

Center for Regulatory Effectiveness

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Examples of Regulation by Litigation

- #1. Farm Workers, AFL-CIO v. EPA
- #2. Washington Toxics Coalition v. EPA
- #3. NRDC. v. EPA
- #4. Center for Biological Diversity v. Leavitt

Dear Attorneys:

The Center for Regulatory Effectiveness (CRE) has addressed “Regulation by Litigation” for a number of years as set forth on its website: www.TheCRE.com.

We are troubled that private parties and Federal agencies seek to use litigation to bypass Congress and the regulatory process established by Congress in the Administrative Procedure Act. When a regulatory policy goal cannot be achieved legislatively or through the issuance of rules and regulations, private parties and Federal agencies have, on many occasions, sought to shift the power to tax and regulate businesses into the courts and out of the hands of our legislative representatives, thus avoiding open legislative procedures, public participation, and administrative due process.

- Specifically, private parties have engaged in Regulation by Litigation by seeking to have a Federal court’s order supplant the administrative and regulatory procedures already established by a Federal agency after full opportunity for public participation and comment on these procedures.
- Federal agencies engage in Regulation by Litigation by seeking judicial solutions to issues for which they do not have a sufficient statutory or regulatory authority.
- Federal agencies also have engaged in Regulation by Litigation by serving as a catalyst to have a third-party sue the government, e.g., by giving grants to third-parties to bring such suits, and also by encouraging a third-party to file a “friendly lawsuit,” followed by the agency intervention seeking a consent decree containing provisions not authorized in a statute or regulation.

Unfortunately, it appears that Regulation by Litigation is increasing, regardless of whether the administration is Democrat or Republican. This is happening in part because the policymakers in the Executive branch and the Judicial branch do not seem to be fully aware of the problems with Regulation by Litigation.

For that reason, we are beginning a systematic effort to educate the public and affected parties about the dangers of Regulation by Litigation. This effort involves a number of steps.

1. We have selected the four ongoing lawsuits captioned above which either are pushing, or have already pushed Regulation by Litigation to the limit.
2. We have posted a summary explaining why each lawsuit exemplifies Regulation by Litigation and copies of important court filings and judicial decisions on our website under “Lawsuits Exemplifying Regulation by Litigation” on “*CyberActivist.US*”.
3. We plan to post critiques of court filings and decisions to point out more specifically how they exemplify Regulation by Litigation.

By posting critiques on our website it is our hope that we will bring the problems with Regulation by Litigation more fully to the attention of the public, regulatory counsel, and the policymakers in the Executive and Judicial branches. CRE is fortunate in that its website is the one most monitored of any non-governmental regulatory website.

In addition, we believe that our website would be improved by comments from you, the regulated entities, and the public as a whole. As Supreme Court Justice Louis Brandeis once observed, “Sunshine is the best disinfectant.” Ours is a public website, onto which anyone can add a comment directly and have it included in the discussion.

Sincerely,

/s/

Jim Tozzi
Member, Board of Advisors

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