SIDEBAR

# Much Success but Now Diminishing Returns

**Susan Parker Bodine**
Partner
*Earth & Water Law*

***"All increases in regulation should take into account costs to families and communities and consider whether diminishing returns on environmental and public health protection are justified"***

Congress enacted most of the major environmental laws between 1970 and 1980. Leading up to that decade, in cities like Pittsburgh, coal dust coated everything, even inside homes. In many communities, including Washington, D.C., swimming was banned. Smog events drove Californians indoors. Songbird populations plummeted. Discharges of pollutants to water and the emission of pollutants to air were loosely regulated, if at all.

By the end of that decade, Congress had enacted laws to address these serious environmental problems, in most cases granting implementation authority to federal agencies like EPA, to be shared with state governments. The Clean Air Act, Clean Water Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, and Toxic Substances Control Act each tackled a specific environmental problem.

While many of these statutes included lofty, hortatory goals or policy statements, the substantive provisions often represented a balance among competing interests. For example, the CWA sets a goal of eliminating all discharges of pollutants to navigable waters by 1985. That goal has not been met and probably never will be, but that does not mean that the act is a failure.

To the contrary, it has been and continues to be wildly successful. Hundreds of billions of pounds of pollutants are kept out of our waterways every year. Fish in the Cuyahoga River that famously caught on fire multiple times are now safe to eat. The Potomac River is now clean enough for swimming.

Our other environmental statutes are equally successful. EPA's Air Quality Trends report shows that air pollutant levels dropped significantly between 1990 and 2022. Over ninety percent of community water systems meet health-based drinking water standards. Sightings of the bald eagle, the symbol of our nation, have gone from rare to common. All of this progress was made while our population and productivity both increased.

Unfortunately, you don't often read about our environmental successes. Instead, you hear calls for increasingly stringent regulations and promises of doom if those calls are not heeded. Often, advocates for more regulation seek to advance a single goal to the detriment of others. Sometimes, EPA follows along.

For example, regulation of fossil fuel-generated power should not fail to balance energy reliability. Automobile regulations that limit the availability of gas-powered vehicles should not fail to recognize that many cannot afford a $40,000 electric car or have limited access to charging stations. Regulation of drinking water should not fail to consider affordability and adverse health impacts resulting from forcing families to choose between paying their utility bills and paying for food. Indeed, all increases in regulation should take into account costs to families and communities and consider whether diminishing returns on environmental and public health protection are justified.

Regulatory agencies have been required to achieve a balance among such competing objectives since 1993, when Executive Order 12866 was signed by President Clinton. That order sets forth a regulatory philosophy under which agencies must carefully consider whether additional regulation is necessary, choose regulatory approaches that maximize net benefits (including economic, environmental, public health and safety, distributive impacts, and equity), and impose the least burden on society. Faithful adherence to this order would require agencies to take off their blinders.

Unfortunately, the considerations required by EO 12866 are more honored in the breach. Agencies can exaggerate benefits and minimize costs to justify any amount of regulatory burden, even where Congress did not provide clear authority.

In 2015, the Supreme Court required agencies to consider costs when regulating, unless prohibited. This year, it took action to ensure agencies stay within the bounds of their statutory authority. To ensure our regulations do not do more harm than good, perhaps it is time to codify EO 12866.

60 percent over that time period, global warming is leading to hotter and wetter climates that amplify the impact of pollution, and we struggle to react to new challenges while some of our oldest problems stubbornly persist.

Our waterways may be less likely to ignite, but are still plagued by too much bacteria, dangerously low oxygen levels, and a growing epidemic of toxic algae blooms. The 1972 Clean Water Act aimed to achieve "fishable and swimmable waters" no later than 1983. Fifty years later, based on the data that state agencies report to EPA, more than half of the rivers, streams, and lakes that have been assessed are too polluted to support aquatic life or fisheries, to be safe for swimming or other recreational uses, or to provide a reliable source of drinking water. The condition of more than half our river and stream miles has not been evaluated in recent years. The rate of wetlands losses doubled from 2009 to 2019 compared with the previous 10-year period.

After initial progress, the Dallas and Houston metropolitan areas have yet to meet the health-based ozone limits established by George W. Bush's EPA. Ozone levels have worsened in recent years and the latest data show that Texas also is not meeting fine particle standards the Bush administration established. We are still tallying the damage done by PFAS and other "forever" chemicals, which may trigger the largest and most expensive environmental cleanup in our history.

*EPA is throttling the fossil fuel industry.* This is a phony crisis. U.S. oil-and-gas production reached their highest levels ever in 2023 and continues to accelerate in 2024. Exxon, Chevron, and Shell reported a combined total of $85.6 billion in profit last year, their second-highest total within the past decade. Since 2021, agencies have issued or revised hundreds of construction permits for new or expanded fertilizer or petrochemical plants, gas processors, compressors, carbon sequestration projects, and liquid natural gas terminals

*EPA air quality standards are now unreasonably stringent and do not adequately consider implementation costs.* The frequent review and tune-up of air quality standards is a statutory requirement, as Scalia explained in *American Trucking*. While these health-based standards are not supposed to consider economic burden, EPA estimated it would cost between $1.4 and $2.2 billion to meet the 2015 ozone standard, or between $4 and $7 dollars per capita assuming a full pass-through of costs. Including a margin of safety to ensure that health-based standards for air, water, or drinking water are protective enough is a requirement of law, not EPA "overreach." The slow motion PFAS disaster that is still unfolding illustrates the high human and economic cost of ignoring the potential for risk until it is too late.

*States will take on environmental problems that courts prohibit EPA from addressing.* States play a critical role in environmental protection, but the notion that states will take up the slack where federal agencies abandon the field needs closer inquiry. For example, Justice Alito's opinion in *Sackett* confidently asserted that "states can and will exercise their primary authority to combat water pollution by regulating land and water use." In fact, based on an Environmental Integrity Project review completed in May, at least 18 states do not currently require permits before developers dredge or fill any wetlands, while the authority in six more is confined to certain coastal marshes. That list includes 17 of the 25 states that joined an amicus brief asking the Court to shrink EPA's jurisdiction over wetlands that are adjacent to navigable waters. So far, there is no evidence that these states either "can or will" fill the void.

**The agency should double-down on its statutory mandates and make a concerted effort to at least come closer to complying with the deadlines for meeting them**

WHAT can EPA and its partners and constituents do to make up for the loss of *Chevron*, recognizing that their interests are not always identical? The agency should double-down on its statutory mandates and make a concerted effort to at least come closer to complying with the deadlines for meeting them. The agency is far, far behind in meeting many of these timetables. For example, it has largely ig-

nored the Clean Water Act's requirement to review the toxic discharge limits for industrial wastewater sources at least once every five years and increase their stringency to reflect any improvements in treatment methods.

The existing standards for 39 of the 50 industrial categories covered by these rules are more than 30 years old, and 22 of them date back to the 1970s or early 1980s. The report to Congress that is supposed to tell us about the state of our nation's waterways is due every two years. The last version was sent up in 2017. Environmentalists have filed lawsuits to compel EPA's compliance with these and other deadlines and will continue to do so.

To build an agenda around statutory mandates, the agency should provide a full accounting and ensure the most important are highlighted on the regulatory agenda. While the agency may initially have to give priority to the rulemaking schedules compelled by court order or consent decrees, a more long-term, strategic focus on mandates could ultimately give the agency more control over its work and reduce time-consuming litigation. EPA budgets should clearly identify the resources that will be committed to achieving these statutory requirements, information that is missing from the agency's spending requests.

EPA cannot realistically promise to meet every single one of its congressional mandates on time. But greater transparency about these commands, when they will be met, and what it would take to do so would give the public a greater appreciation of the scope of the agency's responsibilities. And clearer communication about these obligations could undercut the chorus of complaints about alleged agency overreach. A back-to-basics approach might also earn the agency some sympathy from justices who at least occasionally refuse to join the majority in striking down EPA rules, including Justice Kavanaugh in *Sackett* and Justice Coney Barrett in *Ohio v. EPA.* Even the Heritage Foundation's Project 25 report recommends that EPA focus on its statutory mandates. We should give Heritage the opportunity to show their support for those mandates.

Following the death of *Chevron*, all litigants will need to test how the court will apply "traditional principles of statutory construction" to determine the "best meaning" of vague statutory terms. In particular, will the Supreme Court be more willing to consult the legislative history that Scalia set aside in favor of *Chevron* deference? If John Marshall first originated the idea that we look to courts to say what the law is, can the originalists ignore his attempts to understand what legislators had in mind when interpreting the laws they wrote? Also, will the Court at least balance the few words in our environmental statutes that acknowledge the primary role of states against the much lengthier expressions of federal authority that fill page after page of those same laws?

WE are where we are today because an extensive conservative network of donors, interest groups, academics, and advocates are determined to reduce the federal government's power to protect the environment and public health. Instead of directly challenging popular laws like the Clean Air or Clean Water Acts, they have made them much harder to implement, relying on crowd pleasers like "bloated bureaucracy" to shrink EPA's workforce, and "regulatory overreach" to extend the power of conservative judges to block rules. Give them credit for playing a long game to get a Supreme Court they could only dream of thirty years ago.

**Whether EPA will be allowed to retain or recover its authority to implement our environmental laws is as much a political as a legal question, and cannot be answered by filing more lawsuits**

Whether EPA will be allowed to retain or recover its authority to implement our environmental laws is as much a political as a legal question, and cannot be answered simply by filing more lawsuits. Environmental groups today are barely visible on Capitol Hill, and I have not seen a commitment to long-term strategy or the kind of deep organizing that moves hearts and minds and shakes up the political class. We will need to find that commitment to keep what we have today and to confront the environmental challenges that are surely coming.