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Environmental Law

U.S. Environmental Protection Agency ends 'sue and settle' practice in environmental litigation

Over the years the U.S. Environmental Protection Agency (EPA) has regularly settled litigation brought by environmental interest groups and stakeholders through consent decrees and settlement agreements that force EPA action or regulatory changes by court order rather than through normal regulatory procedures. This practice, termed "sue and settle," presents a number of problems to routine and transparent enforcement of the country's environmental statutes and regulations. On Oct. 16, EPA Administrator Scott Pruitt issued a directive ending the practice by EPA and implementing a number of procedural requirements for EPA litigation and settlement activities.

In many instances, outside environmental groups commenced litigation to challenge or enforce various aspects of the EPA's regulatory or statutory actions in an effort to compel the EPA to move in a specific direction. The sue and settle practice is aided by many U.S. environmental statutes, such as the Clean Air Act and Clean Water Act, which empower private interest group litigation against the EPA when statutory deadlines or requirements are not met, in exchange for awards of attorney's fees to prevailing parties. This has been compounded by forum shopping across the country for favorable district courts, which often handed down nationwide rulings on environmental regulatory matters.

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Under the past several presidential administrations, EPA routinely negotiated settlements and consent decrees in litigation with the plaintiffs that would exclude key stakeholders and states, and then relinquished EPA control or discretion over environmental priorities and responsibilities to the litigants and the courts through the settlement or decree. The numbers varied, but the practice was used heavily by special interest environmental groups in the Clean Air Act area under the Clinton Administration (27), George W. Bush first term (38), second Bush term (28), Obama first term (60), and Obama second term (77). Under the Obama Administration, the practice increased significantly and the nature of the cases was far-reaching for EPA. In just the CAA area, the Obama Administration entered into more settlements (137) than the prior administrations did during the course of three terms.

Based on a sampling of cases reviewed by the U.S. Chamber of Commerce, the regulatory areas affected by sue and settle span the gamut of EPA environmental regulatory discretion. The settlements have significant regulatory cost impacts on the states and affected parties, such as the following:

- 2015 Clean Power Plan – between $5.1 and $8.4 billion annual costs;
- 2013 Revisions to CAA PM 2.5 NAAQs – up to $350 million annual costs;
- Chesapeake Bay Clean Water Rules – up to $6 billion annual costs; and
- 2011-2016 Regional Haze Rules – more than $5 billion additional costs.

In his Memorandum declaring the end of sue and settle, EPA Administrator Pruitt stated that the practice "undermines the fundamental principles of government that I outlined on my first day: (1) the importance of process, (2) adherence to the rule of law, and (3) the applicability of cooperative federalism." Additionally, he wrote that "sue and settle has been adopted to resolve lawsuits through consent decrees in a way that bound the agency to judicially enforceable actions and timelines that curtailed careful agency consideration. This violates due process, the rule of law, and cooperative federalism."

The EPA's Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreement requires a number of important actions by the agency to improve information and transparency. Significantly, the EPA will implement a number of procedures including: publishing an online notice of intent to sue list within 15

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days of EPA's receipt of the notice; publication online of a complaint or petition within 15 days of service on EPA; direct notice to any affected states or regulated entities of a complaint or petition, and appropriate steps by EPA to attain participation of them in the consent decree and settlement negotiation process; publication of a searchable, categorized, online list of consent decrees and settlement agreements governing agency action; and EPA no longer entering into consent decrees where the court lacks authority to order action outside of litigation or relinquishing EPA's discretionary authority.

In addition, the Directive includes two regulatory procedural safeguards for settlements. In the event that the consent decree or settlement requires a deadline for EPA to issue a final rule, it must provide adequate time to modify the rule after notice and comment, and EPA consideration of agency review and comments. Further, EPA will post online and provide a 30-day public comment period of any proposed consent decree or draft settlement agreement to resolve claims against the agency, as well as providing time for the agency to withdraw, modify or proceed with the settlement.

In light of the significant regulatory costs and lack of transparency in sue and settle, a variety of business groups support the EPA's new policy on settlements. Notably, the Chamber of Commerce's prior studies and recommendations on changes to the practice were considered in the directive. Similarly, Heritage Foundation and Freedom Works have applauded the change and steps to improve transparency, state involvement and preventing regulation through settlement. The Heritage Foundation's Darren Bakst, noted that "[i]t's like these groups have an additional step in the process to influence policy."

Conversely, environmental groups that have used the practice are upset by the new policy and will likely challenge the EPA's new directive. For example, the Sierra Club's legal director, Pat Gallagher, said that "[t]here's a general hostility to citizen's enforcement of environmental laws, and it reflects the fact that Pruitt doesn't want these laws enforced."

While the new policy is not likely to cut down on environmental interest group litigation to enforce or modify various environmental regulatory policy, the procedural safeguards have the potential to increase transparency and input on settlements and related regulatory changes. Given the significant regulatory costs associated with administering and complying with EPA's multitude of environmental regulatory areas, advance notice and input from the states and regulated community seems to be a reasonable requirement prior to significant regulatory revisions.

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