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Opposing EPA's "Sue and Settle" Strategy:

Maintaining a Role for States in the Federal Rulemaking Process

by Attorney General Derek Schmidt

Whether regulating Chesapeake Bay pollution, Kansas prairie chickens, or air pollution from power plants, federal regulators have increasingly settled "friendly" lawsuits to achieve their desired result. This "sue and settle" tactic undermines the checks and balances of the rulemaking process and could result in hundreds of billions of dollars in compliance costs.[1] The federalism toll from the rise in sue-and-settle agreements is similarly staggering. To preserve their role in the regulatory process, States are finding ways to disrupt sue-and-settle agreements.

Sue-and-settle agreements take various forms. They typically occur in "citizen suit" cases brought under the Clean Air Act (CAA), Clean Water Act, or Endangered Species Act (ESA), each of which also protects States' traditional regulatory role. Ironically, citizen-suit provisions effectively decrease citizen participation by excluding citizens' most direct representatives—elected state officials—from important decisions. Increasingly, however, special interest groups bring suits to "compel agency action" under § 706 of the Administrative Procedure Act (APA) itself.

A hallmark of sue-and-settle agreements is that instead of defending their discretion to act or not act, agencies capitulate to plaintiffs' demands regarding the agency's regulatory policies and priorities. Settlements are negotiated privately with special interest plaintiffs and are backed by judicially enforceable consent decrees, which often dictate the timing and substance of future regulatory actions. Because the agency often agrees with the goals of the entity suing it, these non-adverse lawsuits may not comply with the U.S. Constitution's "cases" or "controversies" requirement.

A good example is *American Nurses Ass'n v. Jackson*, No. 08-cv-2198 (RMC) (D.D.C.). In that case, the EPA consented to a decree that set deadlines for issuing proposed and final rules establishing emissions standards for hazardous air pollutants from certain coal- and oil-fired power plants called Electric Generating Units (EGUs). The decree undermined the ordinary regulatory process in two significant ways—one substantive and one procedural.

First, the parties (EPA and environmental groups) agreed that § 112(d) of the CAA, 42 U.S.C. § 7412(d), imposed a mandatory nondiscretionary duty on EPA to issue maximum achievable control technology emissions standards for mercury air toxics (MATS). Consent Decree (Doc. #33) ¶ 3, at 3. This concession locked in a sweeping, controversial interpretation of § 112(d), relinquishing substantial agency discretion. Even the judge who approved the decree was not convinced "EPA's legal position [was] correct." Memorandum Opinion (Doc. #31) at 2-3. Because other CAA programs effectively control EGU emissions, Congress gave EPA broad discretion *not* to regulate them. EPA must regulate EGUs under § 112 only if, and only to the extent that, EPA determines that (1) EGU hazardous air pollution emissions cause hazards to public health and (2) it is "appropriate and necessary" to regulate such emissions under § 112. 42 U.S.C. § 7412(n)(1)(A). By nonetheless agreeing to issue regulations under § 112(d), EPA bound itself to issue regulations that the CAA gave EPA broad discretion *not* to issue. And EPA made this decision without public notice and comment or stakeholder input. The substantive effect of the consent decree became clear when EPA conveniently disregarded the massive cost of the regulation (nearly $10 billion per year) to reach the conclusion the consent decree effectively mandated—that EGU emissions limits were "appropriate."

[1] U.S. Chamber of Commerce, Sue and Settle: Regulating Behind Closed Doors (May 2013), available at https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.

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Second, the consent decree required EPA to finalize its regulations on an unusually (and irresponsibly) short timeframe. EPA gave itself only 104 days to respond to more than 20,000 comments on a proposed rule that could undermine the nation's electricity supply and significantly increase electricity costs to consumers. This tactic rendered the notice-and-comment period an empty formality, contradicting fundamental administrative law principles of transparency and accountability, and undermining the CAA's protection of traditional state authority. States issue air permits under state laws and the CAA, and States are responsible for ensuring the availability of reliable electric power within their borders and for protecting the health and welfare of their citizens. Yet EPA used the sue-and-settle strategy in cahoots with special interests to stack the deck against these significant state interests and push through the MATS regulations over vigorous opposition by numerous States and other stakeholders.

Sue-and-settle agreements allow an agency to make important substantive and procedural decisions behind closed doors and outside the strictures of the APA. This was not how Congress designed administrative decision-making. In response, States have actively opposed sue-and-settle agreements and their resulting regulations:

- 22 States, including Kansas, have challenged EPA's MATS regulations, though unsuccessfully so far. *See White Stallion Energy Ctr., LLC v. Envt'l Protection Agency*, 748 F.3d 1222 (D.C. Cir. 2014). Seeking to reverse the D.C. Circuit, Kansas and 20 other States have jointly filed a petition for writ of *certiorari* in the U.S. Supreme Court.

- 21 States, led by Kansas, are challenging EPA's final rule imposing stringent total maximum daily load (TMDL) requirements for the Chesapeake Bay. *See American Farm Bureau Federation v. Envt'l Protection Agency*, No. 13-4079 (3d Cir.).[2] A sue-and-settle agreement required EPA to issue the TMDL rule. The agreement imposed aggressive rulemaking deadlines and undermined States' traditional and statutory role in regulating water pollution and land use.

- 3 States, including Kansas, have challenged the Department of Interior, U.S. Fish and Wildlife Service's (FWS) decision to list the Lesser Prairie Chicken, among other species, as "threatened" under the ESA. *See* Amended Complaint (Doc. #19), *Oklahoma v. Dept. of Interior*, No. 14-cv-123-JHP-PJC (N.D. Okla.). A sue-and-settle agreement required the FWS to prematurely make a listing decision on these species, ignored significant state and private efforts to protect the Lesser Prairie Chicken, surrendered the Service's option not to list the species, and set an unprecedented decision-making timeframe.

In addition to challenging the regulations that result from sue-and-settle agreements, Kansas and other States have intervened in cases to forestall sue-and-settle agreements. *See, e.g.*, *Gulf Restoration Network v. Jackson*, No. 12-cv-677 (E.D. La.). The States intend to head off sue-and-settle agreements before an agency gives up its lawful discretion, because once a judicially enforceable consent decree issues, States and other stakeholders lose much of their say in the process. In addition, Kansas and other States have tried to use Freedom of Information Act requests to uncover the seemingly incestuous relationship between EPA and special interest environmental groups. *See Oklahoma v. Envt'l Protection Agency*, No. CIV-13-726-M, 2013 WL 6714167 (W.D. Okla. Dec. 18, 2013).

The increasing use of sue-and-settle agreements is a troubling and anti-democratic trend that impinges States' traditional regulatory function and harms unrepresented consumer and business interests. A recent Third Circuit decision provides some hope courts will begin to scrutinize sue-and-settle agreements more rigorously.[3] In the meantime, States will continue to try to ensure transparency, integrity, and accountability in the federal rulemaking process by intervening in cases to prevent sue-and-settle agreements and challenging any regulations that ensue.

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[2] Washington Legal Foundation has filed an *amicus* brief in the case as well on behalf of a bipartisan group of 39 Members of Congress. *Available at* http://www.wlf.org/upload/litigation/briefs/AFBFv.EPAamicus(asfiled).pdf.

[3] See *Minard Run Oil Co. and Pennsylvania Independent Oil and Gas Association v. U.S. Forest Service, et al.*, 670 F. 3d 236 (3d Cir. 2012) and *Minard Run Oil Co., et al. v. U.S. Forest Service, et al.*, 2013 WL 5357066 (3d Cir. Sept. 26, 2013). See also R. Timothy McCrum, *Defeating "Sue and Settle" Agreements: Third Circuit Decision Supporting Shale Gas Development Shows the Way*, WLF Legal Opinion Letter, Vol. 22, No. 17, Nov. 15, 2013, available at http://www.wlf.org/upload/legalstudies/legalopinionletter/McCrumLOL_111513.pdf

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