



Federal Regulation through Litigation

The abuse of consent decrees, in which special interest groups sue federal agencies and then enter into settlements, has become a familiar strategy in recent years. A similar pattern is true with agencies approaching permit holders and pressing them into consent decrees.

The oil and gas industry has been the target of an aggressive stance by federal agencies for the past eight years, especially with the Environmental Protection Agency (EPA). While formal rulemakings are required to follow the Administrative Procedures Act, agencies have been using the threat of lawsuits and fines as a new regulatory hammer. Companies operating in what they believe is full compliance with existing laws and regulations now often find themselves on the receiving end of massive information requests designed to facilitate open-ended investigations, rather than receiving a formal Notice of Violation that signals the beginning of the administrative process.

These information requests can be very detailed and onerous for the permit holder to complete. After a period of time, the agency will then approach the operator with the threat of a huge fine unless it enters into a consent decree that requires additional environmental controls beyond what is required by law.

Recommendations:

- Require an agency to issue Notice of Violations with adequate time to fix those violations prior to any information requests.
- Require an agency to notify and work with the relevant state agencies prior to any information requests to resolve any potential violations.
- Require the state agencies to be the primary enforcer and communicator of any Notice of Violations.

As a policy device, government by consent decree serves no necessary end. It opens the door to unforeseeable mischief; it degrades the institutions of representative democracy and augments the power of special interest groups. It does all of this in a society that hardly needs new devices that emasculate representative democracy and strengthen the power of special interests.

— *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1137 (Wilkey, J., dissenting)