



Insight

EPA's Sue and Settle Directive: A Step Toward Transparency

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Environmental Protection Agency (EPA) Administrator Scott Pruitt recently issued a new [directive](#) aimed at addressing [reported abuses](#) of the consent decree and settlement agreement process. This process, also known as “sue and settle,” is the practice of using legal settlements to mandate regulatory activity. It has long rankled industry.

Here's how it works. An interest group sues a federal agency alleging that the agency has not fulfilled its responsibility under the law. Rather than contest the lawsuit, the agency settles and enters into an agreement to initiate and/or expedite a rulemaking, complete with a legally binding deadline to promulgate.

The costs of sue and settle rules are significant. The American Action Forum analyzed the final EPA rules listed in the White House's [public database](#) of “economically significant” rules with judicial deadlines and found that from 2005 through 2016, 23 sue and settle regulations resulted in a total cost burden of \$67.9 billion, with \$26.5 billion in annual costs. Sixteen of these rules imposed a paperwork burden of more than eight million hours.

Some may argue that private interest groups are merely ensuring that federal agencies meet statutory obligations. However, there are notable downsides to sue and settle. For one, these settlements usually bind the agency to a specific regulatory outcome, meaning that the agency must regulate the issue in a certain way regardless of whether or not that is the most economically efficient – or even the most protective of environmental health and safety.

Second, the resulting rules have legally binding deadlines. To meet these deadlines, agencies may have to limit the public comment period or perform a less-thorough economic analysis than they otherwise would or should. This results in a less robust debate about the effectiveness or efficiency of a rule.

Third, these suits can divert an administration's regulatory priorities. Federal agencies do not operate with unlimited regulatory resources. When a settlement requires an agency to focus on a rulemaking it otherwise would not, it results in those resources being taken away from a rulemaking that may be more beneficial to the broader public rather than a narrow interest.

The October 16th directive issued by Administrator Pruitt aims to address sue and settle abuses at EPA by establishing procedures designed to make the settlement agreement process more transparent. The procedures include publishing notices online when the EPA has received a lawsuit, directly notifying affected states and regulated industries of the complaint within 15 days of receiving it, preventing the EPA from committing to a specific outcome, and allowing a public comment period or public hearing on whether to enter into the proposed consent decree or draft settlement agreement.

The EPA directive also provides a good test case that could bolster efforts to pass legislation that would limit sue and settle across the federal government. The [Sunshine for Regulations and Regulatory Decrees and Settlements Act](#), introduced in both houses of Congress in 2017, includes many of the provisions in the EPA directive, but goes further which gives these provisions more teeth, and codifies such policies that could otherwise be subject to reversal under a different administration. If the EPA's directive is effective at improving rules initiated through lawsuits, it would provide momentum to expand the practice beyond the EPA.

With billions of dollars in economic costs at stake, it makes sense to more thoroughly scrutinize sue and settle rules to ensure they meet the basic rigors of the Administrative Procedure Act and sound cost-benefit principles. Administrator Pruitt's directive offers the opportunity to see if the regulatory outcomes of such rulemakings can be improved.