

Sue-and-Settle: Regulation without Representation

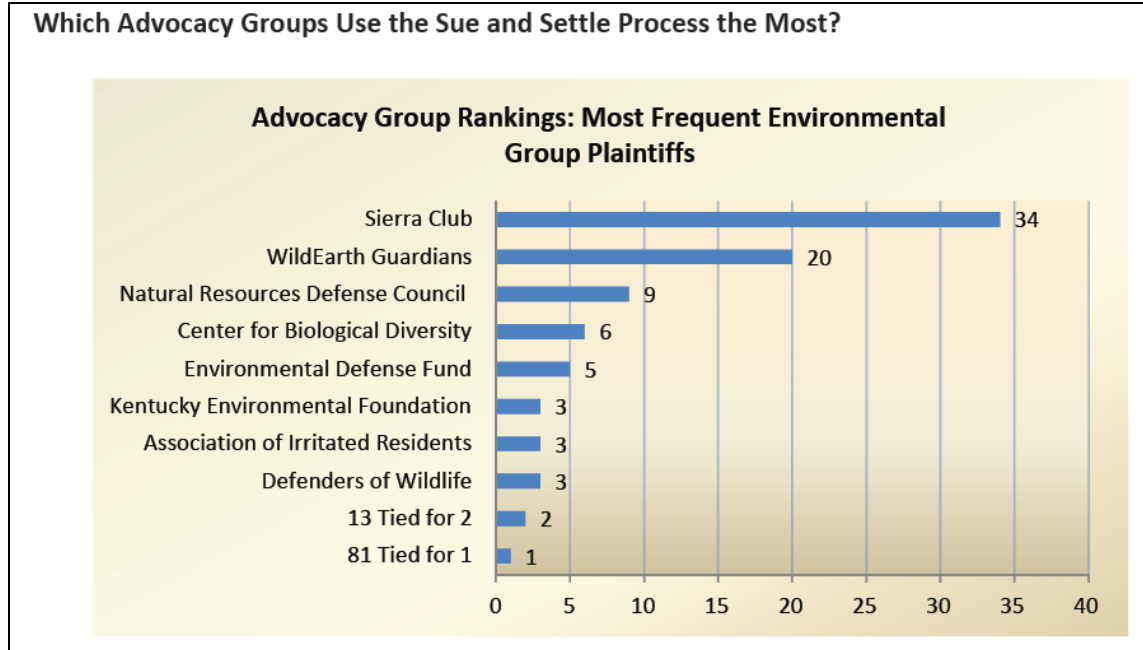
Sue-and-Settle as ‘Art Form’

“Based on EPA’s numbers I have seen for my company, I expect at a minimum to have to permanently shutter two of our three kilns. Given these numbers, even if someone gave me fully paid-off control devices, we would have a difficult time paying to operate the controls and remain in business. That will mean a permanent job loss for at least 45 to 50 families in our small community.” -- Allen Puckett III, small business owner, Columbus Brick Company, on EPA’s sue-and-settle abuse, June 5, 2013

The “sue-and-settle” tactic employed by federal agencies and special interest groups—and elevated to an art form by the Obama Administration—is an affront to government openness and transparency. It is a secret process that excludes small businesses and other affected entities that assume the cost of new rules that arise from sue-and-settle. Had the Senate passed, and President Obama signed, House-passed legislation to stop sue-and-settle abuses, many of the costliest rulemakings now wreaking havoc on the economy could have been stopped or vastly improved.

Under sue- and-settle, activist groups conspire with federal agencies behind closed doors to issue new regulations—regulations that are burdening small businesses with more red tape, mandates, and higher energy costs. Among the negative consequences for small businesses are diminished global competitiveness, reduced access to capital, and a restricted ability to innovate.

The sue-and-settle process typically looks like this: Activist groups (or in some cases, pro-regulatory state governments) allege that a particular agency action has been unlawfully delayed or unreasonably withheld. To get their preferred remedy, these groups (see the most egregious offenders in the chart below) either file a lawsuit or threaten to file to compel an agency to act. Rather than go to court and fight the litigation, agencies instead enter into secret consent decrees and settlement agreements with advocacy groups that result in new regulations.



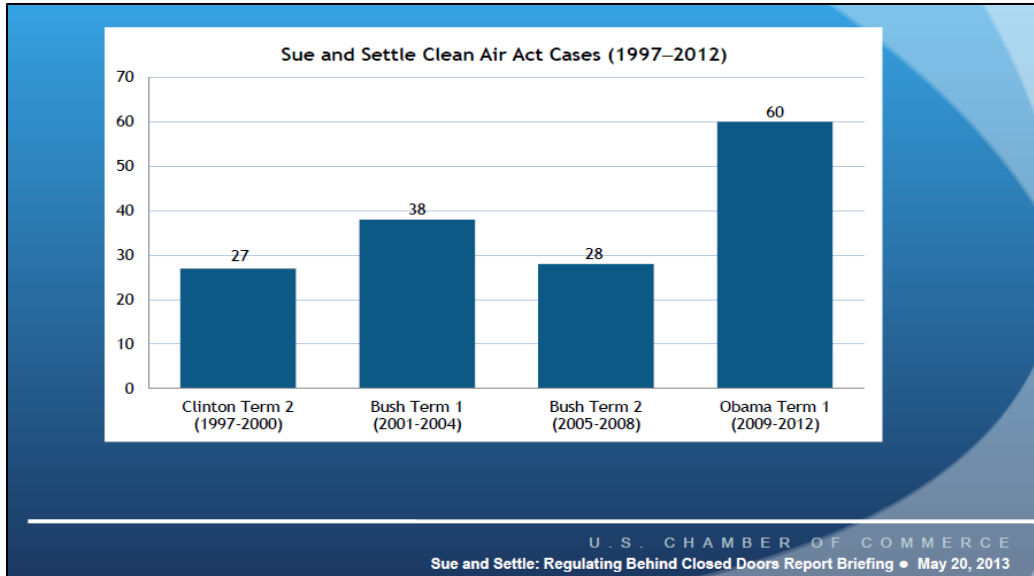
Source: Chamber of Commerce

The victims of sue-and-settle are speaking out. Small business owner Allen Puckett, of the fourth generation, family-owned Columbus Brick Company, is a case in point. Thanks to [a sue-and-settle deal between Sierra Club and EPA](#), infeasible National Emissions Standards for Hazardous Air Pollutants (“Brick MACT”) were foisted upon Puckett and his industry—and they had no say over it. “We asked to be included in the discussions of the timing in the settlement,” [Puckett told the House Judiciary Committee](#), “but were again excluded from the negotiations until a draft settlement agreement was published in the *Federal Register*.”

The deal was cut in secret, but Puckett and his industry were quite aware of the costs. According to Puckett:

- “Over the past 10 years, we have spent over \$100 million dollars installing controls to comply with that first MACT and continuing to operate those controls in most cases. EPA estimates that this new MACT could potentially cost close to TWICE that amount each and every year.”
- “Columbus Brick spent \$750,000 to install a control device on our large kiln to comply with the first Brick MACT. Each year we incur ongoing operational costs because the operation of this control device is still a requirement of our air operating permit.”
- “Before the last rule, our industry had roughly only 20 controlled kilns of over 300 total kilns. Now we have over 100 out of about 250 kilns. Those newly controlled kilns were all installed because of a rule that is no longer on the books. Most of those controls remain in operation.”
- “EPA is using the presence of those new controls and new interpretations of the CAA to create a nearly impossible standard for our industry. Our situation is now the ‘MACT-on-MACT’ scenario. We are concerned that EPA does not know how to deal with this scenario which is further exacerbated by a mandated schedule.”

So what will happen to Puckett and his employees? Because of sue-and-settle, the future is grim. “Given these numbers [in EPA’s rule], even if someone gave me fully paid-off control devices, we would have a difficult time paying to operate the controls and remain in business. ***That will mean a permanent job loss for at least 45 to 50 families in our small community.***”



The Solution to Sue and Settle

H.R. 1493, *the Sunshine for Regulatory Decrees and Settlements Act*, sponsored by Rep. Doug Collins (R-Ga.) would have at least made sue-and-settle deals more transparent and allowed affected parties opportunity to influence regulatory outcomes. According to the [House Judiciary Committee](#), the bill would, among other things:

- “Require notices of intent to sue, complaints, consent decrees and settlement agreements, and attorneys’ fee agreements in lawsuits attempting to force regulatory action be more transparent to the public and regulated entities”;
- “Give to regulated entities, State, local and Tribal co-regulators, and the public more rights to participate in the shaping or judicial evaluation of sue-and-settle consent decrees and settlement agreements, whether through notice-and-comment procedures or rights to participate in litigation as intervenors or amici curiae”;
- “Provide courts with more complete records and tools to review proposed sue-and-settle consent decrees and settlement.

Here are **some additional examples** of Obama Administration sue-and-settle regulations that could have been stopped or dramatically improved had H.R. 1493 been signed into law:

1. New Source Performance Standards (NSPS) for new and modified and existing fossil-fuel fired power plants. EPA settled on December 23, 2010 with the states of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of

Columbia, and the City of New York. Also party to the agreement were the Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund.

- **Latest:** The agreement called for new regulations covering greenhouse gas emissions from new and existing coal- and natural gas-fired power plants. [EPA issued its proposal for new plants on January 8, 2014](#), and plans to issue its proposal for existing facilities on June 1, 2014.
- **Economic impact:** According to Tony Campbell, CEO of the East Kentucky Power Cooperative, the NSPS regulation for new sources, published in the federal register in January, has “already had a chilling impact on electricity generation in the U.S.” As he noted in [testimony](#) before the House Energy and Commerce Committee:

When that proposed rule was issued, approximately 15 coal-fired power plants had received a [EPA Prevention of Significant Deterioration] permit, but had not yet commenced construction. By the time the rule was withdrawn and re-proposed in 2013, **most of those plants had been scrapped** due to regulatory uncertainty, despite the exemption EPA included in the proposed rule.

2. Lead Renovation, Repair, and Painting Rule: In 2008, environmental activist groups filed lawsuits against EPA to challenge the Lead Renovation, Repair, and Painting Rule, and these suits were consolidated in the DC Circuit Court of Appeals. A settlement agreement was reached on August 24, 2009, when EPA agreed to propose significant changes to the rule that were outlined in the settlement agreement. Specifically, EPA agreed to remove an ["opt-out" provision](#) to exempt millions of homes without children or pregnant women from lead mandates, a provision that would have significantly reduced compliance costs.

- **Latest:** EPA is contemplating expanding the LRRP rule to cover commercial and public buildings.
- **Economic Impacts:** Removing the opt-out provision in the settlement agreement more than doubled the number of homes subject to the RRP Rule to 78 million. EPA estimated the cost of this action to be \$500 million annually. However, according to [testimony](#) on June 28, 2013 by the National Association of Homebuilders:

“The costs are far greater because of EPA’s flawed economic analysis, which significantly underestimated the true compliance costs. The agency initially estimated that compliance costs would add \$35 to a typical remodeling job; yet for a typical window replacement project the cost ranges from \$90 to \$160 per window opening, easily adding more than \$1,000 to each project. Moreover, an EPA Inspector General’s (IG) report, published on July 25, 2012, found that the EPA failed to use accurate or even reliable information on the likely costs of changes to the RRP Rule on small entities.”

3. Chesapeake Bay Total Maximum Daily Load (TMDL): On May 10, 2010, EPA announced a [settlement agreement](#) with, among others, the Chesapeake Bay Foundation to resolve a lawsuit filed in 2009 claiming EPA had failed to take adequate measures to protect the Chesapeake Bay. The agreement required EPA to issue costly TMDL mandates and a new stormwater regime for the Bay.

- **Latest:** On September 13, 2013, Pennsylvania Federal Judge Sylvia Rambo [issued a ruling](#) upholding EPA’s Chesapeake Bay mandates and rejected the arguments against them by the American Farm Bureau, the National Association of Home Builders, and other pro- agriculture interests.

- **Economic Impacts:** The plans required in Bay states to meet EPA's requirements will be enormously costly. According to a [report](#) in the Bay Journal on January 1, 2011:

"Maryland's plan could cost \$10 billion through 2017. Virginia said its state plan could cost \$7 billion. Those costs will trickle down to the local level. In December, Lynchburg, VA, officials said they expected stormwater improvements needed to comply with the TMDL would cost \$120 million. Altoona, PA, is considering a 58 percent sewer rate increase to pay for a \$70 million wastewater treatment plant upgrade, mainly needed to meet Bay goals. West Virginia officials say it could cost \$240 million to upgrade 10 wastewater treatment plants in its portion of the watershed.

- Carl Shaffer, President of the Pennsylvania Farm Bureau, [testified](#) in 2011 that, "EPA itself projects that roughly 20 percent of cropped land in the watershed (about 600,000 acres) will have to be removed from production and be converted to grassland or forest in order to achieve the required loading reductions." The America Farm Bureau, he testified further, "believes the TMDL threatens the economic health of businesses, individuals and communities throughout the Chesapeake Bay Watershed without improving the Bay any more than the voluntary state-based efforts in place before the federal takeover."

4. Clean Water Act 316(b) Cooling Water Intake Structures Rule: On July 23, 2010, EPA and environmental advocacy groups, including Riverkeeper, agreed to a [voluntary remand](#) of a 2006 Bush Administration cooling water intake rule. EPA then entered into a settlement agreement with the same groups to initiate a new rulemaking on November 22, 2010.

- **Latest:** EPA plans to issue the final 316(b) rule on April 17, 2014.
- **Economic Impact:** EPA [estimates](#) the annual cost to the electric power sector of the agency's preferred option under its proposed rule is \$386 million, and the cost of other options that would require cooling towers could be as much as \$4.7 billion per year. If EPA adopts a flawed approach involving an overly broad interpretation of the Endangered Species Act, and forces installation of cooling towers, several nuclear power plants could close. According to the non-partisan North American Electric Reliability Corporation, between 25 gigawatts and 39 gigawatts of installed nuclear capacity could be eliminated, threatening the reliability of the grid.