

It seems like every time EPA makes a move, industry says it's another job-killing power grab by the government and files court challenges within about an hour of EPA's action. But why? The rule often survives judicial review, so industry spends millions on lawyers and gets nothing in return. It's true that industry does often win at least part of its challenge, and it sometimes gets a temporary stay that buys it time. But stays are rare in the D.C. Circuit, where many challenges are brought, and often industry wins on only minor points. And yet many of the same companies are trying to build a public image as environment friendly, yet they fight to the death over efforts to clean up the environment. Furthermore, industry is always saying that what it really wants is certainty, so why prolong the uncertainty with litigation.

Admittedly, it's an exaggeration to say that industry always protests. For instance, industry welcomed an important new EPA rule last week setting fuel efficiency standards for new heavy trucks. It helped that the cost savings from using less fuel greatly outweighed the upfront cost of the improved trucks. But consider the headline for this story: "A Rare Agreement on Climate Rules."

Obviously, there are many situations where a rule is extremely costly, industry has a strong chance of knocking it out, and the only rational economic decision is to challenge it. But this isn't always true, so you'd expect to see at least a few more cases where industry just goes along, if only to build a friendlier relationship with regulators.

No doubt the reasons are complex, including some degree of emotional resistance to regulation, but industry's violent resistance to almost all rules may have two other explanations.

The first set of explanations stem from the fact that "industry" is not monolithic. It consists of many separate businesses. They face different compliance costs, and the fact that many industry members have only a mild objection to some regulation doesn't keep suit from being brought by the exceptions. There can also be different industries involved — utilities at this point are generally ok with the EPA mercury rule, but the coal industry isn't.

Second, there are what economists call agency costs. Going along with an EPA rule may be in the company's interest, but it might be in the interest of executives to fight the rule. They might be afraid that shareholders will misunderstand the company's economic interests, or they may be able to get credit for fighting the rule while the legal costs are not transparent to shareholders. The same is true of trade associations, which may want to get credit for fighting rules even if the rules aren't especially bad for the industry. Especially if at least some firms are fighting a rule, executives may face pressure from poorly informed

shareholders to fall into line. And trade associations may have interests or groups like the Chamber of Commerce may have interests in building reputations for aggressiveness that do not necessarily correspond to the interests of most of their members.

These factors apply to all kinds of regulation. There is one characteristic of EPA regulations that probably make the problem worse. Although EPA issues rules, permitting and enforcement are primarily state responsibilities. This gives industry an incentive to build cooperative relationships with state regulators, but diminishes their incentives to do so at the federal level.

One problem with industry's reflexive resistance to all new regulations is that it misleads the public about the economic impact of the regulations. (Or perhaps this is an intended result rather than a side-effect?) Retrospective studies show that on average the government's estimates of costs on average are either on the high side or about right, depending on the study. Yet industry often predicts catastrophic costs from new regulations that simply never materialize. Many lawyers have had the experience of doing filings for firms claiming widespread economic disaster from a regulation, only to find that when the regulation takes effect their clients quietly and painlessly comply. Indeed, companies not uncommonly tell courts and regulators that a regulation would be catastrophic while telling investors that it won't be a problem. Perhaps some kind of sanction is in order for this type of unethical conduct.