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EPA Administrator Scott Pruitt Blocks Unfair “Sue and Settle” Tactics

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On October 16, EPA Administrator Scott Pruitt signed a directive stating that he is ending “sue and settle” agreements through which Pruitt asserts that environmental organizations have forced EPA into legal agreements that impose binding deadlines for issuing discretionary regulations. The directive, together with an explanatory memorandum, prohibits EPA from entering into consent decrees with terms that courts would have lacked the power to impose if the parties involved had not resolved litigation through a legal agreement. Pruitt’s directive states: “EPA shall also not enter in a consent decree or settlement agreement that converts an otherwise discretionary duty of the Agency into a mandatory duty to issue, revise, or amend regulations.”

The directive also makes it more difficult for environmental organizations to recover attorney’s fees: “If EPA agrees to resolve litigation through a consent decree or settlement agreement, and therefore there is no ‘prevailing party,’ then the Agency shall seek to exclude the payment of attorney’s fees and costs to any plaintiff or petitioner in the litigation.” EPA shall not seek to resolve the question of attorney’s fees and costs “informally,” the directive states.

In addition to these limitations, the directive also states that it provides “an unprecedented level” of public participation and transparency in EPA consent decrees and settlement agreements. The 10-point directive includes a commitment to (1) post notices of intent to sue EPA within 15 days after EPA receives them; (2) contact any states or regulated entities affected by potential settlements and consent decrees; (4) publish consent decrees and settlement agreements within 30 days; and (4) seek public input on agreements.

The directive states that, “where appropriate,” Pruitt can deviate from the procedures outlined in the directive but he will not allow EPA to “violate its statutory authority or to upset the constitutional separation of powers.” The directive and the accompanying memorandum were sent to all EPA Assistant Administrators, Regional Administrators, and the EPA Office of General Counsel.

MMA has opposed the “sue and settle” tactic for many years, as has the National Association of Manufacturers and other national and state associations. Jay Moon, MMA President and CEO, commended Pruitt’s directive: “The regulated community, including MMA members, nationwide have been forced to comply with EPA regulations mandated by judicial decrees in which there was no opportunity for input or due process due to the sue and settle tactic used by EPA and environmental organizations. We are very pleased that Administrator Pruitt is ending this unfair device and instituting a transparency of the regulatory promulgation process so that everyone will have an opportunity for meaningful participation.”

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