Noticing, and Commenting on, Settlements

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Courtney R. McVean & Justin R. Pidot, Environmental Settlements and Administrative Law, 39 **Harv. Envtl. L. Rev.** 191 (2015).

As a wet-behind-the-ears lawyer in the U.S. Justice Department's Environmental Enforcement Section, I tried two cases to judgment in my first three years of practice. During fifteen years at the DOJ thereafter, almost every case I touched – including some during a brief stint as an appellate lawyer – settled. So this succinctly-titled article immediately caught my eye.

In *Environmental Settlements and Administrative Law*, Courtney McVean and Justin Pidot focus not on enforcement litigation but on how the federal government settles cases in which agencies are sued for allegedly violating environmental statutes. McVean (a 2014 graduate of the University of Denver Sturm College of Law) and Pidot (a former DOJ attorney who was then an Assistant Professor at Denver) consider the persistent criticism that the Executive Branch's settlement practices make policy in ways that violate administrative law norms. Their careful analysis concludes that most environmental settlements are consistent with the procedural constraints of administrative law and that existing judicial review mechanisms are adequate to correct the occasional settlements that overreach.

To make sense of a large number of settlements of claims brought under diverse federal statutes, McVean and Pidot divide settlements into three categories based on the commitments agencies make to resolve cases: resource allocations settlements, procedural settlements, and substantive settlements. As the authors acknowledge, this typology is not entirely new; it tweaks a classification scheme proposed by Jeffrey Gaba more than thirty years ago.[1] The tweak, though small, is important: McVean and Pidot rename as "resource allocation settlements" the class that Gaba called "scheduling agreements." "Resource allocation" is a more comprehensive label; as McVean and Pidot show, agreeing to a specific timetable is not the only way that settling agencies commit to devote resources to the particular administrative action for which a plaintiff sued. More important, "resource allocation" focuses on the *effect* that a settlement of this type has on the agency that agrees to it, which is where the emphasis should be in assessing whether such settlements run afoul of legal constraints on agency behavior.

Using a handful of recently or currently controversial settlements, McVean and Pidot systematically evaluate whether each of several common criticisms validly applies to each category of settlement. No, resource allocation settlements do not offend judicially-enforced administrative law norms, because agency choices about resource allocation (absent Congressional earmarking) are quintessentially discretionary and typically insulated from judicial review. Therefore, an agency's binding agreement to make a final decision on some issue by a specified date is no different from a choice the agency could have made on its own, without any public involvement or judicial second-guessing, even in the absence of a suit seeking to compel a decision. No, process settlements do not violate public participation requirements because the Administrative Procedure Act exempts procedural rules from notice-and-comment, and courts give agencies wide latitude in making procedural choices so long as the statutory minima are satisfied.[2] Finally, no, even substantive settlements do not improperly skirt public participation and other administrative law obligations, provided that the settlement itself is subject to notice-and-comment procedures or the action that the agency agrees to take is itself subject to judicial review that can include review of the propriety of the agency's commitment to the action in the settlement.

McVean and Pidot acknowledge that substantive settlements, in which agencies commit not only to act but to act in a particular way, pose a risk of circumventing administrative law. They express special concern about deregulatory decisions embodied in settlements, although their example of an improper substantive settlement involves an agency's agreement to limit environmentally harmful activities by persons who were not party to the litigation being settled. They use this example to support their contention that courts can police substantive settlements using existing law, either on collateral attack or by direct review of the settlements themselves.

Direct review of substantive settlements, McVean and Pidot assert, is not functionally different from arbitrary-and-capricious review of regulatory decisions made outside the settlement context. Perhaps my reaction to this assertion is colored by my experience entering environmental enforcement consent decrees with their "double layer of swaddling,"[3] but to my mind this claim, which the authors support, but thinly, is one of the article's few points that is open to question. It would be good to see future work rigorously comparing judicial review of substantive regulatory settlements to judicial review outside the settlement context, notwithstanding the difficulty of making that comparison in light of courts' very malleable application of the arbitrary-and-capricious standard.

The legal analysis in *Environmental Settlements and Administrative Law* also suggests other opportunities for future scholarship aimed more directly at agency incentives and behavior. In today's political milieu, the criticism of environmental settlements comes from the right, alleging that agencies implicitly invite lawsuits from their environmentalist friends and cut sweetheart deals to achieve their environmentalist ends. But the lawsuits allege that agencies have not done *enough* to protect the environment. In deadline suits, the negotiated timetable inevitably requires agency action well *after* the deadline imposed by statute. Why would eager-beaver regulators prefer a strategy of missed deadlines, lawsuits, and settlements to a strategy of meeting regulatory deadlines in the first place? Because McVean and Pidot show that "to evade the requirements of administrative law" is not the answer, the underlying premise of the agencies' critics seems doubtful. Study of agencies' actual dynamic response to being sued could be very enlightening.

Overall, McVean and Pidot persuasively demolish the argument that environmental settlements subvert administrative law's imperatives. Their analysis, as they conclude, exposes criticism of environmental settlements "for what it is: a war of words relying on emotionally charged rhetoric to score political points." (P. 239.) To put that conclusion slightly differently, *Environmental Settlements and Administrative Law* shows that the current complaints about the process of settling environmental lawsuits are stalking horses for disagreements with the substance of the current administration's environmental policies.

Quite fairly, McVean and Pidot acknowledge that the source of criticism of environmental settlements has varied with the political winds. The same arguments now made by Republican legislators and business-oriented interest groups were made, during the George W. Bush Administration, by Democratic legislators and environmentally oriented interest groups. *Environmental Settlements and Administrative Law* thus also demonstrates that environmental law, which since the 1970's has been thoroughly entwined with administrative law, is again illustrating an administrative law truism: when thinking about imposing procedural burdens on agencies, be careful what you wish for, because the process you love today may be the process you hate after the next presidential election. McVean and Pidot have contributed a powerful defense of the need to maintain environmental agencies' flexibility to settle cases brought against them.

1. Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 **Geo. L.J.** 1241, 1243-48 (1985). [?]
2. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978). [?]
3. *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) [?]

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