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EPA In The Trump Era: Settling Mandatory Duty Lawsuits

By **Avi Garbow** (February 22, 2018, 2:19 PM EST)

Since President Donald Trump took office just over one year ago, much has changed at the U.S. Environmental Protection Agency. In this Expert Analysis series, former EPA general counsels discuss some of the most significant developments and what they mean for the future of environmental law in the U.S.

"[We] respectfully give notice of [our] intent to file suit against you ... for failure to perform a non-discretionary duty."

Avi Garbow

Nearly once a week, on average, the U.S. Environmental Protection Agency receives correspondence with this in the subject line. In just the first six weeks of 2018, the EPA reportedly received nearly a dozen notices of intent to sue, or NOIs, for alleged failures to perform a nondiscretionary duty, and in 2017 the EPA received over 40 such NOIs. In each instance, as alleged by the putative complainant, the EPA failed to do what the law required of it — to make a decision, or take an action, by a time certain — and in most of those cases the complainant is right. Whether because of resource constraints, agency or administration prioritization, the demands of scientific rigor, enhanced stakeholder engagement, sheer neglect, or myriad other reasons, the EPA is persistently late on executing actions required of it by major environmental statutes.

These mandatory duties — which by congressional design were generally meant to be consequential — have cascading impacts when undertaken by the EPA. Regulatory agencies, including at the state level, are oftentimes compelled by law to commence rulemaking processes or to make decisions, and that in turn affects regulated entities, and the health and welfare of the broader community, alike. So when a statutory deadline is in the rearview mirror, illuminated by the onset of litigation, what should we expect of the agency's lawyers, or those who represent it at the U.S. Department of Justice? What should we expect of the lawyers representing those who, while not parties to the lawsuit, nevertheless have a stake in how the law is implemented? That, of course, depends upon the desired outcome.

Time Is the Essence

In a mandatory duty lawsuit, as distinct from a direct Administrative Procedures Act challenge to a final

agency action, questions of liability and remedy predominantly revolve around the issue of time. As for liability, aside from any arguments about whether the underlying statutory mandate is nondiscretionary, most complaints present the binary question of whether the agency did, or did not, complete the action by the date set forth in the statute. No degree of zealous advocacy can, or should, obfuscate what in most cases is a clear answer to that initial inquiry. The more critical question then becomes one of remedy, and how much time the agency needs or should be given to make a decision, or to commence and complete a rulemaking, when under the governing law it is already out of time.

In 2009, the Government Accountability Office examined how broadly applicable rulemaking requirements cumulatively have affected agencies' rulemaking processes.[1] The GAO analyzed 16 case-study rulemakings, and found that the average time needed to complete a rulemaking was approximately four years. For the EPA, the average time to complete a rulemaking based on their selected air and water case studies was over five years. This time frame is certainly not fully representative of all decisions or possible rulemakings that are the subject of mandatory duty lawsuits, many of which vary greatly in complexity and degree of completion. It does, however, highlight how the EPA's rulemaking processes can take time, guided by factors including the agency's own action development process, the nature and extent of public input, and the due consideration of applicable statutory criteria.

Initially, the responsibility to attempt to best reconcile what can be a significant delta between a missed deadline for a mandatory duty and the purported future needs (or balanced desires) of an agency rests, in litigation, with attorneys at the EPA and DOJ, and those representing the plaintiffs in the case. The concept that litigants may seek to resolve disputes by way of settlement negotiations is neither new nor nefarious, and in most EPA-related cases is subject to final public and judicial scrutiny. But increasingly, there are expanding roles for counsel representing nonparties who nevertheless have a stake in the outcome, including states and regulated entities. Whether, and how, they occupy that "seat at the table" to present and protect their interests, remains an open question.

EPA's Directive on Transparency and Public Participation in Settlements

On Oct. 16, 2017, EPA Administrator Scott Pruitt signed his "Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements," and issued an accompanying memorandum to the agency's assistant administrators and regional administrators. In so doing, he invoked a deeply flawed and unsubstantiated claim that the EPA and DOJ somehow compromised their defense of the agency in mandatory duty lawsuits by engaging in so-called "sue and settle" tactics. The GAO previously conducted a thorough examination of the EPA's practices involving settlements in deadline suits that may compel the agency to issue a rule, and in a lengthy analysis rejected this spurious allegation.[2]

Terminating, in this fashion, a nonexistent practice can have no meaningful effect. Of greater interest, however, is the manner in which this new directive seeks to promote transparency and public participation in the context of settlement negotiations in mandatory duty suits. The new directive embraces and grows a nascent process, begun in the prior administration, to post on the EPA Office of General Counsel's website NOIs, complaints and petitions for review received by the agency. In addition, the EPA will now post online for review and comment any proposed consent decree lodged in federal court or draft settlement agreement to resolve claims against the agency. This expands an existing process required by the Clean Air Act Section 113(g) providing for public notice and the opportunity for comment to other agency-proposed consent decrees and settlements, notably those resolving claims under the Clean Water Act and other statutes. It is worth pointing out that the aforementioned public

notice and comment process under the Clean Air Act has been grossly underutilized, and states, regulated entities and other interested persons have only infrequently provided comment on draft agreements that set forth critical timing terms for decisions and rulemaking processes that may impact them.

For some, becoming aware of pending complaints, petitions and proposed settlements is sufficient for planning purposes and strategic undertakings. But for others, the directive provides interesting opportunities for a "seat at the table" traditionally reserved for parties in a case. Pruitt's directive stated that "[i]t shall be the policy of the Agency to take any and all appropriate steps to achieve the participation of affected states and/or regulated entities in the consent decree and settlement negotiation process. Accordingly, EPA shall seek to receive the concurrence of any affected states and/or regulated entities before entering into a consent decree or settlement agreement."

The directive is relatively new, and the policy it states concerning the participation of nonparties and certain stakeholders in the settlement negotiation process, and their ultimate concurrence, is surely being shaped on a case-by-case basis. Significantly, the directive is entirely devoid of any reference to the DOJ, whose lawyers represent the EPA in nearly all defensive litigation. But requests to participate in a negotiation process — formal or informal — should at least be mindful of the litigation practice and precedent of the department, as it relates to the new policies of its client agency.

The directive, not surprisingly, states that it does not create rights or benefits meant to be enforceable by law against the EPA. It does, though, create new opportunities for potentially productive engagement on the critical issue of the timing of an agency action or decision — time that is important for the agency's regulatory output to be based on meaningful public participation, and robust consideration of technical and scientific information.

The Courts Decide

At the outset, I noted that what we should expect of lawyers in these situations depends on the desired outcome. The directive establishes new policies and procedures that could create disincentives or difficulties toward reaching negotiated settlement, including the provision that seeks to curtail payment of attorneys' fees to parties who might still argue that they are prevailing for purposes of fee awards. The enhanced opportunities for the participation of nonparties in the negotiation process, and the stated goal of seeking concurrence of any affected states or regulated entities before entering into a settlement agreement, also may significantly complicate the process, fatally so in some instances. But for those parties and other interested entities for whom a desired outcome is adequate time for the agency to make an overdue decision, or commence and complete a rulemaking, there remains a premium on exploring settlement options when the question of liability is essentially answered by dint of the calendar.

It is axiomatic that when litigants do not resolve their dispute, courts will. When the government finds itself already within the zone of noncompliance for failure to take a nondiscretionary action, it cannot expect judicial sympathies to extend to its preferred relief or remedial timetable. Recently, the Ninth Circuit ordered the EPA to commence a rulemaking within 90 days, and complete it within a year, in the face of the EPA's argument that it needed approximately four years to propose the rule and six years to complete it.[3] The EPA argued that the timeline petitioners requested would not allow it to act with due deliberation, though the court noted that the EPA has also "disavowed any interest in working with Petitioners to develop an appropriate timeline." Id. In another recent case, the EPA sought approximately a year for final agency action that, under the Clean Air Act, was otherwise required to

have been completed in July 2016.[4] Notwithstanding the EPA's indication to the court that its requested time period was necessary to ensure a thorough evaluation and a sound decision, the court ordered final action to be taken within 60 days. Id. In those cases, and ones like it, the true victor is not always readily ascertainable.

Settlement in mandatory duty cases is not always achievable nor uniformly desirable. There are cases where consensus cannot be reached, and litigation through judgment is the best way to advance a position. But there are also cases in which the public interest and certain private interests may be in alignment. In those cases, the manner in which the recent EPA directive is implemented, and how plaintiffs, states and other entities carry forth their advocacy, may impact the nature of EPA actions in which many interests vest.

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[1] GAO-09-205, Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as for the Transparency of OMB Regulatory Review, April 2009.

[2] GAO-15-34, "Environmental Litigation – Impact of Deadline Suits on EPA is Limited," December 2014

[3] In re A Community Voice, et al., v. EPA, No. 16-72816, Dec. 27, 2017

[4] State of Conn., et al. v. EPA, D.D.C., Case 3:17-cv-00796-WWE, Feb. 7, 2018