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Client Alert: Administrator Pruitt Issues a Directive to Eliminate “Sue and Settle” Agreements in Environmental Regulation

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On October 16, 2017, Administrator Pruitt issued a directive and accompanied memorandum that would eliminate “Sue and Settle” agreements that have been used during the past administration to influence U.S. EPA’s regulations. Sue and settle is a concept where a federal agency agrees to a settlement agreement with special interest groups to create rules outside the normal rulemaking process. This directive would bar these agreements and eliminate plaintiffs’ attorney’s fees in instances where the agency enters into a consent decree or settlement agreement.

The agency’s directive puts forth a 10-point procedure for lawsuits against U.S. EPA.

1. U.S. EPA will publish online any notice of intent to sue within 15 days of receiving the notice. The major federal environmental statutes allow citizens to act on behalf of the agency to enforce environmental laws. As part of the process, the statutes provide a time period where U.S. EPA can attempt to remedy the alleged violation before citizens may file a lawsuit in federal courts. Current notices of intent to sue can be found at <https://www.epa.gov/noi>.
2. When U.S. EPA receives an actual notice of a complaint or a petition for review of a rule in which U.S. EPA is a defendant, U.S. EPA will publish the complaint or petition online within 15 days of receiving

the complaint or petition.

3. U.S. EPA will notify any states or regulated entities of the complaint or petition within 15 days of receiving the complaint or petition. U.S. EPA will take all steps to ensure participation from all affected parties. Further, before entering into any settlement agreement, U.S. EPA will seek concurrence from any affected state or regulated entity.
4. Within 30 days of this directive, U.S. EPA will publish an online, searchable list of consent decrees and settlement agreements, including a summary of the terms of the agreement including attorney's fees and costs paid. This will be updated on a regular basis.
5. U.S. EPA will not enter into any agreement that includes terms that the court would have lacked authority to order and U.S. EPA will not enter into any agreement that alters U.S. EPA's discretionary authority.
6. If U.S. EPA agrees to settle and there is no prevailing party, U.S. EPA will seek to exclude payment of attorney's fees and costs to plaintiffs.
7. Any agreement that includes a deadline by which U.S. EPA must issue a final rule, the agency must include adequate time to modify any proposed rule, if necessary, to provide adequate notice and comment for the modified proposed rule, and to conduct meaningful consideration of comments received.
8. U.S. EPA will post online for review and comment any proposed consent decree that is lodged in court or any settlement agreement to resolve the claims. It will also publish any decree or agreement in the Federal Register. U.S. EPA will provide a public comment period, may hold a public hearing, and may withdraw, modify, or proceed with the decree or agreement.
9. Administrator Pruitt reserves the right to deviate from this directive.
10. The directive is intended to improve internal management of U.S. EPA.

Industry leaders and some states have been critical of the previous administration's use of sue and settle agreements. This directive is believed to be industry friendly by eliminating such agreements. However, it should be noted that suing plaintiffs may, under this directive, be more likely to engage in full-blown litigation in the federal courts rather than settle because settlement bars attorney's fees under the directive. Thus, regulated entities may see increased litigation costs when citizens sue under the environmental statutes.

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