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Green Watch

The Justice Department's Green Raid on America

From guitars to electric power, the Obama Justice Department makes an end-run around the law

By John Fund and Hans von Spakovsky

Summary: *The Obama Justice Department's attack on Gibson Guitar is part of a larger effort to punish the administration's critics and reward its friends, while promoting environmental extremism. That effort includes the use of sweetheart deals known as "sue and settle."*

Gibson Guitar Corp. is part of American cultural history, but the company ran afoul of the Obama administration's #1 rule: Reward friends/Punish critics.

Gibson Guitar is a 112-year-old company with a peerless reputation. It makes the renowned Les Paul electric guitar and is famous for being the source of John Lennon's J-160E acoustic guitar. But to the Obama Justice Department, it was a target of opportunity, worthy of being treated like dangerous drug dealers or the Mafia.

In August 2009, the Department of Justice (DOJ) sent federal agents armed with automatic weapons to raid Gibson's offices and factories in Nashville and Memphis; they seized computers, files, guitars, pallets of wood, and ebony fingerboard blanks. In April 2011, DOJ executed another such raid of Gibson, even though no criminal charges had been filed.

Initially, the big mystery for the people at Gibson was why that first raid was conducted at all. "Everything is sealed," said Gibson CEO Henry Juszkiewicz. "They won't tell us anything." Apparently, the Justice Department's Environmental and Natural Resources Division was investigating possible violations of the Lacey Act, which makes it a crime to import plants or animals in violation of a foreign nation's laws. In other words, if a country like India makes it illegal to export a certain type of wood, then it is a criminal violation for an American company to import that type of wood from India into the United States.

Gibson pointed out to the Justice Department that the wood seized in both raids—ebony and rosewood from India and ebony from Madagascar—was exported legally under both countries' laws. The wood from India had been certified by the Forest Stewardship Council, an independent nonprofit that monitors the sale and export of wood to make sure it is legal. Gibson had sworn statements and documents from the Madagascar government that the wood was legally exported under Madagascar law.

Gibson's explanations seem to have had no effect on the Justice Department's actions. After the 2011 raid, CEO Juszkiewicz noted that "armed people came in our factory . . . evacuated our employees, then seized half a million dollars of our goods without any charges having been filed . . . I think it's a clear overreach." He said that "the federal bureaucracy is just out

of hand . . . We feel totally abused. We believe the arrogance of federal power is impacting me personally, our company personally and the employees here in Tennessee, and it's just plain wrong."

The value of the rosewood, ebony, and finished guitars seized by the feds in 2011 was more than a million dollars, and the raids crippled Gibson's production by taking most of the company's raw materials. The company then filed a civil lawsuit in federal court to recover the seized material.

The Justice Department received a blaze of bad publicity and received inquiries from members of Congress. Many people were outraged at the idea of SWAT-style armed raids on a guitar maker, particularly since Gibson had cooperated with the Justice Department after the first raid, providing information and documentation. Gibson officials said that the second raid was conducted "without warning or communication of any kind." If Justice had simply contacted Gibson, the officials said, they "would have cooperated without having to stop its production and send workers home."

But the Obama administration's environmentalist allies were happy about the administration's enforcement of the Lacey Act and had no sympathy for Gibson or its employees. "Gibson clearly understood the risks involved," said Andrea Johnson, director of the Environmental Investigation Agency (a liberal group that, despite its name, is a private organization).

Reaching a settlement

By conducting armed raids and threatening criminal charges without the evidence sufficient to back up its claims, the Justice Department overreached. But despite the frivolous nature of the Department's case, Gibson faced a threat to its continued operations: The criminal proceedings had cut off the company's access to sources of hardwood needed to manufacture guitars.

Juszkiewicz agreed to settle the case because, he said,

> The alternative was pretty onerous. We would have had to have gone to trial and we would have been precluded from buying wood from our major source country. For the ability to carry on with the business and remove this onerous Sword of Damocles, if you will, we feel this is about as good a settlement as we can get.

Ironically, the "deferred prosecution" settlement agreement signed by the Justice Department with Gibson in 2012 reveals the weakness of the threatened prosecution—that, in fact, DOJ had no case. In the settlement, the Department acknowledged that "certain questions and inconsistencies now exist regarding the tariff classification of ebony and rosewood fingerboard blanks pursuant to the Indian government's Foreign Trade Policy. Accordingly, the Government will not undertake enforcement actions related to Gibson's future orders, purchases, or imports of ebony and rosewood fingerboard blanks from India."

That amounted to an admission that the Department had improperly seized Gibson's stock of fingerboards from India (it was "unclear" if the material had been illegally exported under the relevant law, which was India's law, not U.S. law). Further, Justice not only agreed to return all of the Indian wood it had seized, it agreed not to object to future importation by Gibson from India.

Justice's case regarding the Madagascar wood was no stronger than its case regarding the Indian wood. Appendix A to the settlement agreement went into a lengthy explanation of "Madagascar Interministerial Order 16.030/2006," as well as a whole series of other "interministerial orders," all of which concerned the export of certain woods. According to a translation of these orders, wood products considered "finished" could be exported. Listed under the examples of "finished" wood products—which, again, could be exported—were "guitar fingerboards."

In that Appendix A, the Justice Department noted that a Gibson representative flew to Madagascar on a trip organized by "Greenpeace and other non-profit environmental groups." The trip's organizers received a "translation" of Order 16.030/2006 and gave Gibson their opinion that fingerboard blanks were not "finished" products" and, therefore, could not be exported. Incredibly, to make its case, the Justice Department relied, for the interpretation of a translation of a foreign government order on the opinion put forth by the trip organizers, including people from the advocacy organization Greenpeace. No mention is made of who made the translation.

Paul Larkin, a veteran Justice Department lawyer who worked in both the Criminal Division and the Solicitor General's office, said that, putting "aside the obvious problems with government reliance on the opinion by the trip's 'organizers' of a *foreign order* written in a *foreign tongue*—Gibson was given conflicting views of the law. That should have ended the matter entirely."

Editor: Steven J. Allen
Publisher: Terrence Scanlon
Address: 1513 16th Street, NW
Washington, DC 20036-1480
Phone: (202) 483-6900
E-mail: sallen@CapitalResearch.org
Website: CapitalResearch.org

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Because Gibson had received conflicting advice, the U.S. government could not prove that the company had the required criminal intent. It could not prove that the exportation of the fingerboards violated Madagascar law. Together with the "questions and inconsistencies" over India's law, this failure should have led the government to drop all charges.

Instead, in conduct bordering on unethical, the Justice Department forced Gibson into a settlement—a settlement to which Gibson agreed in order to remain in business. Gibson was required to pay a $300,000 fine and make a $50,000 payment to the National Fish and Wildlife Foundation. Gibson was also required to improve its internal compliance program to make sure that it would not violate the Lacey Act in the future. Yes, that requirement was included even though the government essentially agreed that the company had not violated the Lacey Act in the first place.

Some are more equal than others

After the settlement was reached, some very interesting facts came to light. It turned out that Juszkiewicz, Gibson's CEO, had contributed to Republican politicians such as Sen. Lamar Alexander and Rep. Marsha Blackburn of Tennessee. Meanwhile, as *Investor's Business Daily* reported in 2011, Chris Martin, the head of Gibson's biggest competitor, C.F. Martin & Co., was a "longtime Democratic supporter, with $35,400 in contributions to Democratic candidates and the Democratic National Committee over the past couple of election cycles." C.F. Martin's catalogue showed several guitars containing "East Indian Rosewood," the exact same wood at issue in the Gibson case and seized during the SWAT raid.

Moreover, at the time Gibson Guitar was raided in 2011, federal agents also seized "$200,000 worth of Indian ebony and rosewood" from Gibson's supplier, Luther Mercantile International, which was destined to be shipped to Gibson. The 60,000 fingerboards were the "same cut and kind of wood that the company routinely sells to other guitar manufacturers," according to Natalie Swango, Luther Mercantile's general manager.

And yet those "other guitar manufacturers" who used the same wood, were never raided by federal agents or threatened with criminal prosecution by the Justice Department.

The Justice Department's press release about the Gibson settlement declared that the settlement "goes a long way in demonstrating the government's commitment to protecting the world's natural resources." Former DOJ prosecutor Paul Larkin noted pointedly:

> The government has made a federal case out of "fretboards" or "fingerboards" . . . Is that how we want federal tax dollars spent—punishing domestic companies that purchase a valuable, harmless product from foreign companies that, in turn, purchase it from an exporter in a foreign land, where the alleged illegality is the violation of an ambiguous order written in a foreign language? All that not to prevent the import of toxic waste but guitar fretboards?

Nor did DOJ's attacks on Gibson make much difference to the global environment. According to *Investor's Business Daily*, the Justice Department claimed it "acted to save the environment from greedy plunderers." But 95 percent of the rosewood from Madagascar and India goes to China: "America is a trivial importer . . . so putting Gibson out of business wasn't going to do a whole lot to save their forests."

The Gibson prosecution did inspire fear and uncertainty among musicians. John Thomas, a blues and ragtime guitarist, said, "there's a lot of anxiety, and it's well justified." He added that he will never go out of the country "with a wooden guitar," for fear it would be seized and criminal charges filed. Musicians "who play vintage guitars and other instruments made of environmentally protected materials are worried the authorities may be coming for them next."

"People are very confused," said George Gruhn, a Nashville-based vintage guitar dealer, because "there is uncertainty about what the federal government expects." Apparently, the government expects Americans to have detailed knowledge about the laws of foreign countries such as India and Madagascar, or risk imprisonment if they don't. To prosecutor Paul Larkin, "*that* is the biggest crime of all."

Despite the expensive and unnecessary ordeal that Gibson's employees went through, they obviously have not lost their sense of humor. Gibson is now advertising the "Government Series II Les Paul," which celebrates "an infamous moment in Gibson history." Gibson electric guitars "have long been a means of fighting the establishment," so musicians can now "fight the powers that be with this powerful Les Paul!"

Shock troops

The Gibson Guitar fiasco put a spotlight on a little-known part of the Justice Department, the Environment & Natural Resources Division (ENRD).

Ask a Justice Department veteran which division is full of the craziest, most ideologically driven lawyers, and (if he or she gives a straight answer) the answer will be the Civil Rights Division. Ask which division comes in second, and the answer will be ENRD, which boasts on its website that it is "the nation's environmental lawyer, and the largest environmental law firm in the country."

One of us worked formerly in the Civil Rights Division at the Justice Department and was told by a lawyer who

worked in ENRD that all the lawyers there thought of the ENRD as simply an extension of Greenpeace, the Natural Resources Defense Council, or the Sierra Club. They did *not* think of themselves as impartial, as government attorneys charged with enforcing our nation's environmental laws in a fair and judicious manner and with acting in the best interests of the public, both individual citizens and businesses. Rather, they were environmental activists.

It is no surprise that ENRD extremism has grown during the Obama administration. The ENRD in June 2013 was headed by Acting Assistant Attorney General Robert Dreher, the former general counsel for the Defenders of Wildlife and a former attorney at the Sierra Club Legal Defense Fund, whose growing extremism is reflected in its new name, Earthjustice.

Earthjustice, Dreher's former employer, has been the biggest beneficiary of attorneys' fees paid out by American taxpayers in connection with litigation against the Environmental Protection Agency—specifically, in collusive "sue and settle" lawsuits handled by the ENRD when it represents the EPA. In general terms, "sue and settle" refers to a corrupt practice in which environmentalists sue bureaucrats and other government officials to "force" them to do things they (the government officials) want to do anyway, and the officials settle the lawsuits on terms favorable to the environmentalists (often providing them with large sums of money).

One would guess that all or nearly all Americans want to protect wildlife and foster a cleaner and healthier environment. It is ENRD's job to enforce the laws that Congress has passed with the stated intent of achieving those goals. It is not ENRD's job to do so in a way that goes beyond the law, abuses the division's authority, criminalizes ordinary conduct, and benefits the political allies of the party that holds the White House.

As Kim Strassel of the *Wall Street Journal* has pointed out, the EPA—and, thus, the ENRD lawyers representing the agency—has suffered an "embarrassing string of defeats" in the courts. Those "judicial slapdowns are making a mockery of former Obama EPA Administrator Lisa Jackson's promise in 2009 to restore the [EPA]'s 'stature' with rulemaking that 'stands up in court.'"

Part of the job of lawyers, including government lawyers, is telling clients that the positions they are taking are not in accord with the applicable law. This is particularly important for Justice Department lawyers who have an obligation to ensure that the agencies they represent are not acting beyond the authority granted to them by Congress. But because most ENRD lawyers agree ideologically with the extreme positions taken by the EPA and other federal agencies such as the Department of the Interior, they are unable or unwilling to assess those positions objectively. They are unable or unwilling to stand in the way of the government's misbehavior and regulatory overreach.

Recently, the Federal Circuit Court of Appeals, which has jurisdiction over many claims made against the federal government, accused the Justice Department—and lawyers in the ENRD, specifically—of making legal arguments in court that were "so thin as to border on the frivolous." The ENRD lawyers made those "frivolous" arguments in a rails-to-trails suit in which the federal government attempted to avoid paying landowners any compensation for land taken under a National Trails System Act program. The rails-to-trail program is one that takes railroad corridors established by easements through private land that have been abandoned by the railroads and converts them to biking and hiking trails.

The appeals court said it could not understand the *Sturm und Drang* ("storm and drive," or the violent expression of emotion as opposed to rationality) that was pushing the Justice Department to fight lower-court judgments against the government.

No one doubts the power of the government to take private land for a public purpose, but the Fifth Amendment in the Bill of Rights requires the government to pay "just compensation" for such a taking. Yet the Justice Department under Attorney General Eric Holder has refused to accept that requirement. It has taken what many have called a "scorched earth" approach, arguing in court that private landowners don't actually own their property that is being taken for the rails-to-trails programs popular with environmentalists. The Department claimed that, when railroads stopped using property, the property reverted to the government rather than the original owner. This position is contrary to a 1990 Supreme Court and a subsequent Federal Circuit Court of Appeals decision that the government is taking private property when it converts a railroad line to a trail.

According to legal analyst Cecilia Fex, it was after this case and other similar ones that the Justice Department started admitting liability for taking private property, making the only issue what level of compensation would be just. But in recent years, the Department has "resurrected its challenges to the government's liability . . . [and] in an apparent coordinated litigation strategy, the DOJ routinely raises arguments that the Federal Circuit has previously rejected. Worse for the attorneys and the courts who do not deal with these [types of] cases, the DOJ advances these arguments without acknowledging the contrary law that was established during its earlier attempts to escape the government's liability." In other words, in addition to trying to prevent private homeowners from being compensated for their property that was taken, the ENRD lawyers violate professional

ethics requirements by failing to inform courts of controlling authority that is contrary to the position the government is taking.

You didn't know? Too bad

Some of ENRD's arguments defy common sense. In one recent case, the Federal Circuit Court of Appeals rejected a claim by Justice lawyers that the statute of limitations barred homeowners from making a claim for compensation even *though the government had not informed the homeowners of the government's intent to use their land for a trail*. That's the very action that normally triggers the right of the homeowner to make a claim against the government! In fact, Thor Hearne, a lawyer who has represented numerous landowners in these cases, said the government often fails to notify homeowners, and often, "owners only learn that their property has been taken when a bulldozer shows up and begins grading a public recreational trail across their land."

The Justice Department's strategy to fight these just claims is costing taxpayers big money. Under the Uniform Relocation Assistance Act, the federal government has to reimburse the litigation expenses of homeowners who win a case, including attorneys' fees, and compensate them for the government's delay (the time between the date the property is taken and the date the owner is finally paid). In one Idaho case where the homeowners finally beat the government, a federal court awarded them $2.24 million in attorneys' fees and costs, in addition to $883,312 in "just compensation" for their confiscated property. Thus, the Justice Department's senseless litigation strategy increased the cost to the taxpayer by more than 250 percent.

Thor Hearne had a case in which his client, a small village, agreed to forfeit any compensation for the strip of land the government took. All the village wanted was for the feds to agree to mark the boundaries of the land it had taken. But the Justice Department lawyers refused unless the village first sued the government and won on the issue of liability, which was unquestioned under federal law. So the village sued and won, and taxpayers had to pay the village $19,000 for the strip of land—plus almost $300,000 in attorneys' fees.

Hearne said, "the Justice Department's history of repeatedly taking frivolous and losing arguments—and recycling these same losing arguments—can only be explained by an intentional strategy of trying to make this litigation so lengthy and so expensive that landowners will let the government simply take their land" without being compensated. Hearne added that the Justice Department should be interested in not just seeing that citizens are justly compensated, but that the government does it "cost-efficiently using taxpayer resources to promptly resolve the claims."

That has not been his experience with ENRD lawyers. Hearne said he is aware of at least 20 cases that Justice lawyers have lost in which they made "essentially the exact same losing argument" each time. The cost to taxpayers of this behavior on the part of ENRD lawyers has been enormous. A former Justice Department lawyer who also worked at the EPA told one of us that, based on his experience, the ENRD lawyers are "zealots" who have a "religious fervor" for environmentalism, and that they see no reason why the government should have to pay private landowners for anything that helps further their "green" agenda.

Extortion and money laundering

Often, the Justice Department uses its power over private landowners, business owners, and other parties to indulge in its habit of sending money to a favored organization of its own choosing. Part of the Gibson Guitar settlement required Gibson to "make a community service payment of $50,000 to the National Fish and Wildlife Foundation" (NFWF).

In other words, instead of funneling money into the U.S. Treasury, the Department, in essence, extorted money from Gibson Guitar to help fund the NFWF, a congressionally created private charity that hands out funds "to some of the nation's largest environmental organizations, as well as some of the smallest," according to its own website.

These kinds of settlements—where the Justice Department uses its authority to engineer a settlement of government claims requiring the defendant to benefit a private group that was not involved in the lawsuit and was not injured by the defendants' actions—create conflicts of interest for government lawyers, because their client is the federal government and they are supposed to be acting in the best interest of the public at large. It is an abuse of their authority to provide a windfall to an outside group instead of the American taxpayer and the government.

And yet Justice under Holder has often done this kind of thing. In 2011, the Government Accountability Office (GAO) issued a report on the costs of lawsuits filed against the EPA, which are defended by the Justice Department. Under various federal statutes, the EPA and the Treasury Department are required to award attorneys' fees to plaintiffs that successfully challenge the EPA. The intent of such statutes is a good one—reimbursing the costs of those who have to sue the government when bureaucrats do something wrong—but that is not what is happening in the environmental area. Instead, the Justice Department and the EPA have engaged in collusive litigation with political allies of the Obama administration in order to implement regulations and new requirements outside the regular process, while at the same

time using taxpayer money to fund the budgets of left-wing environmental organizations.

According to the GAO report, Earthjustice, the former employer of Robert Dreher (who was the acting head of ENRD at Justice in 2013), received 32 percent of the attorneys' fees paid to EPA litigants. When combined with the attorneys' fees received by the Sierra Club and the Natural Resources Defense Council, these three groups received 41 percent of the millions of dollars paid out by the American taxpayer to environmental groups who were successful in their lawsuits against the federal government.

As noted by Sen. David Vitter (R-La.), a member of the Senate Committee on Environment and Public Works: "The GAO report shows that taxpayers have been on the hook for years while 'Big Green' trial lawyers have raked in millions of dollars suing the government. Even worse, because of sloppy record keeping by the EPA and other agencies and a lack of cooperation by the Justice Department, we're not even sure how bad the problem really is."

This is part of a pattern that extends beyond ENRD to other divisions such as the Civil Rights Division, which has funded, in the words of *Investor's Business Daily*, a "raft of political payoffs to Obama constituency groups" through settlements of lawsuits. In one of the latest, radical groups such as La Raza (The Race) will obtain millions of dollars through Attorney General Eric Holder's record settlement of $17 billion with Bank of America over alleged mortgage abuse.

Many of the liberal groups receiving these payments are "what's left of the Association of Community Organization for Reform Now (ACORN) network" and are the "interest groups the administration relies on, outside interest groups, allies and politicians," according to Tom Fitton, president of Judicial Watch. In fact, the organizations benefitting from this settlement "include some of the most radical bank shakedown organizations in the country," according to *Investor's Business Daily*. Similar payoffs have occurred in the major settlements of other bank cases, such as the $13 billion deal with JPMorgan Chase and the $7 billion deal with Citibank.

Another serious problem with ENRD is its handling of lawsuits over agency regulations, aka "rules." Rule-making by federal agencies is regulated by the Administrative Procedure Act and other statutes. For example, the Clean Air Act outlines its own procedures for creating new regulations. The purpose of these statutory rules is to provide public notice of an agency's intent to promulgate a new regulation and to give affected parties an opportunity for comment. Federal law also very importantly requires the federal agency to "reference the legal authority under which the rule" is being proposed, in order to ensure that agencies stay within the legal authority that gives them the power to act. All of this is intended to prevent arbitrary and capricious actions by unaccountable federal bureaucrats.

Usually, the Justice Department vigorously defends the federal government and various agencies when they are sued. But in at least 60 cases between 2009 and 2012, the EPA through its Justice Department lawyers "chose not to defend itself in lawsuits brought by special interest advocacy groups" and in each case "agreed to settlements on terms favorable to those groups," as a report by the U.S. Chamber of Commerce observes. Those cases resulted in "more than 100 new federal rules, many of which are major rules with estimated compliance costs of more than $100 million annually." That is more than double the number of lawsuits settled during the second term of President George W. Bush (only 28). Almost all of the most costly of EPA's rulemakings have been settled by Justice Department lawyers through consent decrees without defending the suit.

Given such losses, it's clear the lawyers of the ENRD are either (a) professionally incompetent or (b) willing participants in betraying their professional obligations to represent the public, rather than the interests of advocacy groups and the particular policy choices of the administration.

An end-run around the law

The advantage to the Obama administration is that these lawsuits and resulting settlements, known as "sue and settle," provide an end run around the normal agency rule-making process, cutting out the public and affected parties like the business community who might protest or try to stop a bad regulation. Neither the EPA nor the Justice Department discloses the filing of such a lawsuit by a group like the Sierra Club until the case is over because a settlement agreement has quietly been negotiated and filed with the court. Often this allows the administration to issue regulations or requirements that go beyond their statutory authority.

By this method, bureaucrats and their environmentalist allies use a legally binding, court-approved settlement agreement—negotiated behind closed doors—as their authority to issue new regulations and timetables. William Kovacs of the Chamber of Commerce objects: "There shouldn't be secret deals in the determination of how someone regulates a sector, an industry, a pollutant." By colluding with their political and ideological allies in the radical environmental movement, the Obama administration can short-circuit the regulatory process and implement whatever rules the administration wants by waiving the white flag of surrender

and agreeing to a settlement that has what both sides (who are really on the same side) want. There is no participation by the public, the business world, or anyone else in the national economy who would be affected by the new regulation.

Unfortunately, the vast majority of courts simply rubber-stamp a settlement agreement, without looking at its substance or questioning the circumstances under which a group such as Earthjustice and the Justice Department negotiated the deal. At that point, the federal statutes awarding attorneys' fees to winning parties allow taxpayer funds to be transferred to the organizations that initiated the friendly lawsuits the administration wanted filed. The administration gains the burdensome new rules it wants, without having to go through the normal transparency and review process, and also has the chance to help its political allies. And the American taxpayer pays for it all.

As has been the practice of the Obama administration in many different areas, "sue and settle" actions expand the power of the executive branch and executive agencies at the expense of congressional oversight and authority, including over budget appropriations. The court-approved settlements help drive an agency's budget, taking it out of the hands of elected representatives in Congress. Such court decrees result in congressionally directed policies being "reprioritized" by court orders that the agency asks the court to issue. This allows an agency like the EPA to tell Congress that it is simply acting under court order and has no choice but to publish a new regulation.

Regulation by litigation

A graphic example of the conspiracy between the administration, Justice Department lawyers, and environmental groups is the litigation filed in December 2008 against the EPA by a coalition of environmental organizations, *American Nurses Association v. Jackson*. The suit claimed the EPA had failed to issue "maximum achievable control technology (MACT)" emissions standards for "hazardous air pollutants" from coal- and oil-fired electric utility plants. This was a very questionable claim, and the Bush administration had taken the position that there was no such requirement under the applicable law.

But without notice to the public or the industry members who had been allowed to intervene in the case by the court, the EPA and the environmental groups negotiated a settlement behind closed doors and filed a proposed consent decree to approve the settlement with the court in October 2009. In the settlement agreement, the EPA admitted that it had "failed" to comply with the Clean Air Act by not issuing a MACT rule and specified that the EPA would put out a proposed rule by March 16, 2011, and a final rule by Nov. 16, 2011. The EPA essentially abandoned its ability to argue that no such regulation was needed or that a less burdensome regulation would meet the requirements of the law. It gained the ability through the litigation and court approval to issue a new regulation far more expensive and burdensome than what it could have issued through the normal rule-making process. And it drastically shortened the regulatory approval process into one much shorter than needed for such a complex problem, making it much more difficult for those affected by the proposed regulation to analyze it effects and provide criticisms and comments to the EPA.

Any professional, objective lawyer representing the government would look at this settlement as a severe setback and a loss. But that is not how the White House saw it. In a "Presidential Memorandum" issued on Dec. 21, 2011, President Obama called the new regulation issued as a result of this settlement "a major step forward in my Administration's efforts to protect public-health and the environment." President Obama clearly welcomed the lawsuit and was glad that his lawyers had lost. But the regulatory process set up by the settlement engineered by Eric Holder's lawyers in the ENRD was so rushed that the EPA's proposed rule contained numerous errors. For example, a crucial conversion factor used by the EPA to determine the emissions history of power plants was "incorrect by a factor of 1,000," according to the nonprofit trade organization known as the Utility Air Regulatory Group (UARG).

UARG calls the new rule one of the "most far-reaching and expensive rules" in the history of the EPA. It's so onerous and so burdensome that, according to an assessment by the North American Electric Reliability Corporation, it could force enough shutdowns of major power plants in the future to threaten reliable electric service in some areas of the country.

If and when that happens, it will be the fault of not only the Obama White House and its political appointees at the EPA, but the lawyers within the Justice Department who engineered a politically convenient settlement rather than carry out their professional duty to represent the American people.

John Fund is the national affairs correspondent at National Review Online. *Hans von Spakovsky is a senior legal fellow at the Heritage Foundation and a former Justice Department official. This article is adapted from their new book,* Obama's Enforcer: Eric Holder's Justice Department*, published by HarperCollins/Broadside.*

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GreenNotes

Elizabeth Whelan, the founder of the **American Council on Science and Health**, died last month. She was a friend and supporter of the **Capital Research Center** and worked with CRC president **Terry Scanlon** ever since **President Reagan** appointed him to be chairman of the **Consumer Product Safety Commission**. A dedicated pro-free market health scientist, Beth fought tirelessly against the pseudoscience that forms the basis for much government regulation and for reporting in most of the news media. **Ronald Bailey** of ***Reason*** wrote that she "devoted her life to combating the misinformation and disinformation that are all-too-often peddled by activist charlatans." Beth's colleagues at ACSH noted, "Beth led the way in urging scientists to speak out against the fallacies that are all too pervasive in our culture." R.I.P.

Speaking of junk science: How far does a left-winger have to go to be called "obsessive and dangerous" by the left-wing online magazine ***Slate***? This far: **Laura Helmuth**, *Slate*'s science and health editor, wrote that "I got a taste of [**Robert F. Kennedy Jr.**'s] delusions last year" when Kennedy called her to promote his belief that autism is caused by thimerosal, a chemical present in some vaccines. "He told me scientists and government agencies are conspiring with the vaccine industry to cover up the evidence . . . and journalists are dupes who are afraid to question authority. . . . Kennedy accuses scientists of fraud . . . He distorts their statements. He says they should be thrown in jail. He uses his powerful name to besmirch theirs. That name, the reason he has power and fame, is inherited from a family dedicated to public service. He now uses the Kennedy name to accuse employees of government agencies charged with protecting human health—some of the best public servants this country has—of engaging in a massive conspiracy to cause brain damage in children." Kennedy recently detailed his views in a book, ***Thimerosal: Let the Science Speak***.

Helmuth noted correctly: "Thimerosal, out of an abundance of caution, was removed from childhood vaccines 13 years ago, although it is used in some flu vaccines. And yet Kennedy, perhaps more than any other anti-vaccine zealot, has confused parents into worrying that vaccines, which have saved more lives than almost any other public health practice in history, could harm their children."

How's that Global Warming/"extreme weather" theory working out? **NOAA**, the National Oceanic and Atmospheric Administration, observes that "1,097 'low maximum' temperature records were broken between Aug. 1 and Aug. 23 at locations across the country this year. This means that these temperatures on the day they were recorded were the coolest on record," reports the ***Daily Caller***. ... "This year's below-average wildfire season comes as welcome news for Westerners, but it's also burning a hole in the environmentalist narrative on climate change," reports the ***Washington Times***. ... "The statistical peak of the **Atlantic** hurricane season has arrived," **Bloomberg News** reported on September 10, "and for the first time since 1992 there isn't a named storm in the basin." (Such storms are named when winds reach 39 miles an hour.)

Global Warming theory has failed; the changes that activists predicted have not come to pass, which, in science, means it's back to the drawing board. So the activists are frantic. According to **Michael Bastasch** of the **Daily Caller News Foundation**, "there are now a whopping 52 explanations [from 'mainstream' scientists] for why there has been no warming for the last 215 months." (See the website **Watts Up With That?** for an updated list.)

And then there's this:

►**National Public Radio**, August 8, 2007: "A snail from the far side of the world—one you've probably never heard of—was declared extinct this week. Okay, normally, that wouldn't be worth mentioning. But this was not your typical extinction. As NPR's **John Nielsen** reports, it may be the first one tied directly to global warming. . . . [**Oxford University** biologist **Justin**] **Gerlach** says he's all but certain that in the late 1990s, the last **Aldabra banded snail** curled up inside its purplish shell and died. . . . He suspects—but cannot prove—that these hot summers [that wiped out the snail] are a side effect of global warming. If he's right, then this snail has earned itself a grim distinction—it would be the first species in the modern era to become extinct as a direct result of climate change. It probably won't be the last, says biologist **Diane Debinsky** of **Iowa State**. [Debinsky:] I think what we're seeing is the beginning, the tip of the iceberg of extinction events. I expect that we're going to be seeing more stories like this."

►**Associated Press**, September 8, 2014: "The Aldabra banded snail, declared extinct seven years ago, was rediscovered on August 23 in the **Indian Ocean** island nation of **Seychelles**. . . . A research team from the **Seychelles Islands Foundation** found seven of the purple-and-pink striped snails on **Aldabra atoll**'s **Malabar Island** last week." .....Oops.