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Sue and Settle – The Growing Problem of Closed-Door Rulemaking

By Christopher R. Nestor and David R. Overstreet

So-called “sue and settle” tactics are becoming an increasingly popular, problematic, and oftentimes successful litigation strategy used by pro-regulatory environmental groups. Because these groups, as well as regulators, are paying ever-increasing attention to the oil and gas industry, the industry must be on the lookout for potential sue and settle tactics that threaten not only the industry’s legitimate business interests, but also proper rulemaking procedures and the due process protections those procedures afford.

In sue and settle cases, pro-regulatory environmental groups sue, or threaten to sue, an agency, such as the U.S. Environmental Protection Agency (EPA), for alleged failure to meet mandatory statutory deadlines for new regulations or for unreasonably delayed discretionary action. In many cases, the agency action (or inaction) at issue is controversial, such as a major new regulatory program that imposes high costs on the regulated community. That controversy, when coupled with litigation leverage over the agency, can provide incentives to the agency to cooperate with the environmental plaintiffs. This is especially so when the agency is already predisposed to regulate but has delayed in doing so for political or other reasons. The end result of the litigation is, in many cases, a consent decree or settlement agreement between the agency and environmental plaintiffs that is negotiated behind closed doors without the regulated community’s knowledge or input and that sets accelerated deadlines for proposal and final issuance of new regulatory actions.

The accelerated timelines often embodied in the settlements can reorder agency regulatory agendas and undercut the public participation and analytical requirements of regulatory process statutes, such as the Administrative Procedure Act,¹ the Regulatory Flexibility Act,² and the Unfunded Mandates Reform Act.³ Additionally, the accelerated timelines can afford little or no opportunity for review of new regulations by the White House’s Office of Information and Regulatory Affairs (OIRA) under executive orders applicable to the rulemaking process.⁴ The sue and settle process can, as the foregoing indicates, result in rulemaking that elevates special-interest, pro-regulatory priorities over the broader public interest and deprive the public, regulated entities and OIRA of opportunities to participate in the regulatory process. The settlements, moreover, can bind or severely limit the regulatory discretion of subsequent administrations.

The increasing trend of sue and settle litigation has drawn recent scrutiny by both Congress and States responsible for implementing many of the resulting regulatory programs. For example, on March 27, 2012, the House Judiciary Committee passed H.R. 3862, the “Sunshine for Regulatory Decrees and Settlements Act of 2012,” by a 20-10 vote. H.R. 3862, which ultimately died in the 112th Congress, would have:

¹ 5 U.S.C. §§ 551 *et seq.*

² 5 U.S.C. §§ 601 *et seq.*

³ 2 U.S.C. §§ 1501 *et seq.*

⁴ See, e.g., Executive Order 12866, “Regulatory Planning and Review,” 58 Fed. Reg. 51735 (Oct. 4, 1993), as supplemented by Executive Order 13563, “Improving Regulation and Regulatory Review,” 76 Fed. Reg. 3821 (Jan. 21, 2011).

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- provided for greater transparency, requiring agencies publicly to post and report to Congress information on sue and settle complaints, decrees, settlements, and fee awards;
- provided that consent decrees and settlement agreements in sue and settle cases may be filed only after parties that will be affected by the disputed agency actions and relevant States, localities and Tribes have been able to intervene in the litigation and join settlement negotiations, and any proposed decrees or settlements have been published for public notice and comment;
- required courts considering approval of decrees and settlements to account for public comments and compliance with the Administrative Procedure Act, the Regulatory Flexibility Act and other relevant administrative procedure statutes or executive orders;
- required the Attorney General or, where appropriate, the defendant agency's head, to certify to the court that he or she has approved of any proposed decree or settlement agreement that does not fully meet standards set forth in a memorandum by former Attorney General Edwin Meese III entitled *Department Policy Regarding Consent Decrees and Settlement Agreements* (Mar. 13, 1986); and
- prescribed a *de novo* standard of review for consideration of motions to modify consent decrees in light of changed facts or circumstances or competing duties.

A House Report accompanying H.R. 3862 identified nearly a dozen major regulatory changes that the EPA and the Department of Interior were able to institute or pursue in conjunction with sue and settle litigation during President Obama's first term.⁵

On August 10, 2012, Oklahoma Attorney General Scott Pruitt and twelve other State Attorneys General sent the EPA a Freedom of Information Act (FOIA) letter seeking documents related to the EPA's sue and settle strategy with environmental groups.⁶ In the FOIA letter, Attorney General Pruitt identified forty-five occasions over the past three years on which the EPA and other federal agencies had settled lawsuits brought under the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Endangered Species Act. Those settlements, Pruitt explained, "take the form of Consent Decrees that dictate how and when the EPA and other federal agencies must develop stringent new regulations." He further explained that the settlements netted the environmental groups almost \$1 million in attorneys' fees from the EPA and, further, that "States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention." The EPA has yet to respond to the FOIA request.

On April 1, 2013, U.S. Senator David Vitter (R-La.) and U.S. Senator Jeff Sessions (R-Ala.) wrote to Gina McCarthy, the nominee to head the EPA and current Assistant Administrator of the Office of Air and Radiation, regarding what they described as "the latest in a series of rulemakings initiated by this Administration in response to so-called 'sue and settle' agreements with special interest groups."⁷ The Senators' letter to Ms. McCarthy addresses the February 12, 2013 "Startup, Shutdown, and

⁵ See House Report 112-593, 112th Congress, 2d Session, at 6-7.

⁶ See Letter from E. Scott Pruitt, Oklahoma Attorney General, *et al.*, to Freedom of Information Officer, EPA (Aug. 10, 2012), available at:

<http://www.oag.ok.gov/oagweb.nsf/0/3D20CC37B2038BB786257A56006C355A!OpenDocument>.

⁷ A copy of the Senators' letter to Ms. McCarthy is available at:

http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c2e0f287-15be-485f-8668-03a7f343755b.

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Malfunction” rule proposed by the EPA in response to an agreement the agency made with the Sierra Club in 2011. As described by the Senators’ letter:

In November 2011, the Environmental Protection Agency (EPA) and the Sierra Club negotiated a settlement whereby EPA unilaterally agreed to respond to a petition filed by Sierra Club seeking the elimination of a longstanding Clean Air Act (CAA) exemption for excess emissions during periods of startup, shutdown, and malfunction (“SSM”). ***The EPA went out of its way further to deny the participation of the States, and other affected parties. Oddly, it appears that, instead of defending EPA’s own regulations and the SSM provisions in the EPA-approved air programs of 39 states, EPA simply agreed to include an obligation to respond to the petition in the settlement of an entirely separate lawsuit. In other words, EPA went out of its way to resolve the SSM petition in a coordinated settlement with the Sierra Club.*** Our concerns with the Agency’s sue and settle tactics are well documented—these settlement agreements are often accomplished in a closed door fashion that contravenes the Executive Branch’s solemn obligation to defend the law, avoids transparency and accountability, excludes impacted parties, and often results in the federal government paying the legal bills of these special interest groups at taxpayer expense. The circumstances under which EPA has agreed to initiate this new rulemaking reaffirms a pattern and practice of circumventing transparency. (emphasis added)

Recent activity suggests that regulation of greenhouse gas (GHG) emissions from the natural gas industry may be a prime target for sue and settle tactics by environmental groups and States that have not historically been favorable to natural gas development activities. On October 9, 2012, for example, the Clean Air Council and Earthjustice sent the EPA a 60-day notice of intent to sue under the citizen suit provision of the Clean Air Act. The notice letter seeks to force the agency to adopt New Source Performance Standards (NSPS) for methane emissions from the oil and natural gas sector and challenges the EPA’s decision not to directly regulate methane when it finalized its review of NSPS for the oil and natural gas source category on August 16, 2012 (77 Fed. Reg. 49490).⁸ On December 11, 2012, the States of New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts followed up with their own 60-day notice letter to the EPA.⁹

Sue and settle tactics can have a tremendous impact on federal and state regulatory processes. They can also have a tremendous impact on the U.S. economy by disrupting or crippling existing industries or deterring investment that creates jobs. This is particularly true where a federal agency, like the EPA, enters into a consent decree or settlement agreement that purports to expand the agency’s regulatory authority beyond the statutes that the agency administers.

Given the increasing prevalence of sue and settle litigation tactics by pro-regulatory environmental groups, and in the absence of legislation like H.R. 3862, industry must be vigilant.

⁸ See Letter from Clean Air Council and Earthjustice to Lisa P. Jackson *Re: Clean Air Act notice of intent to sue for failure to determine whether standards of performance are appropriate for methane emissions from oil and gas operations and, if so, to issue methane standards and emissions guidelines* (Oct. 9, 2012), available at:

[http://www.cleanair.org/sites/default/files/CAC%20Oil%20and%20Gas%20Methane%20Standards%20NOI%20\(1\).pdf](http://www.cleanair.org/sites/default/files/CAC%20Oil%20and%20Gas%20Methane%20Standards%20NOI%20(1).pdf).

⁹ See Letter from Eric T. Schneiderman, New York Attorney General, *et al.*, to Lisa P. Jackson *Re: Clean Air Act Notice of Intent to Sue for Failure to Determine Whether Standards of Performance Are Appropriate for Methane Emissions from Oil and Gas Operations, and to Establish Such Standards and Related Guidelines for New and Existing Sources* (Dec. 11, 2012), available at:

http://www.ag.ny.gov/pdfs/tr_NSPS_Methane_Notice.pdf.

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