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After the Court Case: The Environmental Lawsuit Sue-and-Settle Spin Cycle Raises GOP Eyebrows

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They're as common as U.S. House bills repealing Obamacare, but far more successful: Earthjustice v. BLM. WildEarth Guardians v. U.S. Fish and Wildlife. Natural Resources Defense Council v. EPA.

They're lawsuits brought by conservation groups against federal agencies when, environmentalists say, the agencies fail to enforce the law. A polluted river falls through the cracks; a species in peril remains unprotected; a Clean Air Act deadline for air-quality standards passes without action.

Sometimes, federal lawyers fight back all the way to the U.S. Supreme Court, as in Massachusetts v. EPA, the blockbuster 2007 case that forced the Environmental Protection Agency to regulate carbon dioxide as a pollutant. Other times, they surrender and hammer out the details of a settlement.

Some of those agreements represent conservation milestones: In the 1990s, scores of environmental groups settled cases with EPA over water pollution from diffuse sources; the agreements hatched hundreds of plans to clean up polluted lakes, rivers and beaches. In 2011, WildEarth Guardians got the U.S. Fish and Wildlife Service to agree to a six-year plan for protecting imperiled plants and animals with Endangered Species Act listings, establishing a systematic process to address the decade-long backlog of petitions.

None of these settlements have rewritten any laws; only Congress can do that. Instead, they've refined and put teeth into existing legislation. Still, they rankle industry and its conservative allies. In recent years, House Republicans, aided by the U.S. Chamber of Commerce, have likened "sue-and-settle" agreements to mob tactics. Former Arizona Rep. Ben Quayle, introducing a bill to address the issue, told Congress the settlements amount to "backroom regulation" that robs environmental policy of "transparency and fairness."

Quayle lost his seat in the 2012 elections, but his Sunshine for Regulatory Decrees and Settlements Act lives on: A new version was recently approved by the House Judiciary Committee. Meanwhile, legislators in 12 states, including Arizona, Utah and Wyoming, have filed two Freedom of Information Act requests, demanding all EPA documents pertaining to settled lawsuits between citizen groups and the agency. The EPA rejected the first request as too broad, so the states requested documents "that discuss or in any

way relate to" communication anyone in the agency's 16 offices had with any of 17 nonprofits concerning atmospheric haze. The EPA rejected the second request, too, citing legal precedent that says the law "was not intended to reduce government agencies to full-time investigators on behalf of requestors." Rather than narrow the request, on July 16, the states, led by Oklahoma Attorney General Scott Pruitt, sued.

Eric Biber, a University of California at Berkeley environmental law professor, suspects federal regulators do sometimes welcome environmentalist pressure to enforce neglected laws. "Sometimes, an agency wants to do something but not take the political hit for it," he says. If you have a settlement agreement in place, and Congress calls you into an oversight hearing, "You can say, 'If you want a different outcome, change the law.'"

But the dynamic isn't unique to environmental groups. "A lot of these lawsuits went in the other direction during the (industry-friendly) Bush administration," Biber says. Earthjustice lawyers complained in 2003 of a "sue-and-settle pattern" when timber companies sued the government for access to northern spotted owl habitat. The settlement would have increased old-growth logging fourfold if environmental groups hadn't fought it—and won.

"It's increasingly used as a tool on both sides," Biber says.

It should be noted that neither the Sunshine Bill in the House nor the document requests themselves allege collusion. Any such accusation would be fantastical, says John Walke, a senior attorney with the Natural Resources Defense Council who has also litigated for both the EPA and industry. "Attorneys at the EPA uphold the interest of the United States government. They litigate vigorously, and that's true whether they're being sued by environmental groups, industry or states and cities."

Only in public statements and press releases do lawmakers promote the notion of a secret environmentalist conspiracy within federal agencies. "If the EPA is making backdoor deals with environmental groups to push their agenda on the American people while bypassing the states and Congress," Pruitt said in a press release, "we need to know."

Wyoming Gov. Matt Mead's spokesman, Renny McKay, is more circumspect: "We're concerned about the practice," he says. "We're trying to verify whether this concern is valid or not."

Walke thinks that's a little "like submitting a request to the IRS to reveal a campaign to torture puppies. The value of the lawsuit is the PR value of leveling charges for which there are no facts. When the lawsuit is quietly dismissed later, they won't care." The message is out.

A similar dynamic unfolded when solar technology startup Solyndra went bankrupt after receiving a $550 million loan guarantee from the Energy Department, launching a congressional investigation into possible conflicts of interest. The dustup yielded nothing and ultimately faded—but not before damaging Obama's renewable energy campaign.

It's still worth asking, though, whether taking federal agencies to court and forcing settlements is the best way to enforce—or roll back—environmental laws. In a better world, would another process

accomplish the same goals? Biber doubts it: “Unless you pass a law saying people can’t sue to enforce the law, I don’t know if you can avoid having the problem.”

Says Walke: “The most obvious alternative would be for agencies to be funded adequately by Congress to carry out the law. In the meantime, we live under a system that’s governed by a rule of law. And that law that anoints citizens with the right to hold government accountable.”