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Like many, I have been reflecting on how the changes going on now in the federal government affect environmental practice. Two things that affect what environmental lawyers (as opposed to environmental engineers or managers) do seem to have received less attention than one might have expected: the loss of resources at federal and state environmental regulatory agencies limit those agencies' ability to consider creative solutions to regulatory or enforcement problems and the limitations on data collection and scientific analysis undermine the confidence necessary to approve those creative solutions. These developments affect the tools and strategies that environmental lawyers can use to achieve their clients' objectives and may call for some adjustments in how we do what we do.

Clients do not consult lawyers about every issue, only the issues on which the lawyer's advice or advocacy offers enough value to justify the cost. Routine permit applications and regulatory compliance problems more often fall to internal environmental managers or to nonlawyer environmental consultants. Lawyers get involved when problems are consequential to the client and the solutions are unclear. Indeed, sometimes clients call their lawyers when routine or conventional approaches to issues lead to unacceptable outcomes. When an off-the-rack suit will not fit, you have to call the tailor. When the conventional approach to permit conditions or to enforcement settlement impair a business or a project unacceptably, you have to call the lawyer.

Lawyers, then, often find themselves asked to figure out how to satisfy the requirements of the environmental laws using means that the regulators find unconventional. That is how we came to have mitigation for development impacts on wetlands and species habitat, offsets and bubbles for air and water permitting, buyer-seller agreements for transfers of contaminated property before it is cleaned up, and so forth. Techniques tried in individual cases came to be adopted in policies, regulations and statutes.

This administration has significantly cut the budget of the Environmental Protection Agency. Those cuts include not only reductions in staff and other resources at the EPA, but also reductions in the grants made to states and tribes to administer delegated federal programs. The Clean Water Act requires discharges to obtain NPDES permits, but those permits come from states in most instances. The Resource Conservation and Recovery Act requires hazardous waste generators to comply with regulations and treatment, storage, and disposal facilities to obtain permits, but the program is administered by the state in most places. Reductions to federal resources, therefore, affect not only the EPA, but state agencies as well.

When agencies lose resources—employees or funds—they have to budget more severely the attention that they provide to any given matter. Unless the requirement for any action or decision by the agency has been rescinded, the constriction of resources creates pressure toward routinization. Agencies have an incentive to grant more permits by rule or by general permit. They have an incentive to make cleanup decisions through presumptive remedies or through standardized cleanup objectives.

Clients may seek legal help to understand those off-the-rack outcomes, but they almost always seek legal help when those outcomes do not meet the client's needs. For example, capital improvements may require regulatory certainty over a period longer than a conventional permit term because the plant improvement or new equipment will take longer than five years to bring on-line. A large cleanup may only make sense to do incrementally or by using adaptive management techniques. Indeed, every Act 2 cleanup to a site-specific standard at some level represents a decision that cleanup to the statewide standard is too expensive or impractical so a site-specific remedy has to be crafted and approved.

Agencies that are stressed tend to be less receptive to those sorts of suggestions, and those are the suggestions that environmental lawyers have as their stock-in-trade.

Add to that the decision to reduce or to eliminate data collection and scientific evaluation functions at the federal level. Environmental data result from sampling, not from analysis of every liter of water or air, every kilogram of soil, or every individual in a population of plants, animals, or microorganisms. The fewer observations one makes, the less confident one can be about the true distribution of values in the population; that's just statistics.

But there is a suggestion that data and analysis are always politically skewed. To take a nonenvironmental example, just recently the president fired the commissioner of the Bureau of Labor Statistics for allegedly injecting political bias into monthly employment data. The suggestion that all data and analysis are subjective and political raises one's subjective assessment of the probability of making a mistake in an environmental regulatory decision; the data and analysis may be wrong, so a decision on the basis of those data or that analysis may also be wrong.

When one has a fear of a wrong decision, one often biases the decision one way or the other. In the environmental area, many forces push toward more conservatism. That is why risk assessments of exposure to hazardous substances, for example, often predict that more adverse outcomes will occur than seem reasonable.

Environmental lawyers often have the job of convincing a decisionmaker to take a chance. On behalf of regulated entities, we want to convince the regulator that a somewhat more flexible approach to any given problem will yield an equivalent or better outcome than the conventional, off-the-rack approach. On behalf of environmental groups, we want to convince the regulator that a somewhat more limiting approach will not have the dire economic effects that others may anticipate.

If the decisionmaker does not have the time to hear and to consider the argument and does not have data or analysis that can be trusted, the decisionmaker has a harder time agreeing. The change in receptiveness that we can anticipate calls on environmental lawyers to consider how they will nevertheless get for clients want the clients want.

One approach is weakening of the rule of law. The government could simply declare that a project or cleanup will achieve environmental goals. No creativity would be required of the regulated entity or the agency staff. As lawyers we generally do not favor that sort of approach. If we cannot persuade a decision maker that our proposed creative solution is also likely to be an acceptable solution under the existing law, we tend to think that we should not get what we ask for. We are all for individually crafted outcomes, but based on the established environmental and other criteria, not political fiat.

Also, declared facts tend to be disregarded. To take an old and therefore hopefully less controversial example, the Pennsylvania Oil and Gas Amendments of 2012 (commonly known as "Act 13") essentially declared that oil and gas development would be safe if it proceeded under certain generic operational and

land use restrictions. Maybe that was correct, but some of the constraints on local land use authority violated the Environmental Rights Amendment to the Pennsylvania Constitution. See *Robinson Township v. PUC*, 83 A.3d 901 (Pa. 2013). Moreover, the general proposition has been wholly unpersuasive to the Delaware River Basin Commission and the state of New York, which each bans unconventional oil and gas development in their jurisdictions.

So, persuasion from actual facts and analysis should be more reliable and have more staying power for clients. How we can continue to advocate for creative decision making based on fact and law in the face of agency constriction is part of the current the puzzle for environmental lawyers.

About the Author:

David G. Mandelbaum is a shareholder in the Environmental Practice of Greenberg Traurig. He maintains offices in Philadelphia and Boston. Mandelbaum teaches “Environmental Litigation: Superfund” and “Oil and Gas Law” in rotation at Temple Law School, and the Superfund course at Suffolk Law School in Boston. He is a Fellow of the American College of Environmental Lawyers and was educated at Harvard College and Harvard Law School. Contact him at mandelbaumd@gtlaw.com.