

Daily Dicta: Sue-and-Settle Lives On in the Trump Administration

Two years into the Trump administration, there is little discernible difference in how the government settles environmental lawsuits.

By Jenna Greene | January 16, 2019



Ferruginous pygmy owl.

During the Obama administration, groups such as the U.S. Chamber of Commerce railed against a practice that they dubbed “sue-and-settle (<https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors>).

That is, federal regulators were supposedly settling environmental lawsuits against the government by activist groups like Earthjustice and the Natural Resources Defense Council on sweetheart terms—which conservatives said amounted to a sneaky form of backdoor regulation.

Adding insult to injury, because the statutes at issue—the Clean Air Act, the Clean Water Act and the Endangered Species Act—entitle prevailing plaintiffs to attorney fees, taxpayers in effect were bankrolling the litigation.

“Every lawsuit is a profit-making enterprise,” is how William Kovacs, then the U.S. Chamber of Commerce’s senior vice president for the environment, technology and regulatory affairs, put it.

With much fanfare, former EPA administrator Scott Pruitt in 2017 issued a directive (<https://www.epa.gov/newsreleases/administrator-pruitt-issues-directive-end-epa-sue-settle>) to end the practice. The government would roll over and settle no more—it would stand up and fight! “The days of regulation through litigation are over,” Pruitt said.



So, uh, how’s that working out?

By at least one metric, the supposed policy change has had no impact at all.

According to Judgment Fund payment records (<https://jfund.fiscal.treasury.gov/jfradSearchWeb/JFPymtSearchAction.do>), the feds in 2018 shelled out more or less the same amount in legal fees to settle environmental lawsuits as they did during the height of the Obama administration.

For years, I've been fascinated by the Judgment Fund—a deep well of money that the feds draw on to satisfy legal judgments or settle cases. In 2013, as part of a report (<https://www.law.com/nationallawjournal/almID/1202646949225/sue-settle-cases-under-fire/>) for The National Law Journal, I combed through Judgment Fund numbers to figure out how much the feds had paid in legal fees to settle environmental lawsuits.

The answer: About \$3 million.

In 2012, it was a bit over \$4 million.

So what about 2018, two years into the Trump administration?

I crunched the numbers. And the answer is \$3.3 million.

There is one slight difference. The feds settled 45 environmental lawsuits in 2018, versus 50 in 2013, so they're actually paying a bit more on average per case in legal fees now. Maybe that means they're fighting harder before settling?

But it's also not particularly cost-effective to drag out a case if you know you're going to lose. Many of the 2018 settlements are for Clean Air Act cases, where the EPA was sued, for example, for failing to meet deadlines to designate areas of the country with dangerous levels of ground-level ozone air pollution.

"There is no dispute as to liability," noted (https://earthjustice.org/sites/default/files/files/72_Order_Granteeing%20Plaintiffs%27%2012-2018.pdf) U.S. District Judge Haywood Gilliam Jr. of the Northern District of California last year in finding for the plaintiffs on summary judgment. "Defendants admit that the Administrator violated his nondiscretionary duty under the Clean Air Act."

What's the point of litigating that any further? All that's left to do is strike a deal on fees.

The feds folded quickly in other cases as well. For example, the EPA was sued by the Alliance for the Wild Rockies for failing to conduct a biological assessment regarding the effects of a Superfund cleanup on designated bull trout critical habitat.

Again, what's to litigate? A study was supposed to be done and it wasn't.

Government lawyers inserted this boilerplate as cover for the modest \$15,000 payment for legal fees: "While defendant continues to dispute plaintiff's fee entitlement, defendant wishes to settle nonetheless to promote efficiency and preserve limited resources."

Still, there's a difference between cases like these, where the government was sued for failing to do something it was supposed, and cases where the actions of an agency are challenged.

Both in the Obama administration and now, DOJ lawyers fight much harder to defend those cases—as they should.

For example, it took almost four years to resolve a suit by the Center for Biological Diversity and Defenders of Wildlife against the U.S. Fish and Wildlife Service challenging the agency's determination that the cactus ferruginous pygmy owl did not warrant listing under the Endangered Species Act. ("This case concerns one of Arizona's most extraordinary and extraordinarily vulnerable animals—the cactus ferruginous pygmy-owl—and federal defendants' unlawful and arbitrary decision to allow the species to be extinguished in Arizona and adjoining habitat in Mexico," the plaintiffs wrote.)

In 2017, a federal judge in Arizona sided with the plaintiffs on summary judgment, vacating and remanding the agency's decision on the owl.

The U.S. Fish and Wildlife Service appealed to the Ninth Circuit, only to drop the appeal after a month.

Instead, the case settled, and the feds paid the plaintiffs \$200,000 in legal fees.

As a taxpayer, it strikes me as a rational decision. Like it or not, the environmental statutes entitle prevailing plaintiffs to fees. If government is almost sure to lose, why run up the bill?

It's not sue-and-settle. It's smart litigation.

What I'm Reading

Judges Rebuffs Early Bid by Federal Workers to Stop Unpaid Work During Shutdown
(<https://www.almcms.com/contrib/litigationdaily/wp-admin/post.php?post=4195&action=edit>)

U.S. District Judge Richard Leon, overseeing three lawsuits at a hearing in Washington, refused to issue a temporary restraining order, saying such a move potentially would have brought "chaos and confusion" and put lives at risk by shuttering government functions the executive branch has deemed essential.

AG Nominee Barr Won't Commit to Recusing From Russia Investigation
(<https://www.almcms.com/contrib/litigationdaily/wp-admin/post.php?post=4201&action=edit>)

The Kirkland & Ellis counsel who previously led the Justice Department under the George H.W. Bush administration said he would make the decision to oversee special counsel Robert Mueller III's probe in "good faith."

SF's Joseph Saveri Wins Fight Over \$54 Million Fee Award in Antitrust Case
(<https://www.almcms.com/contrib/litigationdaily/wp-admin/post.php?post=4205&action=edit>)

Saveri left Lieff Cabraser in 2012 to start his own firm, and became lead plaintiffs counsel in price fixing litigation against titanium dioxide suppliers that settled for \$163.5 million in 2013.

Oracle Loses Bid to Thwart Labor Department Discrimination Case
(<https://www.almcms.com/contrib/litigationdaily/wp-admin/post.php?post=4214&action=edit>)

Oracle's lawyers from Orrick, Herrington & Sutcliffe attempted to cast doubt on the appointment of the department's administrative law judges.

Federal Judge Says Company May Be Sued Over Harassment by Non-Employee
(<https://www.almcms.com/contrib/litigationdaily/wp-admin/post.php?post=4219&action=edit>)

Addressing an issue that is unresolved by the U.S. Court of Appeals for the Third Circuit, a federal judge in Pennsylvania has ruled that a transportation company can be held liable for failing to stop an employee from being repeatedly harassed by a non-employee.

Federal Judge Strikes Down Trump Administration's Census Citizenship Question
(<https://www.almcms.com/contrib/litigationdaily/wp-admin/post.php?post=4209&action=edit>)

Oh snap! Secretary Ross "alternately ignored, cherry-picked, or badly misconstrued the evidence in the record before him; acted irrationally both in light of that evidence and his own stated decisional criteria; and failed to justify significant departures from past policies and practices—a veritable smorgasbord of classic, clear-cut APA violations."

In case you missed it...

Daily Dicta: Cravath Litigators Take Lead in Containing PG&E's Litigation Inferno in Bankruptcy Proceedings (<https://www.law.com/litigationdaily/2019/01/15/daily-dicta-cravath-litigators-take-lead-in-containing-pges-litigation-inferno-in-bankruptcy-proceedings/>)

An all-star team of seven partners from Cravath, Swaine & Moore led by firm chairman Evan Chesler will serve as lead litigation counsel for PG&E Corp. as the California utility prepares to file for Chapter 11 bankruptcy protection.

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