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Green Watch

'Sue and Settle'

Secret backroom deals by bureaucrats and environmentalists hurt the American economy

By Chris Prandoni

Summary: *In a process known as sue-and-settle, activists sue government agencies such as the Environmental Protection Agency, negotiate settlements with friendly bureaucrats, and obtain judicial decrees that have the force of law. This process twists laws and creates disruptive regulations, while largely avoiding the scrutiny of Congress and the public.*

The War on Coal—one of the results of sue-and-settle—pits political elites against coal miners and other Americans.

You may never have heard of "sue-and-settle," but these backroom arrangements made between bureaucrats and their allies in environmentalist groups are sweetheart deals that effectively turn the regulatory process over to some of the most extreme elements in American politics. These corrupt bargains undermine the democratic process and empower the likes of the Sierra Club (whose executive director has called for leaving more than two-thirds of the world's oil, coal, and gas resources in the ground) and the Center for Biological Diversity (whose leader opposes all commercial use of public lands).

As a result of sue-and-settle—

►Although Congress never voted to ban coal-fired power plants, the federal government has effectively banned new plants and is in the process of shutting down old ones.

►"Endangered species" that are neither endangered nor species are used by the federal government as tools to shut down the development of our country's natural resources and, incidentally, destroy jobs.

► It is possible that bureaucrats working with environmentalists may block one of the most positive developments in years, the prospect of North American energy independence due to "fracking" (hydraulic fracturing) and new horizontal drilling technology.

► Even as the American public is victimized by sue-and-settle suits, the process channels taxpayer money to the lawyers of the "green" groups.

Here's how the scam works: environmentalists file lawsuits against government entities such as the Environmental Protection Agency or the Fish and Wildlife Service, then meet behind closed doors with officials of those agencies to work out settlements of those lawsuits. These settlements almost invariably "force" EPA officials to take actions they wanted to take in the first place. Sometimes the settlements actually increase the power of the bureaucrats themselves or their political-appointee bosses.

The settlements become consent decrees, approved by judges, and bind the government. Judges usually rubberstamp the agreements because both parties are in agreement and, seemingly, no controversy remains. All this is done without meeting any normal requirements for public notice and with no chance to comment or intervene given to the victims of new regulations, or regulatory watchdog organizations, or the general public.

Working hand-in-glove, environmentalists and officials of the Environmental

Protection Agency and other agencies create multi-billion-dollar regulations that raise utility bills and largely determine what forms of energy Americans will be allowed to use.

Sue-and-settle practices have gotten out of control in large part because federal agencies *do not even maintain organized records* of the numbers and types of lawsuits brought against them. No one knows how often these lawsuits occur or the number of new regulations that result. Allowed to operate in the shadows, sue-and-settle lawsuits have become the preferred tool of radical environmental activists who are intent on raising the cost of your energy bills.

"Citizen suits"

As noted by Ron Arnold of the Center for the Defense of Free Enterprise:

> Sue and settle allows lawyers for Big Green groups to walk into any EPA office and say, "We want this exact rule in place within 90 days," and get a response something like, "Sure, pal. Anything else?"
>
> Every major environmental law today—Clean Air Act, Clean Water Act, and so on—contains provisions for "citizen suits" that allow "citizen attorneys general" to sue alleged violators in federal court.
>
> The problem is that Congress did not intend to empower Big Green attorneys routinely to chop off the citizen suit at the knees by removing the court trial.
>
> But that is exactly what happens with sue and settle: Big Green activist group files suit against agency, agency negotiates chummy backroom settlement with the lawyers, then gets sham settlement rubberstamped by federal court, bypassing a trial completely.

Sen. David Vitter (R-La.) explained it this way:

> Far-left environmental groups sue the federal government … claiming that the government is not satisfying its regulatory obligations. Then the groups and their friends in the administration draft a settlement agreement completely behind closed doors. No other stakeholder or representative of the public is provided the opportunity to shed light on how they might be impacted. The parties then get the judge to bless their agreement. That's usually easy, since he doesn't get to hear any opposing arguments and is often eager to get rid of what would otherwise be a complicated, time-consuming case.

Bad regulations

A recent Chamber of Commerce report by William Yeatman concluded that the sue-and-settle practice is responsible for many of the EPA's "most controversial, economically significant regulations that have plagued the business community for the past few years." Leaving no industry spared, these regulations affect refineries, power plants, cement plants, mining operations, and chemical manufacturers.

One of the worst cases cited by Yeatman involves "Regional Haze" requirements under the Clean Air Act. Because Regional Haze issues were mostly aesthetic, unrelated to people's health, Congress left regulation mainly to the states, with the EPA serving as a backup in case a state didn't come up with a plan. Yet under the version of the Regional Haze requirements worked out in a sue-and-settle agreement, Yeatman concluded, "no state is immune from having its rightful Regional Haze authority trampled by EPA at profound costs for virtually nonexistent benefits." He found that

► In Arizona, EPA's Regional Haze regulation threatens to increase the cost of water and force the state to spend an additional $90.2 million per year to implement the federal regulation.

► In Montana, EPA's proposed Regional Haze controls are almost 250% more expensive than what the agency's standing rules presume to be "cost effective" for Regional Haze compliance.

► In 2011, the EPA disregarded New Mexico's submitted Regional Haze plan and imposed a federal plan that requires nearly $840 million more in capital costs. According to the operators of the San Juan Generating Station, EPA's plan would raise utility bills for each household in New Mexico by $120 annually.

► Although North Dakota is one of only 12 states that achieves all of EPA's air quality standards for public health, it would not be able to achieve EPA's Regional Haze goals for visibility improvement even if all industry in the state shut down. In addition, EPA's proposed plan would cost North Dakota nearly $13 million per year.

► After refusing to approve Oklahoma's Regional Haze plan, the EPA's plan would cost the state $282 million per year.

► In Wyoming, the EPA proposed a federal implementation plan that would cost almost $96 million more per year than the state's plan.

► Minnesota is subject to back-to-back Regional Haze regulations, with EPA claiming authority to regulate regional haze twice in succession at the Sherburne County Generating Plant.

► EPA's proposed plan would cost Nebraska almost $24 million per year to achieve "benefits" that are invisible.

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U-MACT, #1 on the Top 10

What happens when the EPA gets together with environmentalists and writes regulations? One of the most economically destructive offspring of the EPA-environmentalist marriage is the Mercury Air Toxics Standards for Utilities (using Maximum Achievable Control Technology, thus "Utility MACT" or U-MACT). This has all but assured no new coal plant will be constructed in the United States, despite our nation's abundant supply of inexpensive and energy-efficient coal deposits.

In 2000, as the Clinton administration was on the way out, EPA officials concluded it was appropriate to regulate mercury. In March 2005, the Bush administration promulgated the first-ever rule to reduce mercury from power plants. That rule was legally challenged and vacated by a federal court in 2008. Enter familiar players: the American Lung Association, the Environmental Defense Fund, and the Sierra Club, among others. They sued the EPA for missing a deadline to write another mercury rule, and the EPA acquiesced.

The effect of Utility MACT? According to the National Economic Research Associates, Utility MACT will cost 180,000 to 215,000 jobs by 2015. Combined with other new EPA regulations on the electric power sector, the economy could lose approximately 1.65 million jobs by 2020.

The U-MACT rule is a classic EPA-environmentalist bait and switch. Publically, the U-MACT rule was about mercury, and no one likes mercury. The Sierra Club, a plaintiff 34 times in sue-and-settle lawsuits including U-MACT, plastered Washington, D.C.'s Metro subway with advertisements of a pregnant woman and the caption, "This little bundle of joy is a reservoir of mercury." Around the same time, the American Lung Association, another U-MACT plaintiff, ran video ads depicting a coughing baby in a red carriage at various landmarks around D.C. as an ominous voice warned: "Congress can't ignore the facts, more pollution means more childhood asthma attacks. . . . Tell Congress: Don't weaken the Clean Air Act."

In reality, the U-MACT regulation had little to do with mercury. EPA's own analysis showed that over 99 percent of the supposed "benefits" from the rule came from reducing fine particulate matter (PM2.5), not air toxics like mercury. (PM2.5 is matter such as soot that is smaller than 2.5 one-millionths of a meter, or about 1/10,000th of an inch.) Most people may not know exactly what constitutes fine particulate matter, so the EPA and environmental activists simply misled the public, selling the rule as the "Mercury and Air Toxics" rule when it was really about particulate matter. Indeed, EPA's Regulatory Impact Analysis (RIA) for the final rule admits that "total benefits [for the rule] are composed primarily of monetized PM-related health benefits."

Interestingly, the EPA effectively quantifies this miseducation campaign, estimating that the U-MACT would result in $500,000 to $6 million in benefits related to mercury, while the agency was unable to quantify or value the health benefits of the other air toxics regulated by Utility MACT. The $500,000 to $6 million in benefits stands in stark contrast to the nearly $10 billion annual cost that the EPA estimates the U- MACT will impose on the American public. Even EPA's best-case scenario yields an amazing cost-benefit ratio of approximately 1,600 to 1.

Sen. James Inhofe (R-Okla.) introduced a Congressional Resolution of Disapproval to overturn the U-MACT, but the scaremongering and misdirection worked, and the resolution failed 46 to 53.

Utility MACT is just the tip of the iceberg.

Ten Costly Regulations Resulting From Sue and Settle Agreements

1.	Utility MACT Rule	Up to $9.6 billion annually
2.	Lead Renovation, Repair and Painting (LRRP) Rule	Up to $500 million in first-year
3.	Oil and Natural Gas MACT Rule	Up to $738 million annually
4.	Florida Nutrient Standards for Estuaries and Flowing Waters	Up to $632 million annually
5.	Regional Haze Implementation Rules	$2.16 billion cost to comply
6.	Chesapeake Bay Clean Water Act Rules	Up to $18 billion cost to comply
7.	Boiler MACT Rule	Up to $3 billion cost to comply
8.	Standards for Cooling Water Intake Structures	Up to $384 million annually
9.	Revision to the Particulate Matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)	Up to $350 million annually
10.	Reconsideration of 2008 Ozone NAAQS	Up to $90 billion annually

Making taxpayers pay

Another Chamber of Commerce study, authored by William Kovacs, inventoried the most destructive sue-and-settle agreements—and its findings are shocking.

A 2011 GAO report found that, between 1995 and 2010, the Department of Justice spent at least $43 million defending the EPA in court, but taxpayers' losses didn't end there. The EPA and the Treasury Department paid environmental activist groups almost $15 million in compensation for attorneys' fees spent suing the EPA. Earthjustice (formerly the Sierra Club Legal Defense Fund) received $4.7 million, the Sierra Club $967,000, and Natural Resources Defense Council $252,000.

That's right: Taxpayers ended up financing the environmentalist activist groups themselves. Under the U.S. legal system, plaintiffs rarely recover attorneys' fees except in cases of egregious wrongdoing on the part of defendants, but environmental laws make an exception, which creates a strong incentive for litigation in these cases. If you know that your adversary is going to roll over, and you'll get your attorneys' fees covered, you have no reason not to sue.

Killing fracking, but softly

One of the greatest threats posed by the sue-and-settle process involves the energy revolution associated with fracking. Fracking (hydraulic fracturing) has been going on for more than six decades without harm to the environment and poses no serious safety issue. Fracking combined with horizontal drilling gives energy producers access to colossal stores of energy, billions of cubic feet of

natural gas and billions of barrels of oil in the U.S. and Canada. [See *Green Watch* December 2012.]

Yet after successfully crippling the coal industry, environmentalists and the EPA have begun targeting one of America's great success stories: the production of unconventional shale oil and natural gas through fracking. In a testament to how visible fracking has become, a technical term that was once industry lingo is now commonplace in public discussions.

In December 2012, the attorneys general of New York and six other northeastern states announced their intent to sue the EPA over methane emissions associated with hydraulic fracturing. The press release from New York's Attorney General declared that "Methane is a very potent greenhouse gas. Pound for pound, it warms the climate about 25 times more than carbon dioxide. EPA has found that the impacts of climate change caused by methane include 'increased air and ocean temperatures, changes in precipitation patterns, melting and thawing of global glaciers and ice, increasingly severe weather events—such as hurricanes of greater intensity—and sea level rise.' In 2009, EPA determined that methane and other greenhouse gases endanger the public's health and welfare.

"The EPA's decision not to directly address the emissions of methane from oil and natural gas operations—including hydrofracking—leaves almost 95% of these emissions uncontrolled."

Avoiding responsibility the Washington way

by Steven J. Allen

Politicians and bureaucrats often seek ways to avoid responsibility for what they do. Especially when they take unpopular actions, they want to be able to claim they were forced into it "kicking and screaming." Franklin Delano Roosevelt is said to have said, "I agree with you, I want to do it, now make me do it."

That's one aspect of sue-and-settle. It lets politicians and bureaucrats blame environmentalists and courts—anyone but themselves. One bizarre example of blame-shifting comes from the 2012 presidential campaign, when Richard Trumka, president of the AFL-CIO and former head of the mine workers' union, blamed Mitt Romney for the Obama administration's regulations that closed coal mines and coal-fired power plants.

"Those EPA regulations were ordered by the Supreme Court as a result of a lawsuit by Mitt Romney's state when he was governor. If there is a 'war on coal,' it starts and ends with Mitt Romney," Trumka said. Trumka was wrong on two counts: Massachusetts was involved in the infamous case of *Massachusetts v. EPA* (2007) not because of Romney, but due to the actions of the state's Democratic attorney general. And the Supreme Court only allowed EPA to treat carbon dioxide as a pollutant, leading to the regulations; the Court did not order the agency to do so.

The War on Coal was launched in January 2008, when then-Sen. Barack Obama told the editorial board of the *San Francisco Chronicle* that his cap-and-trade plan to restrict carbon dioxide emissions would raise people's electric bills. "Under my plan of a cap-and-trade system, electricity rates would necessarily skyrocket. Coal-powered plants, you know, natural gas, you name it, whatever the plants were, whatever the industry was, they would have to retrofit their operations. That will cost money. They will pass that money on to consumers." Obama noted: "If somebody wants to build a coal-powered plant, they can. It's just that it will bankrupt them, because they're going to be charged a huge sum for all that greenhouse gas that's being emitted." After Congress, then under strict Democratic control, refused to pass cap-and-trade, members of the Obama administration put forth the regulations that, they hoped, would accomplish the same goal. Yet, in 2012, with the critical coal state of Ohio at stake, Richard Trumka, one of the President's top supporters, simply lied.

The Keystone decision: Having it both ways?

A number of experts have speculated, regarding President Obama's yet-unannounced decision on the Keystone XL pipeline (which involves shale oil from Canada), that the President will simultaneously announce his support for the pipeline and set in motion the bureaucratic process for killing it.

It's a pattern we've seen with regard to same-sex marriage; the President said he opposed it, but virtually all his key supporters assumed he was really in favor. Until his hand was forced on the issue, he was able to be both against it and for it at the same time. Similarly, as a state senator in Illinois, he was well known for voting "present," rather than "aye" or "nay," whenever possible.

In the case of Keystone and of fracking in general, the President could announce his support (making him seem to be a moderate and to support an all-of-the-above energy policy) while his political appointees and bureaucrats make agreements with environmentalist groups that effectively kill those ideas. That's precisely the avoidance of responsibility that makes sue-and-settle so attractive to the EPA and other agencies.

The seven states suing the EPA are doing so because they claim that "almost 95 percent" of methane emissions from hydraulic fracturing are uncontrolled. This is a huge percentage, and a misleading one.

In an attempt to calculate methane emissions from hydraulically fractured wells, the EPA used a voluntary industry/EPA partnership program from the 1990s, the EPA Natural Gas Star program. There is one big problem with using this program to calculate methane emissions; it was created for an entirely different purpose. Like using a thermometer to keep time, the EPA used limited data from the Natural Gas Star program combined with a highly questionable methodology to calculate methane emissions, and got wholly inaccurate results.

In April 2012, Energy and Natural Resources Ranking Member Sen. Lisa Murkowski (R-Alaska) and then Environment and Public Works Ranking Member Sen. Jim Inhofe (R-Okla.) wrote EPA Administrator Lisa Jackson a letter outlining their concerns with EPA's methodology:

> EPA's reliance on inaccurate emissions estimates has led to a serious distortion of its cost-effectiveness projections. Benefits are inappropriately overvalued, while costs and burdens are inappropriately trivialized. Reports have shown that, in some cases, EPA overstated emissions estimates by over 1,400 percent. When these numbers are corrected, EPA's proposed requirements grossly fail their own cost-effectiveness standards.

The EPA assumes that unless a "green completion"—a very specific type of technology—is used at the wellhead, to cap a hydraulically fractured well, all methane emissions from that well are released into the atmosphere, and over an extended period. This is a ridiculous assumption, and one that liberal states are using to sue the EPA, arguing that more regulations are needed.

As the press release makes clear, the plaintiffs plan to use the EPA's own calculations "against" the agency. Given that EPA bureaucrats are already on record seeming to agree with the plaintiffs, it's almost inconceivable those bureaucrats won't try to come to a quick settlement using the sue-and-settle process. If that happens, there is no limit to how damaging a new methane rule could be.

If the U-MACT is any indication, a forthcoming methane rule could place the entire shale revolution in jeopardy. After all, a key author of a sue-and-settle methane regulation would be a group of lawyers from New York, one of the few states to ban hydraulic fracturing.

Of course, this methane lawsuit could never have been brought forward had the EPA not first classified so-called "greenhouse gases" as pollutants—something that no Congress ever authorized or would authorize.

Reform?

What can be done? How do the American people take back their government? Here are a couple of proposals Congress is considering:

► ***The Regulations from the Executive In Need of Scrutiny (REINS) Act***

Originally introduced by former Rep. Geoff Davis (R-Ky.), the REINS Act would require Congress to approve any regulation or rule with an economic impact of $100 million or more. Currently introduced by Rep. Todd Young (R-Ind.), the REINS Act passed the House last Congress but never even had a hearing in the Senate.

If the EPA insists on regulating greenhouse gases, a power Congress never intended the agency to have, federal legislators should be able to influence high-impact regulations. Passage of the REINS Act would allow Congress to codify or throw out costly EPA regulations. Since the EPA has begun writing billion-dollar rules, many proponents have hidden behind legalese and EPA's alleged authority. The REINS Act would ensure that the American people can hold their elected officials accountable for regulations from Washington.

► ***Sunshine for Regulatory Decrees and Settlements Act***

One way to protect Americans from destructive regulations written by environmentalists and the EPA is to shed light on the practice. The Sunshine for Regulatory Decrees and Settlements Act, put forth by Sen. Chuck Grassley (R-Iowa) and Rep. Doug Collins (R-Ga.) would require disclosure of proposed consent decrees and settlement agreements before they are filed with a court. The bill would then give the public a chance to provide comments before proposed sue-and-settle agreements are filed with a court.

Agencies like the EPA would be required to give sufficient notice of proposed sue-and-settle lawsuits and to give annual reports to Congress about the number, identity, and content of complaints and sue-and-settle agreements.

Conclusion

The EPA has spent years unilaterally amending laws, writing destructive regulations in conjunction with radical environmental activists, and skirting necessary Congressional oversight. The Obama administration and its allies in the bureaucracy have been achieving virtually all of their policy goals while taking none of the political heat for implementing them.

Reform will not come from within the bureaucracy. Just as Americans rose up against cap-and-trade, they must respond vigorously to sue-and-settle arrangements—particularly "greenhouse" regulations designed to implement cap-and-trade-type policies which Congress already rejected. The people must demand transparency and openness in government, and decisions that will affect the American economy grievously for decades to come must not be left to bureaucrats and environmentalists collaborating with each other.

Chris Prandoni is federal affairs manager of Americans for Tax Reform. ***GW***

GreenNotes

Gunshot victim **Nathaniel McRae** was declared DOA at **Howard University Hospital** in **Washington, D.C.**, after his arrival was delayed by, believe it or not, the **Environmental Protection Agency**. The agency has a regulation that shuts down diesel engines such as those used in ambulances and fire trucks if exhaust filters are not kept sufficiently clean—which is problematic for vehicles in big-city stop-and-go traffic. When an indicator light warned of imminent shutdown, paramedics were forced to wait seven minutes for a second ambulance for McRae. "I know they're trying to reduce pollution emissions, but I don't know if they've contemplated all the dangers," a fire chief from **Florida** told the ***Washington Post***. "Fire doesn't take a timeout." D.C.'s deputy fire chief said his department got an exemption for a foam truck for the **President**'s helicopter take-offs and landings, but only after "quite an arduous process."

What's the big secret of so-called "renewable energy"? According to **Steve Goreham**, executive director of the **Climate Science Coalition of America**, it's that "the two biggest renewable sources, wind and biofuels, don't reduce carbon dioxide emissions.... On average, wind systems provide rated output only about 30% of the time, so they can't replace hydrocarbon or nuclear electricity sources. Coal or natural gas plants must be used as backup to the wind system, ramping up and down inefficiently to mirror changes in wind velocity."

Goreham, a former engineer and business executive, has written a beginner's guide to the issue of Catastrophic Man-Made Global Warming entitled ***The Mad, Mad, Mad World of Climatism***. The **Heartland Institute** has sent some 100,000 copies of the book (foreword by astronaut and former **Sen. Harrison Schmitt**, R-N.M.) to educators, politicians, journalists, and other opinion leaders. But as you might expect, some folks don't like the book. **Profs. Alison Bridger** and **Craig Clements** of **San Jose State** decided to burn the book—and to photograph themselves doing so *(left)*, and to post the pictures on the school's website. The caption: "This week we received a deluge of books from the Heartland Institute. . . . Shown above, Drs. Bridger [the 'climate science' department chair] and Clements test the flammability of the book." A university official later said the "ill-conceived attempt at satire" had been removed from the website.

Sean Parker, co-founder of **Facebook**, faced a $2.5 million fine imposed by the **California Coastal Commission** after his $10 million, ***Lord of the Rings***-themed wedding, complete with an artificial pond and fake ruins. The ceremony took place without permits in a campground in the "sensitive" forests of Big Sur with a creek that serves as a hatchery for a "threatened fish." That "threatened fish"? The ***Oncorhynchus mykiss***, also known as the Rainbow Trout, a favorite among anglers for its abundance.

Remember "**Richard Windsor**," the fake identity created for the secret e-mail account of the EPA's then-**Administrator Lisa Jackson**? (See ***Green Watch***, May 2013.) You may recall the Windsor identity apparently helped EPA bureaucrats coordinate policy with extremist "green" groups. Now it turns out "Richard Windsor"—named for Jackson's dog and home town—was honored by the EPA with at least six ethics and cyber-security certifications, including one for "E-mail Records Management." Come to think of it, who would argue with the idea that the nonexistent Windsor is among the EPA's most useful employees?

Speaking of Jackson, the EPA spent nearly $40,000 on her official portrait, according to **Jim McElhatton** of the ***Washington Times***. The price for her portrait was more than **Agriculture Secretary Tom Vilsack**'s ($22,500) but less than **Air Force Secretary Michael Donley**'s ($41,200).

The **British** newspaper ***Daily Mail*** reported recently on the assessment of the "**Met**" (the meteorological office, Britain's counterpart to the U.S. **National Weather Service**) that earth's global surface temperatures haven't risen in 15 years. The paper noted that "official predictions of global climate warming have been catastrophically flawed" with data "blow[ing] apart the 'scientific basis' for Britain reshaping its entire economy and spending billions in taxes and subsidies in order to cut emissions of greenhouse gases." False forecasts "have had a ruinous impact on the bills we pay, from heating to car fuel to huge sums paid by councils to reduce carbon emissions. The eco-debate was, in effect, hijacked by false data."