

APPEALS COURT REBUFFS FEDERAL AGENCY'S ATTEMPT AT "SUE AND SETTLE" REGULATION

by

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Federal regulations are not to be made in backrooms or through side deals. They are to result from a fair and open process established by the Administrative Procedure Act and overseen by the Office of Management and Budget. In recent years, though, some advocacy groups have circumvented this open process: they sue a federal agency and create their own "side deal" in the lawsuit's settlement. Under this practice, called "sue and settle," groups have required agencies, by court order, to adopt and implement certain procedural changes, expedited time frames, and even new regulations. The public, including businesses and employees potentially adversely affected by the regulations, often have no notice or opportunity to comment before the new "regulations" go into effect.

The U.S. Court of Appeals for the Ninth Circuit, in *Conservation Northwest v. Sherman*, No. 11-35729, 2013 WL 1760807 (9th Cir. Apr. 25, 2013), recognized these tenets and rejected a recent "sue and settle" attempt involving the Bureau of Land Management, Forest Service, and Fish and Wildlife Service. In this case, a coalition of environmental groups had sued the agencies over changes to the Northwest Forest Plan, formed in the 1990s to balance conservation of the Pacific Northwest forests with commercial logging. The suit involved the Survey and Manage Standard, which created a process for assessing the logging impact on about 400 species.

The Standard proved costly. In 2001, the agencies sought to amend the Standard, but that led to much wrangling and litigation. In 2007, the agencies decided to eliminate it, issuing a Final Supplemental Environmental Impact Statement and Record of Decision. The conservation groups challenged the decision, which they had legal standing to do. Nevertheless, in the ensuing settlement, they went beyond the law. They were permitted to "detail[] how Survey and Manage would operate going forward," including changes to species classifications and new management requirements for species that had never been part of the Standard. *Id.* at 2.

The district court entered the settlement as a consent decree. While the court recognized the requirements were to take effect absent any public-participation procedures, it suggested that "because the consent decree was a 'judicial act,' procedural requirements that would otherwise govern agency action are inapplicable." *Id.* at 3. A lumber company that intervened in the case appealed, challenging the validity of the decree.

The Ninth Circuit reversed the lower court. It held that consent decrees cannot conflict with or violate statutes. It explained that "[b]ecause the consent decree in this case allowed the Agencies effectively to promulgate a substantial and permanent amendment to Survey and Manage without following statutorily required procedures, it was improper." *Id.* at 6. "[T]he public should have been afforded an opportunity to

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comment on all alternatives that the Agencies were required by law to consider.” *Id.* at 5; *see also* “9th Circuit Ruling Issued in Midst of Debate over Federal Agency “Sue-and-Settle” Tactics,” *available at* http://wlflegalpulse.com/-_2013/05/21/9th-circuit-ruling-issued-in-midst-of-debate-federal-agency-sue-and-settle-tacti/.

The Ninth Circuit’s ruling is an important judicial limit on one of the most egregious applications of “sue and settle.” It stops, at least in the Ninth Circuit, agency rules from being substantively modified by closed-door settlement agreements. This ruling, while helpful, does not solve the “sue and settle” problem. It highlights it.

Since the Ninth Circuit’s ruling, the House Judiciary Committee’s Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing to look at legislative solutions to “sue and settle” actions. Congressman Collins had introduced H.R. 1493, the Sunshine for Regulatory Decrees and Settlements Act of 2013, to require public notice of settlements and assure affected parties can participate in the development of any resulting regulations and procedural changes. Senator Grassley’s S. 714 is the companion bill in the Senate.

William Kovacs, author of an in-depth report on “sue and settle” for the U.S. Chamber, testified at the hearing. He observed that “sue and settle” agreements are a concern for the businesses community because they lead to regulatory and procedural changes without considering the economic impact on them or their employees. Thomas Easterly, Indiana’s Commissioner of Environmental Management, explained that “sue and settle” actions also shut out state regulators, who can bear responsibility for implementing and funding federal programs.

The concern expressed was that, without these and other stakeholders’ involvement, the cases may not be truly adversarial. If the interests of the groups and regulators align, there will be no opposing parties to challenge the changes required under the settlement. A final wrinkle here is that the U.S. Government, ironically, often pays the attorneys’ fees for the groups who sue the agencies. The Equal Access to Justice Act sets up a one-way “loser pays” system for people who prevail in suits against the government, and the groups often make sure that the settlements state that they can qualify for these funds.

The good news on the “sue and settle” front is that progress is being made to end the practice. The Environmental Protection Agency has begun posting on its website Notices of Intent to Sue, which some statutes require be sent to the agency before a suit against the agency can be filed. *See* <http://www.epa.gov/ogc/noi.html>. This is a helpful first step, as it provides notice that a potential “sue and settle” action is coming. But, it does not cover all potential “sue and settle” actions against the EPA, or other federal agencies, or provide other members of the public, including the regulated community, the right to intervene in or comment on the suit or settlement.

What is needed is a comprehensive solution that assures notice and comment for all actions against all agencies. As a guide, Congress can look at the experience of the Tunney Act, 15 U.S.C. § 16, enacted forty years ago to apply to consent settlements arising in antitrust law. In a nutshell, the Tunney Act requires the publication of any proposed consent settlement and judgment in the Federal Register at least 60 days prior to its effective date. It also requires the government to produce a “competitive impact statement” explaining the alleged violations and proposed consent judgment, including a description of alternatives considered.

For now, federal courts should follow the Ninth Circuit’s lead. They should grant standing to intervene to entities that are subject to the regulatory scheme at issue in the matter and view settlements with greater scrutiny. Regulation by “sue and settle” actions subverts the democratic process and should be stopped.