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NEWSLETTER

Sue and Settle Litigation Continues to Create Controversy

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The litany of so-called "sue and settle" litigation against the Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), and other federal agencies continues to create controversy among environmental advocates, industry, regulators, and Congress. In August, the Senate Committee on Environment and Public Works, Subcommittee on Superfund, Waste Management and Regulatory Oversight held a hearing at which this controversy was brought back to the forefront.[1]

The Endangered Species Act (ESA) allows any citizen to petition an agency for action and bring lawsuits against a federal agency for failing to adhere to the strictures of the ESA. For example, suits have been brought against the EPA for failing to consult with the FWS regarding actions such as approving pesticides that would have an impact on endangered species. Environmental advocates argue that the citizen suit provisions enable the public to ensure that the agencies follow Congress' instruction to protect endangered species. And they claim it succeeds. Some in Congress agree. For example, Senator Markey stated during the hearing that "not one species would have been listed under the [ESA] during the Bush Administration without citizen petitions."

However, industry advocates and some state regulators argue that environmental advocates today are taking advantage of the citizen-suit provisions to improperly promote their own federal policy agendas, outside of the normal legislative and agency processes, by overwhelming the agency's ability to do anything but respond to sue and settle litigation. Senator Rounds characterized the problem this way:

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While originally well-intentioned, these citizen suits are being used to perpetuate what is often referred to as a sue-and-settle process that overwhelms regulatory agencies, resulting in settlement agreements and consent decrees requiring agencies to promulgate major regulations within an arbitrarily imposed timeline. These agreements are often negotiated behind closed doors with little or no transparency or public input.[2]

Senator Rounds stated that the environmental advocates have accomplished this by gaming the system. One common tactic is for the environmental advocates to submit a large-volume petition for rulemaking asking the agency to take various ESA actions, knowing full well that the agency simply does not have the resources to do those things. Once the agency—as expected—fails to act on those petitions in time, the petitioners then sue the agency for that failure.

According to the testimony of the Western Energy Alliance (WEA), this process is being dominated by two organizations: Wild Earth Guardians and the Center for Biological Diversity. WEA argues that these two organizations are able to shape and control federal ESA policy in ways that go beyond what is proper because once pulled into litigation, the agency bears essentially all the cost and risk.[3] Under normal circumstances, this sort of litigation would be costly for the EPA to fight and would be similarly costly for the plaintiff. But, here, the ESA requires the federal government—and the taxpayers—to pay the plaintiffs' legal fees if they prevail. Thus, unless the government is very sure it has a good argument, there is a steep incentive for the government to simply settle early and quickly.

And some industry representatives allege that in some cases the agency wants to agree to the environmental advocates' demands because the agency could not otherwise adopt those policy positions. In either case, the settlements typically are negotiated outside of the view of the public, and often set aggressive timeframes for the agency to undertake specific actions, such as determining whether a species should be listed as endangered. And based on those crushingly quick deadlines, some argue that the agency may simply give in to the advocates' demands to meet that deadline rather than face additional litigation.

One result of this sue-and-settle game is that industry is often forced to get into the fray to protect itself when the federal government won't. In several instances, industry coalitions or individual companies have intervened in these suits on behalf of the agency when the environmental advocates' demands would directly impact those industries. Industry often does so because it fears—perhaps rightly—that the agency's incentives to quickly settle will mean the creation of additional, unwarranted, regulation without the normal—and otherwise statutorily required—opportunities for the public to be provided the opportunity to participate.

In the end, the citizen suit provisions of the ESA are an important tool for the public, but the current over-use of that tool by some is creating headaches for many. The federal agencies are faced with expending a greater portion of their budgets with defending these suits and paying the legal fees of the parties bringing the suit—a proposition often less appealing than simply giving in and settling the suit. Industry is faced with the cost of intervening on behalf of an agency that has little incentive to aggressively fight the suits simply to stave of unnecessary regulation. And the public is faced with agencies that are having their endangered species protection priorities established not by Congress or the President, but arguably by a handful of advocates who have found a way to gain influence over these agencies through litigation.

Onlookers have predicted, and industry has requested, legislative changes to the ESA that would continue to allow the public to help ensure the goals of the ESA are met, but without granting advocacy groups undue influence over federal policy. Over the past several years a number of bills have been introduced in an attempt to do so, but to date none have gathered sufficient support to move very far. Proponents continue to hope that the continued Congressional attention to the issue will lead to these changes in the coming years.

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[1] *Oversight of Litigation at EPA and FWS: Impacts on the U.S. Economy, States, Local Communities and the Environment: Hearing Before the Subcomm. on Superfund, Waste Mgmt., and Regulatory Oversight of the S. Comm. on Env't and Pub. Works*, 114th Cong. 3 (2015).

[2] *Id.* at 3.

[3] *Id.* at 19-20.