



SWITCHBOARD

Natural Resources Defense Council Staff Blog

Ann Alexander's Blog

Sue and settle legislation: a cure in search of a disease



Posted July 16, 2012 in Curbing Pollution

Share | | 0 | Like 4

Certain segments of Congress of late have built their careers on loudly decrying government waste, endless bureaucratic delay, disregard of the law by public officials, and excessive litigation. Their solution? To write legislation strictly mandating that we have lots more of all that.

What, you're not following? Neither am I. Particularly since the "problem" they're throwing this dubious solution at is a figment of their imagination.

The bold new mandate for more waste and delay is H.R. 3862, sunnily titled the "Sunshine for Regulatory Decrees and Settlements Act of 2012". The idea behind it is to make sure that government agencies don't secretly collude behind closed doors with citizen organizations (such as NRDC) that sue to require agency compliance with federal laws protecting the public. Concern about such purported back-room dealing was voiced most recently by agricultural interests who suggested that NRDC's lawsuits filed this year against U.S. EPA to compel compliance with water quality laws were actually the product of a conspiracy with the Agency. We had a clandestine agreement, they insinuated, to quickly settle the litigation on terms favorable to us, before any of the farmers had their say. As the director of the Center of Agricultural Law and Taxation put it, "It is a designed strategy of environmental groups suing their friends in the EPA. It's pretty incestuous. It's a nice, tidy little arrangement."

Well, now. "Incestuous." "Tidy." As one of the lead lawyers for NRDC in these matters, I say, let's unpack this a little. Because if we were busy having secret meetings with U.S. EPA in smoke-filled rooms, I think I would know about it.

The first lawsuit is our attempt to get U.S. EPA to do something about the fact that nitrogen and phosphorus flowing into the Mississippi River have created a "dead zone" in the Gulf of Mexico the size of New Jersey, in which the bottom layer is largely devoid of aquatic life. Nitrogen and phosphorus are fertilizers, which is why we're seeing the intense interest from the agricultural community. The problem is that when you put them in the water, they fertilize algae, which then grows rampantly and dies, a process that uses up the oxygen in the water. Excess algae are also choking the Mississippi River and other waterbodies with algal blooms, some of them toxic. In 1998, U.S. EPA promised to give the problem prompt attention. The Agency started backpedaling shortly afterward though, reiterating the problem periodically but waiting for the states to take action on it. Finally, in 2008, NRDC and other environmental organizations had had enough of this epic dithering, and filed a petition with U.S. EPA calling on it to set standards for nitrogen and phosphorus in our waters as the Clean Water Act requires. Three years later, U.S. EPA finally answered the petition, telling us that the problem was definitely an important one, but it still wants to wait for the states to deal with it. Sound tidy and incestuous so far?

The other lawsuit is much simpler. The Clean Water Act requires that U.S. EPA periodically take a look at its standards for sewage treatment plants, which are a significant source of nitrogen and phosphorus. However, the last time the Agency did that was in 1985, and there have been a lot of pollution control advances since then. NRDC and others filed a petition with the Agency in 2007 asking it to update the standards. Although agencies are required by law to respond to such petitions, we received radio silence for over four years. So earlier this year, we filed suit to compel an answer.



According to the conspiracy theories put forth by Mr. McEowen and others, we did not bring suit in order to actually litigate these issues. Rather, we were in cahoots with U.S. EPA, intending all along to reach an immediate settlement facilitating nitrogen and phosphorus regulation (because nothing says cahoots like decades of inaction and radio silence). Well, let's look at how things have played out since we brought the lawsuits. In the Dead Zone suit, more than three dozen agricultural interest groups asked to intervene. So naturally, the environmental organizations immediately... consented to their intervention. Yes, that's right. We expressly told the court that we did not object to their participation. If our nefarious plot involves keeping everyone else from having a say, we're doing one hell of a lousy job of it. And as for our "incestuous" "friends" at U.S. EPA? Sure, we've been talking to them – through their attorney at the Department of Justice, who approached us to discuss briefing schedules.

It's really pretty clear that H.R. 3862 is a cure in search of a disease. The real problem, though, is that it's a cure that will make the patient sicker. The bill is an attempt to put up roadblocks to supposed "collusive" settlements, but the roadblocks take the form of more bureaucracy, more delay, more waste, and more lawyers getting rich.

First, the bill is designed to actively discourage any effort by groups like ours to make the government meet its own deadlines. If there's a law that says that a certain action needs to be taken by X date – or that an agency needs to respond within a reasonable time to a citizen petition – H.R. 3862 creates a set of ready-made excuses for non-compliance that the agency *must* raise with the court. Essentially, every time an agency wants to agree in a settlement to meet its statutory deadlines, it would be required to explain to the court everything else that's keeping it busy, and how meeting the deadline will leave less time for it to do all those other things. It doesn't mandate that the agency tell the court that the dog ate its homework, presumably only because the drafters didn't think of that.

Second, the bill promotes third-party intervention in suits to enforce deadlines. NRDC has no problem with parties who have a genuine interest participating in our litigation, as evidenced in the Dead Zone suit. However, the goal here is clearly to inhibit efforts like ours in the sewage treatment lawsuit to settle straightforward deadline enforcement matters with minimal lawyer time – by encouraging intervention and protracted litigation by parties whose only interest is encouraging yet more government delay.

Third, and most problematic, the bill would expressly allow an agency, having made a deal to comply with the law, to come back later and ask the court to undo the settlement if it later decides it's too busy to do what it promised. Thus re-opening the entire matter to protracted litigation again.

And finally, of course, the delay tactics wouldn't be complete without onerous new approval requirements and tree-killing annual reports.

If only some of our legislators would spend a little more time touring our algae-choked waterways rather than the grassy knoll of polluting industry's paranoid imagination, we might be able to work together toward creative solutions to the very real problems our litigation and settlements are addressing. At the very least, however, we can hope that they'll quit trying to throw costly bureaucratic hurdles in the way of our efforts to make government agencies do their jobs.

Photo by Amy Goerwitz

Like Share | | 0 |

© Natural Resources Defense Council