EPA / FWS: Legislating Without Congress

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Courts uphold Agency rules:

- No consideration of costs unless Congress specifically requires it.
- Business groups generally lack standing.
- Extreme deference to EPA decisions.
- Laws are remedial.
- Stringency ratchet only goes in one direction.

Agency initiates rules under court order and NGO supervision.

Activist “Sue and Settle” Agreements commandeer agency agenda and determine what projects move forward.

When Congress is divided, budgets and appropriations are not passed and oversight is not effective.

Courts recognize delegation; Defer to Agencies on Health/Science/Economics.

35 years ago Congress gave broad authority to EPA / FWS.

How EPA / FWS Create Policy without Congress
How NGO’s Commandeer Agency Agendas / Creates 2-Tier Regulatory System

- EPA only meets 14% of its deadlines
- The consent decrees place EPA under court order and requires these rules receive priority implementation (over 100 rules since 2009)
- Requires re-ordering of budget and resources
- EPA loses its discretion to balance conflicting mandates
- Court order binds future administrations
- Agency transforms itself from independent actor into servant to demands of a private party.
The Magnitude of Sue and Settle

Sue and Settle Clean Air Act Cases (1997–2012)

<table>
<thead>
<tr>
<th>Period</th>
<th>Cases</th>
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<tbody>
<tr>
<td>Clinton Term 2 (1997–2000)</td>
<td>27</td>
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<tr>
<td>Obama Term 1 (2009–2012)</td>
<td>60</td>
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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
Regulations Keep Increasing / Significant Rules 2000 - 2013

Cumulative Number of Rules: 1976-2013

No. of Rules Deemed Significant Under E.O. 12866

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Rules >$1 Billion in Annual Cost: 2000-2012

EPA v. All Other Federal Government Agencies

All other agencies' rules

- 13 Rules
- $19.1 Billion

EPA's rules

- 17 Rules
- $90.3 Billion
97.2% of All EPA Benefits from 2000 to 2012 are PM Benefits

Non-PM Benefits = $19.7 Billion
PM Benefits = $670 Billion

43 Total Rules have monetized benefits.
Calculating Benefits and Costs of MATS Rules

Utility MACT Rule (2012): Costs vs Direct and Incidental Benefits

- Approximate $62 Billion - PM2.5 Incidental Benefits
- $10.6 Billion
- $394 Million - CO2 (Contingent Benefit)
- $6 Million - Hg (Direct Benefit)


- $13 Billion Incidental PM Benefits
- $510 Million

EPA GHG Existing Plant Emissions Rule: 2020
Option 1, State Control

- $7.4 Billion
- $1.7 Billion Ozone Co-benefits
- $24 Billion PM2.5 Co-benefits
- $4.9 Billion CO2

EPA GHG Existing Plant Emissions Rule: 2030
Option 1, State Control

- $9.8 Billion
- $2.9 Billion Ozone Co-benefits
- $37.7 Billion PM2.5 Co-benefits
- $5.5 Billion CO2 Benefits

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PM levels below EPA Standard

PM$_{2.5}$ Air Quality, 2000 to 2012
33% Decrease in National Annual Average PM$_{2.5}$ Levels

Concentration, ug/m$^3$

Previous National NAAQS PM$_{2.5}$ Standard prior to 2012

National NAAQS PM$_{2.5}$ Standard

National Annual Average Levels

Source: EPA
What does our Regulated Future Look Like?
The Practical Application of UARG v. EPA

1. EPA’s Endangerment Finding is upheld (not reviewed by USCC)

2. If a PSD is needed to comply with a NAAQS requirement the applicant must address GHG emissions (standards not set). As NAAQS standards are lowered more applicants will have to address GHGs.

3. EPA has no authority to issue tailoring rule

4. EPA has no authority to require small sources to get PSD just because of GHG emissions.

5. BACT to be determined

6. Climate considerations are begin incorporated into NEPA and Endangered Species Act.
Proposed Rule for Existing Power Plants

- The EPA’s proposal for existing power plants was announced on June 2, 2014 with a goal of a 30% reduction of 2005 GHG levels by 2030.

- Using Section 111(d) of the Clean Air Act, the rule creates state-specific reduction goals through application of ‘best system of emission reduction’ (BSER)”:
  1. Heat rate improvements at coal fired utilities
  2. Replace coal with natural gas combined cycle
  3. Increase use of renewables
  4. Enhance energy efficiency

- EPA asserts control over national energy policy and state fuel-mix determinations.
But Questions Remain

1. Can EPA determine the energy mix for all 50 states?

2. Can EPA regulate GHG’s from power plants under CAA Section 111(d) since those sources are regulated under CAA Section 112 which authorizes EPA to establish regulations for hazardous air pollutants?
On November 26, 2014, the EPA released its proposal to lower the ozone NAAQS from 75 ppb to a range of 65 to 70 ppb for the primary standard. The Agency is also taking comment on lowering the standard to 60 ppb, or retaining the current standard. There will be a 90-day comment period. EPA must issue a final rule by October 1, 2015.

A 2013 NERA study prepared for the Chamber projected that ozone-regulation levels of 65 ppb would cost $26 billion a year and result in 609,000 fewer jobs every year (based upon the RIA from the 2010 ozone proposal).
Projected 8-Hour Ozone Nonattainment Areas

- Monitored CBSAs and rural counties that would be violating a 65 ppb standard
- Unmonitored areas that are anticipated to violate a 65 ppb standard based on spatial interpolation

Based on a 3-year period, 2011-2013.
Source: URS, July 7, 2014
As of May 9, 2013, there were **1440 species** listed under the ESA by US. Fish and Wildlife Service (FWS).
- **2% recovery rate** with only 28 species on this list having been recovered.

In a 2011 sue and settle deal with NGOs, FWS agreed to propose an additional **757 species** as new candidates for the endangered species list, and make final decisions on **251 species** pending candidates.

The FY 2011 FWS budget allocated $20.9 million for endangered species listing and critical habitat designation; the agency had to spend more than **75%** of this allocation (**$15.8 million**) complying with court orders or agreements from sue and settle deals.
There Is Always An Attack On Jobs and Development

**Lesser Prairie Chicken**
- Listed as threatened under Section 4(d) which allows some flexibility
- Listing would impact key fracking states – OK, TX, CO, KS and NM

**Northern Long-Eared Bat**
- FWS proposed listing it as “endangered” in April 2015
- Species’ range covers 39 states: In the U.S., the species’ range reaches from Maine west to Montana, south to eastern Kansas, eastern Oklahoma, Arkansas, and east to the Florida panhandle.
Distribution of Species in 2011 U.S. Fish and Wildlife Service Multi-Year Work Plan and Settlement Agreements

Source: Compiled by the Texas Comptroller of Public Accounts based on information from U.S. Fish and Wildlife Service, NatureServe and species petitions.
Additional Uses of Sue and Settle; Citizen Suits; NEPA and ESA to Restrict Economic Development

- Coal Export Terminals
- LNG Export Terminals
- New Electric Generation (Coal, Wind, Solar, Natural Gas)
- Keystone Pipeline
- Fracking (Gas / Oil production)
- Forest Management / harvesting
- New Permits / Permit modifications
- NSPS for additional industries
- State Implementation Plans
- MACT Standards for industrial facilities
- Title V Air Permits
- NAAQS Non-Attainment Areas
Whatever is not Regulated will be Regulated by Waters of the U.S.
Expansion of EPA’s Water Jurisdiction

2009  National Water Quality Inventory Report: 3.5 million rivers and stream miles

2012  EPA / USGS maps indicate 8.1 million river and stream miles

…and there could be more waters covered since the tributary connection may be traced using USGS maps, direct observation, aerial photography or other reliable remote sensing or other appropriate information.

79 Fed. Reg. at 22202, April 21, 2014
How WOTUS expands jurisdiction

- Ordinary ditches become “tributaries” subject to federal discharge or dredge & fill permits; e.g. Section 404 permit for basic maintenance

- Rain/snow runoff subject to federal permits and pre-treatment, e.g. for runoff from containment from storage, equipment maintenance, cleaning and processing

- Waters in ponds, receiving units, and impoundments subject to federal permitting, may need pretreatment before leaving area

- State of Mississippi has to rewrite water quality certifications

- Land development / use subject to permits and approvals; must consider: NPDES, Section 404, Spill plan
PERMITTING IMPACTS ON INDUSTRY FROM EXPANDED “WATERS OF THE UNITED STATES” DEFINITION

Many common situations/activities at industrial and commercial facilities will trigger Clean Water Act requirements because of the expanded “waters of the U.S.” (WOTUS) definition:

1. When it rains heavily, water ponds in the vacant areas next to the facility, and may run off into ditches. While these areas are uplands under the current WOTUS definition (not subject to the Clean Water Act), the expanded definition can make them “adjacent” waters or “other” waters subject to the Clean Water Act. Water (or other liquids, dust, soil, ash, etc.) moving from the facility onto these areas can trigger the requirement to get a section 402 or 404 permit; water quality standards under section 303 could apply, as well as more stringent spill control requirements under section 311. Also, the facility owner would have to get a section 404 permit to develop these vacant areas.

2. Advocacy groups contend that air emissions from facilities that leave deposits, such as on the vacant areas (or other waters) in this example will require a section 402 or 404 permit.

3. Oil storage tanks are currently subject to section 311 spill prevention requirements. More stringent requirements will be required under the revised WOTUS definition, because a spill can affect a far larger universe of jurisdictional “waters” near the facility (ponds, ditches, lowlands).

4. The on-site storage of materials that drip over time onto paved areas will result in more stringent and extensive stormwater management requirements under section 402.

5. The on-site storage of materials that blow onto vacant areas (or are carried by rain in the facility’s stormwater) can trigger new/more stringent section 402/404 permitting requirements.

6. The stormwater collection point can, for the first time, itself be treated as a jurisdictional water and become subject to a section 402 permit for discharges from the facility.

7. The stormwater conveyance pipe may be classified as a “tributary” under the new WOTUS definition.

8. The ditches at the facility are likely to be regulated as “tributaries,” “adjacent waters,” or “other waters.” Maintaining these ditches, including clearing vegetation, removing silt, and stabilizing banks will require a section 404 permit. Stormwater discharges into the ditches may require section 402 permitting or, in combination with other discharges, trigger area-wide TMDL requirements under section 303.

9. The retention pond may also be regulated as a tributary, adjacent water, or other water. Clearing vegetation, removing sediment, stabilizing the pond banks, or draining the pond will trigger a section 404 permit and discharges into the pond may require a section 402 permit.

10. Toxic materials used inside the facility (e.g., metal dust) are tracked outside via the loading dock and mixed with stormwater, triggering more stringent section 402 requirements. Routine dust suppression programs and/or vehicle washing will make this problem worse.

11. Control of weeds growing near ditches and impoundments, whether through mechanical techniques or herbicide applicators, can trigger section 404 or 402 permitting requirements.
Currently Designated WOTUS in Kansas

Source: Water Advocacy Coalition
Additional WOTUS in Kansas

Source: Water Advocacy Coalition
Rebalancing the Regulatory Process:

The Chamber’s Comprehensive Approach to Regulatory Reform

General Activities

- Promote Sound Regulatory Policy
  - Legislation
  - Testimony
  - Comments and letters
  - Oversight hearings
  - Initiation of required jobs analysis
  - Litigation of major rules harmful to business
  - Oversight of agencies

- Educate and Conduct Research
  - Community outreach
  - Employment analysis
  - Industry look-back studies
  - Whole economy modeling
  - www.sueandsettle.com
  - Distribute “Notices of Intent to Sue” Letters

- Reform Administrative Procedure Act
  - Support passage of the Regulatory Accountability Act, which would:
    - Place the burden of proof on agencies for establishing high impact regulations.
    - Apply cost-benefit analysis to both executive and independent agencies.
    - Impose substantial evidence standard for court review.

- Streamline the Permitting Process
  - Support passage of the RAPID Act, which would:
    - Establish a procedure to streamline the federal environmental review process for infrastructure projects.
    - Require a lead agency to coordinate the process.
    - Set time limits for agency action.
    - Impose six-month statute of limitations.

- Control Sue and Settle Litigation
  - Support passage of the Sunshine for Regulatory Decrees and Settlements Act, which would:
    - Provide greater notice of consent decree and settlement agreements.
    - Give the public a meaningful voice in proceedings.

Specific Legislative Solutions

Legislative Leaders:

- House: Goodlatte (VA)
  - Senate: Portman (OH)
- House: Marino (PA)
  - Senate: Portman (OH)
- House: Collins (GA)
  - Senate: Grassley (IA)

Legislative Action:

- House: ☑ PASSED
  - Senate: ________
- House: ☑ PASSED
  - Senate: INITIAL HEARING
- House: ☑ PASSED
  - Senate: ________