; some cleanups provide more benefit than they cost, although that is not required by the statute. But the allocation of the costs of any response among the responsible parties is purely zero-sum. Any dollar that one responsible party pays is a dollar that another responsible party does not have to pay. Allocation by negotiation, private process, or litigation represents a good part of what Superfund practitioners do.

Contrast that view of Superfund with other conventional environmental programs. Many of us read Garrett Hardin, "The Tragedy of the Commons," 162 Science 1243 (1968), in an early course on environmental law. In Hardin's parable, cattle overgraze a common field. Each herdsman has the incentive to increase the number of cows he or she owns to increase his or her share of the dwindling grass resource, but all the cows are undernourished and give decreasing amounts of milk or beef; no one does better. If, one the other hand, the herdsmen collectively regulate use of the common resource, each has fewer, fatter, cows and all do better.

If that fable does not work for you, consider professional sports where the team on the field has a single purpose: winning at the expense of the other team. But teams only survive if they sell tickets or television advertising. For that, the games have to have uncertain outcomes. When one team (looking at you, Rockies) sets a record by losing 50 games before playing 60, that is not likely a good thing for any Major League Baseball team. All teams benefit from collective regulation like drafts and salary caps that promote more parity.

That conceptual model motivates much of the structure of environmental regulation. Regulation restricts use of common resources to the benefit of everyone, including the regulated entity that depends upon the common resource particularly. Regulation under this conceptual model is positive sum.

The administration has proposed a significantly lower budget for the EPA and a material reduction in EPA headcount. An effort to deregulate suggests that the administration intends to reduce the total amount that regulated entities spend under the federal environmental programs. If you intended to shrink the United States' economy's investment in conservation and environmental quality, it is not clear why you

would choose not to focus at all on the Superfund program, which may not confer a general benefit. You would cut Superfund and call for the freed-up resources to be spent in positive sum programs. Perhaps the administration disbelieves that any of the environmental programs confer a general net benefit.

Superfund practitioners generally know how one would reduce the amount spent under the program. Among other things, one would change the criteria for remedy selection to more heavily favor pathway elimination over other measures. For example, one would isolate groundwater plumes and provide replacement water rather than attempting to clean groundwater up; one would cover contaminated sediments rather than dredging them.

One would also revisit the provisions in the statute governing private litigation so that they make sense and promote efficient litigation.

As things now stand, Superfund practitioners cannot advise our clients that any of their Superfund matters will take a deregulatory turn. That might happen, but the administration has not given off any signs that it will or that it will in a systematic way. And that decision suggests a deep cynicism about the *other* environmental programs.

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