EPA ADMINISTRATOR MOVES TO END “SUE AND SETTLE”

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On October 16, EPA Administrator Scott Pruitt announced a Directive to address "sue and settle" concerns with new procedures allowing public participation prior to settling lawsuits challenging EPA actions. For states, tribes, regulated industries, and other interested stakeholders affected by these lawsuits, these new measures could provide opportunities to influence outcomes and prevent settlements that damage their interests. The full text of the "Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements," explanatory memorandum, and EPA press release can be viewed here.

INCREASED TRANSPARENCY AND OPPORTUNITY FOR PUBLIC PARTICIPATION IN EPA SETTLEMENTS

The Directive outlines processes designed to increase opportunities for stakeholders to provide input on settlement terms, which the EPA will consider prior to entering into a consent decree or settlement agreement in lawsuits challenging its regulatory activities. To increase transparency and make the public more aware of environmental litigation against the EPA, the EPA's website now contains a searchable database, available here, of consent decrees and settlement agreements with ongoing obligations that bind EPA, and complaints and notices of intent to sue the EPA received on or after January 1, 2013. The majority of consent decrees and settlement agreements included in this database involve lawsuits brought by environmental groups alleging EPA's failure to meet statutory deadlines to review pollutant standards under the Clean Air Act or Clean Water Act, and settlements that dictate new timelines for agency review.[i]

The new procedures require the EPA to publish a notice of a proposed consent decree or draft settlement agreement online and in the Federal Register, provide an opportunity for public comment, and potentially hold a public hearing when requested.[ii] The Directive specifically calls for the EPA to notify affected states and regulated industries of settlements or consent decrees and seek to receive their concurrence before entering into a consent decree or settlement agreement. The opportunity for public comment on proposed consent decrees is already a requirement for certain enforcement cases brought by the EPA and the U.S. Department of Justice ("DOJ"),[iii] but it will largely be a new procedure for settlements of lawsuits against the EPA. These measures afford affected states, regulated industries, and other stakeholders more say in the formation of consent decrees and settlement agreements, ultimately giving them the ability to influence outcomes before final actions are taken.

On October 26, the House passed H.R. 469, available here, echoing the principles outlined in the new EPA Directive. The press release for H.R. 469 is available here.

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ADDRESSING CONCERNS OVER SETTLEMENTS THAT MAY LIMIT EXERCISE OF EPA DISCRETION

According to Administrator Pruitt's memorandum explaining the Directive, the EPA previously engaged in "sue and settle" tactics whereby the Agency would resolve litigation by agreeing to take action that relinquished some Agency discretion over its priorities and duties and handed them over to environmental groups and the courts. The Directive states that the "EPA shall not enter into a consent decree or settlement agreement that converts an otherwise discretionary duty of the Agency into a mandatory duty to issue, revise, or amend regulations." Under the Directive, EPA will no longer commit to take action in a consent decree that a court would have lacked the authority to order if the parties had not resolved the litigation. The EPA says that these measures will safeguard the discretion that Congress authorized the agency and afford the agency more flexibility to accomplish its goals.

CRITICISMS OF THE NEW MEASURES TO END "SUE AND SETTLE"

Opponents to the new measures assert that the prevalence of "sue and settle" practices is unsupported by evidence. The Government Accountability Office issued a 2014 report finding that "[t]he effect of settlements in deadline suits on EPA's rulemaking priorities is limited." Also, a 2015 article published in the Harvard Environmental Law Review concluded that complaints about environmental settlements enabling agencies to avoid the requirements of administrative law are mistaken.[iv]

There are also concerns about the impact of implementing the new measures. The Congressional Budget Office (CBO) estimates that implementing H.R. 469 would cost approximately $9 million over a four-year period from 2018–2022, primarily because litigation involving consent decrees and settlement agreements would take longer and require additional agency resources. The CBO report also states that the additional procedural requirements for developing consent decrees and settlement agreements would increase the amount of reimbursable attorneys' fees for those entities successfully challenging the federal government. On this issue, EPA's new directive states that if the agency agrees to resolve litigation through settlement, it will seek to exclude the payment of attorneys' fees.

CONCLUSION

The EPA's new policies aimed at ending "sue and settle" practices will make proposed consent decrees and settlement agreements with the EPA more accessible to affected states, tribes, regulated industries, and other interested stakeholders, including opportunities to comment and potentially the ability to concur on settlements. This means that stakeholders may have the chance to influence outcomes and prevent settlements that damage their interests. Further, if the Senate passes H.R. 469, these measures will outlast an administration shift at the EPA.

Beyond transparency, the practical implications of these measures are uncertain. Many of the lawsuits categorized as "sue and settle" situations involve the EPA missing mandatory deadlines for rulemaking and other action required by statutes such as the Clean Air Act and Clean Water Act. In these circumstances, affected states, tribes, and regulated industries may have opportunities to be involved in shaping any potential consent decree regarding the timing for such action and, in particular, ensure that the EPA considers their interests with

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respect to any associated settlement agreements that may cover aspects beyond the timing for agency action. By the same token, the resolution of any challenge by industry of EPA regulations will be subject to the same process and involve other interest groups in settlement of industry claims. The procedures designed to end "sue and settle" may make settlement a less attractive option for special interest groups and inadvertently result in more burdensome or unnecessary litigation, occupying more of the agency's and courts' resources.

We will continue to monitor developments related to the EPA's "sue and settle" Directive and H.R. 469.

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[i] *See e.g.*, *Center for Biological Diversity et al. v. McCarthy, 3:16-cv- 03796-VC (N.D. Cal.)* (consent decree terms require EPA to, among other things, sign a final rulemaking notice for review of primary National Ambient Air Quality Standard for oxides of nitrogen (NOx) by April 6, 2018); *Missouri Coalition for the Environment Foundation v. EPA*, 2:16-cv-04069 (W.D. Mo.) (consent decree terms require EPA to, among other things, either approve new or revised water quality standards for nutrients and chlorophyll submitted by the State of Missouri or sign a notice of proposed rulemaking that proposes new or revised water quality standards by December 15, 2017).

[ii] *See e.g.*, 40 C.F.R. § 25.5(a)-(f) (nonadjudicatory public hearings, whether mandatory or discretionary, meet certain minimum requirements including notice provided no less than 30 days before the hearing, a location and time that facilitates public attendance, adequate time for scheduled and unscheduled testimony, and a record available for public review).

[iii] *See e.g.*, 42 U.S.C. § 7413(g) (Clean Air Act); 42 U.S.C. § 9622(i) (CERCLA); 28 C.F.R. § 50.7 (DOJ policy for public notice and comment of proposed consent decrees in actions to enjoin discharges of pollutants).

[iv] Courtney R. McVean and Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 Harv. Envtl. L. Rev. 191, 239 (2015), http://harvardelr.com/wp-content/uploads/2015/04/McVean-and-Pidot.pdf

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