

LEGAL PERSPECTIVE ENVIRONMENTAL



EPA Administrator Pruitt Issues “Sue and Settle” Directive and Institutes New Public Participation Requirements for EPA Settlements of Defensive Lawsuits

On October 16, 2017, EPA Administrator Scott Pruitt issued a directive formally ending the so-called “sue and settle” practices by the Agency. The directive, per an accompanying memorandum, was prompted by the EPA’s practice of resolving defensive lawsuits through consent decrees and settlement agreements “that appeared to be the result of collusion with outside groups.” Previous administrations were criticized when settlement of these lawsuits drove the policies and priorities of the Agency without input from states and regulated parties. The Administrator declared that the days of regulation through litigation are over, and the “EPA will not resolve litigation through backroom deals with any type of special interest groups.”

Sue and settle practices have arisen in a variety of circumstances. For example, the Clean Air Act requires the EPA to review and revise regulations on fixed schedules that were imposed by Congress. Historically, the EPA has struggled to meet many of these statutory deadlines. Other lawsuits include challenges to regulations issued by the Agency or lawsuits seeking to compel the Agency to perform a non-discretionary duty. The plaintiffs bringing lawsuits against the EPA include environmental groups, individuals, states, industry stakeholders and trade associations. The Administrator’s directive broadly addresses lawsuits filed against the EPA but does not encompass the settlement of enforcement actions initiated by the EPA or administrative appeals of permits issued by the EPA.

The directive is aimed at increasing transparency and public participation in accordance with the principles of administrative law. To enhance public participation, the directive requires the EPA to make certain documents publicly available within specified timeframes:

- **Website publication:** Within 15 days of receipt or service, the EPA’s Office of General Counsel must publish online notices of intent to sue the Agency and complaints or petitions for review regarding an environmental law, rule, or regulation.
- **Notice to affected parties:** Within 15 days of receiving service of a complaint or petition for review, the EPA will “directly notify” any affected states and/or regulated entities. The directive is silent on how affected states and regulated entities will be notified.
- **Federal Register:** The EPA must post online for review and comment any proposed consent decree lodged in federal court or a draft settlement agreement and publish a notice of the lodging of a consent decree or draft settlement agreement in the *Federal*

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Register. The public will be given a minimum of 30 days to comment, and the EPA may hold a public hearing to solicit public input.

The EPA will also publish online a searchable list of consent decrees and settlement agreements that currently govern the Agency's actions, including a brief description of the terms of the decree or agreement as well as any attorneys' fees or costs paid. Any new consent decrees or settlement agreements entered into after the directive must be included in this list within 15 days of execution.

In addition, the directive imposes a set of guidelines that the Agency must follow when settling defensive lawsuits. The EPA is now prohibited from entering into a consent decree or settlement agreement that could not otherwise be ordered by a court if the parties litigated. The directive also prohibits the settlement of lawsuits that convert an otherwise discretionary duty of the Agency into a mandatory duty to promulgate or revise regulations, although the Department of Justice, who represents the EPA in federal court proceedings, is already prohibited from doing this by regulation. If the EPA does resolve litigation through a consent decree or settlement agreement, it must seek to exclude the payment of attorneys' fees or costs to the plaintiff or petitioner. The Administrator reserved the right to deviate from these guidelines where appropriate, with the caveat that he will not do so if it will violate the Agency's statutory authority or "upset the constitutional separation of powers."

The directive also requires the EPA "to seek to receive the concurrence of any affected states and/or regulated entities before entering into a consent decree or settlement agreement." The requirement to seek concurrence from affected states and regulated parties in advance of settlement is a significant change, but it is not yet clear what it means. The enhanced public participation procedures now required by the directive, including direct notice, will give the public some ability to weigh in on settlement considerations.

The directive sends a message that President Donald Trump's EPA will not be quick to use consent decrees or settlements to negotiate new deadlines for statutorily required rules or dictate the Agency's policies and priorities. The EPA appears to be poised to litigate if there is a question about whether an alleged inaction that resulted in the lawsuit is discretionary, as opposed to mandatory. Litigation that does not settle, however, could put a strain on the Agency's resources during a time when its budget has been targeted for substantial reductions. One thing is sure – the outcome of these lawsuits will affect the timing and nature of the EPA's regulatory revisions.

Babst Calland's environmental and energy attorneys are closely tracking the implementation of the Administrator's directive and the regulatory developments in the Trump administration. Should you have any questions regarding the EPA's regulatory developments, please contact Jean M. Mosites at (412) 394-6468 or jmosites@babstcalland.com, or Gary E. Steinbauer at (412) 394-6590 or gsteinbauer@babstcalland.com or any of Babst Calland's environmental and energy attorneys.

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