



## Sue and Settle is Gone: EPA Administrator Revises EPA Litigation Policy

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A prominent characteristic of the Obama EPA was its close relationship with national environmental groups. The most controversial EPA rulemakings seemed to be the by-product of litigation settlements when environmental groups sued EPA over discretionary powers given the agency under various environmental statutes. The end result was often a pre-arranged, judicially enforced settlement binding the agency to adopt regulations more stringent than might otherwise be the case. Not only that, but EPA often paid the plaintiff's legal fees and costs. The practice was so abused it earned its own nickname: "Sue and Settle." Now that Administrator Scott Pruitt is leading the agency, Sue and Settle is officially gone.

### Sue and Settle: A Common Practice

The Sue and Settle whirlwind of settlements set key regulatory achievements for EPA Administrators Jackson and McCarthy. For example, in May of 2016, environmental groups sued EPA and alleged it failed to update regulations governing wastes generated from oil and gas production as required by the Resource Conservation and Recovery Act. The Natural Resources Defense Council and other plaintiffs entered into a settlement with EPA just a few months later in which EPA agreed to revise existing regulations and guidelines by March 15, 2019. The controversial Boiler MACT regulations under the Clean Air Act are a direct result of action taken in December 2008 by the American Nurses Association and a host of environmental groups. By count of The Heritage Foundation, EPA under President Obama was responsible for more than 60 Sue and Settle rulemakings.

### A New Procedural Directive

In an October 16, 2017 memo that said Sue and Settle is “collusion with outside groups,” creates rules “outside the normal administrative process,” and excludes “stakeholders” from the rulemaking process, EPA Administrator Pruitt issued a Directive that terminated the Sue and Settle policy. He did not mince words: “EPA will not resolve litigation through backroom deals with any type of special interest group.” The Directive makes three major revisions to EPA’s procedures for resolving citizen suits under environmental statutes.

First, how EPA handles these cases will be more transparent. The Directive orders any notice of intent to sue received by EPA to be published within fifteen days on EPA’s website. In addition, any complaints or petitions for review filed in federal court concerning a rulemaking must be made available online by EPA within fifteen days of its receipt of the same. The Directive also requires EPA to notify affected states and regulated entities of any of these legal actions and says it will be EPA’s policy to “take any and all appropriate steps to achieve the participation of affected states and/or regulated entities in the...negotiation process.” Moreover, before entering into any proposed consent decree or other settlement governing agency actions, EPA will post it online for public comment and will seek to gain the concurrence of the states or regulated entities that would be affected by it.

Second, EPA will interpret its settlement authority narrowly. Thus, “EPA shall not enter into a consent decree with terms...[a] court would have lacked authority to order if the parties had not resolved the litigation,” or one with the effect of converting an otherwise discretionary duty of EPA into a mandatory one to issue or amend regulations. Under the Directive, if EPA resolves a matter and there is “no prevailing party,” EPA will try to preclude payment of legal fees and costs to the plaintiff. Also, any rulemakings agreed to under terms of a settlement must provide sufficient time for “meaningful” public comment and adherence to the rulemaking procedures of the Administrative Procedure Act.

Third, the Directive creates a public notice process for any consent decrees lodged in federal court or draft settlement agreements EPA is considering that resolve claims against the agency. A notice of any such consent decree or settlement agreement will be published in the Federal Register announcing a 30 day notice and comment period. Moreover, EPA may decide to hold a public hearing on whether it should enter into the consent decree or settlement agreement. Based on comments received, the Directive says that EPA reserves the right to “withdraw, modify, or proceed” with the proposed actions.

#### Closing Statement: Powers Preserved

Administrator Pruitt closes the Directive with this warning: “In no circumstances... will I permit the agency to violate its statutory authority or to upset the constitutional separation of powers.” Given the Directive’s extensive requirements governing how the agency must handle these cases, it appears the practice of Sue and Settle is at an end. Is it gone forever? Not likely. Sad to say, but a future Administration that maintains cozy relationships with environmental groups could simply junk the Directive and bring Sue and Settle back. Regulated parties should enjoy the hiatus while it lasts.

## **Related People**

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